

# A Case for Reviewing the System of Remedies under CISG

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## Introduction

Under the United Nations Convention of the Contracts for the International Sale of Goods (CISG), the system of remedies is generally designed in such a manner that it makes avoidance the last option. Parties to a contract usually have to first pursue other remedies (that could preserve the contract) before avoidance. This approach, which appears to presuppose that such other remedies are viable perhaps only subject to adaptability, is examined. This article explores whether other remedies are real choices in their contractual contexts. Furthermore, it considers the normative dimension and practical implications of requiring performance of contractual obligations. This article argues that the general requirement to make avoidance the last option appears not to factor in contractual exigencies and parties' convenience in some cases. Finally, it argues that while parties should be encouraged to preserve contracts, they should be generally entitled to agree on remedies which they find most suitable and expedient.

## Rationale behind the CISG approach

The approach of the CISG to remedies has been observed to have underlying policy considerations.<sup>1</sup> One is the ancient principle of *pacta sunt servanda*. However, it has been argued that the principle is untenable when evaluated as an economic policy and that is why the law of damages eschews it.<sup>2</sup> It is submitted that *pacta sunt servanda* should not be applied to override *favor contractus* (in the context of contractual terms which provide for how parties should deal with breach rather than in the general sense of preserving contracts). This submission also generally

applies to the other policy considerations, namely the economic reason that the termination could be expensive and that the legitimate interests of the parties should be factored in. Parties may have already contemplated such exigencies and provided for them in the contract. The criticism of these policy considerations will place further analyses in good stead as this article progresses.

## Remedies under the CISG

The remedies under the CISG are essentially classified under the buyer's remedies (for breach of contract by the seller)<sup>3</sup> and the seller's remedies (for breach of contract by the buyer).<sup>4</sup> The buyer's remedies include requiring performance,<sup>5</sup> fixing an additional period of time,<sup>6</sup> delivery of substitute goods or repair,<sup>7</sup> reduction of purchase price<sup>8</sup> and retention of performance.<sup>9</sup> Avoidance of the contract, which is a remedy that seeks to terminate the contract, may be based on the seller's fundamental breach, non-performance within the additional period and anticipatory repudiation.<sup>10</sup> The seller's remedies are, for the purposes of this article, subsumed under these remedies.

It will suffice for now to observe that the CISG system of remedies clearly grants primacy to specific performance. This contrasts with the common law position, etched in a long line of decided cases,<sup>11</sup> that the award of damages is the primary remedy for breach of contract. The postulation that "the Convention rules in this area represent a remedial compromise between civil and common law traditions"<sup>12</sup> cannot be supported without qualification. Perhaps such a "remedial compromise" may be more clearly extrapolated from the preserved right to claim damages.<sup>13</sup> In any case, the apparent scepticism about considering damages as a possible means of preserving contracts under the CISG arguably derives from the tendency to gloss over the fact that if the buyer will not be deprived of the right to claim damages by pursuing any other remedy (that may preserve the contract), this means that damages may in fact be claimed without pursuing any of such other remedies, thereby preserving the contract.<sup>14</sup>

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<sup>1</sup> S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Contracts* (Oxford: Oxford University Press, 2009), pp.819–820. See also P. Huber and A. Mullis, *The CISG* (Sellier, 2007), p.182.

<sup>2</sup> D. Campbell, "Defence of Breach and the Policy of Performance" (2006) 25 *University of Queensland Law Journal* 273.

<sup>3</sup> CISG arts 46–52 and 74–77.

<sup>4</sup> CISG arts 62–65 and 74–77.

<sup>5</sup> CISG arts 46 and 28.

<sup>6</sup> CISG art.47.

<sup>7</sup> CISG art.46(2)3).

<sup>8</sup> CISG art.50.

<sup>9</sup> CISG arts 52, 66 and 71.

<sup>10</sup> The consideration of damages as a possible means of preserving the contract will be considered shortly.

<sup>11</sup> For example, *White & Carter (Councils) Ltd v McGregor* [1962] A.C. 413 HL.

<sup>12</sup> J. Lookofsky, *Understanding the CISG*, 3rd edn (Alphen aan den Rijn: Kluwer Law International, 2008), p.109.

<sup>13</sup> Delay in performance, for example. See CISG art.47(2).

<sup>14</sup> Regrettably, developing this argument further is beyond the scope of this article.

## Mechanism for preservation of contracts under the CISG

### *Nachfrist*

Where goods are not delivered according to contractual terms, the buyer may give the seller more time to perform contractual obligations.<sup>15</sup> *Nachfrist*, as explained, would be clearly applicable in cases of non-delivery<sup>16</sup> and failure to pay or take delivery.<sup>17</sup> It has, however, been argued that partial performance precludes the triggering of *Nachfrist*.<sup>18</sup> The wording of s.51(1) of the CISG does not seem to bear this postulation out. The section clearly provides that “articles 46 to 50 apply in respect of the part which is missing or which does not conform”. In any case, it has been observed that art.51 presumes that the delivered goods can actually be “physically and economically” separated into parts.<sup>19</sup>

It has been argued that art.47 is meant to fit into the CISG concept of fundamental breach rather than as a stand-alone remedy.<sup>20</sup> This is not a persuasive view because the extension of time for performance may not be violated (which would then obviate a fundamental breach). A more persuasive point seems to be that the combination of arts 47 and 49(1) (b) reflect some uncertainty with respect to art.47 as a full remedy.<sup>21</sup> This is because the buyer has to wait rather helplessly while the seller tries to cure the breach, of which there is no guaranteed success. Indeed, it is submitted that the value of the *Nachfrist* has been exaggerated as its practical benefit especially in markets with fluctuating prices is doubtful.<sup>22</sup>

### *Seller's right to cure*

The seller's “right”<sup>23</sup> to remedy<sup>24</sup> any failure to perform his obligations, which should surprise common lawyers, is qualified by the requirement to do so without reasonable delay, causing the buyer unreasonable inconvenience or uncertainty of reimbursement. Basically, it is opined that the seller's right to cure will conflict with contractual obligations where time is of the essence. Arguably, the

requirement to cure without “unreasonable delay” should cover such cases. Otherwise, it is submitted that the seller's right to cure would not be exercisable in cases where time is of the essence. This is because where time is of the essence in a sales contract, the buyer's payment is predicated on the seller's timely performance.<sup>25</sup>

It has been further argued that “the buyer should not be expected to accept cure by the seller if the basis of trust for the contract has been destroyed”.<sup>26</sup> It is submitted that the strict interpretation of the CISG does not support such a view, which appears to have subjectivity as its basis. Admittedly, however, it is a practical point.

Where both substitute delivery and repair are suitable to remedy the initial breach of contract, the preferred view seems to be that “the seller can defeat the buyer's choice by offering repair instead of substitute delivery”. One of the reasons adduced for this is that there can be no fundamental breach if cure is possible.<sup>27</sup> Another concern for the buyer is that the CISG appears to place a heavy burden on the buyer who is at risk of losing out owing to inadequate notice. Thus, not surprisingly, it has been suggested that buyers need to be vigilant in preserving their right to give notice of non-conformity and that “the buyer's interests are best protected by contract”.<sup>28</sup>

### *Specific performance*

This is the first consideration under the CISG and is clearly of prime importance. At common law (as well as in the United States<sup>29</sup>), however, specific performance will not be ordered where damages will suffice. Much has been said in support of specific performance: that it vindicates the promisee's decision to enter into a contract, it is more efficient, it reduces litigation costs and avoids difficult issues of evidence with respect to calculating damages.<sup>30</sup> However, such opinions may have factored in legal convenience<sup>31</sup> without considering business practicality—which is the driving force of the relationship between the parties.

<sup>15</sup> CISG art.47. The Official Commentary on a similar provision in UNIDROIT Principles of International Commercial Contracts (UNIDROIT) art.7.1.5 contemplates the other party being “willing to give extra time for performance” where one party performs late.

<sup>16</sup> CISG arts 47 and 49.

<sup>17</sup> CISG art 64.

<sup>18</sup> M. Torsello, “Substantive and Jurisdictional Aspects of International Contract Remedies: A Comment on Avery Katz's Remedies for Breach of Contract under the CISG” (2006) 25 *International Review of Law and Economics* 403.

<sup>19</sup> I. Schwenzer and C. Fantoulakis (eds), *International Sales Law* (Oxon: Routledge-Cavendish, 2007), p.401.

<sup>20</sup> P.A. Piliounis, “Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are these Worthwhile Changes or Additions to English Sales Law” (2000) 12 *Pace International Law Review* 21.

<sup>21</sup> Piliounis, “Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG” (2000) 12 *Pace International Law Review* 21, 21.

<sup>22</sup> See also P. Schlechtriem, “Subsequent Performance and Delivery Deadlines—Avoidance of CISG Sales Contracts Due to Non-Conformity of the Goods” (2006) 18 *Pace International Law Review* 90.

<sup>23</sup> Interestingly, Schwenzer apparently prefers the term “seller's *possibility* to cure”. See I. Schwenzer, “Avoidance of the Contract in Case of Non-Conforming Goods (Article 49(1) (A) CISG)” (2005) 25 *Journal of Law and Commerce* 439.

<sup>24</sup> CISG arts 48(1) and 47(1).

<sup>25</sup> *Gill & Duffus SA v Société pour l'exportation des Sucres SA* [1986] 1 Lloyd's Rep. 332 CA (Civ Div).

<sup>26</sup> Schwenzer, “Avoidance of the Contract in Case of Non-Conforming Goods” (2005) 25 *Journal of Law and Commerce* 439, 439.

<sup>27</sup> Huber and Mullis, *The CISG*, 2007, p.204. It seems to be the predominant view that cases of “*aliud*” fall under non-conformity. See p.197.

<sup>28</sup> A. Kennedy, “Recent Developments: Nonconforming Goods under the CISG—What's a Buyer to Do” (1998) 16 *Dickinson Journal of International Law* 323 and 341. Restatement 2d s.359.

<sup>29</sup> F. Cuncannon “The Case for Specific Performance as the Primary Remedy for Breach of Contract in New Zealand” (2004) 35 *Victoria University of Wellington Law Review* 685.

<sup>31</sup> The common law converse to this may be added, namely that specific performance will not be granted in cases where the court will have to supervise performance.

In practice, parties may find it more convenient not to insist on performance. A buyer who did not receive deliveries as scheduled may find an alternative to save the situation.<sup>32</sup> Loss of reputation in an industry may cause a long-term decline in profit which could continue long after performance has been enforced and after the beneficiary of *Nachfrist* is beyond reach for damages and the contemplation of expectation profit.

Furthermore, proponents of specific performance sometimes anchor their arguments in the alleged use of the remedy in civil law jurisdictions. However, there is evidence<sup>33</sup> that specific performance is actually a remedy rarely used in Denmark, Germany, France and even under the CISG when specific performance is required. This reality has been connected with the cost of enforcement. Indeed, the loss of business reputation and goodwill should be added.

Contrary to the suggestion that “forum law need not work a great injustice in either granting specific performance or denying it”,<sup>34</sup> which in fact misses the point, it is posited that the judicial discretion concerning specific performance creates some legal uncertainty.<sup>35</sup> Also, it has been queried whether the seller is liable to specific performance where, in the context of force majeure, such an act becomes illegal.<sup>36</sup> It is submitted that there would be no such liability especially as the court would face the awkward reality of having to enforce an illegal contract.

### Reduction in price

In principle, this preserves the contract because the buyer is willing to accept defective goods and is entitled to a reduction of the contract price. However, it is important to note that this remedy cannot be claimed for late delivery or any other obligation by the seller<sup>37</sup> and the buyer will also be deprived of the remedy if notice was not given under art.39 of the CISG.

Although the CISG provides for reduction in price with respect to the non-conforming goods “whether or not the price has already been paid”, it is obvious that this remedy will be more convenient and efficient where the price has not yet been paid. In any case, this remedy implicitly presupposes that the buyer will still find the goods the seller has delivered useful. There are, of course, cases where neither specific performance nor non-conforming

goods will be useful to the buyer. Thus it would be quite misleading to suggest that “price reduction is one of the most efficient breaches of the buyer”,<sup>38</sup> and should be qualified.

### Retention of performance

It has been argued that:

“Although the CISG contains no special rule regarding the right of withholding or retaining performance, it may be presumed today as the prevailing view ... pursuant to article 7(2) CISG.”<sup>39</sup>

It is a most surprising position to suggest that the CISG contains no special rule regarding the right to retain performance. For example, art.52(2) provides that if the seller delivers a quantity of goods greater than that provided for the contract, the buyer may take delivery or refuse to take delivery. It is submitted that ss.71, 52 and 56 of the CISG support retention of performance. However, this remedy may be criticised on at least two grounds. First, it is a self-help remedy which could be abused. Secondly, it seemingly presupposes that there is some outstanding performance which may not be the case. The buyer may well have paid in advance.

### Fundamental breach

The restriction of avoidance to cases of fundamental breach (which is one of the most controversial positions in the CISG<sup>40</sup>) is obviously a very important element in the preservation of contracts. This is partly because the CISG uses the term “fundamental breach” particularly in cases where the buyer or seller may “avoid” the contract and escape further contractual obligations.<sup>41</sup> Another reason is that terms like breach<sup>42</sup> and detriment are not defined. Some criteria have been suggested for assessing the fundamental character of breach, namely: contractual agreement, seriousness of the breach, the reasonable use test and a consideration of the seller’s right to cure.<sup>43</sup> These criteria, largely subsumed under s.25 of the CISG (which defines fundamental breach), omit the “foreseeable” factor. Such criteria show the difficulty in determining when a fundamental breach has occurred and the reasonable test criterion is the most contentious.

<sup>32</sup> Principles of European Contract Law (PECL) art. 9:102 provides for cases where specific performance cannot be obtained including where the aggrieved party may reasonably obtain performance from another source. See also art.7.2.2 of UNIDROIT.

<sup>33</sup> H. Lando and C. Rose, “On the Enforcement of Specific Performance in Civil Law Countries” (2004) 24 *International Review of Law and Economics* 473.

<sup>34</sup> J. Fitzgerald, “CISG, Specific Performance and the Civil Law of Louisiana and Quebec” (1997) 16 *Journal of Law and Commerce* 291.

<sup>35</sup> Article 28 of the CISG gives the court the discretion not to enter a judgment of specific performance if it is not obligated to do so under domestic law. It is thought that giving discretion to the court in a matter as fundamental as applicable law is not constructive.

<sup>36</sup> Lookofsky, *Understanding the CISG*, 2008, p.144.

<sup>37</sup> Huber and Mullis, *The CISG*, 2007, p.247.

<sup>38</sup> Torsello, “Substantive and Jurisdictional Aspects of International Contract Remedies” (2006) 25 *International Review of Law and Economics* 403, 407.

<sup>39</sup> P. Schlechtriem, “Subsequent Performance and Delivery Deadlines” (2006) 18 *Pace International Law Review* 90, 92.

<sup>40</sup> D. Peacock, Avoidance and the Notion of Fundamental Breach Under the CISG: An English Perspective (2003) 8 *International Trade and Business Law Annual* 98. The volume of contentious essays on this issue also reflects its controversial status. See, for example, C. Pauly, “Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law” (2000) 19 *Journal of Law and Commerce* 221 and F. Ferrari, “Fundamental Breach of Contract under the UN Sales Convention—25 Years Article 25 CISG” (2005) 3 *International Business Law Journal* 389.

<sup>41</sup> J.O. Honnold, *Uniform Law for International Sales Law under the 1980 United Nations Convention*, 3rd edn (The Hague: Kluwer Law International, 1999), excerpt available at <http://www.cisg.law.pace.edu/cisg/biblio/ho25.html> [Accessed April 4, 2011].

<sup>42</sup> This is provided in art.49 of the CISG. A similar provision is found in art.7.3.1 of UNIDROIT.

<sup>43</sup> Huber and Mullis, *The CISG*, 2007, p.218.

What should be the approach where goods do not conform to specification? Case law which should ordinarily answer this question by illustration seems to complicate it. In the *Cobalt Sulphate* case,<sup>44</sup> it was held that the right to terminate a contract will be refused if it is possible and reasonable for the buyer to resell the goods in the ordinary course of business even if it is for a lower price. This decision reflects the difference between the inquisitorial and adversarial systems of law as well as the circumscription of *favor contractus*. It is submitted that it was a great and unnecessary leap into the unknown for the court to require the buyer to name potential buyers in India and South East Asia or the use of goods in Germany or the possibility of exporting them to other countries. Clearly, the agreement was a British supply rather than a South African supply.

Huber complicates the matter when he argues that cases like *Rotorex Corp v Delchi Carrier SpA*<sup>45</sup> can be explained away by the view that there was no other reasonable use to which the goods could have been put.<sup>46</sup> This is unacceptable because the compressors' inefficiency, lower cooling capacity and consumption of more energy did not mean they could not be sold for a lesser price elsewhere. This is apparently inconsistent with the *Cobalt Sulphate* case where multiple considerations (in the context of exploring the possibility of potential buyers) were made with respect to the possible sale of goods. The

point is that the reasonable use test is too fluid a concept to qualify as an objective parameter for "preserving" contracts.

A simpler way to resolve the seeming conflict arising from the expression of art.48<sup>47</sup> to be subject to art.49<sup>48</sup> may be to say that a seller cannot insist on a right to cure where it is guilty of a fundamental breach since this triggers the buyer's right to avoid the contract. Also, a breach is not fundamental if it can be cured. However, the controversies surrounding fundamental breach make it preferable to avoid through *Nachfrist*.

## Conclusion

Although the CISG system of remedies (which clearly have their inadequacies) aims at preserving the contract as long as possible, this does not seem to be in the interest of the parties especially the buyer. It may be extrapolated from this article that it could be sometimes more economically efficient for a contract to be broken. Parties should take advantage of art.6<sup>49</sup> and be allowed to determine their remedies, for example a *realistic* liquidated damages clause.<sup>50</sup> Parties should not be forced to pursue a remedy when some other is more expedient. Finally, the institutionalised policy of preserving the contract as much as possible appears to create a strange and unhelpful dichotomy between what the CISG seeks to achieve and what parties may wish to gain.

<sup>44</sup> *Cobalt Sulphate* Bundesgerichtshof, April 3, 1996, CISG Supreme Court, available at <http://cisgw3.law.pace.edu/cases/960463gl.html> [Accessed November 10, 2010].

<sup>45</sup> *Rotorex Corp v Delchi Carrier SpA* 71 F. 3d 1024 (2d Cir. 1995); CISG—Online No.140=UNILEXE.1995, at <http://cisgw3.law.pace.edu/cases/940909u1.html> [Accessed April 4, 2011].

<sup>46</sup> Huber and Mullis, *The CISG*, 2007, p.228.

<sup>47</sup> CISG art.48(1) partly provides: "Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without reasonable delay and without uncertainty of reimbursement by the seller of expenses advanced by the buyer."

<sup>48</sup> CISG art.49 provides for circumstances where the buyer may declare the contract avoided. Article 7.3.1 of UNIDROIT appears to be an impressive mix of art.49 and art.25 (which provides for fundamental breach) of the CISG.

<sup>49</sup> This provides that the parties may exclude the application of the CISG, or, subject to art.12, derogate from or vary any of its provisions. This should also be read with art.4, which provides that the CISG is not concerned with the validity of the contract or of any of its provisions or of any usage.

<sup>50</sup> A realistic liquidated damages clause is important to circumvent the arguments as to what could be construed as a penal clause. Thus a badly drafted liquidated damages clause could frustrate the intentions of the parties.