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RECENT DEVELOPMENTS: CISG

MORE U.S. DECISIONS ON THE U.N. SALES CONVENTION: SCOPE, PAROL EVIDENCE, "VALIDITY" AND REDUCTION OF PRICE UNDER ARTICLE 50

Harry M. Flechtner*

The inventory of U.S. cases that apply or discuss the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or the "Convention"),¹ a treaty that has been in force in the United States since January 1, 1988,² continues to grow.³ Two recent decisions by U.S. courts raise CISG issues of interest to American lawyers—the status of the parol evidence rule in transactions governed by CISG, the applicability of CISG to settlement agreements arising out of international sales, the "validity" limitation on the scope of CISG, and the operation of CISG Article 50, a remedy provision without

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1. U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. DOC. A/CONF. 97/18, *reprinted in* S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. and 19 I.L.M. 668 (1980) [hereinafter CISG or Convention].

2. *Journal of Law & Commerce CISG Contracting States and Declarations Table*, 14 J.L. & COM. 237, 244 (1995).

3. The following U.S. cases cite CISG: *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178, 1183 (5th Cir. 1993); *Orbisphere Corp. v. United States*, 13 Ct. Int'l Trade 866, 882, (1989); *Graves Import Co., Ltd. v. Chilewich Int'l Corp.*, No. 92 CIV. 3655, 1994 U.S. Dist. LEXIS 13393, at *13 (S.D.N.Y. Sept. 21, 1994); *Delchi Carrier SpA v. Rotorex Corp.*, No. 88-CV-1078, 1994 U.S. Dist. LEXIS 12820, at *11, *12 (N.D.N.Y. Sept. 9, 1994); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1994); *S.V. Braun, Inc. v. Alitalia-Linee Aeree Italiane, S.p.A.* No. 91 CIV. 8484 (LBS), 1994 WL 121680, at *5 (S.D.N.Y. Apr. 6, 1994); *Interag Co. Ltd. v. Stafford Phase Corp.*, No. 91 Civ. 3253, at *11 (S.D.N.Y. May 22, 1990); *Promaulayko v. Amtorg Trading Corp.*, 540 A.2d 893, 897 (N.J. Super. Ct. App. Div. 1988), *rev'd* (on grounds unconnected to CISG) 562 A.2d 202 (N.J. 1989).

analogy in U.S. sales law. The following article analyzes these cases and the issues they raise. It concludes that, although knowledge of the Convention and its significance for international transactions continues to grow, U.S. courts still sometimes fail to appreciate the changes it works. To comprehend those changes, judges must transcend their usual perspective shaped by familiar domestic sales concepts. Only that will satisfy the mandate of Article 7(1)—the promotion of uniformity in the application of CISG.

I. *BEIJING METALS v. AMERICAN BUSINESS CENTER-PAROL EVIDENCE, THE SCOPE OF CISG, AND "VALIDITY"*

A. *Facts and the Court's Analysis*

In *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,⁴ the Fifth Circuit reviewed a summary judgment enforcing a "payment agreement" between a fitness equipment manufacturer incorporated and operating in the People's Republic of China (Beijing Metals), and a U.S. marketer of such equipment (ABC). Beijing Metals had been selling its products to ABC for resale in the United States and Canada. The original arrangement required ABC to pay against bills of lading, but soon Beijing Metals began shipping on 90-day credit terms. Not long thereafter ABC started to withhold payments, alleging that there were shortages in some shipments and that "from the very beginning, almost every shipment contained substantial amounts of defective and non-conforming goods."⁵ When Beijing Metals threatened to cut off supplies unless ABC came forward with a plan to make overdue payments, the president of ABC traveled to China to work out an arrangement.

What emerged was a written payment agreement in which ABC acknowledged that it owed Beijing Metals almost \$1.26 million, and which established a schedule for ABC to pay the arrearages in installments. The written agreement said nothing about offsets for past non-conforming shipments, and it did not address the terms of future shipments. Nor, apparently, did it contain a merger or integration clause declaring that the written document embodied the parties' entire agreement. Before leaving China, ABC's president delivered a post-dated check covering the first installment due under the payment agreement.

4. 993 F.2d 1178 (5th Cir. 1993).

5. *Id.* at 1180.

After ABC's president returned to the United States, Beijing Metals sent him a fax indicating that future shipments would be made on 90-day terms only if ABC provided a letter of credit to assure payment. ABC replied with two communications objecting to the letter of credit requirement and complaining about the quality of previous shipments. ABC also stopped payment on the post-dated check that had been delivered in China and repudiated the payment agreement. Beijing Metals then sued in U.S. District Court to enforce that agreement.

ABC defended by alleging that the written payment agreement was part of a larger understanding, and was contingent on two additional agreements that for political reasons had not been reduced to writing: 1) an agreement that Beijing Metals would account for shortages and defects in prior shipments by giving favorable terms on future shipments; and 2) an agreement that future shipments would continue on 90-day terms, without requiring ABC to provide a letter of credit. ABC also alleged that the payment agreement was procured by economic duress, and that both that agreement and the post-dated check issued pursuant to it had been fraudulently induced.⁶ The District Court granted summary judgment to Beijing Metals, holding that ABC's proof of the alleged oral agreements concerning future discounts and shipment terms was barred by the parol evidence rule, and that ABC had not raised genuine issues of material fact in its duress and fraudulent inducement arguments.

The Fifth Circuit affirmed in part and reversed in part. In a footnote, the court explained that, although Beijing Metals had urged the application of domestic Texas law and ABC had argued that CISG should govern, "[w]e need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (which applies regardless), duress, and fraudulent inducement."⁷ After deciding that Article 2 of the Uniform Commercial Code ("U.C.C.") did not apply because the agreement at issue "more closely resembles a

6. ABC also advanced several other defenses and counterclaims not germane to this article, including physical duress (an argument abandoned on appeal) and breach of warranty with respect to the underlying sales contracts. *See id.* at 1181 and 1184 n.13.

7. *Id.* at 1183 n.9. The court went on to say that, upon remand, the District Court might have to resolve whether Texas law or the Sales Convention applied to the prior sales transactions between the parties. Presumably this refers to the possibility that, if the trial court found that the payment agreement was fraudulently induced, it would then have to rule on ABC's argument that Beijing Metals had breached the underlying sales contracts by shipping defective goods. *See id.* at 1187.

settlement agreement, as opposed to a sale of goods,"⁸ the court affirmed the trial judge's parol evidence rulings.

The appeals court found that ABC had failed to rebut a presumption under Texas common law that a written contract complete on its face constitutes a complete integration of the parties' agreement. It also held, again applying Texas common law, that the alleged oral agreements did not constitute "collateral contemporaneous agreements," evidence of which was admissible if they were consistent with the integrated writing. The court found that both oral agreements were inconsistent with the writing, and that the agreement concerning 90-day payment terms was not "collateral" to the written agreement because it was not made for a separate consideration and would not "naturally be made as a separate agreement." Thus the district judge, according to the appeals court, had correctly invoked the parol evidence rule to bar evidence of the two alleged oral agreements.⁹

The Fifth Circuit also affirmed the district court's dismissal of the economic duress defense, citing ABC's failure to prove that it had no reasonable alternative to signing the payment agreement.¹⁰ On the fraudulent inducement claim, however, the appeals court reversed. It found that this argument had raised an issue of material fact, and it remanded the case with instructions to admit ABC's evidence of the alleged oral agreements, strictly for the purpose of establishing the elements of fraud.¹¹

B. CISG and the Parol Evidence Rule

In analyzing the parol evidence issues, the Fifth Circuit explained that it did not need to choose between CISG and domestic Texas law because CISG had no effect on parol evidence questions—i.e., according to the court, its parol evidence analysis "applies regardless" of which law governs. Article 8(3) of the Convention, however, provides that "[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations"

8. *Id.* at 1183 n.10.

9. *Id.*

10. "According to ABC, if [its president] did not sign [the payment agreement], it would be forced to accept defective and non-conforming goods, driving it into financial ruin. In so stating, it wholly ignores the availability of pursuing its remedies under [Article 2 of the U.C.C.] or, if applicable, the Sale of Goods Convention [i.e., CISG] (articles 46-52)." *Id.* at 1185.

11. *Id.* at 1185-87.

Commentators generally agree that Article 8(3) rejects the approach to parol evidence questions taken by U.S. domestic law.¹²

Indeed, several commentators have declared that CISG abrogates the parol evidence rule,¹³ although most believe that a well-drafted "merger clause" declaring that the parties intend a writing to be the final and complete statement of their agreement will trump Article 8(3) (as permitted by Article 6) and bar evidence of negotiations not embodied in the writing.¹⁴ Most also recognize that CISG does not govern the allocation of responsibility for fact-finding, and thus it does not affect the usual rule that parol evidence questions are for the judge rather than the jury.¹⁵ In the author's view, the extent to which CISG preempts the parol evidence rule is very limited indeed.

Professor Brand and I have argued not only that a properly drafted merger clause can block evidence of prior or contemporaneous terms not in a writing, but also that the impact of Article 8(3) on parol

12. *E.g.*, JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* § 110(1) (2d ed. 1991); ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 125 (1989); JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* § 152D(3) & (4) (3d ed. 1990); Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 *LOY. L. REV.* 43, 57 (1991).

13. *E.g.*, Kritzer, *supra* note 12, at 125 (referring to the "absence of a parole [*sic*] evidence rule" in the Convention); B. Blair Crawford & Janet L. Rich, *New Rules for Contracting in the Global Marketplace: The United Nations Convention on Contracts for the International Sale of Goods* ("CISG"), in *GOING INTERNATIONAL: INTERNATIONAL TRADE FOR THE NONSPECIALIST* (ALI-ABA COURSE OF STUDY MATERIALS), July 9-13, 1990, at 11 ("CISG Article 8 directs the court to give due consideration to all relevant evidence of the parties' intent including negotiations, course of dealing, usages and performance. The parol evidence rule is thus revoked for CISG contracts."); John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods*, 8 *J.L. & COM.* 11, 44 (1988) ("CISG rejects the parol evidence rule . . .").

14. HONNOLD, *supra* note 12; KRITZER, *supra* note 12, at 125; Winship, *supra* note 12. *See also* MURRAY, *supra* note 12 (expressing doubt whether the "typical" merger clause is sufficient under CISG and suggesting that drafters should "supplement the normal merger clause to the effect that, pursuant to Article 6 . . . , the parties expressly agree to derogate from that portion of Article 8(3) (permitting prior negotiations to be admitted into evidence as a relevant circumstance) and intend the contract to be subject to the parol evidence rule as found in UCC § 2-202"). *But see* Paul C. Blodgett, *The United Nations Convention on the Sale of Goods and the "Battle of the Forms"*, 18 *COLO. LAW.* 421, 424 (1989) (implying that evidence of the parties' negotiations is admissible under CISG even if the parties had integrated their transaction into "a writing without ambiguities, intended as a final, complete and exclusive expression of [their] agreement"); Stephen E. Camisci, Comment, *From Moscow to Moscow: Primary Contractual Considerations for the International Sale of Goods*, 27 *IDAHO L. REV.* 347, 351 (1990-91) ("When the writing is intended as a 'final expression' of the parties' agreement, the U.C.C. would exclude factors such as the negotiations which CISG allows" (citation omitted)).

15. HONNOLD, *supra* note 12; Winship, *supra* note 12.

evidence issues is limited by its focus on interpretation of the parties' agreement.¹⁶ The latter point derives from the fact that, while the parol evidence rule may preclude evidence of distinct *terms* omitted from a writing, modern formulations of the rule do not bar evidence of prior negotiations introduced to aid in interpreting the writing.¹⁷ Thus when Article 8(3) declares that evidence of negotiations should be considered "[i]n determining the intent of a party or the understanding a reasonable person would have had," it addresses interpretative matters generally beyond the preclusive scope of the parol evidence rule.

Nevertheless, even I conclude that the approach to parol evidence questions taken by the Fifth Circuit in *Beijing Metals* is inconsistent with CISG, and that the result in the case might well have changed had the court applied the Convention. The parol evidence rule in U.S. domestic law is, in essence, merely a special method for determining the parties' intent as to certain questions.¹⁸ Specifically, the rule establishes a distinct set of tests and procedures for ascertaining whether the parties intended to discharge prior and contemporaneous terms that were omitted from a document embodying the contract. It is clear that the Convention rejects any special methodology for determining the parties' intent as to the effect of a writing.

This rejection stems not so much from the requirement in Article 8(3) that negotiations be considered in interpreting an agreement as from the lack of any provision in CISG affording special treatment to parol evidence questions (contrast U.C.C. § 2-202). Article 7(1) of the Convention, furthermore, requires those who interpret CISG to bear in mind its international character and the need for uniformity in its application. Because the special procedures and tests we call the parol evidence rule are confined to common law systems, where they arose in

16. Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 251-52 (1993). Articles 8(1) & (2) provide that a party's statements or conduct must be interpreted either "according to his intent" or "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Article 8(3) then establishes a methodology for determining such intent or reasonable understanding. Thus Article 8 deals only with the *interpretation* of the parties' agreement.

17. RESTATEMENT (SECOND) OF CONTRACTS § 214(c) & cmt. b (1981); MURRAY, *supra* note 12, § 82A.

18. See MURRAY, *supra* note 12, § 83 at 382 ("The essence of the so-called parol evidence rule is found in the *process* used by courts to make these 'preliminary determinations' [concerning whether there is an integration]. How does a court go about deciding whether the parties intended their written expression to be the final or final and complete statement of their agreement . . . ? This is not only the threshold question—it is the *only* question which must be pursued to understand the 'parol evidence rule.'").

response to problems unique to those systems,¹⁹ their application to transactions governed by CISG would be inconsistent with the principles stated in Article 7(1).

The Fifth Circuit's parol evidence analysis in *Beijing Metals* would be improper in a transaction governed by CISG because the court employed a special method for determining whether the parties intended to discharge terms that were omitted from their writing—a method different from the approach that would be used for other questions of intent. First, the court indulged in a presumption that the writing evidencing the contract was intended to be a complete and final statement of the agreement—i.e., an integration. There is no basis for such a presumption in the Convention's rules for determining the intent of the parties. Unless there was an international consensus favoring such a presumption, it would tend to undermine the uniformity demanded by Article 7(1).

Second, in determining whether the alleged oral terms formed a "collateral" agreement not discharged by being omitted from the writing, the court employed a traditional parol evidence test under U.S. law. It ruled that a "collateral" agreement was one that "the parties might naturally make separately and would not ordinarily be expected to embody in the writing; and it must not be so clearly connected with the principal transaction as to be part and parcel thereof."²⁰ This is the Texas version of the "naturally and normally" test for collateral agreements first articulated by the Pennsylvania Supreme Court and then taken up by Professor Williston in his Contracts treatise:

When does the oral agreement come within the field embraced by the written one? This can be answered by comparing the two, and determining whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If they relate to the same subject-matter and are so interrelated that both would

19. See CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 210, 211 (1954) (describing the development of the parol evidence rule as a means for common law judges to control juries who ignored credible and reliable written evidence of contracts). "The continental legal system, with no civil jury, and with most contracts required to be entirely in writing, has little trouble in guarding written bargains from oral encroachment. This danger to written transactions is peculiarly inherent in the common-law methods of trial." *Id.* § 210 at 429. See also KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 88-89 (1990).

20. 993 F.2d at 1184 (quoting *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 680 (Tex. App. 1984)).

be executed at the same time, and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing.²¹

By itself this "test" might be an unobjectionable method for determining whether alleged terms formed a transaction separate from the one integrated into a writing, and thus outside the intended preclusive scope of the integration. The "naturally and normally" test, however, has been invoked so frequently in U.S. courts as to become encrusted by purely domestic precedent. It would now be virtually impossible for a U.S. court to use the test in a manner that was genuinely "international" and that would promote uniformity with decisions by courts of other contracting states. The use of a test so firmly tied to our domestic law traditions without clear authorization in the text of CISG would do violence to the directives of Article 7(1).

In short, the court in *Beijing Metals* indulged in what Professor Brand and I have labelled "the somewhat bizarre and abstruse methods for determining intent associated with the parol evidence rule."²² These are the aspects of our parol evidence rule that should not apply in a transaction governed by CISG.²³

Given that the appeal in *Beijing Metals* was from a grant of summary judgment, furthermore, the Fifth Circuit's use of the Texas common law parol evidence rule, rather than a more straightforward method for determining party intent (as apparently required by CISG), may well have determined the result. Certainly the court's invocation of a domestic law presumption that the parties' writing was a complete integration favored the seller's argument against admitting evidence of agreements not found in the writing. Even the "naturally and normally" test used by the court for identifying "collateral" agreements, although neutral on its face, in application has tended to show its association with the underlying purpose of the parol evidence rule—to pre-

21. *Gianni v. R. Russell & Co.*, 126 A. 791, 792 (Pa. 1924). In the "revised" (i.e., second) edition of his treatise, Williston quoted this passage from *Gianni*. 3 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 638 at 1834-35 n.1 (rev. ed. 1936). The citation misleadingly indicates that *Gianni* itself was quoting from the Williston treatise (presumably the first edition), although the passage in question does not quote from or even cite the treatise. The first edition of the Williston treatise did include language that in a general way resembles and may have formed the basis for the quoted passage from *Gianni*. See 2 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 639 at 1238 (1920) (Whether evidence of a collateral agreement should be admitted "will depend in large measure on the question whether a reasonable person making such an agreement as is set up both in the writing and in the proffered parol evidence might naturally have separated the matters into two parts.").

22. Brand & Flechtner, *supra* note 16, at 251.

23. *Id.* at 251-52.

serve the primacy of written agreements.²⁴ Thus the Fifth Circuit's use of this test also tended to work against admitting evidence of terms outside the writing. Absent the special obstacles created by the Texas parol evidence rule, and given that the parties apparently did not include a "merger" or integration clause in their written agreement, the buyer's attempt to introduce evidence of terms not mentioned in the writing may well have survived summary judgment if the court had applied CISG.²⁵

C. *Applicability of CISG*

Although the Fifth Circuit in *Beijing Metals* misconstrued the effect of CISG on parol evidence questions, this would not matter if the contract in the case were not subject to the Convention. There is indirect evidence, derived from its discussion of the applicability of Article 2 of the U.C.C., that the court might not have applied CISG even if it had recognized that choosing between the Convention and the Texas law governing domestic contracts could well affect the outcome of the case.

After asserting that it did not matter whether or not CISG was applied, the Fifth Circuit noted that it *did* make a difference—at least for parol evidence questions—whether the court applied Article 2 of the U.C.C. or the Texas common law of contracts.²⁶ It resolved the choice of law issue as follows:

Because the agreement [between Beijing Metals and ABC], on its face, is limited to a payment schedule for overdue invoices, and more closely resembles a settlement agreement, as opposed to a sale of goods, we will apply the parol evidence rule developed by Texas common law.²⁷

24. MCCORMICK, *supra* note 19, § 210; TEEVEN, *supra* note 19.

25. On a summary judgment motion the question would be whether there were genuine issues of material fact concerning the intent of the parties to discharge prior or contemporary agreements not included in their writing. This issue would be prior to the question whether there existed genuine issues of material fact concerning the credibility of the evidence that such non-written agreements actually existed. On the first issue, the buyer probably could survive summary judgment on the basis of its explanation for why the alleged oral agreements did not appear in the writing even though the parties intended them to remain viable—i.e., the Chinese seller had political problems with admitting in writing that prior shipments had been defective and in making written commitments to extend the buyer credit in the future. See 993 F.2d at 1180.

26. "ABC urges that we apply the parol evidence rule applicable to the sale of goods, which, unlike the common law, does not presume that an apparently complete writing is a total integration." 993 F.2d at 1183 n.10.

27. *Id.*

The Convention, like Article 2 of the U.C.C., governs contracts for the sale of goods.²⁸ Thus the Fifth Circuit might well have refused to apply CISG for the same reasons that it rejected the U.C.C.

Arguably the transaction in *Beijing Metals* is not a contract for sale as defined in Article 2 of the U.C.C.,²⁹ and thus is not subject to that Article, because the payment agreement did not provide for the present or future passing of title to goods. Instead, under the written agreement the seller exchanged its claim for goods *previously* delivered—a chose in action—for the buyer's acknowledgement of the amount of the debt (thereby renouncing possible defenses and setoffs), and an undertaking to pay the debt in installments. This appears to be what the court is driving at when it characterizes the payment agreement as "a settlement agreement, as opposed to a sale of goods" (although to the extent the court's phrasing suggests that settlement agreements and sales are mutually exclusive categories, it is wrong³⁰). Nor would the buyer's allegations that the contract included unwritten agreements concerning price reductions and credit terms in future shipments make the agreement a sale. These alleged agreements apparently did not obligate the seller to transfer any quantity of goods to the buyer; they merely set the terms under which sales in the future, if they occurred, would be made. They formed what Professor Honnold has called a "framework agreement," which, he argues, does not give rise to a sale until the buyer actually orders some quantity of goods.³¹

28. "This Convention applies to contract of sale of goods. . . ." CISG Art. 1(1). According to § 2-102, U.C.C. Article 2 applies to "transactions in goods," but the Article has been applied primarily to sales. *See, e.g.,* MURRAY, *supra* note 12, § 12.

29. "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods. . . . A 'sale' consists in the passing of title from the seller to the buyer for a price. . . ." U.C.C. § 2-106(1).

30. Suppose, for example, that A owes B \$1000. The parties, both of whom are located in Pennsylvania, agree that A will settle the debt by transferring her car to B. This settlement agreement would clearly be subject to Pennsylvania's version of U.C.C. Article 2. Because the settlement between A and B itself involves a sale, however, it is easily distinguishable from the settlement in *Beijing Metals*.

31. HONNOLD, *supra* note 12, § 56.2. Professor Honnold's argument addresses whether such framework agreements constitute sales subject to CISG, although his analysis appears equally applicable to Article 2 of the U.C.C.

In order for U.C.C. Article 2 (or, presumably, CISG) to apply it is not necessary that a contract require the sale of a fixed quantity of goods. Contracts containing flexible quantity provisions, such as those measuring quantity by the buyer's requirements or the seller's output, come within the scope of both sets of laws. U.C.C. § 2-306. *See* CISG Art. 14(1) (a proposal is sufficiently definite to constitute an offer if it "expressly or implicitly fixes or makes provision for determining the quantity" (emphasis added)); HONNOLD, *supra* note 12, § 137.3. The payment agreement in *Beijing*

Regardless of whether the Fifth Circuit properly analyzed the applicability of U.C.C. Article 2 to the payment agreement in *Beijing Metals*,³² there is a substantial argument that the contract comes within the scope of CISG.³³ Although the payment agreement may not have required ABC to buy any particular quantity of goods in the future,³⁴ it did settle the buyer's payment obligations arising out of sales of goods that had already occurred. The agreement thus arguably constituted a modification of the buyer's obligation to pay the price for those past sales—past sales that were themselves subject to CISG.³⁵

Metals, however, apparently did not require the buyer to buy any quantity—fixed or variable—whatsoever.

32. Other courts have applied U.C.C. Article 2 to agreements settling disputes arising out of contracts for the sale of goods. *May Co. v. Trusnik*, 375 N.E.2d 72 (Ohio Ct. App. 1977). See also *Farmland Serv. Coop. v. Jack*, 242 N.W.2d 624 (Neb. 1976); *Gulf Chem. & Metallurgical Corp. v. Sylvan Chem. Corp.*, 300 A.2d 878 (N.J. Super. 1973); *Ruble Forest Prod., Inc. v. Lancer Mobile Homes, Inc.*, 524 P.2d 1204 (Or. 1974). Some recent authority, however, is contrary. *ITT Corp. v. LTX Corp.*, 926 F.2d 1258 (1st Cir. 1991) (applying Massachusetts law); *New England Power Co. v. Riley Stoker Corp.*, 477 N.E.2d 1054 (Mass. App. Ct. 1985); *Adams v. Petgrade Int'l, Inc.*, 754 S.W.2d 696 (Tex. Ct. App. 1988). The two recent cases construing Massachusetts law are distinguishable from the situation in *Beijing Metals* on at least two bases. First, both Massachusetts cases involved settlements in which the seller undertook significant new service obligations. Contracts in which the service element predominates have traditionally been deemed outside the scope of U.C.C. Article 2. Second, the issue in both cases was whether new implied warranties beyond those in the original sales contract arose as a result of the settlement agreements. Arguably such warranties should only be created by a settlement that, unlike those in the Massachusetts cases, provides for a new sale of goods beyond that in the original contract. A refusal to imply warranties in a settlement that entails no new sale of goods does not preclude application of other aspects of Article 2—including its parol evidence provisions—to agreements that settle disputes arising out of sales of goods.

33. The following line of argument was suggested by Professor Volker Behr of the Law Faculty at the University of Augsburg, Germany. Its expression and conclusions, however, particularly any errors or infelicities, are the author's and not Professor Behr's. It is a pleasure to acknowledge not only this specific debt I owe to Professor Behr, but also the general insights he has generously supplied me concerning CISG, comparative U.S. and German commercial law, and jurisprudence. English-only readers who would like to sample the work of a first-rate continental commentator on CISG should refer to Volker Behr, *Commentary to Journal of Law & Commerce Case 1; Oberlandesgericht, Frankfurt am Main*, 12 J.L. & COM. 271 (1993).

34. Unlike U.C.C. Article 2, CISG does not attempt to specify what it means by a "sale of goods." The phrase, however, presumably means much the same thing in both laws. At any rate, the definition of "sale" in U.C.C. § 2-106(1) ("the passing of title from the seller to the buyer for a price") corresponds to the generally accepted meaning of the term. See the definition of "sale" in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2003 (Philip B. Gore ed., 1981) ("a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price"). Thus a contract that did not provide for passing of title to goods would, arguably, not be a sale within the meaning of either U.C.C. Article 2 or CISG. As pointed out in the text, however, CISG may govern the payment agreement in *Beijing Metals* even if that agreement is not itself a sales contract.

35. All shipments between the parties (and the agreements providing for such shipments) were made in 1988 or later. 993 F.2d at 1179. CISG went into force for both the United States and the People's Republic of China on January 1, 1988. *Journal of Law and Commerce CISG Contracting*

Article 29(1), which states that a contract for sale governed by CISG can be modified by the "mere agreement of the parties," may imply that such modification agreements are themselves governed by CISG.

A modification, of course, involves two separate contracts: the modification agreement proper and the contract that is being modified. With a modification like that in *Beijing Metals*—i.e., one that entailed only the alteration of contract rights under the pre-existing sale and did not involve a sale of goods in addition to or in substitution for those covered by the original (unmodified) contract—one could argue that *only* the modified sales agreement, and *not* the modification contract itself, is governed by CISG. Article 29(1), however, is usually interpreted to dispense with any requirement that a modification contract must be supported by "new" or additional consideration distinct from that in the contract being modified.³⁶ Obviously this intended effect of Article 29(1) can be achieved only if the modification agreement is governed by CISG. Thus the apparent purpose of Article 29(1) would be frustrated in many cases if modification agreements such as the one in *Beijing Metals* were deemed outside the scope of CISG. Some non-U.S. authority also supports applying international sales law to agreements that modify sales contracts, whether or not the modification entails a new sale.³⁷ Under the mandate of Article 7(1), requiring uniformity in the application of the Convention, U.S. courts must take such authority into account.³⁸

Finally, the alleged oral "framework" agreements between Beijing Metals and ABC, although they apparently do not *require* the buyer to purchase additional goods, clearly contemplate future sales that (unless the parties agree otherwise) will be governed by CISG. Thus the par-

States and Declarations Table, *supra* note 2, at 237. Thus the shipments would constitute international sales of goods between parties located in "Contracting States," and the Convention would apply under Article 1(1)(a) unless otherwise agreed by the parties under Article 6. There is nothing in the *Beijing Metals* opinion that indicates the parties agreed to exclude the application of CISG.

36. HONNOLD, *supra* note 12, § 201; MURRAY, *supra* note 12, § 152(C), at 887.

37. Ulrich Magnus, *Commentary on CISG Art. 1*, ¶ 19, in KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH by J. von Staudinger (13te Bearbeitung 1994) ("Finally, Article 29 [of CISG] shows that any agreement concerning alteration or rescission of a sales contract under the Convention shall be governed by the Convention" (trans. by Professor Volker Behr)). Cf. Judgment of March 3, 1982, Oberlandesgericht Hamburg [Germany], 5 U 169/81 (holding that an agreement settling a dispute arising out of an international sale of goods was subject to the UNIDROIT-sponsored Uniform Law on the Formation of Contracts for the International Sale of Goods). The foregoing citations were supplied by Professor Volker Behr. See *supra* note 33.

38. V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 218-26 (1988).

ties' plans called for the framework agreements to be incorporated into future sales that will likely be subject to CISG.³⁹ Given that fact, and the fact that non-application of CISG gives rise to the uncertainties of choice of law analysis that CISG was designed to avoid,⁴⁰ it may make sense to resolve close questions in favor of applying the Convention.⁴¹

Thus the payment agreement in *Beijing Metals* may well have been within the scope of CISG. If so, the Fifth Circuit should have applied the Convention's approach to parol evidence questions—with results likely to differ from those the court obtained by applying the Texas common law parol evidence rule.

D. *Fraud, Duress, and "Validity"*

Although the Fifth Circuit's analysis of parol evidence issues in *Beijing Metals* may have been incorrect if the transaction in the case was governed by CISG, the remainder of the court's discussion—in which it applied Texas common law doctrines of duress and fraudulent inducement—would be unaffected by the Convention. This is because CISG Article 4 declares that, "except as otherwise expressly provided in this Convention, it is not concerned with (a) the validity of the contract or of any of its provisions or of any usage. . . ." Arguments that a contract is unenforceable because procured by fraud or duress are clearly matters of "the validity of the contract," and are therefore beyond the scope of CISG.⁴² The "validity" of a contract (or one of its provisions) otherwise subject to CISG is referred to the domestic law applicable under choice of law principles.⁴³ Thus even if the court had recognized that CISG applied to the payment agreement in *Beijing Metals*, its discussion of fraudulent inducement and duress issues would not change.

39. HONNOLD, *supra* note 12, § 56.2.

40. Helen Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 6 (authority cited n.20), 14 (1993).

41. Cf. HONNOLD, *supra* note 12, § 60.4 (advocating "careful analogical extension" of CISG provisions to transactions outside the scope of the Convention).

42. See HONNOLD, *supra* note 12, § 65; KRITZER, *supra* note 12, 86; Hartnell, *supra* note 40, at 39-40, 62, 70-72; Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 646 (1988) ("the drafting history of article 4 suggests that the UNCITRAL representatives considered issues of validity to include only issues such as fraud, duress, unconscionability, and incapacity").

43. C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION ART. 4 ¶ 2.4 at 45 (1987); KRITZER, *supra* note 12, at 81; Hartnell, *supra* note 40, at 3 & *passim*.

There is consensus among commentators that the law governing fraud, duress and certain other matters—including capacity to contract and agent's authority,⁴⁴ illegal contracts,⁴⁵ and unconscionability⁴⁶—are matters of “validity” governed by applicable domestic law rather than CISG. What other issues are within the scope of the “validity” exclusion is uncertain.⁴⁷ For example, is an argument that a sales contract is unenforceable because not supported by consideration a question of “validity” to be resolved by reference to domestic law? Suppose ABC had argued that the payment agreement in *Beijing Metals* was unenforceable because ABC had not promised to do anything except what it was under a pre-existing legal duty to do.⁴⁸ This particular argument is probably preempted by the Convention. As has already been noted, Article 29(1) of CISG is generally read as eliminating any consideration requirement for modifications to sales contracts governed by the Convention.⁴⁹

44. HONNOLD, *supra* note 12, § 66; KRITZER, *supra* note 12, at 86; Hartnell, *supra* note 40, at 62, 64.

45. HONNOLD, *supra* note 12, § 64; MURRAY, *supra* note 12, § 151(B); Hartnell, *supra* note 40, at 79.

46. HONNOLD, *supra* note 12, § 107.1 at 166; MURRAY, *supra* note 12, § 151(B); KRITZER, *supra* note 12, at 82-84; Hartnell, *supra* note 40, at 83-84; Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.02[6] at 1-37 (Nina M. Galston & Hans Smit eds., 1984); Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in *id.* § 9.05[2], at 9-39.

47. *E.g.*, KRITZER, *supra* note 12, at 86-92; Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 79-80 (1988). For an extremely complete and thoughtful discussion of this issue see Hartnell, *supra* note 40, at 19-20 & 62-86.

U.C.C. § 2-719(2)—the “failure of essential purpose” limitation on the enforceability of limited remedies in a sales contract—offers a prime example of the uncertainty concerning the scope of the validity exclusion in CISG. President Murray and I have both argued that the doctrine might not be a matter of contractual validity because it is triggered by events occurring after a sales contract is formed. MURRAY, *supra* note 12, § 151(B) n.21; Flechtner, *Remedies Under the Sales Convention*, *supra* at 80. Professor Hartnell disagrees. Hartnell, *supra* note 40, at 84.

48. Because Beijing Metals was attempting to enforce ABC's promise to pay, ABC's contention would take the form of a “mutuality of obligation” argument. In other words, ABC would argue that it gave Beijing Metals no consideration by promising to do what it was already legally obligated to do. Thus even if Beijing Metals had promised in the payment agreement to refrain from enforcing its rights under the original sales contracts, that promise was unenforceable because Beijing Metals received no consideration for it. The agreement thus arguably lacked “mutuality of obligation” (“both parties must be bound or neither is bound,” as it is traditionally articulated) because Beijing Metals was not bound by its promise. *See Hay v. Fortier*, 102 A. 294 (Me. 1917). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. d & illus. 4, §79(c) & cmt. f (rejecting mutuality of obligation doctrine); MURRAY, *supra* note 12, § 65 (recommending that mutuality of obligation doctrine be “disavowed”).

49. HONNOLD, *supra* note 12, § 201; MURRAY, *supra* note 12, § 152(C), at 887.

That does not mean, however, that all consideration arguments fall outside the "validity" exclusion. The phrase introducing the exclusion of "validity" in Article 4 ("except as otherwise expressly provided in this Convention") indicates that some validity questions are explicitly addressed in CISG.⁵⁰ Thus, the fact that the Convention may dispense with the requirement of consideration for modifications does not mean that consideration in general is not a matter of validity. Nor does it necessarily imply that all consideration arguments are preempted merely because CISG does not include a general consideration requirement.

Suppose, for example, the buyer in *Beijing Metals* had argued that one of the original (unmodified) sales contracts was unenforceable because it lacked consideration. Nothing in CISG addresses whether an agreement (other than a modification or termination agreement covered by Article 29(1)) requires consideration to be enforceable. If consideration requirements are a matter of "validity" beyond the scope of CISG "except as otherwise expressly provided" (e.g., in Article 29(1)), the requirements of domestic law applicable under choice of law principles would govern.⁵¹ The buyer's argument could be seen as raising a question of validity because a lack of consideration (or a substitute therefor, such as promissory estoppel) renders a contract unenforceable under U.S. law.⁵² Furthermore, at least some of the justifications for the consideration doctrine implicate the protection of parties to an agreement,⁵³ and that is one of the distinguishing features of doctrines recognized as falling within the "validity" exclusion.⁵⁴ Finally, consid-

50. Hartnell, *supra* note 40, at 50-53, and text accompanying note 214 at 52 (indicating that Article 29(1) of CISG "expressly" deals with the validity of modification contracts). *But see* Kasately, *supra* note 42, at 645-46.

51. *See* BIANCA & BONELL, *supra* note 43; KRITZER, *supra* note 12, at 81; Hartnell, *supra* note 40, at 3 & *passim*. Because validity questions are not "matters governed by this Convention," they are not subject to the requirement in Article 7(2) that a tribunal first attempt to settle them "in conformity with the general principles on which [CISG] is based" before consulting domestic law.

52. *See* Hartnell, *supra* note 40, at 45 ("the validity exception directs [an adjudicator] to characterize an issue as one of validity only if a domestic law would render the contract void, voidable, or unenforceable") & 51 ("[t]he term 'validity' is a functional term that refers to an *effect*—i.e., void, voidable, and perhaps also unenforceable. . . .").

53. *See, e.g.,* Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1285-86 (7th Cir. 1985) (asserting that the traditional pre-existing duty rule was an attempt to protect parties to a contract from "exploitive or opportunistic attempts at modifications"); Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979) (noting that a reason for refusing to enforce promises unsupported by consideration is that such promises are likely to be made without sufficient deliberation).

54. *See* Hartnell, *supra* note 40, at 64 (suggesting that validity doctrines include those that apply when a party's "apparent consent" is not "real consent") and 80-84 (noting that it is the

eration requirements have been classified as a matter of contractual "validity" by various sources.⁵⁵

On the other hand, consideration requirements—unlike questions of fraud and duress—are by no means uniformly recognized to be matters of contractual "validity."⁵⁶ It is unlikely, furthermore, that there is an international consensus that enforceable agreements require something equivalent to common law consideration.⁵⁷ Thus, applying domestic U.S. consideration concepts to international sales governed by CISG would derogate from the uniformity that is mandated by Article 7 and that was one of the prime objects of CISG.⁵⁸ For this reason, some

"prevailing view" that "validity" encompasses unconscionability concepts and other doctrines designed "to guard the party having a weak bargaining position from disadvantage").

55. *E.g., id.* at 57 (referring to "validity issues such as capacity, form, *consideration*, vices of consent, and illegality" (emphasis added)); RESTATEMENT OF CONFLICT OF LAWS § 332 (1934) (mentioning "the mutual assent or consideration, if any, required to make a promise binding" under the heading "Law Governing Validity of Contract"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 200 cmt. b (1971) (listing "the general need for consideration, what constitutes consideration and the situations, if any, where a contract is binding without consideration" as within the scope of section entitled "Validity of Contract in Respects Other Than Capacity and Formalities"). There is even evidence that consideration requirements are considered matters of "validity" in international usage. According to Hartnell, *supra* note 40, at 63-64, a report prepared for UNIDROIT by the Max-Planck-Institut für ausländisches und internationales Privatrecht entitled DIE MATERIELLE GÜLTIGKEIT VON KAUFVERTRÄGEN (Hamburg 1968) includes coverage of "the requirement of consideration (or its civil law analogues)" under the topic of "substantive validity" of sales contracts.

56. *See* Kastely, *supra* note 42 ("the drafting history of article 4 suggests that the UNCITRAL representatives considered issues of validity to include only issues such as fraud, duress, unconscionability, and incapacity"). In addition, consideration requirements were apparently not considered a "validity" topic by the drafters of the UNIDROIT Draft Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods, UNIDROIT U.D.P. 1972, ETUDES: XVI/B, Doc. 22, *reprinted* 1973 *Revue de Droit Uniforme/Uniform Law Review* 59-69 (1973). At any rate, the topic of consideration is not covered in the UNIDROIT Draft Law nor is it mentioned by the drafters in their comments on validity topics that were omitted from the draft. Max-Planck-Institut für ausländisches und internationales Privatrecht, *Report*, 1973 *Revue de Droit Uniforme/Uniform Law Review* 71, 75-77 (1973).

57. Under the civil law, legally effective contractual obligations require "causa" or "cause"—a concept with some similarities to (and many differences from) common law consideration. *E.g.*, CODE CIVIL [C. Civ.] art. 1131 (Fr.). *See* the definition of "cause" in the glossary to the FRENCH CIVIL CODE 411 (John H. Crabb trans., 1977) ("*causa*, an element essential to the enforceability [*sic*] of a contract consisting of an adequately serious 'cause' or reason for a person to have obligated himself contractually; parallel in function to 'consideration' in Anglo-American contracts, and often similar in factual bases, it is without the formal concept of reciprocal exchange of benefit and detriment.").

58. *See* BIANCA & BONELL, *supra* note 43, "Introduction" ¶ 2.2 at 9 (a major purpose of CISG is "to assure a uniform regime for the international sales contracts") & art. 7 ¶ 2.2.2 at 74 ("the Convention's ultimate aim . . . is to achieve world-wide uniformity in the law of international sale contracts"); Peter Schlechtriem, *Unification of the Law for the International Sale of Goods*, in XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (GERMAN NATIONAL REPORT) 121, 141 (1987) (the "principal and preponderant purpose" of the Convention is "to reach unification");

have argued that a lack of such consensus should prevent an issue from coming within the "validity" exclusion.⁵⁹ Although the fact that CISG applies only to "sales" may imply some sort of "price" requirement,⁶⁰ that does not necessarily mean that U.S. domestic consideration ideas should be imported wholesale into the analysis of transactions governed by the Convention.

Resolving whether consideration requirements are matters of validity outside the purview of CISG is itself beyond the scope of this article. It is extremely important, however, that courts and practitioners become aware of the validity exclusion, its effects and its uncertainties. As one commentator opined, "how adjudicators distinguish uniform, autonomous Convention issues from issues of validity is critical to the success of CISG."⁶¹

II. *BRAUN v. ALITALIA-LINEE*: REDUCTION IN PRICE UNDER ARTICLE 50

Another recent opinion by a federal court—*S.V. Braun, Inc. v. Alitalia-Linee Aeree Italiane, S.p.A.*⁶²—deals with an interesting aspect of Convention remedies: proportional reduction of price by a buyer who has received non-conforming goods. In 1990 *S.V. Braun, Inc.* sold a shipment of bathing suit material to the Nikex Hungarian Foreign Trading Co. Nikex claimed that the material was defective and that the shipment was short in quantity. The parties later settled their dispute by allowing Nikex to retain \$35,000 of the purchase price. Braun then sued the carrier that had transported the material for tortiously misstating the weight of the delivery in the shipping documents, thus giving Nikex grounds for withholding payment. One of Braun's arguments was that Nikex had the right to withhold part of the price under CISG Article 50,⁶³ which provides:

Hartnell, *supra* note 40, at 6-7 (the "preeminent goal" of CISG is "predictability" or "achieving a uniform jurisprudence").

59. See Schlechtriem, *supra* note 58, at 128 (a doctrine should be deemed a matter of validity outside the scope of CISG only if it has gained universal acceptance or is a feature of most legal systems).

60. See also CISG Art. 53 ("The buyer must pay the price for the goods . . . as required by the contract and this Convention) as well as Arts. 54-59 (all of which discuss a buyer's obligation to pay "the price"). Cf. HONNOLD, *supra* note 12, § 56.1 (arguing that CISG covers barter transactions as well as those for a monetary consideration).

61. Hartnell, *supra* note 40, at 7-8.

62. No. 91 CIV. 8484 (LBS), 1994 WL 121680 (S.D.N.Y. Apr. 6, 1994).

63. The court assumed (without discussion) that the Convention applied to the sales transaction between Braun and Nikex. The assumption was probably correct. The seller was presumably

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.⁶⁴

The court rejected Braun's argument, explaining that

[t]he Vienna Convention may permit a proportionate reduction in price for non-conforming goods, but Braun has stipulated here that the goods delivered to Nikex were conforming. Accordingly, Nikex had no legal justification for withholding payment.⁶⁵

According to the court's statement, Braun stipulated only that the goods shipped to the buyer met the quality specifications of the contract ("*the goods delivered to Nikex were conforming*" (emphasis added)). But Article 35(1) of CISG—the first provision of the section of the Convention entitled "Conformity of the Goods and Third Party Claims"—states that "[t]he seller must deliver goods which are of the *quantity*, quality and description required by the contract. . . ." On the basis of this text at least one commentary declares that a failure of quantity constitutes a "nonconformity," and that reduction of price is therefore available when the goods are insufficient in either quality *or quantity*.⁶⁶ If so, a stipulation going merely to the conforming quality of the goods would be insufficient to establish that Nikex could not justifiably reduce the price under Article 50. Elsewhere in the *Braun* opinion, however, the court indicates that the seller also stipulated that "full delivery had in fact been made."⁶⁷ There is a textual argument, furthermore, that the phrase in Article 50 describing when the remedy applies—"If the goods do not conform with the contract"—refers only to situations where the goods fail to meet the quality obligations of the

located in the United States (although the court never specified Braun's location) and the buyer operated out of Hungary. Because CISG was in force with respect to both Hungary and the U.S. when the sale occurred in 1990, and because there is no evidence that the parties agreed to displace CISG with other law, the Convention would apply under Article 1(1)(a). See CISG Art. 6.

64. Article 50 continues: "However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price."

65. 1994 WL 121680 at *5.

66. Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255, 258, 265-67. Bergsten and Miller were not working with the final text of CISG, but were analyzing an earlier draft.

67. 1994 WL 121680 at *4.

contract.⁶⁸ Finally, it is worth noting that most commentators have not taken up the suggestion that price reduction is available when the seller ships the wrong quantity.⁶⁹

Many other aspects of Article 50 deserve careful attention from U.S. lawyers. It is a remedy distinct from the damage remedies with which we are familiar. Indeed, reduction of price is available even if the seller is exempt under Article 79 from liability for damages.⁷⁰

To date, English-language commentaries on Article 50 have focused on the provision's Civil Law origins;⁷¹ methods for calculating the amount of the price reduction;⁷² the distinction between damages governed by CISG Articles 74-77 and proportional price reduction under Article 50;⁷³ and the tendency of common law lawyers to misperceive the price reduction remedy as a mere setoff provision.⁷⁴ One of the more striking observations on Article 50, made by several commentators, is that in some circumstances the provision yields results inconsistent with a fundamental principle of common law remedies: protection of the expectation interest.⁷⁵

68. Article 35(1) itself does not explicitly state that delivery of an insufficient quantity of goods creates a "non-conformity." In contrast, Article 35(2) expressly declares that goods do not conform to the contract unless they meet quality specifications. Article 37, furthermore, seems to draw a distinction between a "deficiency in the quantity of the goods" and "non-conforming goods."

69. See, e.g., BIANCA & BONELL, *supra* note 43, art. 50 ¶¶ 1.1-3.4 (fails to mention the availability of price reduction where the seller delivers the wrong quantity of goods); HONNOLD, *supra* note 12, § 313.1 (fails to mention insufficient quantity as among the "types of non-performance" for which Article 50 arguably might provide a remedy).

70. Professor Honnold declares that Article 50 has its "principal significance" in situations where the seller can claim exemption from damages under Article 79. HONNOLD, *supra* note 12, § 312, at 393.

71. BIANCA & BONELL, *supra* note 43, art. 50 ¶ 1.2 at 368; HONNOLD, *supra* note 12, § 313 at 395; KRITZER, *supra* note 12, at 375; Bergsten & Miller, *supra* note 63, at 256-58, 272; Winship, *supra* note 12, at 49; Sara G. Zwart, *The New International Law of Sales: A Marriage Between Socialist, Third World, Common, and Civil Law Principles*, 13 N.C. J. INT'L L. & COM. REG. 109, 120-21 (1988).

72. BIANCA & BONELL, *supra* note 43, art. 50 ¶ 2.1.2; HONNOLD, *supra* note 12, § 312; KRITZER, *supra* note 12, at 375-78; Bergsten & Miller, *supra* note 66, at 259-63 (n.b., the discussion in the Bergsten & Miller article is based on an earlier draft of the Convention, and their analysis would change under the version of Article 50 finally adopted).

73. BIANCA & BONELL, *supra* note 43, art. 50 ¶ 1.2 at 368-69 & ¶ 2.1.3 at 372; HONNOLD, *supra* note 12, § 311; Andrew Babiak, Comment, *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT'L & COM. P.L.J. 113, 131; Bergsten & Miller, *supra* note 66, at 256, 271-72.

74. BIANCA & BONELL, *supra* note 43, art. 50 ¶ 1.2 at 368-69; HONNOLD, *supra* note 12, § 313 at 396; Bergsten & Miller, *supra* note 66, at 255-56, 267-72.

75. At the request of the UNCITRAL working group drafting the Convention, the U.N. Secretariat prepared a report dealing, inter alia, with the reduction in price remedy. The report criticized the remedy for producing results inconsistent with "acceptable principles for measuring dam-

Indeed, the price reduction remedy of CISG operates in a fashion that cannot be justified by any of the remedial principles recognized in U.S. contract law. In other words, Article 50 is not designed to protect the expectation interest, the reliance interest, or the restitution interest.⁷⁶ An example will illustrate. On April 1 Seller contracts to sell 100,000 barrels of oil with a sulphur content not to exceed 1% for \$25/barrel, delivery on May 1. On May 1 Seller delivers 100,000 barrels with a 2% sulphur content, and Buyer elects to accept the shipment. By May 1 the market value of 1% sulphur oil is only \$20/barrel, and the 2% sulphur oil actually delivered is worth even less—\$15/barrel. If Buyer chooses to pursue damages, which it can do under Article 74 of the Convention, its recovery will be measured by the difference between the \$20/barrel value that 1% sulphur oil would have had and the \$15/barrel value of the 2% sulphur oil that was actually delivered.⁷⁷ Thus Buyer is entitled to damages of \$5/barrel, with the result that Buyer would end up paying \$20/barrel (\$25/barrel contract price less \$5/barrel damages⁷⁸) for the 2% sulphur oil worth \$15/barrel.⁷⁹

ages"—specifically for violating the principle that, "to the extent practicable, the injured party should be placed in the same position as would have resulted from performance of the contract." REPORT OF THE SECRETARY-GENERAL: OBLIGATIONS OF THE SELLER IN AN INTERNATIONAL SALE OF GOODS: CONSOLIDATION OF WORK DONE BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AND SUGGESTED SOLUTIONS FOR UNRESOLVED PROBLEMS, IV UNCITRAL Y.B. 36 at ¶ 150, U.N. Doc. A/CN.9/WG.2/WP.16 (1973), *reprinted* in JOHN O. HONNOLD, DOCUMENT INTERNATIONAL SALES 112, 134 (1989). *See also* Bergsten & Miller, *supra* note 66, at 274 ("to allow the buyer to reduce the price where he has made a bad bargain would put him in a better position than he would be in if the seller were to perform the contract, a situation which cannot be justified by the usual explanation of the function of damages" (emphasis added)). Flechtner, *supra* note 47, at 59 n.28 ("Article 50 offers aggrieved buyers an alternative to damages which, in certain situations, yields results at odds with expectation-based remedies") and 102-03 (the Article 50 remedy "will in some circumstances violate expectation principles").

76. *See* MURRAY, *supra* note 12, § 117(A) for discussion of the three interests protected by common law contract remedies.

77. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, art. 70, ¶ 7, U.N. Doc. A/CONF.97.5 (1979) [hereinafter *Secretariat Commentary*], *reprinted* in JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 404, 449 (1989); BIANCA & BONELL, *supra* note 43, art. 74 ¶¶ 3.12-3.16; Flechtner, *supra* note 47, at 107 and authority cited n.262. Article 74 of the Convention does not specify when or where values are to be measured for purposes of determining damages, but there is authority for measuring value at the time and place of delivery. BIANCA & BONELL, *supra* note 43, art. 74 ¶ 3.16; Flechtner, *supra* note 47, at 107 n.262.

78. There is nothing in CISG equivalent to § 2-717 of the U.C.C., which permits a buyer to set off its damages before paying the contract price. Professor Honnold, nevertheless, suggests that a buyer with a damage claim may have a right of "set-off and counterclaim" as a matter of "procedural systems" and "payment and settlement practices" that are outside the scope of the Convention. HONNOLD, *supra* note 12, § 313.2. CISG's drafting history, furthermore, contains suggestions that parties to a sale governed by the Convention retain setoff rights they enjoy under otherwise-applica-

Article 74 damages calculated in this fashion will (as the common law has long viewed the matter) put Buyer in the position it would have been in had Seller properly performed the contract.⁸⁰

If Buyer chooses to reduce the price under Article 50, on the other hand, it would pay only \$18.75/barrel—\$6.25/barrel less than the contract price. The reduction is calculated by multiplying the contract price by a fraction—the ratio of the value, as of the delivery date, of the goods actually delivered to the value of conforming goods on that date.⁸¹ Since the 2% sulphur oil was worth \$15/barrel on the delivery date, and conforming (1% sulphur) oil would have been worth \$20/barrel, the ratio is $\frac{15}{20}$, or $\frac{3}{4}$. Multiplying the \$25/barrel contract price by $\frac{3}{4}$ yields \$18.75/barrel. Obviously that result departs from expectation damages as calculated under Article 74.⁸² Nor does it cor-

ble domestic law. Cf. *Secretariat Commentary, supra* note 77, art. 77, ¶ 9, reprinted in HONNOLD, *supra* note 77, at 453 (1989) (stating that party who has “claims arising out of the contract or its breach” and who resells goods under the CISG provision that became Article 88(3) retains whatever rights it had “under the applicable national law” to “defer the transmission of the balance [from the resale] until the settlement of those claims”).

79. The fact that Buyer would end up paying \$20/barrel for oil worth only \$15/barrel suggests that it may look for an alternative remedy. Buyer can refuse the tendered oil and “avoid the contract” if the non-conformity (the excessive sulphur content of the oil) constitutes a “fundamental breach.” See CISG Arts. 49(1)(a) and 25. By relieving Buyer of its obligation to pay the price (see CISG Art. 81), avoidance would put Buyer in a better financial position than if Buyer kept the oil, no matter what remedy it chose in the latter case—i.e., whether it claimed damages under Article 74 or reduced the price under Article 50. The point of the textual discussion, however, is not to identify Buyer’s best remedy, but to demonstrate that the remedy of price reduction under Article 50 departs from expectation-based remedies. For a more complete discussion of the remedies available to someone in Buyer’s position see Flechtner, *supra* note 47, at 54 ff.

80. In other words, if Seller had shipped conforming 1% oil Buyer would have paid the contract price of \$25/barrel for oil worth \$20/barrel, losing \$5/barrel. By paying \$20/barrel for 2% oil worth only \$15, buyer similarly loses \$5/barrel—its “expectation” is “protected.”

81. Formulas for calculating the price reduction are given in BIANCA & BONELL, *supra* note 43, art. 50 ¶ 2.1.2, and KRITZER, *supra* note 12, at 377. Note that the Article 50 calculation is based on the value of goods “at the time of the delivery.” In earlier drafts of the Convention price reduction was based on values “at the time of the conclusion of contract.” The change was made to avoid requiring proof of the value of goods as of a time when the goods might not exist. BIANCA & BONELL, *supra* note 43, art. 50 ¶ 1.3.2; HONNOLD, *supra* note 12, § 313 at 396. The discussion of price reduction in Bergsten & Miller, *supra* note 66, at 258-63, is based on the earlier version of the price reduction provision under which value was measured at the time the contract was formed; in other respects the analysis and examples in that article are consistent with the methodology used in the text.

82. “[W]hen, between the date of the contract and the date of delivery, there has been a decline in the value the goods would have had when delivered if the goods had conformed to the contract . . . the Article 50 formula can enable the buyer to obtain a larger recovery than the Article 74 formula.” KRITZER, *supra* note 12, at 377.

respond to a reliance-based or restitutionary recovery.⁸³ If the market value of oil was higher than the contract price on the delivery date, the result under Article 50 would again differ from expectation damages under Article 74—although in that case the Article 74 damages would exceed the reduction in price under Article 50.⁸⁴

In other words, the amount of the price reduction under Article 50 seems to be based on a principle unknown to the common law. To phrase the matter in a fashion that echoes the traditional description of common law remedy principles, one could say that Article 50 puts an aggrieved buyer in the position she would have been in had she purchased the goods actually delivered rather than the ones promised—assuming she would have made the same *relative* bargain for the delivered goods. For example, if at the time non-conforming goods were delivered the contract price was 80% of the market price of conforming goods, the buyer can buy the non-conforming goods for 80% of their market value. Put another way, expectation damages are designed to preserve for an aggrieved party the benefit of her bargain; reduction in price under Article 50 attempts to preserve the *proportion* of her bargain.⁸⁵

Alternatively one could view the Article 50 remedy as a modification of the sales contract. From this perspective a seller could be seen as offering such a modification by shipping non-conforming goods. The buyer accepts the offer by keeping the goods at an implied price pro-

83. On the facts of the example there are no apparent reliance damages or restitutionary amounts for Buyer to recover from Seller. Of course one might require Buyer to pay for the goods it has received at a restitutionary rate—i.e., the reasonable value of the 2% sulphur oil, which is \$15/barrel. This amount does not correspond to the \$18.75/barrel price produced by Article 50. Under the U.C.C., furthermore, Seller would not be limited to a restitutionary recovery against Buyer: Because Buyer has accepted the non-conforming oil, it must pay for the goods “at the contract rate,” U.C.C. § 2-607(1), with an offset for damages, U.C.C. §§ 2-714 and 2-717. The result would correspond to the CISG Article 74 damages described in the text. At any rate, it is clear on the facts of the example in the text that the amount of the price reduction under CISG Article 50 does not conform to common law restitutionary principles.

84. Thus if on May 1 the market value of 1% sulphur oil was \$35/barrel and 2% sulphur oil was worth \$30/barrel, Buyer could claim \$5/barrel damages under Article 74 (the difference between the value of conforming 1% sulphur oil and the 2% sulphur oil actually delivered). Subtracting these damages from the \$25 contract price, Buyer ends up paying \$20/barrel. The reduced price under Article 50 on these facts, in contrast, is approximately \$21.43/barrel ($\frac{30}{35}$, or $\frac{6}{7}$, times \$25/barrel).

85. “The proportion between the purchase price and the objective value of the goods is maintained.” BIANCA & BONELL, *supra* note 43, art. 50 ¶ 2.1.1 at 370. Bergsten & Miller, *supra* note 66, at 262 & 274, use the phrase “balance of the bargain.”

portional to the original contract price.⁸⁶ The “modification” view, however, should be handled with care. There are important differences between the fictitious modification permitted by Article 50 and an actual modification. For one thing, a buyer who accepts non-conforming goods and reduces the price under Article 50 is entitled to recover damages beyond the amount of the price reduction⁸⁷—although this could be rationalized as part of the implied price term of the modification. Additionally, the seller might be bound to a price reduction under Article 50 even if she made it clear that she did not intend to be so bound. Thus suppose a seller shipped non-conforming goods accompanied by notice that, if the buyer was unwilling to pay full price despite the non-conformity, the goods should be returned to the seller. It is not clear whether this expedient would prevent the buyer from keeping the goods and reducing the price under Article 50.⁸⁸

There are many other issues surrounding Article 50.⁸⁹ For example, although the provision specifies the time as of which the value of goods is to be determined (“the time of the delivery”), it is unclear *where* (i.e., in what geographical market) value should be measured.⁹⁰ It is also unclear whether the Article 50 remedy is available against sellers who violate their obligations under Articles 41 or 42 to deliver goods free of rights and claims of third parties⁹¹ and whether a buyer is bound by an election of remedies if it avails itself of Article 50.⁹² For

86. See Bergsten & Miller, *supra* note 66, at 274 (“The justification for a reduction of price for defect in quality is a reformation of the original contract which retains the relative balance of the bargain made by the parties.”).

87. CISG Art. 45(2) provides that “[t]he buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.” See also HONNOLD, *supra* note 12, § 312 at 395; KRITZER, *supra* note 12, at 377-78; Bergsten & Miller, *supra* note 66, at 259; Flechtner, *supra* note 47, at 106.

88. The situation also raises questions concerning damage remedies: could the buyer keep the goods and claim difference-in-value damages under Article 74 despite the seller’s notice?

89. So many, in fact, that one commentary states: “Price reduction as a remedy in international sales law meets with the greatest difficulties.” BIANCA & BONELL, *supra* note 43, art. 50 ¶ 1.2 at 368.

90. *Id.* ¶ 3.3; FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS art. 50 ¶ 4 (1992).

91. BIANCA & BONELL, *supra* note 43, art. 50 ¶ 3.4; HONNOLD, *supra* note 12, § 313.1.

92. HONNOLD, *supra* note 12, § 312 at 394-95; Bergsten & Miller, *supra* note 66, at 264.

Other questions include what notice, if any, a buyer who wishes to reduce the price must give the seller (*compare* BIANCA & BONELL, *supra* note 43, art. 50 ¶ 2.1.3 (implying that reduction in price requires notice that takes effect upon dispatch) and HONNOLD, *supra* note 12, § 312 at 394 (assuming that a buyer will give notice of price-reduction) with Bergsten & Miller, *supra* note 66, at 263 (stating that “no [notice] requirement is placed on the declaration of reduction of price”)); the time limits for invoking Article 50 (see BIANCA & BONELL, *supra* note 43, art. 50 ¶ 2.1.3); how the

U.S. lawyers, however, the most pressing job is to apprehend the nature of the price reduction remedy—how it departs from the remedial concepts with which we are familiar, and how it establishes a new remedy principle of substantial potential significance in certain scenarios.

CONCLUSION

It is critical to the long term success of CISG that courts apply it from a perspective that transcends the purely domestic sales law concepts with which they are familiar.⁹³ As the trickle of U.S. cases construing CISG builds to a more substantial flow, the attainment of this international perspective by our courts and the lawyers that argue before them assumes greater importance. On the evidence of the cases decided by U.S. courts to date, including the *Beijing Metals* case discussed in this article, it appears that the necessary outlook has not yet been secured.⁹⁴ The judiciary of some other countries, particularly in Europe, may have a leg up on achieving the proper viewpoint because they have long been forced to deal with cross-border transactions and foreign law. Fortunately, what is required to transcend our “common law ideology” and attain the requisite international outlook is nothing more than a fundamental lawyer’s skill: the ability to identify and analyze the assumptions underlying our initial reactions to a situation.

reduction is to be calculated if the price is payable other than in money (*id.*, art. 50 ¶ 3.1); and the consequences of the “unilateral” nature of remedy (*id.*, art. 50 ¶ 2.1.3; HONNOLD, *supra* note 12, § 313.2; Bergsten & Miller, *supra* note 66, at 263).

93. See, e.g., John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988).

94. See also the discussion of *Filanto, S.p.A. v. Chilewich International Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993), in Brand & Flechtner, *supra* note 16, at 242-52.