HEINONLINE

DATE DOWNLOADED: Sat Jul 27 10:49:49 2024
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
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 (1988).

ALWD 7th ed.
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 (1988).

APA 7th ed.
Flechtner, H. M. (1988). Remedies under the new international sales convention: the perspective from article of the u.c.c. Journal of Law and Commerce, 8(1), 53-108.

Chicago 17th ed.
Harry M. Flechtner, "Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.," Journal of Law and Commerce 8, no. 1 (1988): 53-108

McGill Guide 9th ed.
Harry M. Flechtner, "Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C." (1988) 8:1 JL & Com 53.

AGLC 4th ed.
Harry M. Flechtner, 'Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.' (1988) 8(1) Journal of Law and Commerce 53

MLA 9th ed.
Flechtner, Harry M. "Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C." Journal of Law and Commerce, vol. 8, no. 1, 1988, pp. 53-108. HeinOnline.

OSCOLA 4th ed.
Harry M. Flechtner, 'Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.' (1988) 8 JL & Com 53
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

REMEDIES UNDER THE NEW INTERNATIONAL SALES CONVENTION: THE PERSPECTIVE FROM ARTICLE 2 OF THE U.C.C.

*by Harry M. Flechtner**

At the University of Pittsburgh Law School symposium on the United Nations Convention on Contracts for the International Sale of Goods,[1] Professor John Honnold urged his audience to avoid reading the international text of the Convention through the lens of domestic law.[2] Such a suggestion from such a source must give pause to one engaged in a comparison of the Convention to Article 2 of the Uniform Commercial Code.[3] Comparisons are, however, an inevitable and perhaps necessary evil until the Convention becomes familiar to those who must interpret and apply its provisions. Lawyers cannot help but approach a new legal regime from the perspective of the law with which they are already acquainted. Done carefully, to avoid distorting the new law into either a mere image of the known or a menacing shadow of change, comparisons can build on established knowledge to provide an efficient introduction to unfamiliar provisions. Comparisons of CISG to domestic sales law can help to translate the Convention's message into a medium that is understandable.

Translation, however, distorts. "Translations" of the Convention will have lasting value only to the extent they aid in becoming fluent in the Convention's "language." That is the premise of the following comparison between the remedy provisions of the Convention and those in Article 2 of the U.C.C. Its goal is to compare not as an

* Assistant Professor, University of Pittsburgh School of Law. A.B. 1973, Harvard College; A.M. 1975, Harvard University; J.D. 1981, Harvard University School of Law. The author wishes to thank Professor Susan Koniak of the University of Pittsburgh School of Law, who read drafts of this article with patience, pruned their prose with kindness, and suggested substantive improvements with insight. The remaining analytical failures and stylistic overgrowth are entirely the author's responsibility. The author also gratefully acknowledges the contributions of Pittsburgh Law School student Linda Stagg, who provided prompt, accurate and intelligent research.

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 INT'L LEGAL MAT. 668 (1980) [hereinafter cited as "Sales Convention"].

2. J. Honnold, "Implementation of the Convention: Ways to Maximize Uniformity in Application," closing remarks at the University of Pittsburgh School of Law Symposium on International Sales Contracts under the Convention (October 23, 1987).

3. U.C.C. §§ 2-101 to 2-725 (1978).

end in itself, but as an *entree* to the Convention for those familiar with the Article 2 perspective on remedies.

The topic is a demanding one. The Convention contains a unique and coherent system of remedies with many similarities to and just as many points of departure from the remedial system in Article 2. Matters of significance for U.S. lawyers emerge from both the details of particular provisions and from the Convention's general approach to remedies. The discussion therefore begins with a broad comparison of the remedy systems in the two bodies of law, emphasizing the different approaches taken to fundamental questions framed by Article 2 in terms of acceptance, rejection, revocation of acceptance and cancellation, and addressed in the Convention under the rubric "avoidance of contract." This general comparison highlights the most important aspects of Convention remedies from an Article 2 perspective—increased availability of specific performance, greater reclamation rights for aggrieved sellers, broader powers to elect remedies, and a uniform material breach standard for relief from contractual duties. The discussion then proceeds to a closer examination of CISG remedy provisions, using the Article 2 perspective to illuminate specific articles of the Convention.

I. General Comparison of Remedies Under CISG and Article 2 of the U.C.C.

Article 2 of the U.C.C. contains two alternative remedial schemes. In one, the exchange contemplated by the contract of sale is completed despite a breach by one of the parties. The goods end up with the buyer and the seller receives the price, either because the breaching party voluntarily (although defectively) performs or because a court orders the breaching party to perform. Money damages compensate the aggrieved party for ways in which the completed exchange falls short of that contemplated.

In the other Article 2 scheme the exchange is not completed. The buyer does not end up with seller's goods and the seller has no right to the price from the buyer. Instead, the parties' obligation to complete the contemplated exchange is "cancelled."[4] An aggrieved

4. "Cancellation occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance." U.C.C. § 2-106(4) (1978). The effect of "termination" is to discharge "all obligations which are still executory on both sides. . . ." *Id.* § 2-106(3).

party can thus escape a bad bargain. If the exchange would have been favorable, the non-breaching party can recover a monetary equivalent in the form of damages measured by the difference between the contract price and either the cost of a substitute transaction (cover/resale damages) or the market price of the goods.

The Article 2 concept that usually dictates which of these two remedial schemes will apply is "acceptance." If a buyer receives and continues to "accept" the goods, the exchange will normally be completed despite a breach.[5] Thus, except in rare circumstances, a buyer can retain accepted goods and a seller is entitled to the price for accepted goods.[6] If the seller has breached, an accepting buyer can recover compensation for resulting loss—damages measured by, for instance, the difference in value between conforming goods and nonconforming goods which were actually delivered plus incidental and consequential damages.[7] If an accepting buyer has breached, the seller's usual remedy is an action for the price plus incidental damages.[8]

Alternatively, if the goods do not continue to be accepted—that is, if the seller has (rightfully or wrongfully) not delivered or the buyer has (rightfully or wrongfully) rejected or revoked acceptance[9] of delivered goods—the basic exchange will normally not be completed. Thus if the buyer has not received and retained the goods, the non-breaching party can require literal performance by the other side only in those rare cases where an aggrieved buyer can obtain specific performance or replevin,[10] or where an aggrieved seller can recover

5. This scheme also applies where "conforming goods are lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer," *id.* § 2-709(1)(a), even if the buyer has not technically "accepted" the goods. In this situation, Article 2 in effect provides that the buyer will be deemed to have accepted the goods and thus the non-breaching seller is entitled to the price.

6. *Id.* §§ 2-607(1), 2-709(1)(a). The only exceptions are the seller's rights to reclaim goods under § 2-702(2) or under the "cash sale" doctrine, *see id.* §§ 2-507(2), 2-507 comment 3, 2-511(3). Successful reclamation under § 2-702(2) "excludes all other remedies with respect to" the reclaimed goods. *Id.* § 2-702(3).

7. *Id.* § 2-714.

8. *Id.* § 2-709(1).

9. In at least some circumstances a wrongful attempt to revoke *(e.g.*, where the goods conform to the contract) may be "ineffective;" in other words, the buyer may be deemed to continue to accept the goods. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 7-3, at 259-60 (2nd ed. 1980).

10. A buyer is entitled to specific performance "where the goods are unique or in other proper circumstances." U.C.C. § 2-716(1) (1978). Replevin is available if the goods have been identified to the contract and "after reasonable effort [the buyer] is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been

the price because the goods cannot be resold or have suffered casualty after risk of loss passed to the buyer.[11] Where the goods do not continue to be accepted, therefore, the aggrieved party can escape an unfavorable bargain but normally must look to resale/cover damages[12] or market price differential damages[13] as compensation for a lost favorable exchange.

The Convention contains two alternative remedial schemes that correspond, in broad outline, to those in U.C.C. Article 2. The most important difference between the remedy systems of CISG and Article 2 is the sorting or channeling mechanism that dictates which of the alternative schemes will apply. Under the Convention, avoidance (or nonavoidance) of the contract performs the function that acceptance (or nonacceptance) of the goods performs under Article 2. Avoidance is the process through which an aggrieved party, by notice to the other side,[14] terminates the contractual obligations of the parties.[15] If the contract is not avoided, the Convention contemplates that the basic exchange of goods and price will be completed despite a breach, with damages or other remedies to compensate for defects in the exchange. If the contract *is* avoided, the contemplated exchange either will not occur or will be undone,[16] triggering remedial provisions very similar to the Article 2 remedies that apply when goods are not accepted or acceptance is revoked. Thus a party who avoids a contract governed by the Convention can escape a bad bargain or look to resale/cover[17] or market price differential damages[18] to compensate for a lost favorable exchange.

The key to the Convention's rules regarding avoidance is "fundamental breach." If the other side has committed a fundamental

---

shipped under reservation and satisfaction of the security interest in them has been made or tendered." *Id.* § 2-716(3).

11. *Id.* § 2-709(1)(a), (b).

12. *Id.* §§ 2-706, 2-712.

13. *Id.* §§ 2-708(1), 2-713.

14. *See* Sales Convention, *supra* note 1, art. 26.

15. U.C.C. Article 2 also uses the term "avoid," but in a different sense. In Article 2 the term denotes termination of a contract without liability for breach. U.C.C. §§ 2-328(4), 2-513(4), 2-613(a), (b) (1978). In the Convention, the term "avoidance" and its variants refer to ending the parties' contractual obligations because of a breach for which the defaulting party remains liable. *See* Sales Convention, *supra* note 1, art's. 81, 75, 76. "Cancellation" is the Article 2 term analogous to "avoidance" as used in CISG. *See* U.C.C. § 2-106(4) (1978).

16. Upon avoidance of the contract, CISG grants each party a right to restitution of what it "has supplied or paid under the contract." Sales Convention, *supra* note 1, art. 81(2).

17. *Id.* art. 75.

18. *Id.* art. 76.

breach, the aggrieved party can avoid the contract.[19] Subject to one exception,[20] if the other side has *not* committed a fundamental breach, the aggrieved party cannot avoid the contract. The Convention defines "fundamental breach" in terms of the materiality and foreseeability of its consequences—that is, a breach is "fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract," provided this result is foreseeable.[21]

For those schooled in Article 2 of the U.C.C., the Convention's use of avoidance/nonavoidance rather than acceptance/nonacceptance significantly changes the analysis of remedies. In some situations, the Convention's approach produces notably different results. The most important of these differences will be explored by discussing four observations concerning the Convention's remedy system: (1) subject to certain constraints, specific performance is readily available under the Convention because a contract need not be avoided even if the goods have not been tendered or accepted; (2) subject to certain constraints, where a buyer commits a fundamental breach the aggrieved seller can readily reclaim goods under CISG because avoidance is an option even if the goods have been tendered and accepted; (3) where the aggrieved party has a right to avoid, the Convention's remedy system is radically elective; (4) the Convention contains a uniformly-applicable material breach standard ("fundamental breach") for relief from contractual duties.

A. Specific Performance and Remedies Where the Buyer Retains Goods: The Aggrieved Party's Nonavoidance Option

Articles 49(1)(a) and 64(1)(a) of CISG provide that, where one party commits a fundamental breach, the aggrieved party "may" avoid the contract. Avoidance terminates the obligation to exchange goods for price and triggers the avoiding party's right to resale/cover or market-price damages.[22] Nothing in the Convention, however, requires avoidance. Even if a fundamental breach has occurred, the aggrieved party can choose not to avoid—that is, the party can opt for

19. *Id.* art's. 49(1)(a), 64(1)(a).

20. *See* the discussion of the Convention's *Nachfrist* provisions at *infra* notes 82-91 and accompanying text.

21. *See* Sales Convention, *supra* note 1, art. 25.

22. For further discussion of the consequences of avoidance, see *infra* notes 36-76, 115-28 and accompanying text.

the set of remedies that contemplate completion of the basic exchange.

If the buyer has possession of the goods, nonavoidance produces results similar to those under Article 2 where the buyer has accepted and not revoked: the seller has a right to the price,[23] the buyer keeps the goods, and the aggrieved party can claim damages for losses caused by the breach.[24] Under the Convention, however, the nonavoiding buyer who has received non-conforming goods has certain remedies not available under Article 2. For instance, the buyer can demand substitute goods if the non-conformity constitutes a fundamental breach.[25] In addition, the buyer can demand that the seller repair any lack of conformity unless that would be "unreasonable in the circumstances."[26] Substitute goods or repair are not normally available to an aggrieved Article 2 buyer unless volunteered by the seller—for instance, in an attempt to cure under U.C.C. section 2-508.[27] In addition, a nonavoiding buyer can, under Article 50 of the Convention, reduce the price in proportion to the loss in value caused by the goods' lack of conformity. This civil-law-based remedy, which should not be confused with setting off damages against the price (as permitted, for instance, by U.C.C. section 2-717), has already received considerable scholarly attention and will not here be discussed in

23. *See* Sales Convention, *supra* note 1, art. 62; U.C.C. § 2-709(1)(a) (1978).

24. Under the Convention, a nonavoiding aggrieved party can recover damages "equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach," provided the loss was foreseeable. *See* Sales Convention, *supra* note 1, art. 74. Under U.C.C. Article 2, the aggrieved party in an acceptance situation can recover similar damages. *See* U.C.C. §§ 2-709(1), 2-714 (1978).

25. *See* Sales Convention, *supra* note 1, art. 46(2). The buyer must request substitute goods either when it gives notice specifying the defects, as required by Article 39, or within a reasonable time thereafter. For discussion of the Article 39 notice requirement, *see infra* notes 234-44 and accompanying text. For further discussion of the substitute goods remedy, *see* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 222, 301 (1982).

26. *See* Sales Convention, *supra* note 1, art. 46(3). The buyer must request repair within the same time limits as apply to a request for substitute goods under Article 46(2) *(see supra* note 25). For further discussion of the repair remedy *see* HONNOLD, *supra* note 25.

27. An order requiring the seller to repair non-conforming goods may be available under Article 2 of the U.C.C. where the circumstances justify specific performance under U.C.C. § 2-716(1). Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152 (D. Colo. 1981). A court's power under Article 2 to order specific performance may also include the power to require delivery of substitute goods if, for instance, seller was the sole source of supply and the goods it had delivered could not be repaired. Unlike the remedies provided in Articles 46(2) and (3) of the Convention, however, an order requiring repair or delivery of substitute goods under U.C.C. Article 2 is presumably limited to situations falling within U.C.C. § 2-716(1) (1978)—that is, "where the goods are unique or in other proper circumstances."

detail.[28]

The nonavoidance scheme of remedies which contemplates that the exchange of goods for price will take place, furthermore, is available whether or not the seller has delivered the goods and whether or not the buyer has accepted delivery. To implement the aggrieved party's nonavoidance option, the Convention gives the aggrieved party a broad right to the actual performance promised by the breaching party. Article 46(1) grants an aggrieved buyer a right to specific performance "unless the buyer has resorted to a remedy which is inconsistent with this requirement"—that is, unless the buyer has avoided the contract.[29] Similarly, Article 62 grants an aggrieved seller a right to demand that the buyer take delivery and pay the price unless the seller has avoided the contract.

Despite the broad language of Articles 46(1) and 62 of CISG, an aggrieved party's right to demand actual performance of the other side's obligations is subject to several limitations. The most important derives from Article 28 of the Convention, which provides that "a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." Where the forum's rules on specific performance in domestic sales contracts are more restricted than those in the Convention, Article 28 permits the forum to apply its restrictive domestic law to transactions governed by the Convention.[30] The law of the forum can be applied even if, absent the Convention, foreign law would govern the transaction

28. For detailed discussion of the price reduction remedy in Article 50, see HONNOLD, *supra* note 25, at 322-27; Bergsten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255 (1979). Bergsten and Miller emphasize the fact that Article 50 offers aggrieved buyers an alternative to damages which, in certain situations, yields results at odds with expectation-based remedies. Professor Honnold argues that price reduction "has its principal significance when the buyer accepts defective goods under circumstances in which . . . the seller is not liable for 'damages.' " HONNOLD, *supra* note 25, at 325.

29. Where the seller has delivered non-conforming goods, the aggrieved buyer's right to actual performance by the seller (that is, the buyer's right to demand conforming substitute goods or repair of the defective goods) is subject to substantive limitation and a special notice requirement. The buyer can demand substitute goods "only if the lack of conformity constitutes a fundamental breach of contract" and can demand repair only if not "unreasonable having regard to all the circumstances." *See* Sales Convention, *supra* note 1, art. 46(2), (3). In either case, buyer must make demand for such remedy either on or within a reasonable time after the notice of non-conformity required under Article 39. *Id.*

30. The wording of Article 28 appears to permit but not mandate imposition of a forum's restrictive specific performance rules.

under choice of law principles.[31] A U.S. court, therefore, could restrict specific performance in a transaction governed by the Convention to situations where it would be available under the forum's domestic sales law. In most cases, of course, this will be Article 2 of the U.C.C.[32]

Other indirect limitations on an aggrieved party's right to compel the breaching party to perform are imposed by the Convention's substantive requirements and by limitations in its scope. For example, Professor Honnold argues that the mitigation of damages principle in Article 77 and an aggrieved seller's obligation under Articles 85 and 88(2) to dispose of goods within its control if the goods are subject to rapid deterioration will sometimes prevent the aggrieved party from forcing the contemplated exchange to be completed.[33] Interposition of third party rights may also foreclose an aggrieved party's nonavoidance option. The Convention does not govern the rights of those not party to the contract of sale.[34] If creditors of the seller have acquired

31. HONNOLD, *supra* note 25, at 223-25. Thus a choice of forum clause in a contract governed by the Convention might operate as a choice of law clause with respect to the availability of specific performance.

32. To obtain an order requiring seller to deliver, therefore, a Convention buyer litigating in most American forae might have to prove that "the goods are unique" or there are "other proper circumstances" within the meaning of U.C.C. § 2-716(1). The buyer could also presumably obtain such an order if it would have a right of replevin under U.C.C. § 2-716(3) or if it could claim undelivered goods under U.C.C. § 2-502, although neither of these U.C.C. provisions is generally considered to give rights to "specific performance."

In most U.S. courts, a buyer's right to substitute goods or repair under Article 46(2) and (3) of the Convention would also be subject to the restrictive specific performance rules of Article 2. An order requiring the seller to repair non-conforming goods is, under Article 2, a specific performance remedy available only where the requirements of U.C.C. § 2-716(1) are met. Colorado-Ute Elec. Ass'n v. Envirotech Corp., 524 F. Supp. 1152, 1159 (D. Colo. 1981). The characterization probably applies equally to an order requiring seller to deliver goods in substitution for non-conforming goods. Because relief under Article 46(2) or (3) of the Convention would constitute a "judgment for specific performance" in a jurisdiction that has adopted Article 2, courts in such jurisdictions presumably need not grant these remedies unless the Article 2 requirements for specific performance are met. *Cf.* HONNOLD, *supra* note 25, at 221-22 (including Article 46(2) and (3) among "the general rules [of the Convention] which Article 28 modifies").

It is less clear whether a U.S. court could restrict the seller's right to the price under Article 62 of the Convention to situations where that remedy would be available under U.C.C. § 2-709(1)—*i.e.*, where the goods were accepted or were destroyed after risk of loss passed to the buyer, or where seller cannot resell at a reasonable price. Professor Farnsworth suggests that a seller's price remedy is not a matter of "specific performance" and thus may not be subject to the "forum approach" rule in Article 28. *See* Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, 249-50 (1979). Professor Honnold, however, asserts that Article 28 makes U.C.C. § 2-709 applicable where the seller sues in a U.S. court to recover the price. HONNOLD, *supra* note 25, at 227.

33. HONNOLD, *supra* note 25, at 222.

34. *See* Sales Convention, *supra* note 1, art. 4.

rights in the goods to be delivered or if the seller has entered into bankruptcy or similar proceedings, the question of the priority of the buyer's claim for performance will be governed by applicable non-Convention law. If such law does not give the buyer's claim for performance priority, the buyer's attempt to compel performance may be defeated.[35] Similarly, if buyer has begun bankruptcy or equivalent proceedings, an aggrieved seller's right to force the buyer to take the goods and pay the price will be subject to non-Convention law that may trump the Convention's provisions.

Even with these limitations, an aggrieved party's power under the Convention to compel the exchange of goods for price where the buyer has not accepted the goods produces results significantly different from those under Article 2. For instance, Article 2 limits an aggrieved buyer's right to obtain undelivered goods to certain narrow circumstances. The buyer is entitled to specific performance under U.C.C. section 2-716(1) only "where the goods are unique or in other proper circumstances." The buyer has a right to replevy unshipped goods under U.C.C. section 2-716(3) only if the goods are identified to the contract and cover is unavailable. Finally, the buyer can recover undelivered goods under U.C.C. section 2-502 only if it has paid a

35. If the buyer has substantially completed its performance under the sales contract, the issue that would arise under U.S. bankruptcy law is whether the buyer's right to a remedy entailing actual performance of the contract would give the buyer a "claim." The Bankruptcy Code defines "claim" to include a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. . ." 11 U.S.C. § 101(4)(B) (1982). According to the legislative history, this definition means that a right to specific performance is a "claim" if but only if applicable law permits payment as an alternative means to satisfy the specific performance right. 124 CONG. REC. 32,393 (statement of Rep. Edwards). If the Convention's specific performance right does not give rise to a "claim," the right would not be discharged by the seller's bankruptcy proceedings. *Id.* This will not do the buyer much good if, *e.g.*, the seller is a corporation liquidating under Chapter 7 of the Bankruptcy Code: during the course of the bankruptcy proceedings the buyer will be automatically stayed from enforcing its right, 11 U.S.C. § 362(a)(1), (2), (3) (Supp. IV 1986); unless the buyer's right to specific performance is seen as a property right in the goods to be recognized and protected in bankruptcy, the buyer will end up with a nondischarged right to specific performance against an empty corporate shell. On the other hand, if the right to specific performance under the Convention is a "claim," the claim will be estimated, *id.* § 502(c)(2), and will presumably have the priority of an unsecured claim.

Under U.S. bankruptcy law an unavoided sales contract will be considered an "executory contract" if material performance remains due on both sides. Countryman, *Executory Contract in Bankruptcy, Part I*, 57 MINN. L. REV. 439, 460 (1973). The bankruptcy trustee generally has the right to "reject" or, if defaults are cured, "assume" executory contracts. 11 U.S.C. § 365(a), (b)(1) (Supp. IV 1986). If a seller's trustee rejects an executory sales contract governed by the Convention, the seller's bankruptcy estate need not perform under the contract and the buyer will normally have a breach of contract claim that is deemed to arise before the bankruptcy petition. *Id.* § 365(g)(1). This claim would presumably be treated as unsecured.

portion of the price and tendered the balance, the seller has become insolvent within 10 days after receiving the buyer's first payment, the goods have been identified to the contract and, where the buyer made the identification, the goods conform to the contract. An Article 2 seller's right to compel a breaching buyer to pay for goods that have not been accepted is also quite limited. Under U.C.C. section 2-709, the seller can recover the price of unaccepted goods only if they suffered casualty after risk of loss passed to the buyer or if the seller cannot resell at a reasonable price. The Convention, in contrast, permits aggrieved parties to exact actual performance by the breaching party unless the result would violate the mitigation principle, third party rights have intervened, or the matter is litigated in a forum where domestic sales law would not permit such relief.

B. Rejection, Revocation, and Reclamation of the Goods: The Aggrieved Party's Avoidance Option

While an aggrieved party's nonavoidance option and its corollary—the right to compel performance by the other side—creates striking differences between the remedy systems of the Convention and Article 2 where the goods have not been delivered and accepted, the avoidance option creates equally striking differences for seller's remedies where buyer has received and retained the goods.[36] An aggrieved seller's right under the Convention to avoid the contract where the buyer has possession of the goods, thus aborting the exchange and entitling the seller to restitution of the goods, has no Article 2 parallel. Where it is the seller who is in breach, in contrast, the buyer's option to avoid even though it has received the goods yields results very similar to those under Article 2.

Article 49(1) of the Convention permits a buyer to avoid the contract whenever the seller commits a fundamental breach or fails to deliver in response to a *Nachfrist* ultimatum under Article 47.[37]

36. Where the buyer has not accepted the goods (*i.e.*, the seller has not delivered or the buyer refuses to retain the goods) avoidance under the Convention yields results very similar to those under U.C.C. Article 2. The normal Article 2 remedies where seller has rightfully or wrongfully refused to deliver or where buyer has rightfully or wrongfully rejected or revoked acceptance are (1) cancellation of the parties' obligations to complete the exchange and (2) resale/cover or market-price damages for the aggrieved party. U.C.C. §§ 2-703, 2-711(1) (1978). Similarly, upon avoidance under the Convention the parties are relieved of their obligations to perform and the aggrieved party can recover resale/cover or market-price damages. *See* Sales Convention, *supra* note 1, art's. 75, 76, 81(1).

37. *Nachfrist* is a procedure through which an aggrieved party can make the other side's failure

Avoidance relieves both parties of executory performance obligations.[38] It gives the buyer a right to restitution of amounts "paid under the contract"[39] and an obligation to return whatever the seller has "supplied . . . under the contract."[40] Thus if the seller has delivered goods, an avoiding buyer must preserve[41] and return the goods, although it may retain them until reimbursed for reasonable expenses of preservation.[42] Indeed, subject to certain broad exceptions, the buyer loses the right to avoid if it cannot return the goods "substantially in the condition" in which it received them.[43] The buyer will also lose the right to avoid unless it sends notice of avoidance within a reasonable time after it knew (or should have known) of the breach.[44] Furthermore, the buyer will lose the right to avoid on the basis of non-conformity in the goods unless it sends notice "specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it"[45] or, at the latest, within two years from the date of delivery.[46] Successful avoidance entitles the buyer to damages measured by the market price of the goods or the price paid in a substitute transaction ("cover").[47]

The buyer's power under the Convention to avoid after the goods have been delivered is strikingly similar to the buyer's power to reject or revoke acceptance under Article 2 of the U.C.C. A rejecting or revoking buyer, like an avoiding buyer, has a right to recover "so

---

to perform its basic obligations by a particular date the equivalent of a fundamental breach. For further discussion of *Nachfrist*, see *infra* notes 82-91 and accompanying text.

38. *See* Sales Convention, *supra* note 1, art. 81(1).

39. *Id.* art. 81(2). In addition, an avoiding buyer can claim interest from the date of payment. *Id.* art. 84(1).

40. *Id.* art. 81(2). In addition, the avoiding buyer "must account to the seller for all benefits which he has derived from the goods or part of them. . . ." *Id.* art. 84(2).

41. Articles 86-88 of CISG detail the avoiding buyer's obligation to preserve delivered goods.

42. *See* Sales Convention, *supra* note 1, art. 86(1). Under Article 88(1) and (2), however, an avoiding buyer may in certain circumstances have a right or even a duty to sell goods in its possession. In that case, the buyer may retain the reasonable costs of preservation and sale from sale proceeds and must account to the seller for the balance. *Id.* art. 88(3).

43. The buyer retains the right to avoid if (1) its inability to restore the goods substantially in their original condition is not due to its own act or omission, (2) the goods changed condition as a result of the inspection provided for in Article 38, or (3) the buyer has sold, consumed or transformed the goods in the normal course before discovering their nonconformity. *Id.* art. 82.

44. *Id.* art. 49(2)(b)(i). Subsections (ii) and (iii) of Article 49(2)(b) adjust the time within which buyer must avoid if the buyer has given a *Nachfrist* ultimatum under Article 47 or if the seller has exercised its right under Article 48(2) to demand that the buyer declare whether it will accept performance.

45. *Id.* art. 39(1).

46. *Id.* art. 39(2).

47. *Id.* art's. 75, 76.

much of the price as has been paid"[48] and an obligation to preserve and return the goods to the seller,[49] subject to a security interest for reasonable expenses of "inspection, receipt, transportation, care and custody. . . ."[50] A buyer loses the right to revoke acceptance under Article 2 if the goods have undergone "any substantial change in condition" not caused by their own defects[51]—a limitation similar to that in Article 82 of the Convention. Article 2 requires a buyer to send notice of rejection or revocation within time constraints similar to those applicable to notice of avoidance under the Convention.[52] By

48. U.C.C. § 2-711(1) (1978). Article 2, however, does not specifically give buyer the right to recover interest on payments. Contrast Article 84(1) of the Convention.

49. U.C.C. §§ 2-602(2)(b), 2-608(3) (1978). Article 84(2) of the Convention requires the avoiding buyer to "account to the seller for all benefits which he has derived from the goods or part of them." Several cases and commentators have found an equivalent implied duty under Article 2. *See* American Container Corp. v. Hanley Trucking Corp., 11 N.J. Super. 322, 268 A.2d 313 (1970); WHITE & SUMMERS, *supra* note 9, at 317-18 and cases cited at 318-19 n.72; Phillips, *Revocation of Acceptance and the Consumer Buyer*, 75 COM. L.J. 354, 357 (1970).

50. U.C.C. § 2-711(3) (1978). Under U.C.C. §§ 2-603, 2-604 and 2-608(3), the rejecting or revoking buyer may have a right or even an obligation to sell the goods which is similar to an avoiding buyer's right or obligation to sell under Article 88(1) and (2) of the Convention. When a U.C.C. Article 2 buyer resells, it is entitled to retain from the proceeds of sale an amount equal to its "reasonable expenses of caring for and selling" the goods, including a sales commission even if the buyer has not paid a commission to a third party. U.C.C. § 2-603(2) (1978); *see id.* §§ 2-604, 2-608(3). Except for the matter of the buyer's right to retain a commission when it has itself conducted the resale, the right to retain proceeds for "reasonable expenses of caring for and selling" the goods under U.C.C. § 2-603(2) appears identical to the avoiding buyer's right to retain proceeds for "reasonable expenses of preserving the goods and of selling them" under Article 88(3) of the Convention. Under U.C.C. § 2-706(6), however, a buyer that has rightfully rejected or justifiably revoked may sell goods in its possession and retain proceeds for items covered by its § 2-711(3) security interest. Those items include expenses of "inspection, receipt, [and] transportation" of the goods, which may go beyond the expenses of preserving and reselling covered by U.C.C. § 2-603(2) and Article 88(3) of the Convention. The buyer's security interest under U.C.C. § 2-711(3) (and thus its right under § 2-706(6) to retain proceeds from the resale of the goods), furthermore, covers "any payments made on [the goods'] price" Under the Convention, an avoiding buyer's right to deduct the amount of its payments to seller from proceeds of the resale of delivered goods is unclear. *See infra* notes 132-33 and accompanying text.

51. U.C.C. § 2-608(2) (1978). Article 2 does not specify the effect of a change in the condition of the goods on a buyer's right to reject. If the change is due to action by the buyer that is "inconsistent with the seller's ownership," the buyer has accepted under § 2-606(1)(c) and must look to its right to revoke in order to thrust the goods back onto the seller. Whether a buyer who has not accepted but who breaches its obligation under § 2-602(2)(b) to hold rejected goods "with reasonable care" would lose the right to reject is unclear. The buyer may merely be liable for resulting damages. *Cf. id.* § 2-603 comment 5 (buyer who fails to make salvage sale required under § 2-603(1) "is subject to damages. . . ."). A change in the goods' condition that does not give rise to acceptance or result from a breach of the buyer's duty to preserve presumably would not preclude rejection.

52. Under Articles 26 and 49(2)(b) of the Convention, a buyer who has received non-conforming goods and who wishes to avoid the contract must send notice within a reasonable time after it knew or should have known of seller's breach. Similarly, an Article 2 buyer must reject goods "within a reasonable time after their delivery or tender," U.C.C. § 2-602(1) (1978), with due allow-

failing to specify "ascertainable" defects in the notice of rejection, an Article 2 buyer may waive the right to base rejection on such defects[53] much as a Convention buyer may, under Article 39, lose the right to rely on discoverable defects by failing to specify them in notice to the seller.[54] Where the seller has delivered, successful rejection or revocation is a prerequisite to the Article 2 buyer's claim for cover or market-price differential damages,[55] just as successful avoidance by buyer is a prerequisite to those damage measures under the Convention.

A seller's right under the Convention to avoid the contract is the mirror image of the buyer's avoidance right. If the contract is avoided because the buyer has committed a fundamental breach or has failed to accept or pay in response to a *Nachfrist* notice,[56] the seller is relieved of responsibility to perform under the contract.[57] Avoidance gives the seller a right to restitution of whatever it has "supplied . . . under the contract"[58] and an obligation to return whatever the buyer has "paid under the contract."[59] An avoiding seller, furthermore, can claim market-price differential or resale damages.[60] An Article 2 seller has similar rights and obligations as long as the buyer breaches without continuing to accept the goods—that is, if the buyer "wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates."[61] In these situations the Article 2 seller can "cancel,"[62] terminating its

---

ance for a "reasonable opportunity to inspect" the goods, *id.* § 2-606(1)(b). An attempted rejection is "ineffective unless the buyer seasonably notifies the seller," *id.* § 2-602(1)(b), which requires notice "at or within the time agreed or if no time is agreed at or within a reasonable time," *id.* § 1-204(3). Thus a buyer who wishes to reject on the basis of a non-conformity in the goods must send notice within a reasonable time after an opportunity to inspect. *See id.* § 2-602 comment 1. If an Article 2 buyer has accepted goods, it can revoke only by giving notice "within a reasonable time after the buyer discovers or should have discovered the ground for [revocation] . . . ." *Id.* § 2-608(2).

53. U.C.C. § 2-605 (1978). This provision does not apply to revocation of acceptance, although a requirement to specify defects in the notice of revocation may be implied by "considerations of good faith, prevention of surprise, and reasonable adjustment." *Id.* § 2-608 comment 5.

54. Differences between an aggrieved buyer's notice obligations under the Convention and Article 2 are explored at *infra* notes 234-44 and accompanying text.

55. U.C.C. § 2-711(1)(a), (b) (1978).

56. For a discussion of the *Nachfrist* procedure available to an aggrieved seller under Article 63, see *infra* notes 82-91 and accompanying text.

57. *See* Sales Convention, *supra* note 1, art. 81(1).

58. *Id.* art. 81(2). In addition, the buyer must "account to the seller for all benefits which he has derived from the goods or part of them. . . ." *Id.* art. 84(2).

59. *Id.* art. 81(2). In addition, the avoiding buyer can claim interest from the date of payment. *Id.* art. 84(1).

60. *Id.* art. 75.

61. U.C.C. § 2-703 (1978).

62. *Id.* § 2-703(f).

contractual obligations with respect to the affected goods,[63] and recover resale[64] or market-price differential damages.[65] Because the seller normally has control of goods that are not accepted, Article 2 does not specifically give the seller a right to restitution.[66] Where the seller withholds delivery, however, it may be required to make restitution of a portion of any payments received.[67]

A Convention seller's right to avoid, however, is not limited to non-acceptance situations. It can avoid even after the goods have been delivered to and retained by the buyer, in which case the seller has a right to restitution of the goods under Article 81(2)[68] as well as a claim for resale or market-price-differential damages under Articles 75 and 76. Under U.C.C. Article 2, in contrast, a seller has extremely limited rights to "undo" an exchange after the goods have been accepted by a breaching buyer. In a credit sale, for example, an Article 2 seller can reclaim goods that have been accepted only if the buyer received them while insolvent and either the seller made demand within ten days after receipt or the buyer misrepresented solvency in writing within three months before delivery.[69] Successful reclamation in a credit sale, furthermore, precludes "all other remedies" including the right to resale or market-price damages.[70] In short, under U.C.C.

63. *Id.* § 2-106(3), (4).

64. *Id.* §§ 2-703(d), 2-706.

65. *Id.* §§ 2-703(e), 2-708(1).

66. That is, if the buyer has repudiated or failed to make a payment due on or before delivery, the seller will normally exercise its rights under U.C.C. § 2-703(a) and (b) to withhold delivery or to stop delivery by a bailee. Where the buyer wrongfully rejects or revokes acceptance, it normally insists that the seller take back the goods. There is one situation that may impliedly require a right to restitution for the U.C.C. seller. If the buyer sends notice of rejection and thereafter exercises "ownership" over the rejected goods *(e.g.*, refuses to return the goods to the seller), the buyer's action is "wrongful as against the seller." *Id.* § 2-602(2)(a). Under U.C.C. § 2-606(1)(c), the seller has the option to treat the buyer's action as acceptance. If the seller refuses to ratify the buyer's "acceptance"—that is, if the seller opts to treat the goods as rejected—the seller should recover the goods. *Cf.* 3 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-602:01 at 20 ("exercise of dominion over the goods by the buyer after rejection is wrongful, giving the seller the option to treat this conduct . . . as an act of conversion or trespass"). Unless the seller's election under U.C.C. § 2-606(1)(c) is limited to situations where the buyer has voluntarily returned the goods or the seller can reacquire the goods under a conversion theory, the seller should have an implied right to restitution.

67. U.C.C. § 2-718(2) (1978).

68. The buyer must also "account to the seller for all benefits which he has derived from the goods. . ." *See* Sales Convention, *supra* note 1, art. 84(2).

69. U.C.C. § 2-702(2) (1978).

70. *Id.* § 2-702(3). Beyond credit sales covered by U.C.C. § 2-702(2) and (3), the only other situation in which Article 2 contemplates that a seller can reclaim accepted goods is where payment fails in a cash sale. *See id.* §§ 2-511(3), 2-507(2); Mann & Phillips, *The Cash Seller Under the Uniform Commercial Code*, 20 B.C.L. REV. 370 (1979). Comment 3 to U.C.C. § 2-507 suggests that the

Article 2 the seller's normal remedy if the buyer accepts the goods is an action for the price. The seller's right under the Convention to avoid the contract, claim restitution of goods that have been accepted, and recover resale or market-price damages represents a significant departure from the U.C.C. Article 2 scheme of remedies.

An avoiding seller's right to restitution under Article 81(2) of the Convention is, however, subject to important practical limitations similar to those constraining a buyer's right to specific performance under CISG. Because the Convention governs only the rights of parties to the sales agreement, creditors of the buyer who have priority in the goods under applicable non-Convention law may defeat the seller's restitution rights under the Convention.[71] The avoiding seller's right to restitution raises particularly thorny problems if the buyer has entered proceedings under U.S. bankruptcy law.[72] Section 546(c) of the federal bankruptcy code, which was drafted with U.C.C. section 2-702(2) in mind,[73] preserves "any statutory or common-law right of a seller of goods . . . to reclaim such goods if the debtor has received [them] while insolvent," provided the seller demands reclamation in writing within ten days after the debtor received the goods.[74] Several courts have read section 546(c) to preclude reclama-

---

10 day demand requirement placed on reclaiming credit sellers by § 2-702(2) also applies to reclaiming cash sellers. Court have split on this suggestion. *Compare* Szabo v. Vinton Motors, Inc., 630 F.2d 1 (1st Cir. 1980) (applying 10 day limitation) *with* Burk v. Emmick, 637 F.2d 1172 (8th Cir. 1980) (rejecting 10 day limitation). *Burk* also held that the reclaiming cash seller, unlike the reclaiming credit seller, retains the right to resale damages. 637 F.2d at 1175.

71. *See* Sales Convention, *supra* note 1, art. 4; Summary Records of the Thirty-third Meeting of the First Committee, U.N. Doc. A/CONF.97/C.1/SR.33 (1980), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, Official Records 410, 414, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter cited as Official Records].

72. Under the U.S. bankruptcy code, the priority of the seller's damage claim would be an issue if the seller either avoided the contract or substantially completed its performance before the buyer filed its bankruptcy petition. If the seller did not avoid before the bankruptcy petition and if neither party had substantially completed its performance, however, the sales agreement would be treated as an "executory contract"; the buyer's bankruptcy trustee has the right to "assume" such contracts if it cures defaults. *See supra* note 35. Assumption of the contract would make it a binding obligation of the bankruptcy estate and would preclude avoidance on the basis of pre-petition breaches.

Upon the filing of the buyer's bankruptcy petitions, attempts by the seller to avoid the contract would be automatically stayed. *See* 11 U.S.C. § 362(a)(3) (Supp. IV 1986); *In re* R.S. Pinellas Motel Partnership, 2 Bankr. 113, 118-19 (Bankr. M.D. Fla. 1979).

73. *See generally* von Mehren, *Section 546(c): An Enigmatic Resolution to the Status in Bankruptcy of the Reclaiming Seller*, 60 AM. BANKR. L.J. 227 (1986); Mann and Phillips, *Section 546(c) of the Bankruptcy Reform Act: An Imperfect Resolution of the Conflict Between Reclaiming Seller and the Bankruptcy Trustee*, 54 AM. BANKR. L.J. 239 (1980).

74. 11 U.S.C. § 546(c) (Supp. IV 1986).

tion against a bankruptcy estate unless the provision's requirements are met.[75] This approach would severely limit, and might entirely defeat, a claim for restitution under the Convention against a buyer in U.S. bankruptcy proceedings.[76]

C. *Election of Remedies: The Choice Between Avoidance and Nonavoidance*

If the aggrieved party has a right under the Convention to avoid the contract, it has the option to choose either avoidance or nonavoidance and thus the power to elect between the two distinct remedial schemes available under the Convention. A buyer that has suffered a fundamental breach, for instance, can opt either to terminate the exchange and recover market-price or cover damages, or to go forward with the transaction and claim remedies consistent with this choice. In certain circumstances an aggrieved Article 2 buyer has a similar election. Where a breaching seller has tendered, Article 2 often permits the buyer to choose between rejection/revocation of acceptance, which aborts the exchange and gives a right to cover or market-price damages, and acceptance, which triggers an obligation to complete the exchange (pay the price) and a right to recover damages under section 2-714.[77] Where the seller refuses to tender, however, the Article 2 buyer normally has only the avoidance-type remedies of cover or market price damages.

An aggrieved seller's right under the Convention to elect between avoidance, which gives a right to restitution and damages measured by resale or market price, and nonavoidance, which gives a right to compel the exchange of goods for price, represents a significant departure from U.C.C. Article 2. Unless the buyer accepts, an Article 2

75. *In re* Deephouse Equipment Co., 22 Bankr. 255 (Bankr. D. Conn. 1982); *In re* Contract Interiors, 14 Bankr. 670 (Bankr. E.D. Mich. 1981). *Contra In re* A.G.S. Food Systems, 14 Bankr. 27 (Bankr. D.S.C. 1980).

76. At the very least, this interpretation of § 546(c) of the bankruptcy code would require an avoiding seller to make written demand for restitution within 10 days after the buyer received the goods, and it might require proof that the buyer was insolvent at the time of receipt. Even if these requirements were met the restitution claim might fail. Section 546(c) preserves a right to reclaim only if the right is conditioned on the buyer's receipt of the goods while insolvent. A seller's right to restitution under Article 81(2) of the Convention is not so conditioned. One court has held that an Article 2 cash seller's reclamation right, which also is not conditioned on the buyer's insolvency, is protected by § 546(c), but the court relied on legislative history that supported the specific result. *In re* Koro Corp., 20 Bankr. 241 (Bankr. 1st Cir. 1982).

77. The Convention permits an aggrieved buyer that opts for nonavoidance to claim damages under Article 74—a provision that is likely to yield results similar to those under U.C.C. § 2-714. *See infra* notes 258-62 and accompanying text.

seller must look to the "avoidance" remedies of resale or market price damages except in certain narrowly-defined situations.[78] If the buyer does accept, an Article 2 seller must normally look to its price remedy and cannot "undo" the exchange by recovering the goods except in certain narrowly-defined situations.[79] For sellers, therefore, the Convention's remedy scheme is radically more elective than that in Article 2.

Examples that demonstrate the elective nature of Convention remedies also illustrate previously-discussed differences between the Convention and Article 2. Suppose a buyer agreed to purchase a generator to be delivered on January 1. If the buyer refuses to take delivery of a conforming generator tendered on January 1 (that is, if buyer "wrongfully rejects" in Article 2 terms), or if the buyer otherwise commits a fundamental breach without getting the generator (*e.g.*, the seller withholds delivery because the buyer failed to make a substantial prepayment required by the contract), the Convention permits the seller to avoid the contract, retain the generator, and recover resale or market-price damages. If the seller chooses this option, the results are similar to those under Article 2. Under the Convention, however, the seller can also chose nonavoidance and compel the buyer to pay the price. The Article 2 seller has a similar right only if the goods suffered casualty after risk of loss passed to the buyer or if goods identified to the contract cannot be resold at a reasonable price.

If the seller breaches by refusing to deliver the generator (presumably a fundamental breach), the Convention permits the buyer either to avoid and recover market-price or cover damages—a result similar to that under Article 2—or to elect nonavoidance and require the seller to deliver the goods—a remedy not available to the Article 2 buyer except in the narrow circumstances described in U.C.C. sections 2-502 and 2-716. Only if the seller tenders does the aggrieved Article 2 buyer have an election (rejection/revocation or acceptance) analogous to the avoidance/nonavoidance option available under the Convention.

Suppose the seller delivered a conforming generator on January

78. Even if the seller puts conforming goods at the buyer's disposal, an Article 2 buyer may prevent the actual contractual exchange from occurring and avoid liability for the price by making a procedurally effective (albeit wrongful) rejection. WHITE & SUMMERS, *supra* note 9, § 7-3 at 257-58, § 8-3 at 314. Whether a buyer who has accepted conforming goods can "undo" the exchange (and avoid price liability) by effectively but wrongfully revoking acceptance is more doubtful. *Id.* § 7-3 at 259-60.

79. *See supra* notes 68-70 and accompanying text.

1, and the buyer retained (accepted) the machine but refused to pay the price. Under both the Convention and U.C.C. Article 2, the seller can recover the price. The Convention seller, however, also has the option to avoid the contract, claim restitution of the goods, and recover resale or market-price damages. The Article 2 seller has this option only if payment has failed in a cash-sale transaction. In a credit sale, an Article 2 seller who exercises its limited right to reclaim goods under U.C.C. section 2-702(2) loses any claim for damages.

D. Material Breach and Relief from Contractual Duties: The Fundamental Breach Standard for Avoidance

Articles 49(1) and 64(1) of the Convention state the prerequisites to avoidance of contract. These provisions allow avoidance if the other party has committed a fundamental breach,[80] which is defined elsewhere as a form of material breach.[81] If the other party's breach is not fundamental, the only path to avoidance is through the *Nachfrist* procedure in Articles 47 and 63.[82] These provisions permit an aggrieved party to "fix an additional period of time of reasonable length

80. *See* Sales Convention, *supra* note 1, art's. 49(1)(a), 64(1)(a). A breaching seller, however, may be able to cure its default. Under Article 37, a seller who has made an early delivery of goods can, up to the date for performance specified in the contract, "deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered." Article 34 gives the seller similar rights to cure in the case of early delivery of non-conforming documents. Under Article 48(1), a seller can cure even after the date for delivery if it can do so without "unreasonable delay." The Convention's cure provisions resemble those in U.C.C. § 2-508(1) (cure until time for performance) and § 2-508(2) (cure after date for performance) with several exceptions. Unlike U.C.C. Article 2, the Convention explicitly restricts cure to situations where it will not cause the buyer unreasonable inconvenience, expense or uncertainty in recovering reimbursable expenses, but it does not explicitly require notice of intention to cure. In addition, U.C.C. § 2-508(2) permits cure after the date for performance only if the seller "had reasonable grounds to believe" that its tender "would be acceptable with or without money allowance"—a limitation not found in CISG.

The most important question concerning the Convention's cure provisions is whether Article 48(1) permits the seller to cure after the buyer has avoided the contract. *See generally* HONNOLD, *supra* note 25, at 311-12; ZIEGEL, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1984) § 9.03[3] at 9-21 to 9-23. A similar issue has arisen under Article 2. Although an Article 2 buyer's right to reject goods is subject to the seller's right to cure, it has been held that a seller does not have a right to cure after the buyer revokes acceptance. Pavesi v. Ford Motor Co., 155 N.J. Super. 373, 382 A.2d 954, 956 (N.J. Super. Ct. Ch. Div. 1978).

81. *See* Sales Convention, *supra* note 1, art. 25; *infra* notes 100, 101 and accompanying text.

82. The procedure in Articles 47 and 63 is associated with the term *"Nachfrist"* because it is based on the German law doctrine of that name. *See* HONNOLD, *supra* note 25, at 307.

for performance" by the other side.[83] If the breaching party fails to perform its basic contractual obligations (for sellers, delivery of the goods; for buyers, taking delivery or paying the price) within the period fixed in a *Nachfrist* notice, or if the breaching party declares that it will not perform those obligations within that period, the aggrieved party can avoid the contract.[84]

The *Nachfrist* procedure, therefore, makes performance of basic contractual obligations within the period fixed in the notice "of the essence" of the contract.[85] It makes non-performance within the time so fixed the equivalent of a fundamental breach of contract and thus allows a party awaiting performance to eliminate uncertainty concerning the amount of delay that is serious enough to justify avoiding the contract.[86] In formulating the *Nachfrist* provisions, however, the drafters of the Convention failed to make distinctions based on the materiality of the performance that is delayed. The failure could undermine the fundamental breach standard at the heart of the Convention's avoidance provisions.

Suppose, for example, that the buyer is late in paying and the market value of the goods has risen substantially above the contract price. If the seller sends a *Nachfrist* notice requiring full payment and the buyer pays all but a trivial portion of the price within a reasonable period fixed by the seller's notice, can the seller avoid the contract, refund the buyer's payments and recover the goods? Can a seller avoid if the buyer pays all but a small portion of the price in a timely fashion, and then fails to pay the trivial balance within the time fixed in a *Nachfrist* notice? Article 64(1)(b) permits the seller to avoid if

83. *See* Sales Convention, *supra* note 1, arts. 47(1), 63(1). During the period fixed by the notice, the aggrieved party may not "resort to any remedy for breach of contract" unless the other side gives notice that it "will not perform within the period so fixed." *Id.* art's. 47(2), 63(2).

84. *Id.* art's. 49(1)(b), 64(1)(b). For observations on the contents of an effective *Nachfrist* notice see HONNOLD, *supra* note 25, at 305-06, 361. The aggrieved party can employ the procedure described in Articles 47 and 63 with respect to any contractual duty, but *Nachfrist* is useful only when applied to basic contractual obligations. The only consequence to the breaching party of failing to perform within the period fixed in the *Nachfrist* notice is to give the aggrieved party an option to avoid under Articles 49(1)(b) or 64(1)(b). Avoidance is available, however, only if seller fails to deliver or if buyer fails to take delivery or pay the price with the period fixed. *See* HONNOLD, *supra* note 25, at 304-05, 360-61. Using *Nachfrist* to fix a time for performing anything but these duties merely prevents the aggrieved party from resorting to a remedy during the period fixed. *See* Sales Convention, *supra* note 1, arts. 47(2), 63(2).

85. *See* HONNOLD, *supra* note 25, at 319.

86. *See* Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, art. 43, ¶ 2, U.N. Doc. A/CONF.97/5 (1979) [hereinafter Draft Commentary], *reprinted in* Official Records, *supra* note 71, at 14, 39.

the buyer fails "to pay the price" within the period fixed by a *Nachfrist* notice—a standard that could be construed to permit the seller to avoid the contract on either set of facts.

During the Vienna diplomatic conference at which the Convention was adopted, Canada introduced an amendment that would have prevented *Nachfrist* avoidance by a buyer that has received delivery of all but an immaterial portion of the goods.[87] Unfortunately, the issue of the materiality of the seller's delayed performance was confused with the question whether *Nachfrist* avoidance should be permitted as to breaches other than late performance, and discussion of the Canadian proposal foundered.[88] One reason that the conferees failed to focus on the materiality issue is that another provision appears to solve the problem with respect to aggrieved buyers. Under Art. 51(2), a buyer that has received a partial delivery can avoid the contract in its entirety "only if the failure to make delivery completely . . . amounts to a fundamental breach of contract." Thus a buyer that has received delivery of less than the required amount of goods cannot use the *Nachfrist* procedure to avoid the entire contract.[89] There are two problems with this solution. First, it applies only to buyers. The question whether a seller can avoid on the basis of a buyer's failure to pay an immaterial portion of the price within the period specified in a *Nachfrist* notice remains open. Second, the "solution" in Article 51(2) creates an equally serious problem: as will be discussed hereafter, Article 51(2) deprives buyers of the *Nachfrist* procedure in situa-

87. During the First Committee's deliberations at the Vienna diplomatic conference, both the Netherlands and Canada introduced amendments that would have permitted a buyer to avoid if the seller failed to perform *any* obligation within the time fixed in a *Nachfrist* notice. The Canadian proposal, however, would have allowed avoidance only if the seller's default consisted of non-delivery or failure to perform another "material obligation." For the amendments submitted by the Netherlands and Canada, see U.N. Docs. A/CONF.97/C.1/L.165 and A/CONF.97/C.1/L/150 (1980), *reprinted in* Report of the First Committee to the United Nations Conference on Contracts for the International Sale of Goods, art. 45, U.N. Doc. A/CONF.97/11 (1980) [hereinafter "First Committee Report"], *reprinted in* Official Records, *supra* note 71, at 82, 116. After discussion in which the participants expressed concern that the proposed amendments would undermine the fundamental breach standard for avoidance, the Canadian and Dutch representatives agreed to a joint proposal that would have permitted avoidance if the seller failed to perform any "material" obligation within the time fixed in a *Nachfrist* notice. Summary Records of the Twenty-Second Meeting of the First Committee, U.N. Doc. A/CONF. 97/C.1/SR.22 (1980), *reprinted in* Official Records, *supra* note 71, at 351, 354-56.

88. *See* Summary Records of the Twenty-second Meeting of the First Committee, U.N. Doc. A/CON.97/C.1/SR.22, *reprinted in* Official Records, *supra* note 71, at 351, 354-56.

89. Draft Commentary, *supra* note 86, art. 47, ¶ 4, *reprinted in* Official Records, *supra* note 71, at 14, 44; HONNOLD, *supra* note 25, at 330.

tions where its use would be appropriate.[90]

Despite the drafters' failure to provide clear guidance, the *Nachfrist* provisions of the Convention can and should be interpreted in a manner that does not undermine the fundamental breach standard for avoidance. Under Article 7(2), questions not expressly settled in the Convention must be answered "in conformity with the general principles upon which it is based." One such principle is that avoidance of the contract is proper only where the other side has committed a serious breach. Article 7(1), furthermore, requires that the Convention be interpreted "to promote . . . observance of good faith in international trade." In light of these considerations, Articles 49(1)(b) and 64(1)(b) should be construed to permit avoidance only where there has been a failure to perform a *material* portion of the specified obligations within the time fixed in a *Nachfrist* notice.[91]

In short the Convention, properly construed, permits avoidance only if there has been a breach that substantially deprived the aggrieved party of its bargain (fundamental breach), or involved a delay in performing certain material obligations beyond the time made "of the essence of the contract" through the *Nachfrist* procedure. Article 2 of the U.C.C., in contrast, may or may not condition avoidance-type remedies on the materiality of a breach, depending on the type of contract, the party in breach, the kind of breach, and whether the goods have been accepted.

Where a breaching seller tenders goods in a single-delivery contract, for instance, a U.C.C. Article 2 buyer can reject and claim market-price or cover damages—the equivalent of avoiding the contract—"if the goods or the tender of delivery fail in *any respect* to conform to the contract."[92] If, however, the seller breached by repudiating or, in a shipment contract, by failing either to notify the buyer of shipment or to make a reasonable contract for carriage, the buyer can reject or cancel the contract only if the breach is material.[93] If the seller defaults in an installment contract, furthermore, Article 2 per-

90. *See infra* notes 167-68 and accompanying text.

91. For further discussion relevant to the proposed construction of Art. 49(1)(b) and 64(1)(b), *see infra* notes 168, 182.

92. U.C.C. § 2-601 (1978); *see id.* § 2-711(1). The "perfect tender" rule in § 2-601 is, however, so hedged about by limiting doctrines—including the seller's right to cure (§ 2-508), waiver of reasonably ascertainable defects by failure to specify in the notice of rejection (§ 2-605), and the overarching requirement of good faith (§§ 1-203 & 2-103(1)(b))—that it has more theoretical than actual significance. *See* WHITE & SUMMERS, *supra* note 9, § 8-3 at 303-305.

93. U.C.C. § 2-610 (1978) (buyer can "resort to any remedy for breach" if seller repudiates as to performance "the loss of which will substantially impair the value of the contract" to the buyer);

mits the buyer to cancel the entire contract and seek market-price or cover damages for all goods covered thereby only if the breach "substantially impairs the value of the whole contract."[94] In addition, a buyer can revoke acceptance of non-conforming goods (another Article 2 equivalent to avoiding the contract[95]) only if the non-conformity causes substantial impairment of value.[96] Where the buyer is in breach, Article 2 conditions the sellers' "avoidance" remedies (cancellation and resale or market-price damages) on the materiality of the buyer's breach only in connection with installment contracts[97] and breach by repudiation.[98]

The Convention replaces Article 2's byzantine rules on material breach with a single standard applicable in all circumstances: to justify avoidance, a breach must be fundamental or, in the case of delayed performance, be made fundamental through the *Nachfrist* procedure. The fact that the standard for avoidance can be stated without distinguishing among varieties of contracts and kinds of breaches does not, of course, eliminate all difficulties. The definition of fundamental breach is itself ambiguous[99] and determining whether a particular breach "substantially . . . deprive[d]" the aggrieved party of what it is "entitled to expect under the contract" will no doubt be problematic. Contract clauses specifying when avoidance will be available in a particular transaction can ease but not eliminate these

---

id. § 2-504 (in a shipment contract, failure to notify of shipment or to make a proper contract is grounds for rejection "only if material delay or loss ensues").

94. *Id.* §§ 2-612(3), 2-711(1). U.C.C. § 2-612(2) also articulates a material breach standard for rejecting a single delivery under an installment contract. Compare CISG Article 73(1), discussed at *infra* notes 169-77 and accompanying text.

95. *I.e.*, rightful revocation, like avoidance, relieves the buyer of the responsibility to take and pay for the goods and entitles the buyer to market-price or cover damages. U.C.C. § 2-711(1) (1978).

96. *Id.* § 2-608(1).

97. *Id.* §§ 2-612(3), 2-703. It is not entirely clear whether an immaterial default by a buyer in a single delivery contract gives the seller avoidance-type remedies under Article 2. For example, suppose the buyer was one day late in making a required pre-payment or in tendering the price in a cash sale, and the circumstances indicate that the delay did not materially effect the seller. Can the seller, under § 2-703, cancel the contract and sue for resale or market-price damages because the buyer has failed "to make a payment due on or before delivery?" Although Article 2 says nothing about the materiality of a buyer's non-repudiation breach in a single delivery contract, and although the material breach standard in § 2-612(3) on installment contracts may imply that there is no such standard in single delivery contracts, at least one court has imposed a material breach standard for any cancellation by the seller. Nora Springs Coop. Co. v. Brandau, 247 N.W.2d 744 (Iowa 1976). *Contra* Note: *A Comparison of the Rights and Remedies of Buyers and Sellers under the Uniform Commercial Code and the Uniform Sales Act*, 49 KY. L.J. 270, 275 (1960).

98. U.C.C. § 2-610 (1978).

99. *See infra* notes 100-14 and accompanying text.

difficulties. No agreement can provide for all possible breaches. The Convention's uncluttered rule of avoidance, nevertheless, simplifies the task of attorneys who must work with CISG's remedy provisions.

II. PARTICULAR AVOIDANCE PROVISIONS

A. Fundamental Breach

As noted above, the key to the Convention's system of remedies is avoidance/nonavoidance of contract and the key to the avoidance machinery is "fundamental breach." Article 25 of the Convention defines the latter as a breach that

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

This provision has already generated issues. One commentator argues that the definition of fundamental breach may require that the aggrieved party's loss be more than material.[100] If this argument is correct, a breach that satisfied the Article 2 material breach standard—substantial impairment of value—might not be "fundamental" within the meaning of the Convention. The Convention provisions dealing with anticipatory non-performance may support the argument. Articles 71 and 72 distinguish between a threat of a fundamental breach and a threatened failure to perform a "substantial part" of contractual obligations. The latter triggers only a right to suspend performance whereas the former gives the more radical power to avoid the contract, suggesting that a breach may be "substantial" without being "fundamental."[101]

The portion of Article 25 that requires serious consequences to be foreseeable in order for a breach to be fundamental has also raised

---

100. *See* ZIEGEL, *supra* note 80, § 9.03[2][a], [b].

101. During the First Committee's deliberations at the Vienna diplomatic conference, Professor Honnold opined that the difference between the "fundamental breach" language in Article 72 and the "substantial part" phrasing in Article 71 was intentional, and he described the Article 71 standard as "more flexible." Summary Records of the Thirty-fifth Meeting of the First Committee, U.N. Doc. A/CONF.97/C.1/SR.35 (1980), *reprinted in* Official Records, *supra* note 71, at 420, 421.

Other explanations for the different terminology in Articles 71 and 72 are possible. For instance, a party facing an excused failure of performance should be able to suspend its own performance under Article 71, which permits such suspension if "it becomes apparent that the other party will not perform a substantial part of his obligations as a result of . . . (a) a serious deficiency in his ability to perform. . . ." An excused default, of course, is not a breach, perhaps explaining why the drafters of Article 71 avoided the term "fundamental breach."

questions. Article 25 fails to specify whether foreseeability should be measured at the time of contract formation or at the time of breach. The legislative history demonstrates that the omission was intentional, designed to permit courts to decide the issue on a case by case basis.[102] Professor Honnold has suggested, consistently with this history, that the willfulness of a default is a factor for the decision-maker to consider— *i.e.*, foreseeability should be measured at the time of a willful breach.[103] Where serious loss was unavoidable by the time it became foreseeable to the breaching party, on the other hand, Professor Honnold suggests that the breach should not be deemed "fundamental."[104]

Despite the legislative history indicating that courts should have discretion to determine when to measure foreseeability for purposes of fundamental breach analysis, some commentators have argued that foreseeability should always be measured as of the time of contract formation.[105] For example Professor Ziegel, who represented Canada at the Vienna diplomatic conference, notes that Article 74 of the Convention limits damages to losses foreseeable at the time of contracting. He said that it would be "anomalous" if a party could take the radical step of avoiding the contract on the basis of consequences for which it could not even recover damages.[106] Consequences foreseeable at the time of breach but not at the time of contract formation, he suggests, are too remote to justify avoidance.[107]

U.S. sales law, however, contains precedent for the "anomaly" feared by Professor Ziegel. Like the Convention, U.C.C. Article 2 limits consequential damages to losses foreseeable at the time of contracting.[108] U.C.C. section 2-608(1), nevertheless, permits the buyer to revoke acceptance of non-conforming goods—an action equivalent to avoidance under the Convention—if the non-conformity "substan-

102. *See* ZIEGEL, *supra* note 80, § 9.03[d] at 9-19. The legislative history on this issue is recounted at length in Speidel, Book Review, 5 NW. J. INT. LAW & BUS. 432, 442-44 (1983) (reviewing HONNOLD, *supra* note 25).

103. HONNOLD, *supra* note 25, at 213; *See* ZIEGEL, *supra* note 80, § 9.03 at 9-19 n. 57; SPEIDEL, *supra* note 102, at 439-40.

104. HONNOLD, *supra* note 25, at 213.

105. *See* P. SCHLECHTRIEM, EINHEIGLICHES UN-KAUFRECHT 46-49 (1981); ZIEGEL, *supra* note 80, § 9.03[d] at 9-19 to 9-20. An English-language account of Professor Schlechtriem's argument is given *id.* at n.57 and in Speidel, *supra* note 102, at 444.

106. ZIEGEL, *supra* note 80, § 9.03[d] at 9-20.

107. *Id.*

108. U.C.C. § 2-715(2)(a) (1978).

tially impairs [their] value to him." The official comments describe this standard as follows:

> [T]he test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.[109]

Article 2, therefore, specifically rejects the notion that the substantial impairment required for revocation of acceptance must have been foreseeable at the time of contracting, and it does so even though the breaching party is liable in damages only for losses foreseeable at that time. Indeed, where Article 2 does require that serious consequence be foreseeable in order to justify avoidance-type remedies, it does not specify when foreseeability should be measured.[110]

Professor Ziegel's alleged "anomaly," furthermore, disappears upon examining the different purposes of the foreseeability requirements in Articles 25 and 74 of the Convention. The foreseeability limitation on damages is designed to limit the financial exposure of the parties to a contract for sale by excluding liability for remote consequences. The foreseeability requirement in the definition of fundamental breach, in contrast, is meant to limit avoidance to appropriate circumstances. It may make sense to provide that a party is not responsible in damages for losses that become foreseeable only after contract formation, when the terms of exchange cannot unilaterally be adjusted to account for a newly-discovered risk. This logic, however, does not require that an aggrieved party be forced to continue a contractual relationship where the other party should have known, at the time of a willful breach, that its actions would cause substantial hardship. The fact that those consequences were not foreseeable when the contract was formed has little relevance to the issue of avoidance.

Professor Ziegel argues that permitting avoidance on the basis of consequences foreseeable at the time of a willful breach reflects a parochial view of punitive remedies in contract actions.[111] It may be

---

109. *Id.* § 2-608 comment 2.

110. Thus U.C.C. § 2-612(2) conditions rejection of an installment delivery on a non-conformity that "substantially impairs the value of that installment," and comment 4 to that section explains this standard in terms of the Hadley v. Baxendale foreseeability criteria: "[s]ubstantial impairment . . . must be judged in terms of the normal or specifically known purposes of the contract." Although what is "normal or specifically known" may change between the time of contract formation and breach, the comment does not indicate which time frame should be used.

111. ZIEGEL, *supra* note 80, § 9.03[d] n. 57 at 9-20.

Professor Ziegel's approach, however, that is limited and outmoded. U.S. law no longer treats sales agreements as static relationships where the parties' rights are cast in stone at the moment of contract formation. The U.C.C. takes the more realistic view that contracts generally involve a continuing association between the parties in an evolving context.[112] Provisions such as the good faith requirement in U.C.C. section 1-203 offer the flexibility to account for facts that arise after contract formation. The Convention's general approach is consistent with that of the U.C.C.[113] There is, therefore, no reason to impose an interpretation of Article 25's foreseeability requirement that ignores post-formation developments, especially when the approach contradicts legislative history.[114]

112. *See* U.C.C. § 1-201(3) (1978) ("agreement" defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance"); *cf. id.* § 2-208 (giving rules of "practical construction" that take into account not only express contractual terms but also course of performance, trade usage and course of dealing), § 2-209 (eliminating consideration requirement for contract modifications).

113. *See* Sales Convention, *supra* note 1, art. 7(1) (Convention to be interpreted to promote "the observance of good faith in international trade"); art. 8(3) (parties' intent to be determined by considering "all relevant circumstances of the case including the negotiation, any practices which the parties have established between themselves, usage and any subsequent conduct of the parties"); and art. 9 (parties are bound by usages and practices established between themselves and, unless otherwise agreed, in the relevant trade).

114. Another argument for measuring foreseeability at the time of contract formation is based on the portion of Article 25 that defines the consequences relevant to a determination of fundamental breach in terms of what a party "is entitled to expect under the contract." Because contractual expectations are formed at the time of contracting, the argument runs, foreseeability should also be measured at that time. *See* SCHLECHTRIEM, *supra* note 105, at 46-49. Professor Speidel articulates, but does not necessarily endorse, a similar argument. Speidel, *supra* note 102, at 441, 444.

This argument also is unconvincing. First, it contradicts the legislative history that indicates the time for measuring foreseeability was purposefully left ambiguous in Article 25. Second, its logic fails to withstand scrutiny. A party may have a contractual expectation of a certain quality or feature of performance even though, at the time of contracting, it appeared that a failure to meet this expectation would not have serious consequences. If it later becomes clear that such a failure will cause substantial detriment, nothing in the text of Article 25 prevents a willful failure to perform up to this expectation from being a fundamental breach. Suppose a contract required goods in a particular color even though, at the time of contracting, the requirement reasonably appeared immaterial to the seller. If the seller later learns that there is no market for goods in a different color and nevertheless willfully breaches the color provision, surely the buyer has suffered "such detriment . . . as substantially to deprive him of what he is entitled to expect under the contract." It would be strange to preclude avoidance and require the buyer to take the worthless goods because the seller's breach was not "fundamental." The buyer has no effective remedy except avoidance because, under Article 74, the seller is not responsible in damages for consequences unforeseeable at the time of contracting.

B. Avoidance of Contract

1. General Consequences of Avoidance; Liquidated Damages and Other Contractual Remedy Provisions

A fundamental breach gives the aggrieved party the option to avoid the contract. Avoidance releases both parties from their performance obligations under the contract, "subject to any damages which may be due."[115] Thus if the seller commits a fundamental breach and the buyer avoids the contract, the seller is relieved of its duty to deliver and transfer ownership of the goods[116] and the buyer is relieved of its duty to take delivery and pay the price.[117] The seller, however, remains responsible in damages for its breach. Avoidance does not invalidate contractual provisions which govern either dispute resolution or "the rights and obligations of the parties consequent upon the avoidance of the contract."[118] Thus arbitration and choice-of-forum clauses remain binding even if the contract is avoided.

Provisions excluding consequential damages, providing for liquidated damages or specifying a limited or exclusive remedy also survive avoidance.[119] Article 6, which allows parties to "derogate from or vary the effect of" the Convention's terms, permits such clauses, but CISG does not specifically address them. Thus the Convention contains nothing equivalent to the U.C.C. Article 2 provisions invalidating penalty clauses[120] and limiting the enforceability of other contractual remedy provisions.[121] Such domestic law rules, nevertheless, may apply in transactions subject to the Convention because questions concerning "the validity of the contract or of any of its provisions" are beyond the scope of CISG.[122] To the extent applicable municipal law deals with the "validity" of remedy clauses, therefore, it is not preempted by the Convention.[123]

The Convention does not define "validity," and it is not clear

---

115. *See* Sales Convention, *supra* note 1, art. 81(1).

116. *Id.* art. 30.

117. *Id.* art. 53.

118. *Id.* art. 81(1).

119. Draft Commentary, *supra* note 86, art. 66, ¶¶ 4, 5, *reprinted in* Official Records, *supra* note 71, at 57.

120. U.C.C. § 2-718(1) (1978).

121. *E.g., id.* § 2-719(3) (invalidating unconscionable attempts to exclude or limit consequential damages).

122. *See* Sales Convention, *supra* note 1, art. 4(a).

123. *See* Draft Commentary, *supra* note 86, art. 42, ¶ 10, art. 66, ¶ 5, *reprinted in* Official Records, *supra* note 71, at 38, 57. *See* ZIEGEL, *supra* note 80, § 9.05[2] at 9-38 to 9-39.

what domestic law doctrines will apply to remedy clauses in contracts governed by CISG. There is agreement that the general unconscionability provision of Article 2 (U.C.C. section 2-302) is a rule of "validity" which, if applicable under choice-of-law principles, is not displaced by the Convention.[124] This analysis presumably applies to U.C.C. section 2-719(3), which invalidates contract terms that unconscionably limit or exclude consequential damages. U.C.C. section 2-718(1), which strikes down liquidated damages clauses if they operate as penalties, also states a rule of "validity."[125] The Article 2 provision forbidding enforcement of a limited or exclusive remedy "[w]here circumstances cause [it] to fail of its essential purpose"[126] is, however, more problematic. Because the doctrine denies legal effect to a contract clause even if the provision was clearly expressed, it might constitute a rule of "validity."[127] On the other hand, the circumstances that cause a limited remedy to fail of its essential purpose will often occur after contract formation. CISG contains an excuse provision dealing with the enforceability of contract terms in light of post-formation developments.[128] If "failure of essential purpose" is deemed an excuse doctrine rather than a rule of validity, it will be preempted by the Convention. To avoid this problem, a party who agrees to a limited or exclusive remedy in a contract governed by the Convention should insist that the agreement include a "failure of essential purpose" clause.

2. *Avoidance and Restitution*

Avoidance of the contract triggers an obligation by both parties to make restitution of whatever the other side "has supplied or paid under the contract."[129] This aspect of avoidance has previously been sketched,[130] but one question deserves further exploration: What are the parties' respective rights where both are entitled to restitution? The only guideline in CISG is the last sentence of Article 81(2): "If

124. 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 (1984); HONNOLD, *supra* note 25, at 260; ZIEGEL, *supra* note 80, § 9.05[2] at 9-39.

125. Draft Commentary, *supra* note 86, art. 66, ¶ 5, *reprinted in* Official Records, *supra* note 71, at 57.

126. U.C.C. § 2-719(2) (1978).

127. *See* HONNOLD, *supra* note 25, at 260.

128. *See* Sales Convention, *supra* note 1, art. 79.

129. *Id.* art. 81(2).

130. *See supra* notes 37-76 and accompanying text.

both parties are bound to make restitution, they must do so concurrently." This statement leaves many questions unanswered.

For example, suppose that the buyer, after paying the price, discovers non-conformities in the goods which constitute a fundamental breach and avoids the contract. Under Article 81(2), the buyer has a right to restitution of its payment and an obligation to return the goods to the seller. If the seller refuses to make restitution the buyer can, under the last sentence of Article 81(2), withhold the goods. What will happen if the seller continues to refuse restitution? An avoiding buyer that has received goods must take reasonable steps to preserve them, although it is entitled to reimbursement for its reasonable expenses.[131] Must the buyer continue to preserve the goods, incurring potentially-uncollectible preservation expenses, until the seller is forced (through judicial process or otherwise) to make restitution?

Because the seller's refusal to refund payments prevents the buyer from making restitution of the goods, the seller's actions may constitute "an unreasonable delay . . . in taking [the goods] back," which would give the buyer a right to sell the goods for the seller's account.[132] This would at least relieve the buyer of further expenses in preserving the goods. The buyer may run into trouble, however, if it attempts to deduct the amount of payments to which it has a right to restitution from the proceeds of the sale. The Convention contains nothing equivalent to the rule in U.C.C. sections 2-711(3) and 2-706(6) which permits a rejecting or revoking buyer to offset the amount of payments made to the seller from the proceeds of resale of the goods. Indeed, Article 88(3) of the Convention permits a buyer to retain only "an amount equal to the reasonable expense of preserving

131. *See* Sales Convention, *supra* note 1, art. 86(1). If goods "have been placed at his disposal at their destination and he exercises the right to reject them," furthermore, a Convention buyer must take possession of and preserve the goods. *Id.* art. 86(2). "A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable." *Id.* art. 87. Article 2 of the U.C.C. gives a rejecting or revoking buyer similar rights and obligations. *See* U.C.C. §§ 2-602(2)(b), 2-603(1), 2-608(3) (1978).

132. *See* Sales Convention, *supra* note 1, art. 88(1). *Compare* U.C.C. § 2-604 (1978) (Rejecting buyer's right to resell goods for seller's account if seller fails to provide instructions as to goods "within a reasonable time after notification of rejection"). The buyer can resell under Article 88(1) of CISG, however, only after "reasonable notice of the intention to sell has been given to the other party." Furthermore, "[i]f the goods are subject to rapid deterioration or their preservation would involve unreasonable expense," the buyer is required to "take reasonable measures to sell them" and need give notice only "[t]o the extent possible." *See* Sales Convention, *supra* note 1, art. 88(2). *Compare* U.C.C. § 2-603(1) (1978) (Rejecting merchant buyer's duty "to make reasonable efforts to sell [the goods] for seller's account if they are perishable or threaten to decline in value speedily").

the goods and of selling them"; the buyer "must account to the other party for the balance." CISG's legislative history, however, suggests that parties selling goods under Article 88(3) retain offset rights that they have under applicable domestic law.[133] If U.S. law applies to the transaction under choice of law principles, therefore, an avoiding buyer may be able to invoke the offset rights given by Article 2 of the U.C.C.

Knotty problems concerning mutual restitution under Article 81(2) can also arise where one of the parties has entered bankruptcy or other insolvency proceedings. For instance, suppose a buyer prepays 10% of the price, the seller delivers the goods, and the buyer refuses further payment. If the seller avoids the contract because of the buyer's fundamental breach, the seller has a right to restitution of the goods,[134] a claim for the value of "all benefits which [the buyer] has derived from the goods or part of them,"[135] and an obligation to make restitution of the buyer's prepayment.[136] What will happen if the avoiding seller files under U.S. bankruptcy law before restitution by both parties occurs? Under section 542(a) and (b) of the Bankruptcy Code,[137] the buyer must turn over to the seller's bankruptcy estate any property in which the estate has an interest (*e.g.*, the delivered goods) and pay to the estate any debt that is property of the estate (*e.g.*, the buyer's obligation to compensate the seller for benefits derived from the goods). If the buyer must make restitution before it receives a refund from the seller, however, it may be left with a mere unsecured claim for restitution of the prepayment—a claim that will usually be worth little in bankruptcy.

The buyer can escape this scenario if it has a right to offset its restitutionary obligation against its claim for restitution from the seller.[138] The buyer, however, must look to nonbankruptcy law for a right to setoff because the Bankruptcy Code merely preserves—it does

133. Draft Commentary, *supra* note 86, art. 77, ¶ 9, *reprinted in* Official Records, *supra* note 71, at 63.

134. *See* Sales Convention, *supra* note 1, art 81(2).

135. *Id.* art. 84(2).

136. *Id.* art's. 81(2), 84(1).

137. 11 U.S.C. § 542(a), (b) (1982).

138. For instance, under § 542(b) of the Bankruptcy Code, *id.* § 542(b), one indebted to the bankruptcy debtor need not pay the debt to the extent the obligation can be offset against a claim on the debtor. If a party must, under § 542(a) of the Bankruptcy Code, *id.* § 542(a), turn over to the estate property against which the party has a setoff right, the party will be treated as having a secured claim, and an interest in the property that must be "adequately protected" if the estate is to retain the property. *See id.* §§ 506(a), 362(d)(1), 363(e), 361 (1982 & Supp. IV 1986).

not create—setoff rights.[139] Although the Convention specifies that mutual restitution should occur "concurrently,"[140] it does not clearly give the buyer a right to setoff. Indeed, because setoff in this situation would effect the rights of third parties (creditors of the seller), a right to setoff would be beyond the scope of the Convention.[141]The buyer's right to setoff, therefore, is governed by the domestic law applicable under choice-of-law principles. This will not solve the buyer's problem if conflicts rules point to Article 2 of the U.C.C. Article 2 does not address the setoff rights of a breaching buyer because an Article 2 seller who has delivered will seldom have a right to reclaim the goods along with an obligation to make restitution of payments received.[142] Any attempt to deal with the setoff issue in the sales contract, furthermore, would presumably be ineffective against the seller's creditors and others not party to the agreement.

3. *Avoidance Procedure and Time Constraints*

The Convention requires that avoidance of contract be effected by notice to the other party.[143] CISG does not specify the contents of the notice, although it presumably should contain information sufficient to inform a reasonable person in the breaching party's position that the contract has been avoided.[144] Article 27 provides that a contract is avoided despite errors or delays in the transmission of notice of avoidance, or even failure of the notice to arrive, provided the aggrieved party attempted to communicate "by means appropriate in the circumstances." An aggrieved buyer who wishes to avoid must also take account of Article 39, which provides that a buyer "loses the right to rely on a lack of conformity of the goods" unless it gives notice specifying the non-conformity.

Article 2 of the U.C.C. contains notice requirements that parallel

139. 11 U.S.C. § 553(a) (1982 & Supp. IV 1986); 4 COLLIER ON BANKRUPTCY ¶ 553.02 at 553-9 (15th ed. 1987).

140. *See* Sales Convention, *supra* note 1, art. 81(2).

141. *See id.* art. 4.

142. As indicated at *supra* notes 69-70 and accompanying text, the Article 2 seller has a right to reclaim delivered goods only if (1) the buyer has received goods on credit, while insolvent, in the circumstances described in U.C.C. § 2-702 or (2) conditional payment (*e.g.*, by check) has failed in a cash sale. In neither case is the seller likely to have received any payment, and the U.C.C. does not address the seller's restitutionary obligations in the reclamation-of-goods situation. U.C.C. § 2-718(3), however, grants an aggrieved seller who has withheld delivery of the goods the right to setoff its damages against the restitution claim of a buyer who has prepaid.

143. *See* Sales Convention, *supra* note 1, art 26.

144. *See id.* art. 8.

those under CISG. Both an Article 2 buyer that is rejecting or revoking acceptance of goods and a Convention buyer that is avoiding the contract after delivery must give notice.[145] Both may lose their rights with respect to defects in the goods unless they notify the breaching party of the defects.[146] Under Article 2, however, a buyer that has not received delivery and an unpaid seller need not give notice to cancel the contract,[147] although notice is a prerequisite to one of the seller's avoidance-type remedies—resale damages.[148] Under the Convention, in contrast, notice of avoidance is always required.

The Convention includes somewhat complex rules on the time for avoidance of the contract. Article 49(2) puts time constraints on the buyer's power to avoid. They apply, however, only where the seller has delivered the goods. Thus if the seller fails to deliver, the Convention does not specifically limit the time for avoidance by the buyer. Where the seller has delivered, the time within which the contract must be avoided depends on the type of breach. If the sellers delivery was late, the buyer will lose the right to avoid unless it does so "within a reasonable time after [the buyer] has become aware that delivery has been made."[149] If the seller's breach is something other

145. *Id.* art. 26; U.C.C. §§ 2-602(1), 2-608(2) (1978).

146. *See* Sales Convention, *supra* note 1, art. 39; U.C.C. § 2-605(1) (1978). Under Article 39 of the Convention, the buyer must give notice specifying non-conformities whether or not it intends to avoid the contract. U.C.C. § 2-605(1), in contrast, requires the buyer to give notice of particular defects only where it is rejecting; a revoking buyer's obligations to specify defects are those implied "by considerations of good faith, prevention of surprise, and reasonable adjustment." *Id.* § 2-608 comment 5. For a comparison of the particularization requirements of the Convention and Article 2 if the buyer intends to retain the goods, see *infra* notes 234-44 and accompanying text.

There are other differences between the particularization requirements in Article 39 of the Convention and U.C.C. § 2-605(1). The U.C.C. requires the buyer to specify defects only where the seller could have cured or, between merchants, where the seller requests a written statement of defects. U.C.C. § 2-605(1)(a), (b). No such limitation appears in Article 39 of the Convention. On the other hand, the Article 2 particularization requirement applies to any defect in tender, *id.* § 2-605(1), *id.* § 2-605 comment 1, whereas the particularization requirement in Article 39 applies only to "a lack of conformity of the goods."

147. R. SPEIDEL, SALES AND SALES FINANCING 148 (1984). In an installment contract, however, a buyer that accepts a non-conforming delivery and a seller that accepts a late payment must give "seasonable" notice in order to cancel the executory portion of the contract. U.C.C. § 2-612(3) (1978); *id.* § 2-612 comment 7.

148. U.C.C. § 2-706(3), (4)(b) (1978).

149. *See* Sales Convention, *supra* note 1, art. 49(2)(a). The language of Article 49(2)(a) suggests that the "reasonable time" for avoidance starts running only upon buyer's actual subjective awareness of delivery.

Although Article 49(2) and the comparable provision applicable to sellers (Article 64(2)) state that a party who fails to comply with the timing requirements in these Articles loses the *right* to avoid, it would probably be more accurate to describe this as a loss of the *power* to avoid. In other words, the drafters apparently intended untimely attempts at avoidance to be ineffective rather than

than late delivery—for example, delivery of goods that do not conform to the contract—the buyer must generally avoid within a reasonable time after it "knew or ought to have known of the breach."[150] In the case of non-conforming goods, furthermore, the buyer must give notice specifying the defects within a reasonable time (not to exceed two years from the date of actual delivery) after it discovered or should have discovered the non-conformities.[151]

The avoidance rights of an unpaid seller, like those of a buyer that has not received delivery, are not limited in time. Where the buyer has paid the price, however, Article 64(2) imposes time constraints on the seller's power to avoid that are similar to those applicable to buyers who have received delivery.[152] If the buyer's breach consists of late performance (*e.g.*, delay in paying or taking delivery), the paid seller must avoid before it "has become aware that performance has been rendered."[153] A paid seller loses the right to avoid for breaches other than late performance (*e.g.*, wrongful failure to accept delivery) unless it does so within a reasonable time after it "knew or

---

wrongful. Similar observations apply to Article 82, which provides that the buyer may lose "the right to declare the contract avoided" if it cannot make restitution of delivered goods substantially in their delivered condition.

150. *Id.* art. 49(2)(b)(i). The time at which the buyer should discover defects in the goods must be determined by reference to Article 38, which generally requires the buyer inspect the goods "within as short a period of time as is practicable in the circumstances." HONNOLD, *supra* note 25, at 321. If the buyer has used the *Nachfrist* procedure, however, the reasonable time to avoid for breach other than later delivery begins to run after the date for performance set in the *Nachfrist* notice (or after the seller has declared that is will not perform by that date). Sales Convention, *supra* note 1, art. 49(2)(b)(ii).

A seller's right to cure after the time for performance includes a right to request that the buyer indicate whether late cure will be accepted; if "the buyer does not comply with request within a reasonable time, the seller may perform within the time indicated in [the seller's] request." *Id.* art. 48(2). Where the seller has made a request under Article 48(2), the buyer's reasonable time for avoidance begins to run after the additional period indicated by seller or after the buyer declares that it will not accept the proposed cure. *Id.* art. 49(2)(b)(iii).

151. *See* Sales Convention, *supra* note 1, art. 39(1), (2).

152. It is not clear whether the time constraints in Article 64(2), which apply only "in cases where the buyer has paid the price," come into play where the buyer has paid a portion of the price. The statutory language suggests that any failure to pay makes Article 64(2) inapplicable. The reasons for exempting unpaid sellers from the time limitations in Article 64 (see *infra* notes 155-56 and accompanying text), furthermore, may well exist in the partial-payment situation. Because the seller can avoid only if the buyer's failure to pay constitutes a fundamental breach or if the buyer has failed to pay a substantial portion of the price in response to a *Nachfrist* notice *(see supra* notes 80-91 and accompanying text), there is little reason to subject the partially-paid seller to the time constraints in Article 64(2).

153. Sales Convention, *supra* note 1, art. 64(2)(a). The text of Article 64(2)(a) suggests that only actual knowledge of the buyer's performance precludes avoidance by the seller. Compare Article 49(2)(a) and *supra* note 149.

ought to have known of the breach."[154]

Professor Honnold notes that the lack of time constraints on avoidance by sellers awaiting payment and buyers awaiting delivery means that an aggrieved party is not forced to estimate when delay in receiving basic performance is sufficient to constitute a fundamental breach.[155] If the seller fails to deliver by the date called for in the contract, for instance, the buyer can safely put off avoiding the contract. If the seller eventually delivers, the buyer still has "a reasonable time after he has become aware that delivery has been made"[156] to determine whether the "late action" constitutes a fundamental breach and, if it does, to avoid the contract. In the case of a seller awaiting late payment, however, the Convention's execution appears flawed. The seller must avoid for late performance before it "become[s] aware that performance has been rendered,"[157] without benefit of a "reasonable time" grace period. The seller awaiting a late payment, therefore, must estimate when the buyer's delay constitutes a fundamental breach in order to preserve its avoidance rights. If the seller puts off avoiding the contract and then learns that payment has been made, it will lose the right to avoid even if the buyer's delay constituted a fundamental breach.

4. Partial Avoidance Under Article 51

If a seller makes a delivery that includes some non-conforming goods or that contains less than the required quantity of goods, Article 51(1) provides that the Convention's remedy provisions for buyers apply to the missing or non-conforming portion of the delivery. In other words the buyer can treat the missing or non-conforming goods as the subject of a contract that is severable for remedy purposes. For example, the buyer may be able to avoid as to the faulty portion of the delivery,[158] thus eliminating its obligation to pay for the missing or defective goods[159] and entitling it to cover or market-price damages therefor.[160] This rule, which apparently applies to deliveries under

154. *See* Sales Convention, *supra* note 1, art. 64(2)(b)(i). If the seller has employed the *Nachfrist* procedure, however, its reasonable time for avoidance begins to run after the date for performance set in the *Nachfrist* notice (or after the buyer has declared that it will not perform within the additional period). *Id.* art. 64(2)(b)(ii).

155. HONNOLD, *supra* note 25, at 320, 363-64.

156. *See* Sales Convention, *supra* note 1, art. 49(2)(a).

157. *Id.* art. 64(2)(a).

158. HONNOLD, *supra* note 25, at 329-30.

159. *See* Sales Convention, *supra* note 1, art. 81.

160. *Id.* arts. 75, 76.

both installment and single-delivery contracts, resembles the U.C.C. Article 2 provisions that permit a buyer to reject or revoke acceptance as to "commercial units" of goods[161] and to obtain market-price or cover damages for a missing portion of a delivery.[162]

Under Article 51 of the Convention, however, the buyer has a right to "partial avoidance" only if 1) the defects in the non-conforming goods or the delay in delivering the missing goods constitute a fundamental breach with respect to those goods or 2) the seller has failed to deliver missing goods within the time fixed in a *Nachfrist* notice.[163] Immaterial non-conformities in a portion of a delivery, for instance, will not permit the buyer to reject or withhold payment for the non-conforming portion, although the buyer can exercise its non-avoidance remedies (*e.g.*, can require the seller to repair[164] or can claim damages[165]) with respect to the defective goods. Under U.C.C. section 2-601, in contrast, a buyer in a single-delivery contract has the theoretical right to reject any "commercial unit" of tendered goods even if the seller has committed only an immaterial breach.

Where a seller makes a partially non-conforming or insufficient delivery, Article 51(2) of the Convention provides that the buyer can avoid the contract "in its entirety" only if the seller's default "amounts to a fundamental breach of contract." At first glance, this provision appears redundant. Article 49(1) makes it clear that, absent use of the *Nachfrist* procedure, the buyer can avoid the contract only if the seller committed a fundamental breach. Nothing in Article 49 suggests that this rule does not apply when the seller delivers non-conforming goods or fails to deliver a full complement of goods. Article 51(2), nevertheless, is not mere verbiage. Professor Honnold notes that

> [o]ne of the purposes of paragraph (2) of Article 51 is to make clear that paragraph (1) does not force the buyer to sort out the non-conforming goods for separate handling. The buyer may "avoid" (reject) as to the entire delivery if the breach as to part causes detriment that is so substantial as to constitute a "fundamental breach" of the contract as a whole.[166]

---

161. U.C.C. §§ 2-601(c), 2-608(1) (1978).

162. *See id.* § 2-711(1).

163. *See* HONNOLD, *supra* note 25, at 328-30. In other words, Article 49(1) authorizes the buyer to avoid the contract only if the seller has committed a fundamental breach or has failed to deliver within the time fixed in a *Nachfrist* notice. Article 51(1) merely makes this rule applicable to a non-conforming or missing portion of a delivery.

164. *See* Sales Convention, *supra* note 1, art. 46(3).

165. *Id.* arts. 45(1)(b), 74.

166. HONNOLD, *supra* note 25, at 330.

In cases involving a partially non-conforming or insufficient delivery, furthermore, Article 51(2) permits the buyer to avoid the entire contract "only" if the failure constitutes a fundamental breach of contract. Thus if the seller fails to deliver an immaterial portion of the goods, the buyer cannot use the *Nachfrist* procedure to create grounds for avoiding the contract in its entirety.[167] The unavailability of *Nachfrist* avoidance whenever the seller has made a partial delivery is troubling. Suppose the seller delivers only 10 of the 100 bales of cotton required under the contract, but indicates that the balance will be delivered in the future. Under Article 51(2), the partial delivery deprives the buyer of the advantages of the *Nachfrist* procedure. The buyer must wait until it is sure that the seller's delay in completing delivery amounts to a fundamental breach before it can avoid the contract. *Nachfrist* avoidance was designed to eliminate such uncertainty. The rule making *Nachfrist* avoidance unavailable where the buyer has received partial delivery appears to reflect the confusion, previously noted, over delay in performance and the materiality of the delayed performance.[168]

C. *Special Breach Rules: Some Illusions*

The Convention contains special provisions dealing with installment contracts and prospective non-performance. At first glance, these articles appear to be equivalent to the U.C.C. provisions on these subjects. This impression is deepened by structural similarities between the relevant articles in the Convention and the apparently-analogous U.C.C. sections. This surface similarity, however, is misleading.

1. *Installment Contracts*

The Convention's special rules on installment contracts appear in Article 73. Article 73(1) permits either party to avoid the contract "with respect to [an] instalment" if the other side has committed a "fundamental breach of contract with respect to that instalment."

---

167. *See Draft Commentary, supra* note 86, art. 47, ¶ 4, *reprinted in* Official Records, *supra* note 71, at 44; HONNOLD, *supra* note 25, at 330.

168. *See supra* notes 85-91 and accompanying text. Under the construction of Article 49(1)(b) previously advocated, *id.*, avoidance of the entire contract would be permitted only where the seller failed to deliver a material part of the goods within the time fixed by a *Nachfrist* notice. This approach would solve the problem that the drafters of Article 51(2) apparently had in mind when they limited the buyer's power to avoid the entire contract to situations where the seller had committed a fundamental breach. For further discussion of this issue, *see infra* note 182.

The provision appears to be analogous to U.C.C. section 2-612(2), which provides that a buyer can reject a non-conforming delivery under an installment contract "if the non-conformity substantially impairs the value of that installment and cannot be cured. . . ."[169]

The purposes of Article 73(1) and U.C.C. section 2-612(2) are, however, entirely different. The U.C.C. provision creates an exception to the perfect tender rule in section 2-601 of Article 2 by imposing a material breach standard for rejecting a delivery under an installment contract. The purpose of Article 73(1), in contrast, is to permit a party to treat each installment of an installment contract as a severable contract for purposes of avoidance.[170] Thus if a buyer refuses to pay for an installment under a contract governed by CISG, the seller can avoid the contract "with respect to that instalment"[171] even if the refusal to pay would not constitute a fundamental breach of the entire contract. Article 73(1), therefore, is analogous to Article 51(1)—the provision which permits the buyer to sever, for remedy purposes, the portion of a contract relating to a missing or non-conforming part of a single delivery.[172]

Thus a buyer that has received an installment delivery containing non-conforming goods or an insufficient quantity of goods may have three avoidance options. Under Article 51(1), the buyer can avoid the contract with respect to the missing or non-conforming goods pro-

169. The remainder of U.C.C. § 2-612(2) provides that the buyer can also reject the installment if there "is a defect in the required documents," but that the buyer must in all events accept an installment where the non-conformity does not constitute a material breach of the entire contract "and the seller gives adequate assurance of its cure. . . ."

170. HONNOLD, *supra* note 25, at 405. Under the Convention, no exception to the perfect tender rule is necessary because Articles 49(1) and 64(1) establish a fundamental breach standard for avoidance that applies to all contracts.

171. This assumes, of course, that the refusal amounts to a "fundamental breach . . . with respect to that installment," as required by Article 73(1).

172. HONNOLD, *supra* note 25, at 405. For discussion of Article 51, see *supra* notes 158-68 and accompanying text.

Article 73(1) does not, by its terms, permit the buyer to use the *Nachfrist* procedure to create grounds for avoidance with respect to an installment if the seller is late in delivering the installment. Contrast Article 51(1), which makes the buyer's remedies in Articles 46-50—including *Nachfrist* avoidance under Article 49(1)(b)—applicable to that portion of a contract which relates to goods missing from a single delivery. There is, however, no good reason to treat the analogous non-delivery situations covered by Articles 51(1) and 73(1) differently: a buyer who is awaiting a late installment delivery should be able to use the *Nachfrist* procedure to establish grounds for avoiding with respect to the installment. HONNOLD, *supra* note 25, at 406 n.3. The author believes that *Nachfrist* should also be available under Article 51(2) (avoidance of the entire contract following a partially nonconforming or insufficient delivery), although the text of Article 51(2) precludes this result. *See supra* notes 167-68 and accompanying text.

vided the seller's breach is "fundamental" as to those goods. Under Article 73(1), the buyer can avoid as to the installment if the delay in full delivery or the non-conformity in the goods "results in such detriment . . . as substantially to deprive [the buyer] of what he is entitled to expect"[173] with respect to the installment. Finally, under Article 49(1) the buyer can avoid the entire contract if the seller's default constitutes a fundamental breach of the entire contract.

Article 73(2) of the Convention provides that, where default with respect to any installment gives the aggrieved party "good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments," the aggrieved party "may declare the contract avoided for the future" if it does so "within a reasonable time." At first glance this provision appears similar in effect to U.C.C. section 2-612(3), which states that "[w]henever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole." The similarity is an illusion. The purpose of U.C.C. section 2-612(3) is to vary the perfect tender rule[174] by imposing a materiality standard for "entire" breaches of installment agreements. Such special treatment of installment agreements is unnecessary under the Convention, which applies the fundamental breach standard of avoidance to all contracts.[175] The purpose of Article 73(2) of CISG is to state a special rule of anticipatory repudiation applicable to future deliveries under an installment contract— *i.e.*, if defaults (material or otherwise) as to past installments give "good grounds" to anticipate a fundamental breach as to future deliveries, the aggrieved party can infer an anticipatory repudiation that justifies avoidance with respect to the future installments.[176] U.C.C. section 2-612(3), in contrast, has nothing to do with anticipatory repudiation, as the Official Comments make clear.[177]

The final clause of Article 73(2), which requires a party to avoid as to future installments "within a reasonable time," is curiously am-

173. *See* Sales Convention, *supra* note 1, art. 25.

174. U.C.C. § 2-601 (1978).

175. *See* Sales Convention, *supra* note 1, art's. 49(1), 64(1); *supra* notes 80-91 and accompanying text.

176. *Draft Commentary, supra* note 86, art. 64, ¶ 6, *reprinted in* Official Records, *supra* note 71, at 54. The rule of Article 73(2) represents a marked change from the substantive standards and procedures that the Convention applies to anticipatory breaches in other contexts. HONNOLD, *supra* note 25, at 406. For discussion of other anticipatory repudiation provisions of CISG, *see infra* notes 185-203 and accompanying text.

177. *See* U.C.C. § 2-612 comment 6 (1978).

biguous. When is the reasonable time to begin running? A comment to a draft of the Convention suggested that the time runs from the breaching party's "failure to perform."[178] Where the faulty performance could not be detected immediately, however, it would be preferable to measure reasonableness from the time the aggrieved party discovered (or had reason to discover) the breach.[179] Neither of these approaches works well if the past defaults involved non-delivery[180] or if "good grounds" to anticipate a fundamental breach as to future installments arose only after a series of non-conforming installments.[181] The best solution is to measure reasonableness from the time the aggrieved party acquired "good grounds" to anticipate serious problems with future installments. Such a standard is very uncertain, but it offers the only hope for dealing with the variety of circumstances that will arise. Behind these issues are questions about the purpose of the "reasonable time" requirement in Article 73(2): is it designed to protect breaching parties who may be expending funds to prepare for future performance, to punish aggrieved parties who fail to assert their rights expeditiously, or to do both (with the emphasis depending on the circumstances of the case)?

A final point worth noting is that Article 73(2) deals only with avoidance as to *future* performance. It does not address avoidance of an entire installment contract.[182] If a default in a completed delivery

178. *Draft Commentary*, *supra* note 86, art. 64, ¶ 5, *reprinted in* Official Records, *supra* note 71, at 54.

179. Compare Article 39(1) of the Convention ("The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice . . . within a reasonable after he has discovered it or ought to have discovered it").

180. If a seller fails to deliver an installment by the date required in the contract, for example, the buyer's "good grounds" to anticipate a fundamental breach as to future installments may not arise until the seller's delay becomes material. Both the seller's failure to perform and the buyer's awareness thereof, however, will occur on the date that the delivery is missed. Thus the buyer is in danger of violating the reasonable time requirement if it awaits the seller's performance. Even if the buyer employs the *Nachfrist* procedure to establish the materiality of the delay as to the missed delivery, *see* HONNOLD, *supra* note 25, at 406 n. 3, there is a risk that its power to avoid as to future deliveries would be lost.

181. Article 73(2) speaks of "one party's failure to perform any of his obligation in respect of *any* instalment" (emphasis added). This language permits the aggrieved party to treat defaults in several installments as cumulative. *Draft Commentary*, *supra* note 86, art. 64, ¶ 6, *reprinted in* Official Records, *supra* note 71, at 54. *Compare* comment 6 to U.C.C. § 2-612 ("defects in prior installments are cumulative in effect, so that acceptance does not wash out the defect 'waived' ").

182. Article 73(2) does not mention avoidance by means of the *Nachrist* procedure. Professor Honnold notes that *Nachfrist* avoidance is "intrinsically inapplicable" to the situation addressed in Article 73(2)—avoidance as to future performance. HONNOLD, *supra* note 25, at 406 n. 3. *Nachfrist* avoidance, in other words, is based on a failure to perform within a reasonable time *beyond* the contractual time for performance. *See* Sales Convention, *supra* note 1, art's. 47, 49(1)(b), 63,

constitutes a fundamental breach with respect to that delivery *and* gives the aggrieved party good grounds to anticipate a fundamental breach as to future installments, however, the past deliveries can be avoided under Article 73(1) and the future installments can be avoided under Article 73(2).[183] Except for this situation, a party who wishes to avoid an entire installment contract must show that defaults as to past deliveries constitute a fundamental breach of the entire contract,[184] or that the party can avoid under the general anticipatory breach provisions (Articles 71 and 72) to which we now turn.

2. *Prospective Non-performance, Anticipatory Repudiation, Stoppage of Goods in Transit*

Article 71(1) of the Convention gives a party the right to suspend its performance

> if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
> (a) a serious deficiency in his ability to perform or in his creditworthiness; or
> (b) his conduct in preparing to perform or in performing the contract.

Article 71(3) requires the suspending party to "continue with per-

64(1)(b). It is not designed to deal with avoidance as to performance not yet due. When avoidance as to future performance is the issue and grounds for avoidance are uncertain, the relevant provision is Article 72 (dealing with avoidance for failure to provide adequate assurances). For discussion of Article 72, see *infra* notes 185-96 and accompanying text.

Professor Honnold suggests that the distinction between avoidance provisions that address future performance (such as Article 73(2)) and those that address performance already due justifies the unavailability of *Nachfrist* avoidance under Article 51(2) where the buyer has received partial delivery of goods. *See* HONNOLD, *supra* note 25, at 406 n.3. The avoidance questions governed by Article 51(2), however, will not necessarily involve future performance *(e.g.*, if the contract calls for a single delivery or the problem delivery is the final one under an installment contract). The analogy Professor Honnold draws between Articles 73(2) and 51(2) is, therefore, invalid. Concerns about using the *Nachfrist* avoidance procedure in connection with situations covered by Article 51(2) can be addressed by generally limiting avoidance to a *material* failure to perform within the time specified in a *Nachfrist* notice. *See supra* notes 85-91 and accompanying text. If this limitation were adopted, there would be no policy reason to deprive the buyer of *Nachfrist* avoidance where the seller has made a partial delivery. Article 51(2), however, does not permit the buyer to invoke *Nachfrist* avoidance in this situation.

183. A buyer's options where the seller has defaulted with respect to some but not all installments may also be affected by Article 73(3). Under this provision, a party who avoids with respect to "any delivery" may also avoid as to other (past or future) deliveries "if, by reason of their interdependence, those deliveries could not be used for the purposes contemplated by the parties at the time of the conclusion of the contract." For an example illustrating the operation of this provision, *see* HONNOLD, *supra* note 25, at 406-07.

184. *See* Sales Convention, *supra* note 1, art's. 49(1)(a), 64(1)(a).

formance if the other party provides adequate assurance of his performance."[185] Article 72(1) permits a party to avoid the contract where "it is clear" that the other party "will commit a fundamental breach of contract." Articles 71 and 72 thus appear to parallel, respectively, U.C.C. section 2-609 (right to suspend performance if "reasonable grounds for insecurity arise with respect to the [other party's] performance" and to treat a failure to provide adequate assurances as a repudiation of the contract) and section 2-610 (options and remedies upon anticipatory repudiation).[186]

The apparent parallelism between Article 71 of the Convention and U.C.C. section 2-609 and between CISG Article 72 and U.C.C. section 2-610 is, however, in part an illusion. Unlike U.C.C. section 2-609(4), Article 71 does not permit a party to treat the contract as repudiated if the other side fails to provide adequate assurances.[187] On the other hand, a failure to receive adequate assurances under Article 71 may make it "clear" that a fundamental breach will occur, thus permitting the aggrieved party to proceed under Article 72.[188] Article 72, however, allows the aggrieved party to avoid the contract only if, time permitting, it gives "reasonable notice" in order to "permit [the other party] to provide adequate assurance of his performance."[189] This requirement, which applies unless "the other party has declared that he will not perform his obligations,"[190] has no parallel in U.C.C. section 2-610.

---

185. The suspending party "must immediately give notice of the suspension to the other party." *Id.* art. 71(3).

186. Among the options that the U.C.C. gives to a party that has experienced an anticipatory repudiation is the right to "resort to any remedy for breach," including the avoidance-type remedies of cancellation and resale/cover or market-price-differential damages. U.C.C. § 2-610(b) (1978). This option parallels the right to avoid the contract under Article 72(1) of the Convention.

187. Article 71 simply does not specify the aggrieved party's rights if adequate assurances are not forthcoming. At the Vienna diplomatic conference, the First Committee considered an amendment that would have permitted the aggrieved party to avoid in these circumstances. Amendment to Article 62 of the Draft Convention, Sponsored by Australia and Canada, U.N. Doc. A/CONF.97/C.1/L.224 (1980), *reprinted in* Official Records, *supra* note 71, at 129. The proposed amendment was rejected. Summary Records of the Twenty-seventh Meeting of the First Committee, U.N. Doc. A/CONF.97/C.1/SR.27 (1980), *reprinted in* Official Records, *supra* note 71, at 377, 377-78.

188. *Draft Commentary*, *supra* note 86, art. 63, ¶ 2, *reprinted in* Official Records, *supra* note 71, at 53; HONNOLD, *supra* note 25, at 400. *Contra* ZIEGEL, *supra* note 80, § 9.05 at 9-35.

189. *See* Sales Convention, *supra* note 1, art. 72(2).

190. *Id.* art. 72(3). Must a party who has failed to receive adequate assurances after a demand made under Article 71 and who wishes to avoid the contract before performance is due issue a second demand for adequate assurances under Article 72? That would be absurd. It can be finessed by holding that a demand for assurances under Article 71 satisfies the notice requirement in Article 72(2). The need to construe around this problem, however, illustrates the clumsy fit between Arti-

In other words, Article 71 of the Convention parallels U.C.C. section 2-609 only to the extent that the latter permits a party to suspend performance upon demanding adequate assurances. Article 72 of CISG, on the other hand, combines the functions of U.C.C. section 2-609(4) (which treats a failure to meet a justified demand for adequate assurances as a repudiation of the contract) and section 2-610 (which specifies the aggrieved party's rights where there has been an anticipatory repudiation).[191] Those familiar with U.C.C. Article 2 who fail to grasp these differences in the Convention's approach to suspension of performance and anticipatory repudiation may be misled.

Other aspects of Articles 71 and 72 are worthy of comment. As could be expected, suspension under Article 71 requires less certainty concerning a future breach than does avoidance under Article 72.[192] Article 72(1) permits avoidance only when "it is clear" that the other party will breach; under Article 71, the threatened breach need merely be "apparent" in order to justify suspension. It also appears that, compared to the requirements for avoidance under Article 72, the consequences of the threatened breach need not be as serious to trigger suspension under Article 71. The standard in Article 71 is non-performance of "a substantial part" of a party's obligations. Article 72 requires a threat of "a fundamental breach of contract." The distinction apparently drawn here between substantial non-performance and fundamental breach lends support to those who have argued that the definition of fundamental breach demands more than a "mere" material breach.[193]

The distinction also creates an ambiguity in the operation of Ar-

---

cles 71 and 72, which were the subject of last-minute debate and tinkering at the Vienna diplomatic conference. *See* HONNOLD, *supra* note 25, at 394, 403; ZIEGEL, *supra* note 80, § 9.05 at 9-34.

To nurture the argument that a demand for assurances under Article 71 satisfies the notice requirement in Article 72, the demand should specify not only that the aggrieved party is suspending performance but also that it will avoid the contract unless assurances are made within a reasonable time. Avoidance upon a failure to respond to such a demand would be equivalent to avoidance for failure to perform in response to a *Nachfrist* notice. *Cf.* Sales Convention, *supra* note 1, arts. 47, 49(1)(b), 63, 64(1)(b); *supra* notes 82-91 and accompanying text.

191. Article 72 of the Convention dispenses with a demand for adequate assurances if the other side has declared that it will not perform. Sales Convention, *supra* note 1, art. 72(2), (3). Similarly, U.C.C. Article 2 does not require use of the adequate assurances procedure where there has been a clear anticipatory repudiation— *i.e.*, "an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance." U.C.C. § 2-610 comment 1 (1978).

192. *See* HONNOLD, *supra* note 25, at 393, 401-02; ZIEGEL, *supra* note 80, § 9.05 at 9-35.

193. This issue is discussed at *supra* notes 100-01 and accompanying text.

ticle 71. Suppose that a party has suspended performance because the other side will apparently fail to perform a substantial but not "fundamental" part of its obligations. If adequate assurances are not forthcoming, can the aggrieved party continue to suspend its performance indefinitely?[194] The answer should be no. Professor Honnold notes that "[c]ontinued suspension of performance is closely akin to avoidance of the contract."[195] Permitting indefinite suspension where the threatened breach is not fundamental, therefore, would undermine Article 72, which permits avoidance only where it is clear that a fundamental breach will occur.[196] Two solutions are possible: (1) Article 71 could be construed to require that the suspending party either avoid the contract or end its suspension within a reasonable time after demanding adequate assurances; (2) the standards for the seriousness of the threatened breach in Articles 71 and 72 could be treated as equivalent. Neither solution, however, is supported by the text of the Convention.

---

194. A similar situation could arise if a party that has suspended performance receives assurances of performance that would not constitute a fundamental breach, but which would involve a failure by the other party to perform "a substantial part" of its obligations. Professor Honnold has argued that assurance of less than perfect performance should be considered "adequate assurance" under Article 71(3) provided the imperfection is not substantial. HONNOLD, *supra* note 4, § 392. Presumably the same principle should apply under Article 72(2). Thus an assurance of imperfect performance should preclude avoidance under Article 72 as long as the performance that is assured would not constitute a fundamental breach. If the assured performance would involve a "substantial" but not fundamental breach, therefore, the aggrieved party could not avoid but could apparently continue to suspend performance under Article 71.

Professor Honnold's analysis of the "imperfect assurance" issue under Article 71 resembles the discussion at *supra* notes 82-91 and accompanying text, in which it is argued that only a material failure to perform within the time fixed by a *Nachfrist* notice should justify avoidance. Imperfect assurances and imperfect responses to a *Nachfrist* notice present analogous questions because the functions of a *Nachfrist* notice and a demand for adequate assurance are analogous: the *Nachfrist* procedure eliminates uncertainty when performance is overdue; the adequate-assurance procedure eliminates uncertainty concerning performance that is not yet due. *See supra* note 190.

195. *See* HONNOLD, *supra* note 25, at 398. In other words, indefinite suspension of performance would relieve the suspending party of its executory duties under the contract, just as avoidance does. *See* Sales Convention, *supra* note 1, art. 81(1). Indefinite suspension, however, would not entitle the suspending party to other avoidance remedies such as restitution under Article 81(2) and resale/cover or market-price-differential damages under Articles 75 or 76. *See* HONNOLD, *supra* note 25, at 393. Thus indefinite suspension would permit the suspending party to escape an unfavorable executory exchange, but would allow it neither to "undo" an executed exchange nor to protect a favorable unexecuted exchange.

196. *See* HONNOLD, *supra* note 25, at 393; *cf. id.* at 393-94 (assurance that performance will occur after a slight delay should be considered "adequate assurance" under Article 71(3) because that approach is "consistent with the principles on avoidance in Article 25, 49, 64 and with the rule of Article 71(1)").

To justify suspension of performance under CISG Article 71, a threat of breach must arise from

> (a) a serious deficiency in [the other party's] ability to perform or in his creditworthiness; or
> (b) [the other party's] conduct in preparing to perform or in performing the contract.[197]

Although these grounds are more inclusive than the standards for suspension in some domestic sales regimes, they are narrower than the broad "reasonable grounds for insecurity" that will justify suspension under U.C.C. section 2-609(1).[198] For example, suppose a seller suggests (but does not openly declare) that it may simply refuse to deliver the goods. Under U.C.C. section 2-609(1), the buyer clearly could suspend performance. Under Article 71(1) of the Convention, however, the buyer could suspend only if the seller's statements indicate an *inability* to perform or constitute "conduct in preparing to perform or in performing." The latter phrase may refer only to conduct directly related to contract performance (*e.g.*, manufacturing the goods or preparing them for shipment). If the grounds for suspension under the Convention are too limited to reach this situation, the buyer must determine whether the seller's ambiguous statement is enough to satisfy the standards for avoidance under Article 72— *i.e.*, whether it constitutes a "clear" threat of a fundamental breach.[199] This is the kind of dilemma that U.C.C. section 2-609(1) avoids by using the "reasonable grounds for insecurity" formulation.[200]

Under Article 71(2) of the Convention, a seller that becomes aware of grounds for suspending performance *after* the goods have been dispatched may intercept the goods in transit. This provision is analogous to U.C.C. section 2-705, which permits a seller to stop goods in transit if, *inter alia*, the seller has a right to suspend performance.[201] On at least one question, however, U.C.C. Article 2 and the Convention reach different results. CISG Article 71(2) permits the seller to intercept the goods "even though the buyer holds a document which entitles him to obtain them." This language would cover a sit-

197. *See* Sales Convention, *supra* note 1, art. 71(1).

198. *See* HONNOLD, *supra* note 25, at 395-97.

199. That something less than a clear avowal of an intention to breach will satisfy the standards of Article 72(1) is suggested by Article 72(3), which dispenses with the adequate assurance procedure when the other party "has declared that he will not perform his obligations."

200. *See* U.C.C. § 2-610 comment 1 (1978).

201. *See id.* § 2-705 comment 1.

uation in which the buyer holds a negotiable bill of lading covering the goods.[202] Under U.C.C. section 2-705(2)(d), in contrast, a seller's right to stop goods in transit ceases upon "negotiation to the buyer of any negotiable document of title covering the goods."[203]

D. Damages Upon Avoidance

A lawyer conversant with Article 2 of the U.C.C. who successfully travels the unfamiliar pathways of avoidance of contract under the Convention, including the sometimes unexpected turnings of its rules on restitution, will discover recognizable landscape at the end of the journey. Article 75, for instance, permits an avoiding party to recover damages measured by the difference between the contract price and the price in a reasonable substitute transaction. The aggrieved party can claim further damages as measured by Article 74. This provision, which will be discussed in more detail in connection with nonavoidance remedies[204] permits an avoiding party to recover consequential and incidental damages.[205]

Provisions comparable to Article 75 are found in U.C.C. section 2-706 (sellers' resale damages) and U.C.C. section 2-712 (buyers' cover damages),[206] both of which also permit recovery of consequential and/or incidental damages. For sellers, the major difference between U.C.C. section 2-706 and Article 75 of the Convention is that

202. *See* HONNOLD, *supra* note 25, at 397.

203. Where the buyer controls a negotiable bill of lading, however, Article 71(2) may not always achieve the result it contemplates. The last sentence of Article 71(2) limits the provision's scope to "the rights in the goods as between the buyer and the seller." This is a reaffirmation of the basic principle, found in Article 4, that the Convention "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract." A carrier of goods, however, is not normally a party to the sales contract and is neither a buyer nor a seller. The domestic law that governs the responsibilities of the carrier may permit it to deliver the goods to the holder of a negotiable bill of lading. Under U.C.C. § 2-705(3)(c), for example, a carrier is not required to obey a stop order unless any negotiable document of title covering the goods is surrendered. It is, however, unclear whether § 2-705(3) would apply where the Convention, rather than Article 2 of the U.C.C., governs the contract for sale.

At any rate, if the carrier is permitted under applicable domestic law to deliver the goods to a buyer who holds a negotiable document of title, even though the seller has a right to intercept the goods under Article 71(2) of the Convention, the situation resembles that described in the last paragraph of comment 2 to U.C.C. § 2-705: the buyer cannot complain if the carrier obeys the seller's stop order; the seller, on the other hand, cannot complain if the carrier exercises its right to deliver the goods to the buyer holding a negotiable bill of lading.

204. *See infra* notes 252-62 and accompanying text.

205. *See* HONNOLD, *supra* note 25, at 409, 416. Under the Convention, all damage claims are subject to a mitigation limitation. Sales Convention, *supra* note 1, art. 77.

206. HONNOLD, *supra* note 25, at 413.

the latter neither requires notice of the substitute sale[207] nor regulates the details of resale beyond requiring that it be made "in a reasonable manner and within a reasonable time after avoidance."[208] For buyers, Article 75 appears almost indistinguishable from U.C.C. section 2-712.[209] Article 75, however, does not specify the adjustment mentioned in both U.C.C. section 2-706(1) and U.C.C. section 2-712(2) for expenses saved by the party claiming damages as a result of the breach. Under the U.C.C. language, items such as transportation expenses saved by the aggrieved party in a substitute transaction are deducted from cover or resale damages.[210] A similar result can be reached under Article 75 of the Convention by construing the phrase "price in the substitute transaction" to permit such adjustment. Equitable considerations demand this construction, given that *increased* transportation costs and similar items of extra expense associated with a substitute transaction would constitute losses suffered "as a consequence of breach" and thus would be recoverable under CISG Article 74.

Article 76(1) of the Convention permits a party that has not entered into a substitute transaction to claim damages measured by "the difference between the price fixed by the contract and the current [*i.e.*,

207. Contrast U.C.C. § 2-706(3) (notice of private resale) and § 2-706(4)(b) (notice of public resale except where the goods "are perishable or threaten to decline in value speedily"). Under the Convention, of course, a seller wishing to recover resale damages must give notice in order to avoid the contract. Sales Convention, *supra* note 1, art. 26.

208. Contrast U.C.C. § 2-706(2) (general rules on conducting the resale) and § 2-706(4) (rules on resale by public sale).

Article 75 of the Convention contains nothing comparable to U.C.C. § 2-706(5), specifying the rights of the original buyer vis-a-vis purchasers at a resale that fails to meet the requirements of § 2-706. Such issues, however, are beyond the scope of the Convention. *See* Sales Convention, *supra* note 1, art. 4. Article 75 also does not include a statement equivalent to the first sentence of U.C.C. § 2-706(6) ("The seller is not accountable to the buyer for any profit made on any resale"). That principle, however, is implied by the Convention's rules on the effect of avoidance of the contract. *See* Sales Convention, *supra* note 1, art. 81(1).

209. One difference between the two provisions is that Article 75 speaks of "the difference between the contract price and the price in the substitute transaction" whereas the comparable phrase in U.C.C. § 2-712(2) is "the difference between the *cost* of cover and the contract price" (emphasis added). The phrase "cost of cover," however, has generally been interpreted to mean the price in the substitute purchase. *See* WHITE & SUMMERS, *supra* note 9, § 6-3 at 216-18.

Article 75 does not specifically require that the substitute purchase or sale be made in good faith. Contrast U.C.C. § 2-706(1) and § 2-712(1). This difference is probably not significant, given the general mandate in Article 7(1) requiring the Convention to be interpreted in a manner that promotes "the observance of good faith in international trade."

210. WHITE & SUMMERS, *supra* note 9, § 6-3 at 217-18, § 7-6 at 265-66.

market] price."[211] The comparable provisions in U.C.C. Article 2 are section 2-708(1) (seller's market-price damages) and section 2-713 (buyer's market-price damages). The manner of measuring market-price damages under the Convention, however, differs in several significant respects from the method in the U.C.C.

CISG Article 76 damages are generally measured by the market price "at the time of avoidance";[212] if the aggrieved party avoids the contract after "taking over the goods," however, the reference point is "the time of such taking over." The latter alternative prevents an avoiding buyer who has received delivery from manipulating the time of avoidance in order to increase the seller's liability.[213] Under U.C.C. Article 2, the seller's market-price damages are normally measured at the time for tender[214] and the buyer's damages are usually measured as of the time the buyer "learned of the breach."[215] If the

211. Article 76(1) also authorizes recovery of incidental and consequential damages under Article 74.

212. The market-price damage provision in the draft Convention submitted to the Vienna diplomatic conference measured damages at the time the aggrieved party "first had the right to declare the contract avoided." Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Law, art. 72(1), U.N. Doc. A/CONF.97/5 (1979), *reprinted in* Official Records, *supra* note 71, at 5, 13. During deliberations by the First Committee at the Vienna conference, this standard was criticized as too uncertain; various amendments, each of which specified the time of avoidance as a measuring point, were proposed and rejected. Summary Records of the Thirtieth Meeting of the First Committee, U.N. Doc A/CONF.97/C.1/SR.30 (1980), *reprinted in* Official Records, *supra* note 71, at 393, 394-96. During a plenary session of the conference, an amendment containing the current language of Article 76(1) was adopted. Summary Records of the Tenth Plenary Meeting, U.N. Doc. A/CONF.97/SR.10 (1980), *reprinted in* Official Records, *supra* note 71, at 219, 222-23.

The "time of avoidance" for purposes of Article 76(1) will presumably be determined by reference to the notice of avoidance required by Article 26. Indeed, the representative to the Vienna conference who introduced the amendment containing the current text of Article 76(1) spoke of measuring damages "at the time of the actual declaration of avoidance." *Id.* at 222 (statement of Mr. Bennet (Australia)). It is not clear, however, whether market price should be determined as of the time the aggrieved party dispatched notice of avoidance or as of the time the breaching party received (or should have received) the notice. Under Article 27, notice of avoidance "by means appropriate in the circumstances" is effective even if the notice is delayed or fails to arrive. Whether the dispatch principle of Article 27 will determine the time at which a contract is deemed avoided for purposes of Article 76(1), however, is not clear.

213. HONNOLD, *supra* note 25, at 414. Despite this apparent purpose, Article 76(1) does not limit the application of the alternative measuring point to buyers. It might therefore apply, *e.g.*, to an avoiding seller who delivered and then "took over" the goods after they were wrongfully rejected by the buyer. As applied to buyers, the phrase "taking over the goods" implies something akin to "acceptance" under U.C.C. § 2-606. Thus the alternative should not apply when an aggrieved buyer rejects the goods immediately after the inspection permitted by CISG Article 38. *See* HONNOLD, *supra* note 25, at 414.

214. U.C.C. § 2-708(1) (1978).

215. *Id.* § 2-713(1).

breach was an anticipatory repudiation and the action comes to trial before the repudiator's performance is due, however, U.C.C. market-price damages are measured at the time the aggrieved party learned of the repudiation.[216] Thus suppose the seller contracted to deliver goods at a price of $10,000 on June 1, at which time the market price was $8,000. If the buyer wrongfully rejected the goods, the seller's market-price damages under U.C.C. section 2-718(1) would be $2,000 (assuming no "expenses saved" because of the buyer's breach). The damages under Article 76 of the Convention, however, would depend on when the seller declared the contract avoided. If avoidance occurred on June 15, when the market price had risen to $9,000, the seller's market-price damages would be $1,000.[217]

Under Article 76(2) of the Convention, market price is measured "at the place where delivery of the goods should have been made."[218] This language refers to the place of tender,[219] at which the U.C.C. also measures market-price damages for sellers and, in many circum-

---

216. *Id.* § 2-723(1).

217. Alternatively, suppose the buyer repudiated the contract on February 1, when the market price stood at $7,000. The seller's market-price damages under the U.C.C. would still be $2,000 unless the seller's suit went to trial before June 1. In the latter case, the seller's damages would be measured at the time it learned of the repudiation, *id.* § 2-723(1), and the seller's could recover $3,000. Under Article 76(1) of the Convention, however, the seller's damages would be determined at the time of avoidance. Thus if avoidance occurred on February 15, when the market price was $7,500, the seller's damages would be $2,500.

Where the seller has repudiated, the Convention's approach avoids difficult issues that have arisen under U.C.C. Article 2. The U.C.C. measures the buyer's market-price damages as of the time the buyer learned of the repudiation, provided the breach of contract action goes to trial before the date for the seller's performance. U.C.C. § 2-723(1) (1978). Where trial does not begin until after the seller's performance was due, however, damages are measured under U.C.C. § 2-713(1) as of the time the buyer "learned of the breach." When does the buyer "learn of the breach" in an anticipatory repudiation situation? At least three answers have been proposed: 1) the date the buyer learns of the repudiation, *e.g.*, Oloffson v. Coomer, 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973); 2) the date the repudiated performance is due, WHITE & SUMMERS, *supra* note 9, § 6-7 at 242-47; 3) the date within a commercially reasonable time after repudiation on which the buyer treats the repudiation as a breach or, failing such treatment, the last day of a commercially reasonable period following the repudiation, J. MURRAY, MURRAY ON CONTRACTS § 246 at 498-99 (1974); *see* First Nat. Bank v. Jefferson Mortgage Co., 576 F.2d 479 (3d Cir. 1978). Professor Nordstrom argued that resolution of this issue required amending the U.C.C. R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 149 at 456 (1970). Article 76 of the Convention avoids this issue by specifying that the buyer's market-price damages are measured as of the time the contract is avoided in all anticipatory repudiation situations.

218. Where "there is no current price at that place," however, market price is measured at a reasonable substitute location, "making due allowance for differences in the cost of transporting the goods." Sales Convention, *supra* note 1, art. 76(2). U.C.C. § 2-723(2) contains an equivalent rule.

219. *See* HONNOLD, *supra* note 25, at 415-16.

stances, buyers.[220] The Convention and the U.C.C., therefore, often point to the same place for measuring market-price damages. Where an aggrieved buyer has rejected or revoked acceptance after the goods arrived, however, U.C.C. section 2-713(2) measures the market price at the place of arrival. Suppose goods that were sold and delivered under a shipment contract (*i.e.*, a contract in which the seller tenders by placing the goods with the first carrier[221]) turn out to be seriously defective. Under the Convention, if the buyer rejects the goods by avoiding the contract, its market-price damages would be measured by reference to the price prevailing at the place of tender—where the seller delivered the goods to the carrier for shipment. Under the U.C.C., the rejecting buyer's market-price damages would be measured by the price at the place where the goods arrived.

Most commentators on Article 2 of the U.C.C. agree that an aggrieved buyer or seller who has in fact entered into a substitute transaction should not be permitted to claim market-price damages more generous than those produced by the resale or cover damages formula.[222] There is, however, contrary opinion[223] and the text of Article 2 does not provide clear guidance. Article 76(1) of the Convention resolves this issue in part by providing that an avoiding party can claim market-price damages only if it "has not made a purchase or resale under article 75." A party that has entered into a substitute transaction within the meaning of Article 75, therefore, must proceed under that provision and cannot claim damages under Article 76. An attempt at resale or cover that does not meet the requirements of Article 75 (*e.g.*, because the substitute transaction did not occur within a reasonable time after avoidance), however, does not prevent the aggrieved party from claiming market price damages under Article 76.[224] To avoid over-compensating the aggrieved party, nevertheless, such substitute transactions should be deemed to establish an upper limit on the amount of damages recoverable under Article 76, although the text of the Convention does not mandate this result.

A seller who is deprived of sales volume by the buyer's breach

220. U.C.C. §§ 2-708(1), 2-713(2) (1978).

221. *See* Sales Convention, *supra* note 1, art. 31(a); *e.g.*, U.C.C. § 2-319(1) (1978).

222. WHITE & SUMMERS, *supra* note 9, § 6-4 at 233-34; MURRAY, *supra* note 217, § 240 at 486-87.

223. *See* Peters, *Remedies for Breach of Contract Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 260 (1973).

224. *Draft Commentary*, *supra* note 86, art. 71, ¶ 6, *reprinted in* Official Records, *supra* note 71, at 60; HONNOLD, *supra* note 25, at 416.

will be fully compensated only if it can recover the profit on the lost sale to the buyer.[225] The U.C.C. deals with this situation in section 2-708(2), which permits an aggrieved seller to recover lost profits where the market-price damage formula "is inadequate to put the seller in as good a position as performance would have done."[226] Although the Convention contains no specific provision comparable to U.C.C. section 2-708(2), both Articles 75 and 76 permit an avoiding party to claim further damages recoverable under Article 74. Article 74, in turn, permits an aggrieved party to recover "the loss, including loss of profits," caused by a breach. This provision will permit a volume seller to recover damages to compensate for the lost sale.[227]

Where a lost profits recovery would yield lower damages than other formulas, however, results under the Convention and the U.C.C. may differ. One court has restricted an Article 2 seller's damages to lost profits under U.C.C. section 2-708(2) where market-price damages measured by section 2-708(1) would have been more generous.[228] The holding is consistent with the expectation-based principles behind U.C.C. remedies and is supported by at least one commentary.[229] This result, however, may be difficult to reach under the Convention. Unlike U.C.C. section 2-708(2), which is cast as an *alternative* to market-price damages under U.C.C. section 2-708(1), the CISG provision that permits recovery of lost profits (Article 74) is structured as a *supplement* to the resale/cover or market-price damage provisions available to avoiding parties. The text of Articles 74-76, therefore, argues against limiting damages to lost profits where the contract has been avoided. Furthermore, the result under Article 2 of the U.C.C. is supported by the general statement of expectation principles in U.C.C. section 1-106(1).[230] Although the Convention's remedial provisions reflect a policy of protecting an aggrieved party's expectation interest,[231] there is no overt statement of this policy and

225. WHITE & SUMMERS, *supra* note 9, § 7-9; MURRAY, *supra* note 217, § 243 at 489.

226. For discussion of the application of U.C.C. § 2-708, see WHITE & SUMMERS, *supra* note 9, §§ 7-8 to 7-13; MURRAY, *supra* note 217, § 243.

227. HONNOLD, *supra* note 25, at 416; ZIEGEL, *supra* note 80, § 9.05[2] at 9-40 to -41. *But see* Hellner, *The U.N. Convention on International Sales of Goods—An Outsider's View* in IUS INTER NATIONES: FESTSCHRIFT FUR STEFAN RIESENFELD 71, 99-100 (1983).

228. Nobs Chemical, U.S.A., Inc. v. Koppers Co., Inc., 616 F.2d 212 (5th Cir. 1980).

229. WHITE & SUMMERS, *supra* note 9, § 7-12.

230. Nobs Chemical, U.S.A., Inc. v. Koppers Co., 616 F.2d 212, 215 (5th Cir., 1980); WHITE & SUMMERS, *supra* note 9, § 7-12 at 282.

231. *See Draft Commentary*, *supra* note 86, art. 70, ¶ 3, *reprinted in* OFFICIAL RECORDS, *supra* note 71, at 59 ("the basic philosophy of the action for damages is to place the injured party in the

at least one remedy—the buyer's right to reduce the price under Article 50—will in some circumstances violate expectation principles.[232]

III. PARTICULAR "NONAVOIDANCE" PROVISIONS

A. Nonavoidance Procedure

If an aggrieved party elects not to avoid the contract despite a fundamental breach, or if the breach is not fundamental and the *Nachfrist* procedure has not been used to create grounds for avoidance, the aggrieved party can pursue its "nonavoidance" remedies. Under the Convention, nonavoidance is the "default" status of the contract, applicable absent the affirmative step of dispatching notice of avoidance.[233] To preserve its rights to nonavoidance remedies for breach, however, an aggrieved party must follow certain procedures.

If the seller has delivered non-conforming goods, for example, Article 39 of the Convention provides that the buyer "loses the right to rely" on the lack of conformity unless it gives "notice to the seller specifying the nature of the lack of conformity."[234] The notice must be given within the shorter of (a) "a reasonable time after [the buyer] has discovered [the non-conformity] or ought to have discovered it"[235] and (b) two years from the date of delivery to the buyer.[236] If a buyer alleges breach of the warranties against third party claims of ownership (Article 41) or infringement (Article 42), furthermore, the Convention requires notice "specifying the right or claim of the third party."[237]

Articles 39 and 43 prevent an aggrieved buyer from either avoiding or claiming a "nonavoidance" remedy on the basis of certain

---

same economic position he would have been in if the contract had been performed"); HONNOLD, *supra* note 25, at 408 (Article 74 operates to place the aggrieved party "in as good a position as if the other party had properly performed the contract," a standard that "drives home the Convention's unified approach to the parties' obligation and to remedies for breach").

232. *See supra* note 28 and accompanying text.

233. *See* Sales Convention, *supra* note 1, arts. 26, 27.

234. A breaching seller, however, "is not entitled to rely" on lack of adequate notice "if the lack of conformity relates to fact of which he knew or could not have been unaware and which he did not disclose to the buyer." *Id.* art. 40.

235. *Id.* art. 39(1). The time when the buyer "ought" to discover non-conformities in the goods will be influenced by Article 38, which governs the buyer's obligation to examine (inspect) the goods. HONNOLD, *supra* note 25, at 281.

236. Sales Convention, *supra* note 1, art. 39(2). The two-year limitation does not apply, however, if it is "inconsistent with a contractual period of guarantee." *Id.*

237. *Id.* art. 43(1). An aggrieved buyer's failure to give the notice required by Article 43(1) is excused if the seller was aware of the third party's right or claim and knew its "nature." *Id.* art. 43(2).

breaches unless notice particularizing the breach is given.[238] The two provisions thus perform the functions of several sections of U.C.C. Article 2. U.C.C. section 2-607(3)(a), for example, provides that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[239] This provision, which applies only if "a tender has been accepted," does not require that the notice particularize the breach.[240] A rejecting Article 2 buyer, in contrast, not only must give notice[241] but also is deemed to waive objection to defects not specified in the notice if 1) the unspecified defect was "ascertainable by reasonable inspection" and the seller could have cured, or 2) the sale was between merchants and the seller requested a written statement of defects.[242] An Article 2 buyer who is revoking acceptance must also notify the seller,[243] although the notice is not subject to the particularization requirements that apply upon rejection.[244]

Nonavoiding sellers must also comply with certain affirmative duties in order to preserve their rights under the Convention. If a buyer delays in taking delivery or, in a cash sale, fails to pay the price, CISG Article 85 requires the aggrieved seller to take reasonable steps to preserve goods within its possession or control. The seller is entitled to reimbursement for the reasonable expenses of preservation, and can retain the goods until reimbursed.[245] One method of preservation specifically sanctioned by Article 87 is storage in a third-party warehouse at the expense of the breaching buyer.

The Convention does not specify the consequences of a breach of the seller's duties under Article 85. Professor Honnold suggests that damage to goods which results from the seller's failure to take reasonable steps to preserve them is the seller's responsibility even if risk of loss had passed to the buyer.[246] A similar shifting of risk of loss from

238. HONNOLD, *supra* note 25, at 282. If the buyer "has a reasonable excuse" for failing to give the notice required by Articles 39(1) or 43(1), however, it retains the right to "reduce the price in accordance with article 50 or claim damages, except for loss of profit." Sales Convention, *supra* note 1, art. 44(1).

239. U.C.C. § 2-607(3)(b) contains special notice requirements applicable to a buyer's claim for breach of the § 2-312(3) warranty against infringements.

240. U.C.C. § 2-607 comment 4 (1978).

241. *Id.* § 2-602(1).

242. *Id.* § 2-605(1).

243. *Id.* § 2-608(2).

244. Notice of revocation, however, must contain more information than the notice of breach required by U.C.C. 2-607(3)(a). *Id.* § 2-608 comment 5.

245. Sales Convention, *supra* note 1, art. 85.

246. HONNOLD, *supra* note 25, at 457-58. Compare Article 66 of the Convention, which pro-

the buyer back onto the seller can occur under U.C.C. section 2-709(1)(a).[247] Beyond matters relating to risk of loss, the apparent purpose of Article 85 is to require the seller to preserve the goods where it intends to collect the price under Article 62.[248] An appropriate remedy for breach of the duty to preserve, therefore, would be loss of the right to the price if material deterioration in the goods results.[249]

A seller that must preserve goods under Article 85 of the Convention can protect itself if the buyer unreasonably delays in taking possession of the goods or in paying the price and the costs of preservation. In such circumstances, Article 88(1) authorizes the preserving seller to sell the goods by "appropriate means" after "reasonable notice of the intention to sell has been given" to the buyer. Where "the goods are subject to rapid deterioration or their preservation would involve unreasonable expense," furthermore, Article 88(2) *requires* the seller to "take reasonable measures to sell them" after giving notice "[t]o the extent possible." A nonavoiding seller who has exercised its option to sell under Article 88(1) or who has complied with its obligation to sell under Article 88(2) can sue for the price of the goods, but it must "account" to the buyer for proceeds of the sale which exceed the reasonable expenses of preserving and selling the goods.[250] If the seller's claim for the price and its obligation to account for proceeds from the sale of the goods are set off, the seller ends up in the position it would have been in had it avoided the contract and claimed resale damages under Article 75.

B. Nonavoidance Damages

Remedies other than damages which are available to a party that

---

vides that a buyer who bears risk of loss is not responsible for "loss or damage . . . due to an act or omission of the seller."

247. This provision permits the seller to recover the price for unaccepted goods which were lost or damaged after risk of loss passed to the buyer only if the casualty took place "within a commercially reasonable time" after the risk passed. Where a buyer who bears the risk of loss wrongfully refuses to accept goods, U.C.C. Article 2 shifts the risk back on the seller at the end of a commercially reasonable time.

248. *See* HONNOLD, *supra* note 25, at 458. The more limited availability of the price remedy under Article 2 of the U.C.C. may explain the absence in Article 2 of rules requiring the seller to preserve the goods. *See id.*

249. That approach is consistent with the mitigation of damages principle in Article 77 of the Convention. Article 77, however, provides only that a failure to mitigate will result in a reduction in "damages," and thus does not directly apply in an action for the price.

250. *See* Sales Convention, *supra* note 1, art. 88(3).

has not avoided the contract— *i.e.*, the seller's price remedy and the buyer's right to specific performance, substitute goods, repair, or reduction in price—have previously been described.[251] To the extent these remedies do not fully protect the aggrieved party's expectations under the contract, Article 74 of the Convention authorizes recovery of damages measured by "the loss, including loss of profit, suffered . . . as a consequence of the breach."[252] Damages under this provision, which are also available where the aggrieved party has avoided the contract,[253] are subject to familiar limitations involving foreseeability[254] and mitigation of damages.[255]

Thus if the seller fails to deliver, a buyer who elects not to avoid the contract and who seeks specific performance under Article 46(1) can also claim damages under Article 74 for losses caused by the delay in receiving the goods, provided the losses were foreseeable when the contract was formed and could not have been avoided by reasonable attempts to mitigate.[256] A buyer can also recover Article 74 damages if it reduces the price under Article 50, seeks substitute goods under Article 46(2), or demands repair of defective goods under Article 46(3). In these circumstances, Article 74 performs the function of the U.C.C. Article 2 provisions that permit an aggrieved buyer to recover consequential damages,[257] which (under U.C.C. section 2-

---

251. *See supra* notes 23-35 and accompanying text.

252. Professor Honnold notes that the Article 74 damage measure "is designed to place the aggrieved party in as good a position as if the other party had properly performed the contract." HONNOLD, *supra* note 25, at 408.

253. For discussion of Article 74 damages where the contract has been avoided, see *supra* notes 204-05 and accompanying text.

254. Damages recoverable under Article 74 "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matter of which he then knew or ought to have known, as a possible consequence of the breach of contract." Sales Convention, *supra* note 1, art. 74.

255. *Id.* art. 77. For a discussion of the extent to which the mitigation of damages principle in Article 77 may restrict the seller's price remedy, see HONNOLD, *supra* note 25, at 420-21.

256. "The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." Sales Convention, *supra* note 1, art. 45(2). An aggrieved seller is protected by an equivalent provision in Article 61(2). Damages under Article 74, however, are less important for a seller exercising its price remedy than for a buyer seeking specific performance because Article 78 authorizes an aggrieved party to recover interest on "the price or any other sum that is in arrears." Thus unless an unpaid seller suffers consequential damages beyond loss of the time-value of the price, the combination of the price remedy in Article 62 and interest under Article 78 will eliminate the need to claim damages under Article 74. *See* HONNOLD, *supra* note 25, at 409. For discussion of the history and scope of Article 78, as well as the rate of interest to be paid thereunder, see *id.* at 422-25.

257. *E.g.*, U.C.C. § 2-714(2) (1978).

715(2)(a)) must be foreseeable at the time of contracting and not reasonably avoidable "by cover or otherwise."

Suppose, however, that a seller delivers non-conforming goods and the buyer can neither avoid the contract nor demand substitute goods because the defects do not satisfy the fundamental breach standard.[258] Suppose further that the buyer cannot require the seller to repair because that would be "unreasonable having regard to all the circumstances."[259] Under Article 74 of the Convention, the buyer can claim damages measured by its losses from the defects.[260] In these circumstances, Article 74 performs the function of U.C.C. section 2-714(2), which authorizes a buyer who has accepted the goods to recover damages for breach of warranty. Damages under the U.C.C. provision are measured by the difference between the value of the goods delivered and "the value they would have had if they had been as warranted."[261] The same measure is available under Article 74 of the Convention.[262]

CONCLUSION

This article began by noting that comparative studies are a necessary evil at a time when the Convention is unfamiliar to those affected by it. With respect to CISG remedies, the author believes that this situation will change quickly. The Convention's remedy provisions are, for the most part, sensible and well-adapted to the international commercial setting in which they will operate. Those involved with transactions within the scope of the Convention will soon internalize and rely on its coherent system of remedies. The focus of the parties and their representatives will shift from displacing the Convention's remedial aspects to refining its approach in contractual provisions

258. *See* Sales Convention, *supra* note 1, art. 46(2), 49(1).

259. *See id.* art. 46(3).

260. The buyer could also use the reduction in price remedy in this setting, although resort to this remedy is optional. *See id.* art. 50.

261. U.C.C. § 2-714(2) (1978).

262. *See Draft Commentary*, *supra* note 86, art. 70, ¶ 7, *reprinted in* Official Records, *supra* note 71, at 59 ("If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract"). *Compare Draft Commentary*, *supra* note 86, art. 70, ¶ 7 n.2, *reprinted in* Official Records, *supra* note 71, at 59 (The difference in value should "[p]resumably" be measured "at the place the seller delivered the goods and at an appropriate point of time, such as the moment the goods were delivered, the moment the buyer learned of the non-conformity of the goods or the moment that it became clear that the non-conformity would not be remedied by the seller") *with* U.C.C. § 2-714(2) (1978) (Difference in value between the goods actually delivered and the goods as warranted to be measured "at the time and place of acceptance").

adapted to the requirements of a particular transaction. As this evolution advances, the significance of comparative discussions like the present one will fade. The measure of this article's success, therefore, is the extent to which it makes itself irrelevant by contributing to an understanding of the Convention on its own terms.