

CISG – A Tool for Globalization (2): American and Japanese Perspectives

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PART FOUR INTERPRETATION AND GAP FILLING – THREE CORE PRINCIPLES (ART. 7)

As an aid to its application to actual cases, the CISG offers three core interpretative principles, which in turn yield several supplemental principles of interpretation. Those three principles, enunciated in Article 7(1) of the CISG, require that, in the process of interpreting the Convention, heed must be taken of (1) the international character of the CISG, (2) the “need to promote uniformity in its application,” and (3) the “observance of good faith in international trade.” Apart from these three core fundamental principles, courts and commentators have discerned several supplemental general principles on which the CISG is based. In most cases, a principle is raised to the level of a “general principle” of the CISG if it is visible in several of its provisions.¹⁾

§4:1 Respect for International Character of CISG (Art. 7(1))

The drafters realized that each signatory country would be joining the Convention with a heavy baggage of its own legal and commercial traditions which cannot be rendered totally irrelevant in the process of analyzing cases under the CISG.

§4:1.1 Promoting Autonomous Construction of CISG (Art. 7(1))

Although adjudicators are likely to interpret the Convention based on their domestic experience, according to the principle of respecting the international character of the CISG, they should, without being influenced by such experience, “carefully read the text and construe its meaning by considering the wording and its relationship within the structure of the Convention.”²⁾ To reach such “autonomous” interpretation free from “domestic

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1) See Roy Goode, *Goode on Commercial Law* at 1025 (Ewan McKendrick ed, Penguin Books 4th ed. 2010).

2) Camilla Baasch Andersen et al., *A Practitioner’s Guide to the CISG* §2.2.1(a) at 86 (JurisNet, LLC 2010) (“*A Practitioner’s Guide*”).

connotations,” adjudicators should view the textual provisions of the CISG through the prism of all “legal writings, the legislative history of the Convention, the unofficial UNICITRAL Secretariat Commentary, the UNICITRAL Digest, and the opinions issue by the CISG-Advisory Council.”³⁾ The principle of “autonomous” construction calls for a complete disassociation from domestic legal concepts, even if they be couched in the same terms as under the CISG, for “[g]uidance and/or reliance on domestic concepts and/or case law in the interpretation of the CISG is definitely not allowed under the Convention.”⁴⁾

§4:1.2 Admonishment to Apply Principles of Domestic Laws Only as a Last Resort

The goal of promoting the international character of the CISG (and its uniform interpretation) could best be achieved if the adjudicative bodies used the same interpretative principles all over the world. Towards this end, they should avoid resorting to domestic laws if “the question [can] be settled in conformity with the general principles on which the Convention is based.”⁵⁾ In other words, “[o]nly in the absence of such principles should matters be settled in conformity with the law applicable by virtue of the rules of private international law.”⁶⁾

COMPARATIVE NOTE ON RESORTING TO DOMESTIC LAWS FOR GUIDANCE

UCC: In the early days of the Convention, judges and arbitrators had scanty amount of prior case law to work with, and many questions on how to interpret the CISG provisions were questions of first impression. Under those trying circumstances, while interpreting CISG provisions, judges were permitted to consider how analogous provisions were construed under the UCC.⁷⁾ Although the viability of this approach is likely to continue,⁸⁾ in keeping with the CISG admonition to look at domestic law for guidance only as a last resort, the number of cases originating from U.S. jurisdictions expressly adopting such approach is relatively small.

§4:1.3 Respect for CISG Case Law – Limited Application of Doctrine of *Stare Decisis*

The Common law doctrine of *stare decisis*, mandating courts to heed holdings and principles enunciated in prior case law (i.e., case precedents) dealing with similar facts could

3) *Id* at 86-87.

4) *Id* at 87.

5) *Explanatory Note by the UNCTRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods* (published together with the CISG) ¶13 (United Nations 2010) (“*Explanatory Note*”), <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (visited March 4, 2013).

6) *Id*.

7) *E.g.*, *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. Dec. 6, 1995).

8) *E.g.*, CLOUT Case No. 696 (Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, 2004 U.S. Dist LEXIS, 53 U.C.C. Rep. Serv. 2d (Callaghan) 878 (N.D. Ill July 6, 2004) (looking for guidance at case law interpreting UCC Section 2-615 where “no American court has specifically interpreted or applied Article 79 of the CISG).

not be incorporated bodily into the analytical framework underlying the CISG. After all, the doctrine is not a part of the legal tradition of many signatory countries. Nevertheless, in order to give full meaning to the international character of the Convention and promote uniform adjudication of disputes, courts and other adjudicative bodies are urged to consider other courts' rulings. According to one court, "[t]hough precedents in international case law cannot be considered legally binding, [] they have to be taken into account by judges and arbitrators in order to promote uniformity in the interpretation and application of CISG."⁹⁾ And, to promote such uniformity, adjudicators should not stop merely at listing or referring to foreign decisions but should "evaluate[] foreign decisions and arbitral awards when it comes to specific problems arising from the provision to be interpreted."¹⁰⁾

COMPARATIVE NOTE

UCC: Although adjudicators of disputes under the CISG are required to look at how other courts or arbitral bodies have dealt with similar issues, they are not bound to adhere to the holdings or the decisions of other courts or arbitrators. Accordingly, it may be challenging to predict the outcome of each new case, particularly based on case law originating from other countries' jurisdictions. On the other hand, the application of the UCC by courts in the United States is steeped with the *stare decisis* approach so much so that any unjustified departures from existing and valid precedents can hardly be imagined.¹¹⁾

Thus, courts located in the United States are bound to follow precedents announced by all courts exercising superior jurisdiction ("*vertical stare decisis*")¹²⁾ as well as their own precedents ("*horizontal stare decisis*"). Moreover, courts in the United States may consider precedents of other courts; however, such precedents are not binding, serving merely as potentially persuasive authority. Accordingly, courts may consider (but need not follow) precedents bearing on issues under the CISG decided by other courts, whether in the United

9) From Abstract of CLOUT Case No. 378 (*Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina s.p.a.* (Tribunale di Vigevano July 12, 2000)), <http://cisgw3.law.pace.edu/cases/000712i3.html> (visited March 14, 2013).

10) Schlechtriem & Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* Art. 7, para. 13 at 126 (Ingeborg Schwenzer ed., Oxford 2010) ("Schlechtriem & Schwenzer").

11) *See, e.g., Hilton v. Caroline Pub. Rys. Comm'n*, 502 U.S. 197, 202, 112 S. Ct. 560, 565 (1991) ("we will not depart from the doctrine of stare decisis without some compelling justification").

12) *See, e.g., Auto Equity Sales, Inc. v. Superior Ct.*, 57 C2d 450 (Cal. Sup. Ct. Mar. 22, 1962) ("Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (citations omitted)).

States or other countries.¹³⁾ Whether the respect given to prior case law by U.S. courts may work to the parties' advantage as compared to courts located in the Civil law jurisdictions may depend on the particulars of individual cases. Likewise, the issue of predictability of results may in appropriate cases need to be considered in choosing or excluding the application of the CISG.

JAPANESE LAW: Founded upon the Continental (Civil) law, Japanese law does not generally adopt judicial precedents (judicial judgments or holdings) as a source of law. Only the legislation and regulations enacted by the Japanese Diet are the source of law. Nevertheless, in practice, established precedents carry certain authority to the same degree as the enacted law. In fact, there are some laws established by following earlier judicial decisions (for instance, the "Revolving Mortgage" (*neteitouken*)). Furthermore, the security device of "*joto-tanpo*," while not legislated into statutory law, has been recognized as law in fact based on judicial action. Moreover, legal conclusions of higher-instance courts are binding on lower-instance courts with respect to the same cases. (Court Act Art. 4) With regard to a case in which a judgment of a prior-instance court contains a determination inconsistent with precedents rendered by the Supreme Court, where the final appeal is to be filed is the Supreme Court, the Supreme Court may, upon petition, accept to review such case as the final appellate court. (C. Civ. Pro. Art. 318 (1))

§4:2 Promoting Uniformity in Keeping with International Character of CISG (Art. 6, 7(1), 8, 9)

If national legal traditions could be simply transplanted to the interpretative process of a case governed by the CISG, the purpose of having one global common commercial law applicable to sales of goods could be easily frustrated. To guard against it, the respect for the international character of the Convention has given rise to a policy of applying CISG provisions in a uniform fashion to similar factual situations in all jurisdictions. In order to remove potential obstacles to achieving such uniformity, the Convention is informed with several governing principles designed to level the interpretative field. Those principles serve as interpretative common glue, keeping the Convention as a coherent and unified body of law. They consist of the following unifying principles:

§4:2.1 Respect for Parties' Autonomy and Freedom of Contract (Arts. 6, 9(1))

This "basic principle" of the parties' autonomy and contractual freedom is reflected in the expressly granted freedom to exclude or derogate from the application of the Convention.¹⁴⁾ (CISG Art. 6) This principle is also visible from the presumption that usages and practices developed between the parties are binding on their contractual relationship.

13) See, e.g., *CNA Int'l, Inc. v. Guangdong Kelon Elec. Holdings Co., Ltd.*, No. 05-C-5734 (N. D. Ill. Sept. 3, 2008) (considering but failing to find persuasive an earlier decision issued by the Supreme Court of France).

14) See *Explanatory Note* ¶12 (cited in note 5).

(CISG Art. 9(1)) Therefore, the meaning of contractual terms and the parties' usages and practices must be analyzed by inquiring into the parties' own particular circumstances of doing business and the meaning they came to attach to a particular language and practices. In fact, the parties' own established practices and conduct will trump inconsistent industry analogues.¹⁵⁾

COMPARATIVE NOTE

UCC: The UCC approach does away with a "lay-dictionary" and "conveyancer's" reading of commercial contracts in favor of determining the meaning of terms by the language the parties used and their actions "interpreted in the light of commercial practices and other surrounding circumstances." (UCC §1-303 Comment 1) Thus, the UCC defines an "agreement" to mean "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade." (UCC §1-201(b)(3)) Express terms, course of performance, course of dealing and usage of trade must be construed as consistent with each other, but if this is unreasonable, according to the following priorities: (1) express terms, (2) course of performance, (3) course of dealing, and (4) usage of trade. (UCC §1-303(3)(e)) Accordingly, the drafters of the UCC have rejected the premise that the parties' language in the contract "has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used." (UCC §2-202 Comment 1(b))

JAPANESE LAW: There are no provisions addressing the interpretation of contracts or other legal acts under the Civil Code. Inasmuch as the purpose of legal interpretation of contracts is to clarify contextual vagueness or ambiguity, the first thing to look for is to ascertain the actual intentions of the parties. If it is impossible to determine such intentions, the contract is deemed not to have been made. From an economical and social point view, a finding that the parties have failed to properly enter into a contract should be avoided. Based on such policy, it may be necessary to ascertain the parties' intentions by providing supplemental or revised interpretations of contracts. If the parties' intentions are still unclear, adjudicators should consider other extraneous tools, such as usage and fair and equitable principles. With respect to "revised interpretation" of contracts, when a contractual provision agreed upon by the parties is found to violate obligations of good faith or public policy, it may be necessary to consider whether the contract could be revised.

§4:2.2 Deemed Incorporation of Widely Known Usages of International Trade into Contracts (Art. 9(2))

Unless the parties have otherwise agreed, all widely known and regularly observed international trade usages of which the parties were (or should have been) aware become,

15) See, e.g., CLOUT Case No. 777, *Treibacher Industrie, A.G. v. Allegheny Techs, Inc.*, 464 F.3d 1235 (11th Cir. Sept. 12, 2006), <http://www.unilex.info/case.cfm?pid=1&do=case&id=1136&step=FullText> (visited Mar. 6, 2013).

by implication, an integral part of their contracts, and such usages override anything to the contrary in the CISG. (*See* CISG Art. 9(2)) Even local or national trade practices can be implicitly included in a contract by way of Article 9(2), as one party to a CISG-governed contract learned after repeatedly doing business in a foreign country and dealing with those practices on prior occasions.¹⁶⁾

COMPARATIVE NOTE

UCC: The UCC appears to be even more generous in allowing usages of trade to find their way into the parties' agreements. In fact, the stated policy of the Code is to "permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." (UCC §1-103(a)(2)) Thus, the UCC defines an "agreement" to mean "the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or *usage of trade*." (UCC §1-201(b)(3) (emphasis added)) While the CISG requires that trade usages not only be "widely known" but also that the parties knew (or ought to have known) them, the UCC will apply usages even if the parties were not aware of them as long as the usage "justified an expectation" of its observance. (UCC § 1-303(c)) As a Comment to UCC Article 1-303(c) elaborates, to be recognized, a usage of trade need not be universal although it must be regularly observed. (UCC §1-303 Comment 6)

JAPANESE LAW: Article 3 of the Act on General Rules for Application of Laws deals with customary laws by providing that customs that are not against public policy have the same effect as laws to the extent they are authorized by the provisions of laws and regulations or relate to matters not provided for in laws and regulations. Article 92 of the Civil Code, on the other hand, deals with customs that are inconsistent with default rules, by providing that customs to which a party to a juristic act shows an intention to adhere will prevail over any inconsistent provisions of law or regulation as long as such provisions are not related to public policy. There is obviously no direct correspondence between Article 3 of the Act on General Rules for Application of Laws and Article 92 of the Civil Code.

§4:2.3 Parties' Subjective Intent Vis-à-Vis "Reasonable Person's" Objective Interpretation (Art. 8(1)-(3))

(a) General Principle: Subjective Intent and Actual Knowledge Prevail (Art. 8(1))

The CISG shows a characteristic slant towards the "subjective" theory of assent in determining the parties' intentions as expressed in their statements or conduct. Unlike the "objective" theory under which the apparent intention of a party (often ascertained from the perspective of a "reasonable person's point of view) will generally control contractual interpretation, the "subjective" theory looks and inquires into the party's actual intent. Accordingly, provided that "the other party knew or could have known" of such intent, the

¹⁶⁾ *See* CLOUT Case No. 175 (Court of Appeals Graz, Austria Nov. 9, 1995).

subjective intent of a party will prevail. (CISG Art. 8(1)) At the same time, pursuant to such qualified subjective approach adopted by the CISG, secret or unmanifested intentions are irrelevant. Only when so qualified subjective intent cannot be ascertained or is otherwise inapplicable, the standard of a “reasonable person of the same kind as the other party” and under “the same circumstances” will be applied. (*See* CISG Art. 8(2))

(b) Default Principle: Objective Intent (Art. 8(2) and (3))

However idealistic the subjective theory of contracts may be, if parties were not aware of the subjective intent of their counterparties, then the objective theory of contract with its ubiquitous “reasonable person” standard will be applied to determine the parties’ intentions, statements, conduct and knowledge. Thus, in cases where the parties’ subjective knowledge or understanding cannot be readily ascertained, the CISG will frequently impute such knowledge and understanding from an objective perspective. (*See* CISG Art. 8(2)) Indeed, resorting to the objective reasonable person’s standard is often necessary to “promote uniformity” in the application of the Convention.

The CISG’s “reasonable person” is a person “of the same kind” and placed “in the same circumstances” as the party whose intent is being ascertained, and that reasonable person’s understanding is determined in light of “all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.” (CISG Art. 8(2) and (3)) Moreover, the understanding of such a reasonable person should be tintured by a dose of good faith, as the principle of good faith stands as one of the Convention’s central interpretative guideposts. (CISG Art. 7(1))

COMPARATIVE NOTE

UCC: The Common law applicable to UCC-governed contracts on this issue has long rejected the subjective theory of assent, and the objective theory universally prevails. Thus, to determine the party’s intent from an objective point of view, the relevant question to ask is what a reasonable person in the position of the other party would infer from the objective manifestation of such intent. As one judge put it, “‘intent’ does not invite a tour through [plaintiff’s] cranium, with [plaintiff] as the guide.”¹⁷⁾

Yet, the objectivist approach is not the whole story behind the interpretation of UCC-governed contracts. While secret intentions of the parties (subjective inquiry) are irrelevant under the UCC (just as they are irrelevant under the CISG), such intentions might be relevant if both parties equally shared in the understanding. In those cases, the courts are likely to follow the subjective interpretation of contracts.¹⁸⁾ It might thus be argued that “the

17) *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987) (Easterbrook J.), *quoted in* E. Allan Farnsworth, *Contracts* §3.16 at 115 (4th ed. 2004) (“Farnsworth”)

18) Farnsworth §7.9 at 446 (cited in note 17).

purpose of the court is in all cases the ascertainment of the intention of the parties if they had one in common.”¹⁹⁾ In such cases of common understanding, the role of the courts is to “approximate more closely the intention of the parties as to disputed terms.”²⁰⁾ On the other hand, when the parties’ actual meaning, intent or understanding diverges, the courts fall back on the objective theory of reasonableness.²¹⁾

Indeed, this mixture of objective/ subjective approaches has been endorsed by the UCC, which is concerned with accurately ascertaining the parties’ actual (i.e., subjective) intentions. In pursuit of the parties’ true meaning and intentions, the Code sanctions inquiries into circumstances surrounding a transaction by giving “full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances . . . , and any agreement permitted under the provisions of the [UCC] to displace a stated rule of law.” (UCC §1-201 Comment on definition of “Agreement”) In fact, parties will often argue that their agreement should be interpreted in light of their course of dealing as well as usages and course of performance. In answer to such arguments, under the UCC, evidence of course of dealing, usage of trade and course of performance is admissible “to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached.” (UCC §2-202 Comment 2) As Comment to the former UCC Section 2-208 explains, “[t]he parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was.” (Pre-2001 §2-208 Comment 1)

JAPANESE LAW: There are no rules with respect to the interpretation of contracts under the Civil Code. According to a commonly accepted theory, the meaning of contractual provisions is determined by looking how a hypothetical “ordinary person” would understand them. In other words, a contractual provision should be interpreted based on an objective meaning.

§4:2.4 Strict Liability for Seller’s Nonperformance – But No Perfect Tender Rule (Arts. 36 and 44)

In order to promote uniformity in the application of the CISG, the drafters insisted that the seller furnish goods strictly as provided under the contract – no excuses. True, the seller will be able to cure any failures in many cases, but the Convention will ultimately hold the seller liable for any defects, nonconformities or other damages flowing from his faulty performance. This principle may be seen, for example, in Article 35 (seller is liable for nonconformities), Article 36 (“seller is liable in accordance with the contract” and “is liable for any lack of conformity”) and Article 44 of the CISG (seller is liable even if buyer fails to give notice of nonconformity).²²⁾

19) I A. Corbin, *Contracts* §106 (1963), *quoted in* Farnsworth §7.9 at 444 (cited in note 17).

20) James J. White and Robert S. Summers, *Uniform Commercial Code* §3-10 at 116 (West 6th ed. 2010) (“White & Summers”).

21) *See, e.g.*, Farnsworth §7.9 at 450 (cited in note 17).

22) *See also* Goode *on Commercial Law* at 1025 (cited in note 1).

§4:3 Observance of Good Faith in International Trade (Art. 7(1))

The principle of acting in good faith in the context of CISG-governed contracts is the third fundamental principle of the CISG. Article 7(1) of the CISG admonishes to pay heed to the “observance of good faith in international trade” while interpreting the Convention. While this general rule is laid out as an aid to the “interpretation” of the CISG, it does not appear explicitly to impose the obligation of fair dealing and good faith on the parties. However, parsing particular provisions of the Convention, such obligation can be seen manifested in several ways, and many courts and commentators concur. Others, however, advocate that the requirement for the parties to observe good faith be limited by the literal reading of the CISG and resorted to only if the particular text of the CISG actually so requires.

§4:3.1 Principle of Mutual Cooperation and Acting for Mutual Benefit

The principle of cooperation for mutual benefit is a recurring underlying concept within the Convention. For example, this principle is readily visible from (a) the parties’ obligation to communicate information that is needed by their counterparties (*see* Arts. 19(2), 21(2), 26, 39(1), 43(1), 48(2), 65(2), 68, 71(3), 72(2), 79(4), and 88(1) and (2)), or (b) the buyers’ obligation while taking delivery of goods to do “all the acts which could reasonably be expected of [them] to enable the seller[s] to make delivery.” (CISG Art. 60)

§4:3.2 Principle of Loyalty

The principle of loyalty, as articulated by a 2000 Finnish case (the “Plastic Carpet Case”), requires that parties “act in favor of [their] common goal” and reasonably consider their mutual interests.²³⁾ In particular, the Finnish court noted that the principle of loyalty is “recognized in scholarly writings as one of general principles on which the Convention is based.”²⁴⁾

COMPARATIVE NOTE

UCC: In the American jurisprudence, a “duty of loyalty” conjures up images of special relationships demanding obligations not to engage in self-dealing or otherwise act for personal benefit, often appearing in the context of assessing the extent of corporate officers’ and directors’ responsibilities. The duty of loyalty so described seems contrary to the ordinary business practices where parties are indeed expected to act in their own interest and for their own benefit, hampered only by the ubiquitous restrictions of good faith obligations. However, the duty of loyalty as described in the aforementioned Finnish court case appears to demand more than the duty of good faith and fair dealing which is present in every UCC-governed contract. To complicate things further, sometimes a duty of loyalty may

23) *Plastic Carpet Case*, No. S 00/82 (Helsinki Ct. App., Finland Oct. 26 2000, <http://cisgw3.law.pace.edu/cases/001026f5.html> (visited Mar. 6, 2013)).

24) *Id.*

also signify an enhanced duty of good faith, honesty and loyalty stemming from special fiduciary relationship. Such fiduciary duties are not the staff of ordinary workaday contract. Because they involve standards of the highest caliber, it is unlikely that judges or arbitrators would ever apply them to contracts for the sale of goods without the presence of a special relationship (e.g., lawyer's relationship with clients or trustee's relationship with trust beneficiaries) between the parties calling for such application. However, once the parties are found to be bound by fiduciary duties, then such duties might enter into their contracts for the sale of goods by way of laws supplementary to the UCC under Section 1-103(b).

JAPANESE LAW: Article 1(2) of the Civil Code sets up a "good faith rule" by providing that parties must exercise good faith in exercising their rights and performing their duties under the contract. This rule requires that an obligor carry out his duties as set forth in the contract according to the just expectation of the other party. (Daishin'in Taisho 14.12.3, Minshu Vol. 4 at 685) Moreover, the principle of good faith is not only a standard governing the exercise of contractual rights and performance of contractual obligations but also a standard for the interpretation of contracts. (Saihan Showa 32.2.7.5 Minshu Vol. 11, No.7 at 1193)

§4:3.3 Principle of Acting in Reasonable Fashion

To promote fair dealings between parties, the CISG provisions are steeped with qualifiers pertaining to reasonableness and adequacy with respect to the parties' performance obligations, which courts tend to interpret based on the applicable commercial standards. Naturally, courts will give heed to express references to reasonableness in the CISG text. However, courts have also shown willingness to be guided by commercially reasonable standards with respect to other issues not expressly provided for. The breadth and prevalence of the standard of reasonableness in the Convention can be found in multiple places within its text.

COMPARATIVE NOTE

UCC: The notion of good faith is well entrenched in the UCC. The UCC "good faith" denotes "honesty in fact and the observance of reasonable commercial standards of fair dealing." (UCC §1-201(20)) Every contract under the UCC carries "an obligation of good faith in its performance and enforcement." (UCC §1-304) For example, the party to a contract that is definite enough to be valid but leaves certain terms of performance for future specification by that party must make such specifications "in good faith and within limits set by commercial reasonableness." (UCC §2-311(1)) Moreover, the parties to a contract cannot disclaim their obligations of "good faith, diligence, reasonableness and care." (UCC Section 1-302(b)) However, in order to stem a potential abuse of the good faith obligation by improper attempts to manipulate its application by the parties and its potential misinterpretation by the courts, the UCC drafting committee cautions that the obligation

“should not inappropriately encourage courts to ‘avoid the effects of the UCC provisions perceived as being utilized in a commercially unreasonable way.’”²⁵⁾

JAPANESE LAW: In the performance of his obligations, a party must take into consideration safety and protection of life, health, body and property of the other party. (Saihan Showa 50.2.25 Minshu Vol. 29, No.2 at 143). Furthermore, the “Basic Policy of Revision of Commercial Laws” announced by a committee of the Ministry of Justice in 2009 for the revision of commercial laws (the “Basic Policy”)²⁶⁾ proposes the following amendment to Article 1(2) of the Civil Code:

- (1) The obligor has to act sincerely according to good faith in the performance of his obligations.
- (2) The creditor has to act sincerely according to good faith in exercising his claims.
- (3) In addition to foregoing obligations set forth in items (1) and (2), the party concerned assumes the duty to act according to the good faith rule as a creditor (obligee) and as a debtor (obligor).

§4:3.4 Obviation of Formalities and Rejection of Parol Evidence Rule (Arts. 8 and 11)

Subject to the particular countries’ exceptions adopted upon their accession to the CISG under CISG Article 96 reservation, the drafters attempted to remove many formulaic and formalistic restrictions on the recognition of the parties’ intentions to form legal effect or the method of proof, including removal of the requirement of writing and the parol evidence rule. (See CISG Arts. 8 and 11) A corollary of that policy is the general presumption of the CISG, known as the “principle of informality,” that a binding contract has been formed.

In line with that principle, Article 8(3) of the CISG requires that parties’ intent and understanding be determined in light of “all relevant circumstances.” This has been interpreted as a rejection of the parol evidence rule, which restricts introduction of extraneous evidence in respect of a written agreement between parties.²⁷⁾ To promote a uniform application of the Convention and the observance of good faith in CISG contracts, even courts in jurisdictions embracing the parol evidence rule have found that rule to be a rule of substantive law (i.e., not a rule of procedure), thus refusing to allow it to thwart the purpose Article 8(3) of bringing “all relevant circumstances” to light.²⁸⁾

25) American Law Institute Draft of UCC Art. 1 (Feb. 1997), *quoted in White & Summers* §1-4 at 13 (cited in note 20).

26) *Published in* 904 *New Business Law* 267 (Shouhomu May 1, 2009).

27) *See, e.g.,* John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* §110 at 170-71 (3d ed. 1999) (“*Uniform Law for Int’l Sales*”), *quoted in MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D’Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998) (rejecting the application of the parol evidence rule in the interpretation of CISG contracts to “achieve the directives of good faith and uniformity in contracts under the CISG”).

28) *See MCC-Marble Ceramic Center*, 144 F.3d 1384 (cited in note 27).

COMPARATIVE NOTE

UCC: While the universal rejection of the parol evidence rule under the CISG is meant to promote good faith in dealings between parties, the UCC has preserved that rule, ironically for similar reasons. Its Common law embodiment prohibits supplementing or contradicting a fully integrated final written agreement by other prior (and sometimes also contemporaneous) oral or written statements. When the final written agreement is only partly integrated, no written or oral prior or contemporaneous statements or negotiations may be introduced to contradict the integrated terms of the agreement. However, the parol evidence rule will not bar evidence adduced to elucidate the meaning of particular contractual terms or to show mistake or fraud for the purpose of reformation of an agreement.

The rationale behind the rule is to affirm the primacy of the final contract over any prior preliminary negotiations or statements. In fact, analyzing many contractual negotiations, parties will often change their preliminary agreements by the time they sign the final expression of their bargain. Yet, when disputes arise, their memories may not be entirely reliable and a party's memory may be improperly selective in his desire to revive things to which the other party never eventually agreed. All that the parol evidence rule intends to do is to say that "if X is the contract, then X is the contract."²⁹⁾

The UCC has phrased the same rule in its own terms, mandating that a "*final expression of agreement*" (i.e., not necessarily an *integrated expression* of agreement): (a) "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement," but (b) may be "explained or supplemented" by evidence of (i) "course of performance, course of dealing or usage of trade," or (ii) "consistent additional terms" except where the agreement is a "complete and exclusive statement of the terms of the agreement" (i.e., a complete and total integration). (UCC §2-202)

JAPANESE LAW: There is no parol evidence rule under Japanese law. Of course, signed documents appear to be stronger than verbal agreements, at least from evidentiary perspective. For instance, a document that is "signed or sealed by the principal or his agent is presumed to be authentically created." (C. Civ. P. Art. 228(4)) However, verbal evidence is not excluded. Indeed, pursuant to the "Principle of Free Determination," "[w]hen rendering judgment, the court, in light of the entire import of the oral argument and the result of the examination of evidence, and based on its free determination, must decide whether or not the allegations of facts are true." (C. Civ. P. Art. 247)

§4:3.5 Principles of Equitable and Promissory Estoppels

The equitable principle of estoppel can be viewed as flowing directly from the obligation to act in good faith. The principle aims at avoiding injustice by preventing a party who makes a representation or promise (in which case the principle is typically referred to as

²⁹⁾ White & Summers §3-10 at 116 (cited in note 20).

“promissory estoppel”) on which the other party has justifiably relied from contradicting such representation or raising defenses with respect to its enforceability. This principle can be read into the fundamental principle of acting in good faith under Article 7(1) of the CISG. In particular, some aspects of the principle are at work in the context of estopping the offeror from revoking an offer in the face of the offeree’s acting thereon in reasonable reliance (CISG Art. 16(b)), or estopping a party from denying a proper modification or termination of an agreement without a required writing to the extent that the party’s conduct was relied upon by the other party (CISG Art. 29(2)).

COMPARATIVE NOTE

UCC: The doctrine of estoppel is recognized by the UCC as one of the supplemental principle of law and equity. (UCC §1-103(b)) Hence, the doctrine of estoppel or the equitable doctrines of laches (sleeping on one’s rights) or estoppel by laches can assert themselves in proper situations where a party unreasonably delays pursuing his rights or doing what he should. A manifestation of the doctrine can also be seen: (a) in the express lifting of the statute of frauds requirement in case of contracts, otherwise valid and enforceable, for specially manufactured goods that are not suitable for sale to others where the seller either substantially commenced manufacture of the goods or made commitments for their procurement (UCC §2-201(3)(a)); and (b) in making offers that give assurances of being held open irrevocably either for the time stated or for reasonable time despite any absence of consideration (UCC §2-205). While some commentators advocate using the estoppel principle sparingly, most courts do not shy away from applying it to UCC-governed contracts in appropriate circumstances.³⁰⁾

JAPANESE LAW: There are no direct provisions regarding the doctrine of estoppel under Japanese law. However, traditional Civil laws have applied "the doctrine of appearance," known as "*Rechtsscheintheorie*" in Germany, which can also be found in the concepts of “Manifestation of Intention” (Article 93, 94 and 96 of the Civil Code) and “Apparent Authority due to Manifestation of Grant of Authority of Agency.” (Civ. C. Arts. 109, 110 and 112) Accordingly, the validity of the party’s manifestation of intention cannot be impaired even if the person making the manifestation knows that it does not reflect his true intention. But in cases where the other party knew or should have known the true intention of the person making the manifestation, the courts will void the stated intention. (Civ. C. Art. 93) The purpose of those provisions is to protect the person who believes in the overt appearance (manifestation) of statements and conduct of the other party in business dealings.

§4:3.6 Policy of Full Compensation for Damages Coupled with Obligation to Mitigate Damages (Art. 74)

³⁰⁾ See, e.g., White & Summers §3-6 at 108-109 (cited in note 20).

In keeping with the policy of good faith instilled in contracts under the CISG, several courts have deduced from it a general principle of full compensation for damages suffered. (CISG provisions of Section II (Damages)) In particular, this principle can be discerned from Article 74 of the CISG, which is “designed to place the aggrieved party in as good a position as if the other party had properly performed the contract,”³¹⁾ allowing it to recover “damages to compensate for the full loss [including], but [] not limited to, lost profits, subject only to the familiar limitation that the breaching party must have foreseen, or should have foreseen, the loss as a probable consequence.”³²⁾ (CISG Art. 74) Hence, consequential damages are recoverable under the CISG unless specifically excluded by the parties.³³⁾ The required foreseeability is assessed from the point of view of a reasonable person.³⁴⁾ However, the measure of damages available to the parties will vary based on whether or not the contract has been avoided. (*E.g.*, Arts. 75 and 76)

The liberal policy of full compensation for damages is counterbalanced by the principle that parties must take reasonable steps to mitigate damages or risk having their claims reduced by the amount that could have been avoided. (CISG Arts. 77, 85 and 88) For example, in awarding damages, courts may inquire whether the parties could have avoided additional expenses by retaining a lawyer in a particular location.³⁵⁾ On the other hand, if a contract provides for a penalty on a party, such penalty is not subject to reduction due to any failure to avoid damages by the other party. Furthermore, in order to assure that courts in fact recognize the measures taken in mitigation of damages, the mitigating parties may sometimes need to give a prior notice to the other party.³⁶⁾

COMPARATIVE NOTE

UCC: The basic UCC policy on damages is also designed to put the aggrieved party in the same economic position he would have been in if the contract had been fully performed. (*See* UCC §1-305). With respect to the duty to mitigate damages, while the UCC does not expressly so provide, the reading of provisions dealing with damages available to buyers and sellers shows that such duty does in fact exist. For example, a buyer cannot recover consequential damages that could have been “reasonably prevented by cover or otherwise.” (UCC §2-715(2(a)) Moreover, a merchant buyer rejecting goods must follow the seller’s instruction concerning such goods or, in their absence, “make reasonable efforts to sell them . . . if they are perishable or threaten to decline in value speedily.” (UCC §2-603(1))

31) *Uniform Law for Int’l Sales* at 445 (cited in note 27).

32) CLOUT Case No. 138 (*Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995)).

33) *See, e.g.*, CLOUT Case 541 (Oberster Gerichtshof Austria, Jan. 14, 2002).

34) *Id.*

35) CLOUT Case 410 (Landgericht Alsfeld Germany; 31 C 534/94).

36) *See* CLOUT Case No. 343 (Landgericht Darmstadt, Germany, 9 May, 2000).

Faced with a wrongful rejection of goods, a seller may either (a) resell such goods (which in and of itself is a damage mitigating technique) and claim a contract price-resale price differential (UCC §2-706(1)), or (b) claim a contract price-market price differential at the time of tender as a measure of damages, in which case, if the prices subsequently drop, the seller would be stuck with the price difference which the seller could have mitigated by reselling the goods (UCC §2-708(1)); or (c) claim damages based on the contract price but only if the seller is unable to resell the goods (UCC §2-709(1)(b)).

JAPANESE LAW: Under the Civil Code, if an obligor fails to perform consistent with the tenor of his obligation, the obligee is entitled to claim damages arising from such failure. (Civ. C. Art. 415) However, one must not overlook the subsequent provision of that Article which sanctions claims for damages for failure to perform when such performance is rendered impossible by reasons attributable to the obligor. (*Id.*) However, the Basic Policy proposes to delete that latter part of Article 415. Once that happens, Japanese Civil Code's treatment of damages will more closely approximate the treatment under the UCC and the CISG. Damages for failure to perform an obligation consist of damages that would ordinarily arise from such failure.

The obligee may also demand compensation for damages arising from any special circumstances as long as the obligor did foresee, or should have foreseen such circumstances at the time of failure to perform the obligation.

In Japan, the duty to mitigate damages has been given effect in the context of analyzing the parties' comparative negligence. (Civ. C. Art. 418) Moreover, the second petty bench of the Supreme Court recently recognized "the duty to mitigate damages" in a decision made on January 19, 2009.

§4:3.7 Principle of Giving "Second Chance" to Perform and Disfavoring Premature Termination of Contracts (Arts. 34, 37, 47, 48, 63, 72)

The principle good faith manifests itself by the apparent willingness of the CISG to afford a party failing in its performance a second chance to remedy his failures as well as the overall policy of disfavoring premature termination of contracts and keeping them in force.

Although the CISG does provide for the ultimate remedy of contract avoidance, such remedy is designed to be exercised only as the last resort in cases of breaches so severe that keeping a contract alive would be intolerable.³⁷⁾ In fact, the Convention gives parties, again and again, a chance to remedy their less-than-perfect performance. For example, if there is a problem with documents relating to the goods provided by the seller, the seller is given a second chance to cure the problem before the time designated by the contract (CISG Art. 34); the same is true with respect to nonconformities of goods and delivery which the seller can correct (CISG Art. 37); or, the seller may, even after the time of delivery, fix any performance problems (CISG Art. 48(1)). Moreover, the CISG expressly permits the buyer

37) See *UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods* for art. 46, ¶ 3 (Overview) at 153 (United Nations 2008) ("*UNCITRAL Digest*"), http://www.uncitral.org/pdf/english/clout/08-51939_Ebook.pdf (visited Mar. 6, 2013).

(without obligating him) to give the seller a second chance to perform within an additionally allotted time (also known as the *Nachfrist*). (CISG Art. 47(1)) Only after such extra time has passed, may the buyer exercise his remedies of contract avoidance. (CISG Art. 49)

The restrictions placed on avoiding a contract support this principle as well. Thus, only a fundamental breach will authorize the buyer to avoid contract in its entirety. (CISG Art. 51(2)) As mentioned, buyers are also encouraged to give sellers the *Nachfrist* additional time to perform. Indeed, without offering the seller such grace period, the buyer's right to declare contract avoided may be problematic.³⁸⁾ The restrictions imposed on contract avoidance by the sellers are no less severe. Without a fundamental breach, the seller can declare contract avoidance only if, within the extra time provided under Article 63(1) of the CISG, the buyer (a) fails to pay for the goods, (b) fails to take delivery, or (c) informs the seller of his intention to do so within said extra time. (CISG Art. 64(1)) Moreover, once the buyer pays the price, the seller's ability to declare contract avoided is further restricted. (CISG Art. 64(2)) And even when it is evident prior to the time of performance that the other party will be in fundamental breach, the non-breaching party must (if time allows) give the other party adequate notice, giving him a chance to prove that such conclusion is not warranted. (CISG Art. 72(2)) Finally, even a fundamental breach in respect of one installment of deliveries of goods generally entitles the non-breaching party to avoid the contract only with respect to that installment. (CISG Art. 73(1))

COMPARATIVE NOTE

UCC: An unstated yet pervasive policy of the Code is to "facilitate the settlement of disputes by the parties themselves, and to minimize economic waste."³⁹⁾ In operation, this policy might suggest that the UCC is at least as liberal to breaching parties as the CISG by preventing parties from summarily cancelling or terminating their contracts. Indeed, the so-called "perfect tender" rule of UCC §2-601 is more often "honor'd in the breach than the observance."⁴⁰⁾ The courts will not sanction a rejection of goods in the absence of substantial nonconformity. In fact, the UCC expressly requires substantial nonconformity before the buyer can revoke acceptance, and, in installment contracts, substantial nonconformity which impairs the value of an installment and cannot be cured before the buyer can reject the installment. (UCC §§2-608 and 2-612(2)) Furthermore, sellers may often rely on their right to cure under UCC §2-508(1) and (2). Finally, as the consequences for wrongful rejection can be severe, the buyers will often think twice before taking such a drastic measure.

38) *See id.* Art. 47 ¶4.

39) White & Summers §9-5 at 437 (cited in note 20).

40) UCC Section 2-601 allows the buyer in case where "the goods or the tender of delivery fail *in any respect* to conform to the contract: (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest. (Emphasis added.)

JAPANESE LAW: There are no provisions dealing with either subsequent completion by the seller or demand for subsequent completion by the buyer under the Civil Code. However, the Basic Policy proposes rules with respect to subsequent completion, which are similar to Articles 37 and 47 of the CISG.

§4:3.8 Principle of Amicable and Expeditious Resolution of Disputes

A few courts have discerned in the provisions of the Convention an underlying principle of promoting quick settlement of disputes.⁴¹⁾ In particular, this principle can be gleaned from the prevalent use by the Convention of the reasonable notice requirements. For example, promoting rapid settlement of disputes has been recognized as one of the underlying purposes behind the buyer's requirement to give timely notice with respect to nonconformities under Article 39 of the CISG.⁴²⁾ Resorting to virtually any remedy under the CISG is conditioned upon giving reasonable notice to the other party. This approach, in turn, invites and encourages amicable resolution of disputes. The policy is also reflected in the high threshold imposed on finding of a fundamental breach. In principle, as long as a breach is still capable of remedy and the party in breach is willing to cure the breach, courts are inclined to allow performance.⁴³⁾

COMPARATIVE NOTE

UCC: The obligations of “good faith, diligence, reasonableness and care” present in every UCC contract and incapable of derogation may also result in the promotion of quick and expeditious resolution of contractual frictions under the Code. (*See* UCC §1-302(b)) It should be observed, however, that, while the obligation of good faith requires “honesty in fact and the observance of reasonable commercial standards of fair dealing” (UCC § 1-201(20)), a concurrent policy of not encouraging courts to “avoid the effects of the UCC provisions perceived as being utilized in a commercial unreasonable way” may be a countervailing consideration.⁴⁴⁾ Nevertheless, the venerable Common law policy of favoring settlements, which enters into the UCC-governed contracts through the application of UCC Section 1-103(b), has been widely adopted in American jurisdictions “in the interest of alleviating discord and promoting certainty.”⁴⁵⁾ In other words, the policy abhors litigation which is “injurious to society” and favors “compromises which diminish litigation and promote a

41) CLOUT Case No. 409, Ct. Ref. 110 4158/95 (Landgericht Kassel, Germany, Feb. 15, 1996).

42) CLOUT Case No. 310 (Oberlandesgericht Dusseldorf, Germany, Mar. 12, 1993).

43) *See, e.g.*, CISG Art. 48(2) (preventing buyer from resorting “to any remedy which is inconsistent with performance by the seller” in cases where seller offers to perform); see also Case No. OR.2001.00029 (Handelsgericht des Kantons Aargau, Switzerland, Nov. 5, 2002) (“*The Case of Inflatable Arches*”) (avoidance of contract unavailable unless remedy of the breach is not possible or is not reasonable to the buyer), *quoted in A Practitioner’s Guide* at 247 (cited in note 2), <http://www.cisg.law.pace.edu/cases/021105s1.html> (visited Mar. 6, 2013).

44) White & Summers §1-4 at 13 (cited in note 20), *quoting* Feb. 1997 Draft of UCC Article 1.

45) Farnsworth §2.12 at 71 (cited in note 17).

peaceful society.”⁴⁶⁾

JAPANESE LAW: There are no provisions under the Civil Code regarding the buyer's obligation to inspect the goods or to give notice of such inspection to the seller. Article 526 of the Commercial Code provides that “[i]n case of a sale between traders, the buyer shall, upon taking delivery of the subject-matter, examine it without delay.” That Article also provides that when the buyer discovers any defects in the goods or any deficiency in quantity, he must immediately dispatch notice thereof to the seller; otherwise the buyer loses the right to rescind the contract, demand reduction in the price or claim damages by reason of such defects or deficiency in quantity. According to a Supreme Court precedent (Showa 47.1.25, Hanrei-Jihou 662.85), the buyer cannot demand that the seller make a perfect tender.

PART FIVE

FROM CONTRACT FORMATION TO PERFORMANCE (ARTS. 14-60)

§5:1 Contract Formation (Arts. 14-24)

§5:1.1 Mechanics of Formation (Arts. 14-16, 18-19)

Formative Elements of Contract. For a contract to be formed there must be (a) a proposal directed to a specific person(s) which is definite enough to indicate the offeror's intention to be bound by it, and (b) an acceptance by the offeree by way of a statement or conduct but not by silence or inaction. (CISG Arts. 1, 14, 18(1)) An offer must indicate the goods and expressly or implicitly make provision for determining their quantity and price. (CISG Art. 14(1))

Effectiveness of Offers and Acceptances. Both an offer and its acceptance become effective once they **reach** the offeree and the offeror, respectively. (Arts. 15, 18(2)) This is the approach prevalent in Civil law jurisdictions. Hence, the offeree who has issued an acceptance which has not yet reached the offeror may still have time to revoke it, provided such revocation reaches the offeror before the acceptance.

In addition, for an effective acceptance, it must reach the offeror “within the time he has fixed, or, if no time is fixed, within a reasonable time,” taking into account “the circumstances of the transaction.” (CISG Art. 18(2)) With its general propensity to keep contracts alive, the CISG takes the position that a late acceptance by the offeree is effective if it is communicated to the offeror without delay. (CISG Art. 21(1)) The same is true of late acceptances stemming from obvious delays in transmission unless the offeror informs the offeree without delay that the offer has lapsed and sends him a notice to that effect. (CISG Art. 21(2))

46) *Hastings Pork v. Johanneson*, 335 N.W.2d 892, 805 (N.D. 1983), quoted in Farnsworth §2-12 at 71 (cited in note 17).

Withdrawal of Offers. The offeree can withdraw his acceptance as long as the withdrawal **reaches** the offeror before or at the time when his acceptance would have become effective. (CISG Art. 22)

Termination of Offers. An offer will terminate when (a) it is properly revoked by the offeror (CISG Art. 16(1)), or (b) the offeree's rejection reaches the offeror (CISG Art. 17), except that the offeror cannot revoke an "irrevocable offer," i.e., an offer indicating its irrevocability, or an offer on which the offeree acted in his reasonable reliance of its irrevocability. (CISG Art. 16(2))

Effectiveness of Revocation. An offer is properly revoked when the revocation **reaches** the offeree before he **dispatches** an acceptance. (CISG Art. 16(1)) In other words, the adopted rule appears to be consistent with the "mailbox" rule under the Common law (see discussion under Comparative Note below).

Mode of Acceptance. An offer can be accepted by a statement or other conduct of the offeree indicating his assent to the offer, **but** not by silence. (CISG Art. 18(1))

Acceptance in Variance with Offer. A purported acceptance with additional terms is construed to be a counteroffer unless (a) such additional terms do not materially alter the terms of the offer, and (b) the offeror does not object, orally or in writing, to such discrepancy. (CISG Art. 19(1)) The terms of the contract so formed include the additional terms. The terms which CISG considers to materially change an offer relate to "the price, payment, quality and quantity of goods, place and time of delivery, extent of a party's liability to the other or the settlement of disputes," among other possible matters. (CISG Art. 19(3))

COMPARATIVE NOTE

UCC: The UCC sets forth its own framework for dealing with issues of contract formation. However, because some of the issues are not fully covered, the supplementary provisions of law sanctioned by UCC Section 1-103(b) will often be applicable.

Making Offers. While the concept of an "offer" is not defined in the UCC, under the Common law, an offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude [the bargain]." (Restatement (Second) Contracts §24) Neither does the UCC specify any requirements of an offer in light of the fact that a contract can be formed in any manner (including conduct) showing an agreement as long as "there is a reasonably certain basis for giving an appropriate remedy." (UCC §2-204) Proposals to the public are generally not considered to constitute offers unless they are qualified by words such as "subject to prior sale," or "while the goods last." (See Farnsworth §3.10) Yet, the UCC sanctions offers made during sales by auction. (See UCC §2-328)

Effectiveness of Offers. An offer is effective when it is **communicated** to the offeree. (E.g., Restatement (Second) Contracts §23)

Withdrawal of Offers. An offer can be withdrawn⁴⁷⁾ if notice of its withdrawal reaches the offeree no later than the offer does (i.e., before the offer becomes effective). (See UCC §1-202(e))

Revocation of Offers. Under the UCC, an offeror can revoke his offer at any time unless such offer (a) is given in writing by a merchant and contains an explicit assurance that it will be held open, in which case it must be held open (i) during the time stipulated, or if not so stipulated, (ii) for a “reasonable time” but in no event exceeding three months (this is the so-called “firm offer”) (UCC §2-205); or (b) is made “without reserve” in a sale by auction where the auctioneer solicits bids on an article or lot, in which case such an offer cannot be withdrawn unless no bids are made within reasonable time. (UCC §2-328(3)) The three-months’ bright line for the maximum duration of firm offers with unspecified time of their effectiveness can be contrasted with the more liberal approach under the CISG which makes similar offers irrevocable for as long as (a) “it was reasonable for the offeree to rely on the offer as being irrevocable,” and (b) the offeree actually “acted in reliance on the offer.” (CISG Art. 16(2)(b)) While the UCC approach offers certainty, the CISG requires parties to engage in some guesswork to determine whether their reliance on the offer’s irrevocability is proper in the circumstances.

Moreover, by applying supplementary rules of the Common law, an offer may become irrevocable when it forms an “options contract,” or, at least temporarily, in situations where the offeree has rendered part performance or detrimentally relied on an offer.

Effectiveness of Revocation. A revocation of a (still unaccepted) offer is effective when it is **received** by the offeree (unless a statute makes it effective upon dispatch, as, in California). In sum, the rule of the majority of UCC jurisdictions parallels the rule of the CISG. Moreover, the offeror’s death may terminate the offeree’s power of acceptance (“revocation by death”). (See UCC §1-202(e))

Termination of Offers. In general, an offer is terminated (or lapses) when:

- (a) a still unaccepted offer is revoked by the offeror, i.e., when the offeree receives the revocation (UCC §1-202(e)) or learns indirectly that the offeror’s behavior indicates his intention not enter into the contract; an offer can be revoked at any time unless it is either a “firm offer,” or offer to sell “without reserve” at an auction, which offers can be revoked only as stated above;
- (b) an offer is rejected by the offeree;
- (c) the offeree makes a (true) counteroffer to a revocable offer (not merely a qualified acceptance listing new or different terms), including an “acceptance” expressly conditioned on the offeror’s acceptance of additional or different terms (UCC §2-207(1));
- (d) the offeree does not seasonably notify the offeror of his acceptance by beginning of

47) An offer that has not yet become effective can only be “withdrawn” but not “revoked”; once it has become effective, it can be “revoked” but not “withdrawn.”

performance (*See* UCC §2-206(2));

- (e) the time stipulated for acceptance has passed, or if not so stipulated, when a reasonable time period has lapsed (Restatement (Second) Contracts §41(1)), as determined from the totality of circumstances, including balancing the interest of the offeror of “avoiding the risks of change during that time,” and the interests of the offeree of “having enough time to make an informed decision”;⁴⁸⁾ or
- (f) either the offeror or the offeree has died or lost legal capacity to enter into the contract (Restatement (Second) Contracts §48).

As contrasted with the CISG liberal approach on late acceptance of an offer, an attempted late acceptance in contracts governed by the UCC would most likely be treated as a counteroffer.⁴⁹⁾

Accepting Offers and Effectiveness of Acceptance. Unless an offer specifies a mode of acceptance, it is deemed to invite acceptance in any manner and by any medium reasonable in the circumstances. (UCC §2-206(1)(a)) The UCC has rejected the Common law “*Mirror Image*” rule, which calls for the offeree’s commitment to accept an offer without any variations.⁵⁰⁾ If an offer calls for shipment of goods, the seller can accept it by making a prompt shipment, unless he “seasonably” indicates to the buyer that he is sending the goods (typically goods that do not conform to the order) merely as an “accommodation” to the buyer, in which case the shipment would be construed as the seller’s counteroffer. (UCC §2-206(1)(b)) If the seller simply sent non-conforming goods to the buyer, he would be at the same time accepting the buyer’s offer and finding himself automatically in breach of contract. (See UCC §2-206(1)(b)) An acceptance of offers calling for acceptance by performance (i.e., a unilateral contracts) requires that the offeree notify the offeror of his acceptance within a reasonable time. (UCC §2-206(2)) Furthermore, a buyer can unwittingly or wittingly accept a contract for goods that were sent to him by treating them as his own, thus acting “inconsistent with the seller’s ownership.” (UCC §2-606(1)(c))

Effectiveness of Acceptance of Offers. In general, an acceptance of an offer is effective upon proper **dispatch** of the acceptance (the so-called “*mailbox*” rule), which is in sharp contradistinction to the receipt doctrine adopted by the CISG. The “*mailbox*” rule tends to protect the offeree’s expectations – thus, it is offeree’s friendly. On the other hand, the receipt rule of the CISG tends to be offeror’s friendly.

48) Farnsworth §39 at 155 (cited in note 17).

49) *See id* §3.19 at 159.

50) Please refer to *Comparative Note* below under Section 5:1.3 (*Battle of Forms . . .*) for discussion on UCC treatment of acceptance that varies from the terms of the offer.

	EFFECTIVENESS UNDER		
	CISG	UCC	JAPANESE LAW
OFFER	Upon receipt (by offeree)	Upon receipt (by offeree)	Upon receipt (by offeree)
WITHDRAWAL OF AN OFFER	When its notice reaches offeree prior to or at the time of his receipt of an offer	When its notice reaches offeree prior to or at the time of his receipt of an offer	Offeror can withdraw the offer until such offer reaches offeree.
REVOCAION OF AN OFFER	When it reaches oferee prior to his dispatch of acceptance	When it reaches oferee prior to his dispatch of acceptance	An offer that sets no time of acceptance made to a remote person may not be revoked during a reasonable time allowed to receive notice of acceptance.
ACCEPTANCE OF AN OFFER	UPON RECEIPT (by offeror)	UPON DISPATCH (by offeree)	UPON DISPATCH (by offeree)

§5:1.2 Incorporation of Standard Terms (Arts. 8, 14, 18)

The principles of interpretation under CISG Article 8 apply to the question of whether the parties' standard terms and conditions have been effectively incorporated into their contract. However, the issue of validity of such terms and conditions belongs to the realm of domestic laws. (*See* Section 3:2.1(b) (*Enforceability of Standard Terms*)) To incorporate standard terms and conditions into a CISG-governed contract, a party (the "Incorporator") must meet the following two conditions:

(a) Intention to Incorporate. The Incorporator must make his intention to incorporate the terms and conditions "apparent to the recipient (the "Recipient") of the offer;"⁵¹⁾ and

(b) Awareness of the Terms and Conditions by Recipient. The terms and conditions must be "*made available*" in some way to the Recipient so that he "*becomes aware of them* in a reasonable manner."⁵²⁾ Amidst a raging scholarly debate on this issue, the Supreme Court of Germany would have the text of the terms and conditions transmitted to the Recipient to achieve an effective incorporation,⁵³⁾ while other judicial authorities together with a number of commentators argue for a more relaxed standard of merely making reference to the terms

51) CLOUT Case No. 45 (Case No. VIII ZR 60/01, Bundesgerichtshof (Federal Supreme Court of German), October 31, 2001, (2002)); English translation available online at <http://cisgw3.law.pace.edu/cases/011031g1.html> (visited Mar. 6, 2013).

52) *Id.* (emphasis added).

53) *Id.* ("It would, therefore, contradict the principle of good faith in international trade as well as the general obligations of cooperation and information of the parties to impose on the other party an obligation to inquire concerning the clause that have not been transmitted and to burden him with the risks and disadvantages of the unknown general terms and conditions of the other party.") (citations omitted).

and conditions.⁵⁴⁾ Furthermore, the strictures of interpretation under the Convention (CISG Art. 8) are said to require that the Incorporator “ascertain whether the recipient understood or was at least . . . required to understand the language used” in the terms and conditions.⁵⁵⁾

§5:1.3 Battle of Forms over Standard Terms (Arts. 7(2), 19)

Once the standard terms and conditions have been properly incorporated pursuant to the foregoing rules, an issue of sorting out between two sets of standard terms containing different or conflicting terms submitted by the parties may arise. As noted above, the Convention provides rules dealing with simple situations where the offeree’s purported acceptance contains additional or different terms. (CISG Art. 19; *see also* discussion above under Section 5:1.1 (*Mechanics of Formation*)) Those rules, however, are inadequate to deal with cases in which parties are trying to impose their own additional or different terms and conditions, thus engaging in “battles of forms.”⁵⁶⁾

With no concrete guidance from the drafters of the Convention, the parties, judges and arbitrators may find themselves in a quandary over how to determine the applicable rules. The only hint given by the drafters is to settle those issues “in conformity with the general principles on which [the Convention] is based, or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.” (CISG Art. 7(2)) Having debated what the proper approach should be, the scholars offer two solutions: the “last shot” rule, and the “knock out” rule.

(a) The Last Shot Rule. This rule appears to comport with the reading of the CISG rule that an acceptance of an offer occurs even in the presence of additional or different terms in the acceptance, which terms become part of the contract as long as the other side remains silent by not objecting orally or dispatching a notice of objection without undue delay, provided, however, that there is no acceptance if those additional or different terms would materially change the offer, for example with respect to “price, payment, quality and quantity of goods, place and time of delivery, extent of one party’s parties’ liability to the other,” or dispute resolution. (CISG Art. 19(1)-(3)) For, in case of an attempted material alteration, the purported acceptance is nothing but a counteroffer. (CISG Art. 19(1)) Despite those meticulous rules, commentators are not satisfied, citing problems of ascertaining the “last shot” in the parties communications, positing that the applicability of the rule often does not

54) *E.g.*, Martin Schmidt-Kessel, *Commentary on Decision of German Federal Supreme Court of 31 October 2001*, <http://cisgw3.law.pace.edu/cases/011031g1.html> (visited Mar. 6, 2013) and authorities cited therein; Peter Hubert, *Standard Terms under CISG*, 13 *Vindobona J. Int’l Com. L & Arb.* 123-134 (2009), <http://www.cisg.law.pace.edu/cisg/biblio/huber2.html#10> (visited Mar. 6, 2013).

55) Huber at 127 (cited in note 54).

56) *See, e.g.*, Peter Schlechtriem, *Battle of the Forms in International Contract Law* (Martin Eimer, transl., 2002) (acknowledging the “knock out” rule as the prevailing position that where the knocked out terms are replaced by statutory provisions); <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem5.html> (visited Mar. 6, 2013).

comport with the actual intentions of the parties, or arguing that the “last shot rule” departs from the modern practice as reflected by the alternative approach of the “knock out” rule.⁵⁷⁾

Thus, in a scholarly example cited to show that the “last shot rule” conflicts with commercial reality, a hypothetical buyer sends a purchase order (containing no arbitration clause), which the seller accepts on the basis of his standard terms containing an arbitration clause. The seller then ships the goods which the buyer accepts. Finding the goods defective, the buyer refuses to submit to arbitration.⁵⁸⁾ Technically, the buyer’s acceptance may have been an acceptance of the seller’s standard terms by the application of CISG Article 19 (1). However, “[t]his approach, while perhaps according most clearly with the language of the Convention, is by no means satisfactory and it must be doubted whether it will in many cases accord with the parties’ true intentions or with commercial reality.” Indeed, had the buyer rejected the goods, the “last shot” principle would suggest that no contract had been formed.⁵⁹⁾

(b) The Knock Out Rule. Arguably a better solution is offered by the “knock out” rule, known as the *Restgültigkeitstheorie* in German. Accordingly, the parties’ standard terms become an integral part of their contract to the extent they do not conflict with each other. At the end of the day, the conflicting terms never enter into the contract. Any resulting gaps can then be mended by applying the governing law of the contract, including the CISG. In fact, at least one court has indicated that the “knock out” rule is the prevailing position on the subject.⁶⁰⁾ Nevertheless, the debate on how to deal with conflicting or additional terms on the battle-of-forms front rages on.

COMPARATIVE NOTE

UCC: An acceptance of an offer occurs even in the presence of additional or different terms, which become “proposals for addition to the contract,” unless the offeree expressly conditions his acceptance on the offeror’s assent to the additional or different terms. (UCC §2-207 (1) and (2)) However, in contracts between merchants, most of the additional or different terms (other than terms that materially change the offer) become part of their contract if the other side remains silent. (UCC §2-207 (2)) Nevertheless, there is no acceptance if the expression of acceptance diverges too much from the terms of the offer (e.g., concerning price, quality, quantity or delivery terms, arbitration, etc.)⁶¹⁾

57) See, e.g., Huber at 129-130 (cited in note 54).

58) Peter Huber, Alastair Mullis, *The CISG – A New Textbook for Students and Practitioners* 93-94 (Sellier 2007) (“*A New Textbook*”).

59) *Id.* at 94.

60) The “Powdered Milk Case” (Bundesgerichtshof German Sup. Ct. Jan. 9, 2002), English translation available at <http://cisgw3.law.pace.edu/cases/020109g1.html> (visited Mar. 6, 2013); see also Huber at 129-30 and authorities cited therein (cited in note 54).

61) White & Summers at §2-3 at 39, 40, 52-53 (cited in note 20).

With respect to contradictory, (i.e., not only “additional” but “conflicting,” or, in the language of the UCC “different”) terms found in the offering terms and the purported acceptance between merchants, the courts have adopted the following two radically different approaches:

- (1) “Knock Out” Rule. Pursuant to this rule (adopted by the majority of courts), conflicted clauses “knock each other out” and disappear from the final contract; and
- (2) Original Terms Control Approach. Alternatively (a minority rule), the contradictory terms in the acceptance disappear from the contract altogether and fail to have any effect. In other words, the original terms control.

§5:2 Contract Warranties (Art. 35)

In general, “warranties” are statements, affirmations or other promises guaranteeing that the goods will be in a certain conditions or will perform accordingly. They are typically distinguished from mere statements of opinion or promises other than those describing the condition or performance of the goods. The CISG, however, has dispensed with the concept of “warranties” for the “unitary notion of conformity, as defined in CISG Article 35.”⁶²⁾ Linguistics aside, inasmuch as the courts continue using the term “warranties,” and the usage of that term helps a comparative analysis, this law review article will apply the term in the context of the CISG as well.

Contractual warranties are typically segregated into (a) express warranties, i.e., warranties given expressly by the parties as part of their bargain, and (b) implied warranties, i.e., warranties arising out of the operation of law. Accordingly, the warranties specifically described in the CISG itself are in the nature of implied warranties. On the other hand, those provided by the parties expressly in their agreement are express warranties.

§5:2.1 Express Warranties (Art. 35)

The CISG recognizes several express warranties which can be given by the sellers with respect to the goods sold to form an integral basis of the parties’ bargain. They include:

- (a) Express Warranty of Quality and Quantity. This warranty requires that the goods conform to the express promises regarding the quality and the quantity of goods sold. (CISG Art. 35(1)) Nevertheless, in one case in which some of the goods did not perfectly match the contractual requirements, the court held that the lack of conformity did not rise to the level of a breach of contract if the goods were of equal value and their utility was not reduced.⁶³⁾

COMPARATIVE NOTE

UCC: As under the CISG, a UCC “express warranty” is some form of an express promise, guarantee, description, or showing to which the goods will conform. In order to qualify as

62) *UNCITRAL Digest* for art. 35, ¶ 1 (Introduction) at 104 (cited in note 37).

63) CLOUT Case No. 251 (Handelsgericht des Kantons Zürich, Switzerland, Nov. 30, 1998).

an “express warranty” under the UCC, no magic words, such as “warranty” or “guarantee,” are necessary. (UCC §2-313(2)) As under the CISG, an express warranty can be created by (a) affirmation of fact or promise relating to the goods, (b) a description of the goods, or (c) offering a sample or model for inspection. (UCC §2-313(1)(a)-(c))

JAPANESE LAW: If the goods in a contract with respect to fungible goods are specified only by type and their quality is not identifiable, the seller may deliver goods of “intermediate quality.” (Civ. C. Art. 401(1)) As regards quality, the Basic Policy proposes to delete Article 401(1) of the Civil Code on the theory that the quality of goods should be determined by interpreting the parties’ intentions.

(b) Express Warranty of Quality Based on Samples of Goods. This warranty requires that the goods conform in quality to samples or models produced by the seller. (CISG Art. 35(2)(c)) In one case, for example, the court held that the specifications of goods based on a sample provided by the buyer did in fact rise to the level of contractual warranties assumed by the seller.⁶⁴⁾

COMPARATIVE NOTE

UCC: The UCC approach is in accordance with the approach taken by the CISG: “Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.” (UCC §2-313(1)(c)) Whether something produced by the seller is merely “illustrative” of what is being offered for sale or a true “sample” which is to form a basis of a contract may sometimes be controversial. When in doubt, it should be presumed “that any sample or model just as any affirmation of fact is intended to become a basis of the bargain.” (UCC §2-313 Comment 6)

JAPANESE LAW: There are no provisions regarding warranties created by samples under the Civil Code. However, based on a judicial precedent (Daishin’in Taisho 15.5.24, Daishin’in Minji-Hanreishuu Vol. 5 at 433), when the seller delivers standard brand goods that differ from a sample, the seller is deemed to have failed to perform his contractual obligations.

§5:2.2 Implied Warranties (Art. 35)

In addition to any express contractual warranties, several implied warranties specifically provided in the CISG are equally binding on sellers unless disclaimed by the parties. The CISG stipulates for the following implied warranties to which the goods must conform:

(a) Implied Warranty of Merchantability

The warranty of merchantability requires that goods be “fit for the purposes for which goods of the same description would ordinarily be used,” except with respect to nonconformities of which the buyer was aware (or should have been aware). (Arts. 35(2) (a) and 35(3)) This warranty can, for example, flow from the usages established under

64) See CLOUT Case 175 (Court of Appeal Graz, Austria, Nov. 9, 1995).

international trade. (*See* CISG Art. 9(2))

COMPARATIVE NOTE

UCC: The Code imposes meticulous standards for the implied warranty of merchantability of goods sold by merchants dealing with goods of the same kind. (UCC §2-314) As in the case of the CISG, this warranty may arise from the parties' course of dealing or usage of trade. (UCC §2-314(3)) Under the UCC, goods are merchantable if, at a minimum, they (a) "pass without objection in the trade under the contract description," (b) in case of fungible goods, "are of fair average quality within the description," (c) are "fit for the ordinary purpose for which [they] are used" and resalable as such, (d) are of uniform "kind, quality and quantity," (e) are "adequately contained, packaged and labeled"; and (f) are not misrepresented on the containers or labels. (UCC §2-314(2)(a)-(f))

JAPANESE LAW: There are no provisions concerning implied warranties of merchantability, fitness for the buyer's use or purpose, or proper packing under the Civil Code. The Basic Policy also does not make any proposals concerning those warranties. Nevertheless, in actual commercial practice, one can observe more and more frequent insertions of clauses excluding some of those warranties.

(b) Implied Warranty of Adequate Packing

This warranty requires that goods be "contained or packed in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods." (CISG Art. 35(2)(d)) The existing case law cautions sellers to take into account, while packing the goods, the post-delivery condition to which the goods may be exposed as well as the regulations in the country of delivery.

COMPARATIVE NOTE

UCC: A UCC buyer has the right to expect that the goods for which he bargained will be delivered "adequately contained, packaged and labeled, as the agreement may require," provided of course that the nature of the sale calls for such delivery. (UCC §2-314(1) (e) and Comment 10 thereto) This requirement is an integral part of the UCC warranty of merchantability, referred to above.

JAPANESE LAW: See Comparative Note above under Section 5:2.2(a) (Implied Warranty of Merchantability).

(c) Implied Warranty of Fitness for Particular Purpose

This warranty requires that goods be "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 buyer did not rely on the seller's skills or judgment. (CISG Art. 35(2)(b))

COMPARATIVE NOTE

UCC: There appears to be no discrepancy in the approaches taken by the CISG and the Code with respect to the implied warranty of fitness for a particular purpose. Thus, under the UCC, as long as (a) the seller has reason to know that the goods bargained for are to be used for a particular purpose, and (b) the buyer is in fact “relying on the seller’s skill or judgment to select or furnish suitable goods,” the implied warranty is in place, subject only to a possible disclaimer or modification by the parties. (UCC §2-315) As mentioned, the implied warranty of merchantability presupposes that goods be fit for “ordinary purpose.” (UCC §2-314(1)(c)) For example, ordinary shoes are made for walking and this is normally their “ordinary purpose.” A particular purpose, on the other hand, implies a particular usage usually characteristic to the business of a specific buyer. For example, if the buyer is a mountaineer and the seller knows that the buyer needs new shoes for his next mountain expedition, in order to comply with the warranty of fitness for a particular purpose, the shoes will now need to be fit for mountain climbing (assuming that our climber is relying on the buyer’s skill to supply such gear). (UCC §2-315 Comment 2) Often both warranties of fitness (for ordinary and particular purpose) can apply to the same bargain, and, in fact, they sometimes overlap.

JAPANESE LAW: See Comparative Note above under Section 5:2.2(a).

(d) Implied Warranty of Good Title

Without agreeing otherwise, a CISG buyer is entitled to receive goods “free from any right of claim of a third party, unless the buyer agreed to take the goods subject to that right or claim,” provided, however, that, with respect to rights or claims based on industrial or intellectual property asserted under the laws of jurisdictions where the goods “will be resold or otherwise used” (if so contemplated by the parties), or, in other cases, under the laws of the place “where the buyer has his place of business,” the seller (but not the buyer) knew or should have known of such rights or claims at the conclusion of the contract. (CISG Arts. 41 and 42(1) and (2)) Furthermore, sellers are not liable to buyers for third-party intellectual or industrial property claims arising out of the sellers’ following the buyers’ “technical drawings, designs, formulae or other such specifications.” Such liability rests with the buyers. (CISG Art. 42(2)(b))

COMPARATIVE NOTE

UCC: Unless otherwise specifically agreed to and excepting any claims with respect to the title to the goods known to him, a UCC buyer is entitled to receive goods (a) with a good title based on a “rightful transfer,” and (b) free from any security interests, liens or encumbrances of which the buyer was unaware at the time of contracting. (UCC §2-312(1)(a) and (b)) Naturally, as under the CISG, where the buyer provides his own specifications to the

seller, it is the buyer who must hold the seller harmless against any claims asserted by third parties arising out of following such specifications. (UCC §2-312(3))

JAPANESE LAW: A sale of goods involves a transfer by the seller to the buyer of title and possessory rights to the goods. The transfer of possessory rights must be effected by actual delivery of goods. In case the buyer or his agent is in possession of the goods, the transfer of possessory rights may be effected by the parties' manifestations of intention. (Civ. C. Art. 182) Transfers of real rights concerning movables may not be asserted against third parties unless the movables have been delivered. (Civ. C. Art. 178)

(e) Implied Warranty of Quiet Possession

The Convention will presumably give remedies to buyers facing actual claims by third parties with respect to titles to the goods even if the titles are otherwise clear and marketable. After all, the enjoyment of "undisturbed possession and ownership of the goods" appears to be at the center of the CISG implied warranty of title.⁶⁵⁾ (See CISG Arts. 41 and 42) In the absence of relevant history of adjudication on this point, it is pure speculation to try to foresee the extent of applicable remedies.

COMPARATIVE NOTE

UCC: It is also not clear to what extent the UCC will allow claims for third parties' interference with peaceful enjoyment of goods based merely on some "colorable claims." It is still unclear whether buyers can shift to sellers the defense of third parties' frivolous claims or claims asserted long time after the sales of goods took place.⁶⁶⁾ Although the current version of the UCC abolishes the warranty of "quiet possession," "[d]isturbance of quiet possession, although not mentioned specifically, is one way, among many, in which the breach of the warranty of title may be established." (UCC §2-312 Comment 1) Be that as it may, the Code allows a buyer to follow the Common law practice of "vouching to defend," by which method a buyer faced with third parties' claims can give a seller notice of litigation, stating that if the seller does not undertake the defense he will be bound by any determination of fact in any subsequent litigation between the buyer and the seller. (UCC §2-607(5)) If the seller ignores such invitation to defend, he will indeed be so bound. (*Id.*) In any event, if the buyer fails to give notice of litigation concerning a claim for infringement, he will be forever barred "from any remedy over the liability established by the litigation." (UCC §2-607(3)(b))

JAPANESE LAW: If a sale of goods involves a sale of rights in the goods vested in third parties, the seller assumes an obligation to acquire those rights and transfer them to the buyer. (Civ. C. Art. 560) If the seller cannot acquire and transfer to the buyer the rights to the goods sold, the buyer may cancel the contract. In such a case, if the buyer knew, at the

65) See *UNCITRAL Digest* for art. 41, ¶ 1 (Overview) at 141 (cited in note 37).

66) See White & Summers §10-15(b) at 501-2 (cited in note 20).

time of contracting, that the rights did not belong to the seller, the buyer may not demand compensation for damages. (Civ. C. Art. 561)

§5:3 Delivery of Goods and Documents and Transfer of Property Rights by Seller (Arts. 30-34, 85, 87, 88)

A delivery of goods and handing over of relating documents as well as a transfer of property rights in the goods are the seller's essential obligations in the context of a CISG contract. (CISG Art. 30) Assuming that the parties have omitted to deal with matters of delivery in their contract, the Convention conveniently supplies a framework of rules to work with. If the parties provided for delivery terms in their contract, e.g., by stipulating to Incoterms delivery terms, such terms will obviously prevail.

§5:3.1 Seller's Obligation to Deliver Goods (Arts. 30-34)

(a) Place of Delivery

The CISG seller must either hand over (i.e., "give possession of") the goods to **the first carrier**, in cases involving carriage, or make the goods available to the buyer ("placing the goods at the buyer's disposal") at (a) **the seller's place of business** (as of the time of contracting); or (b) the place **where the goods are located** in case of (i) specific goods, (ii) unidentified goods to be taken from a specific stock, or (iii) goods to be manufactured or produced, provided that, at the time of contracting, the parties knew where the goods would be located. (CISG Arts. 30 and 31)

(b) Notice Requirement for Consignments with Carriers

In cases involving carriage, where the goods are not identified to the contract, the seller has the obligation to (i) notify the buyer of making consignment of the goods with a carrier, and (ii) specify the goods themselves. (CISG Art. 32(1)) This is a precautionary procedure to guard against a possibility of the seller's appropriating the goods to the contract in cases where he knows that the goods have been lost or damaged.⁶⁷⁾ Without said notice, (i) the seller is in breach of contract, and may be liable for any resulting damages, and (ii) the risk to the goods will not pass the buyer, presumably before the goods are clearly identified to the contract or the time the buyer takes delivery. (See CISG Art. 67(2))

(c) Time of Delivery

"Time" appears to be of the essence in delivery of goods under the CISG. The CISG scheme allows for the following four variations:

- (i) Contractually Fixed Date. When the *date* of delivery is fixed or ascertainable, the goods must be delivered on such a date. (CISG Art. 33(a)) Presumably, absent good faith considerations to the contrary, the buyer may refuse taking any untimely delivery.
- (ii) Contractually Fixed Period. Similarly, when the *period* of delivery has been

67) See Schlechtriem & Schwenger Art. 32, para 1 at 538 (cited in note 10).

fixed or is ascertainable, the goods must be so delivered, except that, where the buyer is entitled to specify the delivery date within such period, the buyer's choice will control. (CISG Art. 33(b))

- (iii) Unspecified Time. In the event the agreement is silent on the time when the delivery is to take place, the seller must deliver the goods “within a reasonable time after the conclusion of the contract.” (CISG Art. 33(c)) The reasonableness of such timing is of course a function of all surrounding circumstances.
- (iv) Derogation from CISG Time Scheme. The parties may qualify the time of delivery in other than fixed terms, such as “promptly after” a certain event, or “as soon as possible,” which is apparently in derogation from the CISG timing scheme under Article 33, although the attribute of “reasonableness” will surely attach to any disputes concerning timely delivery.⁶⁸⁾

COMPARATIVE NOTE

UCC: The UCC does not impose on the seller any “duty” to “deliver” goods for the simple reason that the seller might not be able to make good on a promise to deliver if confronted with a buyer unwilling to take delivery. Instead, the seller's obligation is to “tender delivery.” (See UCC §§2-301, 2-507(1) and 2-503(1)) This obligation to “tender” is understood as an offer coupled with the ability to perform thereunder, followed by actual performance if the buyer “shows himself ready to proceed.” (See UCC §2-503 Comment 1)) The UCC seller must make tender of delivery in reasonable time (UCC §2-309(1)), at his place of business (or, in its absence, his residence) (UCC §2-308(a)), except that if goods are known to be located at another place, then at such place (UCC §2-308(b)), or at the place specified pursuant to the applicable shipping terms (see UCC §§2-319 to 2-324). In general, a tender must be made in one single lot. (UCC §2-307)

JAPANESE LAW: Under the Civil Code, in case where the parties fail to specify the place of delivery in their contract, the delivery of specific goods should be made at the place where such goods were located at the time of contracting. If the goods are unspecified or unascertainable, the seller must bring such goods to the domicile of the buyer. (Civ. C. Art. 484) Although the seller must perform in accordance with the main tenor of his obligations, “if the obligee refuses to accept such performance in advance, or any act is required on the part of the obligee with respect to the performance of his obligations, it is sufficient for the obligor to demand acceptance by giving notice that a tender of performance has been made.” (Civ. C. Art. 493)

§5:3.2 Seller's Obligation to Preserve Goods (Art. 85, 87, 88)

- (a) Duty to Take Reasonable Steps

⁶⁸⁾ See *A New Textbook* at 125 (cited in note 58).

To make good on his good-faith obligations, the seller in possession of the goods is expected to be the “goods keeper” (1) at least until the buyer finally takes delivery, however late that may be, or until the seller sells the goods in the circumstances listed below, and (2) in case of simultaneous exchange of goods for payment, even if the buyer fails to make a timely payment. (CISG Art. 85) This obligation requires that the seller take reasonable steps under the circumstances to preserve the goods, including depositing them at a third-party warehouse for a reasonable price. (CISG Arts. 85 and 87) The duty is in effect when the seller physically controls the goods or their disposition. To be fair to the seller, he can keep the goods until the buyer pays him reasonable expenses for such preservation. (CISG Art. 85)

(b) Option to Sell

The good-faith imperative imposed on the seller to keep the goods has its limits, and, if the buyer’s delay in (1) taking delivery, (2) paying the price of the goods, or (3) paying the cost of preservation becomes unreasonable, the seller can sell the goods by “appropriate means” upon giving the buyer a reasonable notice of his intention to sell. (CISG Art. 88(1)) Following the sale, the seller can keep a portion of the proceeds equal to the reasonable expenses of preservation but must account for the remainder to the buyer. (CISG Art. 88(3))

(c) Obligation to Sell

In two circumstances the seller has to take reasonable measures to sell the goods: first, when the goods are subject to rapid deterioration, and second, when the expenses of preserving them would become unreasonable. (CISG Art. 88(2)) As in case of optional sale of goods noted above, the seller is entitled to keep the portion of the proceeds to cover his reasonable preservation expenses but must account to the buyer for the balance. (CISG Art. 88(3))

COMPARATIVE NOTE

UCC: Even though the UCC gives the seller the right to withhold delivery of goods, resell them and recover damages in case the buyer either wrongfully rejects the goods or revokes their acceptance, defaults on his payment obligations or repudiates (UCC §2-703(a) and (d)), it does not impose on him any express duty to preserve or sell the goods. Nevertheless, the ever-present obligation of good faith may in fact imply similar obligations as those contemplated by the CISG regime. The scope of such potentially imputed obligations could be extrapolated by analogy to (a) non-merchant buyers’ obligations under UCC Section 2-602(2)(b), or (b) merchant buyers’ obligations of good faith with respect to rightfully rejected goods under UCC Section 2-603.⁶⁹⁾

69) As understood by the UCC, a “merchant” is “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such

A. Non-Merchant Buyers

A non-merchant buyer who rightfully rejects goods of which he is in possession or control and in which he has no security interest must, following the rejection, “hold them with reasonable care at the seller’s disposition for a time sufficient to permit the seller to remove them.” (UCC §2-602(2)(b)) By analogy, the mandates of good faith may, at a minimum, require that the seller exercise reasonable care with respect to the goods upon the buyer’s wrongful rejection, revocation of acceptance, default on payment or repudiation. Such duty of care may very well subsume an obligation to preserve the goods, and, in case of perishable or quickly deteriorating goods, to make efforts to sell them.

B. Merchant Buyers

A merchant buyer in possession or control of the goods, after rightfully rejecting them, has the obligation to follow the seller’s reasonable instructions, and, in their absence, “to make reasonable efforts to sell them for the seller’s account if they are perishable or threaten to decline in value speedily.” (UCC §2-603(1)) It should be noted that this obligation is applicable only when the seller has neither a place of business nor an agent “at the market of rejection.” (*Id.*) Moreover, the buyer’s compliance with this duty is measured and limited by the demands of good faith under the circumstances. (UCC §2-603(3)) By analogy, in case of the buyer’s noncompliance, the extent of a merchant seller’s duties in respect of goods in his possession or control may very well encompass a duty to preserve the goods and sell them in appropriate circumstances.

JAPANESE LAW: According to Article 413 of the Civil Code, the buyer who refuses or is unable to accept tender of delivery of the goods from the seller is responsible for any ensuing delay from the time of tender. In such a case, the seller may be relieved from his obligation by depositing the goods with an official depository. (Civ. C. Art. 494) However, in the following three situations, the seller may, with permission of the court, sell the goods at a public auction and deposit the proceeds with the official depository: (a) if the goods are not suitable for deposit, (b) if the goods are likely to suffer loss or damage, or (c) if the expenses required for the preservation of the goods are excessive. (Civ. C. Art. 497) Apart from the foregoing rules, in sales between merchants, if the buyer refuses to receive the purchased goods or is not able to receive them, the seller can deposit the goods, or, after giving the buyer adequate notice, sell the goods at a public auction. (Comm. C. Art. 524(1)) Although the required notice must be given to the buyer without delay, the seller can sell perishable goods at a public auction without notice. (Comm. C. Art. 524(2)) Upon execution of a sale at a public auction, the seller must deposit the resulting proceeds. Nevertheless, in proper cases, the seller is not prevented from appropriating such proceeds in whole or in part. (Comm. C. Art. 524(3))

If the delivery of goods becomes impossible due to reasons attributable to the buyer, the

knowledge or skill.” (UCC §2-104(1))

seller's right to return performance is preserved. (Civ. C. Art. 536(2)) According to Article 485 of the Civil Code, the seller is (unless otherwise agreed by the parties) responsible for the expenses related to his performance except that the buyer is responsible for any increase of expenses caused by the buyer.

§5:3.3 Seller's Obligation to Hand over Documents Relating to Goods (Art. 34)

In addition to the duty to deliver the goods, the seller has an obligation to furnish to the buyer "documents relating to the goods." (CISG Art. 34) The seller must do so "at the time and place and in the form required by the contract." (*Id.*) The typical documents contemplated by Article 34 include bills of lading (such as air waybills), dock and warehouse receipts, insurance policies, commercial invoices, certificates of origin and other certificates.

(a) Time and Place of Handing Over of Documents

The CISG instructs only that the documents be handed over "at the time and place and in the form required by the contract." (CISG Art. 34) If either the time or the place cannot be determined from the contract, it has been suggested that the documents should be submitted "as soon as possible" after shipment of goods or "after the seller 'destined the cargo to the particular vendee or consignee.'"⁷⁰⁾ Regarding the place of handing over of documents, the general practice is to deliver them at the buyer's place of business.⁷¹⁾

(b) Cure of Improper Delivery of Documents

While furnishing nonconforming documents can constitute a fundamental breach, if the buyer could easily cure the problem himself by requesting conforming documents, the courts are unlikely to recognize such a breach fundamental.⁷²⁾ However, the obligation under Article 34 of the CISG to furnish documents applies only when the seller "is bound" to hand them over. Whether this is so can be determined either from the contract or under the rules of Article 9 of the CISG. But, if the time designated to deliver the documents has not yet run out, the seller has the right to cure any nonconformities in the documents if it can be done without causing "unreasonable inconvenience or unreasonable expense" to the buyer, with the buyer retaining the right to claim damages. (CISG Art. 34)

COMPARATIVE NOTE

UCC: A tender of delivery under the Code includes tender of documents of title, if so required. Linguistically, the CISG "documents relating to the goods" become "documents of title" under the Code.⁷³⁾ In fact, documents are never required unless the contract says so

70) *A New Textbook* at 128 (cited in note 58).

71) *Id.*

72) *See UNCITRAL Digest* for art. 34, ¶6 (Handing over of Documents) at 100 (cited in note 37).

73) The UCC defines documents of title to include: "bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers." (UCC §1-201(16)) For a document

or the circumstances or usage of trade so imply. (See UCC §2-503 and Comment 7 thereto) When a tender of delivery calls for delivery of documents, the seller must deliver them in correct form. (UCC §2-503) However, in CIF, C&F or FOB contracts, the Code provides for certain exceptions with respect to delivery of incomplete sets of bills of lading. (See UCC §2-323(2)) The seller may deliver documents of title through customary banking channels. (UCC §2-308(c)) In “shipment contracts” (i.e., contracts not calling for sending the goods to any particular destination), the seller must “obtain and promptly deliver or tender in due form any documents necessary to enable the buyer to obtain possession of the goods.” (UCC §2-504(b)) In “destination contracts” (i.e., contracts requiring that the goods be delivered to a particular destination), a tender of all documents must be made within a “reasonable time” and “at a reasonable hour.” (UCC §§2-309(1) and 2-503(1)(a), (3), (4) and (5)) Furthermore, the Code provides for delivery of negotiable or non-negotiable documents of title in cases of delivery of goods at a particular destination not involving movement of goods. (UCC §2-503(4))

JAPANESE LAW: Although the Civil Code provides for the performance of obligations by obligees, it has no specific provisions regarding handing over of documents to the goods.

§5:3.4 Seller’s Obligation to Transfer Property Rights in Goods (Art. 30)

Article 30 of the CISG requires the seller to transfer property rights in the goods (i.e., the ownership or the title) to the buyer as part of his performance. In the absence of the intention to make such a transfer, the CISG would presumably not apply, as the nature of such transaction would likely be something other than a sale. In other words, for a sale to be a CISG sale, the legal transfer of title is clearly a condition *sine qua non*.

COMPARATIVE NOTE

UCC: Similar to the CISG, the UCC makes it clear that there is no sale without “passing of title from the seller to the buyer for a price.” (UCC §2-106(1)) This is so despite the fact that, for the most part, all provisions of UCC Article 2 concerning “the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties” apply “irrespective of title to the goods.” (Preamble to UCC §2-401) Indeed, the UCC provides rules on when the title passes in the sales of goods albeit primarily for the sake of other laws to which questions of title may be relevant. (See UCC §2-401 Comment 1)

The general rule is that title to goods passes as agreed by the parties, except that (a) title cannot pass before the goods are identified to the contract, and (b) a reservation of title in the goods by the seller is merely a reservation of security interest therein. (UCC §2-401(1)) Otherwise, when the parties do not so agree, the title passes to the buyer as follows:

to classify as “document of title,” it “must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.” (*Id.*)

A. In contracts where the goods are to be moved: at the time and place at which the seller completes physical delivery of the goods, “despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place.” (UCC §2-401(2)) For example, in shipment contracts title passes “at the time and place of shipment,” and in destination contracts, title passes on tender at the destination. (UCC §2-401(2)(a) and (b)); and

B. In contracts where delivery takes place without goods being moved: at the time and place where the seller has delivered a document of title, or, where no documents are to be delivered, “at the time and place of contracting,” provided that the goods are identified to the contract at such time. (UCC §2-401(3)(a) and (b))

JAPANESE LAW: A sale of goods under the Civil Code becomes effective when the seller promises to transfer certain “real rights” in the goods to the buyer. (*See* Civ. C. Art. 555) A transfer of real rights is accomplished solely by manifestations of intention of the parties. (Civ. C. Art. 176) In order to perfect such transfer of rights in the context of a sale of goods, the seller must transfer possessory rights in the goods to the buyer. A transfer of possessory rights takes place upon delivery of the goods. (Civ. C. Art. 182) In fact, “transfers of real rights in movables may not be asserted against third parties unless the movables are delivered.” (Civ. C. Art. 178)

§5:4 Passing of Risk (Default Rules (Arts. 66-90))

The risk of loss to the goods under the CISG passes as agreed by the parties. (*See* CISG Art. 6) In the absence of such agreement, the following rules apply:

	RULE ON WHEN THE RISK PASSES	INVOLVES CARRIAGE	APPLICABLE CONTEXT FOR THE RULE TO APPLY
1.	Risk passes to buyer when goods are handed over (physically) to the first carrier (CISG Art. 67)	Yes	Seller is not bound to hand over the goods at any particular place
2.	Risk passes to buyer when goods are handed over to a carrier at a particular place (CISG Art. 67)	Yes	Seller is bound to hand over goods to a carrier at a particular place
3.	Risk passes to buyer at the conclusion of contract (CISG Art. 68)	Yes	Goods sold in transit
4.	Risk passes (retroactively) to buyer when goods are handed over to the carrier who issued the documents embodying the contract of carriage (CISG Art. 68)	Yes	Goods sold in transit and circumstances indicate that the risk should pass in this way
5.	Risk of loss/damage <u>never</u> passes to buyer (CISG Art. 68)	Yes	Goods sold in transit and, at the conclusion of contract, seller knew (or ought to have known) that the goods were lost or damaged
6.	Risk of loss/damage <u>never</u> passes to buyer (CISG Arts. 67, 69)	No	Good are not clearly identified to the contract
7.	Risk passes when buyer takes over goods in a timely fashion (CISG Art. 69(1))	No	Basic approach when buyer timely takes delivery at a place of business of seller
8.	If buyer fails to timely take over the goods, risk passes to buyer when goods are placed at his disposal (CISG Art. 69(1))	No	Buyer breaches the contract by failing to take delivery
9.	Risk passes to buyer when delivery is due and buyer is aware the goods are put at his disposal at that place (CISG Art. 69(2))	No	Delivery at a place different from seller's place of business

COMPARATIVE NOTE

UCC: The UCC policy seeks to place the risk of loss either on the party who is in the best position to control the goods or the party in breach of the agreement. (*See* UCC §2-509 Comment 3) Accordingly, in the absence of a breach of contract, the risk passes to the buyer: (a) in shipment contracts, as soon as the seller delivers the goods to the carrier, even

if the seller has retained a security interests in the goods (UCC §2-509(1(a)), and (b) in destination contracts, upon tender of the goods that enables the buyer to take delivery (UCC §2-509(1(b))). Similarly, in contracts that do not involve movement of goods which are held by a bailee, the risk of loss passes either on the bailee's receipt of documents of title or his acknowledgement of the buyer's right to take possession (also referred to as an "attornment"). (See UCC §2-509(2)) In cases that do not squarely fit into the above-listed categories, the risk of loss passes from a merchant seller (and, under a 2003 UCC amendment, also a non-merchant seller) upon the buyer's receipt of the goods. (UCC §2-509(3)) (With respect to the risk of loss in "sales on approval," see Comparative Note to Section 2:2.2(f) (Consignment-Like Arrangements), above.)

JAPANESE LAW: In the context of transfers of real rights regarding specified goods, if the goods have been lost or damaged due to reasons not attributable to the seller, the liability for such loss or damage falls on the buyer. (See Civ. C. Art. 534) This rule applies to contracts regarding unspecified goods from the time when the goods have been identified to the contract pursuant to Article 401(2) of the Civil Code. According to that Article, "if the seller has completed the acts necessary to deliver the goods, or has identified the goods to the contract, the seller is to deliver the goods with the consent of the buyer, and, from such time, such goods become subject of a claim (specified goods)." However, the seller has no right to receive return performance from the buyer "if the performance of any obligation has become impossible due to reasons not attributable to either party." (Civ. C. Art. 536(1)) If, on the other hand, the goods are not specified to the contract, the seller assumes all risks with respect to the goods.

§5:5 Buyer's Obligations Attendant on Delivery of Goods (Arts. 38-40, 53-59, 86-88)

Once the buyer has entered into a valid contract to purchase goods, he must then pay the price, take delivery, make inspection of the goods and give notice of any nonconformities to preserve his rights with respect thereto.

§5:5.1 Buyer's Obligation to Pay Price (Arts. 53-59)

The CISG sets out meticulous rules allowing the buyer to fulfill his obligation to pay the price (CISG Arts. 53 through 59):

(a) Complying with Formalities.

It is the buyer's responsibility to take all steps required and take care of all formalities necessary under the contract and the applicable laws to make sure that the payment can be made (CISG Art. 54);

(b) Payment of Correct Price.

Implied in the payment obligation is the obligation to pay the correct price. Thus, if the contract does not specifically set forth the price, unless otherwise agreed, the buyer must pay the price that can be determined by reference to the prices generally charged for the goods sold at the time of contracting under similar circumstances (CISG Art. 55);

(c) Price to Be Determined by Net Weight.

In cases where the goods are sold by weight, the buyer must pay the price as determined by the net weight of the goods (CISG Art. 56);

(d) Place to Pay.

Normally, the buyer is expected to pay the price at the place of the seller's business, except that, where the price is to be paid against handing over of either the goods or the documents, the price is payable at the place where such handing over is to occur, provided that any extra costs incurred in making payment that result from any changes in the seller's place of business are to be borne by the seller (CISG Art. 57); and

(e) Time to Pay.

If not otherwise agreed, the buyer is expected to pay the price upon tender of the goods or the "documents controlling their disposition" to the buyer. In fact, the seller may make such payment a condition to the release of the goods or the documents (CISG Arts. 58(1) and 58(2)), provided, in any case, that the buyer is afforded an opportunity to inspect the goods unless such inspection cannot be conducted in the circumstances surrounding the delivery or the payment procedures. (CISG Art. 58(3))

COMPARATIVE NOTE

UCC: In general, a UCC buyer is under the obligation to pay the price of the goods at the place and time where he receives the goods, provided that he had an opportunity to inspect the goods. However, the buyer has no right to inspect the goods before payment in the context of (a) C.O.D. deliveries, and (b) deliveries against documents of title unless payment is due after the goods are available for inspection. (UCC §§2-310(a) and 2-513(1)) Furthermore, in deliveries against documents of title, payment is generally due at the time and place where the documents are to be received. (UCC §2-310(c))

When the buyer has agreed to pay prior to inspection, he must pay the price unless non-conformity is obvious without inspection. (UCC §2-512(1)(a)) Of course, such payment does not constitute acceptance of the goods by the buyer. (UCC §2-512(2)) In any event, payment of the price, or rather "tender of payment," is a condition triggering the seller's obligation to "tender and complete any delivery." (UCC §2-511(1)) This concurrence of conditions for payment (by the buyer) and delivery (by the seller) expresses the UCC policy of avoiding commercial "surprises" during contract performance. (UCC §2-511 Comment 3) Although the buyer may pay "by any means or in any manner current in the ordinary course of business," the seller may nevertheless require payment in legal tender. (UCC §2-511)

JAPANESE LAW: A sale of goods under the Civil Code presupposes payment of the purchase price by the buyer. (*See* Civ. C. Art. 555) If the purchase price is to be paid simultaneously with delivery of the goods, the payment must be made at the place of delivery. (*See* Civ. C. Art. 574) The buyer assumes the obligation to pay interest on the

purchase price from the day of delivery, or, if payment is to be made on a specified date, then from such specified date. (Civ. C. Art. 575(2)) However, if the buyer is likely to lose the rights to the goods, in whole or in part, on account of claims with respect to the goods by third parties, the buyer may refuse to pay the price in proportion to the extent of such likelihood unless the seller has provided reasonable security. (Civ. C. Art. 576)

§5:5.2 Buyer's Obligation to Take Delivery (Art. 53)

It is the buyer's obligation to take delivery of purchased goods. (CISG Art. 53) This obligation, in turn, requires the buyer to do all things that might be expected of him to allow the seller to complete delivery. (CISG Art. 60(a) and (b)) In general, the buyer must take the goods at the place of delivery.

COMPARATIVE NOTE

UCC: Similar to the CISG, the UCC makes it the buyer's primary obligation to accept the goods "in accordance with the contract." (UCC §2-301) Such acceptance takes place when the buyer (a) indicates to the seller, after an opportunity to inspect the goods, that either the goods are conforming or that he will take them despite any nonconformity, (b) fails to reject the goods despite having had an opportunity to inspect them, or (c) subject to certain exceptions, acts in a way "inconsistent with his claim that he has rejected the goods." (UCC §2-606(1) and Comment 4 thereto) In some circumstances, the buyer may have to accept the goods despite nonconformities whether in the goods themselves or the manner of delivery. (*See, e.g.,* UCC §§2-504, 2-601, 2-612(2), 2-614(1))

The black letter law on acceptance under the UCC distinguishes between cases of properly tendered goods and nonconforming goods or tender:

(1) Goods Duly Tendered: Upon proper tender of conforming goods, the buyer must accept (i.e., take them as his own) and pay for them (UCC §2-301);

(2) Goods or Tender that Fails to Conform to Contract: While the buyer may always accept the goods, he cannot reject them (a) due to delay in "shipment contracts" (but not "destination contracts"), unless the delay is material or loss ensues (UCC §2-504), (b) when, although the agreed upon manner of delivery becomes commercially impracticable, a reasonable substitute becomes available (UCC §2-614), (c) if, in installment contracts, the nonconformity does not substantially impair the value of the given installment, or, even if it does, the nonconformity is curable and the seller gives adequate assurances of its cure (UCC §2-612), (d) if the parties had agreed that the buyer would accept despite nonconformity (UCC §§2-601 and 2-719); and (e) if the nonconformity is *de minimis* based on a course of dealing, usage of trade, the good faith obligations or other principles of contract law.

JAPANESE LAW: There are no provisions regarding the buyer's obligations to take delivery under the current version of the Civil Code. However, the Basic Policy proposes provisions addressing such obligations.

§5:5.3 Buyer's Obligation to Inspect Goods (Arts. 38-40)

The CISG imposes on the buyer an obligation to inspect the goods at the risk of losing the remedies that might be available upon proper identification of nonconformities and timely issuance of CISG Article 39 notice thereof, unless the seller knew or should have known of the facts behind such nonconformities but did not disclose them to the buyer. (*See* Arts. 38(1), 39 and 40)

(a) Time of Inspection.

The CISG insists that the buyer inspect the goods “within as short a period as is practicable in the circumstances.” (CISG Art. 38(1)) Nevertheless, with respect to goods being shipped or redirected in carriage by the buyer, the buyer may postpone inspection until the goods arrive, respectively, at the scheduled or new destination of which the seller knew (or should have known) at the time of contracting. (CISG Art. 38(2) and (3)) Courts tend to strictly enforce this timing requirement, at least with respect to obvious defects, not only to protect the buyer by giving him the opportunity to find nonconformities but also to protect the seller from claims based on nonconformities that may have occurred subsequent to the delivery.⁷⁴⁾ On the other hand, the buyer may not necessarily forfeit his rights of inspection with respect to latent defects discovered after taking delivery, for example, during the use or processing of the goods.

While there are no hard and fast rules regarding the timing within which to conduct an inspection, some courts have tried to establish presumptive time limitations, from a few days to a month following delivery. However, the decisions dealing with this issue vary considerably, and it may be counterproductive to discern any particular patterns.⁷⁵⁾

With respect to latent defects, tribunals have taken two separate approaches. One approach views the inspection obligation as a continuous obligation to ferret out all nonconformities, and a timely examination of such defects does not occur until they reveal themselves. The other approach considers an inspection as a discreet event, in which case once a timely inspection has been made, the buyer's obligations under Article 38 of the CISG have been satisfied.⁷⁶⁾

(b) Manner of Inspection.

As the buyer is directed to “cause [the goods] to be examined,” an inspection of the goods does not have to be conducted by the buyer himself, and may be made, for example, by his customers, subcontractors or experts. (*See* CISG Art. 38(1)) A review of the relevant cases suggests that the manner of inspection depends on the particular circumstances of the sale and the prevailing usages of trade, although undoubtedly it must satisfy the requirement

74) *See UNCITRAL Digest* for art. 38 ¶¶ 11 & 13 (Time Period for Examination) at 115 (cited in note 37).

75) *See id.* Art. 38 ¶15.

76) *Id.* Art. 38 ¶16.

of reasonableness if not “thoroughness” and “professionalism.”⁷⁷⁾ Within the rubric of such reasonableness, buyers may need to determine the limits of costs to be spent, the need of experts, or the adequacy of “spot” or selective inspection.

COMPARATIVE NOTE

UCC: Although the Code gives the buyer the right to inspect the goods without imposing on him *a duty to inspect* as the CISG does, this distinction may be without much difference. This is because a failure to inspect and any resulting failure to discover non-conformities may in fact result in an “acceptance” of the goods, or forfeiture of the *right to revoke acceptance*. Thus, an acceptance of goods will take place when the buyer, having had “a reasonable opportunity to inspect” the goods, (a) “signifies that the goods are conforming or that he will take or retain them in spite of their non-conformity,” or (b) “fails to make an effective rejection.” (UCC §2-606(1)(a) and (b))⁷⁸⁾ Then, even if an “acceptance” of goods has taken place, the buyer’s right to revoke it hinges substantially on his discovery of defects. Accordingly, the Code conditions the right to revoke acceptance on the buyer’s acceptance having been (a) based on a reasonable assumption that the seller would cure any defect, or (b) reasonably induced by the “*difficulty of discovery [of the non-conformity] before acceptance*” or the seller’s assurances. (UCC §2-608(1) (emphasis added)) However, the right to revoke must be exercised “within a reasonable time *after the buyer discovers or should have discovered* the ground for [revocation].” (UCC §2-608(2) (emphasis added)) All in all, neglecting to inspect the goods may lead to a forfeiture of the right to reject them by the buyer despite their non-conformity with all attendant consequences as recounted in the comment to the next section 5:5.4 (*Buyer’s Obligation to Give Notice . . .*), below.

In order to best secure the buyer’s right to reject the goods, the UCC gives him *the right, before payment or acceptance*, and at any reasonable place and time and in a reasonable manner, to inspect the goods that have been tendered, delivered or identified to the contract, provided that, when the seller is authorized or required to send the goods to the buyer, the inspection can be performed after their arrival. (UCC §2-513(1)) However, the buyer has no right to make inspection before making payment if the sale is on a “C.O.D.” or similar basis, or the payment is against documents of title (except where such payment is due after the buyer can make an inspection). (UCC §2-513(3))

JAPANESE LAW: While there are no provisions addressing the buyer’s obligation to inspect goods under the Civil Code, Article 526 of the Commercial Code provides that, in sales between merchants, the merchant buyer should make an inspection of goods without delay. Except in cases where the merchant seller acted in bad faith, if the merchant buyer fails

77) See *id.* Art. 38 ¶10.

78) The Code provides for an alternative way of acceptance consisting of the buyer’s performance of “any act inconsistent with the seller’s ownership.” (UCC §2-606(1)(c))

to give an immediate notice to the merchant seller upon the merchant buyer's discovery of defects or deficiency in numbers, the merchant buyer loses his rights to cancel the contract based on such defects or deficiencies in numbers, or to reduce the price, or to demand damages for compensation. Furthermore, even in cases where the defects were not possible of immediate detection, the merchant buyer loses those rights unless he gives notice of nonconformity to the merchant seller within six months of delivery. (*See* Comm. C. Art. 526(1)) However, in contracts in which at least one party is not a merchant, the buyer has the right either to rescind the contract or, if that is not possible, claim damages if a latent defect prevents him from achieving the purpose of his bargain due to such defect. (Civ. C. Arts. 566 and 570) In either case, the buyer must exercise his rights of cancellation or to damages within one year from the time when he discovers the latent defect. (Civ. C. Art. 566(3))

§5:5.4 Buyer's Obligation to Give Notice of Nonconformities to Preserve Rights (Art. 39)

The Convention requires that the buyer give notice to the seller pertaining to any nonconformity within a reasonable time after the buyer either discovers or should have discovered it in order to preserve his claims with respect to such nonconformity. (CISG Art. 39(1)) In order to protect the seller, such notice must be given within two years from the date of handing over the goods to the buyer unless such limit is inconsistent with the applicable warranty period under the contract. (CISG Art. 39(2)) The loss of remedies consequent upon failure to give the CISG Article 39 notice typically entails a loss of the rights to (a) repairs by the seller, (b) damages, (c) price reduction, or (c) contract avoidance. (CISG Art. 39)

COMPARATIVE NOTE

UCC: The CISG's insistence on giving notice of nonconformities is analogous to the Code's requirements for an effective rejection of tender and the consequences of not doing so. Thus, under the Code, the buyer must reject nonconforming goods within a "reasonable time" after their delivery/tender by seasonably notifying the seller. (UCC §2-602(1)) By failing to give a seasonable notice in connection with rejection of the goods, specifying a particular defect that could be detected by reasonable inspection, the buyer forfeits his right to rely on that defect, but only if (a) the seller could have cured it if so notified, or (b) in transactions between merchants, the seller requested a full statement of all alleged defects following rejection. (UCC §2-605(1)) Furthermore, in the context of payment against documents made without reservation of rights, the buyer forfeits his right to rely on defects apparent on the face of the documents. (UCC §2-605(2))

JAPANESE LAW: See Comparative Note above under Section 5:5.3.

§5:5.5 Buyer's Obligation to Take Possession of and Preserve Goods (Arts. 86 to 88)

The buyer who is in possession of the goods but intends to reject them has the obligation to preserve the goods by taking reasonable measures in the circumstances. (CISG Art. 86(1)) Moreover, while exercising the rejection rights in connection with the goods

that have been “placed at his disposal at their destination,” the buyer must nevertheless take possession (on seller’s behalf) of the goods, provided that the seller (or a person authorized by the seller to be in charge of the goods on seller’s behalf) is not present, and provided further that the buyer can do so (a) “without payment of the price,” (b) “without unreasonable inconvenience,” or (c) without “unreasonable expense.” (CISG Art. 86(2))

The buyer (or for that matter also the seller) who is under the obligation to preserve the goods has the following options:

(a) Right to Deposit Goods in Third-Party Warehouse

The buyer may deposit the goods in a third-party warehouse as long as the attendant expenses are reasonable (CISG Art. 87);

(b) Right to Sell the Goods

The buyer may, upon a reasonable notice to the seller, sell the goods “by any appropriate means” in the event the seller unreasonably delays in (i) taking possession, (ii) taking back, or (iii) paying for the preservation of the goods. (CISG Arts. 88(1) and (2)) However, in case of goods subject to quick deterioration, the buyer must take “reasonable measures” to sell them, striving to give prior notice to the seller of his intention to do so. (CISG Art. 88(2)) Moreover, the buyer must account for the proceeds of the sale while retaining reasonable expenses incurred in preserving and selling the goods. (CISG Art. 88(3))

COMPARATIVE NOTE

UCC: Following the buyer’s rejection of goods that are in his possession or control, the buyer is under the obligation to “hold them with reasonable care at the seller’s disposition for a time sufficient to permit the seller to remove them.” (UCC §2-602(2)(b)) For a non-merchant buyer, this is the extent of his obligations in cases of rightful rejection. (UCC §2-602(2)(c)) However, a merchant buyer who rightfully rejects goods which are in his possession or under his control must follow the seller’s “reasonable instructions” with respect to the goods or, in the absence of such instructions, take reasonable steps to sell them for the seller’s account if the goods are perishable or subject to speedy deterioration. (UCC §2-603(1)) The merchant buyer has this express obligation in case where the seller does not have a place of business or an agent in the market of rejection. (*Id.*) Furthermore, the seller’s instructions will not be deemed reasonable if, upon demand, the seller does not indemnify the buyer for the related expenses. (*Id.*)

JAPANESE LAW: Under the Civil Code, the buyer who exercises his right to cancel the contract must only restore the goods, i.e., return them to the seller as long as it can be accomplished without prejudicing the rights of third parties. (Civ. C. Art. 545) However, the matter of “taking possession of and preserving the goods” is addressed by the Commercial Code, which mandates that the buyer who has cancelled the contract due to a failure by the seller, must store or deposit the goods at the expense of the seller, except that, when there

are concerns over loss of or damage to the goods, the buyer can, with the approval of a court, sell the goods at a public auction and store or deposit the proceeds of such sale. (*See* Comm. C. Art. 527)

PART SIX

ANATOMY OF BREACH AND ITS EXCUSE

(ARTS. 25-26, 45-52, 64, 71-73, 79-80)

§6:1 Non-Fundamental Breach (Art. 25)

A party's deviations from the agreed upon contractual terms as well as a prospective insecurity concerning such party's future performance may entitle the other party to take certain defensive actions (for details, see Parts Seven and Eight, below). However, unless the effect on the aggrieved party indicates a present or future "fundamental breach," the parties are bound to continue their contractual relationship.

§6:2 (Non-Fundamental) Anticipatory Breach (Arts. 71, 72(1) & (2))

A party expecting performance by the other party does not have to wait until such performance falls due if it is "apparent" that the obligor "will not perform a substantial part of his obligations" due to his (a) inability to perform, (b) creditworthiness, or (c) conduct in taking preparations for performance or in performing his contractual obligations. (CISG Art. 71(1)) In such circumstances, the party facing insecurity has the right to suspend performance of his obligations. (*Id.*) This is true even if, with respect to an insecure seller, the grounds that gave rise to insecurity came to light after the goods have been dispatched and the buyer has already acquired documents entitling it to receive the goods. In either case, the insecure seller has the right to prevent the buyer (but not other third parties) from taking possession of the goods. (CISG Art. 71(2))

But what if the obligee's fears are unwarranted? In fairness to the party whose future performance is put in question, the insecure party must give an immediate notice of suspension to other party, and, if adequately assured of future performance, must continue his performance under the contract. (CISG Art. 72(3))

The remedy of suspension keeps the contract alive. As in other cases of "non-fundamental breaches" under the Convention, the insecure party must live with the contract at least for so long as it becomes clear that the other party would commit a fundamental breach, in which case the insecure party may declare the contract avoided, provided that it has first given the other party notice allowing it to give adequate assurance of performance. Of course, there is no need to give such notice if the other party has already declared that he will not perform. (CISG Art. 72)

§6:3 Present or Anticipatory Fundamental Breach (Arts. 25, 72(1), 73)

At a point (and only at such point) when a party's present breach or anticipated future

breach is so severe that it causes the other (aggrieved) party a detriment so substantial that the aggrieved party is deprived of the bargained-for contractual benefit, the aggrieved party can, by notice, avoid the contract in its entirety on the grounds that the other party has committed or it is clear that it will commit a “**fundamental breach.**” (CISG Art. 25; *see also* CISG Art. 72(1))

Fundamental Breach in the Context of Installment Sale Contracts (Art. 73)

In principle, a fundamental breach, in and of itself, of a single installment in a contract calling for multiple deliveries by installment entitles the aggrieved party to avoid contract with respect to that installment only. (CISG Art. 73(1)) However, if the aggrieved party concludes that the party in breach will also be in fundamental breach with respect to future installments, it may then declare the entire contract avoided as long as it does so “within a reasonable time.” (CISG Art. 73(2)) Moreover, a buyer faced with a seller’s fundamental breach with respect to any delivery may also, at the same time, declare the contract avoided with respect to other deliveries, past or future, if, due to interdependence of deliveries, such other deliveries could no longer be used as contemplated at the time of contract conclusion. (CISG Art. 73(3))

§6:3.1 Consequences of Fundamental Breach (Arts. 26, 46, 49, 64)

A party faced with a present or clear prospect of future fundamental breach is in a position to declare the contract avoided by giving proper notice to the other party. (CISG Art. 26) In addition, the CISG gives a buyer facing a fundamental breach resulting from delivery of nonconforming goods the right to request delivery of substitute goods, either within a reasonable time or in conjunction with a CISG Article 39 notice. (CISG Art. 46(2)) However, buyers cannot just demand that sellers replace purchased goods for minor nonconformities or inconvenience. Other remedies should be able to take care of such minor problems. To deserve delivery of new goods from the seller, the delivered nonconforming goods must cause the buyer to suffer a detriment so severe as to substantially deprive him of what he had bargained for (assuming, of course, that the seller foresaw or a reasonable person would have foreseen the problem). (CISG Arts. 25 and 46(2))

§6:3.2 High Threshold to Qualify as Fundamental Breach (Art. 25)

The very thought of a prospective severance of the parties’ contractual relationship even if for good cause of a fundamental breach must have sent shudders down the spines of the CISG drafters. After all, such solution clashes head-on with the CISG core principle of good faith abhorring premature termination of contracts. As a consequence, judges and other adjudicators are reluctant to find a breach of contract so grave as to justify contract avoidance. Only after the following four considerations are fully satisfied, such a finding may be appropriate.

(a) Does the Detriment Suffered Outweigh Considerations to Keep the Deal Together?

In keeping with the CISG principle disfavoring premature termination of contracts, the threshold to qualify for a fundamental breach is exceptionally high due to the fact that,

once a fundamental breach is present, the aggrieved party can declare the contract avoided. (CISG Arts. 49 and 64) From the perspective of the CISG drafters, the remedy of ending a contractual relationship is so extreme that, in addition to cases of fundamental breach as defined under the Convention, it is available only if the party who fails either to (a) deliver the goods, (b) take delivery of goods, or (c) pay the price, does not perform within the reasonable time fixed by the aggrieved party.⁷⁹⁾ Hence, contract avoidance is a remedy of *last resort*, and the thrust of the accumulated case law points to the courts' reluctance to dispense it freely.

(b) *Is the Breach Grave Enough?*

A good rule of thumb for the aggrieved party contemplating to give notice of contract avoidance might be to ask whether the other party's breach is so grave that the aggrieved party's "interest in the performance of the contract essentially ceases to exist . . .".⁸⁰⁾ Thus, a delivery of non-conforming goods will not rise to the level of a fundamental breach unless the goods are nothing but "practically useless" to the buyer.⁸¹⁾ And, even if the delivered goods suffer from a "fundamental defect," when in doubt, the policy behind the CISG would have the contract maintained, as long as the defect is capable of being removed.⁸²⁾ To paraphrase the court in *The Case of Inflatable Arches*, as long as there remains even a partial possibility of performance, a fundamental breach is not present.⁸³⁾ Finally, to be recognized as a fundamental breach, the breach must affect an "essential term of the contract."⁸⁴⁾

(c) *Are the Criteria for Contract Avoidance Satisfied?*

The intrinsic interdependence of the rationale behind fundamental breach and the policy disfavoring contract avoidance suggests that a fundamental breach will rarely be found unless the grounds for contract avoidance are also satisfied. In cases of nonconforming goods, the required "gravity" of breach has been linked to the criteria for contract avoidance. Thus, such gravity can be found either in (a) the four corners of the contract itself, (b) the facts and circumstances of the particular case, or, (c) the criteria of nonconformity enumerated in the Article 35(2) of the CISG, namely the requirement that the goods be (i) fit for the ordinary purposes for which such goods are used; (ii) fit for a particular purpose known to the seller

79) *Explanatory Note* ¶29 (cited in note 5).

80) See Case No. VIII ZR 51/95 (Bundesgerichtshof, Germany, April 3, 1996) (hereinafter, the "*Cobalt Sulphate Case*"), quoted in *A Practitioner's Guide* at 255-64 (cited in note 2), <http://www.cisg.law.pace.edu/cases/960403g1.html> (visited Mar. 6, 2013).

81) Case No. 12 U 39/00 (Oberlandesgericht Hamburg, Germany, Jan. 25, 2008), quoted in *A Practitioner's Guide* at 244 (cited in note 2); <http://cisgw3.law.pace.edu/cases/080125g1.html> (visited Mar. 6, 2013).

82) *The Case of Inflatable Arches* (cited in note 42), quoted in *A Practitioner's Guide* at 247 (cited in note 43).

83) *Id.*

84) *Downs Inv. P/L v. Perwaja Steel* (Sup. Ct. of Queensland, Ct. of Appeal, Appeal No. 11036 of 2000, SC no. 106 of 1996, Oct. 12, 2001), quoted in *A Practitioner's Guide* at 250-51 (cited in note 2), <http://cisgw3.law.pace.edu/cases/001117a2.html> (visited Mar. 6, 2013).

at the contract formation (unless “the buyer did not rely or it would be unreasonable for him to rely on the seller’s skill and judgment”); (iii) of the quality as demonstrated to the buyer through samples or models; and (iv) properly packaged.⁸⁵⁾ (CISG Art. 25(2)) Otherwise, if the breach cannot be sourced to any of the foregoing grounds, “even a defect of the goods which cannot be remedied [will] not entitle the buyer to avoid the contract under Art. 49(1)(a) CISG.”⁸⁶⁾

(d) Was the Detriment to the Non-Breaching Party Resulting from the Breach Foreseeable?

To be fair to the breaching party, however, the CISG insists that, no matter how severe the detriment resulting from the breach may be, the circumstances will not give rise to a fundamental breach if (a) the breaching party did not foresee such result, or (b) “a reasonable person of the same kind would not have foreseen such result.” (CISG Art. 25)

§6:4 Exemption of Unexpected Impediment (Art. 79)

In general, neither the seller nor the buyer is liable for a failure to perform his contractual obligations caused by an “impediment” beyond his control. (CISG Art. 79) However, it is a good question what such “impediment” is meant to embrace. In fact, commentators have noted that the term is “unavoidably vague.”⁸⁷⁾

§6:4.1 Requirements for Exemption of Unexpected Impediment (Art. 79)

The party asserting the exemption of unexpected impediment (“Affected Party”) will be absolved from the resulting liability as long as (a) the impediment was beyond the Affected Party’s control, (b) the Affected Party could not reasonably (i) have taken into account such impediment at the time of contracting, or (ii) have avoided or overcome such impediment or its consequences, (c) in case where the failure to perform resulted from a third party’s failure, both the Affected Party and the third party meet the criteria listed in items (a) and (b) above (CISG Art. 79(2)); and (d) the Affected Party has given timely notice to the other party (in which absence, it would be liable for ensuing damages) (CISG Art. 79(4)).

Importantly, the concept of “impediment” does not necessarily require that performance by the Affected Party become impossible,⁸⁸⁾ and its scope is “wide enough to cover both physical impediment and supervening legal impediment, but not initial illegality, which goes

85) See *The Cobalt Sulphate Case* (cited in note 80), quoted in *A Practitioner’s Guide* at 259-60 (cited in note 2).

86) *The Cobalt Sulphate Case* (cited in note 80), quoted in *A Practitioner’s Guide* at 260 (cited in note 2).

87) E.g., Barry Nicholas, *Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods* §5.02 (1984); <http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html> (visited Mar. 6, 2013).

88) CISG-Advisory Council Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Prof. Alejandro M. Garro, Colum. Univ. Sch. of Law, New York, NY. Adopted by the CISG-AC at its 11th meeting in Wuhan, P.R.C. on Oct. 12, 2007; online at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=169> (visited Mar. 6, 2013).

to the validity of the contract . . .”⁸⁹⁾ Nonetheless, some commentators argue for a more restrictive definition, reserving the concept of impediment to situations where performance has actually been prevented.⁹⁰⁾ Under such restrictive concept, neither commercial impracticability under the UCC, nor situations of hardship or frustration of purpose would be exempted.

§6:4.2 Effect of Breach Exempted Due to Unexpected Impediment (Art. 79)

A breach of contract for which liability is exempted by virtue of a CISG Article 79 impediment (with the relevant notice duly given) is still a breach of contract entailing the following consequences:

(a) *Suspension*. The breach will typically result in a suspension of performance under the contract (CISG Art. 79(3)) for the duration of the impediment; however, because nonmonetary remedies are not foreclosed (see CISG Art 79(5)), the contract could still be avoided notwithstanding the exemption, as discussed below;

(b) *No Termination of Contract*. Even if the underlying impediment is incapable of removal, the breach does not by itself terminate the contract, and neither can the Affected party terminate it. Rather, it is for the other party to invoke his right of contract avoidance (under CISG Arts. 49(1) or 64(1)) when the breach rises to the level of a fundamental breach;

(c) *Other Damages*. The breach can give rise to remedies other than (monetary) damages (CISG Art. 79(5)), including price reduction (CISG Art. 50) or specific performance in cases of temporary impediment; for example, if the breach results in a delay in delivery by the seller, it will allow the buyer to fix additional period for delivery under Article 49(1) and avoid contract if seller does not so deliver; nevertheless, some commentators are of the opinion that Article 79 exempts the non-performing party from claims of performance;⁹¹⁾ and

(d) *Revival of Obligations*. The exemption ceases to apply when the underlying impediment no longer exists (see CISG Art. 79(3)).

COMPARATIVE NOTE

UCC: Under the UCC, the seller is not in breach for delay in delivery or partial or total non-delivery if performance was made “impracticable” due to (a) a **contingency** whose non-occurrence formed a *basic assumption* of the contract, or (b) compliance with a governmental

89) *Goode on Commercial Law* at 1031 (cited in note 1).

90) *E.g., Uniform Law for Int'l Sales* at 68 (cited in note 27).

91) *A New Textbook* at 192-93 (cited in note 58); see also Nicholas §5.03 (“Of course insofar as the impediment makes performance actually impossible, there can be no specific performance; but if performance is physically possible, but impracticable within the meaning of paragraph (1) [of CISG Art. 79], we have the curious result that the seller is not liable in damages for not performing and yet can be compelled to perform. . . . The Convention will then in effect be saying to the seller: ‘You are exempt from paying damages for your non-performance, but you are required to pay an even larger sum by way of penalty for the same non-performance.’”) (cited in note 87).

regulation or order, unless and to the extent that the seller has assumed greater obligations. (UCC §2-615(a)) The requirement that the seller has not assumed greater risks resembles the requirement under the CISG that the Affected Party had not taken the “**impediment**” into account or could not have avoided or overcome the impediment or its consequences. One way to filter through the question of whether the UCC seller has assumed the risk of a contingency might be to ask whether he could have foreseen it, although, even if he had foreseen it, it does not necessarily follow that he has assumed such a risk. However, an absence of a contractual provision to the contrary could lead courts to conclude that the risk was indeed assumed.⁹²⁾ Similar to the requirements under the Convention, the UCC seller affected by commercial impracticability must give the buyer a “seasonable” notice of delay or non-delivery. (UCC §2-615(c)) While the Code provisions excusing sellers on account of commercial impracticability apply specifically to sellers, they may also be made applicable to buyers. (*See Id.* Comment 9)

Other Modes of Delivery Available: Even if one mode of delivery becomes commercially impracticable (without either party’s fault), a substitute performance must be made if available. (UCC §2-614)

UCC Buyers’ Rights: Upon receipt of a notice of a material or indefinite delay or allocation of supply allowed as a result of commercial impracticability, the buyer may, with respect to any affected delivery (but, in case of an installment, if the contingency substantially affects the entire contract, also with respect to the contract as a whole) (a) acquiesce, thus modifying the contract (without any need for extra consideration); (b) terminate the contract, thus discharging unexecuted portions of the contract (UCC §2-616(1)); or (c) do nothing, in which case the contract will terminate (with respect to any affected deliveries) within a reasonable time no longer than thirty days (UCC §2-616(2)).

NOTE: Under the CISG, a “breach” of contract appears to cover any failure in performance, even if liability for it is “**exempted**” under Article 79 of the CISG. This is in marked contrast to the Common law under which there would be no breach of contract in cases where the party’s performance was “**excused**” due to an intervening impracticability, impossibility, or frustration of purpose. In other words, under the Common law as well as the UCC, there is no need for any exemption of liability because the affected party would be **excused** (or discharged) from performing and not in breach of contract. To paraphrase, under the Common law and the UCC, once performance is excused (or discharged), there is no liability for failure to perform and thus nothing to “exempt.”

§6:4.3 Commercial Impracticability or Hardship (Art. 79)

The CISG does not address the issue of economic hardship or commercial impracticability of performance caused by subsequent changes in circumstances. This absence or omission has become a legal “hot potato” which has touched off a heated debate on how

⁹²⁾ *See* White & Summers §4-10 at 183 (cited in note 20).

cases of hardship should be decided. The debate centers on whether the CISG should be construed as having gaps within its structure (which could then be filled by going to external sources). While most commentators have rejected the notion that there are gaps in Article 79, some suggest that the principle of good faith or potentially trade usages could come to the rescue of parties facing extreme hardship or impracticability.

COMPARATIVE NOTE

UCC: Situations of economic hardship have been analyzed under the Common law as situations where performance becomes impracticable. By equating cases of extreme impracticability to cases of impossibility, the courts may excuse performance under a contract, provided that neither the disadvantaged party assumed the risk of such impracticability nor such risk was foreseeable. Similarly, the UCC provisions of Section 2-615 excusing a party's performance are capable of excusing, at least on its face, the parties' performance due to commercial impracticability comparable to cases of hardship under the UNIDROIT Principles. In cases dealing with extreme and severe cost increases, the courts have almost invariably favored UCC buyers facing sellers' claims of commercial impracticability due to increased costs of performance. However, it appears that despite the availability of a statutory framework to relieve parties from hardship situations (in the form of UCC Section 2-615), the courts will not grant such relief except in most extreme and unforeseeable cases, such as wars, revolutions or natural disasters, but certainly not cases of mere market collapses or extreme price fluctuations. This outcome may, to all practical purposes, parallel the total lack of hardship provisions under the CISG, leaving both legal regimes equally attractive (or unattractive, as the case may be) to sellers and buyers of goods.

§6:4.4 Frustration of Purpose (Art. 79)

The concept of "frustration of purpose" does not appear to have a uniform definition across various jurisdictions. Even within the Common law and Civil law systems, no single definition of frustration can be discerned. Across the global jurisdictional spectrum, the same set of facts involving supervening changes in circumstances could be subject to various potentially applicable theories (including, among many others, frustration, force majeure, the French doctrine of *imprévision*, impracticability, hardship, or the Japanese concept of "changed circumstances") with potentially varying outcomes.⁹³⁾ The concept is often hidden within other related definitions, such as force majeure, impracticability, or hardship, among many others. For the sake of this discussion, we will consider "frustration" in light the meaning common to the jurisdictions that have adopted the UCC. Accordingly, "frustration of purpose," as understood under the American Common law, refers to situations where a

93) See generally A. H. Puelinckx, *Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative study in English, French, German and Japanese Law* 3 J. Int'l Arb. No. 2 at 47 (1986).

party's principal purpose for entering into the contract has been destroyed (read: "frustrated") by an event of non-occurrence by depriving him of the "benefit he expected from the other's performance."⁹⁴⁾

It is debatable whether frustration of purpose so understood would be exempted under Article 79 of the CISG. In the absence of relevant case law on the subject, commentators do not speak with one voice. Some conclude that the scope of the Article subsumes cases of frustration;⁹⁵⁾ others conclude that the Article is not capable of embracing such situations.⁹⁶⁾ Still others suggest that cases of frustration and impracticability reveal a gap in the CISG that could be mended by applying the "general principles underlying the Convention" pursuant to Article 7(2).⁹⁷⁾

COMPARATIVE NOTE

UCC: Even though the UCC does not expressly excuse parties in situations when their contracts have been frustrated, it is beyond question that the doctrine of frustration of purpose fully applies to the sales of goods under the Code.⁹⁸⁾ The doctrine is typically exemplified by reference to an actual case in which certain Henry rented a room specifically to view coronation of a British king, prepaying the agreed upon price which was higher than ordinary rentals on account of the special occasion. When the coronation was indefinitely postponed as the King was taken ill, Henry refused to pay the balance of the price. In the ensuing lawsuit, the appellate court discharged Henry from his obligation to perform, holding that, as "the coronation procession was the foundation of this contract," the contract's purpose had been frustrated.⁹⁹⁾

In summary, to be excused due to frustration under the UCC regime (via its supplemental rule of law sanctioned by Section 1-103(b)), a party must show that (a) a supervening event substantially frustrated his "principal purpose" of entering into the contract; (b) a non-occurrence of such event was "a basic assumption on which the contract was made," (c) he was not at fault in bringing about the frustration, and (d) he did not

94) See, e.g., Farnsworth §9.7 at 630 (cited in note 17).

95) Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *Ind. Int'l & Comp. L. Rev.* 279, 306 (1997) ("Article 79 embodies the CISG's provisions for frustration of purpose and impossibility."), <http://www.cisg.law.pace.edu/cisg/biblio/gabriel2.html> (visited Mar. 6, 2013).

96) See, e.g., *Drafting Contracts under the CISG* at 380 n. 1 (Harry M. Flechtner et al. eds., Oxford University Press 2008) ("*Drafting Contracts*"); Jennifer M. Bund, *Force majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 *J. L. & Com.* 381, 386 (1998), <http://www.cisg.law.pace.edu/cisg/biblio/bund.html> (visited Mar. 6, 2013).

97) *A New Textbook* at 193 (cited in note 58).

98) See, e.g., Farnsworth §9.7 at 631 (cited in note 17) ("there is little doubt that [the doctrine of frustration] is applicable to contracts for the sale of goods").

99) *Krell v. Henry*, 2 K.B. 740, 751, 754 (1903).

contractually assume the risk of occurrence of such supervening event.¹⁰⁰⁾

§6:5 Excuse of Party's Breach Caused by Other Party (Art. 80)

A party in breach is exempt from its consequences to the extent that the breach was caused by the other party's "act or omission." (CISG Art. 80) The placement of Article 80 under the "Exemptions" rubric suggests that the Article applies only to situations after a breach of contract has occurred (unlike Article 77 which can apply to situations before and after the breach).¹⁰¹⁾ The promisor will be able to claim the exemption even if the promisee's act or omission that prevented the promisor from performing was subject to exemption under Article 79.¹⁰²⁾

Article 80 exemption applies to cases where (a) the promisee was solely responsible for the promisee's nonperformance, (b) both parties jointly contributed to the nonperformance and the consequences of each party's contribution can be clearly segregated (e.g., one party failed to properly secure the goods while the other party furnished faulty instructions), or (c) there was a shared responsibility for the nonperformance and it is not possible to delimit each party's contribution as each party could have potentially brought about the failure to perform.¹⁰³⁾ However, according to the view advanced by a minority of commentators, Article 80 exemption applies only to situation where the promisee solely causes the promisor's nonperformance (an "all-or-nothing" approach); according to that view, cases of joint contribution should be dealt with based on other legal grounds, such as those delineated under CISG Article 77.

COMPARATIVE NOTE

UCC: Curiously, neither the UCC nor the Common law appears to have formulated the principle set forth under CISG Article 80 under the laws of contracts.¹⁰⁴⁾ The theories of contributory and comparative negligence are primarily within the domain of the tort law. In

100) See Farnsworth §9.7 at 631 (cited in note 17); see also Restatement (Second) of Contracts which defines frustration of purpose as follows:

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances [of the contract] indicate the contrary.

Restatement (Second) Contracts §265.

101) See Thomas Neumann, *Shared Responsibility under Article 80 CISG*, 2 Nordic J. Com. L. 22 (2009), <http://www.cisg.law.pace.edu/cisg/biblio/neumann1.html> (visited Mar. 6, 2013).

102) *A Practitioner's Guide* §9.2.10 at 726-27 (cited in note 2).

103) See Neumann (cited in note 100).

104) See, e.g., Ingeborg Schwenzer and Simon Manner, *The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-) Behaviour on its CISG-Remedies, excerpted from Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday* (Camilla B. Andersen & Ulrich G. Schroeter eds., Wildy, Simmonds & Hill Publishing 2008), <http://www.cisg.law.pace.edu/cisg/biblio/schwenzer-manner.html> (visited Mar. 6, 2013).

fact, the Uniform Comparative Fault Act, which served as a model for adoption by the states, does not apply to “actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive.”¹⁰⁵⁾ On the other hand, actions for breach of warranty could be subject to this model act but only if they sound in tort and not in contract.¹⁰⁶⁾ Cases analogous to those giving rise to the exemption under CISG Article 80 would be dealt by resorting to other principles, such as doctrines of impossibility, frustration, foreseeability, or causation. However, comparative fault rules do occasionally find their way to apportion loss where the promisee has contributed in part or in toto, particularly in the presence of property damage or personal injury.¹⁰⁷⁾

PART SEVEN BUYER’S REMEDIES (ARTS. 45-52)

The buyer confronted with the seller’s breach can choose from a number of available remedies. He can exercise a number of prescribed rights as well as seek damages. (CISG Art. 45(1)) While the structure of CISG remedies aims to keep the parties’ deal together, when the buyer seeks to exercise his right to a remedy, the courts and arbitral tribunals are warned not to grant the seller any grace periods. (CISG Art. 45(3))

§7:1 Good Faith in Action – Keeping the Deal Together in Coping with Seller’s Breaches

The workings of the principle of good faith can be seen within the structure of remedies available to the CISG buyer facing the seller’s imperfect performance. The order of remedies listed in the CISG is telling. Assuming the seller has not cured any delivery problems prior to the scheduled delivery date (CISG Art. 37), the buyer may first ask the seller to perform by either sending substitute goods or repairing nonconforming goods (CISG Art. 46); secondly, the buyer is to consider giving the seller more time to perform (CISG Art. 47); thirdly, the CISG suggests that the buyer allow the seller to perform even after the time of delivery (*see* CISG Art. 48); and only then, the CISG lists conditions allowing or disallowing the buyer to avoid the contract (CISG Art. 49). Then, in an extra attempt to keep the contract alive, the CISG gives the buyer an option to reduce the price of defective goods (CISG Art. 50). While the foregoing remedies (except for remedies involving contract avoidance) are merely optional, the obligation of good faith may add extra teeth to their applicability.

§7:1.1 Buyer’s Right to Accept Early Delivery of Goods (Art. 52(1))

Even if the seller tenders delivery of goods prior to the appointed time, the buyer is free to take (as well as reject) such free delivery. (CISG Art. 52(1))

105) Uniform Comparative Fault Act §1 (Effect of Contributory Fault), commentary on “Harm Covered” (1979 amended draft).

106) *Id.*

107) *See* White & Summers §7.5 at 311 (cited in note 20).

§7:1.2 Buyer's Choices upon Tender of Excess Quantity of Goods (Art. 52(2))

In keeping with the guiding principle of good faith, the CISG offers the buyer confronted with delivery of goods in excess of the purchased amount an option to take the entire or a part of the excess amount and pay for it at the contract price. (CISG Art. 52(2)) Naturally, the second option allowed under the Convention is for the buyer to refuse to accept delivery of the excess amount. (*Id.*)

§7:1.3 Seller's Cure prior to Delivery Deadline (Art. 37)

In case of the seller's early delivery of goods that are not in conformity with the contract, the seller is free to remedy the situation by either delivering any missing parts, making up any deficiencies in quantity, or replacing or otherwise fixing nonconforming goods, as long as the seller (a) can do so prior to the originally agreed upon delivery date, and (b) does not cause any unreasonable inconvenience or expense to the buyer. (CISG Art. 37) Needless to say, the buyer confronted with the remedial actions by the seller retains the right to claim damages under the CISG. (*Id.*)

COMPARATIVE NOTE

UCC: A UCC seller has the right to cure, upon a "seasonable" notice to the buyer, any problems with rejected delivery based on non-conformity of the goods prior to the time fixed for performance. (UCC §2-508(1)) This right is not lost even if the seller has taken back the goods and returned the price paid by the buyer. (*See* UCC §2-508 Comment 1) However, the closer the time draws toward the scheduled time of performance, the "seasonableness" of notifying the buyer of the intention to cure may be called in question. (*Id.*)

§7:1.4 Demand for Performance and Limitations on Specific Performance Remedy (Art. 46)

The CISG authorizes the buyer faced with the seller's breach to demand performance by the seller. (CISG Art. 46(1)) However, if the seller has already delivered goods that do not conform to the contract, the buyer may demand that the seller (a) deliver substitute goods but only if the nonconformity amounts to a fundamental breach and a timely request is made (CISG Art. 46(2)); or (b) repair nonconforming goods, unless making the repair would be unreasonable in the circumstances (CISG Art. 46(3)). The enforceability of the specific performance remedy under Article 46, however, is subject to the limitation that (a) such remedy must be available under the laws of the jurisdiction of the ruling court in the context of non-CISG contracts for the sale of goods (CISG Art. 28); and (b) the buyer has not resorted to any inconsistent remedy (CISG Art. 46(1)).

COMPARATIVE NOTE

UCC: Somewhat analogous remedies are available to buyers of goods under the Code: ***Specific Performance.*** A UCC buyer may obtain a decree for specific performance for

goods that are unique or “in other proper circumstances.” (UCC §2-716(1)) A Comment to Section 2-716 explains that this Section seeks “to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.” (UCC §2-716 Comment 1) Thus, this remedy is no longer limited to “goods which are already specific or ascertained” at the time of contracting,” and “uniqueness” is no longer reserved to sales of “heirlooms or priceless works of art.” (UCC §2-716 Comment 2) For example, an unavailability of cover will strongly weigh in favor of finding that “other proper circumstances” are present. (*Id.*) Furthermore, in the context of commercial, non-consumer contracts, a buyer may be entitled to specific performance if so agreed in their contract. (*See* 2003 Revision to UCC §2-716(1))

Replevin. The buyer also has a right of replevin for goods that are identified to the contract in the absence of reasonable cover. (UCC §2-716(3) and Comment 3 thereto)

Recovery of Personal Use Goods on Seller’s Repudiation. If, in respect of sales of goods purchased for personal, family or household purposes, the seller repudiates or fails to deliver the goods, the buyer has the right to recover them on “making and keeping good a tender” of any unpaid price. (UCC §2-502(1)(a))

Recovery of Goods on Seller’s Insolvency. The buyer can also recover any goods that are identified to the contract if the seller becomes insolvent within 10 days of receipt of the first installment of the purchase price. (UCC §2-502(1)(b))

§7:1.5 Buyer’s *Nachfrist* Notice (Art. 47)

Before discussing more drastic remedies (such as contract avoidance), the CISG suggests that a buyer confronted with the seller’s nonperformance first offer the seller an additional fixed period of time to fulfill his obligations. (CISG Art. 47(1)) To give more teeth to this suggestion, the CISG provides that once the buyer gives the seller more time to perform, (a) the buyer must stand by and honor such choice (unless the seller gives notice that it will not perform); and (b) the buyer is free to make any claim for damages that it might otherwise have had. (CISG Art. 47(2)) This grant of a second chance to the seller is commonly referred to as “*Nachfrist*,” from its German and Swiss origin, and has proved to be an effective way to raise the threshold of resorting to the remedy of avoidance in the European mercantile practice.¹⁰⁸⁾

§7:1.6 Seller’s Right to Cure Subsequent to Delivery Date (Art. 48)

Even though the time for making delivery has passed, the CISG authorizes the seller to cure any problems with his performance, as long as the contract has not been avoided. (CISG Art. 48) The only thing the seller should bear in mind is (a) to effect cure “without unreasonable delay,” and (b) not to cause the buyer any unreasonable inconvenience in connection with such cure or any uncertainty as to whether any expense advanced by him would be reimbursed. (CISG Art. 48(1))

108) *See Drafting Contracts* at 181 (cited in note 96).

To further remove the prospect of a potential contract avoidance by the buyer, the seller is authorized to (a) request confirmation from the buyer that he will accept late performance within certain time, or (b) merely notify the buyer that it will perform within such certain time, in which case such request will be implied. (CISG Arts. 48(2) and (3)) If the buyer does not “comply with [said] request within reasonable time,” the seller will then have the right to perform accordingly. (CISG Art. 48(2))

COMPARATIVE NOTE

UCC: A UCC seller may also get a second chance to tender conforming goods even after the original delivery time has passed if the buyer rejected the goods for non-conformity. However, this right presupposes that the seller had a reasonable belief that the goods would be acceptable to the buyer. If such is indeed the case, the seller may, by giving the buyer a reasonable notice, render a substitute delivery within additional reasonable time. (UCC §2-508(2))

§7:1.7 Buyer’s Right to Price Reduction (Art. 50)

Confronted with a delivery of nonconforming goods, the buyer has the right to reduce the contract price by discounting it in the same proportion as the value of the goods actually delivered would bear to the value of conforming goods at the time of delivery. (CISG Art. 50) While the buyer can take advantage of this option regardless of whether the price has already been paid, he is prevented from doing so if (a) the seller corrects his performance before or after the scheduled delivery time pursuant to Articles 37 or 48 of the CISG, or (b) the buyer does not allow the seller to make the correction. (CISG Art. 50)

COMPARATIVE NOTE

UCC: The UCC gives the buyer who has accepted goods a remedy that operates very much like the remedy under CIG Article 50. The UCC remedy is available to the buyer who, having accepted the goods, gives the seller a notice of breach within a reasonable time after he has discovered or should have discovered such breach. (UCC §§2-607(3)(a) and 2-714(1)) In such a case, the buyer is entitled to damages reflecting reasonably calculated losses resulted from any non-conformity. (UCC §2-714(1)) Where the damages spring from a breach of warranty, the standard measure of damages under the Code is the difference in value between (a) the goods as warranted and (b) the accepted goods. (UCC §2-2-714(2)) This remedy will often result in a deduction of losses from the price in cases where the buyer still owes a part of the purchase price to the seller. As the Code expressly declares, the damages available to the buyer include, in proper cases, both incidental and consequential damages. (UCC §2-2-714(3)) If the buyer has not paid any part of the price of the goods, he has the right to deduct from such amount any damages resulting from the seller’s breach. (UCC §2-

717) For all the similarities to the corresponding CISG remedy, however, the UCC remedy of price reduction is somewhat narrower from its CISG counterpart, which applies even if the buyer has already paid the entire price.

§7:1.8 Buyer's Right to Retain the Goods until Paid (Art. 86(1))

Even though the buyer in possession of the goods intends to reject them, he has the duty to take steps to preserve them. However, he is entitled to retain the goods until he gets paid for "his reasonable expenses." (CISG Art. 86(1))

COMPARATIVE NOTE

UCC: A related UCC provision grants the buyer who rightfully rejects a tender or justifiably revokes his acceptance a security interest in the goods in his possession or control for any payments made to the seller or any reasonable expenses involved in making inspection, taking receipt, transporting and taking care and custody of the goods. (UCC §2-711-(3)) In order to enforce this security interest, the buyer is entitled to resell the goods, provided he can do so in good faith and in a reasonable manner. (*See* UCC §2-706(1)) Following the sale, the buyer must account to the seller for any excess proceeds. (UCC §2-706(6))

§7:1.9 Buyer's Right to Suspend Performance upon Seller's Anticipatory Breach (Art 71)

As discussed in Section 6:2 ((Non-Fundamental) Anticipatory Breach), above, short of calling off the deal, a party who suspects that the other party will not perform some or a significant part of his obligations has the right to suspend his performance. This Section will focus on the buyer's right to suspend performance in more detail. (Regarding the buyer's right to avoid contract upon the seller's anticipatory (fundamental) breach refer to Section 7:3.2, below.)

(a) Requirements for Exercise of Right to Suspend Performance

The following three preconditions must be present before the buyer can properly suspend his performance (without facing liability for damages):

(1) *Reasonable Expectation of Seller's Nonperformance:* The buyer can suspend performance only if the prospect of the seller's nonperformance becomes apparent as a result of (i) a "serious deficiency" in the seller's ability to perform (CISG Art. 71(1)(a)), (ii) a "serious deficiency" in the seller's creditworthiness (CISG Art. 71(1)(a)), which deficiency can be demonstrated, for example, from the seller's insolvency or bankruptcy proceedings involving his property, or the seller's suspension of payments to creditors, stopping of deliveries, or events of similar nature; or (iii) the seller's conduct as discerned from his preparations to perform or actual performance of the contract (CISG Art. 71(1)(b)). Significantly, the prospect of the seller's nonperformance does not need to affect his entire obligations, and even a threat of partial inability to perform will entitle the buyer to suspend performance. Moreover, the buyer does not need to be hundred percent certain that his suspicion is correct or will definitely materialize were he to perform or continue in his performance, and it is sufficient

that his expectation that the seller will not perform is “reasonable.”¹⁰⁹⁾

(2) *Notice Requirement*: Before the buyer can suspend performance on account of an expected nonperformance by the seller, the buyer must “immediately” give notice of his intention to the seller. (CISG Art. 71(3)) This notice is required regardless of whether or not the seller has already dispatched the goods. (*Id.*)

(3) *No Adequate Assurances of Performance*: The main reason for the aforementioned notice requirement is to afford the seller an opportunity to furnish the buyer with adequate assurances that his performance will indeed be forthcoming. Only if the seller does not furnish such assurances or the buyer is not adequately satisfied with seller’s assurances, can the buyer invoke the remedy of suspension. (*See id.*)

(b) Significance of the Remedy of Suspension Performance

The principle of good faith explains why the buyer can merely suspend his performance (in cases where the grounds for avoidance are lacking) even though he is convinced that the seller will not perform and no adequate assurances of performance have been proffered. For, while the buyer is waiting and being kept in suspense (literally and figuratively), there is always a chance that the situation may change and the seller will in fact perform, give assurances of performance or retract his declaration not to perform. Perhaps the market will turn for the better or the seller’s creditors will give him a second chance. Perhaps, having thought better, the seller will decide to perform after all. Perhaps, a white knight will appear and rescue the seller. In any event, a suspension of performance by the buyer does not suspend the seller’s obligations one iota; those obligations continue alive in full force. Conversely, as soon as (a) the seller gives adequate assurances of performance, (b) the threat of his nonperformance is otherwise dispelled or disappears, (c) the seller does perform his obligations, or (d) the buyer resorts to the final remedy of contract avoidance (upon fully meeting its requirements), the buyer’s right of suspension is no longer available to him.

COMPARATIVE NOTE

UCC: A UCC buyer whose expectations to receive performance from the seller become reasonably insecure can also, after having unsuccessfully demanded assurances of due performance, suspend his performance (for which he has not received its return) until the time he receives the seller’s adequate assurances of performance. (*See* UCC §2-609(1)) In cases where the seller’s repudiation of his contractual obligations would substantially impair the value of contract for the buyer (e.g., if “material inconvenience or injustice” would ensue awaiting performance), the buyer has also the right to suspend his performance and/or either (a) await the seller’s performance for a “commercially reasonable time,” or (b) seek damages and remedies available under UCC Section 2-711 (i.e., damages associated with his purchase

109) *A Practitioner’s Guide* §9.2.1(b) at 606 (cited in note 2).

of cover, damages for non-delivery, remedy of recovery of goods that have been identified, or remedy of specific performance, if available). (See UCC §2-610 and Comment 3 thereto) The seller's repudiation can be deduced from his actions indicating a rejection of his obligation to perform or intention not to perform, including his failure to provide adequate assurances of performance within thirty days of a legitimate demand by the buyer (i.e., when reasonable grounds for insecurity are present). (UCC §2-610 Comment 2) On the other hand, and assuming that the buyer has not (a) already cancelled the contract, (b) materially changed his position, or (c) indicated his intention to treat seller's repudiation as "final," the seller is free to retract his repudiation but only before his next performance falls due. (See UCC §2-611)

§7:2 Buyer's Right to Damages and Interest (Arts. 45, 46-52, 74-77)

Regardless of any other available rights, the buyer can always claim damages for the seller's failures to perform any of his obligations. (CISG Art. 45(1)(b)) The Convention further clarifies that by exercising any other (non-monetary) remedy, the buyer is not waiving his rights to damages. (CISG Art. 45(2))

§7:2.1 Entitlement to All Losses Suffered (Arts. 74, 77-78, 88(3))

As a consequence of the seller's breach, the buyer is entitled to damages equal to all sustained losses, provided that such losses were foreseen (or should have been foreseen) by the seller as a "possible consequence of the breach" at the time of contracting in the surrounding circumstances as the seller knew (or should have known) them. (CISG Art. 74) On the other hand, the seller may be entitled to damages that could have been avoided but for the buyer's unreasonable failure to mitigate them. (See CISG Art. 77)

Subject to the limitations discussed under Section 7:5 (*Limitation on Damages*), below, recoverable damages include:

(a) General Direct Damages

The buyer can recover all direct damages suffered by him. (See CISG Art. 74)¹¹⁰⁾

(b) Consequential and Incidental Damages

The buyer is also entitled to claim consequential damages he has sustained as a result of the seller's breach. For example, the buyer is entitled to **lost profits** suffered as a consequence of the breach (CISG Art. 74), as well as reasonable costs and expenses incurred in performing his obligation to preserve and exercising his right to sell the goods (CISG Art. 88(3)) Naturally, courts will honor the parties' agreement to exclude or limit such damages.¹¹¹⁾

(c) Interest

110) The Convention avoids using the terms "direct," "incidental," or "consequential" damages as those terms may not be familiar or understood in some jurisdictions; instead, it lumps these damages together with other damages for breach. (See CISG Art. 74)

111) See, e.g., CLOUT Case No. 541, 7 Ob 301/01t (Oberster Gerichtshof (Sup. Ct.) Austria Jan. 14, 2002) (while admitting general recoverability of consequential damages "insofar as they are pecuniary losses," validating their exclusion by the seller's standard terms and conditions), <http://www.cisg.law.pace.edu/cases/020114a3.html> (visited Mar. 6, 2013).

The buyer is also entitled to interest on all sums due to him by the seller that are in arrears. (CISG Art. 78)

A Controversy Regarding Method of Calculation

The CISG expressly provides for the recovery of interest in addition to the damages available under CISG Article 74. (CISG Art. 78) Without abridging this general rule, the CISG expressly gives the buyer the right to recover interest on a refund of the purchase price. (CISG Art. 84(1)) However, a considerable controversy has developed over the applicable interest rates. While the earlier drafts of the CISG proposed certain solutions on how to determine the rate of interest, faced with multiple objections, the delegates at the 1980 Diplomatic Conference in Vienna decided to leave this issue unresolved.

COMPARATIVE ANALYSIS

UCC: The Code's stated policy, as reflected in the pre-2003 revision of Section 1-106, is to liberally administer its remedies so as to achieve the goal of putting the aggrieved party in the same economic position in which he would have been had the breaching party fully performed.¹¹² In step with that policy, the damages available to the buyer (a) facing the seller's failure of delivery or repudiation, or (b) justifiably revoking acceptance of the goods, appear to be as generous as those under the Convention. Under the Code, the following damages (which can be asserted with respect to the goods involved in the breach or, if the breach affects the entire contract, then with respect to the whole) are available to such a buyer:

Direct Damages: The aggrieved buyer may enter into a substitute transaction (i.e., "cover") and claim direct damages (i.e., damages flowing directly in ordinary course from the seller's breach) measured by the difference between the cost of cover and the contract price. In addition, the buyer is entitled to incidental and consequential damages. However, the buyer cannot claim any expenses saved as a result of the seller's breach. (UCC §§2-711(1)(a) and 2-712)

Incidental Damages: The Code distinguishes between incidental and consequential damages. The former are usually referred to damages relating to the immediate buyer-seller transaction, such as (a) expenses incurred in "inspection, receipt, transportation and care and custody of goods rightfully rejected," (b) "charges, expenses or commissions" involving obtaining cover, and (c) other expenses "incident to the delay or other breach." To the extent such incidental expenses are reasonable they are recoverable by the buyer. (UCC §2-715(1)) However, unless explicitly provided in the contract, the court will not award the aggrieved buyer his attorneys' fees, as the Code is not construed to have abrogated the traditional American rule on this point.

Consequential Damages: Consequential damages usually refer to damages reasonably

112) See also White & Summers §8-12 at 377 (cited in note 20).

foreseeable by the party in breach usually incurred in dealings with third parties as a proximate result of the breach.¹¹³⁾ For the buyer to recover these damages: (a) the seller must have had a reason to know of the buyer's particular requirements and needs leading to the damages at the time of contracting, and (b) the damages could not have been avoided whether by obtaining cover or otherwise. (UCC §2-715(2))

Note on Interest: The CISG appears to be more evenhanded in awarding interest to the parties at least in comparison to the UCC approach, under which the sellers have traditionally been barred from asserting claims for interest. Nevertheless, some courts have found ways to grant interest damages even to sellers under the UCC.

§7:2.2 Calculation of Damages in Cases of Avoidance (Arts. 75-76)

When the contract has been avoided, the damages available to the buyer can be calculated as follows:

(a) Buyer Has Obtained Cover

When the buyer has obtained replacement goods as a consequence of the seller's breach, the buyer may claim the difference between the contract price and the price of the replacement goods, plus other damages recoverable under Article 74 of the CISG. (CISG Art. 75)

COMPARATIVE ANALYSIS

UCC: The Code gives the aggrieved buyer an option to procure cover (i.e., purchasing or contracting for substitute goods) and recover the difference in the cost of cover and the contract price, as well as incidental and consequential damages less expenses saved as a result of the seller's breach. (UCC §§2-711(a) and 2-712(2)) However, cover must be effected "in good faith and without unreasonable delay." (UCC §2-712(1)) Moreover, since the buyer is not required to procure cover, his failure to do so does not bar him from claiming any other form of remedy. (UCC §2-712(3))

(b) Buyer Did Not Cover

When the buyer has not obtained replacement goods, the buyer may claim, in addition to other damages recoverable under CISG Article 74, the difference between the contract price and the current price of the goods calculated at the time of contract avoidance, or, if the buyer took over the goods prior to avoidance, at the time of such taking over. (CISG Art. 76(1)) The current price of the goods is to be calculated at the place where delivery was scheduled to be made under the contract. However, if such price is not available at that location, then a price available at another reasonable place can serve as a substitute, after making due adjustment for different transportation costs relating to such place. (CISG Art. 76(2))

113) See *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F.Supp. 503, 508 (E.D.N.Y. 1994), quoted in White & Summers §7-5 at 309 (cited in note 20).

§7:3 Contract Avoidance and Consequent Remedies (Arts. 49, 81)

Apart from the remedies designed to keep the deal alive, the buyer can resort to the ultimate remedy of contract avoidance. Once the contract has been avoided, both parties are released from their contractual obligations, except that any contractual provisions relating to dispute resolution or governing the parties' post-avoidance rights and obligations do survive. (CISG Art. 81(1)) In order to effect the remedy of contract avoidance, all the buyer needs to do is to declare that fact by notice to the seller. (*See* CISG Arts. 26 and 49(1)) After exercising the remedy of contract avoidance, the buyer benefits from additional remedies. The buyer can resort to the remedy of avoidance in the following three situations.

§7:3.1 Present Fundamental Breach by Seller (Arts. 25, 47, 49(1), 82)

Subject to the following restrictions, the buyer has the right to declare the contract avoided only when the seller's breach amounts to a fundamental breach (CISG Art. 49(1)(a)):

(a) Special Restrictions on Contract Avoidance when Seller Delivers Goods

In cases when the seller has already delivered the goods, even in the presence of fundamental breach, the buyer may declare avoidance of the contract only if:

- (i) in cases of **late delivery**, the buyer does so within a reasonable time from the time he becomes aware that the delivery was made (CISG Art. 49(2)(a)); or
- (ii) in all **other cases**, the buyer does so within a reasonable time after (1) he knew or should have known of the breach, (2) the grace period of the *Nachfrist* notice under Article 47 of the CISG has passed, (3) the seller has declared that he will not perform within such grace period, or (4) either the additional time requested by the seller for performance of his obligations under Article 48(2) of the CISG has passed, or the buyer has notified the seller that he will not accept performance (CISG Art. 49(2)(b)).

(b) Additional Restrictions on Contract Avoidance when Restitution of Delivered Goods Cannot Be Made

Even if all other conditions for contract avoidance are present, once the seller has delivered the goods, the buyer can declare the contract avoided only if he can make restitution of the goods "substantially in the condition in which he received them" (CISG Art. 82(1)), **unless** such restitution cannot be made (i) for reasons other than the buyer's own acts or omissions (CISG Art. 82(2)(a)), (ii) because the goods perished or deteriorated as a result of their examination by the buyer as provided under the CISG (CISG Art. 82(2)(b)); or (iii) because the goods have been changed, consumed or transformed in the normal course of business or use before the buyer discovered nonconformity (CISG Art. 82(2)(c)).

§7:3.2 Clear Prospect of Fundamental Breach by Seller (Art. 72)

As previously discussed, a buyer who anticipates nonperformance by the seller may in certain circumstances suspend his performance. (*See* Section 7:1.9, above) If, however, it becomes clear to the buyer (still prior to the date of contract performance) that the seller will commit a fundamental breach, the buyer may then declare the contract avoided. (CISG

Art. 72(1)) Before doing so, however, the buyer must, if time allows, notify the seller of his intention in order to give him a chance to furnish adequate assurances of performance. (CISG Art. 72(2)) Naturally, the notice requirement becomes irrelevant if the seller has already declared that he will not perform. (CISG Art. 72(3))

§7:3.3 Non-Delivery Despite *Nachfrist* Notice

In cases of non-delivery of goods, the buyer has also the right to declare the contract avoided when the seller either does not deliver the goods within the grace period fixed in the *Nachfrist* notice of CISG Article 47 or declares that he will not so deliver. (CISG Art. 49(1)(b)) Nevertheless, the CISG cautions that before the buyer can declare the entire contract avoided, the seller's failure to deliver completely or in conformity with the contract must amount to a fundamental breach. (CISG Art. 51(2))

COMPARATIVE ANALYSIS

UCC: The UCC's version of "contract avoidance" is cancellation of the contract, which amounts to a termination of all unperformed obligations but contemplates a preservation of (a) all rights with respect to prior breaches, and (b) the buyer's remedies for breach of the entire contract or any unperformed balance. (UCC §§2-711(1) and §2-106(3) and (4)) A hasty cancellation of a contract under the UCC is a dangerous proposition as it can trigger potential claims for wrongful termination, especially if the buyer misjudges whether the seller "had reasonable grounds to believe [that the rejected non-conforming tender] would be acceptable." (See UCC §2-508(2)) Because making that judgment can be difficult, the buyer's right to terminate a contract without giving the seller a reasonable time to cure may be elusive if not outright dangerous in practice. Indeed, wrongfully depriving the seller of an opportunity to cure his breach "nullifies the seller's breach and deprives the buyer of all remedies for the seller's breach arising from the contract, while exposing the buyer to liability for (a) the price of non-conforming goods, (b) contract-market differential with respect to conforming goods, or (c) the difference between the resale price of the goods and the contract price minus the amount attributable to nonconformity."¹¹⁴⁾ The fear of cancellation that may backfire is further compounded by the Code's stated policy of liberal construction of its provisions. (UCC §1-103(a)) As a result, many courts have adopted a leaning (as well as methodologies) strongly favoring a policy of avoiding findings of a seller's breach without an adequate opportunity to cure.¹¹⁵⁾

§7:4 Particular Avoidance Remedies

§7:4.1 Right to Refund and Restitution (Art. 81(2))

A buyer can claim a refund and restitution for any payment made for the goods or

114) White & Summers §9-6 at 444 (cited in note 20).

115) See *id.* §9-5 at 437.

anything else supplied to the seller under the contract. (CISG Art. 81(2)) If both parties have claims for restitution, they must exercise them concurrently. (*Id.*)

COMPARATIVE ANALYSIS

UCC: The remedy of a refund of any amount of the price paid is available to the UCC buyer in cases where (a) the seller fails to deliver the goods, (b) the seller repudiates the contract, or (c) the buyer rightfully rejects the goods or justifiably revokes his acceptance. This remedy is available with respect to the goods affected by the breach or, if the breach affects the entire contract, then with respect to the whole. (UCC §2-711(1))

§7:4.2 Entitlement to Interest on Amount Subject to Refund (Arts. 78 & 84(1))

If a buyer is entitled to a refund of monies paid toward the price, he is also entitled to interest thereon from the date on which he made the payment. (CISG Art. 84(1))

§7:5 Limitation on Damages (Arts. 74, 77)

The policy of full compensation has two built-in safety measures designed to protect the breaching party against unjust demands for compensation.

§7:5.1 Limitation of Foreseeable Damages (Art. 74)

The available damages are limited to losses that “the party in breach foresaw or ought to have foreseen” at the time of contracting. (CISG Art. 74)

§7:5.2 Limitation Consequent on Duty to Mitigate Damages (Art. 77)

If a party fails to take reasonable steps to mitigate potential damages, the other party has the right to claim a reduction in damages in the amount that could have been mitigated. (CISG Art. 77)

COMPARATIVE ANALYSIS

UCC: The UCC appears to be more generous than the CISG to the aggrieved buyer by imposing the foreseeability-type limitation only on consequential damages. This limitation does not apply to direct damages or incidental damages suffered by a UCC buyer. (*See* UCC §2-715(2)(a)) With respect to consequential damages (such as lost profits), the Code specifically rejects the “tacit agreement” rule that had been advanced by some courts, which would require that the buyer prove that the parties actually contemplated such damages and the seller in fact assumed the risk thereof. (UCC §2-715 Comment 2) Instead, the Code adopts a more liberal rule of “reasonable foreseeability of probable consequences,” limited only by the amounts that could have been reasonably prevented by the buyer’s cover or otherwise.¹¹⁶⁾ (UCC §2-711(2)(a) and Comment 2 thereto) This latter limitation reflects the

116) White & Summers §11-4 at 530 (cited in note 20).

buyer's obligation to mitigate damages.

§7:6 Contractual Limitation on Buyer's Remedies (Arts. 4, 6)

In line with the mandate of Article 6 of the CISG, the parties (both buyers and sellers) can as they see fit limit or exclude any or all remedies or damages. For example, the parties are free to completely exclude consequential damages, which choice the parties in fact commonly take in commercial settings. A question arises whether any such limitations or exclusions would be subsequently upheld or enforced? The answer to this question depends on whether the issue of validity or enforceability of such limitations or exclusions automatically invokes the applicability of Article 4 of the CISG. Indeed, Article 4(a) of the CISG proclaims that issues of validity of contractual provisions are beyond the ambit of the CISG. Hence, in all likelihood, the question posed should be answered according to the governing domestic law, as indicated above in Section 3:2.1. If this is correct, then any potential claim of lack of good faith, a concept that is otherwise inherent in the CISG, might presumably become irrelevant unless and to the extent that it is subsumed under applicable domestic law. The same considerations as discussed above apply to the analysis of the enforceability of limitations on damages in the form of liquidated damage provisions.

COMPARATIVE ANALYSIS

UCC: Under the UCC, the parties' freedom to limit their remedies or damages is not absolute: it is limited by the notions of conscionability and reasonableness. Those notions have led the drafters of the Code to postulate that "it is of the very essence of a sales contract that at least minimum adequate remedies be available." (UCC §2-719 Comment 1) A corollary notion demands that parties to a sales contract "must accept the legal consequences that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." (*Id.*) Consequently, when the contract affords an exclusive or limited remedy to a party, such remedy will be stricken if it fails "of its essential purpose." (UCC §2-719(2)) In addition, "any clause purporting to modify or limit the remedial provisions of [UCC Article 2] in an unconscionable manner is subject to deletion," and, in lieu of such offending contractual clause, all of UCC Article 2 remedies are brought to bear. (UCC §2-719(2) and Comment 1 thereto)

PART EIGHT SELLER'S REMEDIES (ARTS. 61-65)

The CISG treats the aggrieved seller in parallel with the aggrieved buyer by first accentuating remedies falling short of contract avoidance. Once the seller resorts to a particular remedy, neither the courts nor arbitral bodies may grant the buyer any grace period.

(CISG Art. 61(3))

§8:1 Before Calling Off the Deal

§8:1.1 Right to Require Performance (Art. 62)

In keeping with the overarching good-faith policy, the first remedy the CISG lists for the aggrieved seller's consideration is to demand performance of the buyer. (CISG Art. 62) Accordingly, while the aggrieved seller may choose to elect other remedies, he is entitled to demand that the buyer (a) pay the price of the goods, (b) take delivery of the goods; and (c) perform any other of his obligations. (CISG Art. 62) Naturally, the seller must be consistent in exercising his remedies. (*Id.*) Furthermore, even though the seller has the right to require that the buyer specifically perform, the courts will stay their hand and refuse to order performance by the buyer if the courts would not grant specific performance in similar cases not governed by the Convention. (CISG Art. 28)

COMPARATIVE ANALYSIS

UCC: The 2003 revision of the Code allows the aggrieved seller to obtain specific performance under UCC Section 2-716, which, before the revision, was reserved for the benefit of the buyers. (UCC §2-703(k) (2003 Revision)) Consequently, the discussion concerning the UCC buyers' right to specific performance under Section 7:1.4, above, is also applicable. However, when the remedy is expressly agreed to in a commercial (non-consumer) contract, the aggrieved seller will not be entitled to it if the breaching buyer's sole remaining obligation is a payment of money. (UCC §2-716(1) (2003 Revision)) While the Code's remedy of specific performance does carry certain reservations (e.g., the requirement that the goods be "unique"), in many cases the seller's main concern is to be paid for the goods. Consequently, such seller may prefer to have the option to force the buyer to perform, i.e., to force him to pay as agreed under the contract. Such remedy indeed exists under the Code in the form of an action for the price, discussed below in the Comparative Note under Section 8:2.1.

§8:1.2 Seller's Right to Retain Goods on Nonpayment (Art. 85)

A seller who was under the duty to preserve the goods for nonpayment of the price that was due concurrently with delivery has the right to keep the goods, provided he is still in possession of them or able to control their disposition. (CISG Art. 85)

§8:1.3 Seller's *Nachfrist* Notice and Right to Damages for Delayed Performance (Art. 63)

The CISG makes it clear that, even if the buyer has failed to perform as bargained for, there may still be a possibility of keeping the deal together if the buyer were given a second chance to make good on his obligations. Accordingly, the aggrieved seller may give the buyer "an additional period of time of reasonable length" to perform. (CISG Art. 63(1)) Once the

seller issues such a notice, he cannot revoke it by resorting to inconsistent remedies (i.e., remedies for breach of contract) unless the buyer has expressly notified the seller that he will not so perform within the time allowed. (CISG Art. 63(2)) Even if the seller does grant the buyer a second chance, the seller's right to damages for delayed performance is expressly guaranteed. (CISG Art. 63(2))

§8:1.4 Seller's Right to Suspend Performance upon Buyer's Anticipatory Breach (Art. 71)

The seller's right to suspend performance in situations where it becomes clear that the buyer will not perform either all or a substantial part of his obligations parallels the analogous right to suspend performance by the buyer.

COMPARATIVE NOTE

UCC: The Comparative Note under Section 7:1.9 (Buyer's Right to Suspend Performance upon Seller's Anticipatory Breach), above, is fully applicable, *mutatis mutandis*.

§8:1.5 Seller's Right to Prevent Taking Delivery by Buyer upon Anticipatory Breach (Art. 71(2))

The seller who has dispatched the goods before the grounds giving him the right to suspend performance based on the buyer's anticipatory breach under Article 71(1) became evident to him, may subsequently take steps to prevent the buyer from taking delivery. (CISG Art. 71(2)) The seller can avail himself of this right notwithstanding the fact that the buyer may already be in possession of documents entitling him to take possession of the goods. (*Id.*)

COMPARATIVE NOTE

UCC: The UCC seller is assured of fairly analogous rights upon the buyer's repudiation to perform. Depending on whether the repudiation affects the entire contract or only its part, the UCC seller can, with respect to the affected goods, or if the anticipatory breach affects the whole contract, also with respect to the undelivered balance, withhold delivery by himself or the bailee of the goods. (UCC §2-703(a) and (b))

§8:2 Right to Damages and Interest (Arts. 61(2), 74, 78)

Irrespective of what form of remedy the seller chooses to exercise, his right to claim damages to which he is otherwise entitled is preserved. (CISG Art. 61(2))

§8:2.1 Right to Damages for All Suffered Losses (Arts. 74, 78)

The measure of damages suffered by the seller for the buyer's breaches is the same as in the case of the seller's breaches. Those damages consist of all losses that were foreseeable or should have been foreseen by the buyer at the time of contracting in light of the then existing circumstances. (CISG Art. 74) For the avoidance of doubt, the CISG specifically entitles the aggrieved seller (as well as the aggrieved buyer) to recover consequential damages (*see* CISG Art. 74) and interest on any payments due that are in arrears. (CISG Art. 78)

COMPARATIVE ANALYSIS

UCC: Confronted with the buyer's wrongful rejection of goods, revocation of their acceptance, failure to make payment due on or before delivery, or repudiation, either with respect to all or part of the whole, the seller is entitled to the following damages in respect of the affected goods, or, if the breach affects the entire contract, in respect of the whole undelivered balance:

Resale-Contract Price Differential: When the seller resorts to the remedy of resale, he can recover damages for any shortfall suffered against the contract price, provided that the resale is performed in good faith and in a commercially reasonable manner. (UCC §§2-703(d) and 2-706(1)) The seller may also claim incidental damages incurred less expenses saved on account of the buyer's breach. (UCC §2-706(1)) Should the resale yield a profit, the lucky seller is not accountable for it to the buyer. (UCC §2-706(6))

Market-Contract Price Differential: Faced with a repudiation or non-acceptance of goods, the seller can claim a market-contract price differential (the difference between the price of goods as contracted for and their market value) and incidental damages suffered less expenses saved on account of the buyer's breach. (UCC §§2-703(e) and 2-708(1))

Lost Profits: If the market-contract price differential measure of damages would not put the seller in as good a position as he would have been had the contract been performed, he may, alternatively, be entitled to the profit he would have made on the contract had the buyer performed, together with any applicable incidental damages. It is not entirely clear whether the seller who also resells the goods can elect to claim either (a) the resale-contract differential, or (b) the market-contract price differential / lost profits, as a measure of damages of choice to maximize his recovery, without regard to which form of damages would make him whole.¹¹⁷⁾

Contract Price: As mentioned previously, the seller may be most interested in having the buyer perform under the contract by paying for the goods as promised. The Code makes this possible by giving the seller the right to sue for the price (a) when the buyer has accepted the goods; (b) when the goods were lost or damaged within a commercially reasonable time after the risk of loss has passed to the buyer; or (c) when, in respect of goods identified to the contract, the seller cannot obtain cover. (UCC §2-709(1)(a) and (b)) Needless to say, the seller may also claim any applicable incidental damages. (UCC §2-709(1)) However, should the action for the price fail, the seller has an alternative to claim damages of market-contract price differential or lost profits, as appropriate. (UCC §2-709(3))

Incidental Damages: With respect to all damages enumerated above, the aggrieved seller can claim incidental damages consisting of "any commercially reasonable charges, expenses

117) See White & Summers §8-7 at 359-366 (cited in note 20).

or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with the return or resale of the goods or otherwise resulting from the breach." (UCC §2-710) However, attorneys' fees are not recoverable unless such recovery is expressly permitted under the contract.

Consequential Damages: The Code, on its face, does not allow sellers to recover consequential damages (these damages can be awarded only if "specifically provided in [the Code] or by other rule of law"). (UCC §1-305) While the buyers' right to such damages is expressly stated in Section 2-715(2) of the UCC, an analogous right of the sellers is conspicuously missing. Accordingly, the courts have routinely denied sellers' claims for consequential damages, whether asserted directly or under the garb of incidental damages.¹¹⁸⁾ Among the variety of damages denied to many sellers are interest costs and costs of lost opportunity. Although most courts have not found the sellers' entitlement to consequential damages allowable under the "other rule of law" of Section 1-305 of the UCC, exceptional cases do exist.¹¹⁹⁾ For that matter, the Common law makes no distinction between buyers and sellers in their right to claim those damages. (*See, e.g.*, Restatement (Second) of Contracts §§347(b) and 351)

§8:3 Right to Declare Contract Avoided (Arts. 63-64, 81)

The aggrieved seller is given the power to avoid the contract in its entirety, except for provisions dealing with (a) settlement or dispute resolution, or (b) obligations triggered by contract avoidance, which of course continue unabated. (CISG Art. 81(1)) However, the seller may resort to such ultimate remedy only in the following three situations:

§8:3.1 Fundamental Breach by Buyer

The seller can declare the contract avoided when the buyer's breach amounts to a fundamental breach. (CISG Art. 64(1)(a)) However, in cases where the buyer has paid the price for the goods, the seller's right to avoid contract is largely limited, for in order to effectively declare contract avoided the seller must do so (a) within reasonable time from (i) the time he knew (or should have known) of the breach, or (ii) the end of the *Nachfrist* period under CISG Article 63(1) or the time the buyer declares that he will not perform within such period, or (b) before he realizes that the buyer has performed in case of late performance. (CISG Art. 64(2)) As one authority has put it, "the seller's right to have the contract avoided ceases to exist the moment the buyer has paid the price or taken possession of the goods."¹²⁰⁾

§8:3.2 Clear Prospect of Fundamental Breach by Buyer (Art. 72)

As previously indicated, a seller who anticipates nonperformance by the buyer is,

118) *See id* §8-16 at 393-397.

119) *See Associated Metals and Minerals Corp. v. Sharon Steel Corp.*, 590 F.Supp. 18, 39 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2nd Cir. 1983).

120) *A Practitioner's Guide* §8.2.4 at 596 (cited in note 2).

in certain circumstances, entitled to suspend his performance. (See Section 8:1.4, above) However, if it becomes clear to the seller prior to the date of contract performance that the buyer will commit a fundamental breach, the seller can then declare the contract avoided. (CISG Art. 72(1)) Before doing so, however, the seller must, if time allows, notify the buyer of his intention in order to give the buyer a chance to furnish adequate assurances of performance. (CISG Art. 72(2)) Naturally, the notice requirement is obviated if the buyer has already declared that he will not perform. (CISG Art. 72(3))

§8:3.3 Failure to Pay Price or Take Delivery Despite *Nachfrist* Notice

In addition to cases where the buyer commits a fundamental breach, the CISG empowers the seller to declare the contract avoided if:

- (a) the buyer has failed to pay the price within the grace period of CISG Article 63(1);
- (b) the buyer has failed to take delivery of the goods within the grace period of CISG Article 63(1); or
- (c) the buyer has declared that he will not do so within such time. (CISG Art. 64(1)(b))

COMPARATIVE ANALYSIS

UCC: A UCC seller faced with the buyer's (a) wrongful rejection or revocation of acceptance of the goods, (b) failure to pay on or before delivery, or (b) repudiation as to a part or the whole, may then, among other available remedies, **cancel** the contract with respect to the affected goods, or, in case of breach of the whole contract, then also with respect to the undelivered goods. (UCC §2-703(f))

§8:4 Particular Avoidance Remedies (Arts. 81, 84(2))

§8:4.1 Right to Refund and Restitution (Art. 81(2))

Upon having the contract avoided, the seller (just as the buyer) is entitled to a refund and restitution of whatever the seller has furnished to the buyer under the contract, and, if both parties have claims for restitution, they must do so concurrently. (CISG Art. 81(2))

§8:4.2 Right to Benefits Derived from Goods Subject to Restitution (Art. 84(2))

A buyer who must make restitution of the goods “must account to the seller for all benefits which he has derived from the goods or part of them.” (CISG Art. 84(2)) However, the burden of proving the extent of such benefits has been held to fall on the seller.¹²¹⁾

§8:5 Limitation on Damages (Arts. 74, 77)

The discussion on limitation on damages with respect to buyers' damages under Section 7:5, above, is fully applicable in relation to limitations on sellers' damages, *mutatis mutandis*.

¹²¹⁾ See, e.g., CLOUT Case No. 165 (Oberlandesgericht Oldenburg Feb. 1, 1995).

COMPARATIVE ANALYSIS

UCC: *Narrow Duty to Mitigate Damages.* A seller's obligation to mitigate damages suffered due to the buyer's breach is very narrow. For example, faced with a wrongful rejection, the seller is not under any duty to retrieve or resell the goods, even if the buyer has requested that the seller pick up the goods because of the buyer's inability to pay.¹²²⁾ Indeed, the case law does not prevent the aggrieved seller from suing for the price even if he has recovered the goods or the buyer has returned them. (*Id.*) In one situation, however, the seller may need to follow his commercially reasonable judgment with respect to mitigation of damages. This happens when the seller is informed of the breach while the goods are still in an unfinished state. Whether to finish manufacture of the goods should be determined by the principle calling for the minimization of losses. The Code teaches that, faced with such a predicament, "the seller may in the exercise of reasonable commercial judgment *for the purposes of avoiding loss and of effective realization*" (a) finish the goods, or (b) stop their manufacture and resell them for scrap or salvage, or (c) proceed in any other reasonable fashion. (UCC §2-704(2) (emphasis added)) In cases where that choice creates a true dilemma for the seller, the Code adds some words of comfort to the seller by placing the burden of showing alleged commercial unreasonableness on the buyer. (UCC §2-704 Comment 2)

§8:6 Contractual Limitation on Seller's Remedies (Arts. 4, 6)

Please refer to the discussion under Section 7:6, above, which is fully applicable here, *mutatis mutandis*.

¹²²⁾ See White & Summers §8-3 at 349 (cited in note 20).