Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL

Liu Chengwei
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Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL,
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INTRODUCTION

The growth of international trade makes some kind of unification necessary. Increased trade overseas has drawn attention to the problems that are caused by the different ways in which countries have chosen to regulate international sales. And the legal community has tried to facilitate overseas trade through efforts to harmonize national laws by legislative or non-legislative means.

Against such a background, the analysis in this contribution is focused on the CISG, UNIDROIT Principles and PECL – three of the most important international instruments for the regulation of international commercial transactions which combine elements from both civil law and common law systems. In so doing, this contribution provides a comparative analysis of these instruments. It is merely thought that comparison is, probably, one of the most efficient ways to underline some of the unique features inherent in some legal regimes and to develop solutions to existing theoretical problems. However, as most of the authors dealing with the vast domain of this area would have done, the author in this contribution has never meant to make an exhaustive examination of international commercial law, bearing in mind that the ability of a single contribution to deal with its many issues is limited. The approach offered here is to review some of the key issues frequently befall in international trade, based on those generally accepted principles or elaborate rules as evidenced by international restatements or conventions and usages and practices or so-called lex mercatoria that is widely known to and regularly observed in international commercial transactions.

Particularly, it is said that no aspect of a system of contract law is more revealing of its underlying assumptions than is the law that prescribes the relief available for non-performance (breach). Issues relating to the remedial provisions are difficult and central substantive issues, which will no doubt be the focus of a large part of the discussion and deliberation surrounding application of commercial law on both a domestic and an international level. Therefore, the study in this contribution focuses, in light of traditional and modern theories, on the remedial scheme established under each of the three bodies of rules, namely Part III (partial) of the CISG, Chapter 7 of the UNIDROIT Principles and Chapters 8 and 9 of the PECL. In practical terms, these sectors are the substantive heart of the particular instruments. It is where the corresponding solutions to a large proportion of real world disputes in commercial transactions are to be found.

The comparative analysis contained speculates on the potential similarities and differences of these sectors, intending to enunciate rules which are common in international commercial law and at the same time to select the solutions which seem best adapted to the special requirements of international trade. One should note, however, that to the extent this contribution doesn’t give absolute priority to any one of the three instruments, whenever it is necessary to choose between conflicting rules and sometime then to derive a number of general principles which apply to all of the rules, what’s decisive to the criterion used is not just which rule is mandatory or adopted by the majority of jurisdictions, but rather which of the rules under consideration have the most persuasive value and/or appear to be particularly well suited for international commercial transactions.

LIST OF ABBREVIATIONS

A. For Documents

BGB  German Civil Code
Chinese CL  Chinese Contract Law
CISG/Convention  United Nations Convention on Contracts for the
Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL

International Sale of Goods

Clunet  Journal du Droit International
CLOUT  Case Law on UNCITRAL Texts
COM  Working Documents of the European Commission
Contract Code  Contract Code Drawn upon on behalf of the English Law Commission
Draft  1978 Draft of the CISG
HGB  German Commercial Code
ILR  International Law Report
ITC  International Trade Code
OJ  Official Journal of the European Communities / Union
PECL/European Principles  Principles of European Contract Law
Secretariat Commentary  Secretariat Commentary on the 1978 Draft of the CISG
TLDB  CENTRAL Transnational Law Database
UCC  Uniform Commercial Code
ULF  Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS  Uniform Law on the International Sale of Goods
UPICCI/UNIDROIT Principles  UNIDROIT Principles of International Commercial Contracts
YCA  Yearbook Commercial Arbitration

B. For Journals

AJIL  American Journal of International Law
Am.J.Comp.L.  American Journal of Comparative Law
Ann.Surv.Int'l andComp.L.  Annual Survey of International and Comparative Law
Arb.Int.  Arbitration International
Ariz.J.Int'l andComp.L.  Arizona Journal of International and Comparative Law
Col.J.Transnat'l L.  Columbia Journal of Transnational Law
Comp.L.Yb.Int'l Bus.  Comparative Law Yearbook of International Business
Europ.Rev.Pr.L.  European Review of Private Law
Georgetown L.andP.Int'l Bus.  Georgetown Law and Policy in International Business
Harv.Int'l L.J.  Harvard International Law Journal
Harv.L.Rev.  Harvard Law Review
ICLQ  International and Comparative Law Quarterly
ILM  International Legal Materials
Int'l and Comp. L.Q.  The International and Comparative Law
### Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL

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<td>J.Int'l Bus.L.</td>
<td>Journal of International Business Law</td>
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<td>J.Int'l L.andPol.</td>
<td>Journal of International Law and Policy</td>
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<td>J. L. and Com.</td>
<td>Journal of Law and Commerce</td>
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<td>JWTL</td>
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<td>Virginia Journal of International Law</td>
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| P.C.I.J. | Permanent Court of International Justice |
| UN | United Nations |
| UNCTRAL | United Nations Commission on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private Law |

#### D. For Citations

| Art. | Article |
| Arts. | Articles |
| Ch. | Chapter |
| Cf. | Cited from |
| ed. | edition or editor |
| eds. | editors |
| e.g. | for example |
| et seq. | and following |
| fn. | footnote |
| ibid. | ibidem - see above |
| infra. | vide infra- see below |
| p. | page |
| pp. | pages |
| Sec. | Section |
| supra. | vide supra - see above |
| Vol. | Volume |
| vs. | versus |
PART I. GENERAL REVIEW
CHAPTER 1. SOURCES OF INSPIRATION

With the modern day increase in international trade and commerce, national commercial law has often proved inadequate to international business needs and the resolution of disputes involving international contracts. As the needs of commerce have changed, so have the practices by which businessmen conduct their trade. Increased trade overseas has drawn attention to the problems that are caused by the different ways in which countries have chosen to regulate international sales. Businessmen have found that their contracts and dealings with foreign traders have been subject to different standards and usages.

1.1 INTRODUCTION

The last century has seen a huge change in the field of international trade. The development of the market economy, the growth of markets for manufactured goods and the opening up of new markets in raw products from developing countries has led to a boom in overseas trade. Newer and faster methods of communication have enabled traders to buy and sell goods at a distance more reliably, and modern technology has made it much easier to transport goods around the globe in shorter periods of time. It has become clear that in the modern world, it is no longer possible for a country to isolate itself from the international circulation of goods and persons. This growth in international trade has led to the re-emergence of the need for the harmonization of the services that facilitate overseas trade: global monetary mechanisms, cross-border transport possibilities, and universal rules and standards which allow traders the world over to conduct business on the same terms.

Against such a background, the legal community has tried to facilitate overseas trade through efforts to harmonise national laws by legislative or non-legislative means; thereby reducing the uncertainties and potential costs associated with transacting business under unfamiliar laws. Among such efforts, there is above all in this contribution the reference to the relevant rules of the United Nations Convention on Contracts for the International Sale of Goods (1980; hereinafter “CISG” or “Convention”). On the other hand, the need of general principles in international contract law, usage and custom of international trade and lex mercatoria has led to certain other unification actions in addition to the CISG. Since the CISG came into force in 1988, there have been other efforts to develop overall unifying principles covering the field of contract law. The UNIDROIT Principles of International Commercial Contracts (1994, hereinafter “UPICC” or “UNIDROIT Principles”) and the Principles of European Contract Law (1998, hereinafter “PECL” or “European Principles”) represent the core of such other efforts. As these two Principles were introduced in 1994 and 1998 it is perhaps premature to consider these principles as a “generally accepted lex mercatoria”. However, these rules have potential to be generally accepted by the international trading community and thereby achieve a position to be regarded as lex mercatoria.

1See Rivkin, David R. in “Lex Mercatoria and Force majeure”: Gaillard ed., Transnational Rules in International Commercial Arbitration (ICC Publ Nr. 480,4; Paris 1993); p. 163. Available online at \<http://tlb.uni-koeln.de/TLDB.html> TLDB Document ID: 116100. It is not questioned here that the majority of contracts in international business are still subject to a specific national law and the questions are left aside regarding the conditions under which a contract may be insulated from the application of any such law.


3Ibid.

4See Jussi Koskinen in “CISG, Specific Performance and Finnish Law”: Publication of the Faculty of Law of the University of Turku, Private law publication series B:47 (1999). Available online at
Thus, the studied legal instruments in this contribution will be focused on the three instruments mentioned above – CISG, UNIDROIT Principles and PECL. These instruments are internationally drafted instruments governing contracts which combine elements from both civil law and common law systems. The CISG harmonised interests and ideas of different legal systems and of countries on different levels of economic development and is understood as a modern uniform substitute for the wide array of foreign legal systems; thus, a text that is suited for implementation in civil law countries and common law countries and for economies that are developed and those which are developing. The UNIDROIT Principles and the European Principles in turn represent the latest developments in the field of contract law and combine civil law and the common law as well as international contract practices.

1.2 OVERVIEW OF THE STUDIED INSTRUMENTS

1.2.1 CISG

In April, 1964, twenty-eight states approved two conventions which were the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) referred to collectively as the 1964 Hague Conventions, which were not very successful. The United Nations Commission on International Trade Law (UNCITRAL), which is the core legal body within the UN system in the field of international trade law and was tasked by the UN General Assembly to further the progressive harmonization and unification of the law of international trade, set out to study the 1964 Hague Conventions to improve and reform them hopefully ending up with a product more successful than the first. Finally, after several drafts after the realization that an entirely new text was needed, the General Assembly convened a conference on a product that is today the CISG.

As suggested by the legislative history, consideration of each individual article of the CISG proceeded on the basis of compromise. For this reason, there was a conscious desire to restrict the content of the CISG to those areas on which it was possible to agree. As a result, certain kinds of sales were excluded according to Art. 2 and matters such as the validity of the contract and the passing of property (Art. 4), the liability of the seller for death or personal injury caused by the goods to any person (Art. 5) were not included. In addition, there was a deliberate attempt not to rely on existing legal definitions which could then be subject to contradicting interpretations in different member states. The aim was not to take the best from every jurisdiction, but to develop an empirical code which, where possible, used independent terms to convey its meaning. Indeed, no international commercial legal regime can expect to be perfect, especially when it is developed on the basis of compromise between legal systems.

While the drafters of the CISG represented various legal systems that possessed their own unique methods of solving certain problems, a commonality existed among the majority of the drafters. So while the remedies provided for by the CISG might not represent part of the “consistent and universal form of international mercantile law” desired by a modern lex mercatoria, they do represent a step forward in that process. From the point of view of legislation as well as from the point of view of practical application, the Convention seems to be a success. Moreover, this success may

\[\text{http://www.cisg.law.pace.edu/cisg/biblio/koskenre1.html}\]

\(^5\) Few countries signed the treaties and there were many criticisms that the treaties “primarily reflected the legal traditions and economic realities of continental Western Europe”.

\(^6\) Supra. note 2.
fuel further uniformity as it is already influencing other fields of international trade law. Indeed, after it came into force on January 1, 1988, the **CISG** has gained tremendous political and economic significance as the uniform sales law for sixty-two countries that account for two-thirds of all world trade.\(^7\)

As for the application issue, the **CISG** is the domestic law of each Contracting State. Important conclusions and recommendations follow from this: For parties with their relevant places of business in different Contracting States, where their contract falls within the scope of the **CISG**, the contract is automatically governed by the **CISG**, unless the parties indicate otherwise. In other words, where without reference to the **CISG**, the parties state that the contract is governed by the law of a Contracting State or the applicable law so holds, the contract is likely to be governed by the **CISG**. For parties to such international sales transactions who do not wish to have them governed by the **CISG**, the recommended procedure is to so state in their contracts. The above conclusion and recommendation can also apply when only one of the parties has his relevant place of business in a Contracting State. The **CISG** can apply to such a contract solely by the election of the parties.

One should note that, however, subject to the fact that when the **CISG** applies by law it can supersede otherwise applicable domestic law to the contrary; when the **CISG** applies solely by contract, it acts somewhat like a set of terms and conditions incorporated in the contract – in other words, in this situation it does not supersede mandatory provisions of the applicable domestic law where that law does not so permit.\(^8\)

### 1.2.2 UNIDROIT Principles

The regime covering the greatest geographical scope among the studied instruments is the **UNIDROIT Principles** resulted from the work of the International Institute for the Unification of Private Law (UNIDROIT), which was set up in 1929 as an auxiliary organ of the League of Nations and whose primary task was to draft a uniform sales law which aimed to combat the problems of trading goods across different jurisdictions.\(^9\) The **UNIDROIT Principles** do not

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\(^7\) As of 10 October 2002, the UN Treaty Section reports that 62 States have adopted the **CISG**: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Burundi, Canada, Chile, China (PRC), Columbia, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Saint Vincent & Grenadines, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, and Zambia. ([http://www.cisg.law.pace.edu/cisg/countries/cntries.html](http://www.cisg.law.pace.edu/cisg/countries/cntries.html))

\(^8\) See General Information on the Application of the **CISG**; available online at [http://cisgw3.law.pace.edu/cisg/cisgintro.html](http://cisgw3.law.pace.edu/cisg/cisgintro.html). In addition, there are situations in which principles of the **CISG** can be deemed applicable even when neither party has his relevant place of business in a Contracting State and the parties have made no reference to the **CISG** in their contract. There are cases in which tribunals have so held (see, for example, ICC Arbitration Case No. 5713 of 1989).

\(^9\) The fruits of its efforts were the 1964 Hague Conventions. These Conventions, as mentioned previously, since entering into force in 1972, have, however, failed to achieve widespread acceptance. Other works of **UNIDROIT** have met with greater success; most notably in the area of international trade are the 1994 **UNIDROIT Principles**.
apply to domestic contracts and are intended to operate globally, which are broader in scope and more detailed in provisions than the CISG.

Because the UNIDROIT Principles are not in the form of a convention or a model law, they do not have a binding effect. They will be applied in practice only because of their persuasive character. According to the Preamble, application of the UNIDROIT Principles to international commercial contracts in four different contexts is possible: (a) Where the parties agree that their contract shall be governed by the UNIDROIT Principles, the Principles are undoubtedly applicable because they are incorporated into the contract like any other contractual clause. Here, the principles will bind the parties only to the extent that they do not contradict mandatory rules of the applicable law. (b) The Principles may also apply when the parties have agreed that their contract be governed by "general principles of law" or the lex mercatoria. (c) The Principles may also be of relevance if the contract is governed by a particular domestic law, even though the application of the Principles is not provided for in the contract. This is the case, whenever dealing with a specific issue, it proves impossible to establish the relevant rule of that particular domestic law and a solution can be found in the Principles. Recourse to the Principles, however, as a substitute for otherwise applicable domestic law is a last resort. (d) The Principles may further serve as instruments for the interpretation and filling the gap of international uniform law. The main idea is to preclude an easy resort to the domestic law indicated by the conflict of laws rule by the forum. In conclusion, it can be said that the UNIDROIT Principles apply only if incorporated into the contract, or if they find enough favour with an arbitrator or judge looking for a rule to fill a gap encountered in the regulation of a given international commercial contract.  

A stated purpose as suggested in the Preamble is to be stressed: “They may be used to interpret or supplement international uniform law instruments”. In practice the question is particularly relevant in the context of the CISG, Art. 7 of which expressly states that “[I]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application” and that “[q]uestions concerning matters governed by this Convention which are not expressly settled are to be settled in conformity with the general principles on which it is based”. In this respect, Bonell, one of the principal architects of the Principles has stated: “The answers given are sharply divided. On the one hand there are those who categorically deny that the UNIDROIT Principles can be used to interpret or supplement the CISG, invoking the rather formalistic and not necessarily convincing argument that the UNIDROIT Principles were adopted later in time than the CISG and therefore cannot be of any relevance to the latter. On the other hand there are those who, perhaps too enthusiastically, justify the use of the UNIDROIT Principles for this purpose on the mere ground that they are ‘general principles of international commercial contracts’. The correct solution would appear to lie between these two extreme positions. In other words, there can be little doubt that in general the UNIDROIT Principles may well be used to interpret or supplement even pre-existing international instruments such as the CISG; on the other hand in order for individual provisions to be used to fill gaps in the CISG, they must be the expression of general principles also underlying the CISG.”

It is said that to the extent that the two instruments address the

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106 See Joern Rimke in “Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of

same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG; cases where the former depart from the latter are exceptional.\textsuperscript{12} On the other hand, to the extent that they formulate general principles which cannot be derived directly from the CISG, these Principles can be utilized for filling gaps in the Convention.\textsuperscript{13} However, an important caveat to recourse to the UNIDROIT Principles to interpret the general principles of the CISG has been pointed out by Bonell: there is a need to show that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying the CISG. This need is, of course, not satisfied where the Principles and the CISG adopt different solutions — for example, in their approach to the battle of the forms.\textsuperscript{14}

Indeed, the approach in developing the Principles appears appropriate with respect to the current state of attempts to unify law.\textsuperscript{15} The UNIDROIT Principles was published in 1994 as a result of comparative research and deliberations by a group composed of representatives of all the major legal systems of the world. The UNIDROIT Principles have, in practice, only a persuasive value. The Principles can, however, have significant role in international and domestic legislator’s adoption policy, court and arbitration proceedings, contract drafting or choice of law clauses. The reason for such significance can generally be seen in the modern and functional solutions adopted in the principles. The potential users of the UNIDROIT Principles to which they are addressed to are especially international law firms, corporate lawyers, arbitration courts and the like. The Principles have so far proved to be successful and widely accepted.\textsuperscript{16} The UNIDROIT Principles are regarded to be especially useful in arbitration proceedings. Although there have been only a handful of cases actually decided solely by reference to the UNIDROIT Principles, research has shown that the Principles are being referred to in a growing number of cases as representative of the general principles and established trade practices on which international trade is based.\textsuperscript{17}

According to the Preamble, the UNIDROIT Principles set forth “general rules for international commercial contracts”. It is also said that the aim of UNIDROIT was to specifically elaborate a general regulatory system which could apply universally and restate the general principles of contract law, thus reflecting all the major legal systems of the world.\textsuperscript{18}

\subsection*{1.2.3 PECL}

Unlike the CISG which is a uniform sales law adopted by countries that account for over two-thirds of all world trade in goods,\textsuperscript{19} PECL is a general law applicable to all contracts of sale that do not fall under the CISG. The PECL aims to provide a comprehensive framework for the regulation of commercial transactions, reflecting the diverse legal systems of the countries that have adopted it.\textsuperscript{20} The PECL is intended to be more flexible and adaptable to new legal developments than the CISG, allowing it to be applied in a wide range of contexts. This approach to legal harmonization is considered to be a significant departure from the more rigid approach taken by the CISG, which is specifically focused on sales contracts.

\begin{itemize}
\item \textsuperscript{14}See Albert H. Kritzer in “General observations on use of the UNIDROIT Principles to help interpret the CISG”. Available online at \texttt{http://www.cisg.law.pace.edu/cisg/text/matchup/general-observations.html}
\item \textsuperscript{15}Supra. note 13.
\item \textsuperscript{17}See Austrian Arbitral Proceeding SCH-4318 and Arbitral Proceeding SCH-4366 (both dated 15 June 1994); see also ICC Arbitral Award No. 8128 of 1995 and the ruling of the French Court of Appeal of Grenoble 23 October 1996, examples of cases in which tribunals have referred to the UNIDROIT Principles as it helped them reason through the CISG. One can anticipate many such references to the UNIDROIT Principles in CISG proceedings. (Supra. note 14.)
\end{itemize}
the PECL, like the UNIDROIT Principles except for their sphere of application, are a set of principles whose objective is to provide general rules of contract law in the EU, and will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.

The PECL (also known as the “Lando-Principles”) is the product of work carried out by the Commission on European Contract Law (the “Lando Commission”). The Lando Commission was founded in 1982, which is a body of lawyers drawn from all of the Member States of the European Union (EU), under the chairmanship of Professor Ole Lando. The Commission ran with funding from the European Community (EC) and its work was specifically endorsed by the European Parliament in a Resolution in 1994. In 1989, the European Parliament passed a resolution in favour of pursuing a European Code of Private Law. In 1994, this intent manifested itself with a resolution in favour of the Lando Commission’s efforts at the harmonisation of contract law. The ambit of the Commission was to draft a European Restatement of Contract Law which was to serve as: a basis for the future codification of European contract law; a legal guide for the EU Organs; a text to be used by member states in future codification or updates of their own law; and a text which parties could chose as the applicable law of their contracts. In 1995, the Lando Commission published the first part of its Principles of European Contract Law (the PECL). After three years, a second version were finalized in 1998, and reflects aspects of contract law from many of the EU’s member states.

Unlike the UNIDROIT Principles (as well as the CISG) which applies exclusively to international contracts, the European Principles are to be applicable (a) to domestic European contracts as well as to trans-European Union international contracts and (2) to virtually all European contracts, including merchant consumer contracts as well as contracts between commercial parties. Moreover, in addition to the express purpose, similar to the UNIDROIT Principles, of being applied “as general rules of contract law in the European Union” (Art. 1:101), the PECL is intended to represent a modern European lex mercatoria and most importantly for future legal developments, “as a model on which [European] harmonisation work may be based”. If the PECL will in fact be used by EU entities in interpreting European contract law or as the basis for further harmonisation efforts, it is a particularly important document to consider as indicating future legal developments. Furthermore, work is already underway to compile a third version of the Principles, and it is envisaged that the Principles will eventually form part of a future European Civil Code. At present, though, the principles are more of academic value as opposed to being applied in practice.

1.2.4 Brief Comparison

So far as the general nature of the studied instruments is concerned, there already exists one important binding instrument in the field of international commercial law - the CISG, which contains the core of a true international commercial code. Nonetheless, the parties have the general right to derogate from or modify any of the provisions in the CISG (subject to Art. 12) and they may even make the decision to exclude the CISG in its entirety. This need not be done explicitly. One example of implicit exclusion of the CISG is the choice of the law of a non-contracting state. The crucial factor is to be able to determine the will of the parties and in determining this will, Art. 8 is applicable.
and the common core of domestic commercial rules.\textsuperscript{22}

In contrast to the governmental negotiation and compromise leading to the CISG, the UNIDROIT Principles and the PECL were fundamentally born of the same need for a uniform body of law applicable to contracts and do not have the status of an international convention; therefore, their applications mainly rely on express or implied incorporation into a contract by the parties. On the other hand, the two Principles, unlike the CISG, where, due to the divergent legal regimes and views, consensus could only be reached on compromise solutions with some ambiguous wording and gaps in coverage, were not bound to take the viewpoints of every single country, legal regime or rule into account. The final choice among possibly conflicting rules was made on the persuasiveness or suitability of the rule within the overall regime. These efforts can thus be seen as more unified and coherent regimes than the CISG. These regimes definitely are a step forward in legal thinking and the number of similarities between the two regimes suggests that they represent the main directions being taken by international contract law.\textsuperscript{23}

As for the relationship between the two sets of Principles, it is also

\textsuperscript{22}See Bernard Audit in “The Vienna Sales Convention and the Lex Mercatoria”: Thomas E. Carboneau ed., Lex Mercatoria and Arbitration, rev. ed. [reprint of a chapter of the 1990 edition of this text], Juris Publishing (1998); p. 194. Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/audit.html} While compromises were made on all fronts, and all Contracting States will notice distinctions between their domestic law and that of the CISG, the common lawyer as opposed to the civil lawyer will face greater obstacles in understanding and applying the CISG. As compared to those schooled in the common law, the majority of the drafters had been trained in civil law. Thus, it is not surprising to find that the CISG is highly reflective of civil law principles. (See Erika Sondahl in “Understanding the Remedy of Price Reduction - A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods” (2003); available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/sondahl.html})

\textsuperscript{23}Supra. note 19.

found that the PECL covers similar areas of law to the UNIDROIT Principles, but its geographical sphere of application is confined to the EU. The material scope of the application of the PECL is, however, wider than that of the UNIDROIT Principles, as it is intended to apply to all contracts including domestic transactions and those involving consumers and merchants.\textsuperscript{24} So while the PECL is of a narrower geographic focus than the UNIDROIT Principles, it covers a wider area of law. Despite of this, the substantial scope of application of the two Principles is identical in that they both aspire to be general principles of contract law. To use an expression well known in the world of international commerce, both are held out as a sort of codification of the modern lex mercatoria. Both of the two undertakings aspire to be models for national and international legislators, they each describe themselves as formulations of the lex mercatoria, and to some extent promote the harmonization of the law of contracts. It may be said that in the not too far future principles for international commercial contracts as elaborated in

\textsuperscript{24}While the UNIDROIT Principles are designed only for international commercial contracts, they are in no way intended to take over the distinction traditionally made in some legal systems between “civil” and “commercial” parties and/or transactions, i.e. to make the application of the Principles dependent on whether the parties have the formal status of “merchants” (commerçants, Kaufleute) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called “consumer transactions” which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, i.e. a party who enters into the contract otherwise than in the course of its trade or profession. The criteria adopted at both national and international level also vary with respect to the distinction between consumer and non-consumer contracts. The Principles do not provide any express definition, but the assumption is that the concept of “commercial” contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc. (See Comment 2 on the Preambles of the UPICC.)
the UPICC and the PECL, in the light of the CISG which is the only one among the three instruments with mandatory application to the signatory States, will be developed and worthy of the name lex mercatoria which expresses rules accepted and observed by the international economic community.  

The need for uniformity and harmony in international trade can be expected to lead to growth of international transactions subject to the CISG, UNIDROIT Principles, and PECL. In a summary fashion as to the relationship between the three instruments, to some extent it can be described briefly that they enable themselves to supplement each other and fit well with each other as part of the multi-layered approach that is becoming dominant, rather than compete or claim to displace the other harmonizing projects. In so far as the three instruments seem to have their own raison d’être they not only do not compete with each other but may actually fulfill very important functions side by side. Particularly, so as to preclude an easy resort to the domestic law indicated by the conflict of law rule of the forum, the two sets of Principles serve a gap-filling role for the interpretation of CISG contracts; they endorse and promote many of the principles outlined in the CISG. Although, in this instance, the articles are not drafted in an identical or substantially similar manner, it is nonetheless possible to identify some supports and the two Principles can be used to: (1) interpret the CISG; (2) answer unresolved questions that fall within the scope of the CISG; or (3) resolve issues that are not addressed in the CISG.

Finally, one must become aware of the existence and basic content of different concepts contained in these instruments, because they will be shaping the rules for contractual dealings in the future. Particularly, one must be on the lookout for superficial harmony which merely mutes a deeper discord and for verbal conflict which hides a fundamental identity of aim. In both cases the key lies in the conceptual presuppositions of each system or family of systems. The deeper discord escapes notice because the same formula means different things according to the frame-work in which it is read; the fundamental agreement on the end to be achieved is not seen because the conceptual routes which lead to that end are different.

1.3 MAJOR SOURCES OF INFORMATION

In view of their close relationship, these instruments merit a comparative study in order to understand their similarities and differences, at least with respect to certain matters. In so doing, every conscientious author would refer to an extensive amount of sources of information available for the three instruments. In this contribution, I carry on my analysis depending mostly on the followings which bear the greatest significance: as for the CISG, it is above all the Secretariat Commentary on the 1978 Draft of the CISG (hereinafter “Secretariat Commentary”). To the extent it is relevant to the Official Text, the Secretariat Commentary is perhaps the most authoritative source one can cite. It is the closest counterpart to an Official Commentary on the CISG.

Indeed, the drafting history of the Convention is a legitimate and valuable aid in the interpretation of the Convention’s provisions. The CISG has a rich and detailed legislative history. The challenge is not paucity of material, but an overabundance of travaux préparatoires spread over thousands of pages of un-indexed volumes, located in sources we are not used to accessing, with frames

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25 Notably, it is also said that the Convention itself purports to formulate the most common practice and therefore qualifies as an expression of lex mercatoria. (See Bernard Audit, supra. note 22.)

of reference (article numbers) that generally differ from those of the *CISG*. 27 The most recent and, generally, the most important segment of the legislative history of the *CISG* is contained in the Official Records of the Conference (Vienna, 10 March - 11 April 1980 [A/CONF.97/19]; hereinafter “O.R.”), which is very useful as a guide to the rationale behind many of the Articles.

As for the *UNIDROIT Principles*, unlike the *CISG* to whose text there is no official commentary, each article of the Principles is accompanied by the Official Commentary. The Official Commentary consists of comments and, where appropriate, factual illustrations intended to explain the reasons for the black letter rule and the different ways in which it may operate in practice. The comments are an integral part of the *UNIDROIT Principles*, all the more so as sometimes they not only explain but to a certain extent even supplement the black letter rule.28 Like the commentary to the *UNIDROIT Principles*, the Commentary to the *PECL* contains comments and, where appropriate, factual illustrations helping explain the text. In addition, the Notes contained in the Commentary to the *PECL* identify civil law and common law antecedents and related domestic provisions.28

Furthermore, all of the three instruments expressly state, *inter alia*, that in their interpretation regard is to be had to their international character and the need to promote uniformity in their application (*CISG* Art. 7(1); *UPICC* Art. 1.6(1); and *PECL* Art. 1:106(1)). This signifies that overviews of the existing case law with parallel references to the areas where there is theoretical debate concerned are, at least *in abstracto*, useful for practical purposes. Importantly, theory is tested by outcome. It is of great importance to draw on experience from arbitral awards or domestic courts’ decision. Therefore, in this contribution regards are also to be had to what national or international courts have already done and, where there are no “precedents”, to the solutions proposed by legal scholars. In this context, particular regard is had to the case law on the *CISG*, which is widely available via the *UNCITRAL* Database- CLOUT (Case Law on *UNCITRAL* Texts; available online at ‹http://www.uncitral.org›), which is a systematic collection and distribution mechanism for information on court decisions and arbitral awards relating to the Conventions and Model Laws including the *CISG* that emanated from the work of the *UNCITRAL*. 29

Finally, it is to be found that a significant feature of this contribution is its referring to extensive sources of information available over the Internet online. In this point, besides the CLOUT database mentioned above, there are other three databases most frequently used so contributed to this contribution that I would like to list them so as to express my gratitude here: (a) the Pace database on the *CISG* and International Commercial Law (available online at ‹http://www.cisg.law.pace.edu› ) produced as a public service by the Pace University School of Law in New York, which has compiled lots of valuable sources of information on the *CISG* including a Bibliography listing all articles and books on the *CISG* and thus is extremely useful and user friendly. (b) UNILEX database (available online at ‹http://www.unilex.info› ), which is an “intelligent” database of international case law and bibliography on the *CISG* and on the *UNIDROIT Principles*. (c) TLDB (CENTRAL Transnational Law 29The purpose of the system is to promote international awareness of the legal texts formulated by the *UNCITRAL* and to facilitate uniform interpretation and application of those texts. Currently, CLOUT covers the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980, the *CISG*, the *UNCITRAL* Model Law on International Commercial Arbitration (1985), and the United Nations Convention on the Carriage of Goods by Sea, 1978 (the “Hamburg Rules”).


Database; available online at (http://tldb.uni-koeln.de/TLDB.html), which contains the largest bibliography on the new *lex mercatoria* in the internet and provides the hitherto missing link between the theory of transnational commercial law and international legal practice.
CHAPTER 2. REMEDIES AVAILABLE UPON NON-PERFORMANCE

No aspect of a system of contract law is more revealing of its underlying assumptions than is the law that prescribes the relief available for breach. The remedies available to an aggrieved party for a breach of contract can in all significant legal systems be classified into three basic categories. Firstly, an aggrieved party may be able to claim specific performance. As such, specific performance hardly gives the aggrieved party exactly the performance to which he was entitled to, unless it is supplemented with some kind of an additional remedy, such as a monetary relief. Secondly, the aggrieved party may have the right to require substitutionary relief. A relevant relief here is compensation, and almost always a monetary compensation, for the loss that the party has suffered for performance not received. Finally, the aggrieved party may have the right to put an end to the contractual relationship. In such a case the third remedy can also be seen in that the aggrieved party is put into a position where he would have been had the contract never been made. The three categories are not exclusive in that monetary compensation will also very often be available together with a claim for specific performance and an act to put an end to the contract. Furthermore, the above mentioned three basic categories of remedies also appear in different variations, such as a right to price reduction and suspension of performance.

2.1 INTRODUCTION

The first and paramount task of international commercial contracts is organizing the relationship between the parties in an optimal manner. This means that contracts must determine the rights and duties of the parties so that the transaction works smoothly and its costs can be minimized. A second important task is providing remedies for cases of breach of contract. Requirements as to the rules for such contracts, as well as to the contracts themselves, have to be assessed in light of these aims. The attainment of the first goal is mainly a task of the parties in drafting their individual contracts, but nevertheless may be supported by the applicable rules, as the UNIDROIT Principles do in Chapter 6, Section 1 (Performance in General). Though the parties to a contract very often deal with the consequences of breaches of contract as well, they rely more often on the applicable rules. It is easier for parties to organize their relationship than to deal with its destruction.

Remedies available to a party are a key consideration for that party, particularly if the contract is breached. However, the issue of remedies is one of the areas in which the diversity of legal systems is obvious. During the drafting of the Convention the most difficult to formulate were those dealing with the remedies of buyer and seller for breach of contract by the other party, which are still among the

most likely to generate controversy. Many aspects of the law of sales reflect merchant practice, and to the extent that this practice is standardized in international sales transactions, the problems in formulating the text of the Draft Convention were reduced. However, the provisions in respect of breach of contract do not reflect merchant practice. They reflect the efforts of lawyers from many legal systems to reconcile their views on the appropriate actions to be taken by the parties and by a tribunal in case of breach. The result has been a series of provisions which are in general harmony with one another but which will often be unfamiliar to lawyers from any given legal system.

Thus, the present Chapter identifies generally the scope of relief available under each of the three bodies of rules, namely Part III (partial) of the CISG, Chapter 7 of the UNIDROIT Principles and Chapters 8 and 9 of the PECL, in light of traditional and modern theories. This Chapter seeks to take an overview of remedies in the event of non-performance while leaving the substantively major remedial provisions to be discussed in the following chapters. In so doing, it firstly touches on the definition of non-performance in general. After that, the available remedies are shown in a manner limited to a descriptively bare outline rather than a more detailed discussion. Finally, this Chapter outlines briefly the structure of this contribution.

2.2 THE CONCEPTS: BREACH OF CONTRACT vs. NON-PERFORMANCE

“Non-performance” is the term used in the UPICC and the PECL, analogous to “breach of contract” used in the CISG. A brief survey reveals that breach of contract as a unitary institution of contract law is not familiar to all legal systems. The concept as such is derived from Anglo-American law. But a unitary approach is also adopted in the Romanic legal systems; there it is called non-performance. To avoid plunging into a battle of conceptual issues, I will use the both terms, i.e. “non-performance” and “breach” equally in this contribution to mean that a contract is not performed as originally contracted.

The Convention uses the basic and unitary concept of “breach of contract”, which may now be regarded as widely, although not yet generally accepted. Under the Convention the notion “breach of contract” covers all failures of a party to perform any of his obligations. There is no distinction between main obligations and auxiliary obligations. And it does not matter whether the obligation had its origin in the contract, in a usage or in the Convention itself. Under certain conditions a breach of contract is considered to be fundamental (Art. 25). A breach of contract is always given when the objective facts of a breach have occurred, hence irrespective of whether there are grounds for exemption or not. It follows from that the term failure to perform as contained in Arts. 79, 132

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80 (Exemption) refers to any breach of contract, which is “to be conceived here in the broadest sense of the word. Apart from late performance and non-performance it includes, in particular, non-conform[ing] performance and relates to the obligations of both the seller and the buyer.”

On the other hand, both the UNIDROIT Principles and the PECL, where “breach” is called non-performance, set up a substantially identical definition to the CISG. In the UNIDROIT Principles, it is expressly set out in Art. 7.1.1 that: “Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.” This article defines “non-performance” for the purpose of the Principles. Particular attention should be drawn to two features of the definition. The first is that “non-performance” is defined so as to include all forms of defective performance as well as complete failure to perform. So it is non-performance for a builder to erect a building which is partly in accordance with the contract and partly defective or to complete the building late. The second feature is that for the purposes of the Principles the concept of “non-performance” includes both non-excused and excused non-performance. The PECL has set up a similar structure and terms for a future European Code. “Breach” is called non-performance, and occurs whenever a party fails to perform any of its obligations under the contract. As the Official Comment to the PECL makes it clear: “Under the system adopted by the Principles there is non-performance whenever a party does not perform any obligation under the contract. The non-performance may consist in a defective performance or in a failure to perform at the time performance is due, be it a performance which is effected too early, too late or never. It includes a violation of an accessory duty such as the duty of a party not to disclose the other party’s trade secrets. Where a party has a duty to receive or accept the other party’s performance a failure to do so will also constitute a non-performance.”

Clearly, the difference between these two basic concepts, i.e. “breach of contract” as used in the CISG and “non-performance” in the UNIDROIT Principles or in the PECL, is not of essence. Indeed, the process of legal harmonization in global economic markets has made a further step forward when non-performance is defined in terms under it that include all failures and defects in performance, including those that are excused, and avoids terminology emphasizing breach or fault. A commentator’s statement on the CISG confirms this: “Exemptions, as can be seen particularly well from the context of impediments, only lead to the removal of certain legal consequences of the breach of contract, while others continue to exist. The reason for it is a breach of contract [...] cannot be eliminated as such by way of exemptions. From this it follows that the term ‘breach of contract’ does not necessarily include an accusation.”

2.3 REMEDIAL SCHEMES OF THE STUDIED INSTRUMENTS

2.3.1 CISG Part III (Partial)

The CISG grants reciprocal remedies within three basic categories to the buyer and seller and clearly establishes that the primary remedy available to an injured party is specific relief, i.e. specific performance. Secondly, the Convention establishes that an injured

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[38] See Comment on Art. 7.1.1 UPICC.
party shall have a right to a substitutionary relief, which requires the party in breach to pay some amount of money to compensate the loss suffered by the other party. Finally, an aggrieved party shall have a right to avoid (terminate) the contract and thus put an end to the contractual relationship. As such, the remedial provisions of the CISG generally correspond with all major legal systems.\footnote{Supra. note 2.}

The CISG also follows the above mentioned three-category system and thus provides three basic remedies, namely specific performance, damages and avoidance of the contract.

Under the Convention, the remedies available for both the buyer and the seller, each dealt with under a section in Part III, are described in a unified scheme that is clear and easy to follow.\footnote{Supra. note 13, p. 10.} In this respect, the remedies available for a breach of contract are summarized in Arts. 45 and 61, which set forth reciprocal remedies for the buyer and seller, respectively. Art. 45(1) gives an overview of the remedies available to the buyer in the event of breach of the seller, namely specific performance, avoidance, compensatory damages, and reduction in price. The seller’s remedies are enumerated at Art. 61(1). They differ from the remedies available to the buyer for obvious reasons in two respects. First, the remedy of claiming a reduction in price is not available to the seller. Second, there is no need for substitutional performance or the requirement that the buyer cure a defect in his performance.\footnote{See Nayiri Boghossian in “A Comparative Study of Specific Performance Provisions in the United Nations Convention on Contracts for the International Sale of Goods”: Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000); p. 15. Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html}}

Generally, the CISG represents a compromise between the civil law and common law systems, sometimes reflecting concepts that are unique to one system and not the other.\footnote{See Robert Koch in “The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)”: Pace Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International (1999); p. 297. Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/koch.html}} Especially, the availability of specific performance as a primary remedy for a breach of contract under the CISG, corresponds with the civil law countries, contrary to the common law countries which regard damages as the primary remedy for a breach of contract.\footnote{Supra. note 2.} The CISG makes specific performance available to both the seller (Art. 46) and the buyer (Art. 62). Before the parties have fulfilled their obligations, at least in terms of its placement in the Convention’s overall scheme, specific performance is the primary remedy although damages are equally available. Under Art. 46, specific performance of the breaching seller may arise in the form of the seller’s right to delivery, substitute delivery and repair. While under Art. 62, the seller may require the breaching buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Besides specific performance, the right to obtain damages for a breach of contract plays an important role within the CISG. Damages (or monetary compensation) may be the only available remedy for an aggrieved party if, e.g. the requirements for granting specific performance or the right to avoid the contract are not met. It can, therefore, also be argued that damages are the primary remedy pursuant to the CISG. Moreover, the aggrieved party’s right to obtain monetary compensation supplements substantionally the...
rights to require specific performance and avoidance in that he always has the right to obtain damages. For the sake of putting the aggrieved party into as good a position as he would have been had the contract been performed as agreed, the aggrieved party has, therefore, always a right to claim for damages in addition to a claim for specific performance or avoidance.\textsuperscript{46} Damages include not only compensation for the expenses incurred by a party, but also the loss of profit. The amount of damages is limited by two conditions: foreseeability and mitigation. Foreseeability means that damages may not exceed the loss that the party in breach foresaw or should have foreseen (Art. 74). The mitigation rule imposes on the innocent party the duty to mitigate the loss (Art. 77). The right to receive interest is also available in addition to the right to damages (Art. 78).

Arts. 49 and 64 of the CISG provide an aggrieved the right to declare the contract avoided. Avoidance of contract under the CISG puts an end to the performance obligations of both parties. It is, however, required that the breach is a fundamental breach.\textsuperscript{47} The idea behind this is said that the CISG was designed to take into account the special characteristics of the international sale of goods, such as long distances involved, costs of transportation and the length of the term of the contracts. Due to this design, the CISG emphasises remedies that seek to preserve the contract notwithstanding a breach.\textsuperscript{48} This deliberation is further supported when the CISG provides a tool in Art. 47/63, familiar to the German legal system and known as the Nachfrist principle, where the aggrieved has the option of fixing an additional period of time for the breaching party to perform his obligations, and during that period he may not resort to any other remedy for the breach, unless he receives notice that the other party will not perform.

Moreover, the CISG contains additional remedies besides the above mentioned. Firstly, as for the anticipatory breach, besides the right to avoid the contract as contained in Art. 49/64 when an anticipatory fundamental breach exists (Art. 72), the CISG provides a possibility to suspend performance in certain situations as provided for in Art. 71. Under this Article a party may suspend the performance of his obligations if, after conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations. Secondly, the CISG evidences a solicitude for the interests of the seller in “curing” defective performance of the contract. Where a breach has occurred, the CISG encourages the Seller to keep his contractual promises by offering him the express right to cure his own mistakes (Art. 48). Thirdly, the Buyer has, according to Art. 50, the right to a reduction of price in the case of non-conformity of goods. The right to a reduction in price serves as an alternative to damages being a kind of restitutionary measure of monetary relief, available even where the buyer is not entitled to avoidance. Fourthly, if under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the Seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him (Art. 65).

\textsuperscript{46} Ibid. \
\textsuperscript{47} Under the Convention, apart from the damages remedy, avoidance and substitute delivery are only available when a fundamental breach occurs. \
\textsuperscript{48} In a broad way, remedies for breach of contract in sales law can be broken into two main categories: one where the contract can be terminated or avoided by the parties, the other where the remedy is granted while the contract remains in force. Since parties will typically expect their contracts to be performed or at least stay in effect, the primary emphasis should be on the remedies that operate without having to avoid the contract. (See Peter A. Piliounis in “The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?”(1999). Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/piliounis.html})
2.3.2 UNIDROIT Principles Chapter 7

Chapter 7 of the UNIDROIT Principles dealing with remedial issues is significant on at least two levels. In practical terms, it is the substantive heart of the whole Principles. It is where the Principles’ solutions to a large proportion of real world disputes in commercial transactions are to be found. It will be a powerful support for the harmonization of actual outcomes and improve the reliability of the often unpredictable results of disputes. The substantive content of Chapter 7 is important as an illustration of the creative power of the UNIDROIT Principles. Chapter 7 is also important as an example of how the Principles work and of their usefulness in the emerging pattern of harmonized international commercial law. Chapter 7 brings closer together the substantive outcomes in courts, arbitral tribunals, and institutions of alternative dispute resolution in different legal systems, thus providing a prime example of how harmonization of international commercial law can improve the law.  

Chapter 7 is divided into four sections made up of 31 articles. Like the CISG PART III, UPICC Chapter 7 is systematically structured to favor the existence and performance of the contract and to minimize the instances in which the contract is terminated before performance is complete. Section 1 focus on bringing about performance of the contract and avoiding termination, especially with the devices such as Cure by Non-performing Party (Art. 7.1.4) and Additional Period for Performance (Art. 7.1.5), designed to bring about performance rather than contract failure after difficulties have been encountered by the parties during performance. Moreover, Section 2 takes a superior and more harmonious path dealing with the right to performance, what Common-Lawyers call specific performance and which is the basic preferred remedy in the CISG as well as in many legal systems of the world. Arts. 7.2.1 (Performance of Monetary Obligation) and 7.2.2 (Performance of Non-monetary Obligation) states the general preference for orders to perform, but Art. 7.2.2 notes exceptions to this general rule. Art. 7.2.3 further deals with the issue of Repair and Replacement of Defective Performance.

Although often regarded as the most drastic and last resorted remedy in case of non-performance, the right to termination is ensured by Section 3 of Chapter 7, functioning equally as CISG’s avoidance provisions, when performance are so late or so defective that the aggrieved party cannot use it for its intended purpose, or the behaviour of the non-performing party may in other respects be such that the aggrieved party should be permitted to terminate the contract. In this Section, Arts. 7.3.1 and 7.3.2 state generally the issues of Right to Terminate the Contract and Notice of Termination. Arts. 7.3.3 and 7.3.4 then deal with Anticipatory Non-performance and Adequate Assurance of due Performance in case of anticipatory non-performance. And Arts. 7.3.5 (Effects of Termination in General) and 7.3.6 (Restitution) finally clear the effects of termination.

Finally, as almost all legal systems or instruments do, Section 4 of Chapter 7 provides damages to the aggrieved party. Arts. 7.4.1 and 7.4.2 state the general Right to Damages and the underlying principle of Full Compensation, subject to the limitations such as Certainty of Harm (Art. 7.4.3), Foreseeability of Harm (Art. 7.4.4) and Mitigation of Harm (Art. 7.4.8), and lessing Harm Due in Part to Aggrieved Party (Art. 7.4.7). In addition, interests is also grouped under the heading of damages in Section 4 and dealt with separately under the titles of Interest for Failure to Pay Money (Art. 7.4.9) and Interest on Damages (Art. 7.4.10).
2.3.3 PECL Chapters 8, 9

Under the PECL, two chapters establish the remedial scheme: Chapter 8 deals with Non-performance and Remedies in General. Art. 8:101 states the remedies available as: "(1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9. (2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages. (3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance."

Thus, the remedies available for non-performance depend upon whether the non-performance is not excused, is excused due to an impediment under Art. 8:108 or results from behaviour of the other party. A non-performance which is not excused may give the aggrieved party the right to claim performance - recovery of money due (Art. 9:101) or specific performance (Art. 9:102) - to claim damages and interests (Arts. 9:501 through 9:510), to withhold its own performance (Art. 9:201), to terminate the contract (Arts. 9:301 through 9:309) and to reduce its own performance (Art. 9:401). If a party violates a duty to receive or accept performance the other party may also make use of the remedies just mentioned. A non-performance which is excused due to an impediment does not give the aggrieved party the right to claim specific performance or to claim damages (Article 8:108). However, the other remedies set out in Chapter 9 may be available to the aggrieved party. The fact that the non-performance is caused by the creditor's act - or omission has an effect on the remedies open to the obligee. It would be contrary to good faith and fairness for the creditor to have a remedy when it is responsible for the non-performance. This effect may be total, that is to say that the creditor cannot exercise any remedy, or partial. The exact consequence of the creditor's behaviour will be examined with each remedy.50

It is to be noted that the PECL similarly provides the additional remedies as contained in the CISG or in the UPICC such as cure by non-performing party (Art. 8:104), assurance of performance in case of anticipatory non-performance (Art. 8:105) and notice fixing additional period for non-performance (Art. 8:106). However, it is should also be mentioned here that the party's right to withhold its own performance as contained in PECL Art. 9:201 (as well as in UPICC Art. 7.1.3, CISG Art. 58) until the other party performs its obligation will not be given detailed discussion in this contribution. This right is not regarded as a remedy for breach of contract.51

2.3.4 Concluding Remarks

As demonstrated above, three basic remedies are provided by each of the three instruments, namely specific performance, damages and termination of the contract. However, the discussions in this contribution are premised on the assumption that the parties have not chosen some other remedy or remedies within their contractual relationship. Any such remedies chosen by the parties would obviously fall outside the scope of this contribution and will not be given detailed discussion. The most important principle of each of the three instruments must be mentioned here, however, that is to regard the contract made between the parties as prevailing.

50Supra. note 10, Comment B.
Contractual freedom is thus the rule, also reflecting the start point for various legal systems in general. Moreover, it is important to note that the remedies available for a breach of contract will be subject to, not only the agreement made between the parties, but also any practice or usage which can be regarded as an implied part of the agreement. In case of a breach of contract it is, therefore, necessary to first look into the contract executed between the parties or any practice or usage of relevance. Only if the agreement and any relevant practice or usage is silent, the provisions of the applicable rules - CISG, UNIDROIT Principles or PECL or any other laws – concerning remedies will be at hand. However, it should also be noted that, in cases of such remedies chosen by the parties or implied by relevant practice or usage, potential uncertainty may arise depending on the types of remedies chosen by the parties. This becomes a clearer problem in the context of the CISG. Art. 4 of the CISG sets forth the scope of the CISG and expressly excludes “the validity of the contract or of any of its provisions or of any usage”. Although the CISG does give the parties the freedom to choose their own remedies, it is not necessarily clear that these remedies will be enforced the same way in every country, if at all.52

Another important issue related closely to remedial scheme deals with situations in which a party is not able to perform due to the change of circumstances, in the form of hardship or force majeure. It is true that, unlike under ULIS, the remedies available under the Convention or in the two Principles are not effected by a particular type of breach. In general, the type of the breach is of no importance in determining which remedies are available.54 However, on the other hand, the remedies available for non-performance depend on whether the non-performance is excused. This point is made clear by the Official Comment to the PECL,55 and similar approaches may also be found in the CISG or in the UNIDROIT Principles. In general, if the non-performance is excused, the aggrieved party does not have the right to claim damages under each of the three instruments. Nor, under the UNIDROIT Principles and the PECL where an excused non-performance arises, can the aggrieved party require specific performance. While under the CISG Art. 79, there seems to be no textual basis for the exclusion of specific performance even in such impediments as making performance impossible.

Finally, it should be noted that “fault” is not generally a prerequisite to a finding of contractual liability. However, if the non-performance viewed as punitive or penal. Penalty clauses are considered invalid and will not be enforced by an English court. So while the parties are generally free to choose their own remedies, English law will not enforce all of the remedies, at least not to the same degree. (Supra. note 19.)

52 Supra. note 2.
53 One such example would be if the parties operating under the CISG specifically agreed that the only available remedy was specific performance. Under English law, e.g., specific performance is a discretionary remedy. While it is unlikely that the parties would agree to such a remedy, there would be no conflict between the agreement for specific performance and Art. 46 of the CISG. On the other hand, an English court applying general legal principles would be unlikely to grant specific performance where the court did not consider that the situation merited the exercise of discretion in favour of specific performance. A more likely issue is the question of the quantum of damages agreed by the parties. Under the CISG, there is no limit on the amount of compensation that may be agreed to be paid upon breach of a contract. In contrast, English common law draws a distinction between genuine pre-estimates of damage (referred to as “liquidated damages”) versus clauses

54 This principle is subject to two exceptions under the CISG. First, substitute delivery and reduction in price are only available in case of the delivery of non-conforming goods. It is disputed whether goods, which are not free of third-party rights (in the sense of Arts. 41 and 42), can be considered non-conforming. Secondly, in cases of non-delivery and non-payment or failure to take delivery, the buyer’s or the seller’s right of avoidance, respectively, is subject to a “Nachfrist-type procedure,” which allows avoidance only after having fixed a reasonable length of time for the defaulting party to remedy his non-performance (Art. 49(1)(b) / 64(1)(b)). (Supra. note 14, p. 298.)
55 Supra. note 21.
is caused by the obligee’s act - or omission - he may not resort to any of the remedies. Non-performance is applied for cases of failure to perform where the obligor carries the risk. The obligee has no remedies against the obligor if he is unable to receive the performance due to his own “fault”. His failure to receive performance may in itself be a non-performance which may give the other party remedies such as the right to terminate the contract.

2.4 STRUCTURE OF THIS PRESENTATION

After the general review made in this Chapter (as well as in Chapter 1), in line with the three major remedies and other valuable deliberations, the discussion in this contribution, although the description of the major substantive contents will have to be limited here to a bare outline, is furthered in details grouped roughly under the headings as follows:

PART II. PRESERVING PERFORMANCE

Preserving performance by means of specific performance, so-called Nachfrist procedure, cure by non-performing party or the reduction of price is of great significance in the context of international commercial transactions, where a great deal of time and effort may be incurred by the innocent party in finding an alternate one. This is particularly true when the contract concerns unique and otherwise identified or specific items. But even in cases where the items are not especially unique or otherwise identified it might be easier and less expensive to require performance of obligations of the breaching party instead of seeking damages or obtaining the subject matter from somewhere else.

A clear indication from the present CISG is that it provides an aggrieved party, both the seller (under Art. 46) and the buyer (under Art. 62), a clear right to require performance of obligations under the contract. As a rule, the CISG adopts the primacy of specific performance, which was nevertheless once regarded as one of the biggest obstacles to reaching a compromise on the final text of the Convention. This will be discussed in Chapter 3. The CISG has certain provisions that even more clearly demonstrate the priority given to specific performance. This is confirmed through giving rise to an opportunity to save the contract from being avoided, on the one hand, by Arts. 47 and 63, where the aggrieved party is given the right to extend an additional period of time for performance – the so-called Nachfrist procedure; on the other hand, by Art. 48, which provides the seller with the right to cure (by either remedying the non-conformity or delivering substitute goods) under certain conditions that secure the buyer’s interests. These two means serving to preserve performance will be given more details in Chapter 4 and Chapter 5, respectively.

Indeed, the three means mentioned above can be grouped roughly under the aggrieved party’s right to performance because the nature of these remedies requires the non-performing party to perform his contractual obligations as originally agreed. However, along with the aforementioned means, there is another remedy designed to preserve the bargain i.e. reduction of the price, provided by the traditional civil law doctrine action quanti minoris, where the aggrieved party is entitled to a proportional reduction in the contract price where the other party’s performance is incomplete or otherwise fails to conform to the contract. This is expressly contained in CISG Art. 50 and will be dealt with in Chapter 6.

In sum, these methods preserving performance illustrate that one of the main purposes of the CISG is to prevent termination of the contract by preserving the enforceability of the contract as concluded by the parties if it is feasible and to avoid economic waste in trade. This principle is also followed under the UNIDROIT Prin-
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ciples and the PECL. Furthermore, the examination in this PART will demonstrate that the two sets of Principles have taken a more modern and uniform way to handle these issues. Arguably, the primacy of preserving performance by mean of various remedies and the preference of specific performance over other remedies such as termination (PART III) or damages (PART IV), appear to be established under each of the three instruments and bear great significance in international commercial transactions.

PART III. TERMINATION

The third major remedy of the aggrieved party – apart from specific performance and damages – is termination of the contract. It should be mentioned here that the term “termination” in this context has a meaning resembling in effect the term “avoidance” in the CISG, the same as which is used in the UPICC and PECL in various provisions in the context of the invalidity. In the context of defects of consent resulting in invalidity, “avoidance” means under the UPIICC/PECL and most legal systems that a contract becomes void ex tunc. In the context of the CISG “avoidance”, by contrast, means that a contract is terminated ex nunc. To avoid being plunged into a battle of conceptual issues, both terms, i.e. “termination” and “avoidance” (as well as their various parts of speech or tenses) are used equally in this PART to mean that a contract is terminated ex nunc, unless specified otherwise.

It is said that the right to termination is the most drastic remedy in case of non-performance, which reflects the gravity of the negative effects of non-performance or performance not complying with the terms of contract. Whether in a case of non-performance by one party the other party should have the right to terminate the contract depends upon the weighing of a number of considerations. A crucial challenge is therefore to identify the grounds on which the aggrieved party may be entitled to terminate the contract where the other party has failed to perform his obligations in accordance with the contract terms. In this respect, Chapter 7 carries on a general discussion on the major grounds for a party’s right to terminate the contract as contained in the CISG, UNIDROIT Principles and PECL. To go on with the discussion, Chapter 8 focuses on the concept of fundamental non-performance; Chapter 9 examines the suspension and termination mechanism against anticipatory non-performance; Chapter 10 touches on the termination of breached installment or part.

As to be demonstrated through these examinations, the grounds for termination focus on the fundamentality of the non-performance, actual or anticipatory. An aggrieved party may terminate the contract only if the non-performance of the other party is “fundamental”, i.e. material and not merely of minor importance. Read together with the remedial specific performance discussed in PART II, limiting the availability of the right to termination as to be discussed in this PART serves a further contribution to preserving the enforceability of the contract and arguably to promoting good faith and efficiency in commercial dealings.

After the identification of the grounds for termination, Chapter 11 reviews the declaration of termination. As a rule termination is effective only if notice thereof is given by the aggrieved party to the defaulting party. Other than this mere notice, by way of contrast with the approach of some civil law jurisdictions, there is no such procedural requirements restricting the exercise of termination as that the party avoiding the contract obtain judicial approval or confirmation. Termination may be effected by the act of the aggrieved party alone. Generally speaking, termination affects the legal life of the contract and the contractual relationship of the parties. Finally, the effects of termination are to be explored in Chapter 12.
PART IV. DAMAGES

There can be no doubt that it has been established as a general principle of law that in case of breach of contract, the aggrieved party is entitled to damages. Remedies other than damages which are available to an aggrieved party such as specific performance and termination have previously been discussed. To the extent these remedies do not fully protect the aggrieved party's expectations under the contract, a general rule of full compensation which is applied when a party is entitled to claim damages has been well established under each of the three instruments. Generally, damages have to be paid in money and are not to be recovered as restitution or restoration. They require a breach of an obligation regardless of whether the breach consists of non-performance, late performance or defective performance.

In this PART, the discussion in Chapter 13 will indicate that the right to damages is established under the three instruments as a controlling remedy almost invariably pursued either in and of itself or in conjunction with other remedies; and that the principle underpinning the general measure of damages is full compensation. Damages can be claimed no matter whether the breach of contract has been culpably committed intentionally or negligently or in any other way. The mere fact of a breach of contract is sufficient. Compensation for damages is, however, limited by the some methods such as foreseeability of loss, certainty of harm, contribution to harm or the duty to mitigation. These limiting methods will be given details in Chapter 14. Nonetheless, the aggrieved party is generally entitled to recover damages whenever it suffers loss from the other party’s unjustified failure to perform. Thus, even in the case of termination of the contract, damages may be requested to compensate the loss arising from such termination. In such a situation, two methods of measuring damages are available. As to be demonstrated in Chapter 15, when the contract is avoided, damages generally amount to the difference between the contract price and the costs of a cover transaction, together with any further damages; where a cover transaction has not been undertaken with regard to the contract breached and a market price is available, the injured party can also measure his damages with the difference between the contract price and the market price.

All legal systems appear to recognize the validity and social utility of a clause which estimates future damages, especially where proof of actual damage would be difficult. Such a clause, sometimes referred to as a “liquidated damages clause” and sometimes as a “penalty clause”, is dealt with in the two Principles as agreed payment for non-performance (although the CISG doesn’t expressly make such clauses valid in all systems). Such clauses are to be discussed in Chapter 16. Another important aspect which may falls under the general heading of damages is the recovery of attorneys’ fees. This issue is of particular significance in international commercial transactions where such fees usually amount to a large number, and therefore will be explored in Chapter 17. Finally, the damages recoverable may include interest upon the amount of the loss from the date at which the loss was incurred to the date of payment. However, the determination of interest is not an issue to be simply resolved after the establishment of liability, but a question that deserves the strictest scrutiny. Thus, Chapter 18 will focus on the payment of interest.

PART V. EXCUSES

The three main aspects of non-performance in a broad sense are the facts of the breach, i.e. failure to perform an obligation including defective performance and late performance, the responsibility of the non-performing party and the legal consequences of the breach, i.e. particular remedies such as specific performance (PART II), damages (PART III) or termination (PART IV). The mat-
ter to be discussed in this PART relates to the responsibility of the non-performing party. The main question addressed in this PART is: How can a party be excused from his primary and secondary obligations (performance and damages) under an originally agreed international commercial contract, or entitled to restoring its equilibrium in case of changed circumstances?

This PART begins with a general review of different approaches to the problem of changed circumstances, which excuses a party from performance of its obligations when a contract has become unexpectedly onerous or impossible to perform. It demonstrates that the concept of changed circumstances, also referred to as rebus sic stantibus, has in its basic form been incorporated into so many legal systems and has found a widely recognized expression in international instruments such as the Vienna Convention on the Law of Treaties, the CISG, UNIDROIT Principles and PECL, that it may be regarded as a general principle of law, albeit on different theoretical bases. This is confirmed by international arbitral practice that lots of awards have also admitted, albeit in exceptional cases and with care and prudence, the application of rebus sic stantibus, and regarded it as a general principle of law. (Chapter 19)

Then the discussion focuses on the two major legal concepts dealing with the problem of changed circumstances, which are exceptions to the basic rule pacta sunt servanda: force majeure (Chapter 20), which is at stake where the performance of the party concerned has, at least temporarily, become impossible, and primarily directed at settling the problems resulting from non-performance, either by suspension or by termination; and hardship (Chapter 21), which occurs where the performance of the disadvantaged party has become much more burdensome, but not impossible, and is mainly directed at the adaptation of the contract. Finally, the force majeure or hardship clauses which are frequently introduced into contracts in international trade are at hand (Chapter 22). It is to be noted that the doctrine of changed circumstances or rebus sic stantibus should only be applied with care and prudence and admitted in exceptional cases, especially if the intention of the parties has been clearly expressed in a contract. The standardized use of relevant clauses may help to define the criteria which may trigger excuses for non-performance and simplify an appropriate procedure for the suspension, termination or adaptation of agreed contracts, and are thus necessary to protect the interests of both parties in cases of unexpected changes in circumstances, in light of the observation of the good faith and equity principle.
PART II. PRESERVING PERFORMANCE
CHAPTER 3. SPECIFIC PERFORMANCE

The general purpose of all contract remedies is to place the aggrieved party in as good a position as he would have enjoyed had the other party performed his obligations under the contract. This means that all contract remedies must seek to protect one’s contractual rights. Specific performance is one such remedy available to the aggrieved party. The purpose of specific performance is to help the creditor obtain, to the fullest extent possible, the actual subject matter of his bargain. In general terms, specific performance means the execution of a contract according to the precise terms agreed upon. But granting specific performance is not free of restrictions in all legal systems.58

3.1 COMPRISED APPROACH UNDER THE CISG

3.1.1 Introduction

Most contracts contain a promise of performance. One party undertakes to provide goods, rights or services, and the other side undertakes to pay a sum of money in return. If one party reneges on his promise, however, the problem arises as to whether that party can be sued for specific performance or only for damages arising from non-performance.57

Nonetheless, the CISG, which is the result of decades of work, serves again as an example of unifying divergent rules regulating international transactions through international conventions in order to eliminate, or at least reduce the potential conflicts when an international transaction is concluded. It is also to be noted that although the Convention has attained its purpose to a certain extent, it did not fully achieve unification because differences among legal systems are so deeply rooted, they are sometimes very difficult to eliminate. It is the case with regard to the aggrieved party’s right to require specific performance, which is finally attended to under the CISG in Arts. 46, 62 and 28. “Article 46/62 has civilian overtones. Article 28 is a compromise provision. It reads rules of the forum into a court’s obligation to compel specific performance.”59


3.1.2 Primacy of Specific Performance under Arts. 46/62

Familiar to the civil law theory regarding the promisee’s right to claim specific performance as an obvious and a simple consequence of the principle of pacta sunt servanda, the CISG adopts the primacy of specific performance as a rule. The CISG provides an aggrieved party, both the buyer and the seller (the seller’s right to require performance under the CISG is, however, slightly stronger than that in many domestic legal systems), a clear right to require performance of obligations under the contract. Art. 46 lays down the general rule under certain limitations that the buyer may “require performance” by the seller. Similarly, Art. 62 provides that “the seller may require the buyer to pay the price, take delivery or perform his other obligations”.

A clear indication from the CISG is that specific performance is the primary remedy available both to the buyer and to the seller. This remedy appears to be broad for several reasons. Above all, the Convention gives an aggrieved party the right to choose between specific performance and damages. This approach takes on added importance because, in many cases, particularly in international trade, an award of damages will not fully compensate for an aggrieved party’s losses. In order to cover, for example, a buyer will incur the costs of finding an alternative supplier and negotiating a new deal. Although the Convention entitles a buyer to recover foreseeable incidental damages, these costs often involve the expenditure of time rather than cash, and it is difficult to establish an accurate monetary value for time and effort. Similarly, resale by a seller may entail costs in time and effort that may not be compensated in a damage award. In addition, a court may err in its estimate of compensatory damages, that is, the additional cost to the buyer of substitute goods, the difference in value between the contract goods and the available substitutes, and any other losses caused by the breach. The risk of error is particularly acute in cases involving international sales, because identical products are not common in the international market. If a seller has breached, for example, and the buyer is unable to find an exact substitute, then the court must estimate any difference in value to the buyer between the original contract item and the closest substitute. Numerous types of product differentiation are likely. Purchases from alternative suppliers may come with reduced warranties, less brand name recognition, or diminished quality. The diminution in value caused by these differences is difficult to prove with certainty and difficult for a court to evaluate.

Also, the style in which Art. 46/62 is drafted should be noted at this point. The style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party’s failure to perform are stated in terms of the injured party’s right to the judgement of a court granting the requested relief. However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when Art. 46(1) provides that “the buyer may require performance by the seller”, or when Art. 62 provides that the “seller may require the buyer to pay the price, take delivery or perform his other obligations”, it anticipates that, if the seller or the buyer does not perform, a court will order such performance and will enforce that

58 Supra. note 1.
order by the means available to it under its procedural law.\(^\text{61}\) Under the **CISG**, if the court would give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this Convention (according to Art. 28), it would be required to do so if the criteria of Arts. 42/62 are met. In this respect, a court lacks the discretion to refuse an injured party’s request for a decree of specific performance under Art. 46/62, which is said to “have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party.”\(^\text{62}\)

Another respect worthy noting is what is not required under Arts. 46 and 62. On the one hand, identification of the goods to the contract is not a prerequisite to a claim for specific performance. By way of contrast with Arts. 67(2) (risk of loss does not pass to the buyer until the goods are identified to the contract) and 69(3) (if the goods are not identified to the contract, they are not considered placed at the buyer’s disposal until identification occurs), Arts. 46 and 62 contain no express requirement that the goods be identified to the contract. Nor can such a requirement be inferred from the terms of Arts. 46 and 62. Indeed, there are cases where a court order be sought to require the goods to be identified with the remedy of specific performance under ArtS. 46/62.\(^\text{63}\) On the other hand, as shown in light of the legislative history, the aggrieved party, unlike in common law, is not required to show the court that damages are an inadequate remedy; nor are injured buyers or sellers required to demonstrate that they cannot reasonably purchase or resell the goods under contract prior to obtaining specific performance.\(^\text{64}\) Neither Art. 46 nor Art. 62 requires the unavailability of cover or resale as a prerequisite for ordering specific relief.\(^\text{65}\)


Finally, this remedial right is broad in the fact that the remedy to specific performance under the **CISG** is broad in scope. The aggrieved party can require the breaching party to perform the full range of his contractual obligations. For instance, as far as Art. 46 goes, no distinction is made between different sorts of breaches. The buyer can require the seller to perform all “his obligations” under the contract. The buyer may be entitled, subject to the restrictions provided by the Convention, to this remedy when the seller fails to procure or produce the goods or to deliver them, hand over any documents relating to them at the right place or date fixed in the contract (Arts. 31, 33 and 34). He may also apply to the court for this remedy where the seller refuses to deliver goods, hand over any documents relating to them (Art. 30), or where part of the purchased goods are missing or does not conform to the contract (Art. 51) and do all other acts necessary to fulfil the contract as originally agreed. Similarly, the Convention gives the seller the right to apply to the court to enter a judgement ordering the buyer to “**pay the price, take delivery or perform his other obligations**”.

In short, the aggrieved party may require performance by the non-performing party in regard to any obligation of the latter. The form that specific performance takes depends on the circumstances surrounding the sale.\(^{66}\)

### 3.1.3 Forum’s Rule under Art. 28

As discussed above, the civil law approach prevails in Art. 46/62, thus making specific performance the primary remedy without the pre-condition of the inadequacy of damages and without the courts having any discretion in granting it. In order to preserve the tradition of common law countries and not force them to make a major change in their position toward specific performance, a compromised solution was adopted in Art. 28. Similar to ULIS Art. 16, Art. 28 provides a procedural exception primarily tailored to suit the peculiarities of Anglo-American law, which does not generally provide the remedy of specific performance in the context of most sales contracts. But unlike ULIS, **CISG** does not require a reservation regarding a state’s right to refuse to enter decrees of specific performance.\(^{67}\) Art. 28 reads: “If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, 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.”

However, the wording in Art. 28 is slightly ambiguous. Phrases like “its own law”, “similar contract of sale not governed by this Convention” and “specific performance”, are terms that have different connotations depending on whether they are read by a common law or a civil law jurist. For example, the phrase “its own law” raises the question of whether the law is the substantive law of the forum or its entire law, including rules of conflicts of law. Nonetheless, when one seeks to determine the meaning of a legal term in an international convention such as the **CISG**, one should bear in mind that the terms are not necessarily derived from the meaning they have in certain legal systems, but instead reflect the intentions of the **CISG**’s drafters. Therefore, in clarifying the meaning of specific performance, one must reject the connotations of the term in domestic law and try to reveal the meaning as it was intended within the context of the **CISG**. Briefly, the examination of the purpose of Art. 28 makes it evident that what is meant is the substantive law of the forum. The meaning of the phrase “similar contracts” embraces...
all sale contracts that are outside the scope of the CISG. This includes domestic contracts of sale and contracts between parties from countries that do not subscribe to the CISG, but excludes the contracts listed in Art. 2 of the CISG. And "specific performance" in the CISG includes any order compelling either party to perform contractual obligations, especially the seller’s right to require the price being a claim for specific performance even though the term specific performance is not used in Art. 62.86

Although the language of Art. 28 is not entirely clear, this Article expressly contains a conflict of law provision referring to the rules of the forum on specific performance and giving them priority over the Convention. It follows that, “the right to require performance of obligations under the CISG is effectuated through the forum’s own domestic law so as to give the forum a right not to enter a judgment for specific performance unless that forum would do so under its own law. This provision thus limits the availability of specific performance as provided by the CISG because the domestic rules on requiring performance vary from jurisdiction to jurisdiction, and most importantly differ from the provisions of the CISG. The primary difference as regards such domestic laws is between civil law and common law systems, which take a totally different approach to specific performance. Even if the differences in civil law countries concerning their approach to specific performance are not that fundamental, there are still variations. Consequently, one must be aware of the forum’s domestic laws regarding specific performance to be in a position to give a certain answer whether that forum grants performance under the general principle of the CISG.

While Art. 28 is useful from the perspective of a common law party and may make the specific performance flexible to some extent, it is inconsistent with the aim of the CISG because it allows the application of different rules depending on the law of the forum, thus, impeding unification. For instance, Schlechtriem states: “Although meant only as a concession to Common Law countries, this provision may be misused as a door-opener for provisions of domestic law allowing the denial of or derogation from obligations, for example in cases of impossibility or clausula rebus sic stantibus. This would, of course, destroy the uniformity.”70 Besides detracting from the uniformity and international character of CISG, a parochial or variable application of the specific performance provisions will lead to uncertainty in international commercial transactions. Parties will be unsure whether specific performance will be available in a given transaction if a suit can be brought in two or more places, one of which disfavors specific performance.

Seemingly, the parties to a contract governed by the CISG, may want to specify in the contract that specific performance will or will not be an available remedy for a breach of contract, in order to avoid possible uncertainty caused by the affect of Art. 28. Such a contractual exclusion of the availability of specific performance would seem to be justifiable in light of the fact that freedom of contract pursuant to Art. 6 of the CISG is the main principle throughout the CISG. It is, however, proposed by many commentators that such exclusion would not always be possible. It seems, pursuant to the views of Bonell and Lando, that Art. 28 is to be regarded as “mandatory law” and thus parties to a contract cannot exclude its application.71 “Such interpretation will not cause any problems if

86 Supra. note 1, pp. 27-37.
71 In this respect, Bonell states: “Article 28 by its very nature does not seem
the main principle of courts discretion, as provided by Article 28, is remembered: ‘the court is not bound to enter’ A forum court is thus faced with two aspects: First, its domestic rules regarding freedom of contract and the question whether it allows an agreement of the parties deviating its domestic rules regarding specific performance. Secondly, it is the choice of the forum court whether it will apply Article 28 and not enter a judgment for specific performance. Consequently, after evaluation on such aspects it is up to the court whether it will give effect to a contract provision regarding specific performance and enter a judgment for specific performance, even if it would not do so under its own legal principles.”

Also, a choice of forum clause will add certainty to the transaction by eliminating the Art. 28 problem. Another solution is for the party who is uncertain about the availability of specific performance to sue for damages instead. These solutions are certainly practical, but not without their own problems. International agreements are hard enough to conclude when the parties concentrate only on substantive performance and ignore the possibility of breach. Damages may not be what the aggrieved party wants. Arguably, the problems of specific performance under CISG are not easily solvable. In particular, the impediment that Article 28 imposes on achieving a uniform and international interpretation of CISG is quite real. In sum, while this approach was a useful compromise to allow the international delegates to approve the CISG, it is an unsatisfactory solution that is unlikely to be adopted in future legal unification or harmonisation efforts. “The problems of specific performance under CISG are not easily solvable. Most importantly, the impediment that Article 28 imposes on achieving a uniform and international interpretation of CISG is quite real. Despite the fact that Article 28 grew out of a compromise between the common law and civil law, its special status as a compromise should not be allowed to jeopardize the future uniform and international interpretation of the convention. All these assertions are a matter of theory, and are justified or at least justifiable on that level.” What practice reveals, however, is that there is little danger in letting a forum’s substantive law govern the availability of specific performance. In recent years, there have been several calls for the increased availability of specific performance in all contracts. In the area of international sales, particularly, the realities may counsel more toward specific performance than in other situations.

Instead of allowing a broader approach to specific performance, the regime introduced by the CISG allows the common law courts to continue to apply the traditional restrictive regime while sacrificing the potential benefits of uniformity of remedies.

In any event, reality and theoretical counter arguments weaken the case for the restricted availability of specific performance. This assertion is somewhat supported by the examples of the UNIDROIT

201 Supra. note 14.

74 Ibid.
75 For instance, an international sale where the goods are locally scarce is a convincing case for specific performance. A seller would have a strong argument for specific performance when the goods have been shipped to a foreign port where the seller is not likely to have any facilities set up for reselling the goods. The expectation of the parties may be that specific performance would be granted because of the prevalence of specific performance in several legal systems worldwide.
Principles and the European Principles as to be discussed separately below. That two Principles appear to be: let reality govern. It appears that forum law need not work a great injustice in either granting specific performance or in denying it.

3.2 BUYER’S RIGHT TO SPECIFIC PERFORMANCE: CISG ART. 46

3.2.1 Introduction

The CISG establishes for the buyer a clear right under Art. 46 to require the seller to perform as originally agreed. Art. 46 reads as follows:

"The buyer may require performance by the seller of his obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement.

If the goods do not conform with the contract the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter."

The Secretariat Commentary on Art. 42 of the 1978 Draft [draft counterpart of CISG Art. 46] states that, Art. 46 describes the buyer’s right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed. Art. 46 is divided into three subparts. Art. 46(1) sets out the buyer’s general right to specific performance of the seller’s obligations, provided that the buyer has not pursued a remedy inconsistent with requiring performance. Art. 46(2) grants the buyer the right to require delivery of substitute goods in the case of non-conforming goods and under certain circumstances. Art. 46(3) provides that the buyer may require the seller to repair non-conforming goods under circumstances similar to those in Article 46(2). All three subparts can be grouped under the buyer’s right to specific performance because the nature of the remedy in all the subparts requires the seller to deliver conforming goods or perform other obligations. It is “an expression of the maxim pacta sunt servanda”.

One should note, however, the three different categories of specific performance under Art. 46 each provide limits to the granting of specific performance under the said paragraph: Para. (1) states that the buyer may require specific performance unless he has resorted to a remedy which is inconsistent with such requirements; para. (2) delivery of substitute goods may be required only if the breach constitutes a fundamental breach; para. (3) allows the right to require repair of non-conforming goods only if such requirement is not unreasonable having regard to all circumstances.

Official Text at the 1980 Vienna Diplomatic Conference. To the extent it is relevant to the Official Text, the Secretariat Commentary on the 1978 Draft is perhaps the most authoritative source one can cite. It is the closest counterpart to an Official Commentary on the CISG. (See the match-up, available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-46.html>)

Supra. note 6, Comment 1 on Art. 42 of the 1978 Draft.

Supra. note 18.

Nonetheless, the buyer does not lose in seeking specific performance his right to recover any damages he may have suffered thereby. Art. 45(2) ensures by providing that: “The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies”. “The right to claim damages ensures that the buyer is put into as good a position as if he would have been had the contract been performed. Therefore, the right to claim damages essentially supplements the buyer’s right to require performance.”

80 Supra. note 14.

3.2.2 General Rule: Art. 46(1)

3.2.2.1 Right to require performance

The buyer’s general right to demand the seller to perform his obligations under the contract derives from Art. 46(1): “The buyer may require performance by the seller of his obligations...”. “The obligations that the buyer may require the seller to perform are covered under Articles 30 through 34, and under Articles 41 and 42. Those obligations include the obligation to produce, procure, or deliver goods at a place or time required by the contract and the obligation to deliver the goods free from third-party claims.”

81 Supra. note 18.

Thus, the right to require performance includes the delivery of the goods, or of any missing part thereof, the handing over of documents, the curing of defects or the performance of all other acts necessary to fulfill the contract as originally agreed. Its purpose can be understood as seeing to it that the obligations of the seller are performed as laid down in the contract and the CISG: “Paragraph (1) recognizes that after a breach of an obligation by the seller, the buyer’s principal concern is often that the seller perform the contract as he originally promised. Legal actions for damages cost money and may take a considerable period of time. Moreover, if the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true if alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.”

As for the application of Art. 46(1), Koskinen states: “The buyer’s right to require performance under Article 46(1) is at hand in situations where the seller has totally failed to perform, i.e. non-delivery. It is thus distinguished from the buyer’s right to require delivery of substitute goods or right to demand repair. What is a total failure to perform? It is clear that if the seller refuses to deliver the goods, he is in breach, as addressed by Article 46(1). But if the seller delivers goods that are totally different from what has been agreed upon, i.e. apples instead of pineapples, the answer is a bit more complicated. Should the matter be then considered as a non-delivery? The problem lies in the right to avoid. Will states that ‘If the answer were positive the buyer might find it difficult to avoid the contract. For the mere delay in performance caused by the delivery of apples instead of pineapples does not necessarily amount to a fundamental breach.’ Therefore, Will concludes that the delivery of goods other than those agreed upon between the parties, should not be regarded as non-delivery, but as a non-conformity of goods, covered by paragraph (2) of Article 46.”

In short, the buyer’s right to require performance under Art. 46(1) is at hand in cases of non-delivery. “If he has delivered, but the goods do not conform with the contract, paras. 2 and 3 provide remedies for specific claims for performance.”

82 Supra. note 6, Comment 2 on Art. 42 of the 1978 Draft.
83 Supra. note 14.
84 Supra. note 24, p. 178.
3.2.2.2 Non-resorting to inconsistent remedies

As mentioned above, despite the broad language of Art. 46, the buyer’s remedies under this article are subject to a number of restrictions, one of which is expressed by Art. 46(1), by virtue of which the buyer will be entitled to apply for specific performance only when he has not “resorted to a remedy which is inconsistent with this requirement”. Despite the express language of this provision, it is not quite clear which remedies are incompatible with the remedy of requiring performance.

Inconsistency is clearly at hand if the buyer avoids the contract: If the buyer effectively avoids the contract, the exclusion of his right to require performance follows automatically from Art. 81(1) which provides: “Avoidance of the contract releases both parties from their obligations under it ...”. Consequently, the buyer may not compel performance if he has chosen to put an end to the contract by avoiding it. “The same is true in the case where the buyer has claimed price reduction in the case of non-conforming delivery pursuant to Art. 50, since it would re-establish equivalence.”

It is obvious that if the delivered goods are defective and the buyer demands a price reduction or refund for repair costs as compensation, he may not at the same time require repair or delivery of substitute goods, as provided by paras. (2) and (3) of Art. 46, by the seller; in such a case the right to require performance and claim for a price reduction are inconsistent remedies, because they aim to compensate the same interest. Thus, the buyer may not require performance if he has chosen to reduce the price or avoid the contract.

The question whether a claim for damages would be an inconsistent remedy, depriving the buyer of the right to require performance gives rise to some doubt. What is certain is that, under the Convention, the buyer is not deprived of his right to claim damages by exercising his right to claim performance (Art. 45(2)); as mentioned above, the right to claim damages essentially supplements the buyer’s right to require performance. But is the converse necessarily true, i.e. is the buyer not deprived of his right to require performance by claiming damages? The Convention does not make the position clear.

Koskinen submits in this respect that claiming damages is not generally inconsistent with the remedy of specific performance, due to the provision of Art. 45(2). However, the buyer may lose his right to require performance if he has, without avoiding the contract, claimed damages for failure to perform or defective performance of some other obligation. Of the essence is the point of time when the buyer becomes bound by his damages claim. Such point of time must be decided in conformity with general principles of good faith. If the buyer has only claimed for damages and the seller has expressly or impliedly indicated his agreement to the buyer’s damages claim, the buyer may lose his right to subsequently require the seller to perform his obligations, because such a further requirement to perform could constitute an inconsistent requirement especially if the seller has had reason to rely on the buyer’s notification of a damages claim. On the other hand the buyer may, in addition to a requirement of specific performance, claim for damages by the seller, provided that the buyer makes it clear to the seller that such requirements are made simultaneously. Jafarzadeh notes from another perspective that “a distinction must be drawn


86 However, it is also said that a requirement of price reduction does not necessarily have to be an inconsistent remedy with a requirement to perform, pursuant to some, a price reduction could be seen as a compensation (damages) for a failure in delivery.

87 Supra. note 14.
between the case of a claim for damages for late delivery and that of non-delivery. Where the buyer has claimed damages for delay in delivery he would not be pursuing a remedy ‘inconsistent’ with that of requiring performance, while a claim for damages for non-delivery would be inconsistent with requiring performance, since such a claim for damages can only be brought ‘If the contract is avoided’.

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In sum, “inconsistent remedies include: (1) avoidance of the contract under articles 26, 49, or 81; (2) reduction of the contract price under article 50; and (3) a claim for damages based on the market-contract price differential under article 74.”

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Absent resort to such remedies, Art. 46(1) imposes no limits on the buyer’s right to specific performance within its text. The reason is apparently to impress upon the seller the importance of his or her obligations. The seller must rely on the buyer’s actions. It is expressly mentioned in the Secretariat Commentary: “Subject to the rule in paragraph (2) relating to the delivery of substitute goods, [and the rules on repair contained in paragraph (3) that was added to article 46 of the Official Text], this article does not allow the seller to refuse to perform on the grounds that the non-conformity was not substantial or that performance of the contract would cost the seller more than it would benefit the buyer. The choice is that of the buyer.”

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3.2.3 Right to Demand Cure: Arts. 46(2) and 46(3)

3.2.3.1 In general

The general right to specific performance is augmented in Art. 46 by two more specific provisions which deal with the right to require substitute goods or repair of the goods. Both of these instances deal with situations where there has been performance in fact, but where the performance does not conform with the provisions and requirements of the contract.

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Thus, Arts. 46(2) and 46(3) contemplate seller’s delivery of non-conforming goods and the buyer requiring substitute goods, or repair of defective goods.

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The delivery of substitute goods under Art. 46(2) and the right to demand repair under Art. 46(3) are, of course, significant above all in regard to non-conforming or defective goods. Evaluation of the non-conformity is to be made pursuant to Art. 35.

88 Supra. note 29.
89 Supra. note 10, p. 214. One should note, however, although the requirement is expressly provided under para. (1) of Art. 46, it seems that the buyer’s right to resort to the remedies under paras. (2) and (3) of this Article should also be subject to the same requirement; the buyer will not be entitled to require the seller to deliver replacement goods or repair defects in the goods where he has already resorted to an inconsistent remedy. (Supra. note 30)
90 Supra. note 6, Comment 11 on Art. 42 of the 1978 Draft.
91 See Siegfried Eiselen in “A Comparison of the Remedies for Breach of Contract under the CISG and South African Law”:
92 Art. 35 CISG reads as follows:
"(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
(a) are fit for the purposes for which goods of the same description would
scope of the term non-conformity, Enderlein and Maskow state: “Non-conformity of goods not only comprises defective quality and deficiencies in quantity but also wrong deliveries (c. Article 35). Goods do not conform with the contract when they are not free from third party rights or claims (c. Articles 41 and 42; [...]”).

Thus, even cases of defects in title seem to be covered under Arts. 46(2) and Art. 46(3). However, neither Art. 46(2) nor Art. 46(3) is entirely clear at this point. Also, it is said that the nature of the goods plays here an important role: “If the goods, which are burdened with a third party claim, are generic, the buyer has generally a right to require the seller to re-deliver substitute goods. And, accordingly, if the goods are specific and the seller cannot ‘buy himself out’ of such a third party right, a right to require specific performance would anyway seem to be impossible.”

As indicated above, the right of the buyer to demand that the seller cure the non-conforming delivery may be exercised in the form of requiring him to tender substitute goods (Art. 46(2)) or to repair the defect in the goods (Art. 46(3)). It is to be noted that although the language of Arts. 46(2) and (3) shows that the remedies provided under these two sub-paragraphs are separate remedies, they are not to be regarded as alternatives but can both be resorted to in the same case. Thus, it is possible for a buyer to request both substitute goods and the repair of goods depending on the circumstances. For instance, the seller may only be able to supply a portion of replacement goods but be in a position to repair the remainder of the defective goods.

However, as to be demonstrated below, when the non-conformity of goods does not amount to fundamental breach and repair is not reasonable, the buyer has the right to damages or price reduction, but has no right for performance at the expense of the debtor under Art. 46.

3.2.3.2 Delivery of substitute goods: Art. 46(2)

According to para. (2) of Art. 46, the buyer can require delivery of substitute goods, if the seller delivers goods that do not conform with the contract and the non-conformity constitutes a fundamental breach.

As for the application and purpose of Art. 46(2), Koskinen states: “The said paragraph governs therefore the scope of specific performance when the seller has delivered goods but they do not conform to the contract made between the parties. By delivery of substitute goods is meant that defective goods have been delivered and due to the defectiveness a second delivery is made to replace the first delivery. The situation where buyer rejects defective goods before delivery and demands a new conforming delivery is governed, as a matter of fact, by Article 46(1) and not by Article 46(2). Such a situation shall, consequently, be evaluated under Article 46(1). The buyer’s right to demand re-delivery of substitute goods reflects further the CISG’s aim to respect the pacta sunt servanda principle. The buyer is given the possibility to rely on the seller’s promise

ordinarily be used;
(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement;
(c) possess the qualities of goods, which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”

93 Supra. note 29.
94 Supra. note 14.
95 Supra. note 30.
and require him to re-deliver substitute goods and consequently perform as originally agreed between the parties.”

However, one particular situation is to be noted here: Whether can the buyer of specific goods require the seller to deliver substitute goods on the basis of para. (2) of Art. 46? Since under a contract for specific goods the seller has not undertaken any duty other than to deliver the particular goods, it seems that requiring him to deliver substitute goods would be contrary to the mutual agreement of the contracting parties. Koskinen confirms: “When applying Article 46(2), as regards conformity of goods, it is important to separate generic and specific goods. If the contract made between the parties consists of generic goods, it follows directly from Article 46(1) that the buyer is entitled to require the seller to perform as agreed in case of non-conformity, and accordingly require re-delivery of substitute goods under Article 46(2). Therefore, the precondition of an absence of resorting to an inconsistent remedy must also exist. When, on the other hand, the contract consists of specific goods, a requirement of re-delivery of substitute goods seems to be irrelevant as the nature of the goods makes such re-delivery impossible, de facto. Consequently, the buyer would only have a right to require repair under paragraph (3) of Article 46 or claim damages.”

Clearly, Art. 46(2) governs the scope of specific performance when the seller has delivered goods but they do not conform to the contract made between the parties. However, the right to require re-delivery of substitute goods under Art. 46(2) is expressly limited by two provisions, one of which is that the non-conformity must amount to a fundamental breach (for criteria in determining what constitutes a fundamental breach, see Chapter 8). Jafarzadeh submits that “since it could be expected that the cost of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer’s loss from having non-conforming goods, the Convention adopts the approach that a buyer will be entitled to resort to require the seller to deliver replacement goods only where the non-conformity is serious enough to constitute a ‘fundamental breach’. Accordingly, relatively trivial defects do not justify a claim for substitute delivery, though in appropriate cases they may entitle the buyer to require the seller to remedy the lack of conformity by repair (Art. 46(3)).”

In this respect, Enderlein and Maskow confirm as: “Under the CISG, substitute goods can be requested by the buyer only when the non-conformity of the goods constitutes a fundamental breach of contract; hence not in the case of minor defects as was the case under ULIS. This is in line with Article 49 according to which avoidance of a contract (at first) can only be requested if a fundamental breach of contract is committed, for the economic consequences of a delivery of substitute goods may be the same for the seller as in the case of an avoided contract (O.R. 337). […] The economic consequences could even surpass those of an avoidance of contract because the additional expenses incurred and the risks involved in transporting substitute goods are to be born by the seller […]”.

In sum, “[p]aragraph (2) of Article 46 gives the buyer the right to require the delivery of substitute goods when the goods delivered are not in conformity with the contract, and this non-conformity constitutes a fundamental breach. Requiring delivery of substitute goods is one form of specific performance. This remedy is limited by the conditions of the breach. […] When the breach is not fundamental,
the buyer has recourse to repair, price reduction or damages. Of course, even in the case of a fundamental breach of contract, the buyer can decide in favour of repair at his option. On the other hand, since the right to avoid is similarly preconditioned with the requirement of fundamental breach. Therefore, the buyer has a possibility to choose between avoidance of the contract or requirement of re-delivery of substitute goods. In any event, if the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller.

3.2.3.3 Right to repair: Art. 46(3)

The third aspect of the buyer’s right to specific performance under the CISG, is his right to require repair under Art. 46(3) of delivered but defective goods. Unlike the right to require re-delivery of substitute goods, it generally applies as well to specific as to generic goods. “Naturally, if specific goods are burdened with a third party right, there is, however, no right to require repair in case the seller cannot buy the third party out.”

However, like the buyer’s right to re-delivery of substitute goods under Art. 46(2) the right to demand repair is also subject to Art. 35, defining non-conformity of goods. “When determining non-conformity of goods pursuant to Article 35, and as regards any third-party rights to the delivered goods, it is of importance to decide whether the breach occurred is fundamental. If the breach is one of a fundamental nature, the buyer has naturally a right to avoid the contract or to require delivery of substitute goods. If, however, the requirements of a fundamental breach are not met, the buyer would nevertheless have a right to require repair.” Clearly, the remedy to require repair is not restricted by a requirement of fundamental breach. As stated above, the reason delivery of substitute goods is available only in cases of fundamental breach is to avoid hardship to the seller, since the delivery of certain goods, and especially heavy machinery, is very costly. The seller must bear the cost of transporting the conforming goods to the buyer and the cost of transporting the non-conforming goods back to his place of business. Alternatively, he may resell the non-conforming goods, which will likely be difficult if he does not have the necessary network in a foreign market. Another burden may arise when the delivered goods have perished as result of improper storage. For all these reasons, it is unfair to put such a heavy burden on the seller when the non-conformity is negligible. Repair in such cases will satisfy the buyer without causing unnecessary hardship to the seller.

According to the wide language of the provision the buyer will have a general right to require the seller to cure any form of lack of conformity by way of repair except in cases where it is unreasonable, having regard to all the circumstances. “The flexible language of the provision is designed to encourage a reasonable and flexible approach to cases where the buyer can readily make repair, particularly when the seller’s facilities for repair are in a distant country. Accordingly, a buyer will not be entitled to require the seller to make good minor defects which can readily be repaired by him.”

Although the right to require repair can be regarded as a more lenient.
nient right than the right to demand substitute goods, it is also limited by a provision recited in the Article itself, as follows: "... unless this is unreasonable having regard to all the circumstances." Thus, the right to repair is limited to situations where it is reasonable to repair under the circumstances. In this point, it reflects the same concern for not causing hardship to the seller is the underpinning of the provision that governs the right to repair. In any event, the buyer can require repair only if it is reasonable to do so. The reasonableness of the demand is judged according to the circumstances surrounding the contract and the conflicting interests of the parties. Unreasonable in this context means unreasonable to the seller and it does not depend on the character of the breach, but rather on the nature of the goods delivered and all the other circumstances. The nature of some goods is such as to exclude repair at all, e.g. in the case of agricultural products. More generally, a claim for repair may be unreasonable if there is no reasonable ratio between the costs involved and the price of the goods or if the seller is a dealer who does not have the means for repair. Specifically speaking, of particular importance are the extra costs that the seller would have to suffer as a result of the repair. If such cost would be unreasonably high especially compared to a delivery of substitute goods, the precondition of Art. 46(3) is likely to be fulfilled. This means that when repair by the seller is very onerous, the buyer cannot claim repair.

When judging what is unreasonable, all circumstances have to be taken into account. When it comes to all the other circumstances, regard must be given to both the seller’s and the buyer’s interests. Under Art. 46(3) it should also be noted that some minor defects in the goods could be repaired more readily by the buyer, especially when the seller’s facilities for repair are in a distant country. At that, the availability of qualified repair locally is an important point to be evaluated. Where qualified personnel are particularly scarce, as may be the case in some developing countries, the seller’s inconvenience may have to give way to the interests of the buyer. On the other hand, it is doubtful whether the (little) interest of the buyer in performance in conformity with the contract must be considered. As a matter of fact, there can be no doubt. The requirement of repair is a right and not an obligation of the buyer. When the buyer is not interested in having goods repaired, he will not require it. The little interest of the buyer could, however, constitute a problem of Art. 48 when the seller of his own accord offers repair. Furthermore, whether the repair is unreasonable may also depend on technical difficulties. Repair could even be impossible due to technical reasons (this could, however, constitute a fundamental breach of contract).

In any event, the costs as a consequence of repair must be born by the seller, as is the case with delivery of substitute goods. When the repair is not reasonable, the buyer will be entitled to damages or a reduction in price. “It can be concluded that the buyer’s right to require the seller to repair non-conformities, not amounting to a fundamental breach, in delivered goods supplements the CISG’s basic principle to respect the contract made between the parties. Consequently, the pacta sunt servanda principle and the thinking that the most natural remedy for a breach of contract is to require the seller to perform as originally agreed upon between the parties, is supported. Such right is limited in exceptional circumstances and to ’avoid economic waste where the seller has substantially performed or where the cost of repair exceeds the benefit to be gained.’”

\[107\] Supra. note 24, pp. 180-181.

\[108\] Supra. note 14.
3.2.3.4 Time limit restriction

As discussed above, when applying for replacement goods, what the buyer is required to prove is that the seller's non-conforming delivery is serious enough to constitute a “fundamental breach” (Art. 46(2)). In contrast, when he applies for an order requiring the seller to repair the lack of conformity he should only show that his request is not “unreasonable having regard to all the circumstances” (Art. 46(3)). Nonetheless, another limitation of the same is both found in Arts. 46(2) and 46(3). As provided in paras. (2) and (3) of Art. 46, the request for substitute goods or repair must be made “either in conjunction with notice given under article 39 or within a reasonable time thereafter”.

Thus, the Convention provides a further restriction which is applicable to the remedies prescribed both under Arts. 46(2) and (3). Under this requirement the buyer must request supply of substitute goods or repair from the seller in conjunction with notice he has to give under Art. 39 so as to inform the seller of the lack of conformity. If the buyer does not request cure at the very moment of giving notice, he has to do so within a reasonable time after he has given notice to the seller that the goods delivered do not correspond to the contract. Failure to request the remedy either in conjunction with the notice given under Art. 39 or within a reasonable time thereafter would deprive him of the right to require the seller to cure the lack of conformity. “The time limitation serves the interests of both parties. It is important for the buyer to receive the goods within a certain period of time, otherwise the receipt of the goods will have no meaning for him. As for the seller, he is protected from the constant threat of claims.”

Although reasonable time, as provided by Art. 46(2)/46(3), is not defined further, most of the commentators believe that necessities of international trade seem to set a maximum limit of two years, as defined in Art. 39(2). For instance, Jafarzadeh states: “On this provision, in the case of latent defects the buyer may be entitled to demand that the seller cure the lack of conformity up to two years from the date in which the goods are actually handed over to him.” Enderlein and Maskow also believe that: “What is appropriate here is therefore to fix a short time and by no means another two-year period as allowed for under Article 39, paragraph 2.”

3.2.3.5 A summary

Having accepted that the buyer has a right to require the seller to perform what he has undertaken under the contract, it is suggested that the Convention provisions giving the buyer a right to require the seller to cure his non-conforming delivery by delivery of substitute goods and/or repair are consistent with general principles and the authorities authorising the buyer to obtain specific performance.

However, it was suggested that in giving the buyer a right to demand cure, a distinction should be made between the right to demand replacement goods and to demand cure by repair. The right to demand substitute goods should be given only where the lack of conformity results in sufficiently serious consequences. But the right to demand cure by repair is to be available unless it is unreasonable having regard to all the circumstances. Nonetheless, the concern for these two express restrictions is of the same and they are both designed to avoid causing unnecessary hardship to
the seller. However, it is submitted from the practical perspective that the buyer should not be given a right to demand delivery of replacement goods where the contract was for sale of specific goods, although he may be entitled to demand cure by repair. Demanding delivery of substitute goods should be available only where the contract is for the sale of unascertained goods.

Strangely, neither Art. 46(2) nor 46(3) refers to inconsistent remedies. However, it appears that the choice of an inconsistent remedy does preclude the buyer from later demanding repair or substitute goods. Art. 81 dictates this result by providing that avoidance of the contract releases both the buyer and the seller from their obligations under the contract. Essentially, the avoiding buyer releases the seller from the obligation to provide repair or substitute goods. Furthermore, both provisions expressly require that the request for repair or substitute goods be given within the time limit. “If the buyer does not through immediate notice request a delivery of substitute goods or repair, he has to do so within a reasonable time. The CISG is based on the assumption that this rule serves the interests of both parties. Usually the buyer is interested in receiving conform[ing] goods as quickly as possible, and the seller wants to know the claims of the buyer. It should be avoided in any case that the buyer can speculate on rising market prices.”

After all above, although according to the wide language of Art. 46 the buyer will have a general right to performance for non-delivery and specific rights to require the seller to cure any form of lack of conformity by way of substitute goods or repair, the buyer who contemplates resorting to these remedies obviously takes the risk that, if the matter comes to litigation, the court may hold that inconsistent remedies exist or to require repair is unreasonable or that the lack of conformity is not sufficiently serious to constitute a fundamental breach. Accordingly, although specific performance under the Convention may be regarded as the logically prior remedy, in practice the buyer would likely prefer the certainty and simplicity of damages, unless repair or replacement other forms of performance is very easy and economical for the buyer to obtain otherwise.

3.3 SELLER’S RIGHT TO SPECIFIC PERFORMANCE: CISG ART. 62

3.3.1 Rationale of Art. 62

Much of what was said above of the buyer’s right to compel performance applies to the seller’s right to compel performance under Art. 62. Because there are fewer buyer’s obligations, Art. 62 is conceptually simpler than Art. 46. Art. 62 sets forth in broad terms: “The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.”

Like Art. 46, Art. 62 recognizes that the seller’s primary concern is to obtain performance, it thus also represents the pacta sunt servanda principle. “The rationale behind Article 62 is the same as Article 46: to promote respect for the agreement and to ensure there is adequate compensation. Damages may take time to be assessed and may be inadequate because they do not compensate for certain expenses suffered by the innocent party. Another rationale behind Article 62 is the difficult task of the seller to dispose

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115 Supra. note 18. Also, the requirement in Art. 46(3) that repair be reasonable in the circumstances may operate to prevent inconsistent remedies; if the buyer declares the contract avoided, it would seem more unreasonable for the seller who relied on the avoidance to be expected to repair after taking the usual steps attending avoidance (such as resale or taking back the goods). Despite this, the reference to reasonableness in Art. 46(3) recognizes mainly practical difficulty in repair, i.e., expense.

116 Supra. note 58.
of goods when the buyer refuses to take delivery. [...] The right of the seller to enforce performance eliminates the expense and delay of seeking another buyer or negotiating a substitute transaction. This is an especially important right in cases where the goods have reached the destination port and the buyer refuses to take delivery. In such a situation the seller may not be able to resell the goods in that market because it may be a foreign market, unknown to the seller. In this way, specific performance provides a more appropriate form of compensation than damages because it gives a seller exactly what he expected from the contract. "118

3.3.2 General Application

It follows from the plain language of Art. 62 that the seller may require the performance by the buyer of any obligation such as payment of price, taking delivery or any other obligation that arises from the contract. However, it is said that this is simply what may be demanded of the buyer, “the addition of a provision allowing specific performance in favour of the seller is unlikely to have a significant practical effect except in exceptional circumstances.”119

Knapp states that the seller’s right to performance “contrasts with other remedies provided in Article 61 because it does not create any new right to the seller or a new obligation of the buyer. It is simply a pursuance of their initial rights and obligations under the contract. Hence, the intention of Article 62 is to emphasize that the mere non-performance by the buyer of his obligations does not cause an ipso facto avoidance of the contract and that the contractual obligations continue in force even if not performed in due time.”120 Nonetheless, Treitel combined several of the unclear points to illustrate a situation where it would be appropriate for a seller to seek specific performance. A seller could have contracted to supply all of the requirements of the buyer’s manufacturing business over an extended period of time (therefore the goods are neither specific nor necessarily ascertained) for a contracted price. The seller may have made a significant initial investment and the market price might vary in such a way as to make any damage award speculative. Under these circumstances, the seller has some justification to seek specific performance.121

Art. 62 is limited, similarly as in Art. 46(1), to situations where the seller has not resorted to an inconsistent remedy with the right to require performance. Consequently, if the seller declares the contract avoided under Art. 64 he loses the right to require performance of the buyer’s obligations.122 In this respect, it is to be noted that the ground for declaring the contract avoided is irrelevant: It is the remedy, not the reason for resorting to it, that is inconsistent with a requirement for, e.g., taking delivery.123 Knapp further notes that the seller’s election of Nachfrist avoidance procedure (Article 63) is inconsistent only so long as the Nachfrist period lasts.124 On the other hand, the exercise of the right to obtain performance does not exclude transition to other rights which are also inconsistent with it when the right to require performance does not lead to

118 Supra. note 1, p. 24, 25.
120 See Knapp in Bianca and Bonell, supra. note 16, p. 453.
122 Fitzgerald even believes that the only inconsistent remedy available to the seller is avoidance under Art. 64. (Supra. note 18.)
124 Supra. note 65, p. 451, 454.
the intended result. In particular, claiming damages is not excluded by requiring performance as it is expressly provided in Art. 61(2) that “[t]he seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.”

3.3.3 Potential Problems

The biggest potential problem with Art. 62 is what happens when a seller tries to force a buyer to accept goods he or she does not want, or to pay for goods that have been delivered but not accepted. It is clear that if the buyer has received conforming goods he is under an obligation to perform his obligations under the contract and pay the price for the goods. But can the seller require the buyer to pay the price where the buyer has not received the goods or has not accepted them and does not even wish to receive the goods? Art. 62 does not give a clear answer to this question.

In this respect, Sevón submits: “If payment is not made in time, the seller may require the buyer to pay the price. Such a requirement may be presented irrespective of an extension of the delay. Even if the delay amounts to a fundamental breach of contract, the seller may choose to require payment. He may do so even if he has the right to sell the goods under the provisions on preservation of the goods in Article 88. If he chooses to sell the goods or is under an obligation to do so, thereafter he may claim the balance between the price and the proceeds from the sale.” This indicates strongly an interpretation that the seller may require the buyer to pay the price even where the seller has not received the goods. On the other hand, as Art. 62 expressly provides that the seller may require the buyer to take delivery, it is obvious that a buyer who is unwilling to receive the goods is still obliged to perform and take the delivery. “If the buyer has neither paid the price nor taken delivery, the remedy may be used together with, or separately from, a requirement for payment. Situations can be envisaged where the seller is more anxious to receive payment than to force the buyer to take delivery of the goods. He may therefore present these requirements simultaneously or separately.”

However, the right of the seller to require performance by the buyer is limited by Art. 28, as is discussed above. Thus, the domestic rules in this question may be decisive and lead to another solution, which follows from the relation between Arts. 62 and 28 on specific performance. “In considering the CISG provisions that govern the right to compel payment of price as one type of specific performance, the CISG is markedly different from some domestic laws. In certain domestic systems, the right to compel payment of the price when the buyer has accepted the goods is presented as a right to collect a debt. This right to collect, however, does not fall under the rules regulating specific performance. Another difference between domestic systems and the CISG is that certain domestic legal systems provide that the seller cannot force the buyer to accept the goods unless he is unable to resell them after reasonable effort. The CISG gives the seller the right to compel acceptance without the aforementioned condition.”

A further point, as regards the seller’s right to require performance by the buyer, is of relevance. According to Art. 85, if the buyer is in delay in taking delivery of the goods the seller must take such steps as are reasonable in the circumstances to preserve them. Consequently, if the seller is in possession of the goods and the buyer has failed to take the delivery, Art. 85 sets forth an obligation to the seller to preserve the goods. Furthermore, Art. 85 leads to another important provision, i.e. the provision in Art. 88(2), which

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125 Supra. note 24, p. 236.
126 Supra. note 68, p. 223.
127 Supra. note 68.
128 Supra. note 1, p. 25.
states that: “If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them.” Therefore, although Art. 62 does not directly obligate the seller to sell the goods in case the buyer is in breach, such obligation may still arise on the seller.\textsuperscript{129} It is said that that Arts. 85 and 88 will eventually force a seller into resale when the buyer is especially reluctant to take the goods.\textsuperscript{130}

Given the potential problems concerning the seller’s right to specific performance under Art. 62, it is recommended by Enderlein and Maskow: “When the buyer neither pays nor takes delivery of the goods, the seller will, just to mention the most important options, do the following [...] Where he is still in possession of the goods he may, to the extent that the relevant conditions are given, resell them by way of self-help or emergency sale and require the buyer to pay the costs and damages (lower sales price) (Articles 85, 87 and above all Article 88; Article 74 fol). He can also, without setting a Nachfrist – however, a Nachfrist is more effective so as not to have to prove the fundamentality of the breach of contract – make the contract void (Article 63 fol) and claim damages, typically after a substitute sale.”\textsuperscript{131}

3.4 UNIFORM REMEDY IN UNIDROIT PRINCIPLES / PECL

3.4.1 Introduction

While some may argue that parties to a CISG contract do not generally seek specific performance due to the problems and difficulties in execution, and as a commercial solution rather claims damages, the specific performance rule is an important rule, particularly in international trade. The most natural remedy for a breach of contract is the right to require performance, reflecting the importance of the contract made between the parties.\textsuperscript{132}

However, it must be remembered that, in situations, where the CISG will be the applicable law of the dispute, Art. 28 may cause significant problems concerning the possibilities to predict whether the court or arbitral tribunal will enter a judgment for specific per-

\textsuperscript{129}In this point Knapp states that: “... the seller, whether or not he has declared the contract avoided, is under no obligation to try to resell the goods before resorting to remedies for failure to perform the contract by the buyer” and elaborates further that the seller is “... not authorized to resell the goods before declaring the contract avoided.” (Supra. note 65, p. 452)


\textsuperscript{131}Supra. note 24, pp. 235-236.

\textsuperscript{132}Koskinen states in this point: “A buyer and a seller must have the right to rely upon the contract and that the other party keeps his word. Therefore, if specific performance is the primary remedy for breach of contract, there are strong reasons for believing that more mutually beneficial exchanges of promises will be concluded in the future and that they will be exchanged at a lower cost than under any other contractual remedy. Furthermore, under specific performance post breach adjustments to all contracts will be resolved in a manner most likely to lead to the promise being concluded in favor of the party who puts the highest value on the completed performance and at a lower cost than under any alternative. The existence of a specific performance rule tends to have the effect that the parties to a contract perform their obligations under the contract, rather than start to speculate on any alternatives.” (Supra. note 14)
Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL

It follows from the discussion above that specific performance under the CISG scheme leads to disparate results in different forum courts. The reasoning to this is mainly Art. 28, which makes the remedial uniformity uncertain by providing the court the possibility to effectuate specific performance through its own domestic law. It has also been stated that the effect of Art. 28 leads to a risk of forum shopping by the parties and sacrifices the potential benefits of uniformity of remedies. The main reasoning for this is also clear: the basic difference of the common law and civil law systems to approach specific performance.

Therefore, in recent years, there have been several calls for the increased availability of specific performance in all contracts. This assertion is somewhat supported by the examples of the UNIDROIT Principles and the European Principles. As to be demonstrated below, the UPICC/PECL has been more successful in introducing a more coherent and certain scheme regarding specific performance than that in the CISG, by characterizing the specific performance as a remedy not falling in court's discretion. Both the UNIDROIT Principles and the PECL establish a clear right to specific performance, respectively in Arts. 7.2.1 through 7.2.5 UPICC and in Arts. 9:101 through 9:103 PECL. The two Principles take generally the same approach and make furthermore a clear distinction between monetary obligations and non-monetary obligations, providing, however, that the right to perform for both is the starting point.

3.4.2 Performance of Monetary Obligation

3.4.2.1 Money due generally recoverable

In accordance with the general principle of pacta sunt servanda, Continental Law allows a creditor to require performance of a contractual obligation to pay money. Also according to Common Law an action for an agreed sum is often available, although it is limited in certain respects: it may be brought only when the price has been "earned" by performance, e.g. the performance of a service or the passing of property in the goods. This is followed under Art. 7.2.1 UPICC, which reads under the heading "Performance of Monetary Obligation": "Where a party who is obliged to pay money does not do so, the other party may require payment." It is also the main rule in the PECL, which stipulates in Art. 9:101(1): "The creditor is entitled to recover money which is due.

As a rule it is always possible to enforce monetary obligations. This is the basis of the rule in PECL Art. 9:101(1). A monetary obligation for the purposes of this rule is every obligation to make a payment of money, regardless of the form of payment or the currency. This includes even a secondary obligation, such as the payment of interest or of a fixed sum of money as damages. But in each case, the monetary obligation must have been earned by the creditor, i.e. it must be due.

Also, Art. 7.2.1 UPICC reflects the generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action before a court. The term "require" is used in Art. 7.2.1 UPICC to cover both the demand addressed to the other party and the enforcement, whenever necessary, of such a demand by a court. The article applies irrespective of the currency in which payment is due or may be made. In other words, the right of the obligee to require payment extends also to cases of payment in a foreign currency.

134 Ibid., Comment A.
135 See Comment on Art. 7.2.1 UPICC.
3.4.2.2 Money not yet due

Most continental systems do not recognise restrictions upon a claim for payment of the price. However, the principle that monetary obligations always can be enforced is not quite so certain where the monetary obligation has not yet been earned by the creditor’s own performance and it is clear that the debtor will refuse to receive the creditor’s future performance.\(^{136}\)

This is the situation regulated by Art. 9:101(2) PECL (no similar rule is found in the UNIDROIT Principles), which reads correspondingly: “Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless: (a) it could have made a reasonable substitute transaction without significant effort or expense; or (b) performance would be unreasonable in the circumstances.” The basic approach underlying the rules of PECL Art. 9:101(2) is obvious. Under the principle of pacta sunt servanda the creditor is entitled to make its performance and thereby to earn the price for it. The debtor’s unwillingness to receive the creditor’s performance is therefore, as a rule, irrelevant. However, according to sub-paras. (a) and (b) of PECL Art. 9:101(2) there are two situations where the above principle does not apply:\(^{137}\)

(a) Resale possible

The restriction in Art. 9:101(2)(a) has a precursor in ULIS Art. 61(2), which restricts the seller’s right to require payment of the price where a resale was in conformity with usage and reasonably possible. In that case the seller may only claim damages. The CISG however, has not imposed this restriction on the seller’s right to perform and claim the price. Under the CISG, it follows from the fact that Art. 62 has dropped this restriction, that the seller is bound to the contract; it is therefore obliged to tender performance to the buyer even if the latter is unwilling to receive performance, and may claim the purchase price.\(^{138}\)

It is now reintroduced in the PECL. The underlying consideration is that a debtor should not have to pay for a performance which he does not want in cases where the creditor can easily make a cover transaction or in other cases where it would be unreasonable to oblige the debtor to pay the price. It is clarified in the Official Comment on PECL Art. 9:101(2) that: A creditor which can make a reasonable cover transaction without involving itself in significant trouble or expense is not entitled to continue with performance against the debtor’s wishes and cannot demand payment of the price for it. The creditor should terminate the contract and either make a cover transaction, thus becoming entitled to invoke Art. 9:506, or simply claim damages without making any cover transaction (see Art. 9:507 and Comment thereon). The debtor cannot invoke subparagraph (a) of paragraph (2) unless two conditions are satisfied. The first is that the creditor can make a cover transaction on reasonable terms because there is a market for its performance or some other way of arranging a substitute transaction. The second is that the cover transaction does not substantially burden the creditor with effort or expense. In certain situations the creditor may even be bound by commercial usage to effect a cover transaction.\(^{139}\) Such situations are noted in the Official Comment on Art. 7.2.1 UPICC, which states: “Exceptionally, the right to require payment of the price of the goods or services to be delivered or rendered may be excluded. This is in particular the case where a usage requires a seller to resell goods which are neither accepted nor paid for by the buyer.”\(^{140}\)

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\(^{136}\) Supra. note 78, Comment B.

\(^{137}\) Supra. note 78, Comment B(i).

\(^{138}\) Supra. note 78, Note 2.

\(^{139}\) Supra. note 78, Comment B(ii).

\(^{140}\) Supra. note 80.
One should note, also, whenever the creditor makes, or would have been obliged to make, a cover transaction, the creditor may claim from the debtor the difference between the contract price and the cover price as damages under PECL Art. 9:506 or UPICC Art. 7.4.5.

(b) Performance unreasonable

A very different situation is dealt with in PECL Art. 9:101(2)(b): Here performance by the creditor would be unreasonable. A typical example is where, before performance has begun, the debtor makes it clear that it no longer wants it. This situation can arise, for example, in construction contracts, other contracts for work and especially long term contracts. An instance which would not involve unreasonable expenditure is where the creditor must continue to employ its workforce.\(^\text{141}\)

It is said that Art. 9:101(2)(b) is based on considerations to be found in experience gained from ENGLISH, IRISH and SCOTTISH practice. Once an action for the price was available there was no requirement that it must be reasonable to pursue it rather than to enter a cover transaction. This gave rise to difficulties when a party had announced in advance that it no longer required a service but the other performed it nonetheless and then sued for the price: see White and Carter (Councils) Ltd. v. McGregor [1962] A.C. 413 (H.L.). The rule in contracts other than sale of goods now appears to be that if at the date of the repudiation the innocent party has not yet performed his part of the contract, he may complete his performance and claim the price only if he has a legitimate interest in doing so: see Attica Sea Carriers Corp. v. Ferrostaal Poseidon Bulk Reederei GmbH [1976] 1 Lloyds' Rep. 250 (C.A.). If he has no legitimate interest in performing he is confined to an action for damages, and his recovery will be limited by the principle of mitigation. SCOTTISH law is the same - White and Carter (above)\(^\text{142}\) is a Scottish case. The guilty party has the onus to show that the innocent party has no legitimate interest in performing (Scotland: Salaried Staff London Loan Co. Ltd. v. Swears and Wells Ltd. 1985 S.L.T. 326, I.H.).\(^\text{142}\)

As demonstrated above, the feature common to the two cases dealt with in PECL Art. 9:101(2) is that the debtor is at risk of having forced upon it a performance which it no longer wants. The burden of proving that the existence of one of the exceptions applies is on the debtor. However, none of the two exceptions laid down in PECL Art. 9:101(2) affects the right of a beneficiary under a letter of credit to claim payment from the bank. This is because letters of credit are treated as independent of the underlying contract.\(^\text{143}\) One of the consequences that arise if either one of the exceptions applies, is spelt out in Art. 9:101(2): the creditor may not demand the money owed under the contract for the counter-performance, in particular the price. However, damages for non-performance may be claimed.\(^\text{144}\)

3.4.3 Performance of Non-monetary Obligation: In General

In accordance with the general principle of the binding character of the contract, each party should as a rule be entitled to require performance by the other party not only of monetary, but also of non-monetary obligations, assumed by that party. While this is not controversial in civil law countries, common law systems allow enforcement of non-monetary obligations only in special circumstances.\(^\text{145}\)

\(^{141}\) Supra. note 78, Comment B(iii).

\(^{142}\) Supra. note 78, Note 3.

\(^{143}\) Supra. note 78, Comment B(iv).

\(^{144}\) Supra. note 78, Comment B(v).

\(^{145}\) See Comment 1 on Art. 7.2.2 UPICC.
With respect to non-monetary obligations, traditionally there are important differences between the common law and civil law, at least in theory. In the common law specific performance is a discretionary remedy that will only be granted if damages are inadequate. In the civil law countries the aggrieved party’s right to performance is generally recognized. In the German legal family this is “axiomatic”. However, one should note that the basic differences between common law and civil law are of theoretical rather than practical importance. As stated by Lando: “However, civil law makes exceptions too. On the Continent specific performance is not available when performance has become impossible or unlawful. In several civil- and common-law countries, specific performance will also be refused if it would be unreasonable to grant it, if, for instance, the cost of raising a ship which has sunk after it was sold would considerably exceed the value of the ship. Nor is performance available for contracts which consist in the provision of services or work of a personal character, and in several countries a performance which depends upon a personal relationship such as an agreement to establish or continue a partnership; in such a case, the defaulting partner cannot be legally compelled to play an active role in the partnership. These exceptions show that the difference between civil and common law is ultimately far smaller than might appear at first sight. Furthermore, even in the civil-law countries an aggrieved party will generally pursue an action for specific performance only if he has a particular interest in performance which damages would not satisfy.”

With regard to the performance of non-monetary obligations, it is recalled that CISG Art. 46 gives the buyer generally a right to performance. Following the basic approach of CISG Art. 46, UP-ICC Art. 7.2.2, subject to certain qualifications included in subparas. (a)-(e), adopts the principle of specific performance: “Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance”. It is said that the principle is particularly important with respect to contracts other than sales contracts. Unlike the obligation to deliver something, contractual obligations to do something or to abstain from doing something can often be performed only by the other contracting party itself. In such cases the only way of obtaining performance from a party who is unwilling to perform is by enforcement. Similarly, PECL Art. 9:102(1) generally stipulates that: “The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.”

Due to lack of a better, generally understood term, the common law phrase “specific performance” is used in PECL Art. 9:102(1). It is said that PECL Art. 9:102 covers all obligations which are not covered by Art. 9:101, e.g. to do or not to do an act, to make a declaration or to deliver something. In some cases a court order itself will act as a substitute for performance by the non-performing party. Specifically speaking, it applies to three situations: first, if no performance at all is tendered by the non-performing party; second, where tender of a non-conforming performance has been made but has been validly rejected by the aggrieved party; third, where the performance is defective but has not been rejected. Furthermore, the Official Comment on PECL Art. 9:102(1) states that the aggrieved party has not only a substantive right to demand the other party’s performance as spelt out in the contract. The aggrieved party has also a remedy to enforce this right, e.g. by applying for an order or decision of the court. In this point, the Official Comment on UNIDROIT Principles also clearly states: The term “require” is

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147 Ibid., Note 2.
148 Supra. note 2, p. 7.
149 Supra. note 90.
150 Supra. note 91, Comment A.
used in Art. 7.2.1 [as well as in Art. 7.2.2] to cover both the demand addressed to the other party and the enforcement whenever necessary, of such a demand by a court.\textsuperscript{151}

However, the right to performance of non-monetary obligations under \textit{UPICC} Art. 7.2.2 or under \textit{PECL} Art. 9:102 is subject to several exceptions, which will focused on in the following discussions.

3.4.4 Exceptions to Performance of Non-monetary Obligation

3.4.4.1 The principle and exceptions

Whether an aggrieved party should be entitled to require performance of a non-monetary obligation, is very controversial. The common law treats specific performance as an exceptional remedy whilst the civil law regards it as an ordinary remedy.\textsuperscript{152}

As stated previously, in common law countries specific performance is a discretionary remedy. Even under the uniform sales laws such as the \textit{CISG}, the remedy of specific performance is at the discretionary of the courts, because \textit{CISG} Art. 28 provides that courts are not bound to decree performance if they would not do so according to their national law. To the contrary, under the \textit{UNIDROIT Principles} specific performance is not a discretionary remedy, i.e. a court must order performance, unless one of the exceptions laid down in Art. 7.2.2 applies.\textsuperscript{153} Similarly, by contrast with the \textit{CISG}, under the \textit{PECL} the aggrieved party also has a substantive right to demand and to enforce performance of a non-monetary obligation. Granting an order for performance thus is not in the discretion of the court; the court is bound to grant the remedy, unless the exceptions of para. (2) or (3) of Art. 9:102 apply. National courts should grant performance even in cases where they are not accustomed to do so under their national law.\textsuperscript{154}

Nonetheless, each of the two Principles has sought a compromise under \textit{UPICC} Art. 7.2.2 or \textit{PECL} Art. 9:102: a claim for performance is admitted in general but excluded in several special situations. A general right to performance has several advantages. Firstly, through specific relief the creditor obtains as far as possible what is due to it under the contract; secondly, difficulties in assessing damages are avoided; thirdly, the binding force of contractual obligations is stressed. A right to performance is particularly useful in cases of unique objects and in times of scarcity. On the other hand, comparative research of the laws and especially commercial practices demonstrate that even in the Civil Law countries the principle of performance must be limited. Generally, the limitations on the principle of performance are variously based upon natural, legal and commercial considerations. In all these cases other remedies, especially damages and, in appropriate cases, termination, are more adequate remedies for the aggrieved party.\textsuperscript{155}

This compromise forms the basis of the formula adopted in \textit{UPICC} Art. 7.2.2 or \textit{PECL} Art. 9:102. It is said that the civil-law countries could have allowed the possibility of restricting specific performance to the situations for which this remedy is needed in practice. The common-law countries could have conceded that in these situations specific performance as a genuine right, rather than a discretionary remedy, is the appropriate solution.\textsuperscript{156} One

\textsuperscript{151} Supra. note 80.

\textsuperscript{152} Supra. note 91, Comment B.

\textsuperscript{153} See Comment 2 on Art. 7.2.2 \textit{UPICC}.

\textsuperscript{154} Supra. note 91, Comment D. However, rules on the means and the procedure of enforcement of a judgment for performance must be left to the national legal systems. (Supra. note 95.)

\textsuperscript{155} Supra. note 97.

\textsuperscript{156} Supra. note 93.
of the consequences that arise from these exceptions provided for in UPICC Art. 7.2.2(a)-(e) or in PECL Art. 9:102(2) and (3) is expressly set out in these rules: performance cannot be demanded by the aggrieved party.

3.4.4.2 Performance impossible

The first exception is impossibility of performance. Specific performance can’t be obtained where: under UPICC Art. 7.2.2(a): "performance is impossible in law or in fact"; similarly, under PECL Art. 9:102(2)(a): "performance would be unlawful or impossible". It expresses the rule impossibilium nulla est obligatio. If restricted to the right to performance as such (as distinct from subsidiary remedies), the rule seems to be common to the laws of most legal systems, while CISG Art. 79 (5) appears to be to the contrary (but this is controversial, see the discussion in Chapter 20).

For obvious reasons, there is no right to require performance if it is impossible. This is particularly true in case of factual impossibility, i.e. if some act in fact cannot be done. The same is true if an act is prohibited by law. However, even if the performance itself may be illegal, impossibility does not nullify a contract: other remedies may be available to the aggrieved party. Similarly, specific performance is not available where a third person has acquired priority over the plaintiff to the subject matter of the contract. Nonetheless, if an impossibility is only temporary, enforcement of performance is excluded during that time. Whether or not the impossibility makes the non-performing party liable in damages is irrelevant in this context.

It is to be noted, under the UNIDROIT Principles, that the refusal of a public permission which is required under the applicable domestic law and which affects the validity of the contract renders the contract void (see Art. 6.1.17(1)), with the consequence that the problem of enforceability of the performance cannot arise. When however the refusal merely renders the performance impossible without affecting the validity of the contract (see Art. 6.1.17(2)), sub-para. (a) of UPICC Art. 7.2.2 applies and performance cannot be required.

3.4.4.3 Unreasonable burden

Specific performance will not be ordered if the performance would be quite different to the original obligation, e.g. a lessee which has carelessly burned down the leased premises will not be ordered to re-build them. It is expressly stated that, performance cannot be required if: under UPICC Art. 7.2.2(b): "performance or, where relevant, enforcement is unreasonably burdensome or expensive"; similarly, under PECL Art. 9:102(2)(b): "performance would cause the debtor unreasonable effort or expense".

No precise rule can be stated on when effort or expense is unreasonable. However, considerations as to the reasonableness of the transaction or of the appropriateness of the counter-performance are irrelevant in this context. In exceptional cases, particularly when there has been a drastic change of circumstances after the conclusion of a contract, performance, although still possible, may have become so onerous that it would run counter to the general principle of good faith and fair dealing to require it. However, it is to be noted that this exception is not limited to the kind of drastic changes of circumstances amounting to a case of hardship.
which may cause other possible consequences such as renegotiation other than excluding performance (see the discussion in Chapter 21).

It is also to be noted, under UPICC Art. 7.2.2(b), that the words “where relevant, enforcement” take account of the fact that in common law systems it is the courts and not the obligees who supervise the execution of orders for specific performance. As a consequence, in certain cases, especially those involving performances extended in time, courts in those countries refuse specific performance if supervision would impose undue burdens upon courts.164

3.4.4.4 Performance from another source available

Many goods and services are of a standard kind, i.e. the same goods or services are offered by many suppliers. If a contract for such staple goods or standard services is not performed, most customers will not wish to waste time and effort extracting the contractual performance from the other party. Instead, they will go into the market, obtain substitute goods or services and claim damages for non-performance.165 In view of this economic reality specific performance is excluded whenever: under UPICC Art. 7.2.2(c): “the party entitled to performance may reasonably obtain performance from another source”; similarly, under PECL Art. 9:102(2)(d): “the aggrieved party may reasonably obtain performance from another source”.

It is said that this exception is a compromise between different basic attitudes of the common law and the civil law. It does not directly copy any national legal order. But it links up with ULIS Arts. 25, 42(1)(c). Under the common law the possibility of a cover transaction is an important consideration for denying specific performance. In continental laws, cover is merely an option for the buyer, but he is not obliged to use it, unless there is a usage to that effect.166 Under the two Principles, this exception does not introduce any kind of a test of adequacy of damages in the sense that performance could only be required if damages were an inadequate remedy. Rather, this rule should encourage the aggrieved party to choose from among the remedies which would fully compensate it the one which can most simply be obtained. If the aggrieved party chooses to require performance, this will generally create a presumption that this remedy optimally satisfies its needs. Consequently, the non-performing party will have to prove that the aggrieved party can obtain performance from other sources without any prejudice and that therefore it may reasonably be expected to make a cover transaction.167

In fact, once the party entitled to performance may reasonably obtain performance from another source, that party may terminate the contract and conclude a replacement transaction. According to practical experience, termination and damages will often satisfy its requirements faster and more easily than enforcement of performance.168 However, the word “reasonably” indicates that the mere fact that the same performance can be obtained from another source is not in itself sufficient, since the aggrieved party could not in certain circumstances reasonably be expected to have recourse to an alternative supplier.169 Nonetheless, an aggrieved party may reasonably be expected to obtain performance from other sources, even if the cost is higher than the contract price, but only if the defaulting party is in a position to pay the damages for the dif-

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164Ibid.
165See Comment 3(c) on Art. 7.2.2 UPICC.
166Supra. note 91, Note 3(e).
167Supra. note 91, Comment H.
168Ibid.
169Supra. note 110.
If this is not so, a request for performance is not excluded.

3.4.4.5 Performance of an exclusively personal character

With regard to the fourth exception, PECL Art. 9:102(2)(c) excludes enforcement of performance where "the performance consists in the provision of services or work of a personal character or depends upon a personal relationship". It seems that this Article covers two different situations: (1) it excludes a right to require performance of services or work of a personal character; and (2) excludes specific performance where the parties would be forced to enter or to continue a personal relationship.

As for the first alternative, it is said that this rule is based on three considerations: firstly, a judgment ordering performance of personal services or work would be a severe interference with the non-performing party's personal liberty; secondly, services or work which are rendered under pressure will often not be satisfactory for the aggrieved party; and thirdly, it is difficult for a court to control the proper enforcement of its order. The scope of the first alternative depends on the meaning of the term "services or work of a personal character", which does not cover services or work which may be delegated. A provision in the contract that work may not be delegated does not necessarily make the work of a personal character. If the contract does not need the personal attention of the contracting party but could be performed by its employees, the clause prohibiting delegation may be interpreted as preventing only delegation to another enterprise, e.g. a sub-contractor. Services requiring individual scholars of an artistic or scientific nature and services to be rendered in the scope of a confidential and personal relationship are personal services. The signing of a document would not usually constitute service or work within the meaning of this provision. Such an obligation can mostly be enforced since the non-performing party's declaration can be replaced by a court decree. Secondly, PECL Art. 9:102(2)(c) excludes specific performance where the parties would be forced to enter or to continue a personal relationship. It is said that in case of agreements to enter into a partnership, the second alternative applies if and insofar as the partnership presupposes a close personal contact. But as in case of a contract to form a public company, the specific personal element is sometimes lacking; in this case this rule does not prevent the promise being enforced.

While under the UNIDROIT Principles, Art. 7.2.2(d) deals with the fourth exception in a succinct manner, that is to exclude enforcement of performance where "performance is of an exclusively personal character". Indeed, UPICC Art. 7.2.2(d) is based on the same considerations as PECL Art. 9:102(c): Where a performance has an exclusively personal character, enforcement would interfere with the personal freedom of the obligor. Moreover, enforcement of a performance often impairs its quality. The supervision of a very personal performance may also give rise to insuperable practical difficulties, as is shown by the experience of countries which have saddled their courts with this kind of responsibility. Furthermore, UPICC Art. 7.2.2(d) seems to be enough to cover the two alternatives in PECL Art. 9:102(c). Its Official Comment confirms this: The precise scope of this exception depends essentially upon the meaning of the phrase "exclusively personal character". The modern tendency is to confine this concept to performances of a unique character. The exception does not apply to obligations undertaken by a company. Nor are ordinary activities of a lawyer, a surgeon or an engineer covered by the phrase for they can be performed by other persons with the same training and experience. A perfor-

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170 Supra. note 112.

171 Supra. note 91, Comment G.
mance is of an exclusively personal character if it is not delegable and requires individual skills of an artistic or scientific nature or if it involves a confidential and personal relationship.  

Finally, it is to be noted that both UPICC Art. 7.2.2(d) and PECL Art. 9:102(c) speak only of positive acts. It is possible to require performance of a negative obligation, e.g. to forebear from rendering services for someone else or from entering into a partnership with someone else. In this respect, it is said that the performance of obligations to abstain from doing something does not fall under this exception. If, however, enforcement of a negative obligation concerning services, work or a personal relationship would result in indirect enforcement of a positive act to provide or maintain the same, it applies.  

### 3.4.4.6 Unreasonable delay in requiring performance

The final exception both contained in the two Principles is the time limit. UPICC Art. 7.2.2(e) excludes the right to performance if: “the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance”; similarly, PECL Art. 9:102(3) does so where: “The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.” This exception takes up the COMMON LAW view that an aggrieved party who delays unreasonably in requiring performance in natura may lose his claim. A similar rule is found in CISG, too, but it is limited to cases where the buyer claims delivery of substitute goods and repair of non-conforming goods (Arts. 46 (2) and (3)).

It is said that UPICC Art. 7.2.2(e) is based on the following reasons: Performance of a contract often requires special preparation and efforts by the obligor. If the time for performance has passed but the obligee has failed to demand performance within a reasonable time, the obligor may be entitled to assume that the obligee will not insist upon performance. If the obligee were to be allowed to leave the obligor in a state of uncertainty as to whether performance will be required, the risk might arise of the obligee’s speculating unfairly, to the detriment of the obligor, upon a favourable development of the market. The Official Comment on PECL Art. 9:102(3) also clarifies this issue: This provision is supplementary to provisions on limitation and is intended to protect the non-performing party from hardship that could arise in consequence of a delayed request for performance by the aggrieved party. The latter party’s interests are not seriously affected by this limitation because it may still choose another remedy. The length of the reasonable period of time is to be determined in view of the rule’s purpose. In certain cases, it may be very short, e.g. if delivery can be made out of the non-performing party’s stock in trade, in other cases it may be longer. It is the non-performing party which has to show that the delay in requesting performance was unreasonably long.

### 3.4.5 Right to Require Remedy of Defective Performance

It is remembered that under PECL Art. 9:102(1), the right of the aggrieved party to specific performance includes “the remedying of a defective performance”. More generally, UPICC Art. 7.2.3 stipulates under the heading “Repair and Replacement of Defective Performance”: “The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of
defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly."

It is said that *UPICC* Art. 7.2.3 applies the general principles of Arts. 7.2.1 and 7.2.2 to a special, yet very frequent, case of non-performance, i.e. defective performance. For the sake of clarity the article specifies that the right to require performance includes the right of the party who has received a defective performance to require cure of the defect.\(^\text{178}\) In fact, the Official Comment on *PECL* Art. 9:102 also makes it clear that if the non-performing party performs, but its performance does not conform to the contract, the aggrieved party may choose to insist upon a conforming performance.\(^\text{179}\) It is also recalled that *CISG* Art. 46 grants a right to performance *in natura* in case of “non-conforming”. However, the right to require delivery of substitute goods in *CISG* Art. 46(2) is limited to cases of fundamental breach of contract.

Cure (Under this PART cure denotes the right both of the non-performing party to correct its performance, see the discussion in Chapter 5; and of the aggrieved party to require such correction by the non-performing party. The present Chapter deals with the latter right.) may be advantageous for both parties. The aggrieved party obtains what it has originally contracted for and the non-performing party eventually obtains the full price. A conforming performance may be achieved in a variety of ways: for example, repair; delivery of missing parts; or delivery of a replacement.\(^\text{180}\) *UPICC* Art. 7.2.3 expressly mentions two specific examples of cure, namely repair and replacement. Repairing defective goods (or making good an insufficient service) is the most common case and replacement of a defective performance is also frequent. Unlike the rule under *PECL* Art. 9:102(1), which generally deals with performance of non-monetary obligation, under *UPICC* Art. 7.2.3, the right to require repair or replacement may also exist with respect to the payment of money, for instance in case of an insufficient payment or of a payment in the wrong currency or to an account different from that agreed upon by the parties. Apart from repair and replacement there are other forms of cure, such as the removal of the rights of third persons over goods or the obtaining of a necessary public permission.\(^\text{181}\)

The right to require a conforming performance is, of course, subject to the same exceptions as the general right to performance. Thus a non-performing party cannot be forced by court order to accomplish a performance conforming to the contract if the aggrieved party has failed to demand performance within a reasonable time or if the latter may reasonably be expected to make someone else effect repair of the performance.\(^\text{182}\) Most of the exceptions to the right to require performance that are discussed *supra*. §3.4.4 are easily applicable to the various forms of cure of a defective performance. Only the application of *supra*. §3.4.4.3 calls for specific comment. In many cases involving small, insignificant defects, both replacement and repair may involve “unreasonable effort or expense” and are therefore excluded.\(^\text{183}\)

### 3.4.6 Other Issues

*PECL* Art. 9:103 expressly states under the heading “Damages not Precluded”: “The fact that a right to performance is excluded under this Section does not preclude a claim for damages.” This rule may also be implied in *CISG* Arts. 45(2) and Art. 61(2), as well as in *UPICC* Art. 7.4.1 and Comment thereon. These rules

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\(^{178}\) See Comment 1 on Art. 7.2.3 *UPICC*.

\(^{179}\) Supra. note 91, Comment C.

\(^{180}\) Ibid.

\(^{181}\) See Comment 2 on Art. 7.2.3 *UPICC*.

\(^{182}\) Supra. note 124.

\(^{183}\) See Comment 3 on Art. 7.2.3 *UPICC*.
make it clear that even in the exceptional cases discussed supra. §3.4.4 where an aggrieved party cannot require performance the party may recover damages. Damages are always available according to the rules (see the discussion in PART IV) unless the non-performance is excused under force majeure (see the discussion in Chapter 20).

Another issue, which isn’t expressly dealt with either in the CISG or in the PECL, is found in UPICC Art. 7.2.5 under the heading “Change of Remedy” as follows: “(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy. (2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.” This Article addresses a problem which is peculiar to the right to require performance. The aggrieved party may abandon the remedy of requiring performance of a non-monetary obligation and opt instead for another remedy or remedies. This choice is permitted on account of the difficulties usually involved in the enforcement of non-monetary obligations. Even if the aggrieved party first decides to invoke its right to require performance, it would not be fair to confine that party to this single option. The non-performing party may subsequently become unable to perform, or its inability may only become evident during the proceedings. On the other hand, performance may have become useless for the aggrieved party. In such cases it may then be vexatious to force the non-performing party to stick to its promise.

In this respect, two situations must be addressed. In the first case, the aggrieved party has required performance but changes its mind before execution of a judgment in its favour, perhaps because it has discovered the non-performing party’s inability to perform. The aggrieved party now wishes to invoke one or more other remedies. Such a voluntary change of remedy can only be admitted if the interests of the non-performing party are duly protected. It may have prepared for performance, invested effort and incurred expense. For this reason UPICC Art. 7.2.5(1) makes it clear that the aggrieved party is entitled to invoke another remedy only if it has not received performance within a fixed period or otherwise within a reasonable period of time. How much additional time must be made available to the non-performing party for performance depends upon the difficulty which the performance involves. The non-performing party has the right to perform provided it does so before the expiry of the additional period. UPICC Art. 7.2.5(2) addresses the second and less difficult case in which the aggrieved party has attempted without success to enforce a judicial decision or arbitral award directing the non-performing party to perform. In this situation it is obvious that the aggrieved party may immediately pursue other remedies.

As for the time limit, in the event of a subsequent change of remedy the time limit provided for a notice of termination under UPICC Art. 7.3.2(2) must, of course, be extended accordingly. The reasonable time for giving notice begins to run, in the case of a voluntary change of remedy, after the aggrieved party has or ought to have become aware of the non-performance at the expiry of the additional period of time available to the non-performing party to perform; and in the case of UPICC Art. 7.2.5(2), it will begin to run after the aggrieved party has or ought to have become aware of the unenforceability of the decision or award requiring performance.

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See Comment 1 on Art. 7.2.5 UPICC. See also the discussion attached to supra. note 32.

See Comment 2 on Art. 7.2.5 UPICC.

See Comment 3 on Art. 7.2.5 UPICC.

See Comment 4 on Art. 7.2.5 UPICC.
Finally, a unique provision is set out in *UPICC* Art. 7.2.4 under the heading “Judicial Penalty”: “(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order. (2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.” No corresponding provisions is found either in the *CISG* or in the *PECL*. In view that the discussion of this contribution focuses on the rights and obligations between the parties and does not involve the specific discretion of a tribunal, this issue will be given no further details.\(^\text{189}\)

\(^{189}\) It is recommended to refer to the Official Comments on Art. 7.2.4 *UPICC*. 

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CHAPTER 4. NACHFRIST FOR LATE PERFORMANCE

4.1 General Considerations

This [...] [Chapter] deals with the situation where one party performs late and the other party is willing to give extra time for performance. It is inspired by the German concept of Nachfrist although similar results are obtained by different conceptual means in other legal systems. The purpose behind the flexible remedy of Nachfrist is [...] to keep the contract afoot as long as there is a possibility to perform contractual obligations. This is in line with the attempt to overcome some of the problems of distance, expense and time in having an international contract terminated where, operating under another general principle [...] namely good faith, remedial action could have been possible, resulting in a win-win situation.

4.1 GENERAL CONSIDERATIONS

When the non-performance arises, a practical occasion arises for the aggrieved party to relate to it. He can do so by abstractly insisting on his right to performance as discussed in Chapter 3. The aggrieved party can, however, ascertain his right to obtain performance also with an option of serving a notice on the non-performing party which sets an extra time of reasonable length for the performance of his obligations. This concept is commonly known as a Nachfrist (literally translated “prolonged deadline”) because of its similarity to the German remedy of the same name.

Similar legal concepts exist in other national commercial laws of civil law countries. Of similar intent and consequence to the German concept of Nachfrist are the French Civil Code’s mise en demeure and kindred provisions to those of Germany and France in other national civil and commercial codes. On the other hand, Common Law attorneys may find the concept of Nachfrist foreign as this term has no direct common-law counterpart. Common law in general holds parties strictly to their time commitments. Nonetheless, it is said that the doctrine of Nachfrist resembles the doctrines of waiver and estoppel in common law. The fact that the aggrieved party may not resort to any other remedy during the period of the Nachfrist is equivalent to the aggrieved party being estopped from relying on his strict contractual rights as the result of a representation made to the non-performing party. In addition, both the remedy of Nachfrist and the doctrine of promissory estoppel have the effect of suspending performance as opposed to extinguishing contractual rights.

Nachfrist is also a concept incorporated in many instruments applicable to the international commercial contracts. Under the CISG, for instance, Arts. 47 and 49(1)(b) / Arts. 63 and 64(1)(b) are provisions which span both remedies of termination and damages, through the principle of Nachfrist which is the granting of additional time for late performance. “The principle has been mainly

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190 See Comment on Art. 7.1.5 UPICC.
191 See Bruno Zeller in “Buyer’s notice fixing additional final period for performance: Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Articles 47 and 49(1)(b) CISG”. (2001) Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp47.html#er> ; also in “Seller’s notice fixing additional final period for performance: Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Articles 63 and 64(1)(b) CISG”. (2001) Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp63.html#er> .
193 Ibid.
borrowed from German domestic law as well as from the French procedure of *mise en demeure*. However, there are significant differences between the German and French treatment of *Nachfrist* and the one accorded to in the *CISG*. This is a good point to remind ourselves of the mandate of article 7(1) where uniformity of application demands the autonomous interpretation of the *CISG*, that is, without relying on principles founded in domestic law. In other words, German and French treatment of *Nachfrist* and *mise en demeure* must be ignored and cannot be used to explain the principle within the *CISG* despite significant similarities in doctrine and jurisprudence.¹⁹⁴

Even, the actual legal import of the same term *Nachfrist* from German law under descriptions of the various international rules such as the *CISG*, *UPICC* and *PECL* differs—to a lesser degree—among themselves. Generally, the *UPICC* and the *PECL* also contain such a *Nachfrist* procedure respectively in Art. 7.1.5 and Art. 8:106, which both fairly closely mirror the *CISG* in effect. The provisions in both the *CISG* and the *PECL* can be viewed as operating on a similar basis, subject to two main exceptions which are to be given more details below. First, unlike the *CISG*, the innocent party under the *PECL* is not limited to cases of non-delivery or failure to pay the price or take delivery before it can rescind the contract. Second, instead of having a separate provision dealing with avoidance (Arts. 49(1)(b) and 64(1)(b) in the *CISG*), the *PECL* includes the avoidance provisions within the *Nachfrist* article. Likewise, Art. 7.1.5 of the *UNIDROIT Principles* contains a very similar provision to the *PECL* with some variance.

Anyway, despite of these slight differences among international rules themselves, in a case of non-performance of international commercial contracts the aggrieved party may generally by notice to the other party allow an additional period of time for performance. The fact that the concept of *Nachfrist* has been included in various international laws indicates that certainty now has a brother, namely flexibility. Globalization requires that legal rules must be flexible in order to be applicable to changing circumstances and avoid costly disputes in circumstances, which could have been solved by an instrument like *Nachfrist*.¹⁹⁵ However, it is to be borne in mind the significant differences between the German and French treatment of *Nachfrist* and the one accorded to in the three instruments, one of such differences is the different approach adopted, namely by contrast with the autonomic extension in domestic laws an optional approach is adopted under each of the three instruments.

### 4.2 RATIONALE UNDERLYING THE OPTIONAL APPROACH

#### 4.2.1 Optional Approach under the Studied Instruments

The *CISG* deals with the *Nachfrist* remedy separately under Arts. 47 and 63. Art. 47(1), tying in with Art. 33 which fixes the time when the seller must deliver the goods, deals specifically with the buyer’s options and states: “The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.” A similar remedy in favour of the seller is set forth in Art. 63, which is connected with timing obligations of the buyer in such provisions as Art. 38(1) (examination) and Art. 59 (payment of the price). Art. 63(1) is concerned with the options of the seller and provides: “The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.”

¹⁹⁴ Supra. note 2.

¹⁹⁵ Ibid.
As stated above, the CISG incorporated, among other elements, the notion of Nachfrist from German law. However, unlike German law, the CISG does not require a party to offer an additional period of time under which a prospectively defaulting party may perform under the contract. The substantive difference between the two approaches is both obvious and important. Under German law, for instance, if the buyer requests a Nachfrist, the seller is obligated to respond to the request. Failure to do so results in an automatic grant of additional time. To the contrary, Knapp submits when discussing Art. 63 CISG that: “Fixing an additional period of time under Article 63(1) is the seller’s right, but not his obligation . . . , the seller may sue for enforcement of his right without granting the buyer any additional term for performance. Similarly, if the failure by the buyer to perform his obligation amounts to a fundamental breach of contract, the seller is authorized to declare the contract avoided under Article 64(1)(a) without having any obligation to fix first an additional term of performance for the buyer. In this respect the procedure envisaged by Article 63(1) differs from the Nachfrist of the law of the Federal Republic of Germany and the mise en demeure under French law.”

In fact, the wording “may” used both in CISG Arts. 47(1) and 63(1) shows that the procedure envisaged under the CISG is not mandatory. It merely permits a party to offer such an additional period of time. Both provide identical obligations for the buyer and the seller with regards adherence, notice, and reasonable length of time. In other words, Arts. 47 and 63 each creates the possibility that a buyer or seller may – but need not – set a Nachfrist with the main consequence being that the buyer or seller, during that period, must generally adhere to its contractual obligations while retaining its rights to subsequently claim damages. This optional approach is adopted both in UPICC and PECL. Art. 7.1.5(1) UPICC reads: “In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.” Art. 8:106(1) PECL reads: “In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.” Under these provisions, it is for the aggrieved party among their options, not obligated to allow an additional period for performance.

In other words, none of the three instruments requires, as under the German law, an automatic extension of time for performance and delegate such option to the discretion of the parties involved. As a result, the procedural device of granting additional time does not have the same function under German and international com-
commercial law, respectively. In this point, different function actually derives from the particular rationale of Nachfrist in the context of international commercial law.

4.2.2 Underlying Rationale

The idea behind Nachfrist in the three instruments is that the aggrieved party should not be able to avoid the contract merely because the obligations are not performed on time. While details of the question of termination are not dealt with in this Chapter, it is to be shown (with the detailed discussion in PART III) that each of the three instruments specifically rejects the idea that in an international commercial contract the aggrieved party may, as a general rule, avoid the contract once the contract date for performance has passed and the other party has not yet performed one or more of his obligations. In these circumstances termination of a contract is primarily to be justified on the basis of the doctrine of “fundamental breach/non-performance”.

Under this requirement, termination can be a thorny problem, for in any case the aggrieved party must be sure that the breach is fundamental. Under certain circumstances, such as when time is of the essence, late performance may become a fundamental non-performance. But it is not necessarily always the case when time is not clearly of essence. In this respect, Nachfrist clarifies a situation which otherwise would be unclear. It means that Nachfrist in the three instruments in itself is not a remedy, or is not really a stand-alone remedy in the traditional sense. It fits very closely with other remedies, particularly those allowing the parties to terminate the contract when it is meant to fit into the concept of fundamental non-performance. Thus, if the aggrieved party is in a situation where there is uncertainty as to the existence of a reason to avoid the contract, he can overcome this by fixing a Nachfrist.

On the one hand, as discussed previously in Chapter 3, the right of the aggrieved party to require specific performance by the other party anticipates the aid of a court or arbitral tribunal in enforcing that right. However, in case of delayed performance, the use of judicial procedures for enforcement may not seem feasible or may require more time than the aggrieved party can afford to wait. It may consequently be to the aggrieved party’s advantage to avoid the contract and make a substitute purchase from a different supplier.\(^{198}\) On the other hand, however, at that time the aggrieved party may not be certain that the breaching party’s delay constitutes a fundamental breach of contract justifying the avoidance of the contract. This is particularly because of the special characteristics of late performance, which is significantly different from other forms of defective performance: “Late performance can never be remedied since once the date for performance has passed it will not occur again, but nevertheless in many cases the party who is entitled to performance will much prefer even a late performance to no performance at all. Secondly, at the moment when a party fails to perform on time it is often unclear how late performance will in fact be. The commercial interest of the party receiving per-

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One way to circumvent the above problems is by use of the Nachfrist procedure. It appears that the primary purpose of a Nachfrist procedure is to protect the aggrieved party who is waiting for a delayed performance. While waiting, the aggrieved party might have to determine at what point the delay constitutes such a fundamental breach that he becomes entitled to terminate the contract. In any event, unlike in the case of fixed-term contracts, a delay in performance is not automatically a fundamental breach of contract. Hence, the Nachfrist procedure is established where it is not clear from the contract itself or the surrounding circumstances whether failure to make timely performance amounts to a fundamental breach, and thus “enables that party to give the performing party a second chance without prejudicing its other remedies”. Indeed, the procedure would apply regardless of whether the breach would otherwise have been considered fundamental. In other words, failure of the other to meet such a reasonable deadline is then grounds for termination whether the breach is fundamental or not.

In short, the granting of additional time can be advantageous since, in the case of delayed performance, the innocent party may, inter alia, employ this device in order to relieve himself of the risk of wrongful termination, which results from a peculiarity of the three instruments, namely the fact that it can be difficult to determine when the failure to promptly perform amounts to a fundamental non-performance.

4.2.3 Granting Additional Period in Two Situations

Following the optional approach and its underlying idea under the three instruments, when there has been a non-performance by one party (the debtor), the other (the aggrieved party) may always fix an additional period of time for performance.

The Nachfrist procedure under CISG Arts. 47 and 49(1)(b)/Arts. 63 and 64(1)(b), UPICC Art. 7.1.5 or PECL Art. 8:106 in effect contains two rules: (a) Even where the aggrieved party has an immediate right to terminate because of the other’s non-performance, if the aggrieved party has indicated that it is still prepared to accept performance, it may not change its mind without warning. (b)

By contrast, Section 326 of the BGB does not have anything to do with reducing the risk of wrongful termination or securing the right to avoidance. Partly, this is due to the fact that, unlike the three instruments, the BGB does not differentiate between simple and fundamental breaches of contract. More importantly, according to German law, the right to terminate a contract only arises in a rather limited number of situations. Whereas the three instruments allow the creditor to avoid the contract for any fundamental breach, the BGB starts from the notion that, in principle, a contract may only be unilaterally terminated if the agreement provides for a contractual right to avoidance. As one of the exceptions to this general rule, this provision under German law, instead, in many cases, enables the aggrieved party to declare the contract avoided.

The first situation, the case of the aggrieved party who indicates that he will still accept tender of performance or the cure of a defective performance but then changes his mind, gives rise to little problem in systems such as the FRENCH or SPANISH where a court order is needed for termination (French CC art. 1184(3); Spanish CC art. 1124(3)): instead of terminating the contract at once the court can simply grant a further delay for performance. Systems such as the COMMON LAW which allow termination by simple notice without prior warning have often developed rules to prevent a sudden change of mind by the aggrieved party; e.g. the Common law rule that if the aggrieved party has “waived” his right to terminate for the time being he can only withdraw the waiver by giving reasonable notice: Charles Rickards Ltd v. Oppenheim [1950] 1 K.B.

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199 See Comment 1 on Art. 7.1.5 UPICC.
200 In the case of fixed-time contracts, the date of delivery may be so essential to the buyer that non-compliance with it may constitute a fundamental breach of contract. (See Enderlein and Maskow, infra. note 26, p. 137.)
201 Supra. note 10.
Where there has been a delay in performance but the delay is not fundamental (because time was not of the essence and the delay has not yet had serious consequences for the aggrieved party) the aggrieved party may terminate the contract after having given the non-performing party reasonable notice. In this point, two preliminary points need to be borne in mind: (a) Under the three instruments there is no need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into breach; (b) Under the three instruments termination is an act of the aggrieved party, not an act of a court or arbitrator. Provided there has been a fundamental non-performance or the other conditions for termination are met the aggrieved party may terminate by giving notice of termination to the non-performing party.  

As stated above, not every delay in performance will constitute a fundamental non-performance and thus the aggrieved party will not necessarily have the right to terminate immediately merely because the date for performance has passed. It will only have this right if time was “of the essence”. In cases of non-fundamental delay, however, the Nachfrist procedure allows the creditor to fix an additional period of time of reasonable length for performance by the debtor. If upon expiry of that period of time performance has not been made, the aggrieved party may terminate the contract. This case is probably the one in which the notice procedure will be used most frequently. The notice procedure can also be used when it is the aggrieved party who is to perform a service but the other party has refused to accept or to allow performance. It should be noted that the Nachfrist procedure applies even if the non-performance is excused because of a temporary impediment (see Chapter 20).

In other cases the notice procedure does not give the aggrieved party any additional rights but is nonetheless useful. Even where the delay or other non-performance is fundamental, and thus the aggrieved party has the right to terminate immediately, it may not wish to do so: it may be prepared to accept a proper performance by the debtor provided it is rendered within a certain period. The procedure permits it to give the debtor a final chance to perform (or to correct a defective performance), without the aggrieved party losing the right to seek specific performance or to terminate if by the end of the period of notice the debtor has still not performed in accordance with the contract. At the same time, however, the rule that the aggrieved party may not seek specific performance or terminate during the period of notice protects the debtor from a sudden change of mind by the aggrieved party. The debtor may have relied on having the period set in the notice in which to perform.

The notice procedure may also be used when a performance is prompt but defective in a way which is not fundamental. In such a case the aggrieved party will not have the right to terminate and serving a notice fixing an additional time for performance will not give it that right, because the Nachfrist procedure applies only to delayed performance, not to defective performance. Nonetheless, serving a notice may still perform the useful functions of informing the debtor that the aggrieved party still wants proper performance.
and of giving the debtor a last chance before the aggrieved party seeks specific performance. In these respects the notice serves the same function as a *mise en demeure* in French law or *Mahnung* in German law, though under the *CISG*, *UPICC* or *PECL* the aggrieved party is not required to serve a notice before exercising a remedy except in the case of termination for non-fundamental delay. ²⁰⁷

In sum, the aggrieved party may serve a *Nachfrist* notice informing the other party to continue performing in case of non-fundamental delay or where he is in doubt whether the other party has committed a fundamental breach. After the expiry of this period the aggrieved party can consider a fundamental breach to have occurred and avoid the contract. Thus the breach is “upgraded” by the expiration of the *Nachfrist*. On the other hand, even in the case of a fundamental breach where the aggrieved party is entitled to avoid the contract immediately, termination may not be necessarily the best solution for him. The aggrieved party may be prepared to accept a proper performance by the debtor provided it is rendered within a certain period. The *Nachfrist* procedure permits it to give the debtor a final chance to perform. Clearly, the *Nachfrist* procedure under the three instruments has advantages for both parties, although its principal purpose is to provide additional latitude and protection to the innocent party in case of uncertainty. The advantage for the non-performing party in this situation, apart from the fact that he now has more time to perform (although he may still be subject to a claim for damages in respect of any delay), is that he can rely on the fact that the aggrieved party is bound by that period, during which the latter may not resort to termination or specific performance.

### 4.3 Setting of a *Nachfrist* Notice

#### 4.3.1 Transmission of the Intention

The aggrieved party must set an additional period, i.e. inform the non-performing party accordingly with an appropriate notice to make his intention clear, once he makes decision to invoke the *Nachfrist* procedure so as to give the non-performing party a second chance. In this respect, two issues should be examined: form of the notice; risk in communication (see also the discussion in Chapter 11 on the notice of a declaration of termination).

#### 4.3.1.1 Form of the Notice

As for the form of the notice, the *CISG* is silent on whether the notice must be in writing or can be presented orally. However, a broad interpretation of *CISG* Art. 11(*A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.*) will lead to the conclusion that the notice granting an additional period for performance under Art. 47/63 need not be made in writing and that it may be transmitted by any means.

Under the *UNIDROIT Principles*, the Official Comment to Art. 1.9(1) (*Where notice is required it may be given by any means appropriate to the circumstances.*) clearly states: “This article first lays down the principle that notice or any other kind of communication of intention (declarations, demands, requests, etc.) required by individual provisions of the Principles are not subject to any particular requirement as to form, but may be given by any means appropriate in the circumstances. Which means are appropriate will depend on the actual circumstances of the case,

²⁰⁷Ibid.
in particular on the availability and the reliability of the various modes of communication, and the importance and/or urgency of the message to be delivered.” Under the European Principles, the Official Comment to Art. 1:303(1) (Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances.) similarly indicates that “notices may be made in any form - orally, in writing, by telex, by fax or by electronic mail, for example - provided that the form of notice used is appropriate to the circumstances. It would not be consistent with good faith and fair dealing (see Article 1:201) for a party to rely on, for instance, a purely casual remark made to the other party. For notices of major importance written form may be appropriate.”

It can therefore be concluded that no form is prescribed for the notice; it can be oral or in writing but, according to its character of the Nachfrist notice and as to be supported by the discussion infra. 4.3.2, it cannot be given by other conduct, i.e. conduct implying an intent. Given this, there will be no lengthy discussion here as to the type or form of the notice that must be furnished by the aggrieved party to invoke the Nachfrist procedure.

4.3.1.2 Risk in transmission

As to the communication to the non-performing party, under the CISG the general rule of Art. 27 reflects the “dispatch principle”, it is expressly stated that: “Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.” Following this rule, the risk in transmission of a Nachfrist notice is fairly burdened on the side of the non-performing party. However, it seems unpractical that a Nachfrist notice will be effective once it is dispatched because only if such intention is transmitted to the non-performing party it brings fruits.

By contrast, both the UNIDROIT Principles and the PECL adopt the receipt principle as a general rule. Art. 1:303(1) PECL stipulates that “[a] notice is effective when it reaches the person to whom it is given”, whose purpose is to “indicate that the same will also be true in the absence of an express statement to this effect: see Arts. 2.9, 2.11, 3.13, 3.14, 6.1.6, 6.2.3, 7.1.5, 7.1.7, 7.2.1, 7.2.2, 7.3.2 and 7.3.4.” Similarly, Art. 1:303(2) PECL states that “any notice becomes effective when it reaches the addressee.” It is important in relation to the receipt principle to determine precisely when the communications in question “reach” the addressee. In an attempt to define the concept, Art. 1:303(3) PECL draws a distinction between oral and other communications: “For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person’s place of business or mailing address.” The former “reaches” the addressee if they are made personally to it or to another person authorised by it to receive them. The latter “reaches” the addressee as soon as they are delivered either to the addressee personally or to its place of business or mailing address. The particular communication in question need not come into the hands of the addressee. It is sufficient that it be handed over to an employee of the addressee authorised to accept it, or that it be placed in the addressee’s mailbox, or received by the addressee’s fax, telex or computer.

A plain understanding of the receipt principle is that a party cannot

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208 See Comment 1 on Art. 1:9 UPICC.
210 See Comment 2 on Art. 1:9 UPICC.
211 See Comment 4 on Art. 1:9 UPICC.
rely on a notice sent to the other party unless and until the notice reaches that party. Although it is not necessary that the notice should actually have come to the addressee's attention provided that it has been delivered to him in the normal way, the risk of errors in the communication is normally placed upon the sender under the receipt principle. However, many of the situations in which one party giving a notice to the other are situations in which the party to be notified is in default, or it appears that a default is likely. Here it seems appropriate to put the risk of loss, mistake or delay in the transmission of the message on the defaulting party rather than on the aggrieved party. While under the UNIDROIT Principles, no appropriate solution could be found as to this concern either in Art. 1.9 or Art. 7.1.5; a persuasive solution has been found in the PECL in conjunction with the reference of "Subject to paragraphs (4) and (5)" at the outset of Art. 1:303(2) PECL. Under the PECL, Art. 1:303 adopts the receipt principle as a general rule, at the same time it links this general rule to two qualifications for the operative effect of communications, one of which is set out in PECL Art. 1:303(4) reading pertinently: "If one party gives notice to the other because of the other's non-performance or because such non-performance is reasonably anticipated by the first party, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice shall have effect from the time at which it would have arrived in normal circumstances."

In sum, on the one hand, the so-called “receipt principle” seems appropriately applicable to the Nachfrist notice since decisive is that the notice reaches the addressee so that the non-performing party would be well aware of his situation; on the other hand, the rule following from the dispatch principle that the risk of loss, mistake or delay in the transmission of the message should be put on the defaulting party rather than on the aggrieved party, suits for the case of a Nachfrist notice. Therefore, the solution found in PECL Art. 1:303(4) best accords with the case of a Nachfrist notice: Generally, the Nachfrist notice is effective when it reaches the non-performing party. In a case of the risk in transmission, a delay or inaccuracy in the transmission of the Nachfrist notice or its failure to arrive does not prevent it from having effect; the notice shall have effect from the time at which it would have arrived in normal circumstances. The idea underlying the principle and the exceptions is that the risk for transmitting a message should be carried by the one who, as a result of his deviation from normal performance, caused the statement to be sent.

4.3.2 Fixing of the Time-limit

As discussed above, the CISG, UPICC and PECL recognize, on the one hand, the difference between non-performance which amounts to a fundamental breach and non-performance which is not serious enough to constitute a fundamental breach; and each allows, on the other hand, the aggrieved party who is not sure whether the non-performance amounts to a fundamental breach the ability to avoid the contract by allowing him to set an additional period of time to perform the contract. Therefore, they all require that two conditions must be met: Firstly, the period must be fixed. Secondly, the period so fixed must be reasonable. In other words, when a notice fixing an additional period for performance is served after a non-fundamental delay, it will only give the aggrieved party the right to terminate if, first, it is for a fixed period of time, and secondly, if the period is a reasonable one.

4.3.2.1 Fixed period

With regard to the first condition, it is to be noted that an effec-
The last date when we can accept delivery will be July 1.” To the contrary, Enderlein and Maskow hold that the Nachfrist must not be considered as final and/or the non-performing party must not be warned by the entitled party that he will declare the contract avoided. A formulation like “We set an additional period of time for payment on your part until May 31...” is sufficient. The setting of a Nachfrist for performance gives the entitled party an option to either stick to the contract, e.g., when non-payment is caused by foreseeable temporary difficulties of transfer, or make it subject to avoidance. The aggrieved party would be forced into too strict a scheme if in setting a Nachfrist he had to threaten the other party with avoidance of the contract. However, the authors in favour of this left open what would happen if the non-performing party does not carry out his threat. One should not get too near to the scheme of the ipso facto avoidance. Of course, on the other hand, the entitled party in setting the Nachfrist may declare the contract at the same time avoided in case it is not kept to by the non-performing party (see the discussion infra. 4.4.2 on automatic termination).

In my opinion, Zeller stands more persuasively in submitting that, as far as the non-performing party is concerned the additional period is a final period, however, the entitled party is not barred from fixing additional periods if he so wishes or if he wants to respond to the non-performing party’s request for additional time. In setting an additional period of time, the entitled party expresses his continuing interest in contract performance and offers the non-performing party a chance to fulfil the contract nonetheless. If the non-performing party does not perform within the additional period,

In other words, this time will have to be fixed or be fixable according to the calendar (O.R., 49). The mere invitation to perform “as soon as possible”, “promptly”, “immediately” or within a similarly vaguely defined period of time is not sufficient because that would merely have to be considered as abstract reliance on the right to obtain performance. It is confirmed by the Official Comment on PECL Art. 8:106 which states: “If the notice is not for a fixed period of time it may give the defaulting party the impression that it is free to postpone performance indefinitely. It will not suffice to ask for performance ‘as soon as possible’. It must be a request for performance ‘within a week’ or ‘not later than July 1’. The request must not be couched in ambiguous terms; it is not sufficient to say that ‘we hope very much that performance can be made by July 1’.”

However, a questionable issue arising from the fixing of the time-limit is whether a Nachfrist notice should be considered as final and/or the non-performing party be warned by the entitled party that he will declare the contract avoided. Honnold submits that an effective Nachfrist notice should make clear that the additional period sets a fixed and final limit on the date for performance; e.g., Notwithstanding,

The notice should make clear that the additional period sets a fixed limit on the date for performance. It must be clear from the communication that it is an additional period of time for performance, i.e., fulfilment after expiration of that period is rejected.

This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. “within one month from today”). A general demand by the entitled party that the other party perform or that he perform “promptly” or the like is not a “fixing” of a period of time. In other words, this time will have to be fixed or be fixable according to the calendar (O.R., 49). The mere invitation to perform “as soon as possible”, “promptly”, “immediately” or within a similarly vaguely defined period of time is not sufficient because that would merely have to be considered as abstract reliance on the right to obtain performance. It is confirmed by the Official Comment on PECL Art. 8:106 which states: “If the notice is not for a fixed period of time it may give the defaulting party the impression that it is free to postpone performance indefinitely. It will not suffice to ask for performance ‘as soon as possible’. It must be a request for performance ‘within a week’ or ‘not later than July 1’. The request must not be couched in ambiguous terms; it is not sufficient to say that ‘we hope very much that performance can be made by July 1’.”

However, a questionable issue arising from the fixing of the time-limit is whether a Nachfrist notice should be considered as final and/or the non-performing party be warned by the entitled party that he will declare the contract avoided. Honnold submits that an effective Nachfrist notice should make clear that the additional period sets a fixed and final limit on the date for performance; e.g.,


214 Supra. note 2.
the entitled party may set another (or more) additional period(s) of
time, or avoid the contract. Neither does the contract end auto-
matically upon the expiration of the additional period (unless it is
expressly stated in the notice, see the discussion infra. 4.4.2) nor
has the entitled party an obligation to avoid the contract.\footnote{217}

4.3.2.2 Reasonable length

In considering the Nachfrist procedure would have the danger turn-
ing an inconsequential delay into a basis for declaring the
contract avoided, which means in cases of non-fundamental
delay the notice procedure is conferring an additional right on the
aggrieved party, the period of notice must be reasonable. Deter-
mining the additional period of “reasonable length” one should fix in
the notice perhaps is perhaps the most significant issue in drafting
a Nachfrist notice.

What is reasonable can only be decided with regard to specific
cases. Enderlein and Maskow suggest the following, non-
exhaustive, list of factors for determining a reasonable length:
“in calculating the additional period, factors have to be taken into
account which concern both parties. On the seller’s part, these
are: possibilities and costs for storage of the goods (compare
also Article 88, paragraph 2) and price developments, e.g. the
Nachfrist will be shortened in the event of a rapid decline in prices
because the proceeds from a substitute transaction under Article
75, which presupposes an avoidance of the contract, would be
reduced as a result. On the buyer’s part, it is the difficulties which
he is confronted with during performance that are of relevance,
e.g. when he needs more time than expected for complying with
the so-called formalities in preparing the payment (Article 54) or
also in importing the goods. The seller can take such factors
into consideration only when the buyer informs him thereof. In
the setting of a Nachfrist, the postal handling time needed for
the information to reach the buyer has to be considered because the
latter must have time to undertake the relevant activities during
that Nachfrist.”\footnote{218}

In other words, the question of what exactly should be considered a
reasonable length of time, depends on the particular circumstances
for each case. Among the elements to be taken into account are the
nature, extent and consequences of the delay, the non-performing
party’s possibilities of and time needed for performance, and the
aggrieved party’s special interest in speedy performance. In the
light of the fact that there is a breach of contract by a party (the
debtor), the interests of the other party (the aggrieved party) should
be decisive. Within this leeway the choice is given to the innocent
party who faces breach by the other. Indeed, respect must be given
to the aggrieved party’s discretion in setting the “reasonable” period
if the notice-avoidance procedure is to serve its purpose – reducing
uncertainty concerning the right to avoid the contract.

However, it follows from the flexible reasonableness that different
periods of time could be reasonable: “The vague term of reason-
ableness leaves some room to act at one’s own discretion which
can be used by the party who is entitled to set the Nachfrist, i.e. in
this case the seller. If he fixes too short a period, the competent
deciding body could determine the minimum Nachfrist.”\footnote{219}
PECL in its Comment therefore states as follows:

“The determination of which period of time is reasonable must
ultimately be left to the court. Regard should be had to several
factors such as:

\footnote{220 Supra. note 26, Comment E.}
- the period of time originally set for performance. If the period is short, the additional period of time may also be short;
- the need of the aggrieved party for quick performance, provided that this is apparent to the defaulting party;
- the nature of the goods, services or rights to be performed or conveyed. A complicated performance may require a longer period of time than a simple one;
- the event which caused the delay. A party which has been prevented from performance by bad weather should be granted a longer respite than a party which merely forgot its duties."

In a word, the question to what amounts to a reasonable time is a question of fact and is left to the courts to decide. While the setting of a reasonable time under the European Principles is handled much as it is under German law by designating the courts as the final word on a reasonable time, the CISG presents a more ambiguous dilemma than under German law. As far as the CISG is concerned, no jurisprudence has solved this issue. Under the UNIDROIT Principles, Art. 7.14(3) provides for the allowance of a reasonable amount of time in which to complete performance of the contract. If the additional amount of time is not of a reasonable length, the UNIDROIT Principles provide for an additional extension in order to comply with the mandate in the Article. However, the UNIDROIT Principles and its Official Comment do not specifically address the method to be incorporated in determining what is a reasonable amount of time and who decides when and if an additional extension of time is warranted. Nonetheless, it can be argued that a court would invoke good faith, which is a principle in the CISG or the UPICC, and could set a date which fulfills the requirements of the principle of reasonableness. In any event, the Nachfrist must not serve the aggrieved party as a pretext upon its expiration to declare the contract avoided.

Finally, one should recall that it is because in cases of non-fundamental delay the notice procedure is conferring an additional right on the aggrieved party, that the period of notice must be reasonable. "In cases other than non-fundamental delay the aggrieved party is granting a concession to the debtor. Here the aggrieved party can give the debtor as long or as short a period as it chooses, though having done so it will not be able to resort to termination or specific performance within that period. It may serve a notice which fixes an ambiguous deadline for example, ‘Please perform as soon as possible’. In this case it may not terminate or seek specific performance unless the non-performance has continued for long enough that it would be consistent with good faith for the aggrieved party to terminate despite its earlier notice."  

4.4 EFFECTS OF SERVING A NACHFRIST NOTICE

Generally, the serving of a Nachfrist notice which grants additional time has two kinds of effects. First of all, during the fixed period, limited remedies are available but the others are suspended. Hence the other party gets another chance at performance. Secondly, if the other party does not make use of this opportunity prior to the expiring of the additional period, the party serving the notice is entitled to declare the contract avoided upon the expiry. In other words, a Nachfrist notice has the main consequences that the aggrieved party, during the additional period specified in the notice, in general

221 In this point, since it is usually advised an inclusion of an arbitration clause in international commercial contracts and it is expressly provided that the “court” “includes an arbitral tribunal” under UPICC Art. 1.10 or PECL Art. 1:301, one can assume that the appropriate length of time can be determined by an arbitrator as well.

222 Supra. note 25.
has to stick to the contract while retaining his limited rights. After that Nachfrist has elapsed fruitlessly, he has the right to avoid the contract.

4.4.1 Remedies Available/Suspended during the Period

Understandably, in order to protect the non-performing party who may be preparing to perform the contract as requested by the aggrieved party who has sent a Nachfrist notice, perhaps at considerable expense, during the additional period specified in the notice the latter may not resort to some remedies for breach of contract, unless he has received notice from the former that he will not comply with the notice.

In this respect, a point well worth noting is the different wording used in the three instruments. Under the CISG, Art. 47(2) reads pertinently that “the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.” Similarly, Art. 63(2) stipulates in part that “the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.” By contrast, under the UNIDROIT Principles, the first sentence of Art. 7.1.5(2) reads: “During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy.” An identical rule is found in the first sentence of PECL Art. 8:106(2): “During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy.” According to the three texts, the right to recover damages arising from late performance is in any event, even when the non-performing party has performed within the Nachfrist, not affected. However, one area of uncertainty within the CISG has been removed under UPICC Art. 7.1.5(2) or under PECL Art. 8:106(2) by clearly stating that the aggrieved party “may withhold performance of its own reciprocal obligations” while an additional period of time is fixed. With these remedies unaffected, the party who grants the extension of time, on the other hand, cannot terminate or seek specific performance during the extension time.223

On the one hand, the setting of an additional period of time for performance at first has a disadvantageous effect on the party who set such an extension. Firstly, among the rights granted by the three instruments this refers to the right to early termination of the contract and/or such which practically amount to it. Even if the non-performance was a priori a fundamental breach of contract, the aggrieved party is not in a position to declare the contract avoided; he has to wait until the period of time has expired. He cannot require performance and at the same time avoid the contract. This does not have to be expressly laid down here; it would follow from the general principles, like waiver or estoppel.224 Secondly, the aggrieved party can within the additional period of time not seek specific performance. This is acceptable because the right to require performance and the right to set an additional period of time for performance are basically variants of the right to obtain performance between which the aggrieved party can choose from the outset.225

The wording of the rule, on the other hand, is not completely exact. It is nevertheless indeed problematic when the aggrieved party must not exercise other rights ensuing from a breach of contract either, but rather has to wait and see whether the buyer performs

223See Comment 2 on Art. 7.1.5 UPICC.
224Supra. note 26, p. 183.
225Supra. note 26, p. 240.
within the Nachfrist. For example, under the CISG, if the seller delivers within the Nachfrist and a lack in quality becomes apparent the buyer may well invoke his rights under non-conforming delivery before the period set has expired. However, if the buyer has required repair within a fixed period of time, he cannot request delivery of substitute goods before that period has expired, even if there was originally the possibility to do so.\footnote{Supra. note 26, pp. 183-184.}

In short, as stated in the Official Comment to PECL: “During the period fixed the aggrieved party may not take further action against the debtor; it may withhold its own performance and it may claim damages for the delay in performance or other losses caused by the non-performance, but it may not seek specific performance or terminate the contract during the period of notice.”\footnote{Supra. note 15.}

### 4.4.2 Early End of the Existing Uncertainty upon Rejecting Notice

The aggrieved party does not need to wait until the Nachfrist has expired, only when the non-performing party has declared that he will not perform within the additional period of time because such a declaration on the non-performing party’s part will mean “an early end of the existing uncertainty”.\footnote{Supra. note 26, p. 184.}

In this respect, under the CISG, the aforementioned Art. 47(2) is clearly limited at the outset to the situation “[unless the buyer has received notice from the seller that he will not perform within the period so fixed, [...]”; similarly, Art 63(2) reads that “[unless the seller has received notice from the buyer that he will not perform within the period so fixed, [...]”]. In more general terms, the second sentence of UPICC Art. 7.1.5(2) provides in part: “If it receives notice from the other party that the latter will not perform within that period, [...] the aggrieved party may resort to any of the remedies that maybe available under this Chapter.” Similarly, the second sentence of PECL Art. 8:106(2) reads in part: “If it receives notice from the other party that the latter will not perform within that period, [...] the aggrieved party may resort to any of the remedies that may be available under chapter 9.”

Since the rejecting notice has to refer to that there will be no performance also during the Nachfrist it can only be given after the Nachfrist has been set and the non-performing party has received the respective information. When the non-performing party has named before a date of performance later than the expiry of the Nachfrist, the aggrieved party cannot rely on it because it is very well possible that the setting of an additional period of time inspires the non-performing party to make exceptional efforts to keep to the period granted. The situation is different when performance is rejected definitely and once and for all. It is not sufficient in this case (by contrast to anticipatory non-performance, see the discussion in Chapter 9) that it becomes apparent or is clear that the non-performing party will not keep to the Nachfrist. If, however, the notice is given, the contract can be avoided at once (according to, e.g., CISG Arts. 49(1)(b) / 64(1)(b)), even when the delay does not yet constitute a fundamental breach of contract.\footnote{Supra. note 26, pp. 241-242.}

### 4.4.3 Termination upon Expiry of the Extension

#### 4.4.3.1 In general

Once the additional period specified in the Nachfrist notice is expired, the second sentence of UPICC Art. 7.1.5(2) provides in part that “if upon expiry of that period due performance has not been
made, the aggrieved party may resort to any of the remedies that maybe available under this Chapter." Similarly, the second sentence of PECL Art. 8:106(2) stipulates that "if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under chapter 9." In this respect, although no counterpart rule is found in the CISG, the Secretariat Commentary makes it clear that once the additional period of time has expired without performance by the seller/buyer, the buyer/seller may not only avoid the contract under Art.49(1)(b)/64(1)(b) but may resort to any other remedy he may have. In particular, the buyer/seller may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the seller/buyer has performed his obligations within the additional period of time fixed by the buyer/seller.\(^{230}\)

Nonetheless, it is to be recalled that the most advantageous aspect of a Nachfrist procedure is that, in contrast to the general rule of termination, the requirements of fundamental non-performance need not be fulfilled, because "[t]he Nachfrist procedure, [...], makes performance of basic contractual obligations within the period fixed in the notice ‘of the essence’ of the contract. 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."\(^{231}\) By granting an additional period of time, that party can therefore relieve himself of the risk that, eventually, the breach might be held not to have been fundamental. Therefore, the most frequently occurring consequence upon the expiry is perhaps the termination of the contracts. In this respect, different (nevertheless similar in substance) approaches are found in the three instruments.

### 4.4.3.2 CISG approach

As stated earlier, unlike the including of the avoidance provisions within the Nachfrist article under UPICC 7.1.5 or PECL Art. 8:106, the CISG provides for a separate provision dealing with avoidance by the side of the Nachfrist procedure envisaged elsewhere. In this respect, the buyer’s ability to avoid the contract after the serving of a Nachfrist notice is outlined in Art. 49(1)(b), and the seller’s in Art. 64(1)(b).

Another point well worth noting is that the CISG in its jurisprudence indicates that only in the context of seller’s non-delivery or buyer’s failure to pay the price or take delivery of the goods does the expiration of a Nachfrist give rise to a right to avoid the contract. In this respect, the wording of Art. 47(1) appears to cover the whole range of obligations arising under the contract and the Convention, such as delivery of all or part of the goods, the remedy of any lack of conformity by repair of the goods or by delivery of substitute goods or performance of any other act which would constitute performance of the seller’s obligations. However, Art. 49(1)(b) only authorizes the buyer to declare the contract avoided: "in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed." Thus, only in the event of non-delivery does the expiry without performance of the Nachfrist entail the right of the buyer to avoid the contract.\(^{232}\) In any other situation, the setting of a nachfrist does

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\(^{230}\) Supra. note 9, Comments 9, 10 on Draft 43 and 59.


\(^{232}\) Supra. note 26, p. 193. Enderlein and Maskow note that it would seem reasonable to apply this rule analogously to the expiry of a Nachfrist where
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not provide a basis for avoidance for the buyer. Similarly, Art. 64(1)(b) authorizes the seller to declare the contract avoided: "if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of Article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed." Unlike the general term in Art. 62, Art. 64(1)(b) also presumes a restricted case through being limited to the event of failure to pay the price or take delivery.

Flechtner analyses the underlying considerations behind such limitations envisaged in CISG ArtS. 49(1)(b) / 64(1)(b) as follows: "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." Despite these limitations, neither the limitation to non-delivery in Art. 49(1)(b) nor the limitation to failure to pay the price or take delivery in Art. 64(1)(b) does in any way preclude that a breach of other obligations, whose non-performance does not yet constitute a fundamental breach of contract at the time for performance, becomes such as more time passes. This may be emphasized by fixing a Nachfrist as well. However, in this event, it will not suffice to prove that a Nachfrist of reasonable length was fixed and performance was not made nevertheless, but it must be proved that the conditions for the existence of a fundamental breach of contract are given. This is true, for instance, of the fixing of a Nachfrist for the performance of the obligation to participate in the manufacture of the goods, which is not to be considered as part of the obligation to take delivery. By contrast, non-performances during the Nachfrist of those most essential obligations such as seller's delivering the goods or buyer's paying the price or taking delivery, constitute according to Arts. 49(1)(b) and 64(1)(b) immediately, after the expiry of the Nachfrist, a fundamental breach of contract, without having to prove that the conditions for the existence of a fundamental breach of contract are given.

Finally, it is to be noted that the buyer's obligation to pay the price, pursuant to Art. 54 CISG, includes taking such steps and complying with such formalities which may be required by the contract and by any relevant laws and regulations to enable payment to there was no performance, in the case of curing a non-conformity. But this was rejected repeatedly and for good reasons at the diplomatic conference.

233 For example, in the case of defective goods, if the contract is breached, the Buyer may compel performance and set an additional time for performance. On the expiration of that period, the Buyer must again decide whether to avoid the contract or not, and this decision will still depend on whether the breach is fundamental. The only change in the situation is that the Buyer once again has the possibility of giving a notice of avoidance within a "reasonable time" to the Seller. (Supra. note 3.)
be made, such as registering the contract with a government office or with a bank, procuring the necessary foreign exchange, as well as applying for a letter of credit or a bank guarantee to facilitate the payment of the price. Therefore, the Secretariat Commentary states that the buyer's failure to take any of these steps within an additional period of time fixed by the seller in accordance with Art. 63 CISG would authorize the seller to declare the contract avoided under Art. 64(1)(b). However, Enderlein and Maskow have their reservations here because the buyer insofar is granted several options and he cannot be forced by the seller to choose one. Furthermore, not even a general date is fixed in regard to most of these steps vis-à-vis the seller so that there is neither a connecting point for the setting of a Nachfrist. To put it briefly, the relevant obligations of the buyer are not feasible enough so that such a far-reaching interpretation of the obligation to pay the price could lead to abuse by the seller.

4.4.3.3 UNIDROIT Principles / PECL approach

Art. 7.3.1(3) UPICC follows the approach adopted under the CISG and provides: "In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired." Similarly, PECL Art. 9:301(2) also provides as: "In the case of delay the aggrieved party may also terminate the contract under Article 8.106 (3)." Thus, the two Principles contain a very similar termination situation through the Nachfrist procedure, but with some variance due to the delicate difference over the Nachfrist procedure itself between them.

As mentioned above, the two Principles also include the avoidance provisions within the Nachfrist article under UPICC 7.1.5 and PECL Art. 8:106, respectively. In this respect, UPICC 7.1.5(3) reads: "Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate." PECL Art. 8:106 provides similarly: "If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice."

As indicated in the aforementioned two texts, the position at the end of the period of extension depends on whether the late performance was already fundamental at the time when the extension was granted. In this situation, if the contract is not completely performed during the extension, the right to terminate for fundamental non-performance simply springs into life again as soon as the extension period expires. On the other hand, if the late performance was not yet fundamental, termination would only be possible at the end of extension if the extension was reasonable in length.

One should note, however, if the aggrieved party serves a notice of less than a reasonable period it need not serve a second notice; it may terminate after a reasonable period has elapsed from the date of the

237 See Secretariat Commentary on Art. 60 of the 1978 Draft [draft counterpart of CISG article 64], Comment 7. Available online at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-64.html
238 Supra. note 46.
notice.\textsuperscript{240}

On the other hand, both texts indicate that the aggrieved party may provide for automatic termination. It may say in its notice that the contract shall terminate without further notice if the defaulting party fails to perform within the period of the notice. Although no similar rule is found under the \textit{CISG}, such an automatic termination may be included in a \textit{CISG Nachfrist} notice under the general party autonomy doctrine. Once such an automatic termination is expressly provided for in the notice, if the defaulting party in fact tenders performance after the date set in the notice, the aggrieved party may simply refuse to accept it. However, if the aggrieved party actually knows that the defaulter is still attempting to perform after the date, good faith requires it to warn the defaulter that the performance will not be accepted. If the defaulting party asks the aggrieved party whether it will accept performance after the date set, good faith requires the aggrieved party to give an answer within a reasonable time.\textsuperscript{241} One should note, however, \textit{PECL} Art. 8:106(3) expressly states that: “If the period stated is too short, [...] as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.” Although no similar rule is found in \textit{UPICC} 7.1.5(3), it appears that such a slight distinction bears technical manner rather than a substantial difference.

Finally, it is to be noted that an additional paragraph which is not found in the \textit{PECL} is added to \textit{UPICC} Art. 7.1.5(3), which reads: “Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.” (Art. 7.1.5(4)) In this respect, it is said that the \textit{UNIDROIT Principles} include a \textit{de minimis} threshold such that a \textit{Nachfrist} notice does not allow avoidance of the contract where the unperformed obligation is minor. In this regard, the \textit{UNIDROIT Principles} mirror more closely the \textit{CISG}. As with the threshold under the \textit{UNIDROIT Principles}, the \textit{CISG}’s limitation of avoidance to, for instance, cases of non-delivery can also be viewed as a \textit{de minimis} threshold, since the rest of the seller’s obligations can be viewed as less important (or more compensable by damages) than the delivery obligation.\textsuperscript{242}

\textsuperscript{240} Supra. note 25.

\textsuperscript{241} Supra. note 15, Comment F.

\textsuperscript{242} See Peter A. Piliounis in “The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the \textit{CISG}: Are these worthwhile changes or additions to English Sales Law?” (1999). Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/piliounis.html}
CHAPTER 5. CURE BY NON-PERFORMING PARTY

CISG Art. 48, UPICC Art. 7.1.4 or PECL Art. 8:106 provides that, if certain conditions are met, the non-performing party may “cure” a defect in his performance by way of replacing or repairing defective performance even in the case where the contract time for performance has expired. In effect, by meeting these conditions, the non-performing party is able to extend the time for performance for a brief period beyond that stipulated in the contract, unless timely performance is required by the agreement or the circumstances. This remedy thus favours the preservation of the contract. It also reflects the policy of minimising economic waste [involved in termination of the contract for international commercial transactions], [...] and the basic principle of good faith [...] 243

5.1 INTRODUCTION

In many cases of defective performance the breach may easily be redressed, for example by delivering a missing part. Therefore, some domestic laws governing contracts and sales often contained so-called cure provisions. Even many of those legal systems that do not have a rule permitting cure would normally take a reasonable offer of cure into account in assessing damages. 244

Under the CISG, for the purpose of minimising the hardship and economic waste involved in termination of the contract for international sales, appropriate rules are provided permitting the defaulting seller to “cure” a defect in his performance by way of replacing or repairing defective documents and goods. For this purpose, Art. 34 enables the seller who handed over documents before the contract date to cure any lack of conformity in the documents before the time for performance is expired. The same power is given to him by Art. 37 when he has delivered goods which do not conform to the contract. The right to cure is also extended by Art. 48 to the case where the contract time for performance has expired. In short, in accordance with commercial practice, Arts. 34, 37 and 48 of the CISG therefore allow the vendor to remedy defects both before and after the stipulated date for delivery. Thus, where a breach has occurred, the CISG encourages the seller to keep his contractual promises by offering him the express right to cure his own mistakes. 245

Art. 37 CISG concerns the cure of defects before the date for delivery and is similar in substance to Art. 34 concerning documents. 246 “With regard to Article 37 of the CISG, it is submitted that this regulation should neither be unfamiliar for common nor civil lawyers, as most legal systems recognise the principle of liberty to cure prior to the set date for performance. It may well be that only a few codes, such as the UCC, expressly provide for this right. Nevertheless, 247 See Alison E. Williams in “Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom”: Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001); pp. 9-57. Available online at http://www.cisg.law.pace.edu/cisg/biblio/williams.html 248 Art. 34 CISG reads: “If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.” Art. 37 reads: “If the seller has delivered goods before the date for delivery, he may, up to that date, 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, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.”
under both English and German law for example, the seller is unquestionably entitled to cure a defective tender by substituting it with a tender of conforming goods within the time limit fixed by the contract. This should be quite natural, “the date for delivery may be at the very beginning or within a period of time. If the seller has chosen a date for delivery at the beginning of the period, he may cure any non-conformity up to the end of the period. It seems that the seller has the same right even if the buyer has chosen a date within the agreed period. The buyer’s choice of a specific date does not change the originally agreed period of time for delivery by the seller.”

The seller may cure non-conformities not only up to the date of delivery. According to Art. 48, which reads in pertinent part: “the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations”, even after the deadline for delivery has passed - the seller can generally still “cure”. In this respect, Art. 48 of the CISG follows the American rule of section 2-508(2) of the UCC. However, Art. 48 does not confer a right to cure as extensive as the right conferred under UCC 2-508(2). Art. 48 was the subject of controversy in Vienna.

Clearly, the right of the seller or the non-performing party to cure is established under the three instruments. However, the existence of such a right to cure may, generally speaking, give rise to uncertainty. Especially if such a right can be exercised outside the period designated for performance, which is the focused situation in the following discussion, the innocent party may, at first, wonder whether and when the vendor will resort to it.

### 5.2 CONDITIONS FOR INVOKING CURE

#### 5.2.1 In General

As mentioned above, Art. 8:104 PECL states the right to cure a


249 See A/Conf. 97/C.1/L.140 (= O.R. 114) (the motion); A/Conf. 97/C.1/L.160 (= O.R. 114) (Bulgarian motion to the same effect); A/Conf. 97/C.1/SR.20 at 6 et seq. (= O.R. 340 et seq.)

250 See Comment and Notes to the PECL: Art. 8:104. Available online at
non-confirming tender by making a new and conforming tender if there is still time to do so. The Official Comment thereon indicates that this will depend on "whether time is of the essence or has become of the essence, e.g. by the giving and expiry of a notice under Article 8:106. In either of these cases there is no right to cure under this Article."\(^{251}\) Also, the seller’s liberty to cure under CISG is "[s]ubject to article 49" so that, in case of a fundamental breach, he cannot deprive the buyer of his right to avoid the contract by curing the defect. However, this limitation is to some extent complex and therefore will be discussed separately infra. 5.3. On the other hand, "[w]here the failure to meet a deadline in itself does not constitute a fundamental breach - in other words, when time is not of the essence - the seller’s cure within a reasonable time after the due date will normally prevent the delay from constituting a ‘fundamental breach of contract’ such as to permit the buyer to avoid the contract."\(^{252}\)

In addition, Art. 48 CISG provides seller’s right to cure only "if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer". In other words, the vendor must be able to remedy the breach without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement of his expenses. Thus, the seller’s right to cure under CISG Art. 48(1) is subject to two additional conditions: (a) without unreasonable delay; (b) without causing unreasonable inconvenience or uncertainty. The approach is followed under the UNIDROIT Principles, in which according to Art. 7.1.4(1), the right of the non-performing party to cure is subject to four conditions: "(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure; (b) cure is appropriate in the circumstances; (c) the aggrieved party has no legitimate interest in refusing cure; and (d) cure is effected promptly."

Anyway, these conditions (among which the two conditions as may be roughly categorized under the heading: (a) reasonableness of notice; and (b) appropriateness of cure will be given further details below) safeguarding the non-performing party’s right to cure makes clear that, although with the right accommodating the non-performing party’s interests by permitting cure outside the contract period, the non-performing party’s liberty to cure may give rise to an element of uncertainty, the three instruments generally take the policy that the vendor cannot rely on this unique right to the detriment of the innocent party. Hence, it is concluded that, the remedy and its exceptions balances the interests of both parties. Apart from the fact that it does not unduly tilt the balance in favour of the vendor, it may, on a more general note, also be submitted that the right to cure is probably in tune with commercial reality. When the non-performance arises, a practical occasion arises for the aggrieved party to relate to it, where he relatively seldom immediately upon the obligations becoming due resort to the deciding organs. For instance, as discussed in Chapter 3, where defective goods are tendered, the “typical buyer” will reject the supplied goods and, at the same time, tell the seller to repair or replace them, thereby holding the contract open for performance. From this it can be inferred that, in general, buyers appear to be willing to give the seller a second chance.\(^{253}\)
5.2.2 Reasonableness of Notice

The Secretariat Commentary on Art. 44 of the 1978 Draft [draft counterpart of CISG Art. 48] indicates that if the seller intends to cure the non-conformity he will normally so notify the buyer. He will also often inquire whether the buyer intends to exercise his remedies of avoiding the contract or declaring the price to be reduced or whether he wishes, or will accept, cure by the seller. The Official Comment on Art. 7.1.4 UPICC also states that cure may be effected only after the non-performing party gives notice of cure. The notice must be reasonable with regard to its timing and content as well as to the manner in which it is communicated.

As for the timing of notice, both CISG Art. 48(1) and UPICC Art. 7.1.4(1)(a) clearly provide that the seller or the non-performing party may remedy his failure to perform only if he can do so without unreasonable delay. The Official Comment on UPICC Art. 7.1.4 further states that notice of cure must be given without undue delay after the non-performing party learns of the non-performance. The Secretariat Commentary also indicates that the seller no longer has the right to remedy the failure to perform after the delay amounts to a fundamental breach even if the buyer has not as yet declared the contract avoided. Of course, even if the seller no longer has the right to remedy his failure to perform under this article, the parties can agree to his doing so. In other words, particularly because of the avoidance’s prevailing over the right to cure under the CISG, “[i]t is generally assumed that a delay is unreasonable when it amounts to a fundamental breach of contract. In this case the seller cannot assert his right to cure against the will of the buyer; he needs the buyer’s agreement.”

On the other hand, it does not suffice that the seller or the non-performing party states his readiness to cure only in general terms. To the extent information is then available, the notice must indicate how cure is to be effected and when. In this respect, Art. 7.1.4(1)(b) clearly requires that the notice must indicate the proposed manner and timing of the cure. The first sentence of Art. 48(2) CISG also “makes it clear that the seller must indicate the time period within which the proposed cure will be effected. If there is no indication of this period but merely an offer to cure, the seller can draw no conclusions nor derive any rights from a failure by the buyer to respond.” The underlying idea is that the right to cure may well be doubtful and, in particular, the period of time which the non-performing party offers for performance may reinforce that doubt. Therefore, the notice must be reasonable with regard to its content, so as to indicate how cure is to be effected and when.

Finally, notice must also be communicated to the aggrieved party in...
a manner that is reasonable in the circumstances. In this point, it is to be noted that according to CISG Art. 48(4), a request or notice by the seller under Art. 48(2) or (3) is not effective unless received by the buyer. Hence, it is not the general dispatch rule presumed under CISG Art. 27, but the general receipt rule established under UPICC Art. 1.9 (under the CISG, Art. 24, even if expressly conceived for Part II of the CISG, is applied analogously) that applies to the notice of cure. Here the general principle obviously is to place the risk of transmission always on the party which has committed a breach of contract.

5.2.3 Appropriateness of Cure

It does not suffice that the notice of cure is reasonable, the cure in itself must be appropriate. In this point, it seems appropriate to examine the following aspects in determining the appropriateness of cure:

Firstly, cure is appropriate in the circumstances (Art. 7.1.4(b) UPICC). It depends on whether it is reasonable, given the nature of the contract, to permit the non-performing party to make another attempt at performance. Unlike the CISG, as indicated in UPICC Art. 7.1.4(2), cure is not precluded under the UNIDROIT Principles merely because the failure to perform amounts to a fundamental non-performance. The factors to be considered in determining the appropriateness of cure include whether the proposed cure promises to be successful in resolving the problem and whether the necessary or probable delay in effecting cure would be unreasonable or would itself constitute a fundamental non-performance. However, the right to cure is not defeated by the fact that the aggrieved party subsequently changes its position. If the non-performing party gives effective notice of cure, the aggrieved party's right to change position is suspended. Nonetheless, the situation may be different if the aggrieved party has changed position before receiving notice of cure (since the notice of cure is governed under the receipt principle).

Secondly, an appropriate cure surly should not cause the buyer or the aggrieved party "unreasonable inconvenience" or "uncertainty of reimbursement" of expenses advanced by the aggrieved party (Art. 48(1) CISG). It cannot generally be said what unreasonable inconvenience means; this can only be decided on a case-by-case basis. On the other hand, at first it seems quite natural that the seller or the non-performing party must bear the costs involved in remedying a failure to perform. However, the aggrieved may incur expenses, for instance when the buyer has to send back exchanged goods. What matters is not the amount of the expenses, but irrespective of that, the uncertainty of reimbursement, e.g. the risk that the seller is insolvent or not willing to reimburse expenses incurred by the buyer.

Thirdly, cure is effected promptly (Art. 7.1.4(1)(d) UPICC). Even the lack of inconvenience on the part of the aggrieved party does not justify the non-performing party in delaying cure. Cure must be effected promptly after notice of cure is given. Time is of the essence in the exercise of the right to cure. The non-performing party is not permitted to lock the aggrieved party into an extended waiting period.

Fourthly, forms of cure are proper. Cure may include repair and replacement as well as any other activities that remedy the non-performance and give to the aggrieved party all that it is entitled to expect under the contract. However, repairs constitute cure only

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263 Supra. note 14.
265 See Comment 3 on Art. 7.1.4 UPICC.
266 See Comment 5 on Art. 7.1.4 UPICC.
when they leave no evidence of the prior non-performance and do not threaten the value or the quality of the product as a whole.\textsuperscript{267} In any case, it depends on the circumstances of each and every case and is left to the courts to determine which forms of cure will prevail; but the aggrieved party’s obligation to mitigate losses (see Chapter 14) has to be taken into account.

Finally, the aggrieved party has no legitimate interest in refusing cure (Art. 7.1.4(1)(c) \textit{UPICC}). The non-performing party may not cure if the aggrieved party can demonstrate a legitimate interest in refusing cure. However, if notice of cure is properly given and if cure is appropriate in the circumstances, it is presumed that the non-performing party should be permitted to cure. A legitimate interest may arise, for example, if it is likely that, when attempting cure, the non-performing party will cause damage to person or property. On the other hand, a legitimate interest is not present if, on the basis of the non-performance, the aggrieved party has simply decided that it does not wish to continue contractual relations.\textsuperscript{268}

In sum, the non-performing party has the right to cure only if there are no circumstances which could be summed up under the notion inappropriateness. In any case, we have to keep in mind that curing non-performance should never cause the aggrieved party inconveniences that are unreasonable or expenses that are uncertainty of reimbursement. As for the reasonability or the appropriateness, in general each case is different and can be decided only in the light of the individual circumstances. There is, however, a difference between inconvenience and expense. Whereas it does not permit unreasonable inconvenience and unreasonable expense for the innocent party, consistently using the notion “unreasonable” in both cases, the inconvenience rests with the aggrieved party but the expenses, even the reasonable ones, may be claimed from the non-performing party as damages.

5.3 SELLER’S RIGHT TO CURE AND BUYER’S RIGHT TO TERMINATION

\textit{CISG} Art. 48(1) clearly states: “\textit{Subject to article 49, . . .}” Thus, the right to cure under Art. 48(1) theoretically could be cancelled by the buyer’s avoidance of the contract. This Article by its language expressly reserving Art. 49, appears to underline the priority of the buyer’s remedy of termination over the seller’s right to cure. Is this appearance true? Things are not as simple as that.

It seems that a precise answer to the question requires one to examine the issue in light of the legislative history of the provision. The interplay between termination and cure was a highly controversial issue throughout the \textit{UNCITRAL} Working Group’s sessions.\textsuperscript{269} The issue again became the subject of considerable debate at the

\textsuperscript{267}See Comment 6 on Art. 7.1.4 \textit{UPICC}.
\textsuperscript{268}See Comment 4 on Art. 7.1.4 \textit{UPICC}.

\textsuperscript{269}Initially, the \textit{UNCITRAL} Working Group, in examining the provision which is now Art. 48, took into consideration the relationship of the seller’s right to cure with the buyer’s right to terminate the contract and the remedy of reduction of price. Several proposals were considered. The central issue in discussion of those proposals was whether the buyer may preclude the seller from curing any failure to perform his obligations where the cure can be effected without such delay as would amount to a fundamental breach and without causing the buyer unreasonable inconvenience or unreasonable expense. This issue was discussed in the context of a defect in the goods which, in the absence of repair, was so serious as to constitute a fundamental breach but where the delay in remedying that defect would not constitute a fundamental breach and would not even cause the buyer unreasonable inconvenience or unreasonable expense. Different views were rendered by the members of the Committee. However, there was considerable opposition in the Committee to the idea that the buyer’s right to declare the contract avoided could be affected by an offer to cure the defect after the time for performance. The seller was in breach and a possibility to cure was a privilege which depended upon the consent of the buyer who had the right to declare the contract avoided. There was, on the other hand, substantial support for the proposition that the buyer’s right to declare a reduction
Vienna Conference. Three alternative proposals were considered by State delegations and the Conference finally adopted the second alternative as Art. 48(1) which opens with the words “Subject to Art. 49, the seller may ... remedy ....” It is said that the legislation in the price was subject to the seller’s right to cure, provided that the seller bore all expenses of such cure. As a result, the Committee accepted the majority’s view and reworded para. (1) of the Draft Art. 30, which was renumbered as Art. 44(1) of the Draft Convention 1978, as follows: “[U]nless the buyer has declared the contract avoided in accordance with Art. 31, the seller may ... remedy ....” The Secretariat Commentary on Art. 44 of the 1978 Draft in line with this general understanding notes that “the seller would have the right to remedy the non-conformity in the goods by repairing or replacing them, unless the buyer terminated the seller’s right by declaring the contract avoided.” (Infra. note 29.)

270 Supra. note 12. Para. (1) of the 1978 Draft was modified at the 1980 Vienna Diplomatic Conference. With respect to paragraph (1), one of the two changes is: The substitution of “Subject to article 49” for “Unless the buyer has declared the contract avoided in accordance with article 45 [1978 Draft counterpart to CISG article 49].” In this respect, three alternatives were proposed: Alternative I: Delete the words “Unless the buyer has declared the contract avoided in accordance with [CISG article 49].” Alternative II: Delete these words and substitute the words “Subject to [CISG article 49].” Alternative III: Qualify seller’s right to avoid by adding to [CISG article 49(1)(a)] the words “... and the seller does not remedy the failure in accordance with [CISG article 48]” (said to be a clarification of alternative I and that, in fact, the two constitute a single proposal). Alternatives I and III were rejected. Alternative II was accepted with minimal discussion (O. R. p. 352).

Conference comments on alternatives I and III included the following: “Mr. KLINGSPORN (Federal Republic of Germany) said that ... his delegation had submitted [a proposal identical to alternative I]. The existing text created a situation which was neither satisfactory nor logical. If for example, the seller delivered a machine on the date fixed and the machine, once it was installed, failed to work in a satisfactory manner, that should not be regarded as a fundamental breach of contract and the buyer should not be able to declare the contract avoided if the seller was prepared to remedy the fault within a reasonable time. The seller’s right to remedy his failure to perform should prevail over the buyer’s rights. The situation should also be clarified in respect of [CISG article 49]” (O. R., p. 341) “Mr. FELTHAM (United Kingdom) said that he shared the view of those who felt unable to accept the amendment proposed by ... the Federal Republic of Germany. In support of its amendment, the latter
tive history of the provision clearly shows that the majority of delegations at the Conference were opposed to the approach which sought to give absolute priority to the seller’s right to cure over the buyer’s right to avoid the contract under Art. 49(1)(a). The opening words of Art. 48 were adopted upon this general understanding.271 Accordingly, where the fundamental breach test is satisfied, the buyer would be entitled to terminate the contract. The buyer is not required to accept the seller’s offer to cure and give him an opportunity to cure the defect under Art. 48. This is because the language of para. (1) of Art. 48 subjects the exercise of the right of cure to the buyer’s right to avoid the contract under Art. 49. In addition, there is no provision under the Convention to require the buyer to give the seller in breach an opportunity to cure before exercising his right of avoidance. Moreover, para. (2) of Art. 48 implicitly permits the buyer to reject the seller’s request to remedy the defect within a reasonable time. Under this provision, the buyer is deprived of the right to resort to remedies which are inconsistent with the seller’s performance only when he accepts the seller’s request or remains silent. There is no express provision in the Convention to deprive the buyer of his right of avoidance in accordance with Art. 49(1)(a)

for the seller’s mere offer to cure his default after the contract date. The only thing provided by the Convention is the last phrase of Art. 50 under which the buyer who rejects the seller’s offer to cure under Art. 48 is deprived of his right to claim price reduction. 272

Although it is said that the “subject to” reference in Art. 48(1) to Art. 49 is less than clear, Lookofsky believes where time is not of the essence, the seller should have the chance to cure even a seriously non-conforming delivery; in this situation, most commentators therefore agree that the seller’s right to cure is not defeatable by a buyer’s exercise of his right to avoid for a fundamental breach. 273 For example, Jafarzadeh confirms this view as follows: “Under Art. 48(1) the seller is empowered to cure at his own expense ‘any failure to perform his obligations’. Therefore, this is a general provision, which covers fundamental and non-fundamental breaches. On the other hand, by virtue of Art. 49(1) the buyer is given an option to avoid the contract where the seller’s failure amounts to a fundamental breach, whether the seller offers to cure or not. On this interpretation, giving priority to the buyer’s right to avoid does not make the seller’s right to cure futile, since the seller can exercise his right under Art. 48(1) where his breach does not amount to fundamental breach for the purpose of precluding the buyer from exercising his right to reduce the price under Art. 50. The buyer would be able to exercise his right under Art. 49(1) where the seller does not show his ability and willingness to cure the breach, since the buyer should not be deprived of his right for the mere possibility of curing the breach by the seller. This is because the buyer, as indicated before, is not under any duty under the Convention to discover the possibility of cure by the seller and to give him an opportunity to cure.” 274

Therefore, with regard to the availability of the right to terminate the contract on the one hand, and the liberty to cure on the other, it may furthermore be added that the balancing of interests according to the Convention also leads to economically sensible results. Nonetheless, the right of the buyer to avoid the contract according to Art. 49 has priority under the CISG. Therefore, the seller has no right to remedy his failure to perform if the buyer avoids the contract. On the other hand, the seller may remedy his failure to perform as long as the buyer did not declare the contract avoided. 275 However, if priority were decisive, one would provoke a competition between buyer and seller and produce purely arbitrary results. Ignoring that such competition in exercising a remedy should not be a consideration under law, it would also leave the seller in limbo as long as he does not know of the defect. 276 On the other hand, an aggrieved party must act reasonably to mitigate damages. The injured party’s duty to minimize loss may require it to accept new offers from the breaching party, possibly even after a “fundamental” breach. 277 Therefore, it may come into one’s concern that the “subject to” reference in Art. 48(1) to Art. 49 may encumber the seller invoking his right to cure if the buyer hastily declared the contract avoided before the seller has an opportunity to cure the

272 Ibid.
5.4 EFFECTS OF EFFECTIVE NOTICE

5.4.1 Right to Inquire vs. Duty to Accept Cure

As discussed above, the right to cure under CISG Art. 48(1) theoretically could be cancelled by the buyer’s avoidance of the contract. The language of Arts. 48(1), 49(2)(b)(iii) and 50 as well as the legislative history of the provision demonstrates that, even in such a situation where the buyer has not declared the contract terminated and the seller, after becoming aware of the defect, informs the buyer of his readiness to cure, the buyer is entitled to disregard the seller’s offer to cure and terminate the contract on account of the seller’s fundamental breach. Thus, under the CISG when the buyer has the right to avoid a contract but does not exercise it, the seller is left with uncertainty.

Therefore, Art. 48(2) provides that: “If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request”. Thus the seller intending to cure may end the uncertainty by sending a request (which is effective upon receipt) to the buyer to ask for clarification as to whether the buyer will accept the cure. Furthermore, Art. 48(3) CISG stipulates: “A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.” Thus, the assumed interest of the seller also serves to retain the contract. The buyer has to respond to the communication of the seller, even if no request in accordance with Art. 48(2) was added to it. If the buyer does not answer within a reason-
able time, the seller has the right to perform and the buyer has an obligation to accept performance within the time indicated in the seller's request.\footnote{Supra. note 3.}

By contrast, the \textit{UNIDROIT Principles} doesn't require the non-performing party to inquire the aggrieved party whether the latter will accept the cure. \textit{Insofar as} the non-performing party has the \textit{right to cure} there should be no need to request information as to whether the aggrieved party will accept performance. The \textit{aggrieved party} is in that case \textit{obliged to accept the cure}. This is especially confirmed by the fact that the non-performing party's right to cure is not precluded by notice of termination under the \textit{UNIDROIT Principles}. Under the \textit{UNIDROIT Principles}, the decision to invoke Art. 7.1.4 rests on the non-performing party. Once the aggrieved party receives effective notice of cure, it must permit cure and, as provided in Art. 5.3, cooperate with the non-performing party. For example, the aggrieved party must permit any inspection that is reasonably necessary for the non-performing party to effect cure. If the aggrieved party refuses to permit cure when required to do so, any notice of termination is ineffective. Moreover, the aggrieved party may not seek remedies for any non-performance that could have been cured.\footnote{See Comment 10 on Art. 7.1.4 UPICC.}

\subsection*{5.4.2 Suspension of Inconsistent Remedies}

The second sentence of Art. 48(2) \textit{CISG} requires: \textit{“The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.”} Similarly, Art. 7.1.4(3) \textit{UPICC} stipulates: \textit{“Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party’s performance are suspended until the time for cure has expired.”}

Thus, when a notice of cure (or request as to whether the buyer will accept the cure) from the non-performing party has been given and gets effective upon its reaching the other party (if he is a party to a \textit{CISG} contract, only if he has not declared avoidance or remains silent on the former’s request), the aggrieved party may not exercise any remedies inconsistent with the non-performing party’s right to cure during the period indicated in the request or notice until it becomes clear that a timely and proper cure has not been or will not be effected. Inconsistent remedies include giving notice of termination, entering into replacement transactions and seeking damages or restitution.\footnote{See Comment 7 on Art. 7.1.4 \textit{UPICC}.}

In this way the aggrieved party is, at least temporarily, \textit{deprived of his right to invoke certain remedies such as termination}. He cannot declare the contract avoided during the period of time offered by the non-performing party. This rule clearly shows the underlying idea of the right of the non-performing party, i.e. to keep to the contract, if possible and thus balance interests of both parties and avoid unnecessary waste.

\subsection*{5.4.3 Retained Rights of the Aggrieved Party}

The second sentence of Art. 48(1) \textit{CISG} stipulates that \textit{“the buyer retains any right to claim damages as provided for in this Convention”}. Thus, the right to claim damages, e.g. as a result of delay, does not lapse on the ground that the seller has performed in the end. But the \textit{curing of a failure} to perform may have an \textit{influence on the amount of the damage claimed}. Also in the case of a cure, damage may be claimed to compensate for a possible stoppage in production.\footnote{Supra. note 38.}
Similarly, Art. 7.1.4(5) UPICC reads: "Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure." Under this provision, even a non-performing party who successfully cures is liable for any harm that, before cure, was occasioned by the non-performance, as well as for any additional harm caused by the cure itself or by the delay or for any harm which the cure does not prevent.

Finally, in accordance with Art. 7.1.4(4) UPICC, the aggrieved party may "withhold performance pending cure". Although the CISG is silent on this issue, it is logically inferred that the buyer may withhold his own performance during the time for the seller’s cure.

286 See Comment 9 on Art. 7.1.4 UPICC.
CHAPTER 6. PRICE REDUCTION FOR NON-CONFORMITY

A remedy allowing the buyer to pay a reduced price for defective goods delivered by the seller has been recognised since Roman times, under the Roman law remedy of actio quanti minoris. As originally framed, where there was a latent or hidden defect in the goods purchased which reduced their value, the buyer could sustain an action against the seller to reduce the purchase price payable. The purpose of the remedy is to allow the buyer to keep defective goods and pay the price it otherwise would have paid had it been aware of the hidden defects in the goods. The goal of this formula is to enable the buyer to preserve the bargain.

6.1 GENERAL CONSIDERATIONS

Where the goods do not conform to the contract, Art. 50 CISG, like ULIS Art. 46, grants the buyer the right to reduce the price. Art. 50 reads: “If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.”

The remedy of price reduction reflects the CISG’s focus on preserving the contract even though a breach may have occurred. In nature, price reduction is a remedy. The drafters of the CISG have consistently referred to price reduction as a remedy. The organization of the CISG also supports characterizing price reduction as a buyer’s remedy, since it is found in the section entitled “Obligations of the Seller,” which spans from CISG Arts. 45 to 52. While ambivalence surrounds the debate over whether to classify price reduction as a claim or defense, the prevailing view among most scholars that price reduction is a remedy provides a solid starting point. However, price reduction under CISG Art. 50 is by no means an easy concept to master. To date, for instance, English-language commentaries on Art. 50 have focused on the provision’s Civil Law origins; methods for calculating the amount of the price reduction; the distinction between damages governed by CISG Art.s 74-77 and proportional price reduction under Art. 50; and the tendency of common law lawyers to misperceive the price reduction remedy as a mere setoff provision. One of the more striking observations on Art. 50, made by several commentators, is that in some circumstances the provision yields results inconsistent with a fundamental principle of common law remedies: protection of the expectation interest.

This chapter strives to advance the uniform application of the CISG by engaging in a thorough analysis of CISG Art. 50 and the problems that have arisen with respect to interpreting and applying price reduction. Clearly, both civil and common legal communities can


benefit from a detailed exploration of the CISG remedy of price reduction. Also, this Chapter explores the manner in which the PECL counterpart, i.e. Art. 9:401 (Right to Reduce Price), could be used to help interpret CISG Art. 50. However, before taking such a detailed exploration, a full understanding of Art. 50 CISG requires a brief review of its background and ratio legis. It is said the remedy of price reduction is a traditional civil law remedy, which has been recognised since Roman times under the remedy of actio quanti minoris in Roman law. 291

Briefly, the actio quanti minoris is an action for the reduction of the price in a sales transaction. In Roman Law, and in countries following the Roman Law tradition, it is also known as the actio aestimatoria (estimatory action): “The actio quanti minoris can be found in Roman Law through the Justinianean Compilations. It arose out of the edicts of the ædiles curules, a type of judge with jurisdiction over certain commercial matters; hence it is an actio ædilitia.” 292 As reviewed by Bergsten and Miller: “The remedy of reduction of price for the purchaser of defective goods derives from the actio quanti minoris in Roman Law. At the risk of considerable oversimplification, this action originated from an Edict of the Aediles which sought to ‘repress the sharp practices of sellers of slaves and cattle in the City markets.’ If a buyer became aware, after delivery, of certain specified defects which the vendor did not declare and which, had the buyer been aware of them at the time of sale would have led him to pay a lesser price, he could bring an action for reduction of price or for rescission of contract. Defects which were evident at the time of conclusion of the contract were excluded from this remedy since the buyer should have taken them into account when calculating the price he was willing to pay.” 293

The Roman law origins of the remedy, which provides monetary relief to buyers who have received non-conforming goods, has since been carried forward into several of the main civil law codes. 294 Under these codes, the remedy is particularly useful, since, an advantage of price reduction as opposed to contractual damages is that the buyer can obtain the remedy without having to prove that the seller is at fault. 295 By contrast, while the CISG incorporates many elements of the traditional Roman law remedy, the CISG Art. 50 price reduction does vary significantly from civil forms of price reduction. Therefore, we will focus first on the features of CISG Art. 50.

6.2 FEATURES OF CISG ART. 50

6.2.1 Unique Role and Justification

While CISG Art. 50 and other civil law versions of price reduction both originate from actio quanti minoris, it is important to be cognizant of the distinctions embodied in the CISG remedy of price reduction.


292 Supra. note 2.


294 See e.g., Swedish Sales Act §§ 42, 43; Art. 1644 of the French Civil Code; German Civil Code (BGB) §§ 459, 462, 472; See also Austrian ABGB § 932(1); Danish Sale of Goods Act § 842-43; Finnish and Swedish Sale of Goods Acts §§ 37-38; Greek CC Arts. 534, 535, 540; Italian CC Art. 1492(1); Portuguese CC Arts. 911, 913; Dutch BW Arts. 6:265, 6:270, etc.

Despite the background of Art. 50 of the CISG, the price-reduction remedy does not play the same role within the context of the Convention as in some civil law system: “It has been pointed out that in the Civil law, rescission and reduction of price are the normal remedies for a buyer who has been delivered non-conforming goods, and damages are, in principle, the exception. In large measure this is because damages can be recovered in the Civil law only if the non-performing party was at fault. Contractual fault can, of course, be understood in ways that lead to a blurring of the distinction between fault and no-fault liability. However, to the extent that contractual fault requires more than the mere showing that the goods delivered were non-conforming, reduction of price provides a remedy by way of monetary relief even though damages are not available for that non-conformity.” However, “[t]he damages provisions of the United Nations Convention on the International Sale of Goods undermine the need of the reduction of the price remedy contained in its article 50 because, unlike the Civil Law system, the CISG, following the Common Law approach, does not require fault of the seller in order to make him liable for damages.”

Thus, it may be inferred that reduction of price does not have the same justification in the Convention as it does in some Civil law systems. Under the CISG, the justification for a reduction of price for non-conforming performance is a reformation of the original contract which retains the relative balance of the bargain made by the parties: “If the buyer made a bad bargain, in that he contracted to pay more than the value of the goods or the price went down between the conclusion of the contract and the delivery date the buyer has just as bad a bargain in percentage terms after the price has been reduced. If the buyer made a good bargain, after reduction of the price he has just as good a bargain in percentage terms as at the time of the original contract. Where the buyer made a good bargain and therefore would recover more in damages than by reducing the price, the Civil law allows him to claim the higher amount of damages, thereby breaking the original balance of bargain, only if he can show that the seller was at fault. However, since the buyer does not need to show any fault on the part of the seller in order to claim damages under the [...] Convention, reduction of price loses one of its primary theoretical justifications and becomes an alternative form of monetary relief to the buyer.”

Consequently, the buyer loses the advantages of a profitable purchase if, between the conclusion of the contract and the date of delivery, the price of the delivered but non-conforming goods increases more than the price of conforming goods. And as to be demonstrated infra. 6.3.3, the remedy of price reduction under the CISG thus becomes an alternative form of monetary relief at the option of the buyer.

6.2.2 Self-help Remedy

Perhaps, the most straightforward feature of Art. 50 is the manner in which it operates: “While civilian legal systems require expert advice or the court to determine the difference in value between the contract price and the actual value, the CISG gives this power of determination solely to the buyer. On this basis, price reduction can be seen as a self-help remedy that can be implemented by the buyer without any requirement to have the determination upheld by

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296 See Bergsten and Mille, supra. note 7.
297 Supra. note 2.
298 See Bergsten and Mille, supra. note 7.
299 See Peter Schlechtriem, Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods, Manz, Vienna (1986): p. 79. Available online at «http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-50.html» The Norwegian proposal (A/Conf. 97/C.1/L.167 (= O.R. 118)) to calculate the reduction with reference to the (lower) value of the goods at the time delivery was favorably received. Art. 50 thus differs both from the German Civil Code and from ULIS Art. 46.
a court, expert or other tribunal.\textsuperscript{300}

Unlike a buyer’s damage claim or his right to specific performance, which each relies on the seller or the tribunal’s decision, a price reduction claim under Art. 50, which is drafted from the perspective of the buyer, gives the buyer the ability to unilaterally declare a price reduction, even before it has paid. Thus, it is the buyer that has the option and the power to reduce the price paid to the seller. Even the only other remedy under the Convention which is effected by the unilateral act of a party, i.e. declaration of avoidance of contract, is required to be made by notice to the other party, no such requirement is placed on the declaration of reduction of price. Presumably it must be done by means appropriate in the circumstances, but it may well be that one such means would be the statement of claim or defense in a lawsuit. Furthermore, unlike the buyer’s other remedies of Art. 46 specific performance and Art. 49 avoidance, Art. 50 may not be subject to a “reasonable time” requirement.

In practice, however, this difference is largely illusory. Any price reduction by the buyer must certainly be reasonable, otherwise it would be disputed by the seller and subject to review by a court. During these proceedings, expert evidence would in all likelihood be adduced as to the value of the goods. Additionally, the burden of proof on the value of the goods (both the value of delivered goods and conforming goods) is squarely on the buyer. The self-help view of the remedy is further reduced where the buyer has already paid the purchase price. Art. 50 applies “whether or not the price has already been paid.” If the buyer chooses to reduce the price before it has paid, it can merely deduct the difference in value from what it pays to the seller. Where the price has already been paid, the buyer must seek a refund from the seller for a portion of the purchase price. Most parties would prefer to be the defendant in any action rather than the plaintiff, and this situation illustrates this principle if the seller refuses to cooperate with the price reduction, the buyer will be required to commence legal proceedings to recover the price difference. This is a much more onerous remedy than the buyer unilaterally determining a price reduction and deducting it from the price it pays to the seller.\textsuperscript{301}

Therefore, as stated by Williams: “Price reduction is said to be advantageous because it is a self help remedy. This supposed advantage is, however, unlikely to be of much use in the majority of international sales since, in most cases, the price will have already been paid. Thus, the Buyer would have to go to court to reclaim part of the price.”\textsuperscript{302} From the point of view of the final adjustment of the financial obligations of the parties, it is of no consequence that the price is reduced by the buyer’s unilateral declaration. “On the other hand, some consequences may attach to the fact that the price is reduced by the unilateral act of the buyer. A declaration would probably constitute a binding election of remedies. It may affect the running of a period of limitation and it may have procedural consequences under the law of the forum. None of these matters, however, is governed by the [...] Convention itself.”\textsuperscript{303}

Interestingly, it was found that in practice Art. 50 was not used “offensively” by the buyer. Instead, it found use predominantly as a

\textsuperscript{300} Supra. note 1.

\textsuperscript{301} Ibid.

\textsuperscript{302} See Alison E. Williams in “Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom”: Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001); pp. 9-57. Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/williams.html} The same result would occur if the buyer were to make a claim for damages or specific performance. In either case, if the seller disagrees with the buyer as to the existence of a non-conformity in the goods – or other failure of performance – or as to the monetary consequences of that non-conformity, the issue must ultimately be settled in court.

\textsuperscript{303} See Bergsten and Mille, supra. note 7.
counterclaim or a defence to an action by the seller for the purchase price. Such a result is in some respects not surprising. Where there is no dispute between the parties as to the amount of the reduction, the matter would not come to court and the remedy would act in its intended manner: as a self-help remedy of the buyer. This way the remedy avoids the costs and uncertainty of litigation. Where there is a dispute over the price to be paid, then the matter could proceed to litigation. Once the matter proceeds to litigation, the buyer who has already paid the purchase price would in most cases seek the full level of damages for the breach rather than merely reducing the price. Price reduction would usually only come to light where the seller is making a claim against the buyer for the purchase price and the buyer is seeking to reduce or eliminate the obligation to pay the price. Nevertheless, as to be demonstrated infra. 6.3.3, CISG Art. 50 retains certain important uses for commerce.

6.2.3 Seeming Advantages

It is said that an Art. 50 price reduction seems advantageous for the buyer especially as opposed to damages because it is not subject to the same limitations as damages. First of all, while a seller may escape liability from having to pay damages if he can successfully assert a foreseeability or force majeure defense, these exemptions are specifically not applicable to Art. 50. However, on the one hand, “[i]t may be doubted whether it is of great significance that the remedy of reduction of price is not subject to the test of foreseeability. It would always appear to be foreseeable that non-conformity in respect of quantity or quality would lead to a reduction in value of the goods, although the amount of that reduction might not be foreseeable. This assumption is so strong that under the UCC the requirement that the loss be foreseeable explicitly applies only to the buyer’s consequential damages, but not to his direct or incidental damages.” Nevertheless, on the other hand, as to be demonstrated, the fact that “exemption” from damages in case of force majeure under Art. 79 is not applicable to reduction of price has real consequences in the overall remedy scheme of the Convention.

Also, it is said that Art. 50 may even provide further insulation to a buyer if the view is accepted that Art. 50 is not subject to Art. 77, which imposes a duty on the buyer to mitigate her losses. However, even the mitigation principle does not apply to reduction of price, the same result is achieved by Art. 50 itself. According to the second sentence of Art. 50, even if the buyer has already declared the price reduced, if the seller remedies any failure to perform his obligations in accordance with Art. 37 or Art. 48, e.g., by sending the missing goods, by repairing the defect or by sending replacement goods, or if the buyer refuses to accept performance by the seller in accordance with those articles, his declaration of reduction of price will be of no effect.

6.3 IN CONTRAST WITH DAMAGES

6.3.1 Introduction

As stated above, some seeming advantages of the right to reduce price become apparent when contrasted with the right to damages. However, at several stages of the drafting history of the provision, Common law participants saw the provision as a type of set-off whereby the buyer was authorized to deduct damages from the price. It became clear in the discussions that many representatives believed that price reduction constitutes a kind of damages. As stated above, Art. 50 represents one of several CISG provisions with a civil law background. Whereas the civil codes of, for

304 Supra. note 1.

305 See Bergsten and Mille, supra. note 7.
example, France and Germany contain codified versions of the actio quanti minoris of Roman law, the right to reduce the price of defective goods is unknown in common law countries. As a result, during the deliberations of the Draft Convention some common law participants appear to have confused this remedy with the right to deduct damages from the price under, for example, section 2-717 UCC. 306

Practically speaking, it is easy to confuse the remedies of reduction of price and of damages because they overlap to a great extent. On the one hand, the remedy of reduction of price is similar to the remedy of damages in that both grant relief to the buyer measured in money. On the other hand, they overlap to a greater extent under the Convention than they do in the Civil law because the Convention accepts the Common law rule that damages are available for any defective performance even if the non-performing party was not at fault. Nevertheless, reduction of the price is a remedy separate from that of damages and should not be confused with the right to set-off. For example, not only does set-off differ from a price reduction with respect to its capability of being asserted unilaterally, but a set-off also requires the parties to have reciprocal debts. This difference will be clarified in more details below.

6.3.2 Distinctions from Damages under the CISG

6.3.2.1 Diverse ratio legis

Generally, the ratio legis of damages is to place the injured party in the same economic position he would have been in if the other party had fulfilled his obligations. “Instead, Article 50 of the CISG has the same ratio legis as the provisions of [...] paragraphs 462 and 472 of the Bürgerliches Gesetzbuch (BGB). The buyer is given the opportunity to retain non-conforming goods and bring the contract in line with the changed circumstances through proportionate reduction of the purchase price.” 307

Assuming that the contract price is equal to the value of the goods at the time of conclusion of the contract and there is no price change between that time and the time of delivery, there would be no difference in the amount of monetary relief to the buyer whether he reduced the price or claimed damages. However, if there has been a change in the price of the goods, the amount of monetary relief would be different. As stated by Sondahl: “Article 50 is especially unique since it is not designed to protect a buyer’s expectation, reliance, or restitution interests, and it may at times violate expectation principles. While Article 74 damages put the buyer in the position she would have been in had the seller properly performed the contract, Article 50 departs from the expectation damage calculation method. Amount of the price reduction under Article 50 is based on a principle unknown to the common law. Unlike expectation damages, which are designed to preserve the benefit of the bargain for the aggrieved party, price reduction attempts to preserve the proportion of the bargain. Assuming that the buyer would have made the same relative bargain, Article 50 treats the buyer as though she has purchased the non-conforming goods that were actually delivered. Price reduction is not as concerned with the actual economic efficiency of the promise as the damages remedy.” 308


307 Ibid.

Alternatively one could view the Art. 50 remedy as a modification of the sales contract. From this perspective a seller could be seen as offering such a modification by shipping non-conforming goods. The buyer accepts the offer by keeping the goods at an implied price proportional to the original contract price. In other words, the principle underlying price reduction is that the buyer may keep non-conforming goods delivered by the seller in which case the contract is adjusted to the new situation. Price reduction should therefore be regarded as an adaptation of the contract not as an award of damages.

### 6.3.2.2 Different manner in calculation

The aforementioned diverse ratio legis indicates that, unlike damages-based remedies, the principle of the price reduction remedy is not dependent on actual loss being suffered by the buyer, but is solely dependent on the abstract relationship between the actual value of the goods delivered and the hypothetical value of conforming goods. To phrase the matter in a fashion that echoes the traditional description of common law remedy principles, one could say that Art. 50 puts an aggrieved buyer in the position she would have been in had she purchased the goods actually delivered rather than the ones promised – assuming she would have made the same relative bargain for the delivered goods.

It follows that the two remedies differ in that the right for a buyer to reduce the price payable is generally not calculated in the same manner as contractual damages and is different from a right to set-off which is also tied into damages. Arguably, this point is the most important distinction between the two remedies. In other words, the decisive point in distinguishing the two remedies is that the date at which the buyer’s monetary relief is calculated and the means by which it is calculated are different. In comparing this point, we are referring only to the direct damages which the buyer could recover for delivery of non-conforming goods. In this context, the differences in calculating the monetary compensation under the two remedies can be summarized as follows: damages are measured as of the time of delivery; reduction of price is measured as of the time of conclusion of the contract. Damages are calculated as the absolute sum of money necessary to reimburse the loss suffered by the buyer; reduction of price is calculated in terms of an amount proportional to the difference in value of the goods as contracted and the goods delivered.

### 6.3.2.3 Other differences

Although the most obvious difference between damages and reduction of price is that the amount of them is measured in a different manner, there are a number of other differences between the two remedies.

For instance, as shown above, one difference (more formalistic than substantive) is that, under the Convention, the remedy of price

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309 Supra. note 4. The “modification” view, however, should be handled with care. There are important differences between the fictitious modification permitted by Art. 50 and an actual modification. For one thing, a buyer who accepts non-conforming goods and reduces the price under Art. 50 is entitled to recover damages beyond the amount of the price reduction – although this could be rationalized as part of the implied price term of the modification. Additionally, the seller might be bound to a price reduction under Art. 50 even if she made it clear that she did not intend to be so bound. Thus suppose a seller shipped non-conforming goods accompanied by notice that, if the buyer was unwilling to pay full price despite the nonconformity, the goods should be returned to the seller. It is not clear whether this expedient would prevent the buyer from keeping the goods and reducing the price under Art. 50.

311 Supra. note 4.

312 See Bergsten and Mille, supra. note 7.
reduction is effectuated by the unilateral declaration of the buyer. No further action by the seller, such as acquiescing to the reduction of price, or by a tribunal in confirming the reduction, is necessary. This can be compared with the remedy of damages in which the buyer may “claim” the damages from the seller but his claim is not liquidated until the seller or a tribunal has agreed to it. Another difference is that even if the seller is excused from paying damages for his failure to perform the contract by virtue of Art. 79, the buyer may still reduce the price if the goods do not conform with the contract. Third, the right to reduce the price is not affected by the limitation to which a claim for damages is subjected under Art. 74, i.e. that the amount of damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contracts a possible consequence of the breach of the contract.

Finally, in illustrating the differences between damages and reduction of price it is helpful to compare reduction of the price with the effect of a partial or complete avoidance of the contract. Art. 51 CISG provides that if the seller delivers only part of the goods or if only part of the goods is in conformity with the contract, all of the remedies of the buyer, including the right to declare the contract avoided, apply to the part which is missing or which does not conform.313 As a result, in case of partial non-delivery of the goods, reduction of price under Art. 46 and partial avoidance of contract under Art. 47 would lead to the same measure of monetary relief for the buyer. This is confirmed by the Secretariat Commentary on Art. 46 of the 1978 Draft [draft counterpart of CISG article 50]: 314 “The remedy of reduction of the price also leads to results which are similar to those which would result from a partial avoidance of the contract under article 47 [draft counterpart of CISG article 51].”315 The most important difference between Arts. 50 and 51 in this regard is that if the contract has been partially avoided under Art. 51, the seller loses his right to remedy the non-conformity whereas reduction of price under Art. 50 does not terminate the seller’s right to remedy the non-conformity.
6.3.2.4 A summary

In sum, reduction of the price is a remedy separate from that of damages and in fact has becomes an alternative to damages for the buyer. The Secretariat Commentary makes it clear: “The remedy of reduction of the price is a remedy which is not known in some legal systems. In those legal systems it would be natural to see this remedy as a form of damages for non-performance of the contract. However, although the two remedies lead to the same result in some situations, they are two distinct remedies to be used at the buyer’s choice.”\(^{316}\)

Nonetheless, it is also important to realize that assertion of a price reduction will not bar a buyer from also seeking damages, if the declare that portion of the contract avoided. Similarly, if the non-conformity as to quality existed in all the goods and reduced their value by 10%, the buyer could reduce the price by that amount.\(^{314}\) 1978 Draft Art. 46 reads: “If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer’s declaration of reduction of the price is of no effect.” Its match-up with CISG Art. 50 indicates that although the basic concept of price reduction remains unchanged, CISG Art. 50 differs from 1978 Draft article 48 in several respects: First, the method of computing the price reduction is different; Second, CISG Art. 50 contains a new reference: CISG Art. 50 is made inapplicable if the seller remedies any failure to perform his obligations in accordance with CISG Art. 37; Also, a new article has been added to the Official Text, CISG Art. 44, which should be read in conjunction with CISG Art. 50. Thus, the Secretariat Commentary on 1978 Draft Art. 46 is only of limited relevance to CISG Art. 50. (See the match-up, available online at [http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-50.html](http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-50.html))\(^{315}\) See Secretariat Commentary on 1978 Draft Art. 46, Comment 4. Available online at [http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-50.html](http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-50.html)

6.3.3 An Alternative to Damages

6.3.3.1 Introduction

As stated above, the importance of the price-reduction remedy in international sales law is somewhat limited because, by virtue of CISG Art. 45, damages are, in principle, readily available for the buyers in every breach of contract on a no-fault basis. On top of that, under the CISG the remedy of damages often serves the buyer better since the amount recoverable under Arts. 45 and 74 is usually higher than the sum by which the price can be reduced according to Art. 50. Clearly, in the majority of situations it will still

seller is liable for his fault. Under Art. 45(2) CISG, exercise of the right to reduce the price does not preclude the buyer from claiming any further damages he has suffered which would not be compensated by a reduction of price, such as extra expenses in preparing for the goods or losses caused by spoilage of other goods caused by delivery of the non-conforming goods. Thus, the buyer “may seek to combine a reduction in price under Article 50 with an action for damages.”\(^{317}\) In most circumstances before a court, seeking damages alone would give the buyer the largest recovery, since damages are calculated on the basis of the loss suffered by the buyer. Price reduction alone is calculated without reference to the loss suffered by the buyer, and so therefore would not include common costs incurred by the buyer, such as costs of mitigation, lost profit and so on. On the other hand, a claim in damages would typically include the loss in value suffered by the buyer in receiving non-conforming goods. A buyer would therefore be well advised to either seek damages alone or damages in conjunction with price reduction to maximise its remedy.\(^{318}\)

\(^{314}\) 1978 Draft Art. 46 reads: “If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer’s declaration of reduction of the price is of no effect.”


\(^{316}\) Ibid. Comment 3.

\(^{317}\) Supra. note 3, p. 376.

\(^{318}\) Supra. note 1.
be more beneficial to rely on a claim for damages.

Nonetheless, from this it cannot be inferred that, concerning contracts which are governed by the Convention, the price-reduction remedy is superfluous because under certain circumstances it is advantageous or even necessary to rely on this right instead of damages. In certain circumstances, Art. 50 confers on the buyer a right to reduce the price of non-conforming goods in lieu of claiming damages (assuming there is a right to damages). In fact, the remedy of price reduction is an alternative remedy to the claim for damages, especially in the following circumstances.

6.3.3.2 In conjunction with force majeure

First, the main application of Art. 50 in lieu of damages is in conjunction with Art. 79, which sets forth various measures whereby a party (in this case, the seller) is not liable for a failure to perform if that party can show that the failure was due to an impediment beyond its control (force majeure). In other words, Art. 50 has its principal significance when the buyer accepts defective goods under circumstances provided by Art. 79(1) of the CISG in which the seller is not liable for damages according to Art. 79(5).

Art. 79(5) makes it clear that this exemption only applies to claims for damages and that it does not prevent either party from exercising any other remedy under the Convention. Since the force majeure exemption does not affect the buyer’s rights other than damages, he may reject the goods and declare the contract avoided if the seller’s failure amounts to a fundamental breach in terms of Art. 25 of the CISG. However, in case he has a particular interest in the goods and thus decides to accept them, the buyer cannot claim damages under Art. 45(1)(b) because, according to Art. 79 of the CISG, the seller is free from that liability. Under these circumstances, the buyer can resort to the remedy of price reduction under Art. 50, because Art. 50 is separate from any claim for damages, the buyer can still claim a price reduction for defects under those circumstances.

6.3.3.3 In case of falling market

Secondly, perhaps the more frequently occurring situation is where the market price of the (conforming) goods has changed substantially between the time of contracting and the time of delivery. More directly, in the case of a falling market, where the market price of conforming goods has substantially decreased between the time of contracting and delivery, the buyer is well advised to opt for the reduction of the purchase price instead of damages. This results from the different methods, as shown above of calculating the price reduction and damages respectively. It may be inferred from a hypothetical illustration that whenever the market fails the price-reduction remedy represents an economically sensible alternative to damages.

See Anette Gärtner, supra. note 20, where he illustrates as: The contract price of a quantity of shirts is £100,000; however, the shirts supplied are non-conforming, so their value amounts to £40,000 as opposed to £80,000 for conforming goods; in addition, by the due delivery date, the market price has fallen to £60,000. Under the circumstances of this example, two remedies are available to a buyer who does not intend to declare the contract avoided because he wants to keep the goods. First of all, Art. 45(1)(b) of the CISG entitles the buyer to damages for breach of contract. These will be determined in accordance with Art. 74, under which he may recover “a sum equal to the loss . . . suffered . . . as a consequence of the breach.” Since the ratio legis of this provision is to place the injured party in the same economic position he would have been in if the other party had fulfilled his obligations, in case of defective performance, this sum equals the difference between the value of the supplied goods and the market price. The damages a buyer could claim in the above

Of course, if there were a reduction in market price from the time of contracting, the buyer would most likely reject the goods, since it could obtain conforming replacement goods on the open market at less than the contract price. The application of Art. 50 appears to give the buyer the upper hand, since it can elect to pursue the remedy that offers it the highest return. One must note that Art. 50 is expressly made subject to the seller’s right to cure any defect under Art. 48. This does serve to balance the position between buyer and seller so that the seller does have an opportunity to have some input into the resulting remedy pursued by the buyer. The combination of these two remedies can be viewed in light of the CISG’s purpose to preserve the parties’ bargain wherever possible.

### 6.3.3.4 Upon difficulty in proving damages

Thirdly, price reduction is most advantageous to the buyer when establishing the liability of the seller is difficult. "In some circumstances, the buyer would prefer to rely on the price reduction remedy instead of damages. The most straightforward situation is where the buyer has difficulty in proving its loss, such as where it has purchased the goods for altruistic/non-commercial purposes. If, for example, the buyer has purchased foodstuffs to donate to charity, it has not necessarily suffered any loss from the diminution in value of the non-conforming goods. Without any loss or necessarily the ability to prove any damage, the buyer’s preferred remedy would be a reduction in the price to be paid to the seller."322

Interestingly, an examination of German case law on Art. 50 CISG reveals that, so far, neither Art. 79(1) nor falling markets seem to have induced buyers to resort to this remedy. According to the facts of most cases, the buyers in question decided to reduce the price under circumstances where, theoretically speaking, claiming damages could have brought in greater monetary relief. From this it can be inferred that the price-reduction remedy does not only serve a useful purpose in the above mentioned situations. Instead, it may be presumed that merchants prefer to make use of this self-help remedy because it enables them to immediately restore the parity of performances without having to resort to a court.

### 6.3.3.5 A summary

In sum, the main situation where price reduction remains a suitable alternative is in the situation where the seller can claim exemption from liability under Art. 79, where the buyer no longer has the right to claim damages nevertheless his other remedies, including the right to reduce price under CISG Art. 50, are not affected. The second situation where price reduction may benefit the buyer is where the price of the goods has fallen between the conclusion of the contract and delivery. In this case, the sum calculated under Art. 50 will be higher than the difference in value between the conforming and non-conforming goods at the time of delivery. Finally, where the buyer could have difficulty in calculating his damages, he may find price reduction a more practical and speedy option.

These situations show that Art. 50 is of narrow applicability. In most cases, as mentioned above, damages would be the preferred remedy. The narrow application of Art. 50 does throw some doubt

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322 Ibid.

323 Supra. note 20.
on the necessity for such a provision. Despite these concerns, the worth of a provision should not be determined on the basis of its frequency of use. Apart from its use as a familiar tool to those comfortable with civil law systems, it does protect the buyer from certain inequitable situations that would otherwise not be properly remedied by damages alone.\footnote{324} Indeed, it appears sensible to assume that this advantage is also the reason why many international contracts for the sale of generic goods provide for price-reduction in cases of non-conforming goods. With regard to this particular problem, one can therefore draw the conclusion that, Art. 50 of the CISG reflects commercial practice which indicates that it provides for an economically sensible solution.\footnote{325} Accordingly, a price-reduction remedy, which was obviously modelled upon Art 50 of the CISG, has also been included in Art. 9:401 PECL (infra. 6.5.2).

6.4 ESSENTIALS OF CISG ART. 50

6.4.1 Scope of Application

6.4.1.1 General application in case of non-conformity

According to Art. 50, a reduction in price is available only when “the goods do not conform with the contract”. In other words, the remedy operates only in cases of non-conformity. Generally, the question of whether the goods conform with the contract can be determined in reference to Art. 35, namely: whether the goods are of the quantity, quality and description required by the contract, and if they are contained or packaged in the manner required by the contract; and meet the four specific requirements set out in Art. 35(2)(a) to (d).\footnote{326}

Especially since CISG Art. 35(1) imposes an obligation on the seller to deliver “goods which are of the quantity, quality, and description required by the contract”, it does not seem too far-fetched to allow a reduction of the price for a quantity deficiency. In fact, “[n]o distinction is drawn in Article 50 between different types of non-conformity. The same remedy applies regardless of the reason of non-conformity and there is no difference between the approach to defects of quantity and defects of quality.”\footnote{327} Furthermore, decisions have stated that non-conformities include both quantity and quality,\footnote{328} although it still remains to be seen whether price reduction applies to defects that are solely quantitative. In short, on the basis of Art. 35(1) a failure of quantity constitutes a “non-conformity”, and that reduction of price is therefore available when

\begin{quote}
“(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.”

\footnote{327}Supra. note 1.

\footnote{328}See Oberlandesgericht [Appellate Court] Koblenz, Germany, 31 January 1997, available online at \texttt{http://cisgw3.law.pace.edu/cases/970132g1.html} , where it is stated that lack of conformity includes lack of both quantity and quality.
\end{quote}
the goods are insufficient in either quality or quantity.

**6.4.1.2 Ambiguity over defects in title**

There is some uncertainty arising from the wording of Art. 50, as it is unclear whether it also covers other situations other than non-conformity, such as defects in title to the goods. It appears controversy whether price reduction under Art. 50 should also be applied to cases where goods are not free from rights or claims (including those based on industrial or other intellectual property rights) by third parties.

On the one hand, some suggest that price reduction should not be available in such situations. For example, Bergsten and Miller suggest that “the fact that the goods are subject to a right or claim of a third party, including a right or claim based on industrial or intellectual property, does not make them non-conforming goods as that term is used in the Draft Convention.” Similarly, Pliounis submits: “While by no means clear, it appears that Article 50 does not apply to defects in title. This interpretation is supported by the wording of Article 50 itself, which refers to goods not conforming to the contract. While arguably a defect in title does not ‘conform to the contract’, it is more properly characterised as an obligation of the seller rather than a particular character of the goods under the contract.”

Repeatedly speaking, the drafting history of the Convention is a legitimate and valuable aid in the interpretation of the Convention’s provisions. In this respect, there were proposals during negotiations to broaden the scope of Art. 50 so as to apply it as remedy for defects of title. The proposal was criticized on several grounds, including lack of a formula to reduce the price in this situation, willingness to leave the third-party rights out of the Convention, and fear that other remedies would be displaced. Finally, the Norwegian representative withdrew the proposal after discussion in favour and against, saying that the matter should be left up to the courts.

Thus the dogmatic gap between non-conformity of goods, and third party rights or claims was not closed completely, and the right to reduction of the price was practically restricted to non-conformity. Even the Secretariat Commentary believes: “Goods may conform with the contract even though they are subject to the right or claim of a third party under article 39 or 40 [draft counterpart of CISG article 41 or 42].”

Although no decision was reached as to whether the price may be reduced for defects in title and there are many commentators who preclude the application of Art. 50 in such situation, there are also some commentators that consider that Art. 50 may be applicable to international sales where the goods are subject to third-party rights or claims. It would indeed be justifiable to grant a right to price reduction in the case of third party rights or claims. For example, Schlechtriem submits: “The general similarity of the prejudice caused by these defects with that caused by other defects justifies the availability of price reduction in these cases as well. But the formula for calculating the decrease in value due to such defects surely would have required thorough deliberations for which no time remained at the Conference.” Particularly, it cannot be overlooked that Art. 44 expressly refers to Art. 50: “Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a loss of profit, if he has a

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329 Supra. note 7.
330 Supra. note 1.
reasonable excuse for his failure to give the required notice." In other words, a buyer who failed to give notice of the existence of third party rights or claims, but has a reasonable excuse, may nevertheless claim a price reduction. However, some considers that it is hardly understandable that a buyer should have the right to a reduction of the price only if he fails to give notice, but not if he gives notice in time, some obviously believes that the reference made in Art. 44 to Art. 50 only relates to the case described under Art. 39(1), but not to Art. 43(1).  

Anyway, it remains ambiguous whether price reduction will be applied in case of defects in title. It bears significance to recall that "Quanti Minoris was included in the CISG besides damages because there was a cultural controversy between the world’s main legal traditions about how to remedy a non-conformity; there is not such a controversy about how to remedy third-party claims that disturb possession, the remedy is a claim for damages." The buyer’s ability to claim damages for any loss suffered is by far a better remedy in such circumstances. These ambiguities in scope of Article 50 also highlight the limited application of the price reduction remedy under the CISG. Sondahl seems to bring forward some guidance in submitting that:

“It was suggested that price reduction might be useful in its application toward a partial claim against a third party in order to determine the diminished value of the goods. Seeing no reason why ‘a distinction should be made between remedies for goods that were defective in the physical sense and goods that were defective in other senses’, another delegate voiced his support for the applicability of price reduction to third-party claims (and the inclusion of such claims in the conception of a non-conformity). While a number of other delegates registered support for the amendment allowing for the applicability of price reduction to third-party claims, ultimately the concerns of other representatives led to the withdrawal of this amendment. The withdrawal of the amendment demonstrates the ‘open’ status of this debate. The absence of a clear decision in the text of the Convention demonstrates the decision to apply or not to apply price reduction rests with the courts."  

6.4.2 Exercise of the Right to Price Reduction

Art. 50 of the CISG makes it clear that the buyer “may exercise unilaterally” this right. The language of ULIS that said “the buyer may declare the price to be reduced” was changed to “the buyer may reduce the price”. “During the negotiation of the Convention it was felt that the Article had to be clear on this point. A statement by the UNCITRAL Secretary-General and repeated proposals of the UK to give the buyer a ‘substantive right’ to reduce the price, instead of a declaration of its reduction, eventually succeeded in convincing the drafting committee to clarify the article.”

As stated above, price reduction is a self-help remedy that can be implemented by the buyer unilaterally without any requirement to have the determination upheld by a court, expert or other tribunal. Furthermore, the CISG provides no time limit for the buyer to exercise his right to reduction of the price; provided that notice under Arts. 39 and 43 is given in time this right is subject to the general limitation rules only. Also, there is no need for the seller’s agreement, although it is surely always more appropriate that the parties agree on the amount of the reduction. Compared to cure and

336 Supra. note 2.
337 Supra. note 1.
avoidance, a reduction of the price of goods is the simplest remedy where the least additional expenses occur and should, therefore, be facilitated.\footnote{Supra. note 49.}

In a word, the \textit{price is reduced by a simple declaration of the buyer}, whether or not the price has been paid. A reduction, however, is not merely a facilitated claim for damages as it may sound from some commentators. While he can unilaterally declare a reduction and, provided he has not paid yet, force the seller to file suit if he does not agree. On the other hand, the \textit{declaration by the buyer} is governed by Art. 27, i.e. it is \textit{directly effective}, even if it does not reach the seller; it follows that the buyer, having declared a reduction, no longer has the right to performance by the seller.\footnote{Supra. note 49, p. 197.}

\subsection*{6.4.3 Calculation of Proportional Reduction}

Under \textit{CISG} Art. 50, the amount by which the buyer may reduce the price is a proportional reduction of the price of goods: \textit{in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.}

\subsubsection*{6.4.3.1 Decisive point: time of delivery}

As for the time as to which to establish the value of the goods, what is \textit{decisive is the time of delivery} and not the time of the conclusion of the contract, as laid down in Art. 46 ULIS or in 472(1) BGB, both for the value of the non-conforming goods and for conforming ones. The Convention makes it clear: \textit{at the time of the delivery bears to the value that conforming goods would have had at that time.}

\footnote{Ibid. This approach produced some controversy. In fact, it was disputed to the very last minute. It was argued about both during the meeting in which it was discussed and during the final approval of the article. The controversy continues to exist.}

\footnote{Supra. note 49, p. 198.}

of the contract and Art. 31. 345

6.4.3.2 Place for comparing

The major difficulty surrounding price reduction, presumably, involves the geographical market value that should be considered when determining the value of the goods. Although the CISG clearly specifies that the goods should be valued when they are delivered, no mention is made with respect to what country’s market shall control the valuation of the goods.

As for the place to measure the market value in calculating the reduction, the representatives of Argentina, Portugal and Spain made a joint proposal to include language determining that the prevailing value would be that of the residence of the buyer. The representative of Norway, while expressing his preference to avoid such a complicated question, suggested the place of delivery was a better reference point. Consistently with this opinion, the representative from the Netherlands pointed that a buyer not necessarily would choose its place of residence for delivery and that, also, the matter could be complicated by resale while the goods are still in transit. The joint proposal was defeated. 346 Accordingly, the CISG leaves open where the value of the conforming and/or non-conforming goods will be assessed.

In this respect, Enderlein submits: “The Convention does not stipulate at which place or market the prices have to be compared; however, in view of the close relationship between date and place of delivery, this place should be decisive. It is not excluded, however, that buyers may consider the place of destination.” 347 In another commentary, Enderlein and Maskow review as: “According to the sense and purpose of the price-reduction provision, the decisive place must be the place where the seller has to perform; in the case of sales involving carriage, it should be the place of destination [...]. Will [...] suggests a three-step solution: the place of destination, then the place of delivery, and finally the place of business of either the buyer or the seller, depending on where a market price can best be assessed. v. Hoffmann [...] also would like to take into account the current value in the buyer’s country.” 348

6.4.4 Limited by the Cure

The second sentence of Art. 50 CISG stipulates: “However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.”

It follows that the buyer has no right to reduction if the seller cures the defective goods. Insofar as this is done according to Art. 37, 349 before the time of delivery, this should be quite natural. And if the seller remedies a defect under Art. 48 (see Chapter 5), there will be no need for a price reduction because equivalence will be re-established. What is of significance here is that the right to price reduction will be lost when the buyer refuses to have the defect cured by the seller. The reason for this rule lies, as Honnold believes, in the obligation to mitigate losses. It is of no importance

345 Supra. note 16.
346 Supra. note 2.
347 Supra. note 58.
348 Supra. note 55.
349 Art. 37 CISG reads: “If the seller has delivered goods before the date for delivery, he may, up to that date, 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, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.”
here why the buyer refuses the cure, e.g. because of unreasonable inconvenience. In this case, the buyer might retain the right to claim damages taking account of the probable mitigation of losses under Art. 77. It is to be noted that the reference to Art. 37 in Art. 50 is a new one which was introduced at the Diplomatic Conference. “Mr. KLINSPORN (Federal Republic of Germany) said his delegation believed that the second sentence of [CISG article 50] should refer to [CISG article 37 as well as to CISG article 48]. It seemed to him logical that a provision in regard to a buyer’s declaration of reduction of price should apply not only to the case in which a seller remedied a failure to perform his obligations after the date for delivery [CISG article 48], but also that case in which such a failure was remedied before the date for delivery [CISG article 37].” (O.R. p. 360)

Thus, Art. 50 allows the seller, in the same way as in a damages situation, to cure the delivery. It seems very reasonable that the seller can opt to cure the defect rather than being obligated to receive less money. The courts have been quite clear on the seller’s right to cure and the buyer’s obligation to let the seller cure.

6.5 STATUS OF THE PRICE REDUCTION UNDER UNIDROIT PRINCIPLES / PECL

6.5.1 Exclusion under the UNIDROIT Principles

Interestingly enough, the UNIDROIT Principles contain no equivalent remedy to Art. 50 of the CISG. There is no explanation within the UNIDROIT Principles for the reason for this exclusion, which might be due to the limited role the remedy plays when damages are readily available and not dependent on fault. Another possible explanation for the exclusion of a price reduction remedy in the UNIDROIT Principles is the scope of coverage of those Principles. The actio quanti minoris is one of the earliest consumer protection remedies and exemptions to the caveat emptor principle, originally designed to protect buyers from latent defects in goods (typically slaves). Since the UNIDROIT Principles only cover international commercial contracts, it could be argued that there would be a lesser need for such protection. If this were the sole basis, there would likewise be little reason to include such principles in the CISG.

However, the price reduction remedy has grown beyond its original scope of consumer protection and an examination of the situations where it is useful to the commercial buyer (such as those discussed supra. 6.3.3) indicates that there is a role for the remedy to play in modern commercial law. While there is some potential for overlap with a claim for damages, price reduction is a useful element in the buyer’s arsenal and helps protect the buyer with a remedy that can in principle be exercised by the buyer without having to resort to a court. The uncertainties introduced by Art. 50 are not significant and the provision should bear the potential of future application in private law harmonisations. This tendency is confirmed by the PECL.

6.5.2 Inclusion under the European Principles

Given the importance and familiarity of the remedy to civilian legal systems, in contrast to the UNIDROIT Principles, the unification efforts of the PECL adopts the reduction of price as a remedy under Art. 9:401, which is fairly similar to the CISG Art. 50 in approach, though the language differs.

350 Supra. note 57.
351 Supra. note 2.
352 Supra. note 1.
PECL Art. 9:401 reads under the heading “Right to Reduce Price” as follow: “(1) A party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would had at that time. (2) A party who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the other party. (3) A party who reduces the price cannot also recover damages for reduction in the value of the performance but remains entitled to damages for any further loss it has suffered so far as these are recoverable under Section 5 of this Chapter.”

The Official Comment on the PECL makes clear that this Article generalises the remedy provided by the action quanti minoris. In the conditions laid down in para. (1) the aggrieved party is entitled to a reduction in the contract price where the other party’s performance is incomplete or otherwise fails to conform to the contract. The remedy is given whether the non-conformity relates to quantity, quality, time of delivery or otherwise. The remedy is designed both as an alternative to damages and for cases where the non-performing party is excused from liability for damages. The Article applies only where the aggrieved party accepts the non-conforming tender. If it does not, its remedy is either to pursue a restitutionary claim under PECL Art. 9:307 or to claim damages.\footnote{353See Comment and Notes to the PECL: Art. 9:401. Comment A. Available online at \url{http://www.cisg.law.pace.edu/cisg/text/comparison50.html}}

As with the CISG, para. (1) above adopts the proportionality measure for the price reduction, measured at the time of delivery: “The amount of the price reduction is proportional to the reduction in the value of the promised performance. In some cases the value of the performance will be directly related to the proportion of the contract performed and the contract price may simply be reduced accordingly. In other cases the value of the performance may be reduced by a greater (or less) proportion.”\footnote{354Ibid.}

Likewise, para. (2) is intended to allow a party such as the buyer to recover the amount of the price reduction once it has been paid. This paragraph indicates at the same time a similar approach to the CISG in that it provides no time limit for the entitled party to exercise his right to reduction of the price, whether or not the price has been paid. The Official Comment confirms this: “The aggrieved party may obtain a price reduction under this Article either by withholding payment, if it has not already paid the price, or by recovering the amount of the price reduction if the price has already been paid.”\footnote{355Supra. note 67, Comment D.}

Finally, para. (3) makes it clear that the claimant cannot demand both the price reduction plus damages for the reduction in value. “Where the aggrieved party reduces the price under this Article it cannot also claim damages for reduction in the value of the performance as tendered compared with the value of a conforming tender […]. The two remedies are incompatible so that there is no right to cumulate them under Article 8:102. However, other loss remains recoverable within the limits laid down by Section 5.”\footnote{356Supra. note 67, Note 1.} “It is in the nature of things that a party who reduces the price cannot also claim a sum equal to the reduction in value as damages. However, most laws allow the aggrieved party to recover damages for further loss.”\footnote{357Supra. note 67, Note 1.} While there is no express equivalent to para. (3) in Art. 50 of the CISG, the two provisions would likely have the same effect.\footnote{358Supra. note 1.}
To end, since the price reduction remedy is such a fundamental concept in civilian legal systems, it seems certain that any future efforts on the unification of contract or sale of goods law will contain some form of this remedy. The European context (with its predominance of civil law systems) outside of the PECL gives further support to the *actio quanti minoris* continuing to play a role in future legal developments. In its draft directive on Guarantees for Consumer Goods (COM (1998), p. 217, Art. 3.4), the European Commission has included as one of the remedies a price reduction remedy similar to Art. 50 of the CISG. 359

359Ibid.
PART III. TERMINATION
CHAPTER 7. RIGHT TO TERMINATION

Whether in a case of non-performance by one party the other party should have the right to terminate the contract depends upon the weighing of a number of considerations. On the one hand, performance may be so late or so defective that the aggrieved party cannot use it for its intended purpose, or the behaviour of the non-performing party may in other respects be such that the aggrieved party should be permitted to terminate the contract. On the other hand, termination will often cause serious detriment to the non-performing party whose expenses in preparing and tendering performance may not be recovered.360

7.1 GENERAL CONSIDERATIONS

Generally, the right to termination is said to be the most drastic remedy in case of non-performance, which reflects the gravity of the negative effects of non-performance or performance not complying with the terms of contract. The right to termination functions, however, as a far-reaching sanction for non-performance under many uniform laws. The advantages of early avoidance are clearly justified under the Convention: “Avoidance makes it possible for the aggrieved party to clarify his situation by reselling or repurchasing the goods required by the initial contract. The aggrieved party may not mind in such a detrimental situation, whether the non-performing party changes his mind and fulfils the contract.”361

Furthermore, the right to termination remains unimpaired even in case of impediments where the non-performing party is excused, justified above all when there is a fundamental breach ascribed to that party. It is said that the objective character of breach of contract is not affected by the presence of impediments which exempt the breaching party from only certain legal consequences, leaving others untouched. The reason for it is a breach of contract cannot be eliminated as such by way of exemptions. From this it follows that the term “breach of contract” does not necessarily include an accusation.362 For example, pursuant to Art. 79(5) which reads: “Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention”, the claim to avoid the contract is not eliminated in situations of exemptions, if other provisions of the Convention give rise to it.363 The Official Comment to the UNIDROIT Principles makes it clear, the right to terminate the contract is intended to “apply both to cases where the non-performing party is liable for the non-performance and to those the non-performance is excused so that the aggrieved party can claim neither specific performance nor damages for non-performance.”364 Following a similar approach, the PECL uses the same rules for termination whether or not the non-performance was excused; the aggrieved party may give notice of termination.365

360 See. Comment 2 on Art. 7.3.1 UPICC.
363 This solution resembles the typical legal consequences from changed circumstances (see the discussion in PART V). Exemptions, as can be seen particularly well from the context of impediments, only lead to the removal of certain legal consequences of the breach of contract, while others continue to exist. The aggrieved party, hence the partner of the party who is affected by the changed circumstances, thus has only two options left: either to avoid the contract or to accept in this way or another the wishes of the other party to adjust the contract - or wait for better times. (Supra. note 3.)
364 See Comment 1 on Art. 7.3.1 UPICC.
365 See Comment and Notes to the PECL: Art. 9:301. Note 2. Available online at
Another respect worthy noting is that, under the CISG the buyer is not deprived of the right to avoidance even where the risk of accidental loss or damage to the goods during transport has passed to him in a manner regulated under Arts. 67, 68, and 69. Art. 70 CISG reads in this respect: “If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.” This Article essentially states that the buyer is not deprived of rights because of a fundamental breach of contract where the risk has passed. This relates basically to the avoidance of the contract and the delivery of substitute goods because it (fundamental breach of contract) is a general prerequisite for the exercise of these rights. Hence, where non-conforming goods are delivered and the non-conformity constitutes a fundamental deficiency, the buyer can require the avoidance of the contract or delivery of substitute goods. This is true even where the goods accidentally perish or are damaged after the risk has passed, and also where those events have nothing to do with the deficiency.\(^\text{366}\)

As a rule, termination is effective only if notice thereof is given by the aggrieved party to the defaulting party. There is no automatic termination under the three instruments, except for the provision of PECL Art. 8:106(4) (If a party is excused under Article 8:108 through an impediment which is total and permanent, the contract is terminated automatically and without notice at the time the impediment arises.) or unless it is so stated in the Nachfrist notice (see Chapter 4). Therefore, the aggrieved party may lose his right to termination if he doesn’t give notice to the other party within a reasonable time. On the other hand, termination may be effected by the act of the aggrieved party alone; it does not have to bring an action in court in order to have the contract terminated.\(^\text{367}\)

By way of contrast with the approach of some civil law jurisdictions, there is no requirement that the party avoiding the contract obtain judicial approval or confirmation.\(^\text{368}\)

Nonetheless, one should note that other remedies protecting the interests of the aggrieved party such as the Nachfrist procedure (Chapter 4), the offer by the breaching party to cure (Chapter 5) or other circumstances may restrict the exercise of the right to termination to certain extent.

### 7.2 GROUNDS FOR TERMINATION

As mentioned above, the right to termination is regarded as the most drastic remedy in case of non-performance, which reflects the gravity of the negative effects of non-performance or performance not complying with the terms of contract. To prevent the abuse of this remedy, the aggrieved party has the right to terminate a contract \textit{only under specific conditions}. If these conditions are given, he can, but does not have to, declare a contract avoided.\(^\text{369}\)

Generally, one party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial:\(^\text{370}\) “Today most legal systems agree in effect on the most important condition for allowing the aggrieved party to terminate the contract: The non-performance complained of must


\(^\text{369}\) Alternatively, the aggrieved party even in such a detrimental situation justifying termination is certainly entitled to exercise other remedies vested in him and claim damages if the compensation for damages provide adequate protection.

\(^\text{370}\) See, e.g. Award ICC No. 2583, Clunet (1976) 950, and note Derains; No. 3540, Clunet (1981) 915; 7 YBCA 124.
be of a serious nature. This criterion is expressed quite differently: English law requires breach of a condition and not of a mere warranty; in France where the contract, unless otherwise provided by the parties, can only be dissolved by judicial decision, the judge will not pronounce the dissolution unless there is a ‘grave reason’; in Germany, a main obligation of the contract, and not merely an incidental one, must be violated. The uniform sales laws express the same idea by distinguishing ‘fundamental’ and other breaches of contract; only the former empower the aggrieved party to terminate the sales contract.”

371 The basic ground for the aggrieved party to terminate the contract is that the non-performance of the other party is fundamental, i.e. material and not merely of minor importance. Under the CISG, according to Art. 49(1)(a)/64(1)(a) the typical situation in which the aggrieved party may declare the contract avoided is where the failure by the other party to perform any of his obligations amounts to a fundamental breach, which is defined in Art. 25 (for more details see Chapter 8). Both the UPICC and the PECL follows the basic idea established under the CISG that only if a party’s failure to perform its obligation amounts to a fundamental non-performance, the other party may terminate the contract. Art. 7.3.1(1) UPICC reads in this respect: “A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.” Art. 9:301(1) PECL reads pertinently: “A party may terminate the contract if the other party’s non-performance is fundamental.”

On the one hand, if there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any opportunity to remedy the breach under Art. 48. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time (see Chapter 5). Nonetheless, the typical practice under CIF and other documentary sales is to be noted, where there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have therefore often been able to refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance. On the other hand, where there is a fundamental breach of contract by the buyer, the seller also need not give the buyer any prior notice of his intention to declare the contract avoided. It may be questioned, however, how often the buyer’s failure to pay the price, take delivery of the goods or perform any of his other obligations under the contract and this Convention would immediately constitute a fundamental breach of contract if they were not performed on the date they were due. It would seem that in most cases the buyer’s failure would amount to a fundamental breach as it is defined in Art. 25 only after the passage of some period of time.

However, a party’s fundamental non-performance is not the only circumstance where termination arises. Besides actual fundamental breach of contract, “anticipatory” fundamental breach constitutes another ground for termination (Chapter 9). The Conven-

372 Supra. note 1.
374 Ibid., Comment 7.
375 See Secretariat Commentary on Art. 60 of the 1978 Draft [draft counterpart of CISG Art. 64], Comment 5. Available online at <http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-64.html>
tion, under Art. 72, provides the aggrieved party with the possibility to avoid the contract if it is clear, prior to the date of performance, that the other party will commit a fundamental breach of contract. The aggrieved party can declare avoidance before the performance is due; however, he should refrain from exercising this right, if the other party gives adequate assurance of his performance. A high degree of certainty about occurrence of the breach and its fundamental character is required.\footnote{Supra. note 2, p. 97.}

\footnote{7.3.3 \textit{UCC}} adopts this rule and stipulates: “Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.”. \footnote{9:304 \textit{PECL} also contains a substantially similar rule: “Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it, the other party may terminate the contract.”}

Thirdly, there are the possibility to avoid parts of a contract under \textit{CISG} Art. 51 (Art. 51 \textit{CISG}) , and the specific case of avoiding a contract for delivery by instalments under \textit{CISG} Art. 73 (Chapter 10). \textit{PECL} Art. 9:302 is most comparable to \textit{CISG} Art. 73 as it considers a failure of performance in the situation: “If the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned, there is a fundamental non-performance, the aggrieved party may exercise its right to terminate under this Section in relation to the part concerned. It may terminate the contract as a whole only if the non-performance is fundamental to the contract as a whole.” Interestingly, however, there is no similar rule in the \textit{UNIDROIT Principles}.

Finally, it is to be recalled that the discussion in Chapter 4 indicates that the so-called Nachfrist procedure makes performance of basic contractual obligations within the period fixed in the notice “of the essence” of the contract. 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. Despite the lack of clear guidance on the role played by such a procedure in determining fundamental breach, the Nachfrist provisions can and should be interpreted in a manner that does not undermine the fundamental breach standard for avoidance.\footnote{See Harry M. Flechtner in “Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.”: 8 Journal of Law and Commerce (1988) 53-108. Available online at \url{http://www.cisg.law.pace.edu/cisg/text/flecht47,63.html}}

\section{7.3 CONCLUDING REMARKS}

Whether the aggrieved party should have the right to terminate the contract in the case of a non-performance by the other party depends upon a weighing of conflicting considerations: “On the one hand, the aggrieved party may desire wide rights of termination. It will have good reasons for terminating the contract if the performance is so different from that for which it bargained that it cannot use it for its intended purpose, or if it is performed so late that its interest in it is lost. In some situations termination will be the only remedy which will properly safeguard its interests, for instance when the defaulting party is insolvent and cannot perform its obligations or pay damages. The aggrieved party may also wish to be able to terminate in less serious cases. A party which fears that the other party may not perform its obligations may wish to able to take advantage of the fact that the threat of termination is a powerful incentive to the other to perform to ensure that the other performs every obligation in complete compliance with the contract. For the defaulting party, on the other hand, termination usually involves a serious detriment. In attempting to perform it may have incurred...
expenses which are now wasted. Thus it may lose all or most of its performance when there is no market for it elsewhere. When other remedies such as damages or price reduction are available these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination should be avoided.\textsuperscript{378}

For these reasons it is a prerequisite for termination that the non-performance is fundamental. As outlined \textit{supra.} 7.2, the major grounds or circumstances for a party's right to terminate the contract under the \textit{CISG, UNIDROIT Principles and PECL} include the following: (a) a fundamental non-performance by a party; (b) an anticipatory non-performance that is or will become a fundamental one; (c) fundamental non-performance with respect to partial delivery or a given installment, future installments or both; and (d) a failure or refusal to perform within a reasonable Nachfrist. Strictly, however, all the four grounds focus on the fundamentality or substantiality of the non-performance, actual or anticipatory, and thus limit the availability of the right to termination.

In short, termination is permitted only if there has been a breach that substantially deprived the aggrieved party of its bargain, i.e. fundamental non-performance, or involved a delay in performing certain material obligations beyond the time made "of the essence of the contract" through the Nachfrist procedure, which is the only route to avoidance without an initial or anticipatory fundamental breach. In a word, it is assumed that restricting the right to termination promotes good faith and efficiency in commercial dealings.

\textsuperscript{378}Supra. note 6, Comment A.
CHAPTER 8. FUNDAMENTAL NON-PERFORMANCE

Generally speaking, only if one of the party's failure to perform his contractual obligations amounts to a fundamental breach will the other party be entitled to avoid the contract as of right (de pleno jure).  

8.1 GENERAL CONSIDERATIONS

Contract termination is a most drastic remedy, especially in the context of world-wide commercial trade, which normally involves expensive transaction costs. Consequently, the remedy of contract termination is not available for just any breach of contract, and usually requires fundamental non-performance as a precondition. Indeed, fundamental non-performance is one of the decisive prerequisites for the aggrieved party's right to termination. Thus, the distinction between “non-fundamental” and “fundamental” breach becomes of major importance. It is crucial to determine the different remedies available to the aggrieved party. For instance, in case of a “fundamental” breach, the injured party under the CISG cannot only claim damages, price reduction or the repair of non-conforming goods but may also declare the contract avoided or request the delivery of substitute goods.

Under the CISG, Art. 25 defines that 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, 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 result.” The concept of “fundamental breach”, as defined in Art. 25, is a milestone in the CISG's remedial provisions, which is said to be one of the pillars of the Convention because various sanctions available to the buyer and seller, as well as certain aspects of the passing of risk, depend on this concept: “Article 25 is a key article because the remedies of the buyer and seller under CISG turn on the character of the breach involved. Generally speaking, if the breach is fundamental the aggrieved party is entitled to avoid the contract; if it is not, he is remitted to a claim in damages although in appropriate circumstances he may also be entitled to seek an order for specific performance.”

The CISG uses the term “fundamental breach” in various settings: “A fundamental breach is a condition for the immediate avoidance of the contract in the case of non-fulfilment of an obligation (Art. 49, paragraph 1, subpara. (a); Art. 64, paragraph 1, subpara. (a) and/or of an anticipated non-performance of an obligation (Art. 72, paragraph 1) as well as of avoidance in the case of incomplete or partially conform[ing] delivery (Art. 51). The same applies to contracts on delivery by instalments where the contract is to be made void in regard to the affected partial delivery and possibly also in regard to other partial deliveries (Art. 73). It also holds true for the right to delivery of substitute goods in the event of non-conformity (Art. 46, paragraph 2). And, finally, it may cause certain rights to be retained which would otherwise be lost after the passing of risk (Art. 70).”

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Generally, Art. 25 CISG attempts to define “fundamental breach” in terms of (foreseeable) “substantial detriment”. Art. 8.103 PECL, which corresponds in substance to CISG Art. 25, by contrast, further identifies three situations in which non-performance of an obligation is fundamental to the contract: “(a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance.” The UNIDROIT Principles provide a more detailed guideline as to which factors are relevant in determining fundamental non-performance. Art. 7.3.1(2) UPICC lists a number of circumstances that are relevant to the determination of whether, in a given case, failure to perform an obligation amounts to fundamental non-performance. In this context, regard shall be had, in particular, to whether: “(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party’s future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.”

The chapter will illustrate below how these relevant factors are used for determining fundamental non-performance. Reference will be made to pertinent provisions (including those mentioned above) of the CISG, UNIDROIT Principles and PECL, and a number of relevant scholarly writings in order to take a better insight into the concept of fundamental non-performance in international commercial transactions. Taking all relevant sources into consideration, I will focus on such elements, in determining whether a breach is fundamental, as may be roughly categorized under the following headings: (a) foreseeable substantial detriment; (b) strict compliance of essence; (c) intentional non-performance; (d) no reliance on future performance; (e) disproportionate loss.

8.2 FORESEEABLE SUBSTANTIAL DETRIMENT

8.2.1 Introduction

At the outset, it is to be mentioned that with regard to element of foreseeable substantial detriment, both the UNIDROIT Principles and the PECL adopt a substantially identical approach to the CISG, therefore as far as this element is concerned, the following discussion will focus on CISG Art. 25.

The concept of “fundamental” breach is already to be found in Art. 10 ULIS but was criticised for being too subjective. Then the definition in Art. 25 introduced more objective criteria and can be seen as a compromise between a strict subjective test and a strict objective test. The hypothetical will in Art. 10 ULIS was eliminated and instead a material test was adopted in Art. 25 CISG. However, a “fundamental” breach had to be drafted in general terms since such a concept cannot specify all possible circumstances. “Article 25

383 Supra. note 2. Art. 10 ULIS reads: “For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.”

does not provide any examples of events that constitute such a fundamental breach. Instead, general terms and phrases are used to define fundamental breach, such as ‘detriment’, ‘substantial deprivation’, and ‘foreseeability’. These terms hardly allow the parties to a sales contract, in case of dispute, to determine ex ante (before one of the parties deems the contract avoided) whether a breach was fundamental.”

In such a situation, there is a need for certainty and predictability since parties must use different measures to effect either a contract avoidance or continuance. As a result, the Convention adopts a solution similar to the one laid down in the German law in §286(2) and §326(2) of the German Civil Code (for the special case of delay) and in §325(1) sentence 2, and has further been developed by courts for other cases of breach of contract: There is a fundamental breach of contract, which justifies avoidance or the demand for substitute goods, if the injured party has no further interest in the performance of the contract after the particular breach. However, the determination of this interest depends entirely on the individual terms of the contract. The question of whether damages caused by a delay in delivery amount to a [fundamental] breach of contract does not depend on the amount of the damages, but rather on the terms in the contract concerning the time of delivery. Non-conforming goods only give rise to a right of avoidance if the contract expressly states that non-conformity is of special interest to the buyer - such as in the case of an express warranty - or if the terms of the contract make this clear. The late delivery of goods with a quoted market price is normally considered a fundamental breach. The question of whether goods which were not packaged according to the agreement presents a fundamental breach depends not only on whether the goods were damaged or at least endangered because of the packaging, but also on whether the packaging explicitly demanded by the buyer was necessary for further shipment or resale. Neglecting to insure the goods during transport, if the seller was obligated to do so by contract, can be a fundamental breach of contract even if the goods were not damaged, if the lack of insurance deprives the buyer of the possibility of reselling the goods in transit.

It is also to be noted that the uncertainty created by the definition of fundamental breach can be avoided through a more specific avoidance regime negotiated by the parties or by making use of the Nachfrist avoidance mechanism (see Chapter 4).

These opportunities, however, do not resolve the uncertainty inherent in the definition of fundamental breach. Moreover, the aggrieved party cannot anticipate every problem that might arise. Thus, the circumstances which give rise to fundamental breach still must be determined. For this purpose, the definition of fundamental non-performance can be divided in two elements: first, a detriment such as substantially to deprive the other party of what he is entitled to expect under the contract – the detriment component – and second, the foreseeability of the detriment – the foreseeability component.

8.2.2 Substantial Detriment

The elements which define a substantial detriment are extremely

complex. In this point, the *substantial detriment* itself is characterized by three aspects: in the end, and that is the decisive element, there has to be a relevant detriment to the aggrieved party; it has to be fundamental; and proportionate to the expectations justified under the contract.\(^{390}\)

### 8.2.2.1 Existing detriment

The first foundation for a breach being fundamental is that it must cause the non-breaching party detriment. The Convention itself does not contain any definition of the term “detriment”. Nor does it give any example of detriment that rises to the level of a fundamental breach.

In the absence of a precise definition, Jafarzadeh interprets the term “detriment” in light of the Convention’s legislative history as well as its intended purpose. He quotes the Working Group report stressing that the term *detriment* “had to be interpreted in a broader sense and set against the objective test of the contents of the contract itself”; infers from the Secretariat Commentary that it is possible to conclude that the drafters intended the word “detriment” to be synonymous with “injury” and “harm”, and it can also be exemplified by monetary harm and interference with the other activities; and further clarifies the term by considering its purpose, i.e. simply to allow the injured party to terminate the contract, demand substitute goods, or to prevent the risk of loss from passing to the buyer, that these purposes clearly require a broad sense which is beyond the realm of compensation for damages. Accordingly, Jafarzadeh submits that, keeping in mind both its history and purpose, the term has to be interpreted in a broad sense and any narrow construction must be excluded.\(^{391}\)

In other words, a definition of “detriment” cannot be confined to an actual material loss or damage but has to be interpreted in a broader sense including also immaterial detriments such as losing a customer, losing resale possibilities or being brought into disrepute etc.\(^{392}\) “Detriment basically means that the *purpose* the aggrieved party pursued with the contract was foiled and, therefore, led to his losing interest in the performance of the contract [...]. From this follows his interest in avoiding the contract. Though in commercial relations most things can be reduced to a damage, this is not the central issue here. On the contrary, when compensation for damages can serve as the adequate remedial action, this should be an indication of the fact that there is no detriment in the meaning of the Convention. It will be the case, however, when the aggrieved party in remaining bound to the contract is hindered in his commercial or manufacturing activities in such a way that he can no longer be expected to continue holding on to it. Hence, detriment can be a very complex phenomenon. But it must be in existence at the time of the avoidance of the contract. What matters most in commercial relations are economic results and not formal fulfilment of obligations.”\(^{393}\)

In short, it is possible to conclude that the CISG drafters simply and naturally intended the word “detriment” to be interpreted in a broader sense, and that the determination of a fundamental breach was to be made on a case-by-case basis. Detriment just fills the modest function of filtering out certain cases, as for example where breach of a fundamental obligation has occurred but not caused

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\(^{390}\) Supra. note 4.

\(^{391}\) See Mirghasem Jafarzadeh in “Buyer’s Right to Withhold Performance and


\(^{393}\) Supra. note 4, p. 113.
8.2.2.2 Substantial deprivation

The second major requirement for a breach to be regarded as substantial detriment is that the detriment caused by the breach must have some degree of seriousness so that it substantially deprives the victim of breach of what he is entitled to expect under the contract. Unlike the nature of detriment, which was not much at issue either by UNCITRAL’s Working Group or in the Diplomatic Conference, determining “substantiality” causes major problems because it is open to various interpretations and each interpretation may conflict with certain provisions in the Convention or render them meaningless.

For instance, it was even argued that to define “fundamental” by “substantial” is an idem per idem definition and therefore mere tautology: “As to the substantiality, there is, no doubt, a tautology between substantial and fundamental as characterizing a breach of contract. That repetition seems to have been unavoidable to ensure congruence of the definiens and the definiendum.”

Another commentator submits, however, that Arts. 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.”

Despite these ambiguities, it will become obvious that the relevant detriment is not a static element, but in many instances occurs only when the breach of contract continues. Hence, one of the greatest difficulties in analyzing the fundamentality of a breach is to determine the time when the detriment has become so great that the prerequisites are met.

Anyway, the term “substantial” detriment is not sufficiently clear and the Convention seems to have left the question of determining the sufficient substantial deprivation of the aggrieved party from his contractual expectations to the tribunals to decide in the light of the circumstances surrounding any particular case. Therefore, it is eventually for the courts to develop rules in their case law that can be relied on by the parties. In some cases, courts determining fundamental breach have in particular looked at the gravity of the consequences of the breach in the light of: (a) the contract’s overall value and the monetary loss suffered by the aggrieved party; (b) the fitness of the goods for the intended purpose and (c) whether or not an award of damages would adequately protect the aggrieved party, and other interference caused by the breach into his activities.

Of course, the international origin of the CISG and the fact that the “international legislator” attempted to find autonomous, original terms without using a single system of laws or legal terminology, and the need to promote uniformity in its application, make an autonomous method of interpretation necessary. This means, above all, not to proceed to interpret it from national juridical constructions and terms.

Therefore, as Jafarzadeh does with the term “detriment” mentioned above, the term “substantially” should also be autonomously interpreted in the light of the Convention’s legislative history, as well as

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394 Ibid.
396 Supra. note 15.
397 Supra. note 1, pp. 238 - 245.
its intended purpose. In the light of the legislative history and its intended purpose of the CISG, the degree of seriousness of the detriment resulting from the breach “should be considered as having quantitative as well as qualitative meaning.” The Secretariat Commentary also might shed the light on the meaning of “substantial detriment”: “The basic criterion for a breach to be fundamental is that it results in substantial detriment to the injured party”. The determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.”

In this point, however, “[o]ne must consider that the Secretariat Commentary was written prior to the introduction of the refined expectation interest of Article 25. For the breach to be fundamental under Article 25, the aggrieved party must suffer a detriment which must be such as to ‘substantially to deprive him of what he is entitled to expect under the contract’. From the history of Article 25 it is clear that – unlike the drafts – it does not refer to the extent of the damage, but instead to the importance of the interests which the contract and its individual obligations actually create for the promisee.” In other words, the final formulation of Art. 25 has to be understood not as relying on the amount of actual damages, but rather as meaning that the special interests of the creditor should be the yardstick to measure the seriousness of the breach. This means that there is a fundamental breach of contract, if the injured party has no further interest in the performance of the contract after the particular breach; and thus suggests not merely a substantial or material breach of contract, or one which substantially impairs the value of the contract to the injured party, but a breach which goes “to the root” of the contract.

However, on the one hand, in determining the substantiality of the detriment one factor which should be taken into account is the extent to which the detriment to the aggrieved party is the result of its own conduct. If the detriment was substantially due to its own conduct it might be inappropriate to say that the non-performance was fundamental. In other cases it may be appropriate to permit termination but to hold that the aggrieved party’s conduct amounted to a non-performance itself for which the other party may claim damages.

On the other hand, although the right to termination remains unimpaired even in case of impediments where the non-performing party is excused (the right is given there above all when there is a fundamental breach of contract), it is not excluded that the existence of impediments is taken into consideration where a breach of contract is classified as fundamental. From a doctrinal point of view, this may be substantiated by the principle of good faith. A point in favour of this opinion is furthermore that the definition of a fundamental breach of contract in Art. 25 in a certain way refers to the conduct of the party in breach, even though it relates mainly to the effects the breach of contract has on the other party.

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400 See Secretariat Commentary on Art. 23 of the 1978 Draft [draft counterpart of CISG Art. 25], Comment 3. Available online at <http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-25.html> (One should note, however, significant changes were made to Art. 23 of the 1978 Draft. Accordingly, the Secretariat Commentary on 1978 Draft Art. 23 should not be regarded as entirely relevant to the interpretation of CISG article 25. See the match-up, available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-25.html>.

401 Supra. note 20.


403 Supra. note 20.

The expectations of the latter, which is to be discussed below, may, however, be influenced by the possibility of impediments.\textsuperscript{405} 

\textbf{8.2.2.3 Discernible expectations}

After all above, the main question still remains: At what point does deprivation resulting from detriment reach the threshold of substantial deprivation? The legislative history of the provision shows that it was controversial.\textsuperscript{406} Eventually, in order to reconcile the different proposals, it was decided that for a breach to be fundamental, it must result in such detriment as substantially to deprive the victim of breach of \textit{what he is entitled to expect under the contract}. According to Art. 25 CISG, the fundamentality test is satisfied if the aggrieved party can prove that a substantial deprivation of his expectation from the performance of the contract has occurred or will occur because of the breach. The major emphasis is laid upon the contractual expectation of the injured party: \textit{“of what he is entitled to expect under the contract”}. The expectation of a party under a contract is a central criterion to the determination whether a breach of contract is detrimental. The expectation interest adds an objective criterion to the definition since it is the contract that determines the party's obligations and it is also the contract that determines the importance of these duties. Consequently, it is not the personal and subjective interest of the injured party that matters but the expectation that can be assessed by looking at the contract itself.\textsuperscript{407} Thus, to meet the substantial deprivation component, the expectations of the aggrieved party have to be discernible from the contract. In other words, to determine the degree of a given detriment, to draw the line between substantial and insubstantial, is no longer left to the judges' sole and sovereign appreciation, but tied to the expectation of the injured party, while those expectations, in turn, are not left to the party's inner feelings but instead tied to the terms of the existing contract.\textsuperscript{408}

However, in relying on the phrase \textit{“of what he is entitled to expect under the contract”}, one should be careful. The extent to which a party suffers an injury to its expectations will be found not only in the language of the contract but in the circumstances surrounding the contractual relationship of the parties. The terms of the contract is not the only source for the aggrieved party's expectation interests. For instance, as mentioned above, the aggrieved party's expectations may be influenced by the possibility of impediments. Nonetheless, it does not mean that the assessment of the existence of substantial detriment will depend on the circumstances of any individual case, even those circumstances take place after the time of making the contract. If some particular circumstances are significant for a contracting party, he should bring them into the other party's attention at the time of contract. As will be seen in detail below, the test of the aggrieved party's expectations is further limited by the qualification, which takes account of what the non-performing party could reasonably foresee. Accordingly, it is fair to say that the Convention has not left the determination of the degree of a given detriment, and drawing the line between substantial and insubstantial deprivation, to the judge's sole and

\textsuperscript{405}Supra. note 4, p. 332. 
\textsuperscript{406}Examination of the legislative history of Art. 25 shows that it was first suggested that to ascertain whether breach was fundamental, it should have been proved that the detriment caused by the breach was substantial and the Committee welcomed that proposal and inserted it into the definition of fundamental breach. In the Diplomatic Conference, however, the debate on the words “substantial detriment to the other party” was extensive. Some delegations labelled it something between “vague”, “subjective” and “objective and flexible”. The main objection to the “substantial” criterion was that “substantial” as an adjective caused as much uncertainty as “fundamental” itself, and, therefore, required an objective yardstick. Various proposals were offered for this purpose. (Supra. note 4.) 
\textsuperscript{407}Supra. note 2. 
sovereign appreciation, but requires him to decide in the framework of the contract and the circumstances that existed at the time it was made.409

8.2.3 Foreseeability

8.2.3.1 Introduction

As discussed above, where the effect of non-performance is substantially to deprive the aggrieved party of the benefit of its bargain, so that it loses its interest in performing the contract, then in general the non-performance is fundamental. This is not the case, however, where the non-performing party did not foresee and could not reasonably have foreseen those consequences. According to the second part of Art. 25, a breach of contract causing material prejudice is not fundamental if 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 means that where a breach of contract is classified as fundamental the non-performing party must have foreseen the detriment, as well as a reasonable person of the same kind in the same circumstances.

It is assumed that a party who knows the far-reaching consequences of a breach of contract for the other party, if he is not sure of his possibility to fulfil, either does not conclude the contract at all or makes increased efforts to prevent its violation. Therefore, the fundamentality of a breach is made dependent not only on its consequences but also on its foreseeability by the other party. The same consideration can be found in Art. 74 regarding the determination of the amount of damages. The rights of the aggrieved party are thus limited in the event that the other party did not foresee special consequences which make up the fundamentality of the breach of contract. It results that the parties should draw their respective attention to such consequences either in the contract itself or through additional information to be given in principle until the conclusion of the contract, e.g. particularly serious consequences in the case of acceptance not in time because of lack of storage facilities, substantiality of proof of technical check-up for re-sale of the goods.410

8.2.3.2 Test for foreseeability

This second part of Art. 25 is composed of a subjective and an objective test of foreseeability; it is meant to eliminate a “fundamental” breach where the substantial detriment occurs unexpectedly.

The concept of foreseeability developed out of Art. 10 of ULIS which completely based fundamental breach on the foreseeability of events. Art. 25 of the present Convention, however, adds an objective test into the determination of whether a breach is fundamental by asking two questions: (a) Did the party in breach foresee that the breach of contract would result in a substantial deprivation of the non-breaching party? and (b) Would a “reasonable person of the same kind in the same circumstances” have foreseen such a result? These two questions will require the court to view the contract from the subjective perspective of the party-in-breach, as well as from the objective perspective of a reasonable merchant of the same kind in the circumstances of the party in breach. These subjective and objective elements are cumulative, not alternative. The outcome is that a breach would be regarded as fundamental only where courts or tribunals are satisfied that both elements are proved.411

The first requirement for negating the claim for breach under Art. 412 Supra. note 4, p. 115. 411 Supra. note 13.
25 is whether or not the party in breach **actually** foresaw the harm caused by the given breach. Whether the detriment caused by the breach was actually foreseeable by the non-performing party depends on his knowledge of the facts surrounding the contract. Generally, foreseeability may depend on the party’s knowledge and evaluation of the relevant facts, his experience, his perception of the circumstances, etc. However, this requirement is a purely subjective one which focuses solely on the personal position of the breaching party. It cannot be inferred that one party indeed did not foresee the serious consequences of his breach of contract because this could be considered as professional competence below average. An **objectivization** is, therefore, made here. As parties in breach are not likely to admit that they foresaw the detrimental result, the objective criterion of a “reasonable person standard” was introduced. Here the question has to be asked whether a “reasonable person of the same kind in the same circumstances would not have foreseen the result”. This is an objective test requiring the party in breach to show that a reasonable person of the same kind in his circumstances would not have foreseen that the given default would have caused the injuries in question to the innocent buyer. Although this test is meant to add objectivity to the definition, it remains rather vague since numerous characteristic features have to be taken into account to determine a person of the same kind and it is suggested that the whole socio-economic background including religion, language, etc. must be taken into consideration.

In particular, since parties to international sales contracts are presumed to be merchants, a “**reasonable person**” can be construed as a **reasonable merchant**. A reasonable merchant would include “all merchants that satisfy the standards of their trade and that are not intellectually or professionally substandard”. The features that may characterise reasonable merchants include: (a) The merchant’s degree of skill and professional qualifications (for example specialized licenses); (b) The merchant’s professional associations or affiliations which may set competency standards; (c) The length of the merchant’s business experience; and (d) The geographic region in which the merchant does business. The phrase “of the same kind” is the first element of precision intended to mitigate the effects of subjectivity of the first criterion of foreseeability. The meaning of the phrase has to be apparently inferred from the purpose of the clause. It is provided to tailor a reasonable person to the likeness of the party in breach. The hypothetical merchant ought to be engaged in the same line of trade, doing the same function or operations as the party in breach. Not only must business practices be taken into account, but the whole socio-economic background as well, including average professional standards. A further element is also provided by Art. 25 for the purpose of precision. Under this requirement, the court must take into account the reasonable merchant “in the same circumstances”, in which the party in breach was. By this requirement, the whole range of facts such as conditions on world and regional markets, national legislation, prior trade usage between the parties, etc. must be taken into account to determine whether a reasonable person would have foreseen a detrimental result.

In short, in order to determine foreseeability, the subjective and objective perspective of the party in breach must be considered. Additionally, the objective perspective of the reasonable merchant in the breaching party’s position is relevant. In other words, the party in breach is considered to have been able to foresee the consequences of the breach if, when objectively viewed, it is determined that he could or should have known them. But what happens when the breaching party had special knowledge and thus could have

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412 Supra. note 30.
413 Supra. note 4, p. 116.
414 Supra. note 2.
415 Supra. note 13.
foreseen more than the average merchant? The conjunction and, makes it possible to conclude that such special knowledge cannot be taken into account, allowing the breaching party to escape a finding of fundamental breach by hiding behind the paradigm of the reasonable person of the same kind in the same circumstances.\footnote{Supra. note 1, p. 265.}

### 8.2.3.3 Time for foreseeability

Unlike Art. 10 ULIS which was quite clear that the time point should have been "the time of the conclusion of the contract", the language of Art. 25 does not specify when the result of a fundamental breach should be or should have been foreseen, and it remains uncertain whether the time of the contract conclusion is crucial to assess foreseeability or whether foreseeability of a detrimental result occurring after the conclusion of contract also has to be taken into consideration.

Again, Art. 25 is open for interpretation on this point and has generated much controversy. It has been suggested that if a detrimental result was not foreseeable at the time of the conclusion of contract, and becomes foreseeable after that, the party in breach cannot claim that the detrimental result was unforeseeable. According to this view any foreseeability of a substantial detriment \textit{before the time of breach but after the time of conclusion} is to be taken into consideration. Others suggest that foreseeability of detrimental results after the conclusion of contract can only be taken into consideration in exceptional cases and only up to the time when the preparations for performance of the contract performance started. These views consider the overall situation of the contract and leave room for a more individual evaluation of the circumstances. The relevant information often might be passed on to the party in breach after the conclusion of the contract and it is argued that the drafters of the Convention meant to provide courts with a rather flexible provision. The legislative history demonstrates that the omission was \textit{intentional}, designed to permit courts to decide the issue on a case by case basis.\footnote{Supra. note 13.}

In other words, while it is held that generally the time of the conclusion of the contract should be referred to, it is considered possible that in exceptional cases subsequent information should be taken into account as well. There is no reason to impose an interpretation on Art. 25’s foreseeability requirement that ignores post-formation developments. Such information could be given until the actual and/or required commencement of the preparation in view of performance so that the other party can still adapt itself to it. This seems justified because it can be doubted that the information available at the time of the conclusion of the contract has really made possible the foreseeability or required foresight of the consequences. This doubt may be removed when subsequent information is taken account of. When, for instance, in the case of a contract for delivery of consumer goods to be manufactured the buyer signals immediately after the conclusion of the contract that the imprint of agreed data on the packaging is of decisive importance because the goods otherwise could not be sold in the envisaged sales area, this will have to be regarded as sufficient for the violation of the respective obligation to be characterized as fundamental.\footnote{Supra. note 35; see also supra. notes 13, 17.}

In short, foreseeability can be determined at any time up to the point of breach, and not only at the time of contract formation. The point at which foreseeability is determined could be when: (a) the contract is concluded; (b) performance begins; or (c) the defaulting party decides to breach. Unlike Art. 74, which deals with damages,
Art. 25 was never drafted with the following words: "at the time of the conclusion of the contract". The absence of such words was not due to an inadvertent omission, because the drafters specifically rejected a proposal to make the “vantage point” for foreseeability only at the time of contracting. This clearly indicates that the point for foreseeability in Art. 25 is not limited to when the contract is formed. Accordingly, one may argue that the question was deliberately left unanswered because the working groups could not agree on the answer. They therefore left the question to the courts again.

8.2.3.4 Burden to prove unforeseeability

Finally, it is important to mention that the burden to prove unforeseeability lies with the breaching party. The mere allegation, however, does not suffice but, as explained below, the party in breach must prove his allegation.

The legislative history of Art. 25 reveals that the burden of proving unforeseeability of loss was originally on the party in breach. There was a consensus that this burden should be on the party in breach because of the logical difficulty of requiring the non-breaching party to prove what the party in breach actually foresaw or a reasonable man in his position could have foreseen. As was seen, a party alleged to be in breach thus has a difficult burden, but if he can show that he did not foresee the drastic effects of his default, and can prove that a reasonable merchant facing the same market conditions would not have foreseen such results, then the party claiming breach will not be able to rely on the other party’s breach for termination.

Thus, it is the responsibility of the aggrieved party to prove that he suffered a detriment that substantially deprived him of what he is entitled to expect under the contract. Where such detriment and substantial deprivation are established, the burden of proof is said to shift to the party in breach. To successfully invoke unforeseeability, the party in breach should prove two points: first, that he himself in no way anticipated the substantial detriment caused by the breach; and second, that a reasonable person in his place would not have done so. If the party in breach can prove that he did not foresee the substantial loss of expectation interest that the breach caused the non-breaching party, and can prove that a reasonable person similar to himself in no way anticipated the substantial loss of expectation interests, there is no fundamental breach.

It appears that the foreseeability element has two functions: “first, a substantive function, i.e., the breaching party’s knowledge or foreseeability of the harsh consequences of the breach; secondly, a procedural function, since the element of foreseeability shifts the burden of proof to the party in breach when that party claims that
neither he nor any reasonable person of a similar class and in the same circumstances could have foreseen the result.\textsuperscript{422}

In short, the aggrieved party cannot terminate the contract if the non-performing party can show that it did not foresee, and could not reasonably have foreseen, that the non-performance was fundamental for the other party.\textsuperscript{423}

8.3 OTHER ELEMENTS IN DEFINING FUNDAMENTAL NON-PERFORMANCE

8.3.1 Strict Compliance of Essence

Clearly, the emphasis of Art. 25 \textit{CISG} is “on the degree of the detriment resulting from the breach” rather than on the degree of substantiality of the performance itself. The definition of a fundamental breach in Art. 25 is, however, not final. The parties themselves may in any part of their contract derogate from the requirements of Art. 25 in line with Art. 6 \textit{CISG}, and thereby set their own standards as to what will be regarded as a fundamental breach under the contract.\textsuperscript{424} According to Art. 6 \textit{CISG}, “not only may the parties determine the content and extent of their obligations by adopting contractual provisions that vary from the default rules in the Convention, but they may also indicate the circumstances under which the failure to perform by one party amounts to a fundamental breach. The principle of party autonomy thus requires looking at the nature of the contractual obligation for which strict performance might be essential.”\textsuperscript{425}

Thus, where the parties have expressly agreed or the established practices indicate that any deviation from all or specific contract terms constitutes a fundamental breach, the application of the approach focusing on the nature of the contract would entitle the aggrieved party to avoid the contract even if the breach is minor. For instance, the parties may, from the outset, characterize as fundamental, certain categories of non-fulfilment of obligations; e.g. by determining that time is of the essence. This would correspond to the principle of contract autonomy.\textsuperscript{426} In this respect, the significant difference is that where the parties fail to characterize their terms in this fashion, then in the case of a minor breach, Art. 25 will prevent avoidance. Also, the typical practice under CIF and other documentary sales is to be noted, where there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have therefore often been able to refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance.\textsuperscript{427}

\footnotesize
\textsuperscript{422}Supra. note 1, pp. 229.
\textsuperscript{423}See Comment 3(a) on Art. 7.3.1 \textit{UPICC}.
\textsuperscript{425}Supra. note 1, p. 300.
\textsuperscript{426}The issue in such a case is whether the Convention's principle of party autonomy is limited by the Convention's good faith requirement to act reasonably. Unlike under the \textit{UNIDROIT Principles} and the \textit{PECL}, however, the principle of party autonomy is not expressly limited under the Convention, and attempts at the Vienna Diplomatic Conference to limit this principle by the concept of good faith were rejected. Within the scope of the Convention, the parties' freedom to determine the content of their individual contract is only restricted by otherwise applicable mandatory rules, be they of national, international, or supranational origin. It seems, therefore, that the Convention's principle of party autonomy prevails over the Convention's good faith requirement and that the breaching party cannot invoke good faith to invalidate a clause providing for avoidance or substitute delivery for any deviation from the contract, no matter how trivial. This view is confirmed by Art. 4, according to which the Convention is not concerned with the validity of the contract or of any of its provisions. (Supra. note 1, pp. 337-338.)
\textsuperscript{427}See Secretariat Commentary on Art. 45 of the 1978 Draft [draft counterpart
The above approach is confirmed under the UNIDROIT Principles and the PECL, particular regard is explicitly had to the nature of the contractual obligation. Art. 7.3.1(2)(b) UPICC explicitly looks not at the actual gravity of the non-performance but at the nature of the contractual obligation for which strict performance might be of essence. The Official Comment thereon clearly states: “Such obligations of strict performance are not uncommon in commercial contracts. For example, in contracts for the sale of commodities the time of delivery is normally considered to be of the essence, and in a documentary credit transaction the documents tendered must conform strictly to the terms of the credit.”

Similarly, under Art. 8:103(a) PECL, “the relevant factor is not the actual gravity of the breach but the agreement between the parties that strict adherence to the contract is essential and that any deviation from the obligation goes to the root of the contract so as to entitle the other party to be discharged from its obligations under the contract. This agreement may derive either from express or implied terms of the contract. Thus, the contract may provide in terms that in the event of any breach by a party the other party may terminate the contract. The effect of such a provision is that every failure in performance is to be regarded as fundamental. Even without such an express provision the law may imply that the obligation is to be strictly performed. For example, it is a rule in many systems of law that in a commercial sale the time of delivery of goods or of presentation of documents is of the essence of the contract. The duty of strict compliance may also be inferred from the language of the contract, its nature or the surrounding circumstances, and from custom or usage or a course of dealing between the parties.”

In sum, the nature of the contractual obligation is also an important factor in the determination of fundamental breach: “Where the parties have expressly or implicitly agreed that in the case of a breach by one party the other party may terminate the contract, strict compliance with the contract is essential and any deviation from the obligation is to be regarded as a fundamental breach. Absent such an express provision, the duty of strict compliance may also be inferred from the language of the contract, the surrounding circumstances, custom, usage, or a course of dealing between the parties.”

8.3.2 Intentional Non-performance

Intentional non-performance is another factor in the determination of fundamental breach. For example, one party’s express refusal to perform his obligation, such as to pay for the goods or to take delivery of them, constitutes fundamental breach, except where the promisor is entitled to refuse to perform.

Under the CISG, the approach that focuses on whether the breach was committed intentionally or recklessly “can be supported by the text of article 25. It is, however, incompatible with the remedial system of the Convention under which fault is not a condition of contractual liability and of no importance in the availability of either remedy. Recourse to this approach to determine fundamen-

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642 See Comment 3(b) on Art. 7.3.1 UPICC.
644 supra. note 1, pp. 215-216.
645 supra. note 1, p. 343.
tal breach is thus not permissible. By contrast, Art. 7.3.1(2)(c) UPICC clearly contains such a rule dealing with the situation where the non-performance is intentional or reckless. Similarly, PECL Art. 8:103(c) is also confined to intentional non-performance.

It may, however, be contrary to good faith to terminate a contract if the non-performance, even though committed intentionally, is insignificant. For example, in an Italian-German dispute over the delivery of textiles, some textiles were of a different color from that specified in the contract. After being informed by the Italian seller that he could not at that time deliver the remaining textiles of the ordered color, the German buyer declared the contract avoided. The Düsseldorf Court of Appeals held that a fundamental breach occurs if the seller declares seriously and definitely that he will not deliver substitute goods, but does not occur if he only declares that he cannot deliver at the moment. It is to be mentioned here that, unlike Art. 7.3.1(2)(c) UPICC, PECL Art. 8:103(c) sets a link between intentional non-performance and no reliance on future performance (to be discussed below) with the conjunction “and”. Under this provision even if the non-performance in itself is minor and its consequences do not substantially deprive the aggrieved party of what he is entitled to expect under the contract, it might be treated as fundamental if there is indication of intentionality that gives the aggrieved party reason to believe that he cannot rely on the other party's future performance.

8.3.3 No Reliance on Future Performance

In determining fundamental breach, consideration is also given to whether the breach gives the aggrieved party reason to believe that he may not rely on the other party's future performance. Under Art. 7.3.1(2)(d) UPICC the fact that non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance is of significance. If a party is to make its performance in instalments, and it is clear that a defect found in one of the earlier performances will be repeated in all performances, the aggrieved party may terminate the contract even if the defects in the early instalment would not of themselves justify termination. Sometimes an intentional breach may show that a party cannot be trusted. Such an approach is clearly found in PECL Art. 8:103(c) as mentioned above.

Another consideration gives the aggrieved party reason to believe that it cannot rely on the other party's future performance is the party's (in)ability to perform at all, e.g. in the context of sales of goods that is to say either to deliver the ordered goods or to pay the purchase price and to take delivery. Regardless of whether or not performance is due, non-performance is considered a fundamental breach where performance is objectively impossible, namely where the object of the transaction is unique and has been destroyed. For example, if a party contracts to sell his Kandinsky and it has perished, performance is objectively impossible since no one could deliver the painting. A fundamental breach has also been committed where only the party, which has yet to fulfill its obligation, is unable to perform the contract (subjective impossibility). If, in the

435 Supra. note 20.
436 See Comment 3(d) on Art. 7.3.1 UPICC.
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foregoing example, the Kandinsky were not destroyed but stolen, the seller would only be subjectively prevented from performing, since the thief or any other person having bought the stolen painting from him would be able to deliver it to the buyer, if only theoretically.\footnote{Supra. note 1, p. 223; pp. 245-247. In addition, where one party can reasonably conclude from the other party's conduct that he will not perform a substantial part of his obligation, the former may ask the latter for an adequate assurance of performance, and failure to provide an additional guarantee is usually regarded as a fundamental breach. Furthermore, the regime for suspension in anticipatory non-performance (see Chapter 9) is helpful to lessen the risks inherent in matters such as creditworthiness.}

In practice, where a party has legitimately lost his faith and confidence in the other party's future performance and cannot be reasonably expected to continue the contractual relationship, courts have frequently found for fundamental breach. The reasons for the courts' findings can be best classified under the following headings: a) Violation of Exclusive Rights; b) Uncertainty as to Future Performance; c) Failure to Provide Security for the Purchase Price; d) Making Delivery Dependent on an Unjustified Condition.\footnote{Supra. note 1, pp. 247-253.} But where no future performance is due from the non-performing party, other than the remedying of the non-performance itself, or where there is no reason to suppose that it will not properly perform its future obligations, the aggrieved party cannot invoke PECL Art. 8:103(c).\footnote{Supra. note 51, Comment D.}

8.3.4 Disproportionate Loss

Finally, Art. 7.3.1(2)(e) \textit{UPICC} deals with situations where a party who fails to perform has relied on the contract and has prepared or tendered performance, e.g. by invoking his right to cure (see Chapter 5). In these cases regard is to be had to the extent to which that party suffers disproportionate loss if the non-performance is treated as fundamental. Non-performance is less likely to be treated as fundamental if it occurs late, after the preparation of performance, than if it occurs early before such preparation. Whether a performance tendered or rendered can be of any benefit to the non-performing party if it is refused or has to be returned to that party is also of relevance.\footnote{Supra. note 1, p. 331.}

However, under the \textit{CISG} “[t]he criterion employed by the \textit{UNIDROIT Principles}, which looks at whether the breaching party would suffer a \textit{disproportionate loss} as a result of the avoidance in determining fundamental breach, cannot be supported by the various cross-references to fundamental breach. To the contrary, the drafting history of article 46(2) gives good reason to view recourse to this criterion, in general, as prohibited.”\footnote{Supra. note 54.} In other words, consideration of the extent to which the breaching party suffers \textit{disproportionate loss} in determining whether a breach is fundamental is supported neither by the wording of Art. 25 \textit{CISG} nor by its drafting history. This factor, therefore, cannot be employed in the determination of fundamental breach of a \textit{CISG} contract.\footnote{See Comment 3(e) on Art. 7.3.1 \textit{UPICC}.} Interestingly, neither is it explicitly dealt with under the \textit{PECL}.

8.4 CONCLUDING REMARKS

The main objective of this Chapter has been to identify the various factors employed by the three instruments, as well as by scholars and the courts in determining when a breach of contract is fundamental. To that end, I have covered the following regards to be had in determining fundamental non-performance, roughly categorized under such headings: (a) foreseeable substantial detriment;
(b) strict compliance of essence; (c) intentional non-performance; (d) no reliance on future performance; (e) disproportionate loss. All these approaches employed in determining fundamental non-performance seems undoubtedly to support the underlying purpose of this concept, namely to preserve the enforceability of the contract by limiting the remedy of termination.

On the one hand, all the three instruments attempt to protect the interests of the aggrieved party by recognizing in principle the right to termination. In this respect, by providing the right to termination they take into account that there are situations where the interests of the aggrieved party are not sufficiently protected by an award of damages. On the other hand, by requiring that the fundamental non-performance requirement is satisfied as a prerequisite to terminate the non-performed contract, they also considers the interests of the non-performing party. One should note, however, the underlying purpose of the fundamental breach requirement “is not so much concerned with protecting the interests of the breaching party as much as preserving the enforceability of the contract if it all feasible and to avoid economic waste in trade. This policy is also reflected in offering the breaching party the possibility to cure and requiring the aggrieved party wishing to avoid the contract due to late delivery to provide a Nachfrist.”

In short, in holding those regards as described above to be had in determining fundamental non-performance, the three instruments, differing slightly but not in substance, seem to incorporate a dual test based on a certain degree of severity of the non-performance, on the one hand; and whether the aggrieved party especially needs these remedies, on the other hand.

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443 Supra. note 1, p. 335.
CHAPTER 9. ANTICIPATORY NON-PERFORMANCE

Anticipatory breach denotes situations where: 1) one of the parties will not or will not be able to perform the contract prior to the performance date, or 2) a party has declared that he will not perform a substantial part or all of his obligations within the time for performance. The usual remedy for anticipatory breach under some legal systems is temporary “suspension” of performance by the innocent party, subject to certain conditions or limitations. Yet, if the anticipatory breach amounts to a “fundamental” breach, the aggrieved party is entitled to an early termination of the contract.

9.1 GENERAL CONSIDERATIONS

Under the Convention, Arts. 71 and 72 deal with related but different aspects of future non-performance by a party of his contractual obligations. Art. 71(1) permits a party to suspend temporarily 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 [...]” Art. 72(1), on the other hand, allows a party to avoid the contract, thus putting a permanent end to its obligation to perform, if “prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract”.

Clearly, the consequences under the two articles are different: “Under art. 71 the party seeking assurance of performance is only entitled to suspend his own performance pending the provision of the sought assurance; it is only if adequate assurance is not furnished that he is entitled to avoid the contract. Under art. 72, the aggrieved party may immediately avoid the contract if he can discharge the substantially heavier burden of proof incumbent on him and the other party has declared that he will not perform his obligations.”

This distinction reflects different objects of the two articles: “The object of Article 72 is to provide the innocent party with a remedy in cases where it is clear that the other party will not perform at all or will commit another fundamental breach. This remedy based on the Anglo-American doctrine of anticipatory breach allows the innocent party to avoid the contract when the breach occurs without having to wait until performance becomes due. Whereas Art 72 is aimed at the phenomenon of anticipatory breach of contract, i.e. a breach of contract that takes place before the performance is due by the party in breach, Article 71 has a wider scope in that it deals with anticipatory breach as well as incomplete performance. The remedies in Article 71 is aimed at keeping the contract intact, whereas the remedies in Article 72 is aimed at avoiding the contract.”

On the one hand, “suspension under Article 71 requires less certainty concerning a future breach than does avoidance under Article 72. 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.”


446 See Sieg Eiselen in “Remarks on the manner in which the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Articles 71 and 72 of the CISG”. (2002) Available online at <http://www.cisg.law.pace.edu/cisg/principles/uni71,72.html#er>; also in “Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Articles 71 and 72 of the CISG”. (2002) Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp71,72.html#er>

other words, “Article 72 states that the prospect of future breach must be ‘clear’ to justify avoidance, whereas suspension under Article 71 requires only that the threat of breach ‘becomes apparent.’” Thus, Art. 71 is concerned with the situation where “it becomes apparent” that the other party will not perform a substantial part of his obligations whereas Art. 72 applies where “it is clear” that one of the parties will commit a fundamental breach of contract. Art. 71 is therefore wider than Art. 72 and, in concept at least, was intended to be more easily invokable.

On the other hand, “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.” In this point, Flechtner believes that “the drafters would not have used two different phrases (‘fundamental breach’ as opposed to non-performance of ‘a substantial part of his obligations’), and in particular, two different adjectives describing the seriousness of the breach (‘fundamental’ as opposed to ‘substantial’), had they not intended to distinguish the seriousness of the threatened breach that would satisfy the standards of the respective articles.” Also, it follows from the two different phrases (“fundamental breach” as opposed to non-performance of “a substantial part of his obligations”) that there has been a conscious choice not to deem every deficiency or any conduct, even if relating to a substantial part of the promisor’s obligations, a fundamental breach.

Thus, non-performance of a substantial part of obligations will not always amount to a fundamental breach. However, on the other hand, if the expected non-performance were at the same time a fundamental breach of contract, the obligor would have a choice between a suspension of performance under Art. 71, or avoidance of the contract under Art. 72. In other words, in certain circumstances, a party may be entitled to rely on either Art. 71 or 72: “If an anticipatory breach occurs, the innocent party may want to enforce specific performance in which case it would make use of its


449 Supra. note 2.

450 Supra. note 4.

451 Supra. note 5.

right to suspend performance under Article 71 rather than to avoid the contract under Article 72 even if it is entitled to do so. However, in the case of part performance a party may apparently only rely on Article 51 in conjunction with Article 45 where Article 51 applies or on Article 71 (if it wants to enforce full performance) or Article 49 (if wants to avoid the contract), but not on Article 72. Article 72 is therefore a remedy that is only to be used in true circumstances of anticipatory breach and not where an actual breach has already taken place. However where the contract consists of a series of performances (installments, for instance, delivery of a certain number of goods on a monthly basis), a serious deficiency in quality of the first installment, entitles the innocent party to exercise its rights under section 73 and avoid the contract.”

In any event, however, an anticipated minor breach of contract by the other party is insufficient either to suspend under Art. 71 or to avoid under Art. 72 the contract. Only if the anticipated non-performance of a party is so serious as to contradict a substantial part of his obligations could the party who has to perform first be empowered to suspend performance under Art. 71; or when the anticipated non-performance amounts to a fundamental breach of contract, could the other party avoid the contract prior to the date for performance.

9.2 GROUNDS FOR SUSPENSION

As stated in the preamble of this Chapter, the usual remedy for anticipatory breach is temporary “suspension” of performance by the innocent party. According to Art. 71(1) CISG, a party may suspend performance of his obligations in case of anticipatory non-performance under certain circumstances. Interestingly, the mechanism of suspension under CISG Art. 71 seems to differ to some extent from the withholding mechanism as found in UPICC Art. 7.3.4 or PECL Art. 8:105, where only anticipatory fundamental non-performance triggering termination is dealt with. Therefore, the following discussion on suspension will focus on CISG Art. 71.

Art. 71 CISG provides the grounds and conditions for suspending performance by any party due to the other party’s anticipatory breach: “A party may suspend the performance of his obligations 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.” It is a logical condition for the suspension of performance of an obligation that the obligation to perform is already due. Hence it was concluded that the party who had to perform first was empowered to suspend performance. What are required are not only acts in performance of the contract, but also those in preparation of performance which, therefore, can also be suspended. Thus production of goods may be stopped and procurement of materials put off. However, there is no right to suspend performance for insecurity in relation to performance obligations which are not substantial but which might, under the common law, be regarded as essential contractual terms.

Furthermore, to justify suspension of performance a threat of anticipatory non-performance of a substantial part of obligations must arise from: (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.

According to the cause (a), deficiency in the ability to perform and deficiency in the creditworthiness are placed next to each other. “A deficiency in the seller’s ability to perform may arise for the seller,
e.g. in the event of a forthcoming strike [...] , an official order, a prohibition of export, embargo measures, etc. A deficiency in the buyer’s creditworthiness can be the result of a FOB business where there is insufficient storage room on board a ship. There may be a deficiency in the ability of a party to perform a contract even if that party’s financial situation is excellent. The reasons for insufficient ability are irrelevant, they don’t have to be anybody’s fault nor does anybody have to be responsible for them [...]. 457 Creditworthiness, too, can relate to both parties; not only to the buyer who is obligated to pay the price of the goods, but also to the seller who may find himself incapable of financing manufacture of the sold goods. The creditworthiness of the buyer may even play a role when he is the one to perform first, e.g. in the case of advance payment or the opening of a letter of credit. However, a deficiency in the creditworthiness of the buyer is no reason for suspending performance when the financial situation of the buyer has not changed since the conclusion of the contract and when there are growing doubts on the part of the seller in regard to setting the buyer a time limit for payment. Nonetheless, deficiency in creditworthiness should be interpreted broadly and cover the event where the economic situation of a guarantor or provider of a guarantee deteriorates. According the cause (b), on the other hand, such conduct may also refer to the fulfilment of other contracts (O.R., p. 52) and is independent of the financial situation, e.g. frequent complaints. It may also cover the use of certain unfitting raw materials in performing obligations under similar contracts. 458

If the reasons which allow a party to suspend performance of his obligations were known to him at the time the contract was concluded, that party could not refer to them to suspend performance. It is, however, not a condition that those reasons emerge only after the conclusion of the contract. It will suffice that they become apparent only after the conclusion of the contract. One should note that Art. 71(1) was substantially amended at Vienna. It is originally provided in 1978 Draft Art. 62(1) that a party could suspend performance of his obligations if the prescribed circumstances gave “good grounds to conclude” that the other party would not be able to perform a substantial part of his obligations. The version was said to permit suspension based on a “subjective assessment of the situation” (O. R., p. 419). Therefore, after lengthy deliberations, the wording of Draft Art. 62(1) was changed when the more objective “it becomes apparent” was adopted in Art. 71(1). The modification is said to have been made so that under CISG Art. 71 “subjective fear by one party will not justify suspension; there must be objective grounds showing substantial probability of non-performance” 459

The right to suspend performance must not lead to a situation where contracts are thoughtlessly concluded. In spite of the inclusion of the circumstances existing at the conclusion of the contract, the first party still has the obligation to examine the creditworthiness of the other party. Therefore, the right to suspend performance cannot be invoked if the bad economic situation of the other party is generally apparent but not in fact known to the party wishing to suspend performance. A party would have the right to suspend performance only if he was aware of the bad economic situation of the other party at the conclusion of the contract and can prove that the other party’s economic situation considerably worsened. An objective measure should be used to judge the reasons which would give rise to a suspension of performance; subjective fear by one party will not be sufficient. There must be a high degree of probability of non-performance. The reasons must become apparent to a reasonable person in the same circumstances. Decisive is not just the relevant information, but whether the party wishing

457 Supra. note 10, pp. 286-287.
458 Supra. note 10, p. 287.
to suspend performance could hold it to be true. If the party suspending performance could hold the information available to him to be true, the risk falls to the other party. If the first party, however, refuses to perform his obligations unfoundedly, he commits a fundamental breach of contract. Risks of this kind cannot be fully avoided in international trade.\footnote{Supra. note 10, pp. 285-286.}

In a word, “it is clear that under article 71 the suspending party cannot invoke the suspension right on mere hunches on the probability of non-performance.”\footnote{See Alejandro M. Garro in “Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods”: 23 International Lawyer (1989); pp. 443-483. Available online at http://www.cisg.law.pace.edu/cisg/biblio/garro1.html} Nonetheless, suspension under Art. 71 requires less certainty concerning a future breach than does avoidance under Art. 72. While Art. 71 says it becomes apparent that the other party will not perform a substantial part of his obligations, Art. 72 mentions that it is clear that the other parties will commit a fundamental breach of contract. The requirement that it merely be “apparent” under Art. 71 is intended to be less onerous than the requirement that it be “clear”, a criterion which applies in cases of avoidance for anticipatory breach under Art. 72. Thus the standards of Art. 71 are less strict than those of Art. 72.\footnote{Supra. note 10, p. 286.}

\textbf{9.3 SELLER’S RIGHT TO STOP GOODS IN TRANSIT UPON SUSPENSION}

Art. 71(2) continues the policy of Art. 71(1) in favour of a seller in stipulating that in case the seller has already dispatched the goods before the grounds for suspension become evident, he, nevertheless, “may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them”. In other words, if the deficiency in the buyer’s creditworthiness is such as to make it apparent that the buyer will not pay for the goods, the seller has the right as against the buyer to order the carrier not to hand over the goods to the buyer even though the buyer holds a document which entitles him to obtain them, e.g., an ocean bill of lading, and even if the goods were originally sold on terms granting the buyer credit after receipt of the goods.\footnote{See Secretariat Commentary on Art. 62 of the 1978 Draft [draft counterpart of CISG article 71], Comment 10. Available online at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-71.html The match-up indicates that paragraphs (2) and (3) of Art. 62 of the 1978 Draft and CISG Art. 71 are substantially the same. However, paragraph (1) was significantly modified. See the match-up, available online at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-71.html} As for the application of CISG Art. 71(2), in contrast to Art. 71(1), the issue to be dealt with here only concerns the right of the seller to stop the goods in transit. One could have imagined that the buyer, too, should have been granted such a right, i.e. that he should have had the opportunity to revoke a money transfer order. A relevant proposal was rejected, however, during the drafting of the CISG because there was fear of a serious impairment of the international payment transactions and because in many countries the non-payment of a cheque constitutes a criminal act. No such protection is needed in the case of the opening of a letter of credit because the seller usually cannot have access to the letter of credit before having delivered.\footnote{Supra. note 15.} At the same time, Art. 71(2) expressly states that it “relates only to the rights in the goods as between the buyer and the seller”. The right to stop the goods in transit, therefore, does not relate to the relationship between the buyer and his other partners if he has already resold the goods and a third party has obtained title in the goods.\footnote{465 See Secretariat Commentary on Art. 62 of the 1978 Draft [draft counterpart of CISG article 71], Comment 10. Available online at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-71.html The match-up indicates that paragraphs (2) and (3) of Art. 62 of the 1978 Draft and CISG Art. 71 are substantially the same. However, paragraph (1) was significantly modified. See the match-up, available online at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-71.html} In other words, under the CISG the seller loses his right to order the carrier not to hand over the goods if the buyer has transferred
the document to a third party who has taken it for value and in 
good faith.\textsuperscript{466} It follows that \textit{the relations between the buyer and his 
obligees remain untouched}. If an obligee of the buyer has the 
goods or if he has pledged title in the goods from a document, the 
rights of the seller are not governed by the \textit{CISG} but by the 
otherwise applicable domestic law. In this point, \textit{Vilus} submits: “The 
most common situation referred to in Art. 71 is the case when the 
goods are in transit. In such circumstances there is a common law 
institution called \textit{stoppage in transitu} which the seller can use when 
the buyer has delivered the documents to a third person. This is 
clear from the formulation of Art. 71 which emphasizes that ‘the 
present paragraph relates only to the rights in the goods as be-
tween the buyer and the seller.’ The view is held that in such cases 
the seller cannot claim the goods from a third party on the basis of 
the Convention, but he might do so under the applicable national 
law.”\textsuperscript{467}

On the other hand, the right to stop the goods in transit does not 
touch upon \textit{the relationship between carrier and buyer}. There are 
\textit{no obligations for the carrier under the \textit{CISG} to respect the seller’s 
request for stoppage}. The question whether the carrier must or is 
permitted to follow the instructions of the seller where the buyer 
has a document which entitles him to obtain them is governed by 
the appropriate law of the form of transport in question.\textsuperscript{468} If he volun-
tarily stops the goods in transit he exposes himself to a claim for 
damages on the part of the buyer. The seller, on his part, could, 
because of the right to stop performance, request the buyer not 
to take measures against the carrier. Because of the contractual 
relationship with the carrier, the seller could perhaps give orders 
to the former thus exercising his right to stoppage. Otherwise, he 
would have to call in a court. In other words, if the seller has al-
ready dispatched the goods, he can only prevent the handing over 
of the goods to the buyer by giving relevant \textit{orders to the carrier 
or forwarding agent in question}. To what extent the latter follows 
those orders in the first place depends on the contract concluded 
for carriage. If the buyer’s country has acceded to the \textit{CISG}, or if 
the domestic rules of that country also provide for a right to stop 
the goods in transit, the seller may try to enforce this right through 
the courts, e.g. by way of \textit{distress or temporary injunction}.\textsuperscript{469}

\section*{9.4 DUTY TO GIVE NOTICE IN EXERCISING 
SUSPENSION}

Unlike Art. 73 \textit{ULIS}, Art. 71(3) \textit{CISG} requires that the party sus-
pending performance pursuant to paragraph (1), whether before 
or after dispatch of the goods, “\textit{must immediately give notice of the 
suspension to the other party},” who may restore performance by 
giving “\textit{adequate assurance of his performance}” to the aggrieved 
party. This is intended to increase cooperation between the par-
ties.

However, it is sufficient to give \textit{notice after the performance of obli-
gations has been suspended}; the entitled party does not have to 
indicate his intention earlier because frequently there will be no 
time to do so. \textit{Notice} here is subject to Art. 27 \textit{CISG} and \textit{need not}, 
therefore, \textit{to be received}. The risk of transmission is borne by the

\begin{thebibliography}{99}
\bibitem{CISG}Supra. note 10, p. 288.
\bibitem{CISG}Supra. note 21, Comment 11.
\bibitem{CISG}See \textit{Jelena Vilus} in “Provisions Common to the Obligations of the Seller and 
the Buyer”: \textit{Petar Sarcevic and Paul Volken} eds., \textit{International Sale of Goods: 
Dubrovnik Lectures}, Oceana (1986); pp. 243-244. Available online at 
\url{http://www.cisg.law.pace.edu/cisg/biblio/vilus.html}
\bibitem{CISG}Supra. note 21, Comment 12. The rules governing the carrier’s obligation to 
follow the consignor’s orders to withhold delivery from the consignee differ 
between modes of transportation and between various international conventions 
and national laws.
\bibitem{CISG}Supra. note 22.
\end{thebibliography}
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addressee. It should, however, be in the interest of the suspending party to see to it that the notice reaches the other party. In addition, it is not required in the rule to indicate grounds in the notice. But it may be inferred from the principle of good faith that grounds should be stated so as to enable the other party to decide what action is to be taken. If the entitled party fails to give notice of suspension, he will not lose the right to suspend performance, but he may have to satisfy the claims for damages by the other party.  

9.5 RESTORING PERFORMANCE BY GIVING ADEQUATE ASSURANCE

In the same sentence, Art. 71(3) CISG requires that the party suspending performance “must continue with performance if the other party provides adequate assurance of his performance”. This is another effort made to increase cooperation between the parties. Thus the other party can reinstate the first party’s obligation to continue performance by giving the first party adequate assurance that he will perform. Three questions are involved here: first, what is adequate assurance? second, what is covered by such adequate assurance? and third, what happens when the other party does not provide adequate assurance?

First, for such an assurance to be “adequate”, it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performance. For instance, if export of the goods sold was prohibited, but the seller later obtained an export license, the requirement of adequate assurance would be fulfilled. The same is true for cases where a strike in the seller’s factory was thwarted or settled, or where the seller obtained new sources of materials for the manufacture of the goods. According to Honnold, this includes the event in which the buyer, who had suspended payment of this obligations, has re-established them. If performance was suspended on the basis of the mere statement by the other party that he did not intend to perform his obligations, a later statement that he would now be performing as required by the contract may be adequate. Such assurance could also be given by way of offering immediate performance of his obligations or performing them without delay. In the event of a deficiency in creditworthiness, a banker’s guarantee would for instance offer adequate assurance.

In short, adequate assurance depends on the circumstances which have led to the suspension of performance. Adequate assurance need not include full performance; a slight delay should be accepted. In this context, however, reference should be made to assurance in the sense of security for damage claims in case of non-performance.

When the other party provides adequate assurance, such assurance may cover two events: (a) the grounds which led to the suspension of performance have been overcome; and (b) the grounds were not existent at all. In the latter case, the suspending party may already have committed a breach of contract including all the consequences ensuing from it. Suspension of performance may, thus, entail a certain risk. The other party might, in certain circumstances, not only claim damages because of the delay but also because of the costs incurred in providing additional assurances.

On the other hand, it is generally assumed that the suspending party, who has to continue with the performance of his obligations, can extend the period for performance by the time that has passed.

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470 Supra. note 10, pp. 288-289.
471 Supra. note 21, Comment 13.
472 Supra. note 10, p. 289.
473 Ibid.
474 Supra. note 29.
since he has stopped his preparatory work. That time may also be shorter. In any case, the party who is entitled to suspend performance can reasonably adjust the time for performance in accordance with the circumstances.475

However, there is no statement of the consequences of an inadequate assurance in Art. 71(3) CISG, and it should not be presumed that the failure to provide an assurance (or an adequate assurance) is enough to make it “clear” that the other party will commit a fundamental breach. A failure to provide an adequate assurance does not automatically provide a right of avoidance and there is therefore no mechanism by which a party may demand an assurance of performance and treat a failure to respond with an adequate assurance as a fundamental breach.476 The Secretariat Commentary on Art. 62 of the 1978 Draft [draft counterpart of CISG Art. 71] clearly states, however, that if the party suspending performance suffers damages because the other party did not provide adequate assurances as required by this article, he may recover any damages he may have suffered, whether or not he declares the contract avoided.477

9.6 TERMINATION UPON ANTICIPATORY FUNDAMENTAL NON-PERFORMANCE

As stated in Chapter 8, “anticipatory” fundamental breach constitutes the second ground for avoidance of the contract. In this respect, Art. 72(1) CISG stipulates: “If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.” Both Art. 7.3.3 UPICC and Art. 9:304 PECL follows this rule in substance. Art. 7.3.3 UPICC reads: “Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.” And. 9:304 PECL reads: “Where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it, the other party may terminate the contract.”

The following paragraphs, I will focus on anticipatory non-performance as a ground for the right to terminate the contract.

9.6.1 In General

Art. 72(1) CISG, Art. 7.3.3 UPICC and Art. 9:304 PECL are said to establish the principle that a non-performance which is to be expected is to be equated with a non-performance which occurred at the time when performance fell due.478 These articles entitle the aggrieved party to terminate the contract for “anticipatory non-performance”, by which is meant an obvious unwillingness or inability to perform where the failure in performance would be fundamental within Art. 25 CISG, Art. 7.3.1 UPICC and Art. 8:103 PECL, respectively.

The right to terminate for anticipatory fundamental non-performance rests on the notion that a party to a contract cannot reasonably be expected to continue to be bound by it once it has become clear that the other party will commit, cannot or will not perform at the due date. The effect of these articles is that for the purpose of the remedy of termination an anticipatory fundamental non-performance is equated with a fundamental non-performance after performance has become due.479 It is

475 Supra. note 10, p. 290.
477 Supra. note 21, Comment 16.
478 See Comment on Art. 7.3.3 UPICC.
479 See Comment and Notes to the PECL: Art. 9:304. Comment A. Available online at ‹http://www.cisg.law.pace.edu/cisg/text/peclcomp72.html›.
implicit in these articles that a party which exercises a right to terminate the contract for anticipatory non-performance has the same rights as on termination for actual non-performance and is therefore entitled to exercise any of the remedies available to actual non-performance, including damages, except that damages are not recoverable where the non-performance at the due date would be excused.\footnote{480}{Ibid., Comment D.}

However, at first blush there seems to be a slight difference between the provisions of Art. 72(1) \textit{CISG} and Art. 9:304 \textit{PECL}. In Art. 72(1) \textit{CISG}, it is required that it must be clear that the counter party \textit{will commit} a fundamental breach. Both Art. 7.3.3 \textit{UPICC} and Art. 9:304 \textit{PECL} are apparently more widely formulated in that they only require that it must be clear that \textit{there will be} a fundamental non-performance, i.e. a fundamental non-performance will take place. This difference is more apparent than real.\footnote{481}{Supra. note 3.}

\subsection*{9.6.2 Clear Indication of A Fundamental Non-performance}

The \textit{CISG}, \textit{UPICC} and \textit{PECL} all require a clear indication of a fundamental non-performance, i.e. that it must be clear that there will be or the other party will commit a fundamental non-performance; "a suspicion, even a well-founded one, is not sufficient."\footnote{482}{Supra. note 36, Comment B.}

It is clear that a fundamental breach of contract will be committed when the other party declares that he will not perform his obligations. There is the same clarity when the other party denies the very existence of a sales contract. It is also clear that a fundamental breach of contract will be committed when the seller resells to a third party the goods that he had contracted to deliver to the buyer, or when he sells the machines with which he had agreed to produce the goods for the buyer. A breach of contract is also clear in the case of insolvency and the initiation of bankruptcy proceedings. The circumstances mentioned in \textit{CISG} Art. 71(a) \textit{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.} can be so serious that it is clear that a fundamental breach of contract will be committed. There need not, however, be \textit{absolute certainty}. Since the possibility is envisaged that adequate assurance be provided and the contract be performed in the end, there need not be a fundamental breach of contract.\footnote{483}{Supra. note 10, p. 291.}

Thus, great difficulty arose in connection with the question of when a particular act or occurrence justifies the conclusion that a fundamental breach is to be expected. The debate over whether the formulation "it is clear" under \textit{CISG} Art. 72(1) means or should mean a higher degree of certainty than the formulation in Art. 71(1) "it becomes apparent" played a major role in the discussion. Under commentators there is a difference of opinion on whether "it is clear" (in Art. 72) has the same meaning as "it becomes apparent" (in Art. 71). The majority opinion seems to be that Art. 72 requires a higher standard of prospective certainty than Art. 71 mainly due to the more drastic nature of the remedy under Art. 72, namely avoidance. Suspension as provided for in Art. 71 is less drastic in that it is only a temporary remedy, especially if the contract is to be avoided without giving notice to the counter party. This approach also seems to be supported by the case law. This approach is also supported by the provisions of Arts. 7.3.3 and 7.3.4 of the \textit{UNIDROIT Principles} (as well as those of \textit{PECL} Arts. 9:304 and 8:105), where there is a clearly formulated difference in the requirements. In terms of Art. 7.3.3 it is required that it must be...
clear that there will be a fundamental non-performance, whereas in terms of Art. 7.3.4 there need only be a reasonable belief on the part of the innocent party that there will be a fundamental non-performance.\footnote{Supra. note 3.}

However, Schlechtriem refers to a linguistically somewhat lower ceiling but not to a fundamental difference. Schlechtriem submits that the different formulations do not require different degrees of certainty - such a requirement would hardly be practicable anyway. In Art. 73(2), the same wording originally used in Art. 71(1) - “good grounds to conclude” - was retained for the case where a fundamental breach is anticipated with regard to instalment contracts. The decisive factor in all three provisions - Arts. 71(1), 72(1) and 73(2) - is whether a reasonable person would be convinced that a breach of contract is certain to occur. Moreover, another reason for not requiring a higher degree of certainty under Art. 72(1) is that otherwise, a serious refusal to perform would never be “certain” enough under Art. 72(3) since an obligor can always change his intentions until the time for performance. On the other hand, the refusal of the obligor to provide “adequate assurance” following a notice under Art. 71(3) should not in itself be regarded as “clear” evidence of an impending breach of contract.\footnote{See Peter Schlechtriem in “Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods”, Manz, Vienna (1986); p. 96. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-72.html>}

Furthermore, the terminology used is of the same in both Art. 7.3.3\footnote{See Secretariat Commentary on Art. 63 of the 1978 Draft [draft counterpart of CISG article 72], Comment 4. Available online at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-72.html> The match-up indicates that paragraph (1) of article 63 of the 1978 Draft and paragraph (1) of CISG article 72 are substantially identical. Paragraphs (2) and (3) of the Official Text are new. See the match-up, available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-72.html> Supra. note 39.} UPICC and Art. 9:304 PECL, and the UPICC or the PECL therefore sheds little light on what measure should be used to determine whether “it is clear” under CISG Art. 72(1). Therefore, if there is any doubt on whether, due to the conduct of the other party or the prevailing circumstances, there is an anticipatory breach objectively speaking, a party should rather exercise the right to suspend performance under Art. 71 CISG and require an adequate assurance from the other party than issue a notice of avoidance under Art. 72(2). It is the safer option because the giving of a notice of avoidance in terms of Art. 72(2) under circumstances where it is not warranted may in itself constitute an anticipatory breach entitling the other party to avoid the contract.\footnote{Supra. note 3.} Even where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in Art. 77 CISG may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance.\footnote{See Secretariat Commentary on Art. 63 of the 1978 Draft [draft counterpart of CISG article 72], Comment 4. Available online at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-72.html> The match-up indicates that paragraph (1) of article 63 of the 1978 Draft and paragraph (1) of CISG article 72 are substantially identical. Paragraphs (2) and (3) of the Official Text are new. See the match-up, available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-72.html> Supra. note 39.}

Nonetheless, termination in case anticipatory non-performance is permitted only where the obligation of which non-performance is threatened is of such kind that its breach would entitle the aggrieved party to terminate the contract. This applies also to a threatened delay in performance. If a party indicates that it will perform but that its performance will be late this does not constitute an anticipatory non-performance within these articles except where time of performance is of the essence of the contract or the threatened delay is so serious as to constitute a fundamental non-performance. If a party declares the contract avoided without a fundamental breach of contract by the other party being antici-
pated, the former commits a fundamental breach of contract. In other words, a party who intends to declare the contract avoided in case of anticipatory non-performance should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation may not have been “clear” and the declaration of avoidance itself be void. In such a case, the party who attempted to avoid would be in breach of the contract for his own failure to perform.\textsuperscript{489}

In sum, in order for Art. 72(1) \textit{CISG}, Art. 7.3.3 \textit{UPICC} and Art. 9:304 \textit{PECL} to apply it must be clear that a party is not willing or able to perform at the due date. If its behaviour merely engenders doubt as to its willingness or ability to perform the other party’s remedy is to demand an assurance of performance.\textsuperscript{490} Despite of all the ambiguities as for what measure of certainty is required that a fundamental breach will occur in such cases, In a 1992 German decision, the \textit{Landgericht} [District Court] Berlin has given the best judicial exposition of the standards required under Art. 72. It defined the words “it is clear” (“offensichtlich”) in terms of the probabilities that a fundamental breach will be committed. It stated that a very high degree of probability is required (“einer sehr hohen naheliegender Wahrscheinlichkeit.”), but that this did not mean a probability almost reaching certainty (“eine an Sicherheit grenzende Wahrscheinlichkeit.”).\textsuperscript{491} As clarified in the Secretariat Commentary, the future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller’s plant by fire or the imposition of an embargo or monetary controls which will render impos-

\textsuperscript{489}Supra. note 44, Comment 3.

\textsuperscript{490}Supra. note 36, Comment C.

\textsuperscript{491}Germany 30 September 1992 \textit{Landgericht} [District Court] Berlin; available online at \url{http://cisgw3.law.pace.edu/cases/920930g1.html}

\textsuperscript{492}In a word, a high degree of certainty about occurrence of the breach and its fundamental character is required.\textsuperscript{493}

\textbf{9.6.3 Notice Given in case of Termination}

Unlike the apparent duty to give notice, as established under Art. 71(3) \textit{CISG}, by a party intending to suspend performance, there are different opinions on whether the obligation to give notice is a condition precedent for the valid exercising of the right to avoid in case of anticipatory fundamental non-performance.

According to Art. 72(2) \textit{CISG}: “If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party”. Some commentators submit that in the very interest of the obligee, it should be reasonable in most cases to give notice of an avoidance of contract. Given the sophisticated means of communication, it is hardly imaginable that time would not allow to give notice to the other party of the intended avoidance of the contract. Time also relates to the time-span between the giving of notice and the expiration of the time for performance. The other party must have sufficient time to provide assurance. Even in the event of the other party’s bankruptcy, his receiver could prefer

\textsuperscript{492}Supra. note 44, Comment 2.

\textsuperscript{493}See Anna Kazimierska in “The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods”: \textit{Pace Review of the Convention on Contracts for the International Sale of Goods}, Kluwer (1999-2000); p. 97. Available online at \url{http://www.cisg.law.pace.edu/cisg/biblio/kazimierska.html}. In this respect, Kazimierska submits that this certainty will arise when the seller resells to a third party the goods he was to deliver to the buyer, or when he sells machines necessary for the production of goods contracted for by the buyer, or in the case of seller’s insolvency and initiation of bankruptcy proceeding. When a deficiency in the seller’s ability to perform, usually a deficiency in his creditworthiness, becomes so serious that it is clear that a fundamental breach of contract will be committed, the buyer also will have grounds for avoidance.
fulfillment to avoidance of a contract. A notice is reasonable whenever there is a chance that the other party will provide assurance of performance.494

However, this is contradicted by circumstances where there is absolute certainty of future fundamental breaches of contract.495 Notice of the intent to avoid is unnecessary in those situations - practically speaking, the most important - in which the other party has already declared that he will not perform the contract (Art. 72(3)). Since this exception also covers the frequent cases in which a demand for new terms or alleged contract violations by the other side are used as a pretext for not performing one's own obligations, immediate avoidance still remains an option in most cases. However, Art. 72(2) should apply primarily to situations where performance by a willing party is jeopardized by objective circumstances. In those cases where there is no time to notify, where the delivery date is so near that assurances could not be procured in time, there is again no need to notify the other party. Where there is little chance that the other party can still provide security - for example, where a delivery cannot be made because of war - notice will often be unnecessary.496

Nonetheless, the CISG takes a more lenient approach to antici-

494 Supra. note 10, pp. 292-293. Another issue to be noted here is that under the CISG, this notice is subject to Art. 27. If it is lost, the party entitled to avoid the contract does not lose that right. But he should in his own interest make sure that the notice reaches the other party.

495 Thus there is no need to give notice in advance of the intention to avoid the contract. But also in this case, the other party has a right and no obligation (except in regard to mitigation of losses, note 3) to declare the contract avoided. If the entitled party does not avoid the contract, and if the obligor changes his mind, the latter may still fulfill the contract. On the other hand, the obligee does not have to wait and see whether the obligor changes his mind; he can avoid the contract immediately. In such a case, the declaration of an intended non-performance of the contract is irrevocable (Supra. note 10, p. 293.)

496 Supra. note 42, p. 95.

497 Supra. note 3.

498 Alike the matter in suspension of performance discussed above, termination also entails a certain risk. In the assessment of the appropriateness of termination, decisive is not just the relevant information, but whether the party wishing to terminate the contract could hold it to be true. If the party terminating the contract could hold the information available to him to be true, the risk falls to the other party. If the first party, however, refuses to perform his obligations unfoundedly, he commits a fundamental breach of contract. Risks of this kind cannot be fully avoided in international trade.
cation is to enable the other party to provide adequate assurance that it will perform. If that has become impossible, then the necessity to give notice must surely fall away.\textsuperscript{499}

9.7 ADEQUATE ASSURANCE OF DUE PERFORMANCE

9.7.1 Purpose of Rule

Practically speaking, it is not always easy to provide clear proof of a fundamental breach of contract except in exceptional cases, for instance, bankruptcy of the debtor or its express refusal to perform. Thus, the party threatened by future non-performance would often be in a dilemma. If it were to wait until the due date of performance, and this did not take place, it might incur loss. If, on the other hand, it were to terminate the contract, and it then became apparent that the contract would have been performed by the other party, its action will amount to non-performance of the contract, and it will be liable in damages.\textsuperscript{500}

Therefore, the notice of the party intending to declare the contract avoided demanding that the other party provide adequate assurance of the performance, as Art. 72(2) CISG allows in such a case, seems to be the best solution to relieve the former party from doubts about occurrence of the other party’s breach and reduces the risk he would otherwise be taking. A similar rule is laid down in the first sentence of Art. 7.3.4 UPICC: “A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance”; as well as in Art. 8:105(1) PECL: “A party which reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and meanwhile may withhold performance of its own obligations so long as such reasonable belief continues”.

Such rules are intended to protect the interests of a party who has reason to believe that the other will be unable or unwilling to perform the contract at the due date but who cannot or may be reluctant to terminate the contract immediately in case it transpires that the other party would after all have performed.\textsuperscript{501} Consequently it enables a party who reasonably believes that there will be a fundamental non-performance by the other party to demand an assurance of performance from the other party and in the meantime to withhold its own performance.

9.7.2 Non-receipt of Adequate Assurance

As to what adequate assurance is, it is comparable to that in the suspension mechanism under Art. 71 as discussed above (supra. 9.5.1). What constitutes an adequate assurance will depend upon the circumstances, including the standing and integrity of the debtor, its previous conduct in relation to the contract and the nature of the event that creates uncertainty as to its ability and willingness to perform. In some cases the debtor’s declaration of intention to perform will suffice. In other cases it may be reasonable for the creditor to demand evidence of the debtor’s ability to perform.\textsuperscript{502}

Rather, the way in which such adequate assurance is to be provided depends on the expected fundamental breach of contract. In

\textsuperscript{499} Supra. note 3.

\textsuperscript{500} See Comment 1 on Art. 7.3.4 UPICC. See also Comment and Notes to the PECL: Art. 8:105. Comment A. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp71,72.html>

\textsuperscript{501} Ibid.

\textsuperscript{502} See Comment 2 on Art. 7.3.4 UPICC; Comment D on Art. 8:105 PECL, supra. note 57.
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practice, there will be very few cases where a mere statement of intention and ability to perform provides adequate assurance to the promisee. In most instances a new term of payment against documents, a guarantee by a reputable bank, or a letter of credit issued by a reputable bank will be required. The simplest means is to provide assurance by way of paying a sum, e.g. banker’s guarantee. If there is serious doubt as to the seller’s performing of his obligations, he could also provide a guarantee of performance. He could also explain in which way he can and will deliver the goods in time, in the agreed quality and free from third party rights or claims (e.g. use of sub-contractors, increase in the production capacity, cancellation of other obligations to deliver, acquisition of licenses, etc.). In any event, for such an assurance to be “adequate,” it must give reasonable security to the promisee that either the promisor will perform in fact, or that the promisee will be compensated for all losses incurred in executing his own performance.

There is a difference of opinion between commentators, however, on whether a failure or a refusal to produce adequate security where it has been demanded is in itself a fundamental breach or whether it may only be a clear indication that the other party will commit a fundamental breach. As discussed above, in the suspension mechanism under Art. 71 CISG, a failure to provide an adequate assurance does not automatically provide a right of avoidance and there is therefore no mechanism by which a party may demand an assurance of performance and treat a failure to respond with an adequate assurance as a fundamental breach. This matter under CISG Art. 72(2) remains unclear as that under Art. 71(3). Despite the absence of a clear guidance on this matter, considering the conditions required in Art. 72 are much harsher than that in Art. 71, it may be correct to say that the failure by a party to give adequate assurances that he will perform when properly requested to do so may, under CISG help it “clear” that he will commit a fundamental breach.

In this respect, Art. 7.3.4 UPICC and Art. 8:105 PECL may be of assistance in interpreting the interplay between Arts. 72 and 71 as Art. 7.3.4 UPICC and Art. 8:105 PECL make express provision for the innocent party to demand an adequate assurance where it reasonably suspects that there will be a fundamental non-performance. In terms of Art. 7.3.4 UPICC and Art. 8:105 PECL, it is clearly stipulated that a failure to provide this assurance within a reasonable period of time, entitles the other party to terminate (avoid) the agreement. In other words, if the aggrieved party does not receive adequate assurance of performance and still believes on reasonable grounds that performance will not be forthcoming, it may terminate the contract. Although whether this is possible in the light of the drafting history of the CISG, is debatable; the other party’s failure to give the assurance requested is itself treated as a fundamental non-performance under the two sets of Principles, giving the aggrieved party the right to terminate the contract and also a right to damages where the deemed non-performance is not excused.

9.8 CONCLUDING REMARKS

Whereas a contract can usually be avoided only after a fundamen-

504 Supra. note 10, p. 293.
505 Supra. note 28.
506 Supra. note 3.
507 Ibid.
508 See Comment 3 on Art. 7.3.4 UPICC; Comment C on Art. 8:105 PECL.

143
tal non-performance under CISG Arts. 49 and 64, UPICC Art. 7.3.1 or PECL Art. 9:301, a party may, under the prerequisites of CISG Art. 72, UPICC Art. 7.3.3 or PECL Art. 9:304 already declare the contract avoided before. Indeed, termination based on anticipatory non-performance as contained in these rules confirms the approach that employs the parties’ (in)ability and (un)willingness to perform as a relevant factor in the determination of fundamental breach prior to the date of performance. It also confirms the approach that focuses on whether a party’s behavior may give cause to the other not to rely on his future performance.\footnote{\textit{supra.} note 60, p. 309.}

However, these rules all require a clear indication of a fundamental non-performance, i.e. that it must be clear that there will be or the other party will commit a fundamental non-performance; “a suspicion, even a well-founded one, is not sufficient.” If at the time performance was due no fundamental breach would have occurred in fact, the original expectation may not have been “clear” and the declaration of avoidance itself be void. In such a case, the party who attempted to avoid would be in breach of the contract for his own failure to perform. Therefore, if there is any doubt on whether, due to the conduct of the other party or the prevailing circumstances, there is an anticipatory fundamental non-performance objectively speaking, a party should rather exercise the right to suspend performance under Art. 71 CISG and wait until the time for performance has expired or when the other party has provided adequate assurance of his performance; or under UPICC Art. 7.3.4 or PECL Art. 8:105 demand adequate assurance of due performance and meanwhile withhold his own performance than issue immediately a notice of termination. Nonetheless in this context, the mitigation principle (to be discussed in Chapter 14) should be taken into consideration. A contract should definitely be avoided where an immediate avoidance would mitigate the losses.\footnote{\textit{supra.} note 10, p. 292. But even if there is no \textit{obligation to mitigate losses}, clarity can be obtained by avoiding contract and the way could be opened up for new contracts. When a contract has been declared avoided, the entitled party can immediately claim damages.}

In sum, a party who intends to declare the contract avoided in case of anticipatory non-performance should do so with caution. It is the safer option to exercise the right to suspend or withhold performance because the giving of a notice of termination in terms of CISG Art. 72, UPICC Art. 7.3.3 or PECL Art. 9:304 under circumstances where it is not warranted may in itself constitute an anticipatory breach entitling the other party to avoid the contract.
CHAPTER 10. TERMINATION OF BREACHED INSTALLMENT OR PART

Where a contract is to be performed in installments or separate parts, most systems recognize that the aggrieved party should have the right to refuse to accept, and to refuse to render its promised counter-performance for the defective installment or part, without necessarily having the right to refuse to accept further performance of the remaining performance under the contract; but it may be entitled to refuse to accept any further performance when the non-performance affects the whole contract.\[511\]

10.1 TERMINATION OF INSTALLMENT CONTRACTS: CISG ART. 73

CISG Art. 73 describes the right to avoid the contract where the contract calls for the delivery of goods by installments. The contract calls for the delivery by installments if it requires or authorizes the delivery of goods in separate lots. In a contract for delivery by installments a breach by a party in respect of one or more installments can affect the other party in respect of that installment, in respect of future installments and in respect of installments already delivered. The three paragraphs of Art. 73 treat these three aspects of the problem of the avoidance of installment contracts.\[512\]

Art. 73 governs the avoidance of installment sales as follows: “(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment. (2) If one party’s failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time. (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.”

As it indicates, a disturbance to a present delivery was taken as the starting point in Art. 73(1). Where there is a breach of a single delivery of an installment contract, the contract may be avoided only with respect to the installment that is defective or was not performed and to the obligation of the other party corresponding to that performance. Art. 73(1) requires that the breach constitutes a fundamental breach of contract with regard to the installment in question. In addition, a breach of one installment may also indicate the probability of a breach of installment obligations not yet due. In that case, the contract may be avoided with regard to the future installments as well. A slight reformulation was made in order to achieve a greater degree of objectivity in cases where there was a risk of a breach in respect of future deliveries in Art. 73(2), according to which avoidance in regard to future obligations must be declared within a reasonable time so that the other party has

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\[512\] See Secretariat Commentary on Art. 64 of the 1978 Draft [draft counterpart of CISG article 73], Comments 1 and 2. Available online at http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-73.html The match-up between Art. 64 of the 1978 Draft with CISG Art. 73 indicates that they are substantively identical. Each of their three paragraphs contains minor word changes, however, none is in any way substantive. The Secretariat Commentary on 1978 Draft Art. 64 should therefore be relevant to the interpretation of CISG Art. 73. See the match-up, available online at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-73.html
sufficient time to consider the matter. Finally, if, due to the interde-
pendence of the installments, the defective or failed performance
makes past or future installments worthless, those installments can
be avoided as well (Art. 73(3)).

Thus, Art. 73 of the Convention does not provide supplementary
remedies in order to deal with installment contracts but lays down
a comprehensive principle with applies to both parties. While para-
graph (1) of Art. 73 basically repeats the contents of Arts. 49(1)(a)
and 64(1)(a) with respect to the parties’ failure to perform a particu-
lar installment, paragraph (2) deals with future installments. Para-
graph (3) of Art. 73 provides for cases where one installment is
avoided in accordance with paragraph (1) of Art. 73 and it has in-
terdependence with other past or future deliveries. Moreover, it is
to be mentioned that as under CISG Art. 73, the goods for deliv-
ery by installments do not have to be similar in every installment to
make avoidance possible. The contract may provide for deliveries
of different goods or partial deliveries in a given installment. The
contract also does not have to provide for fixed dates of deliveries;
what is more, agreement may be reached on deliveries called for
when they are necessary.513

It is said that the basic problem of CISG Art. 73 concerns whether
installment contracts should be considered as one contract, i.e., in
their totality, whereby a difficulty of performance in regard to one
installation would affect the contract as a whole, thus avoiding the
whole contract, or whether they should be regarded as a series of
separate contracts. Since abuses are possible in cases involving
installment contracts, the rights and duties of the parties should be
analyzed very carefully.514

10.2 TERMINATION OF FUTURE INSTALLMENTS: CISG
ART. 73(2)

Art. 73(2) entitles the aggrieved party to declare the installment
contract avoided for the future if the promisor’s failure to per-
form any of his obligations in respect of any delivery gives the
aggrieved party good grounds to conclude that a fundamental
breach of contract will occur with respect to future installments.
This paragraph provides three inseparable conditions under which
the non-breaching party may declare the contract avoided with
respect to future installments: 1) a breach by the defaulting party
with respect to any of the installments has occurred, 2) such
breach “gives the [non-breaching] party good grounds to con-
clude that a fundamental breach of contract will occur with respect
to future installments”, and 3) the declaration of avoidance must be
made “within a reasonable time of the failure to perform”. The
crucial condition is the second one, which concerns anticipatory
fundamental breach.515

Art. 73 represents, in principle, application of the rule of Art. 72
in the special case of installment contracts.516 As under Art. 72(1)
(see Chapter 9), paragraph (2) of Art. 73 does not itself provide any
assistance to determine when a particular act or occurrence jus-
tifies the conclusion that a fundamental breach is to be expected.
The formulation “good grounds to conclude” seems to require a less
strict and more subjective standard for avoidance than under Art.

513 See Anna Kazimierska in “The Remedy of Avoidance under the Vienna
514 See Jelena Vilus in “Provisions Common to the Obligations of the Seller and
the Buyer”: Petar Sarcevic and Paul Volken eds., International Sale of Goods:
Dubrovnik Lectures, Oceana (1986); pp. 246-247. Available online at
515 See Jianming Shen in “Declaring the Contract Avoided: The U.N. Sales
10, No. 1, New York State Bar Association (Winter 1997); p. 23. Available
online at <http://www.cisg.law.pace.edu/cisg/biblio/shen.html>
516 Supra. note 4.
This reading is confirmed by the Secretariat Commentary: “[...] It should be noted that article 64(2) [draft counterpart of CISG article 73(2)] permits the avoidance of the contract in respect of future performance of an installment contract even though it is not ‘clear’ that there will be a fundamental breach of the contract in the future as would be required by article 63 [draft counterpart of CISG article 72].”

It should be noted that the test of the right to avoid under article 64(2) [draft counterpart of CISG article 73(2)] is whether a failure to perform in respect of an installment gives the other party good reason to fear that there will be a fundamental breach in respect of future installments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear.

As stated above, the standard under Art. 73(2) is less strict and more subjective than grounds for avoidance under Art. 72. This may be explained by the fact that in the setting of Art. 73(2) a breach of contract has already occurred. The grounds for the assumption that a fundamental breach will occur are different under Art. 73 from those under Art. 72. Neither the promisor’s failure to provide adequate assurance on demand due to a deterioration of creditworthiness, nor his declaration that he will not perform, give the promisee the right to avoid the contract. An actual failure to perform must instead be the basis for avoidance of future installments. Thus, as far as it concerns future installments, Art. 73(2) does not support the approach that considers a party’s refusal to perform itself as a fundamental breach. It confirms, however, the no-reliance approach based on an actual breach.

The final clause of Art. 73(2), which requires a party to avoid as to future installments “within a reasonable time”, is curiously ambiguous. 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”. 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. Neither of these approaches works well if the past defaults involved non-delivery or if “good grounds” to anticipate a fundamental breach as to future installments arose only after a series of non-conforming installments. 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.

However, it is to be noted that that Art. 73(2) deals only with avoidance as to future performance. It does not address avoidance of an entire installment contract. If a default in a completed delivery constitutes a fundamental breach with respect to that delivery and gives the aggrieved party good grounds to anticipate a fundamen-

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518 Supra. note 2, Comment 5.

519 Supra. note 2, Comment 6.

520 See Harry M. Flechtner in “Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.”: 8 Journal of Law and Commerce (1988); pp. 53-108. Available online at <http://www.cisg.law.pace.edu/cisg/text/flecht73.html> Behind these issues are questions about the purpose of the “reasonable time” requirement in Art. 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)?
tional breach as to future installments, however, the past deliveries can be avoided under Art. 73(1) and the future installments can be avoided under Art. 73(2). 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 (see the discussion followed), or that the party can avoid under the general anticipatory breach provisions (see Chapter 9).

**10.3 TERMINATION OF A CONTRACT AS A WHOLE: CISG ART. 73(3)**

In some contracts it will be the case that none of the deliveries can be used for the purpose contemplated by the parties to the contract unless all of the deliveries can be so used. This would be the case, for example, where, as to be illustrated below, a large machine is delivered in segments to be assembled at the buyer’s place. Therefore, Art. 73(3) CISG provides that a buyer who avoids the contract in respect of any delivery, an action which can be taken under Art. 73(1), may also avoid in respect of deliveries already made or of future deliveries if, “by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract”. Unlike paragraphs 1 and 2 which grant both parties the right to avoid the contract, paragraph 3 refers exclusively to the rights of the buyer.

There are no particular difficulties in determining whether a breach in respect of an installment is fundamental where each installment consists of goods that are usable or resalable independently of the other installments. However, it may be more difficult where the individual installments are parts of an integrated whole. This would be the case, for example, where the sale is of a large machine which is delivered in segments to be assembled at the buyer’s place. In such a case the determination as to whether the breach in respect of that installment was fundamental should be made in the light of the detriment suffered by the buyer in respect of the entire contract, including the ease with which the failure in respect of the individual installment can be remedied by repair or replacement. If the breach is fundamental and, because of their interdependence, installments already delivered or to be delivered could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract, Art. 73(3) authorizes the buyer to declare the contract avoided in respect of those deliveries.

It is to be noted that under Art. 73(3) earlier deliveries may well have been faultless, and a fundamental breach of contract does not necessarily have to be expected in regard to future deliveries. The right in Art. 73(3) to declare the whole or part of the contract avoided ceased to depend on the worthlessness of the deliveries to the buyer and was made subject to the more objective test of whether, by reason of their interdependence, the deliveries could not be used for the purpose contemplated by the parties. However, this is true only if the purpose of the entire contract was clear to both parties at the conclusion of the contract. This wording of paragraph (3) seems to support the approach that focuses on the purpose of the contract in determining fundamental breach, even though it is not expressly stated that the lack of utility of past or future deliveries can alone constitute a fundamental breach.

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522 Supra. note 2, Comment 7.
523 Supra. note 2, Comment 4.
As mentioned earlier, under CISG Art. 73, the goods for delivery by installments do not have to be similar in every installment to make avoidance possible. Thus, for the goods to be interdependent they need not be part of an integrated whole, as in the example of the large machine mentioned above. For example, it may be necessary that all of the raw material delivered to the buyer be of the same quality, a condition which might be achievable only if they were from the same source. If this was the case, the various deliveries would be interdependent and Art. 73(3) would apply. On the other hand, it is not sufficient that the buyer alone knew of the interdependence; the seller, too, has to be aware of that interdependence. If the interdependence of the installments is not clear from itself, the buyer has to inform the seller accordingly. In so doing, it does not suffice that the buyer informs the seller of the interdependence of the installments during performance; he should rather reveal the purpose of the goods to the seller already at the conclusion of the contract. In this point, another issue is recalled: if the buyer wants to avoid the contract not only in regard to the latest, but also to earlier and future installments, he has to declare so at the same time. “The declaration of avoidance of past or future deliveries must take place at the same time as the declaration of avoidance of the current delivery.”

10.4 PARTIAL TERMINATION: CISG ART. 51

Under the CISG, application of Art. 73 may concur with Art. 51 (read in conjunction with Art. 49) which provides a buyer with a right to avoid a part of a contract and such a part could be an installment. Then the buyer has a choice between Art. 51 and Art. 73 of the Convention. In this respect, Art. 51 reads as: “(1) if the seller delivers only a part of the goods or if only a part of the goods...”

Sale of Goods (CISG) 1998, Kluwer Law International (1999); p. 321. Available online at [http://www.cisg.law.pace.edu/cisg/biblio/koch.html]. It could be argued that Art. 73(3) is the counterpart of Art. 51(2) as far as delivery is made in installments and that it clearly contemplates a fundamental breach situation. It is argued that, under Art. 51(2), one important factor in determining whether the non-conformity of some of the goods or the incomplete delivery entitles the buyer to avoid the entire contract is if the breach renders the intended use of the remainder impossible. Art 51(2) therefore seems to support, at least in situations where the failure to make delivery completely or in conformity with the contract, the approach which asks whether the purpose of the contract has been frustrated by the breach. Thus, the cross-reference to Art. 51(2) confirms such an approach as far as partial non-performance is concerned, and Art. 73(3) confirms it in respect to installment sales. It is, however, rejected by the Convention’s regime governing the seller’s obligations. This approach, therefore, cannot be applied outside the scope of Arts. 51(2) and 73(3). One way to avoid any inconsistency could be to apply this approach only within the scope of Arts. 51(2) and 73(3), and to consider unfitness for the intended purpose outside their scope as a fundamental breach only where the parties have agreed on fitness for a particular use. In that case, the parties’ will prevails over conceptual concerns.

Ibid.

Supra. note 12.

Supra. note 3. Where the seller makes a delivery which includes some non-conforming goods or of less than the required quantity of goods, Art. 51(1) entitles the buyer to exercise his remedies under Arts. 46-50, including Art. 49 which gives him the right to avoid the contract. Although the Convention does not expressly make a distinction between cases where the contract is or is not severable, it seems that, by recognising partial avoidance, Art. 51(1) presupposes that it should be the case where performance of the seller could be divided into conforming and non-conforming parts. Leser describes CISG Art. 51 as creating a de facto division in the contract. Where the non-conforming part is severable, the reference means that both the conditions and the effects of Arts. 46-50 can be applied to that part. It follows that the buyer can treat the missing or non-conforming part as the subject of a separate contract that is severable for remedy purposes, and consequently terminate the contract in respect of that part, provided that the seller’s failure constitutes a fundamental breach with respect to that part. (See Mirghasem Jafarzadeh in “Buyer’s Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi’ah Law” (2001). Available online at [http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh1.html].)
delivered is in conformity with the contract, articles 46 to 50 apply
in respect of the part which is missing or which does not conform.
(2) The buyer may declare the contract avoided in its entirety only
if the failure to make delivery completely or in conformity with
the contract amounts to a fundamental breach of the contract."

As noted above, the purpose of Art. 73(1) is to permit a party to
treat each installment of an installment contract as a severable con-
tract for purposes of avoidance. Art. 73(1), therefore, is analogous
to Art. 51(1) – the provision of 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. Thus, under both Arts.
51(1) and 73(1) the buyer may be able to terminate the contract in
respect of some part of the subject-matter of the contract and keep
the contract alive with respect to the other part. In addition, Art.
51(2) also offers the buyer the ability to avoid the entire contract.
In such situations the buyer can avoid the contract “in its entirety
only if the seller’s default “amounts to a fundamental breach of con-
tract” as a whole. Thus, it could be argued that Art. 73(3) is the counterpart of Art. 51(2) as far as delivery is made in
installments and that it clearly contemplates a fundamental breach
situation. Thus, Art. 73 CISG “should read in conjunction with
art. 51 and the comments thereon".

Another commentator notes the distinction: the provision included
in Art. 73 is intended specifically for installment deliveries and
for avoidance not only of the installment with respect to which a
breach has occurred but also future and interdependent install-
ments. However, under Art. 73(1) the breach must be fundamental
as far as the failed installment is concerned; whereas under Art. 51,
the buyer is allowed to fix an additional period of time to enable the
seller to perform his obligations. If the seller does not effect such
a partial delivery within the period so set, the buyer is free to avoid
the contract as regards this installment, irrespective of whether the
failure constitutes a fundamental breach of the part of the contract
at /http://www.cisg.law.pace.edu/cisg/text/ziegel73.html/

See Christopher Kee in “Remedies for breach of contract where only part of
the contract has been performed: Comparison between provisions of CISG
(Articles 51, 73) and counterpart provisions of the Principles of European
Contract Law” (2002); pp. 281-282. Available online at
in question. So, by acting under Art. 51 the buyer will not have to ascertain if the breach has been fundamental.\(^\text{535}\)

Thus, from a buyer’s perspective, Art. 51 offers a considerably more certain method of avoiding the offending part of the contract. By providing recourse to the Nachfrist provisions in CISG Arts. 47 and 49(1)(b), there are circumstances in which the buyer does not need to show the fundamental breach required by CISG Art. 73. CISG Art. 51(2) also offers the buyer the ability to avoid the entire contract in instances where failure as to a part amounts to a fundamental breach of the whole contract. CISG Art. 73(3) would instead appear to take the curious position of forcing the buyer to elect between avoiding future or previous deliveries, although this distinction has been dismissed.\(^\text{536}\)

### 10.5 COMBINED APPROACH: PECL ART. 9:302

It is said that Art. 51 was created to promote one of the fundamental tenets of the CISG - to keep contracts “on foot”. An unintended consequence has been competition with CISG Art. 73. In this respect, The PECL does not draw a distinction between rights of the seller and buyer in the same manner as the CISG.\(^\text{537}\) In this instance, the most comparable counterpart is PECL Art. 9:302, which reads: “If the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned, there is a fundamental non-performance, the aggrieved party may exercise its right to terminate under this Section in relation to the part concerned. It may terminate the contract as a whole only if the non-performance is fundamental to the contract as a whole.”\(^\text{538}\)

The Official Comment to PECL Art. 9:302 makes its general principle clear: “Where the contract calls for a series of performances by one party, each with a matching counter-performance (typically, a separate price for each performance), the contract may be seen as divisible into a series of units. If one party fails to perform one unit, the other may want to put an end to its obligation to accept performance of that unit: for instance, in a contract for services it may want to arrange for someone else to do the work. However, it may not be appropriate for the aggrieved party to have the right to terminate the whole contract because the failure may not be fundamental in relation to the whole. The unit not performed may not affect the rest of the contract significantly, and the non-performance may not be likely to be repeated. In these circumstances, it is appropriate to allow the aggrieved party to terminate in relation to the part not performed, leaving the rest of the contract untouched. Only if the non-performance is fundamental to the whole contract should the aggrieved party be entitled to terminate the whole.”\(^\text{539}\)

It is clearly found that PECL Art. 9:302 only allows termination in instances where there has been fundamental non-performance, or to use the CISG terminology a fundamental breach. In doing so, the PECL is similarly promoting the notion of keeping contracts “on foot”.\(^\text{540}\) Two crucial terminologies in PECL Art. 9:302 must be given further details. On the one hand, PECL Art. 9:302 allows termination of the contract in relation to the part concerned where

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\(^{535}\) Supra. note 3, pp. 99-100.

\(^{536}\) Supra. note 24, pp. 282-283.

\(^{537}\) Supra. note 24, p. 282.

\(^{538}\) Supra. note 1, Comment A.

\(^{539}\) Supra. note 1, Comment C.

\(^{540}\) Supra. note 24, p. 285.
non-performance is fundamental and if the contract is to be performed in separate parts and in relation to a part to which a counter-performance can be apportioned. Termination “in relation to the part concerned” of the contract is a slightly awkward phrase, as the contract is not terminated, but it has the advantage that the general rules on termination (such as the need to give notice under Art. 9:303) applies. CISG Art. 73 takes the same approach. 541

On the other hand, PECL Art. 9:302 allows the aggrieved party to terminate the contract as a whole where the non-performance is fundamental to the contract as a whole. However, “contract as a whole” does not, as it might initially appear, mean the entire contract. PECL Art. 9:305 describes the effect of termination as it applies to all references to this word within the PECL. With two exceptions, termination of a contract as a whole will only relieve the parties of their future obligations. The article specifically leaves intact the rights and liabilities that have accrued at the date of termination. The two exceptions are where the value of property already delivered has been fundamentally reduced (PECL Art. 9:306) and where recovery of property already delivered can be made (PECL Art. 9:308). 542

By contrast with the CISG approach, the drafters of the PECL have avoided the competition between CISG Arts. 51 and 73 by not including a specific provision that explicitly directs the parties to act in the same manner as CISG Art. 51. At first glance, PECL Article 9:302 is most comparable to CISG Article 73 as it considers a failure of performance in the situation where “the contract is to be performed in separate parts and in relation to a part to which counter performance can be apportioned”. 543 Although using the same language of CISG Art. 51, i.e., “parts”, a plain reading of PECL Art. 9:302 does only allow termination as to the part where there has been fundamental non-performance. Therefore, with the exclusion of this linguistic argument, PECL Art. 9:302 does represent a shorter restatement of CISG Art. 73. 544

However, it is important not to immediately assume that the PECL promotes the rights and remedies afforded by CISG Art. 73 and by its silence condemns the approach of CISG Art. 51. It is suggested that the better view, although in this instance the omission of the PECL to explicitly address a CISG Art. 51 scenario does not in and of itself suggest a criticism of the approach, is that the combined PECL articles promote the CISG Art. 51 position in two ways - by providing a restrictive definition of termination, and by requiring fundamental non-performance. 545 In other words, PECL Art. 9:302 does not exclude those circumstances contemplated by CISG Art. 51. 546 when considering PECL Arts. 9:302, 9:305 and 9:306 together and in context, it is possible to see that the same philosophy that drives CISG Art. 51 emerges. 547

10.6 CONCLUDING REMARKS

Unfortunately, no counterpart is found in the UNIDROIT Principles concerning the subject discussed in this Chapter. To end this discussion, some important remarks must be made: It is important to be mindful of the rationale that guides PECL Art. 9:302 and CISG Arts. 51 and 73 - where the failure to perform or deliver a part of the contract does not compromise the purpose of the entire contract, it is would be unreasonable to allow the entire contract to be

541 Supra. note 1, Comment B.
542 Supra. note 30.
543 Supra. note 27.
544 Supra. note 24, p. 284.
545 Supra. note 30.
546 Supra. note 27.
547 Supra. note 24, p. 286.
ended. Recourse is first given to what might be described as “non-drastic” remedies. Thus, the notion of restricting a party’s ability to unreasonably end an entire contract is identified.

If the failure to perform a part of the contract amounts to fundamental non-performance of the entire contract, then termination of “the contract as a whole” is allowed. However, termination “of the contract as a whole” normally means only termination of all the future obligations on each side. Nonetheless, in this instance and with the assistance of CISG Art. 73(3) and PECL Art. 9:306 (Property Reduced in Value), which states that: “A party which terminates the contract may reject property previously received from the other party if its value to the first party has been fundamentally reduced as a result of the other party’s non-performance”, all obligations including those previously accrued can be avoided.

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549 Supra. note 31.
CHAPTER 11. DECLARATION OF TERMINATION

757 Fair dealing requires that an aggrieved party which wishes to terminate a contract normally give notice to the defaulting party. The defaulting party must be able to make the necessary arrangements regarding goods, services and money at its disposal. Uncertainty as to whether the aggrieved party will accept performance or not may often cause a loss to the defaulting party which is disproportionate to the inconvenience which the aggrieved party will suffer by giving a notice. When performance has been made, passiveness on the side of the party which was to receive performance may cause the performing party to believe that the former has accepted the performance even if it was too late or defective. If, therefore, the aggrieved party wishes to terminate the contract it must notify the other party within reasonable time. 550

11.1 NO AUTOMATIC TERMINATION

759 Termination is an act of the aggrieved party, not an act of a court or arbitrator. By way of contrast with the approach of some civil law jurisdictions, there is no requirement under the Convention (as well as the two Principles) that the party avoiding the contract obtain judicial approval or confirmation. 551 “Avoidance constitutes a right. Since it is made dependent on a declaration, the entitled party can consciously decide to continue to claim performance of the contract even when there are grounds for avoidance.” 552 In other words, the aggrieved party has a right and no obligation (except in regard to mitigation of losses) to declare the contract avoided.

760 However, “[a]voidance of the contract by one party may have serious consequences for the other party. He may need to take immediate action to minimize the consequences of the avoidance such as to cease manufacturing, packing or shipping the goods or, if the goods have already been delivered, to retake possession and arrange to dispose of them.” 553 For this reason CISG Art. 26 provides “[a] declaration of avoidance of the contract is effective only if made by notice to the other party”. It follows that the contract is avoided at the time notice of the declaration of avoidance is given to the other party. 554 Thus, a non-breaching party’s avoidance will be successful and recognized by a court only if a notice of avoidance is communicated to the breaching party. The non-breaching party therefore cannot effectively exercise the right to declare the contract avoided if he fails or refuses to give notice to the other party. This narrows the rule from that found in ULIS Arts. 26, 30, 61 and 62, which provided for an automatic or ipso facto avoidance in certain circumstances in addition to avoidance by declaration of the aggrieved party. Automatic or ipso facto avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been ipso facto avoided. 555

554 Ibid., Comment 2.
555 See Secretariat Commentary on Art. 45 of the 1978 Draft [counterpart of CISG Art. 49], Comment 2. Available online at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-49.html> ; also Secretariat
In other words, prescribing a declaration of avoidance, the CISG breaks with the ipso facto avoidance, i.e. avoidance by virtue of law, which has played a great role in ULIS, thus overcoming the uncertainty as to whether, and possibly when, the contract is made void.\footnote{Supra. note 3.} Art. 7.3.2(1) UPICC reaffirms the principle: “The right of a party to terminate the contract is exercised by notice to the other party.” The notice requirements recited in UPICC Art. 7.3.2(1) and CISG Art. 26 correspond to one another.\footnote{See Albert H. Kritzer in “Editorial remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 26”. Available online at \texttt{http://www.cisg.law.pace.edu/cisg/principles/uni26.html}} PECL Art. 9:303(1) contains a substantially identical rule: “A party’s right to terminate the contract is to be exercised by notice to the other party.” The notice requirement will permit the non-performing party to avoid any loss due to uncertainty as to whether the aggrieved party will accept the performance. At the same time it prevents the aggrieved party from speculating on a rise or fall in the value of the performance to the detriment of the non-performing party.\footnote{See Comment 1 on Art. 7.3.2 UPICC.}

However, the PECL specifies two exceptions to the rule that notice of termination must be given: The first is under Art. 8:106(3), according to which a notice setting a reasonable period during which the defaulting party must perform may provide that at the end of the period the contract shall terminate automatically if performance has still not been made. The second is under Art. 9:303(4), which provides that where a party’s non-performance is excused because it was due to a total and permanent impediment, the contract terminates automatically. Some legal systems regard the contract as destroyed by such an event. However, in cases of only partial or temporary impediment, the defaulting party may still tender performance, and a notice of termination by the aggrieved party will be needed. Note that in cases of excused non-performance, the non-performing party has a duty under Art. 8:103(3) to give notice of the impediment.\footnote{Supra. note 1, Comment D.}

Indeed, the two exceptions specified by the PECL can also be found or implied under the CISG. It is said that under the CISG the entitled party can, however, achieve partly similar effects (to ipso facto avoidance) when he, in cases where the right to make the contract void follows from the expiry of a Nachfrist without performance (Art. 49, subpara. (b); Art. 64, subpara. (b)), already in fixing such Nachfrist, declares the contract void if the other party does not perform within that additional period.\footnote{Supra. note 3, p. 117.} In addition, it is to be noted that where the failure in performance is due to a supervening event for which neither party is contractually responsible, such an event may lead to automatic discharge; but this differs from termination for contractual default, most obviously in that it excludes all claims for damages.\footnote{See Mirghasem Jafarzadeh in “Buyer’s Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi’ah Law” (2001). Available online at \texttt{http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh1.html}}

On the other hand, although it is not clear in the UNIDROIT Prin-
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ciples whether the contract would terminate automatically where a party’s non-performance is excused because it was due to a total and permanent impediment, it does be specified in UPICC Art. 7.1.5(3) that the aggrieved party may in its notice allowing additional period for performance “provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate”. However, Art. 7.1.5(4) UPICC stipulates at the same time: “Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.”

Nonetheless, in general, there is no automatic termination: there must be a “declaration” of termination. As a rule termination is effective only if notice thereof is given by the aggrieved party to the defaulting party. However, it must be remembered that termination may be effected by the act of the aggrieved party alone; it does not have to bring an action in court in order to have the contract terminated. 562

11.2 INFORMALITY OF THE NOTICE

As discussed above, declaration of avoidance of the contract is effective only if made by notice to the other party. Nonetheless, the rule that notice of termination must be given does not require that the notice be in a particular form or by a specific means of transmission. By virtue of the Convention’s “iformality principle”, “[t]he notice can be oral or written and can be transmitted by any means.” 563

It is to be noted, however, that eight States, including China, made declarations under Art. 96 rejecting provisions of CISG that allowed effective notification in form other than in writing – e.g., Arts. 11, 12, 96. 564 Nonetheless, even when Contracting States make use of the reservation in Art. 96, domestic requirements on form are only to be regarded as far as they relate to the formation of the contract, its modification or consensual termination. The precise formulation contained in Arts. 12, 29 and 96 “its modification or termination by agreement” makes it clear that a one-sided declaration to terminate a contract does not fall within the scope of the reservation and the corresponding domestic regulations on form. 565 Moreover, this informality principle does not apply (to the transmission) if the contract, usages or practices provide otherwise (Arts. 6 and 9), nor does it apply to the content of the notice. 566

Thus, it may be said that generally there is no formal procedure for avoidance other than a mere notice. However, it would not be consistent with good faith and fair dealing for a party to rely on, for instance, a purely casual remark made to the other party. For notices of major importance written form may be appropriate. 567 Particular care will have to be taken when choosing the means for communication of such an important decision like avoidance. Therefore, both the UNIDROIT Principles and the PECL add the wording “appropriate to the circumstances” when they lay down the principle that any notice required are not subject to any particular requirements as to form, but may be given by any means. 568 In fact, as to

563 Supra. note 4, Comment 4.
564 See John O. Honnold, Uniform Law for International Sales, 3rd ed., Kluwer (1999): p. 215. Available online at <http://www.cisg.law.pace.edu/cisg/text/e-text-26.html> It is also to be noted that the “iformality principle” has been clearly adopted by the new China Contract Law (e.g. Art. 10).
568 See Secretariat Commentary on Art. 25 of the 1978 Draft [counterpart of
be discussed below, it is where the notice of termination is made with the means _appropriate_ under the circumstances that the dispatch theory is decisive as to the notice.

However, a means of communication which is appropriate in one set of circumstances may not be appropriate in another set of circumstances. For example, even though a particular form of notice may normally be sent by airmail, in a given case the need for speed may make only electronic communication, telegram, telex, or telephone, a means appropriate “in the circumstances”. In other words, “[w]hich means are appropriate will depend on the actual circumstances of the case, in particular on the availability and the reliability of the various modes of communication, and the importance and/or urgency of the message to be delivered. Thus, if the postal service is unreliable, it might be more appropriate to use fax, telex or other forms of electronic communication for a communication which has to be made in writing, or the telephone if an oral communication is sufficient. In choosing the means of communication the sender must as a rule take into account the situation which exists both in its own and in the addressee’s country.”

In short, notices may be made in any form - orally, in writing, by telex, by fax or by electronic mail, for example - provided that the form of notice used is appropriate to the circumstances. A communication is appropriate to the circumstances, if it is appropriate to the situation of the parties. And there may be more than one means of communication which is appropriate in the circumstances. In such a case the sender may use the one which is the most convenient for him.


569 See Comment 1 on Art. 1.9 _UPICC_.

570 Supra. note 20.

571 Supra. note 20, Comment 2.

572 Supra. note 15.

### 11.3 TRANSMISSION OF THE INTENTION

As noted above, the notice of termination can be oral or in writing, and may be given by any means appropriate to the circumstances. But, it should state clearly an intent of avoidance, although the degree of clarity required in the notice is not clearly ascertained. Honnold states with this regard: “A buyer’s declaration of avoidance, to be effective under Article 26, must inform the seller that the buyer will not accept or keep the goods. Conversely, a seller’s declaration of avoidance must inform the buyer that the seller will not deliver the goods or, if the goods have been delivered, that the seller demands their return. . .”

Under the Convention, in other words, the avoiding party must affirmatively declare that he avoids the contract and must transmit advice of his decision to the other party by an appropriate means of communication (Arts. 26, 27). There must be a positive act on the part of the entitled party to declare his intention to terminate. This principle is of a general nature applicable to all cases of avoidance under the Convention, whether it affects the whole contract or only part of it, and irrespective of whether it is based on an actual or anticipatory breach. Thus, in some circumstances termination

573 Supra. note 12. For cases see: *Amtsgericht Zweibrücken*, 14 October 1992 [1 C 216/92] (Germany) (UNILEX) [http://cisgw3.law.pace.edu/cases/921014g1.html](http://cisgw3.law.pace.edu/cases/921014g1.html)(PACE), where the Court confirmed that, according to _CISG_ art.

574 the buyer’s notice of declaration of avoidance must represent his clear intention to avoid the contract, which in this case neither the buyer’s request for a price reduction nor that the goods be taken back could represent; *Amtsgericht Oldenburg*, 24 April 1990 [5 C 73/89] (Germany) (UNILEX) [http://cisgw3.law.pace.edu/cases/900424g1.html](http://cisgw3.law.pace.edu/cases/900424g1.html)(PACE), where the Court confirmed that the buyer had not effectively avoided the contract by refusing acceptance and returning the invoice; *Amtsgericht Nordhorn*, 14 June 1994 [3 C 75/94] (Germany) (UNILEX) [http://cisgw3.law.pace.edu/cases/940614g1.html](http://cisgw3.law.pace.edu/cases/940614g1.html)(PACE), where the Court held that the fact that the defective goods were sent back to the seller amounted to a valid declaration of lack of conformity, however the Court found that the buyer’s declaration of avoidance was not made according to a
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of a contract by conduct implying an intent, e.g. the mere sending back of delivered and fundamentally non-conform goods, is not sufficient. Nonetheless, no particular content is required in the notice: it is sufficient to inform the other party that the contract is being avoided. The notice of termination needs not use exact language, such as, "I hereby declare our contract avoided." Rather, a more pragmatic form for declaration of avoidance is to be acknowledged, that is, the communication must contain language which clearly operates to put the party in breach on notice that the party not in breach will no longer fulfil. On all accounts, the entitled party must represent his clear intention to terminate the contract in provision contained in the seller’s general conditions of contract which the Court found to have been incorporated in the contract. The Court invoked art. 4(a) and evaluated the validity of the seller’s general conditions on the basis of Italian law as the law governing the contract according to German rules of private international law. As the seller’s clause was valid under Italian law, the buyer’s declaration of avoidance was without effect because he had failed to declare the contract avoided according to the contractually established procedure.

Further, the Convention does not require, as do some legal systems, that an advance notice be given of the intention to declare the contract avoided. This Convention requires only one notice, the notice of the declaration of avoidance. So do the UNIDROIT Principles and the PECL. However, a party who declares the contract avoided pursuant to CISG Art. 49(1)(b) or Art. 64(1)(b) must have previously fixed an additional period of time of reasonable length for performance by the other party under CISG Art. 47(1) or Art. 63(1). In such a case the party who declares the contract avoided must necessarily send two communications to the other party, unless the Nachfrist notice provides that at the end of the period the contract shall terminate automatically if performance has still not been made. Such situations are also supported under the UNIDROIT Principles and the PECL.

11.4 RISK IN COMMUNICATION

As discussed above, the entitled party may terminate the contract by a mere declaration, no further steps are required, neither agreement by the other party nor assistance by the courts. Then the question arises: when does the declaration become effective: once the notice is given, or when it reaches the addressee? It is an issue of great significance, which concerns not only who should bear the risk of delay, error or loss in respect of a communication, but also whether the declaration is irrevocable once it is made.

11.4.1 CISG Approach

The declaration of avoidance under the CISG is subject to the pro-

576 Supra. note 11. However, it is to be noted that the Official Comment on PECL Art. 9:303 clearly states that: “Notice may be given either by expressly declaring the contract terminated or by rejecting the tender of performance.” (Supra. note 1.)

577 See Germany 17 September 1991 Oberlandesgericht Frankfurt <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910917g1.htm>, where the Court stated: “The telegram of the [buyer] of March 3, 1989 constitutes the declaration of the avoidance of the contract because the [buyer] unmistakably communicated to the [seller] that she, from now on, would produce the collection of shoes with another Italian manufacturer, and she was ending immediately the already-begun collaboration with the [seller]. As to that the [seller] could have no doubts – even, in the absence of a separate, explicit statement thereof – that the [buyer] rejected the performance by the [seller] of sending the [buyer] 130 pairs of model shoes, which was only a preliminary step of the planned exchange of goods and, with its avoidance, the purpose of the delivery of the model shoes was not achieved. An explicit reference to the avoidance of the contract, pursuant to the CISG, was not required for the validity of the legal effects of the avoidance of the contract . . . It was sufficient that the [buyer] made clear that she wouldn’t pay the [seller]’s bill because of her breach of contract, because meanwhile the delivered model shoes became useless to her . . .”

577 Supra. note 4, Comment 3.

578 Supra. note 4, n. 2.
visions of Art. 27 which reads: “Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.” The risk therefore is *prima facie* on the person to whom the communication is addressed.\(^5\)

It is said that under the CISG the general rule that the risk of delay, error or loss in respect of a communication is to be borne by the addressee arises out of the consideration that it is desirable to have, as far as possible, one rule governing the hazards of transmission.\(^6\) One advantage of the rule is that at least a clear and unequivocal solution has been found for the question which was generally left open by ULF and ULIS. Since Art. 27 is optional, the parties are also at liberty to set other requirements, such as receipt for communications to be effective. Even absent explicit agreement, usages or practices established between the parties can modify the principle stated in Art. 27. The idea underlying the principle and the exceptions in Art. 27 is that the risk for transmitting a message should be carried by the one who, as a result of his deviation from normal performance, caused the statement to be sent. This is persuasive, for example, in the case of a notice of defects, since the seller is responsible for ensuring that the quality of goods conforms to the contract.\(^7\)

One may admit that the transmission risk in communication of a notice of avoidance should be borne by the party who caused the notice to be sent in a manner not fitting to the contract terms. Such an approach however, would not be justified in situations exempted, such as when the avoidance does not result from defective performance attributable to that party.\(^8\) An avoidance does not always have to be motivated by a disruption in performance for which the other side is responsible. It can also be caused by *force majeure*, which cannot be attributed to either party. In such cases the basic idea behind Art. 27 cannot convincingly support apportioning the risk of transmission to the addressee.\(^9\) Nonetheless, it may happen that the defaulting party will continue performance of the avoided contract, not having received the notice. In such a situation it is a question of good faith or mitigation of loss for the entitled party to draw the other party’s attention in the content of the notice if he becomes aware from the conduct of the other party that he did not receive the communication. “If, however, the sending party recognizes from the behaviour of the other party that the latter has *not received the communication*, it should be a matter of good faith (Art. 7) or of mitigating a loss (Art. 77) for the former to draw the attention of the latter to the content of the communication. Otherwise, he would, for instance, no longer have the right to assert accumulating claims for damages.”\(^10\)

Indeed, a number of scholars interpret the rule in Art. 27 as an acceptance of the dispatch theory. This can mean that Art. 27 not only provides that “a delay or error in the transmission of the com-

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\(^5\) Supra. note 12.

\(^6\) Supra. note 20, Comment 4. However, Part III of the Convention contains exceptions to this rule in cases where it was considered that communication ought to be received to be effective: CISG Arts. 47(2), 48(4), 63(2), 65(1), 65(2) and 79(4). Also, it is noted that in Part II of the CISG, the legal effectiveness of an offer under Art. 15(1) and the legal effectiveness of an acceptance under Art. 18(2) are tied to the moment of receipt as defined in Art. 24. The same rule applies to the withdrawal of an offer (Art. 15(2)), the rejection of an offer (Art. 17), a declaration fixing a period of time for acceptance of an offer (Art. 20(1)), and the withdrawal of an acceptance (Art. 22).


munication or its failure to arrive does not deprive [the declaring] party of the right to rely on the communication", but also explains this result by assuming that the declaration becomes effective on dispatch. Some writers have expressed a contrary point of view by taking the position that effectiveness occurs only upon receipt. Neumayer emphasizes that the practical importance of this receipt concept is the ability of the declaring party to withdraw or change his declaration at any time prior to the time of receipt. Schlechtriem further believes that the theory that such declarations should at least remain ineffective prior to receipt makes sense. A declaration which avoids the contract or reduces the price should not occur before the other party has a chance to know the declaration and the change in the legal situation brought about thereby.\footref{585} As to be shown below, the receipt rule has been adopted by the UNIDROIT Principles and the PECL.

### 11.4.2 Receipt Principle under the UNIDROIT Principles

Like the CISG, the right of a party to terminate the contract under the UPICC is also exercised by notice to the other party. However, unlike the dispatch rule established under Art. 27 CISG, the notice to be given under the UPICC by the aggrieved party is subject to Art. 1.9, which reads pertinently in Art. 1.9(2): "A notice is effective when it reaches the person to whom it is given." It is further stated in the Official Comment that with respect to all kinds of no-

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\footref{583} Supra. note 32, p. 62.
\footref{584} Supra. note 3, p. 120.

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Thus, the so-called "receipt" principle is adopted under the UNIDROIT Principles, in opposition to the dispatch rule established under the CISG. Accordingly, UPICC Art. 3.6 (Error in Expression or Transmission) prescribes that: "An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated." As noted above, the practical importance of this receipt concept is the ability of the declaring party to withdraw or change his declaration at any time prior to the time of receipt;\footref{587} however, one may admit that the transmission risk in communication of a notice of avoidance should be borne by the party who caused the notice to be sent in a manner not fitting to the contract terms.\footref{588} Thus, it seems unfair that under the UNIDROIT Principles the notice of termination to be given by the aggrieved party becomes effective when the non-performing party receives it.\footref{589} In this point, the combined approach adopted under the PECL, as to be discussed below, may be referred for a better solution. Nonetheless, like Art. 27 CISG, Art. 1.9 UPICC is also optional, the parties are therefore at liberty to set other requirements, such as dispatch for communications to be effective. “The parties are of course always free expressly to stipulate the application of the...
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dispatch principle. This may be appropriate in particular with respect to the notice a party has to give in order to preserve its rights in cases of the other party’s actual or anticipated non-performance when it would not be fair to place the risk of loss, mistake or delay in the transmission of the message on the former. This is all the more true if the difficulties which may arise at international level in proving effective receipt of a notice are borne in mind.”

Moreover, this Article links the general rule to two qualifications for the operative effect of communications, the second one of which is Art. 1:303(5) reading: “A notice has no effect if a withdrawal of it reaches the addressee before or at the same time as the notice.” This qualification clarifies the ambiguity found in the practice of the CISG on whether a rule is supported that permits the revocation of a declaration governed by CISG Art. 27 after the declaration has been dispatched.

Even, together with this general rule, the first qualification contained in Art. 1:303(2) is the application of dispatch rule for case of default, which is reflected in Art. 1:303(4) as: “If one party gives notice to the other because of the other’s non-performance or because such non-performance is reasonably anticipated by the first party, and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect. The notice shall have effect from the time at which it would have arrived in normal circumstances.” It is noted that many of the situations in which the PECL envisages one party giving a notice to the other are situations in which the party to be notified is in default, or it appears that a default is likely. Here it seems appropriate to put the risk of loss, mistake or delay in the transmission of the message on the defaulting party rather than on the aggrieved party.

Moreover, this Article links the general rule to two qualifications for the operative effect of communications, the second one of which is Art. 1:303(5) reading: “A notice has no effect if a withdrawal of it reaches the addressee before or at the same time as the notice.” This qualification clarifies the ambiguity found in the practice of the CISG on whether a rule is supported that permits the revocation of a declaration governed by CISG Art. 27 after the declaration has been dispatched.

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Indeed, the dispatch principle applies under the PECL to notices given under many other articles besides Art. 9:303. However,
it must be remembered the focus of this qualification is put on the situations in which the party to be notified is in default, or it appears that a default is likely because it seems appropriate to put the risk of loss, mistake or delay in the transmission of the message on the defaulting party rather than on the aggrieved party. Accordingly, the dispatch rule does not apply to a notice which is to be given by the defaulting party, e.g. under Art. 8:108(3), or by a party which wishes to invoke hardship, see Art. 6:111, or to an assurance of performance under Art. 8:105(2). Also, as implied in Art. 27 CISG, the dispatch principle will not apply if the means of notice was not appropriate in the circumstances. It will be able to rely on it only if and when it arrives.

In sum, with respect to the notice of termination, the PECL combines both the dispatch rule and the receipt principle. In general, it takes the position that effectiveness occurs only upon receipt. At the same time, the application of dispatch rule for case of default is also presumed. The Official Comment makes it clear: “A notice subject to the general 'receipt' principle takes effect when it is received. A notice subject to the dispatch principle may be effective even though it never arrives or is delayed, but it is not effective the moment it is dispatched. It would not be fair that even a non-performing party should be affected by a notice as from a time at which it could not have known about it. Accordingly the notice takes effect only from the time at which it would normally have been received.” In other words, in the event of loss of the communication, effectiveness occurs at the hypothetical moment of receipt under normal circumstances.

11.5 TIME LIMIT FOR THE DECLARATION: IN GENERAL

Generally speaking, there is no provision that precisely defines the time for the aggrieved party to declare the contract avoided. When there is a fundamental non-performance of any obligation, the aggrieved party can terminate the contract immediately without referring the matter to the court or arbitral tribunal.

When he has set a Nachfrist as discussed in Chapter 4, the aggrieved party has to wait until the fixed period inefficiently expires and cannot declare the contract avoided before that moment, because it is not possible to require performance and at the same time to avoid the contract. Only when the other party has declared that he will not perform within the additional period of time does the aggrieved party not have to wait until the expiration of the Nachfrist period.

However, as discussed in Chapter 9, when he anticipates a fundamental breach of contract will be committed by the other party prior to the date performance is due, the aggrieved party may avoid the contract at any time before the period for the performance expires because CISG Art. 72, UPICC Art. 7.3.3 or PECL 9:304 prescribes no time limit for such a declaration. Nonetheless, the two cases can be distinguished in order to define the time for exercising the right to avoidance under these articles: a) the aggrieved party may avoid immediately if he is absolutely certain about the fundamental character of the impending breach of the contract, or when the time does not allow him, according to the wording of CISG Art. 72(2), to send a reasonable notice to the non-performing party permitting the offering of adequate assurance of the performance, or the non-performing party declares that he will not perform his obligations;
b) the aggrieved party may exercise his right after the ineffective lapse of the sufficient time necessary for the non-performing party to provide adequate assurance of the performance when he has sent a reasonable notice requiring such an assurance.

As far as installment contracts (Chapter 10) are concerned, there are no time limits for making the avoidance declaration under CISG Art. 73(1), referring to avoidance of a given installment, and 73(3), which allows avoidance of future installments and installments already made. It is even stated that all the installments in an installment contract must be performed before the entitled party loses the right to declare the contract avoided. It is to be noted, however, under Art. 73(3), the buyer wishing to avoid the contract with regard to the latest as well as earlier and future installments, has to do it at the same time. On the other hand, the requirement to declare the contract avoided within a reasonable time is imposed on the aggrieved party under the provision of Art. 73(2), if he has good grounds to conclude on the basis of the other party’s failure to perform his obligations under any installment, that a fundamental breach will occur with respect to future installments. What time is reasonable in the installment contract depends, among other things, on the length of the interval between the latest and the next installment and its reception and payment. The time runs since the occurrence of the failure.

11.6 DECLARATION WITHIN REASONABLE TIME

11.6.1 Definition of reasonable time

On all accounts, avoidance of the contract has significant results. It is particularly the case as far as care and disposition of the goods are concerned. Deferring the declaration of avoidance creates expenses and risk for both parties to the contract. In order to protect contracted parties against the undesirable effects of the postponement of the aggrieved party’s right to termination, the three instruments each lays down, under CISG ArtS. 49(2) / 64(2), UPICC Art. 7.3.2(2) and PECL Arts. 9:303(2), 9:303(3), respectively, rules setting a time limit – a reasonable time – for the hesitant party intending to avoid the contract.

The term “a reasonable time” is not defined under the rules. What is a reasonable time will depend upon the circumstances. For instance the aggrieved party must be allowed long enough for it to know whether or not the performance will still be useable by it. If delay in making a decision is likely to prejudice the defaulting party, for instance because it may lose the chance to prevent a total waste of its efforts by entering another contract, the reasonable time will be shorter than if this is not the case. If the defaulting party has tried to conceal the defects, a longer time may be allowed to the aggrieved party. It is also noted that in situations where the aggrieved party may easily obtain a substitute performance and may thus speculate on a rise or fall in the price, notice must be given without delay. When it must make enquiries as to whether it can obtain substitute performance from other sources the reasonable period of time will be longer.

In other words, such a formulation of the time limit within the exercise of the right to avoidance enables a flexible application of the rules to many different international commercial contracts. The time limit will vary with respect to the nature of the goods or services according to the market conditions in which the transaction will be pursued or other factors such as, usages developed within a trade.

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598 Supra. note 6, Comment 13 on Draft Art. 45
599 Supra. note 33, p. 119.
600 Supra. note 33, p. 119.
601 Ibid.
603 Comment 3 on Art. 7.3.2 UPICC.
or a course of dealing between parties to a contract. So, the time limit would have to be evaluated pursuant to the circumstances of a given case.\textsuperscript{603}

11.6.2 CISG Approach

In the case of late performance, \textit{CISG} ArtS. 49(2)(a)/ 64(2)(a), which refer to cases where the performance is delayed \textit{nevertheless} the non-performing party has performed following that delay, not only when it constitutes a fundamental breach of contract, as in the case of a fixed-term contract, but also when the delayed performance is effected after the deadline set in a \textit{Nachfrist} notice. With respect to the buyer, Art. 49(2)(a) states that "where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made". With respect to the seller, Art. 64(2)(a) provides that "where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so: (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered". However, the Secretariat Commentary clearly states that the entitled party does not lose his right to declare the contract avoided under Art. 49(2)(a)/64(2)(a) until all the goods have been delivered or until the total price has been paid.\textsuperscript{604}

All cases of non-performance under the \textit{CISG}, other than the late performance provided that a fundamental breach of the contract occurs, are regulated under Art. 49(2)(b)/64(2)(b). So far as the seller is concerned, such other breaches embrace delivery of non-conforming goods as well as delivery of goods not free from claims of a third party.\textsuperscript{605} For the buyer, since late performance constitutes the main case of a breach of obligation by the buyer, other breaches (all the more so since they have to be fundamental to substantiate a right to avoid the contract) will be of relatively little practical relevance. Cases to which that right could possibly be applied would be, for instance, sub-supply of defective materials, breaches of the prohibition to re-export goods, insofar as this can effectively be countered by avoiding the contract, and pledging of goods which were sold under the reservation of title. These will above all be non-conforming activities by the buyer which are not specifically covered by the \textit{CISG}.\textsuperscript{606}

For the all breaches other than late performance, the general rule is still that the aggrieved party has to exercise his right within a reasonable time. The time may differ in particular situations. For the buyer, the time starts to run (Art. 49(2)(b)): (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance. For the seller, the time starts to run (64(2)(b)): (i) after the seller knew or ought to have known of the breach; or (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

In addition to the rules on the time limits for avoidance, the Convention clearly states in Art. 45(3)/61(3) that no period of grace can

\begin{footnotes}
\item[603] Supra. note 33, p. 120.
\item[604] Supra. note 6, Comment 9 on Draft Art. 45; Comment 8 on Draft Art. 60.
\item[605] Supra. note 54.
\item[606] Supra. note 3, p. 247.
\end{footnotes}
be granted by a State court or arbitral tribunal. This rule applies to the remedy of avoidance. As the Convention does not foresee any procedure for applying to a court for avoidance of the contract, such an additional period cannot be maintained in the Convention’s regulation. Such a procedure would be inappropriate in international trade as it could be expensive and take time for a judge to decide to allow immediate avoidance or to grant a period of grace. The situation is different when the aggrieved party is equipped in the so-called Nachfrist procedure with the right to grant the breaching party a reasonable additional period. It would be highly undesirable to leave the matter to judicial discretion. In the case of a fundamental breach of contract, the right of the aggrieved party to avoid the contract arises immediately at the time of the breach (or in case of an anticipatory breach even before), and it cannot be deferred by any court or arbitral tribunal.

11.6.3 UNIDROIT Principles / PECL Approach

By contrast with the sorting out of late performance from other breaches under the CISG, both UPICC Art. 7.3.2(2), which reads as: “If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance,” and PECL Art. 9:303(2), which reads as: “The aggrieved party loses its right to terminate the contract unless it gives notice within a reasonable time after it has or ought to have become aware of the non-performance,” state a general rule that will apply not only when theaggrieved party has received a late tender of performance but also when it has received a tender which was defective.

Thus, in case of defective performance or where the performance is delayed nevertheless the non-performing party has performed following that delay, an aggrieved party who intends to terminate the contract must give notice to the other party within a reasonable time after it becomes or ought to have become aware of the non-performance. Indeed, in either case (late or defective performance), once it knows or should know of the tender, it should have a reasonable time to check it for defects and to decide what to do; but if it waits for more than a reasonable time without notifying the other party that it is terminating the contract it loses the right to terminate. If it is prepared to accept the tender, it need not give any notice.

Unlike the delayed nevertheless performed performance, when a tender of performance is due but has not been made, the courses of action open to the aggrieved party will depend on the circumstances, i.e. its wishes and knowledge. Such overdue performance is also covered by UPICC Art. 7.3.2(2) and given clearer guidance in PECL Art. 9:303(3). It may be the case that the aggrieved party does not know whether the other party intends to perform, and either it no longer wants the performance or is undecided. In this case the aggrieved party may wait and see whether performance is ultimately tendered and make up its mind if and when this happens. Alternatively, it may still want the other party to perform, in which case it must seek performance within a reasonable time after it has or ought to have become aware of the non-performance.

One should note, however, that UPICC 7.3.2(2) does not deal with the situation where the non-performing party asks the aggrieved party whether it will accept late performance. Nor does it deal with

607 Supra. note 33, p. 122.
608 Supra. note 53.
609 Supra. note 52.
610 Comment 2 on Art. 7.3.2 UPICC.
611
the situation where the aggrieved party learns from another source that the non-performing party intends nevertheless to perform the contract. In such cases good faith (Art. 1.7) may require that the aggrieved party inform the other party if it does not wish to accept the late performance. If it does not do so, it may be held liable in damages.\footnote{Ibid.} Notably, such gap has been filled in PECL Art. 9:303(3), which reads: (a) When performance has not been tendered by the time it was due, the aggrieved party need not give notice of termination before a tender has been made. If a tender is later made it loses its right to terminate if it does not give such notice within a reasonable time after it has or ought to have become aware of the tender. (b) If, however, the aggrieved party knows or has reason to know that the other party still intends to tender within a reasonable time, and the aggrieved party unreasonably fails to notify the other party that it will not accept performance, it loses its right to terminate if the other party in fact tenders within a reasonable time.

Thus, a clearer guidance is outlined with regard to the situations when a tender of performance is due but has not been made: (1) It does not know whether the other party intends to perform or not but it wants performance. In that case it should seek specific performance, and it must seek it within a reasonable time after it has or ought to have become aware of the non-performance. (2) It does not know whether the other party intends to perform and either it does not want the performance or is undecided. In this case it may wait to see whether performance will ultimately be tendered and under PECL Art. 9:303 it may make up its mind if and when this happens. If the defaulting party wishes it may ask the aggrieved party whether it still wishes to receive performance, in which case the latter must answer without delay. (3) It has reason to know that the defaulting party is still intending to perform within a reasonable time, but it no longer wishes to receive the performance. In this case it would be contrary to good faith for it to allow the defaulter to incur further effort in preparing to perform and then to terminate when performance is tendered. Therefore PECL Art. 9:303(3)(b) requires it in this situation to notify the other party that it will not accept the performance, on pain of losing its right to terminate if the other party does in fact perform within a reasonable time.\footnote{Supra. note 52, Comment C.}

11.6.4 Concluding Remarks

The rules of the three instruments governing the time for avoidance have a very significant role, and their most important function is to provide a sanction for contravening the time limits laid down to declare the contract avoided, namely, the loss of the right to declare avoidance, notwithstanding the presence of substantive grounds for it.\footnote{Supra. note 58.}

\begin{quote}
(UPIC) Art. 1.9(1) reads: “Where notice is required it may be given by any means appropriate to the circumstances.” PECL Art. 1:303(1) reads: “Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances.”
\end{quote}
CHAPTER 12. EFFECTS OF TERMINATION

Avoidance is a process through which an aggrieved party, by notice to the other side, terminates the contractual obligations of the parties.\textsuperscript{614} As a result of the avoidance, both parties are released from their obligations. However, it is likely that either party might be left with property that has been transferred or payment that has been made by the other. In this case, each party that has performed its own obligation can claim restitution of whatever was paid (price) or supplied (goods or something ancillary to them) under the contract, and if both parties have to make restitution, it must be done concurrently.\textsuperscript{615}

12.1 INTRODUCTION

The CISG contains four articles on the effects of avoidance. The general rule is found in Art. 81, while Arts. 82, 83, and 84 specify the concrete duties of the seller and buyer in cases of avoidance of contract. Under the UNIDROIT Principles, two articles are related: Art. 7.3.5 prescribing the Effects of Termination in General; and Art. 7.3.6 dealing with Restitution. And under the PECL, Arts. 9:305 to 9:309 govern the nature and effect of termination under the European Principles.

Generally speaking, termination affects the legal life of the contract and the contractual relationship of the parties.\textsuperscript{616} In the following, the effects of termination will be examined in details, involving such issues as relief of future performance, unaffected rights and obligations after termination and restitution.

12.2 RELIEF OF FUTURE PERFORMANCE

The primary effect of the avoidance of the contract by one party is that both parties are released from their obligations to carry out the contract.\textsuperscript{617} In this respect, CISG Art. 81(1) provides in pertinent part that avoidance of the contract releases both parties from their obligations under it. Thus, the seller need not deliver the goods and the buyer need not take delivery or pay for them.\textsuperscript{618} Under the Convention, the most important obligations are generally: a) the obligations of the seller to deliver the goods, to transfer title to the goods and to hand over the documents; and b) the obligations of the buyer to pay the price and to take delivery of the goods. If the obligations have not been fulfilled by the moment of the avoidance of the contract, the parties do not have to fulfill them later,\textsuperscript{619} i.e. the other party could refuse to accept performance.\textsuperscript{620}


\textsuperscript{616} See Mirghasem Jafarzadeh in “Buyer’s Right to Withhold Performance and
Under the UNIDROIT Principles, Art. 7.3.5(1) prescribes that “Termination of the contract releases both parties from their obligation to effect and to receive future performance.” This provision states the general rule that termination has effects for the future in that it releases both parties from their duty to effect and to receive future performance. Much like CISG Art. 81(1) or UPICC Art. 7.3.5(1), PECL Art. 9:305(1) basically provides that termination releases both parties to the contract from their obligation to effectuate and receive future performance. Thus, by the notice of termination to the other side, an aggrieved party may either refuse to perform its own obligations, which he may also do on a temporary basis without terminating the contract by withholding its performance; or refuse future performance, including cure of any defective performance already made, from the other party.

In short, the main consequence of termination is that both parties are free in the sense that they are released from the duties and obligations assumed under the contract, except the obligation to pay damages (as well as the right to claim and the obligation to make restitution). However, one should note that partial avoidance of the contract under CISG Art. 51 or 73 releases both parties from their obligations as to the part of the contract which has been avoided (and gives rise to restitution as to that part). As to be shown below, this point has also been arguably supported by the two sets of Principles. Indeed, all systems now accept that where a contract for performance in successive parts or installments is terminated after some parts of it have been performed, it may be terminated for the future without the need to undo the completed parts.

12.3 RETROSPECTIVE OR PROSPECTIVE APPROACH

The various legal systems exhibit great differences in concepts and terminology in the area dealing with the effects of termination. The differences in the practical results obtained are not so great but are still significant. The most apparent difference is between systems such as the FRENCH which treats résolution as essentially retrospective and those such as the COMMON LAW which sees termination (or “rescission for breach”) as essentially prospective.

In some legal systems avoidance of the contract eliminates all rights and obligations which arose out of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes terminate with the rest of the contract. It would be very inconvenient, however, to treat a contract which has

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Comment 1 on Art. 7.3.5 UPICC.


Supra. note 4, Comment 3.
been terminated as cancelled in the sense of never having been made. First, if the contract had never been made the aggrieved party might be precluded from claiming damages for loss of its expectations, which would not seem an appropriate outcome. Secondly, if the contract were cancelled in the sense of never having been made, this might prevent the application of dispute settlement clauses or other clauses which were clearly intended to apply even if the contract were terminated. 627 On the other hand, in “prospective” systems such as the COMMON LAW claims by either party which arose before the date of termination are largely unproblematic: they are not affected by subsequent termination, except that if money due but as yet unpaid would in any event have to be repaid after termination, it will for obvious reasons cease to be payable. It seems likely that other systems would reach the same result even if in theory termination was retrospective; for instance, in FRENCH law for a contract à exécution successive only résiliation for the future might be ordered. 628 Indeed, as the differences are sometimes more apparent than real it may be helpful to consider the effect of “termination” in the various systems in a number of factual situations. 629

As regards the question whether termination has retrospective or prospective effects on the contract, it is hard to say that the Convention adopted any single approach. 630 This is because it provides, on the one hand, that avoidance releases both parties from the obligations they have undertaken under the contract, subject to any damages which may be due and without affecting any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties con-sequent upon the avoidance of the contract (Art. 81(1)). As to be discussed separately infra. 12.4, the two sets of Principles adopt a similar mechanism. Under the UNIDROIT Principles, Termination does not preclude a claim for damages for non-performance (Art. 7.3.5(2)) or affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination (Art. 7.3.5(3)). Under the PECL, Art. 9:305 are most pertinent to this point: Termination of the contract […] does not affect the rights and liabilities that have accrued up to the time of termination (Art. 9:305(1)); nor does it affect any provision of the contract for the settlement of disputes or any other provision which is to operate even after termination (Art. 9:305(2)).

On the other hand, the Convention requires both parties to return all benefits of possession (profits and advantages of use). If the seller is required to return the price, he must also pay interest from the date on which the price was paid. Similarly, in contrast to the seller who is bound to pay interest on the refundable price, the buyer is required to account to the seller for all benefits which he has actually derived from using the goods or part of them (Art. 84). In addition, it imposes on the parties reciprocal duties of restoration (Art. 82). An obvious example of adoption of the retrospective effect of termination by the Convention can be found when an installment contract is entirely terminated after delivery of some defective installments (Art. 73(3)). Under this provision, all installments are to be returned even though some of them are perfect. These instances reveal that, although the Convention does not pose the problem in abstract terms of retrospectivity, its wording implies retrospective effects of avoidance. 631 Accordingly, it can be said that under the Convention an avoidance only “redirects” the main obligations of the contract; it does not void the contract ab initio. 632

628 Supra. note 12, Note 1.
629 Supra. note 12.
630 Supra. note 3.
631 Ibid.
Nonetheless, it should be said that the contract is not nullified upon the exercise of the remedy of avoidance. Some obligations of the parties are terminated and some remain in existence. The specific obligations characteristic of the sales contract end or performance already made in fulfilling these obligations has to be returned in goods or in price so that a situation is achieved as from before the conclusion of the contract. However, the contract remains in force as long as there are still claims of the parties under it, including claims for returning the goods or the price. On these grounds, the contract cannot be considered as terminated either ex nunc or ex tunc, although legal doctrine does not adopt unified opinion on that question. The discussion, whether the avoidance operates retrospectively or prospectively is said to be of little help as avoidance always releases the parties from future characteristic obligations and, at the same time, imposes on the parties reciprocal duties of restoration having retrospective effect.

Thus, it may be concluded that the Convention has adopted a quasi-rescission and not a real one. As to be demonstrated below, such a quasi-rescission mechanism is followed either under the UNIDROIT Principles or under the PECL. However, it is also to be noted that the UPIICC/PECL approach differs to some extent from the CISG approach. Such differences will be given details separately infra. 12.5.

12.4 UNAFFECTED RIGHTS AND OBLIGATIONS AFTER TERMINATION

12.4.1 Continuing Right to Claim Damages

Apart from the termination, which releases both parties from their duty to effect and to receive performance, claims for damages can be asserted by the aggrieved party under corresponding rules of each of the three instruments or based on contractual provisions. This refers in particular to claims for damages which have arisen in connection with the obligations from which he is now released. Damages, for instance, have to be paid because of delay, even if the contract is later avoided because of that delay and even if damages arise because of avoidance.

According to CISG Art. 81(1), the fact that a party has resorted to the avoidance remedy does not deprive him of his right to claim damages that may be due under the Convention (pursuant to Arts. 74, 75, and 76) or the contract. Indeed, CISG Arts. 45 and 61 have already made it clear that claims for damages can be asserted apart from other legal consequences of breaches of contract, thus also apart from avoidance. The term “damages which may be due” is in this context conceived as a bit tight, for the same should apply to obligations to pay penalties under the contract in their different manifestations.

Similarly, under Art. 7.3.5(2) of the UNIDROIT Principles, the fact that, by virtue of termination, the contract is brought to an end, does not deprive the aggrieved party of its right to claim damages for non-performance in accordance with the rules laid down in section 4 of Chapter 7 (Arts. 7.4.1 et seq.). The PECL provisions that are relevant to this point are to be found in Art. 8:102, entitled Cumulation of Remedies, which clearly states that a party is not deprived of its right to damages by exercising its right to any other remedy. Thus, a party which pursues a remedy other than damages is not precluded from claiming damages. A party which terminates the contract may, therefore, also claim damages.

632 Supra. note 6, pp. 148-149.
633 Supra. note 3.
634 Supra. note 7.
635 Ibid.
Thus, the primary effect of termination (supra. 12.2) may be more correctly stated as: “To the extent that the right to claim damages remains unaffected, the effects of contract avoidance are that the parties are deemed to have performed their respective obligations and no further performance remains to be tendered.”

12.4.2 Unaffected Clauses Intended to Apply despite Termination

Although avoidance of the contract relieves the parties from their contractual obligations, this does not mean that every clause of the avoided contract ceases to be effective or that all the rights and obligations provided for in the contract automatically come to an end. Generally speaking, dispute resolution clauses always remain binding after the contract ceases to exist by way of avoidance or automatic termination. All systems now accept that termination will not affect the application of clauses such as arbitration clauses which were intended to apply despite termination.

Hereby a widely recognized rule is repeated under each of the three instruments. Under CISG Art. 81(1), if the contract itself provides that a party may exercise various rights and that the other party must fulfill certain obligations after the contract is avoided, these provisions, despite the contract having been avoided, will remain effective until those rights and obligations are fully realized. These contractual rights and the corresponding obligations to honor these rights do not cease to exist simply because the contract is avoided. These clauses, unlike those that are performance-related, are not avoidable unless the contract itself or a subsequent agreement between the parties indicates otherwise. Under either of the two sets of Principles, a similar rule is set out in UIPCC Art. 7.3.5(3) and PECL Art. 9:305(2), respectively. Thus, notwithstanding the general rule laid down in UIPCC Art. 7.3.5(1)/PECL Art. 9:305(1), there may be provisions in the contract which survive its termination. This is the case in particular with provisions relating to dispute settlement but there may be others which by their very nature are intended to operate even after termination.

The purpose of these provisions is to prevent complete termination of the contract, including those provisions concerning not only those rights and obligations which are ancillary to an avoidance of the contract, like a respective penalty, but such which are to help solve a conflict between the parties and which, of course, are of special importance when that conflict aggravates so that the contract is terminated early, such as arbitration and renegotiation clauses and forum selection clauses, all of which will help the party relying on the avoidance take recourse to remedies provided by the instruments and the applicable law. It is to be noted that the Secretariat Commentary declares non-exhaustive the two named

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640 supra. note 25, p. 34.

641 E.g. COMMON LAW: Heyman v. Darwin [1942] A.C. 356, H.L.; FINLAND: Aurejärvi 106; FRANCE: clause compromissoire (N CPC art. 1466) and penalty clause (Maurarie and Aynès, Obligations no. 543); GERMANY, see Stein-Jonas (- Schlosser) 1025 No. 00; GREEK law, see Kerameus 171-173, with further refs, and Papanicolaou in Georgiadis and Stathopoulos II art. 389 no. 14 (1979); ITALIAN law: no specific text but see Satta 852; Cass. 5 Aug.1968 n. 2803, in Foro It., 1969, I c.445 and Cass. 27 May 1981 n.3474, in Foro It., 1982, I c.199; NETHERLANDS BW art. 6:271; PORTUGUESE CC art. 434(1); SPANISH Arbitration Act 1988 (see Bercovitz, Arbitraje, art. 1, 17 ff and Unidroit art. 7.3.5(3). (Supra. note 12, Note 3.)
conditions (sentence 2, CISG Art. 81(1)) which continue in existence. 646 This is not convincing because the second condition (any other provision of the contract governing...) actually is a description of general features. The surviving conditions can be multifaceted. They relate to general questions of cooperation between the parties, like agreement of general business terms whose individual elements again have to be examined according to that criterion, agreements on the form of declarations, a general obligation to cooperate, obligations to maintain secrecy, a reservation of title up to restitution, limitation of claims, and the applicable law. Another group of conditions refers to the modalities of performance, i.e. commercial terms, risk bearing, packaging, procurement of licenses, which can play a role where the return of the goods or of the price is concerned. Of particular practical relevance are those agreements which deal with liability, such as penalties, liquidated damages and damage clauses, including possibilities of exemption and restrictions, the amount of interest, etc. 647

On the other hand, one should note that the rule does not remedy deficiencies which lead to non-validity of an arbitral clause or any other provision intended to apply despite termination under national law, including that based on other conventions. 648 None of these rules say that these provisions are valid; it merely provides the rule according to which avoidance of the contract “does not effect” such provisions. 649 This is confirmed by the Secretariat Commentary: “It should be noted that article 66(1) [draft counterpart of CISG article 81(1)] would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law. Article 66(1) [draft counterpart of CISG article 81(1)] states only that such a provision is not terminated by the avoidance of the contract.” 650

12.5 RESTITUTION

12.5.1 In General

Termination may involve nothing for the aggrieved party more than refusing his own performance or refusing future performance from the other party, where nothing has been done by either party, or where any performance made has already properly been rejected, or where the contract is to be performed in successive parts and the parts already performed are not affected. But either party may be left with property transferred by the other, or with a payment made by the other. If this is the case, then a third situation arises: Either party may wish to rid itself of a performance already received, to recover money transferred to the other party and/or to recover property, or its value, transferred to the other party; in other words, in some sense to “undo” what has taken place before the date of termination. 651

646 It is stated with this regard: “The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the avoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this Convention. For example, article 75(1) [draft counterpart of CISG article 86(1)] provides that ‘if the goods have been received by the buyer, and if he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them’ ['If the buyer has received the goods and intends to reject them, he must take such steps to preserve them as are reasonable in the circumstances'] and article 66(2) [draft counterpart of CISG article 81(2)] permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself or may arise out of the necessities of justice.” (Supra. note 4, Comment 6.)

647 Supra. note 7, pp. 342-343.

648 Supra. note 7.

649 Supra. note 9.

650 Supra. note 4, Comment 5.

651 Supra. note 14, Comment A.
Indeed, even though termination is forward having no retroactive effect in general, there are situations in which it is appropriate to “undo” what has taken place before termination. Thus the aggrieved party may need the right to reject a performance already received if termination means that it is of no value to it; either party may need to recover money already paid to the other party if nothing has been received in return; and either may need to be able to recover other property which has been transferred. These points are dealt with in CISG Arts. 81(2), 82, 83 and 84; UPICC Art. 7.3.6 and PECL Arts. 9:306, 9:307 and 9:308 respectively.

12.5.2 Entitlement of Parties to Restitution on Termination

Under the Convention, if the contract is avoided after one party has performed his obligations in whole or in part, Art. 81(2) entitles that party to claim restitution of what he has supplied or paid and requires the other party to make restitution: “A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.” This provision differs from the rule in some countries that only the party who is authorized to avoid the contract can make demand for restitution. Instead, it incorporates the idea that, as regards restitution, the avoidance of the contract undermines the basis on which either party can retain that which he has received from the other party. In other words, the party who is obligated to make restitution after avoidance does not have to be the breaching party. Whoever has received performance must make restitution in accordance with the Convention and/or any contractual provisions.

Usually, the avoidance of the contract is at the same time accompanied by a claim to return that which has been supplied or paid. It is, however, a condition for the claim to return what has been supplied or paid that the right to such return is asserted. This is justified because the parties may wish to leave what has been supplied or paid, respectively, with the other party. In other words, the parties are free to claim restitution as they may wish to leave what has been supplied or paid with the other party. In the case of a contract for delivery and payment of goods by installment, they may agree to retain what they received prior to the avoidance. On the other hand, subject to Art. 82(2), the party who makes demand for restitution must also make restitution of that which he has received from the other party. “If both parties are required to make restitution, they must do so concurrently” (Art. 81(2), sentence 2), unless the parties agree otherwise.

In other words, if both the seller and the buyer have received performance in whole or in part from one another, then they must make restitution concurrently. However, the rule of concurrent per-

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654 Supra. note 29.
655 Supra. note 6, p. 147.
656 Supra. note 7, p. 343.
657 Supra. note 6, pp. 146-147.
658 Supra. note 4, Comment 8.
659 Supra. note 25, p. 36. As convincing as this rule may sound, it will be difficult to implement it. Since in international trade concurrence does not mean a direct change from one hand into the other, there can be several forms in which this requirement is to be fulfilled. Art. 82 can provide an orientation for it. It is believed, however, that in choosing the forms of concurrence, it has to play a role whether a party is liable for a breach of contract. The concrete form to be applied would then have to be chosen to the disadvantage of that party. When the contract is avoided because the seller has delivered grossly non-conforming goods, the buyer may demand that a letter of credit be opened up as a condition for the restitution. Where the avoidance, however, is caused by the buyer who stops paying installments, the seller will at best be willing to repay the
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Performance does not apply to restitution by the buyer who only demands substitute goods (instead of declaring an avoidance). The seller cannot make a delivery of substitute goods dependent on whether the buyer returns the delivered goods. A Norwegian proposal, which, contrary to trade practices, aimed towards this goal and would have permitted the buyer to keep defective goods until the seller delivers substitute goods, was rejected by a large majority (O.R., p. 136). The question of whether the buyer's restitution obligations to the seller can prevail over claims of his other creditors are matters to be decided by domestic law. Domestic law also governs the details of the transfer in restitution. Its special restrictions are not displaced by Art. 81(2).

In any event, however, the non-performing party may be required by the other party to cover all costs incurred to return that which has been supplied or paid. This rule, although not provided in the Convention, is acknowledged by the doctrine.

It is supported in the Secretariat Commentary, which states as: “The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 73 [draft counterpart of CISG article 77] of the party who relies on the breach of the contract to ‘take such measures as are reasonable in the circumstances to mitigate the loss’ may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market where such resale would adequately protect the seller at a lower net cost (OFFICIAL RECORDS, p. 57)."

Under the UNIDROIT Principles, the relevant provision is Art. 7.3.6(1), which provides for a right for each party to claim the return of whatever it has supplied under the contract provided that it concurrently makes restitution of whatever it has received. In this respect, sentence 1 of Art. 7.3.6(1) UPICC reads as: “On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received.” The present article also applies to the situation where the aggrieved party has supplied money in exchange for property, services etc. (which are beyond the scope of the CISG), which it has not received or which are defective. Money returned for services or work which have not been performed or for property which has been rejected should be repaid to the party who paid for it and the same principle applies to custody of goods and to rent and leases of property. At first glance, the UNIDROIT Principles follow the approach established under CISG Art. 81. However, as to be shown infra. 12.5.5, this is not the case. Except for the basic textual similarities, the two sets of rules differ distinctly in their application. In this point, the PECL approach goes further and thus deserves a separate discussion below (infra. 12.5.3) with details to be developed.

Finally, it is to be recalled that if the contract is partially avoided, the rules governing its effects are relevant to that part of the contract, which has been avoided. Similarly, in the case of a partial

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660 Supra. note 7, p. 344; supra. note 18.
661 Supra. note 42.
662 Supra. note 4, Comment 11.
663 Comment 1 on Art. 7.3.6 UPICC.
664 Ibid.
665 Supra. notes 10, 42.
avoidance this restitution, naturally, applies only insofar as the performance already made is concerned.\textsuperscript{666}

12.5.3 Restitution under the PECL

As already discussed earlier, Art. 9:305 states the general rule that termination of a contract has no retroactive effect. It does not follow from the fact that the contract has been terminated that the party which has performed can get restitution of what it has supplied.\textsuperscript{667} Nonetheless, the PECL introduces a set of rules dealing with restitution - the PECL rule according to which the restitution of the goods is available only if the goods do not have any value for the party who received them (Art. 9:306); the principle that restitution of the money paid is subject to the circumstance that the party who paid for a performance did not receive it or it was properly rejected (Art. 9:307); and the rule according to which the party who performed will be entitled to restitution, where possible, only in absence of payment or counter-performance by the other party (Art. 9:308).\textsuperscript{668}

12.5.3.1 Property reduced in value: Art. 9:306

Under many different types of contract there is a possibility that the aggrieved party may have received from the other some property which is of no value to it because of the other party’s non-performance itself or because it has terminated the contract and will therefore not receive the rest of the performance. In such cases it should have the right to reject the useless property.\textsuperscript{669} PECL Art. 9:306 provides for such cases as: “A party which terminates the contract may reject property previously received from the other party if its value to the first party has been fundamentally reduced as a result of the other party’s non-performance.”

This Article may also apply where the contract is to be performed in distinct installments, if failure to deliver a later installment makes the earlier installments useless. In all the cases suggested the aggrieved party could in the alternative claim damages or reduction in price for the reduced value that the property received now has to it. However it will often be more convenient for it simply to return the unwanted property than to have to dispose of it some other way and, since it is by definition the aggrieved party, it seems appropriate to give it the right to reject. There will be a considerable advantage in rejecting the property if it has not yet paid for it, as it can thus avoid having to pay even a reduced price.\textsuperscript{670} Most systems also recognise the rule embodied in Art. 9:306 that the aggrieved party may reject property which has already been delivered to him, and which was itself in conformity to the contract, if the subsequent non-performance has rendered it of no use or interest to him.\textsuperscript{671}

\textsuperscript{666}Supra. note 43.

\textsuperscript{667}See Comment and Notes to the PECL: Art. 9:307. Comment A. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp81.html>

\textsuperscript{668}Supra. note 2.


\textsuperscript{669}Ibid.

\textsuperscript{670}For instance, in GERMAN law, if the performances are inter-related either party can demand return of the earlier-delivered part. In ENGLISH and IRISH law, where a part of the goods to be delivered are defective, the buyer may reject the whole (U.K. Sale of Goods Act 1979, s. 30; for Ireland, see Forde 1.192), and this will apply even if the goods are to be delivered in installments provided that the installments are similarly inter-connected and thus the contract is not severable (see Gill and Dufus SA v. Berger and Co Inc [1983] 1 Lloyd’s Rep. 622, reversed without reference to this point [1984] A.C. 382, H.L.; Atiyah 452). The position with severable contracts is less clear but probably there is a right to reject installments already received if they are rendered useless by the later breach (Atiyah 455; Forde 1.198). The DANISH Sale of Goods Act, 46, and the FINNISH and SWEDISH Sale of Goods Acts 43 and 44 (see Ramberg, Köplagen 462), provide that a buyer who has received a defective installment...
12.5.3.2 Recovery of money paid and property: Arts. 9:306, 9:307

PECL Art. 9:307 deals with the recovery of money paid and states as: “On termination of the contract a party may recover money paid for a performance which it did not receive or which it properly rejected.” If money has been paid before the date of termination, and assuming that it was not paid as a deposit or on terms that it would be forfeited if the contract was not performed, systems in which termination is seen as retroactive will normally allow the money to be recovered. It does not matter whether the party seeking to recover the money is the aggrieved party or the non-performing party. The COMMON LAW is more restrictive. Except in cases of frustration, it allows recovery by the aggrieved party only where there has been “a total failure of consideration” and by the non-performing party only where the party who had received the money can be restored to his original position. With this regard, the PECL follows a broad approach to restitution as CISG Art. 81(2). Under Art. 9:307 a party may claim back money which it has paid for a performance which it did not receive. This rule has general application where a party which has prepaid money rightfully rejects performance by the other party or where the latter fails to effect any performance. It applies equally to contracts of sale, contracts for work and labour and contracts of lease. The party claiming restitution for money paid may also claim interest.

On the other hand, when it deals with property other than money, Art. 9:308 states that: “On termination of the contract a party which has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property.” In other words, Art. 9:308 provides restitution after termination where a party has supplied a performance other than money without receiving the counter-performance, and the performance can be restored. If the contract is terminated it may claim back what it has supplied under the contract. If the property remains in the possession of the party to whom it was transferred, and is not claimed by a third party, the “retroactive” systems allow the transferor to recover it. However, systems differ where a third party such as a creditor of the recipient claims the property. The PECL follows the CISG in leaving the question of whether the right to restitution enables the claiming party actually to recover the goods in the face of competing claims by third parties to the law applicable to the issue. Art. 9:308 deals exclusively with the relationship between the parties and not with the effect which the contract may have on the property in goods sold or bartered. Whether a creditor of the buyer, the buyer’s receivers in bankruptcy, or a bona fide purchaser may oppose the restitution of goods sold is to be determined by the applicable national law. However, where the defaulting party has transferred property to the aggrieved party before termination and if the aggrieved party can restore the property but does not do so, the court may order it to restore it or its value has supplied property which can be returned and for which it has not received payment or other counter-performance may recover the property.” In other words, Art. 9:308 provides restitution after termination where a party has supplied a performance other than money without receiving the counter-performance, and the performance can be restored. If the contract is terminated it may claim back what it has supplied under the contract. If the property remains in the possession of the party to whom it was transferred, and is not claimed by a third party, the “retroactive” systems allow the transferor to recover it. However, systems differ where a third party such as a creditor of the recipient claims the property. The PECL follows the CISG in leaving the question of whether the right to restitution enables the claiming party actually to recover the goods in the face of competing claims by third parties to the law applicable to the issue. Art. 9:308 deals exclusively with the relationship between the parties and not with the effect which the contract may have on the property in goods sold or bartered. Whether a creditor of the buyer, the buyer’s receivers in bankruptcy, or a bona fide purchaser may oppose the restitution of goods sold is to be determined by the applicable national law. However, where the defaulting party has transferred property to the aggrieved party before termination and if the aggrieved party can restore the property but does not do so, the court may order it to restore it or its value

674 See Comment and Notes to the PECL: Art. 9:308. Comment A. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp81.html>
675 Supra. note 12, Note 8(b).
676 Supra. note 61, Comment B. Similarly, the Official Comment on UPICC Art. 7.3.6 also clearly states that in common with other articles of the UNIDROIT Principles, Art. 7.3.6 deals with the relationship between the parties and not with any rights which third persons may have acquired on the goods concerned. Whether, for instance, an obligee of the buyer, the buyer’s receivers in bankruptcy, or a purchaser in good faith may oppose the restitution of goods sold is to be determined by the applicable national law. (Comment 5 on UPICC Art. 7.3.6.)
under Art. 9:308. Among other things, it is to be noted that a contract for the sale or assignment of stocks, shares, investment securities, negotiable instruments and debts is often performed by delivering the warrant certificate or other instrument which gives evidence of the right. If the contract is terminated the seller or assignor should be entitled to recover the paper irrespective of whether this paper is a negotiable instrument or not, subject to third party rights. On the other hand, if a contract for the assignment of a product of the mind is terminated literal restoration of the intangible is sometimes not possible. However, the assignment of patents, trade marks, and other legally protected intangible rights may be called off by a formal declaration or other act of the assignee and thereby returned to the assignor. Furthermore, restoration is possible of things which attach to the intangible. Know-how and literary works are written on paper, paintings are made on canvas, sculptures cast in bronze. Tangible things which in this way materialize the product of the mind may be restored when the contract is terminated. These things often have a value. Moreover, it should be also noted that PECL Arts. 9:307 and 9:308, much like the UNIDROIT Principles, also apply to situations, such as service contracts, where the CISG cannot be applied.

12.5.3.3 Concluding remarks

As it indicates, when the effects of termination on performance already received are concerned, the PECL follows CISG Art. 81(2) and UNIDROIT Principles Art. 7.3.6(1) in taking a broad flexible approach. Thus the PECL is broadly in accordance with those systems which take a liberal approach to restitution after termination and thus enable the court or arbitrator to order full restitution of benefits received. This normally achieves a just settlement on the facts.

However, it is noted that restitution of the property under PECL Art. 9:306 will occur where it is useless for the party that received it. This rule clearly is not compatible with the CISG set of rules. On the other hand, both PECL Arts. 9:307 and 9:308 subject the restitution to the instance where one party has conferred a benefit but has not received the promised counter-performance. Thus, unlike the CISG, where the ability to return the goods received in substantially the condition in which one received them is a prerequisite for avoiding a contract or demanding substitute goods (infra. 12.5.5), the general approach adopted by the PECL is that, upon termination of a contract, both parties are released from their duties to effect and to receive performance (PECL Art. 9:305). A restitution duty, which does not affect the right to terminate the contract, may arise only where one party has conferred a benefit on the other party without receiving the promised counter-performance in exchange.

In other words, as to be discussed in more details infra. 12.5.5, the PECL only give a restitutionary remedy after termination, where one party has conferred a benefit on the other party but has not received the promised counter-performance in exchange. The benefit may consist of money paid (Art. 9:307), other property which can be returned (Art. 9:308) or some benefit which cannot be returned, e.g. services or property which has been used up (Art. 9:309). Nonetheless, it does not matter that the property is worth more than was to be paid for it so that by obtaining restitution the aggrieved party escapes a bad bargain. In other words, the restitu-

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677 Supra. note 61, Comment C.
678 Supra. note 61, Comment E.
679 Supra. note 61, Comment F.
680 Supra. note 12, Note 8.
681 Supra. note 2.
682 Supra. note 54.
12.5.4 Restitution of Benefits Received

Restitution of accruing benefits such as interests or other benefits derived from the performance appears as a natural concomitant of restitution of performances already received. The Convention, under Art. 84, provides for additional rules requiring restitution of benefits received by the parties. In this respect, Art. 84 reads as: "(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid. (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them: (a) if he must make restitution of the goods or part of them; or (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods."

Going beyond the obligation to restitute the goods under Art. 81(2), this Article stipulates that the benefits have to be accounted for which the party having to restitute the goods obtained from the performances in goods or in price, have to be returned. Where the seller is under an obligation to refund the price, he must pay interest from the date of payment to the date of refund. The obligation to pay interest is automatic because it is assumed that the seller has benefited from being in possession of the purchase price during this period. Since the obligation to pay interest partakes of the seller’s obligation to make restitution and not of the buyer’s right to claim damages, the rate of interest payable would be based on that current at the seller’s place of business. This rule proceeds on the assumption that the seller, within the period in which he has disposal over the price, has a benefit from having had possession of the goods. Therefore, paragraph (2) specifies that the buyer is liable to the seller for all benefits which he has derived from the goods only if (1) he is under an obligation to return them or (2) it is impossible for him to make restitution as either surcharges or reductions. In general, this has to be considered as justified since restitution relates to the claims as they actually stand. (Supra. note 7, p. 345, 349.)

Where the buyer must return the goods, it is less obvious that he has benefited from having had possession of the goods. Therefore, paragraph (2) specifies that the buyer is liable to the seller for all benefits which he has derived from the goods only if (1) he is under an obligation to return them or (2) it is impossible for him to make restitution as either surcharges or reductions. In general, this has to be considered as justified since restitution relates to the claims as they actually stand. See Secretariat Commentary on Art. 69 of the 1978 Draft [draft counterpart of CISG Art. 84], Comment 2. Available online at http://www.cisg.law.pace.edu/cisg/text/seccomm/seccomm-84.html The match-up indicates that Art. 69 of the 1978 Draft and CISG Art. 84 are substantively identical. See the match-up, available online at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-84.html Supra. note 7, p. 349.
restitution of the goods or part of them but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods (O.R., p. 58). \textsuperscript{688} Basically, the buyer does not have to return the equivalent of the benefits which he omitted to draw. This again does not exclude that the seller may assert \textit{claims for damages} because of loss in value of the goods delivered where the avoidance is based on a breach of contract by the buyer and/or the latter restitutes belatedly. These claims for damages may indeed come close to benefits not drawn. The benefits do not have to be returned in kind, but according to the requirements of international trade, in \textit{money}. \textsuperscript{689}

In sum, Art. 84 reflects the principle that a party who is required to refund the price or return the goods because the contract has been avoided or because of a request for the delivery of substitute goods must account for any benefit which he has received by virtue of having had possession of the money or goods. Where the obligation arises because of the avoidance of the contract, it is irrelevant which party’s failure gave rise to the avoidance of the contract or who demanded restitution. \textsuperscript{690} Thus, Art. 84 obligates the parties to return all benefits of possession (profits and advantages of use). If the seller is obligated to refund the price, he must also pay interest – in an amount to be determined by domestic law – from the date on which the price was paid. In contrast to the seller who is bound to pay interest on the refundable price, the buyer is only obligated to return benefits that he actually derived from using the goods. In addition, Art. 84(2) restricts the duty to return benefits in subparagraphs (a) and (b) to those cases in which the buyer either must return part or all of the goods or the buyer derived benefits before the goods were destroyed, and (complete) restitution therefore has become impossible. \textsuperscript{691}

\textbf{12.5.5 Exceptions: Restitution Not Possible or Appropriate}

\textbf{12.5.5.1 CISG approach: making restitution a prerequisite for avoidance}

In some cases restitution will not be possible, for instance, restitution of the received goods. This, however, could not occur with respect to the seller’s duty to refund the received price. In such exceptional cases the provisions of Art. 82 of the Convention shall apply. According to the provisions contained in \textit{CISG} Art. 82, the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them (Art. 82(1)). However, the buyer retains the right to avoid the contract: \textit{if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission} (Art. 82(2)(a)); if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in \textit{article 38} (Art. 82(2)(b)); or if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use \textit{before he discovered or ought to have discovered the lack of conformity} (Art. 82(2)(c)). One should note that the norm relates merely to the \textit{right of the buyer} to avoid the contract.

Art. 82(1) simply recognizes the effect of natural causes on the condition of the delivered goods. \textsuperscript{692} This point is made clear in the

\textsuperscript{688} Supra. note 73, Comment 3.
\textsuperscript{689} Supra. note 7, p. 350.
\textsuperscript{690} Supra. note 73, Comment 1.
\textsuperscript{691} Supra. note 19.
\textsuperscript{692} Supra. note 9, p. 258.
Secretariat Commentary: “The rule in paragraph (1) recognizes that the natural consequences of the avoidance of the contract or the delivery of substitute goods is the restitution of that which has already been delivered under the contract. Therefore, if the buyer cannot return the goods, or cannot return them substantially in the condition in which he received them, he loses his right to declare the contract avoided under article 45 [draft counterpart of CISG article 49] or to require the delivery of substitute goods under article 42 [draft counterpart of CISG article 46].”

Thus, the general rule of the Convention, i.e., that the contract may be avoided only if the goods can be returned substantially in the condition in which the buyer received them, is stated in Art. 82(1).

In other words, the right to avoid the contract lapses when the goods can no longer be restored.

The ability to return the goods is, therefore, a prerequisite for avoiding a contract or demanding substitute goods. If, because he cannot return the goods, the buyer is barred from avoiding the contract or demanding substitute goods, his other remedies under the contract or the Convention (damages, reduction of price) remain unaffected (Art. 83).

However, the goods to be returned do not have to be the same goods that were received; rather they must be “substantially in the same condition in which” the goods were received. “It is not necessary that the goods be in the identical condition in which they were received; they need be only in ‘substantially’ the same condition. Although the term ‘substantially’ is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract.”

Moreover, loss or damage to the goods does not in all cases eliminate the right to avoid the contract or to demand substitute goods. On the one hand, according to Art. 82(1), insubstantial damage is irrelevant. Normal wear and tear of the goods would not be in the way of their restitution. It would be different, however, in the case of greater damage which has its cause in the improper use or maintenance of the goods by the buyer. The latter can insofar not rely on grounds for exemption. They would only refer to claims for damages.

On the other hand, Art. 82(2), provides three considerable exceptions to that rule: “The buyer should be able to avoid the contract or require substitute goods even though he cannot make restitution of the goods substantially in the condition in which he received them (1) if the impossibility of doing so is not due to his own act or omission, (2) if the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 36 [draft counterpart of CISG article 38], and (3) if part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.”

Paragraph 698


Supra. note 7, p. 346.

Supra. note 19, p. 106.

Supra. note 79.


695 Supra. note 7, p. 346.

696 Supra. note 19, p. 106.

697 Supra. note 79.
(2) in Art. 82, therefore, deals with the allocation of the risk of loss of the goods before avoidance. A fourth exception to the rule states in Art. 82(1) is to be found in Art. 70 which states that if the seller has committed a fundamental breach of contract, the passage of the risk of loss under Art. 67, 68 or 69 does not impair the remedies available to the buyer on account of such breach (O.R., p. 58).

While the construction of Arts. 82(2)(b) and 82(2)(c) is rather straightforward, some explanation is required as to Art. 82(2)(a). In any case, under Art. 82(2)(a), the buyer is presumably responsible for the acts or omissions of his personnel. On the one hand, in Schlechtriem’s opinion, the acts of third persons can only be attributed to the buyer if his act or – especially – his omission has made it possible for the third persons to affect the goods. These questions do not turn on whether the buyer was at fault.

It is generally understood that under Art. 82(2)(a), the buyer is responsible for damages caused by acts or omissions by his personnel and by third persons, if he made it possible, by means of acts or omissions, for them to damage the goods. On the other hand, more than mere physical causation is probably required before the buyer’s remedies are lost. Otherwise, destruction caused by an accident or force majeure could be attributed to the buyer – e.g., his taking possession unless the goods would have been destroyed while under the seller’s control as well. The words “due to”, however, permit the restrictive interpretation that the buyer must not merely have provided the opportunity for third persons or force majeure to affect the goods but also have increased this chance by his act or omission.

Finally, it is to be noted that the Secretariat Commentary points out that the right of either party to require restitution may be thwarted by other rules which fall outside the scope of the international sale of goods. In this context it is stressed: “If either party is in bankruptcy or other insolvency procedures, it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets. Exchange control laws or other restrictions on the transfer of goods or funds may prevent the transfer of the goods or money to the demanding party in a foreign country. These and other similar legal rules may reduce the value of the claim of restitution. However, they do not affect the validity of the rights between the parties.” It may thus be concluded that there are so many important exceptions to this principle (of restitution) that the principle itself should constitute an exception.

12.5.5.2 UPICC/PECL approach: focusing on the allowance upon impossible restitution

Under the UNIDROIT Principles, the relevant provision is sentence 2 of Art. 7.3.6(1), which reads: “If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.” Thus, if the non-performing party cannot make restitution it must make allowance in money for the value it has received.

The Official Comment states with this regard as follows: There are instances where instead of restitution in kind, allowance in money...
should be made. This is the case first of all where restitution in kind is not possible. Allowance in money is further envisaged by para. (1) of this article whenever restitution in kind would not be “appropriate”. This is so in particular when the aggrieved party has received part of the performance and wants to retain that part. The purpose of specifying that allowance should be made in money “whenever reasonable” is to make it clear that allowance should only be made if, and to the extent that, the performance received has conferred a benefit on the party claiming restitution.

Under the PECL, the closest counterpart is Art. 9:309, entitled Recovery for Performance that Cannot be Returned, which reads: “On termination of the contract a party which has rendered a performance which cannot be returned and for which it has not received payment or other counter-performance may recover a reasonable amount for the value of the performance to the other party.” According to this Article, recovery for performance that cannot be returned, is subject to the following requirements: (i) that there is a termination of the contract; (ii) that a party has rendered performance and has not received payment or counter-performance for it; and (iii) that performance cannot be returned by the other party. If those requirements are met, the entitled party may recover a reasonable amount for the value of the performance rendered to the other party.

As stated in the Comment to this Article, it frequently happens that after a contract has been terminated one party is left with a benefit which cannot be returned - either because the benefit is the result of work which cannot be returned, or because property which has been transferred has been used up or destroyed - but for which it has not paid. The other party may have a claim for the price, but this will depend upon the agreed payment terms and the price may not yet be payable. It may have a claim for damages, but the party which has received the benefit may be the aggrieved party, or, though it is the one which has failed to perform, it may not be liable for damages because its non-performance was excused under Art. 8:108. It would be unjust to allow it to retain this benefit without paying for it, and Art. 9:309 requires it to pay. In calculating this amount, the PECL Comment on Art. 9:309 provides that, upon termination of a contract, the party which has received the benefit should not be required to pay the cost to the other of having provided it, if the net benefit to it is less, since it is only enriched by the latter amount. Occasionally it may happen that the net benefit to the recipient is greater than the cost of providing it. Then the recipient should not be liable under this Article for more than an appropriate part of the contract price.

12.5.5.3 Comparative perspectives

The two sets of rules contained in the respective regimes of the CISG and the PECL (or the UNIDROIT Principles) are quite different. CISG Art. 82 deals exclusively with whether avoidance is still possible even when goods cannot be returned. As a general rule in the Convention, avoidance of the contract is not possible, unless one of the exceptions listed in CISG Art. 82(2) occurs. Avoidance of a contract is available regardless of whether the party which rendered the goods received the performance or other counter-performance.

On the other hand, the PECL only give a restitutionary remedy after termination, where one party has conferred a benefit on the other party but has not received the promised counter-performance in

709 Comment 2 on Art. 7.3.6 UPICC.
710 Supra. note 81.
exchange. The benefit may consist of money paid (Art. 9:307), other property which can be returned (Art. 9:308) or some benefit which cannot be returned, e.g. services or property which has been used up (Art. 9:309). In particular, PECL Art. 9:309 provides that, when restitution cannot be made, the party who delivered the goods may recover a reasonable amount for the value of the goods to the other party if it has not received payment for them or counter-performance. Therefore, PECL Art. 9:309 addresses the issue of restitution, but only to set the rules on how to calculate the amount of recovery. As already demonstrated above, this is also the case for the approach adopted under Art. 7.3.6(1) of the UNIDROIT Principles.

By contrast, the CISG clearly requires restitution of whatever received as a condition to avoid the contract. The ability to return the goods received in substantially the condition in which one received them is "a prerequisite for avoiding a contract or demanding substitute goods. If, because he cannot return the goods, the buyer is barred from avoiding the contract or demanding substitute goods, his other remedies under the contract or the Convention (damages, reduction of price) remain unaffected". In other words, the Convention clearly requires that whatever is exchanged between the parties because of the contract must be returned, and if this is not possible, subject to the exceptions considered by CISG Art. 82, avoidance of the contract is no longer an option. Thus, pursuant to CISG, if the buyer cannot make restitution for what he received, the contract cannot be avoided unless one of the exceptions set by CISG Art. 82(2) is met. The UPICC/PECL does not require any restitution as a condition for avoidance. Such differences arise out of the different understanding regarding the retroactivity concept. While both the CISG and the UPICC/PECL provide that avoidance of a contract does not have retroactive effect, since both expressly exclude that a terminated contract should be treated as never made, the CISG and the UPICC/PECL differ on what survives after avoidance and on the regime to be applied to the performances made under the contract. These are major differences that must to be taken into consideration when comparing the CISG and UPICC/PECL.

Therefore, while under the CISG restitution is an obligatory step toward the avoidance of a contract, under the UPICC/PECL restitution is only a possible consequence of the avoidance of a contract. In fact, a restitution remedy arises only where there was a performance for which payment was not made. Thus, while the CISG tends to eliminate the consequences of an already partially performed contract, the UPICC/PECL tends to maintain the exchange when it is satisfactory for both parties. It is arguable that limiting the recovery where the party did not get what it bargained for may be a good way to reduce possible disputes between parties over issues related to restitution and/or the reasonable amount of the value of performance.

12.5.5.4 Concluding remarks

In many contracts a literal restoration is not possible. This applies to work and labour, services, the hiring out of goods, the letting of premises, and the carriage and custody of goods. A party which has received a performance of this kind cannot give it back. In contracts for sale or barter restoration may become impossible when the goods have perished or have been consumed or resold. In all these situations the party which has received a performance which it cannot return might restore the value of it and various legal systems provide for such a restitution.
As the above analysis indicates, although such cases are dealt with to some extent in CISG Art. 82, the CISG approach unfortunately, in so doing, makes the restitution a prerequisite for avoiding the contract. By contrast, the UPICC/PECL introduces the idea that there are circumstances in which it might be inappropriate to make the restitution. Such an idea is not shared with the CISG. 719 As stressed by the Comments to the two sets of Principles, either the rule under the UNIDROIT Principles both in Art. 7.1.3 on the right to withhold performance and Art. 7.2.2 on specific performance of non-monetary obligations, or the rules under the PECL in Chapter 9 Section 1 on right to performance apply mutatis mutandis (with appropriate adaptations) to the claim for restitution of property. Thus the aggrieved party cannot claim the return of goods or other tangibles when it has become impossible or would involve the defaulting party in an unreasonable effort or expense. In such cases the non-performing party must make allowance for the value of the property. 720

Finally, it is noted that it would be also inconvenient to treat a contract which as being retrospectively cancelled in the sense that performances received must be returned or restitution made of their value. This is not appropriate where the contract was to be performed over the period of time when there can be termination for the future without undoing what has been achieved already. 721 In this point, Art. 7.3.6(2) of the UNIDROIT Principles clearly prescribes that: “However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.” Thus, if the performance has extended over a period of time, restitution can, in accordance with Art. 7.3.6(2), only be claimed in respect of the period after termination. This rule, however, only applies if the contract is divisible. 722 Although no similar counterpart is found in the text of the PECL, its Comment confirms this point: Where a contract is to be performed over a period of time, or in installments, and the performance is divisible, the rule [Art. 9:307] applies to payments made in respect of so much of the performance as was not made or has been rejected. Also, the rule [Art. 9:308] applies to contracts which are to be performed in parts. If the aggrieved party is entitled to terminate in respect of a part of a contract, it may recover a payment made in respect of that part. 723

719 Supra. note 2.
720 Comment 3 on Art. 7.3.6 UPICC; supra. note 61, Comment H.
721 Supra. note 14.
722 Comment 3 on Art. 7.3.6 UPICC.
723 Supra. note 54, Comments C; note 61, Comment D.
PART IV. DAMAGES
CHAPTER 13. GENERAL MEASURE OF DAMAGES

Damages is perhaps the most important relief available to an aggrieved party in the sense that it is a remedy almost invariably pursued either in and of itself or in conjunction with other remedies. According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.

13.1 RIGHT TO DAMAGES

The right to damages exists in the event of failure to perform any of the obligations which arise from the contract. Thus it is not necessary to draw a distinction between principal and accessory obligations. As to be demonstrated, the aggrieved party is generally entitled to recover damages "whenever it suffers loss from the other party's unjustified failure to perform".

Under the CISG, Art. 45/61 provides that if the seller/buyer fails to perform any of his obligations under the contract or the Convention, the other party may "claim damages as provided in articles 74 to 77" (Art. 45(1)(b)/61(1)(b)). Furthermore, the entitled party "is not deprived of any right he may have to claim damages by exercising his right to other remedies" (Art. 45(2)/61(2)). It is confirmed in the two Principles. Art. 7.4.1 UPICC establishes the principle of a general right to damages in case of non-performance as: "Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles." Art. 9:501(1) PECL reads similarly: "The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108."

The right to damages, "like other remedies, arises from the sole fact of non-performance. It is enough for the aggrieved party simply to prove the non-performance, i.e. that it has not received what it was promised. It is in particular not necessary to prove in addition that the non-performance was due to the fault of the non-performing party. The degree of difficulty in proving the non-performance will depend upon the content of the obligation and in particular on whether the obligation is one of best efforts or one to achieve a specific result." In other words: "Where a party's obligation is to produce a given result, its failure to do so entitles the aggrieved party to damages whether or not there has been fault by the non-performing party, except where performance is excused [...]. Where a party's obligation is not to produce a result but merely to use reasonable care and skill it is liable only if it has failed to fulfill its obligation, that is to say if it has not exercised the care and skill it has promised. In the absence of a clause specifying the required degree of care and skill, this is equivalent to the commission of a fault." In short, damages can be claimed no matter whether the breach of contract has been culpably committed intentionally or negligently.

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725 See Saphire Award, ILR (1967); p. 185. Available online at [http://tl.db.uni-koeln.de/TLD8.html]; TLDB Document ID: 261600.

726 See Comment 1 on Art. 7.4.1 UPICC. However, one should note that some of the acts described to be obligations under the CISG are nothing but mere incumbencies whose non-performance does not entail the right to claim damages but results in a loss of rights (like the obligation to examine the goods and the buyer's obligation to give notice under Arts. 38 and 39.)

727 See Comment and Notes to the PECL: Art. 9:501. Comment A. Available online at [http://www.cisg.law.pace.edu/cisg/text/peclcomp74.html]

728 Supra. note 3.

729 Supra. note 4, Comment B.
or in any other way. The mere fact of a breach of contract is sufficient.\(^{730}\) To submit such claims, “the aggrieved party may request damages either as an exclusive remedy (for example damages for delay in the case of late performance or for defective performance accepted by the aggrieved party; damages in the event of impossibility of performance for which the non-performing party is liable), or in conjunction with other remedies. Thus, in the case of termination of the contract, damages may be requested to compensate the loss arising from such termination, or again, in the case of specific performance, to compensate for the delay with which the aggrieved party receives performance and for any expenses which might have been incurred. Damages may also be accompanied by other remedies (cure, publication in newspapers of, for example, an admission of error, etc.).”\(^{731}\)

### 13.2 FULL COMPENSATION

It is said that the right to damages is simply a direct deduction from the principle *pacta sunt servanda*, since its mainly effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.\(^{732}\) This principle of full compensation is also reflected in the three instruments.

Under the *CISG*, Art. 74 provides a general rule which is applied when a party under Art. 45/61 is entitled to claim damages, and provides that the injured party may recover as damages “a sum equal to the loss, including loss of profit, suffered [...] as a consequence of the breach”. The specific reference to “loss of profit” is necessary because in some legal systems the concept of “loss” standing alone does not include loss of profit.\(^{733}\) Since Art. 74 is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damages ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in Art. 74 describing the appropriate method of determining “the loss ... suffered ... as a consequence of the breach”. The court or arbitral tribunal must calculate that loss in the manner which is best suited to the circumstances.\(^{734}\)

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\(^{731}\) See [Comment 2 on Art. 7.4.1 *UPICC*](http://www.cisg.law.pace.edu/cisg/text/secmm/secmm-74.html).

\(^{732}\) Supra. note 2.


\(^{734}\) Ibid., Comment 4. The Secretariat Commentary goes on to discuss two common situations which might arise under Art. 74 and suggests means of calculating “the loss ... suffered ... as a consequence of the breach” as: Where the breach by the buyer occurs before the seller has manufactured or procured the goods, article 70 [draft counterpart of CISG article 74] would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had incurred in the performance of the contract. The profit lost because of the buyer’s breach includes any contribution to overhead which would have resulted from the performance of the contract. (Comment 5)
The principle of full compensation is expressly stipulated under the very heading of “Full Compensation” in Art. 7.4.2(1) UPICC: “The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. [...]” It is said that this Article “establishes the principle of the aggrieved party’s entitlement to full compensation for the harm it has sustained as a result of the non-performance of the contract. It further affirms the need for a causal link between the non-performance and the harm.”

In this respect, Art. 9:502 PECL states that: “The general measure of damages is such sum as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. [...]” This Article “combines the widely accepted ‘expectation interest’ basis of damages and the traditional rule of ‘damnum emergens’ and ‘lucrum cessans’ of Roman law, namely that the aggrieved party is entitled to compensation of such amount as will give it the value of the defeated contractual expectation. In a contract for the sale of goods or supply of services this is usually measured by the difference between the contract price and the market or current price but where the aggrieved party has made a cover transaction [...] it can elect to claim the difference between the contract price and the cover price. The sums recoverable as general damages embrace both expenditure incurred and gains not made. Damages under this Article are not intended to provide restitution (i.e. restoration of the parties of the status quo ante by mutual surrender of benefits received); [...]”

The principle of full compensation under the three texts “makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed”. However, damages may be excused as in the case of force majeure or of an exemption clause. Hardship does not in principle give rise to a right to damages. In other words, the aggrieved party may not recover damages for loss not caused by the failure to perform. However, not every intervening event, even if unforeseeable, which exacerbates the loss falls within this principle. The question in each case is whether that event would have had an impact on the contract if the failure in performance had not occurred. Only if this question is answered in the affirmative will the event in question be treated as breaking the chain of causation.

In short, the general measure of damages is the principle of full compensation, namely that the creditor is entitled to be put into
the same position as he would have been had the debtor complied with the terms of his contract.\textsuperscript{740} In application of the principle of full compensation regard is to be had to any changes in the harm, including its expression in monetary terms, which may occur between the time of the non-performance and that of the judgment. The rule however is not without exceptions: for example, if the aggrieved party has itself already made good the harm at its own expense, the damages awarded will correspond to the amount of the sums disbursed.\textsuperscript{741}

13.3 RECOVERABLE LOSSES

It is recalled that Art. 74 provides for compensation for “loss, including loss of profit, suffered as a consequence of the breach.” Following the logic of this provision, it can be concluded that loss should be divided into two main categories: actual or effective loss and loss of profit.\textsuperscript{742}

It is said that CISG Art. 74 “seeks to give the injured party the ‘benefit of the bargain’, as measured by expectation interests as well as reliance expenditures.”\textsuperscript{743} Following this approach, a measure protecting “expectation interest” has been said to accord directly with the underlying morality of promise keeping. A party’s expectation interest will generally represent the actual worth of the contract to that party. And perfect expectation interest will leave an injured party indifferent between performance and nonperformance. However, the expectation interest is not the only interest that may be protected by an award of damages. Sometimes, so-called “reliance interest” is protected as well, the idea behind which is that if the contract has not been duly performed, the aggrieved party may seek to recover those expenses which he incurred having acted in reliance on the contract, as these expenses would otherwise be wasted. “This occurs when the plaintiff incurs expense in performing the contract, or perhaps even in preparing for its performance, in reliance on the defendant also performing his part of the bargain.”\textsuperscript{744} The core of the protection of reliance interest is to put the aggrieved party into the situation in which he would have been had the contract never been performed. It is the other side of a coin.

In specifying the harm for which damages are recoverable, UPICC Art. 7.4.2(1), which reads in part: “Such harm includes both any loss which it suffered and any gain of which it was deprived,” following the rule laid down in Art. 74 CISG, states that the aggrieved party is entitled to compensation in respect not only of loss which it has suffered, but also of any gain of which it has been deprived as a consequence of the non-performance. The notion of loss suffered must be understood in a wide sense. It may cover a reduction in the aggrieved party’s assets or an increase in its liabilities which occurs when an obligee, not having been paid by its obligor, must borrow money to meet its commitments. The loss of profit or, as it is sometimes called, consequential loss, is the benefit which would normally have accrued to the aggrieved party if the contract had been properly performed. The benefit will often be uncertain so that it will frequently take the form of the loss of a chance.\textsuperscript{745} Similarly, 9:502 PECL provides in part that: “Such damages cover the


\textsuperscript{741}See Comment 4 on Art. 7.4.2 UPICC.


\textsuperscript{744}Supra. note 17.

\textsuperscript{745}See Comment 2 on Art. 7.4.2 UPICC.
loss which the aggrieved party has suffered and the gain of which it has been deprived." Thus, in addition to its primary claim for loss of bargain (that is, the loss which any aggrieved party would be likely to suffer from the non-performance) the aggrieved party can recover for loss resulting from its particular circumstances, so far as foreseeable (see Chapter 14). In Anglo-American usage such loss is sometimes termed “consequential loss”.746

Furthermore, the loss for which damages are recoverable under PECL clearly includes “future loss which is reasonably likely to occur” (Art. 9:501(2)(b)), “that is, loss expected to be incurred after the time damages are assessed. This requires the court to evaluate two uncertainties, namely the likelihood that future loss will occur and its amount. As in the case of accrued loss before judgment (see Article 9:502) this covers both prospective expenditure which would have been avoided but for the breach and gains which the aggrieved party could reasonably have been expected to make if the breach had not occurred. Future loss often takes the form of the loss of a chance.”747 It is further noted: “All the legal systems will allow damages for loss which will occur after the day damages are assessed provided the loss is not too remote, [...]. Such loss may follow from the death of a breadwinner (spouse or parent) or personal disablement, where recoverable as contract damages, and from loss of future profit. See for instance CISG art. 74 [...].”748 In addition, it is said that the issue of future damages is fully dealt with in its Art. 7.4.3 UPICC under the heading “Certainty of Harm” (see Chapter 14).

In short, besides a broad division, none of the three instruments defines what concrete types of loss can be compensated. “It seems that the principle of full compensation for harm, in the light of the particular contract and circumstances, should be the basis for determining the loss. This principle, in turn, will lead us to the conclusion that all kinds of loss, suffered by the party and caused by the breach, are recoverable.”749 However, whether non-pecuniary loss can be compensated seems to be controversial and will be discussed in the following section.

13.4 COMPENSATION OF NON-PECUNIARY LOSS

As discussed above, it is the entire loss, including loss of profit, suffered as a result of the breach of contract, which has to be compensated. Art. 74 CISG is, however, not applied to claims for damages in the case of the death or the bodily injury of a person caused by the goods, irrespective of whether or not the contracting party himself or a third person is involved. Art. 5 CISG excludes the claim for such damages from the scope of the Convention. The CISG only knows of compensation in money.

However, a rule governing such non-pecuniary loss might find application, in international commerce, in regard to contracts concluded by artists, outstanding sportsmen or women and consultants engaged by a company or by an organization.750 Therefore, recoverable loss under both UPICC and PECL, whose sphere of application is each broader than the CISG and not limited to sales of goods, is not confined to pecuniary loss but may cover non-pecuniary loss, for example, pain and suffering, inconvenience and mental distress resulting from the failure to perform. Art. 7.4.2(2) UPICC expressly provides for compensation also of non-pecuniary harm and states: “Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.” Art. 9:501(2)(a) PECL also states that the loss

746 Supra. note 13, Comment B.
747 Supra. note 4, Comment F.
748 Supra. note 4, Note 5.
749 Supra. note 19.
750 See Comment 5 on Art. 7.4.2 UPICC.
for which damages are recoverable under PECL includes “non-pecuniary loss”. Conceptually, non-pecuniary loss can be defined as loss, flowing from an injury or damage to non-material values, which “are such values that do not have ‘economic content’ and are inseparable from the personality of a bearer of these values.” Non-pecuniary loss may be pain and inconvenience following from physical harm or from disappointment or vexation, and may be due to attacks on a person’s personality, reputation or honour or to the death of a spouse or other closely related person. The compensation of non-material harm may assume different forms and it is for the court to decide which of them, whether taken alone or together, best assures full compensation. The court may not only award damages but also order other forms of redress such as the publication of a notice in newspapers designated by it (e.g. in case of breach of a clause prohibiting competition or the reopening of a business, defamation etc.).

However, one should note that such a radical difference between the damages provisions in the CISG and those in the two Principles, namely in respect of non-pecuniary damages or damages resulting from personal injury or death, “does not so much reflect a difference in the basic approach between the CISG and UNIDROIT Principles [as well as European Principles] as the fact that the drafters of the CISG wished to remove the complex area of products liability from the sphere of the CISG. The fact that such a provision is included in the UNIDROIT Principles [as well as European Principles] provides good grounds for arguing that the provisions of article 5 CISG should be restrictively interpreted and only the liability for personal injury or death should be excluded, but not other personal damages such as damage to reputation.”

It is submitted that that there may be at least two kinds of situations in which this type of loss may be compensated under the CISG. The first situation is the one where the purpose of the transaction is entirely non-material, and the parties are aware of such a purpose. Accordingly, the loss, caused by the breach, which totally or substantially undermines the whole (non-material) purpose of the transaction, should be recoverable. However, in a context of international commerce, the situations of this kind seem to be quite nonypical. The second situation is where an injured party's business reputation was negatively affected as a result of the breach. In commerce in general and in international sales, in particular, business reputation plays an important role. It can affect and sometimes pre-determine the state of affairs of a subject of commercial activity. Thus, it is suggested that, at least in theory, loss of reputation in itself should be recoverable under Art. 74.

13.5 COMPUTATION OF LOSSES AND GAINS

Despite the principle of full compensation for harm will lead us to the...
conclusion that all kinds of loss, suffered by the party and caused by the breach, are recoverable, it seems to be universally accepted that loss should be offset by the gains which the aggrieved party has made due to the non-performance. It is submitted that the second consequence of the principle that damages are compensatory is that an award of damages should not enrich the plaintiff: he cannot recover more than his loss. In any event, the aggrieved party must not be enriched by damages for non-performance. It is for this reason that p Art. 7.4.2(1) UPICC prescribes pertinently that account must be taken of “any gain to the aggrieved party resulting from its avoidance of cost or harm”, whether that be in the form of expenses which it has not incurred (e.g. it does not have to pay the cost of a hotel room for an artist who fails to appear), or of a loss which it has avoided (e.g. in the event of non-performance of what would have been a losing bargain for it). To the same effect, the Official Comment to the PECL Art. 9:502 clearly states: “The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain. Compensating gains typically arise as the result of a cover transaction concluded by the aggrieved party. But it is for the non-performing party to show that the transaction generating the gains was indeed a substitute transaction, as opposed to a transaction concluded independently of the default. A compensating saving occurs where the future performance from which the aggrieved party has been discharged as the result of the non-performance would have involved the aggrieved party in expenditure.”

In other words, the party entitled to damages does not suffer a “loss” to the extent that the breach of contract also confers advantages on him which absorb the detriment suffered. This approach, common to most legal systems where it is said that damages should compensate the loss of the aggrieved party – neither more nor less, focuses on how to make the injured party whole, seeking to encourage the making of contracts by assuring the injured party the value of performance and by eliminating the prospect of penalties for non-performance. In short, the non-performance must be a source neither of gain nor of loss for the aggrieved party. Finally, it is to be noted that despite of the full compensation doctrine, each of the three instruments “does not provide for nominal damages for a breach which has caused the aggrieved party no loss.” It is a common feature that damages are awarded only if and to the extent the aggrieved party has suffered a loss as a consequence of the non-performance of the contract. No action for damages lies where the claimant fails to prove any loss resulting to him from the breach of contract.

756 Supra. note 13, Note 4.
758 See Comment 3 on Art. 7.4.2 UPICC.
CHAPTER 14. LIMITS TO CLAIMS FOR DAMAGES

While it is encouraging to see broader protection for the injured party, limiting the liability of the breaching party may also be desirable under some circumstances. It is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of his breach. The principle, which is common to many legal systems, is that of limiting the contractual liability of the party in breach. 763

14.1 GENERAL CONSIDERATIONS

Based on the idea that the recovery of damages cannot be unlimited, the purpose of using the methods of limiting damages is to restrict the liability in damages. This purpose makes the issue of limiting damages an integral part of the general measure of damages. In this respect, it is to be noted that the respective techniques limiting damages vary depending on the principles established in particular legal systems.

Generally speaking, the limits of recovery are in part derived from the conditions of the non-performing party and in part from circumstances of the aggrieved party. On the one hand, most legal systems often give special consideration to the non-performing party and limit damages out of consideration for it. They do so by a great variety of techniques such as requiring that the non-performing party was at fault; or that he foresaw or could have foreseen the loss; or that he “adequately” caused the loss. 764 On the other hand, with regard to those limitations of recovery which are derived from the conditions of the aggrieved party, two types of loss clearly stand out: the first is loss suffered by the aggrieved party which results from his own unreasonable behavior or his failure to take reasonable steps to mitigate his loss; and the second ground for limiting recovery is the presence of savings or gains which result from the breach of contract (see Chapter 13).

These two heads of limiting the aggrieved party’s loss and therefore of his compensation seem to be very widely recognized. For example, the CISG has adopted the Anglo-American foreseeability test (Art. 74). By contrast, the CMEA General Conditions for Deliveries combine the requirements of a causal connection and of fault on the part of the non-performing party (§67 D(1)(c) and (d), (2) and (3)). And the aggrieved party’s burden of mitigating the loss is also expressly spelt out in the uniform laws. However, in view of the great diversity of approaches it is not yet possible to explain and compare all of these various approaches towards the limiting of damages. For this reason, the author will focus below on those well-known methods such as foreseeability, certainty, mitigation and contribution as adopted under the three instruments.

14.2 FORESEEABILITY OF LOSS

14.2.1 In General

One of the methods of limiting damages, which has received an ex-

763 See Treitel, Remedies for Breach of Contract: A Comparative Account, (1988); p. 76. Treitel submits that the full compensation of the expectation and reliance interests would operate either as too strong a disincentive to the assumption of contractual obligations, or to an undue raising of charges to cover such unlimited liability.

764 The theory of “adequate causation” holds that a wrongdoer is liable for a loss if his default appreciably increased the objective possibility of loss of a kind that in fact occurred; on the other hand, he is under no liability if his default was, according to the ordinary course of things, quite indifferent with regard to the consequence which in fact occurred, and only became a condition of the occurrence of the loss as a result of unusual or intervening events. (See Treitel, G.H. in “Remedies for Breach of Contract”: David/ von Mehren eds., International Encyclopedia of Comparative Law, Bd. VII, Tübingen (1976); p. 66. Available online at: http://tlb.uni-koeln.de/TLDB.html; TLDB Document ID: 117200.)
tensive application in various legal systems and international acts, is the principle of foreseeability, or so-called contemplation principle. This principle has a long history. It was first established in Roman law. Much later, it was established in the Code Napoleon and, consequently, adopted by a number of legal systems. This rule has been adopted by the Common law as well. It was established in a famous case Hadley v. Baxendale and further restated in Victoria Laundry v. Newman Industries. 765

Considering numerous versions of foreseeability in particular legal systems, 766 it is decided in this section to focus on such a test as similarly established under the three studied instruments. In this respect, the second sentence of Art. 74 CISG closely resembles the common law foreseeability requirement: “Damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.” It is also adopted in the two Principles. Art. 7.4.4 UNIDROIT prescribes that: “The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.” Art. 9:503 PECL stipulates that: “The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent.”

Clearly, these provisions cited above resemble in substance. I, therefore, will focus on the approach taken on by the CISG, with a comparison with the other instruments where the approach developed or worded differently. According to the second sentence of Art. 74 CISG, “the only damages that must be compensated are those which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract. [...] The underlying idea is that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement.” 767 This rule encourages the injured party to disclose any special circumstances and is therefore consistent with the cooperation and communication goals. It is also consistent

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765 See Djakhongir Saidov in “Methods of Limiting Damages under the Vienna Convention on the International Sale of Goods” (2001) Available online at <http://www.cisg.law.pace.edu/cisg/biblio/saidov.html> Enderlein and Maskow also states that: “It is above all the Anglo-American (e.g. 2-715, paragraph 2 UCC) and the French legal families (Article 1150 Code civil) which provide for a limitation of damages by way of foreseeability. Other legal systems come to similar conclusions using the so-called theory of adequacy.” (See Fritz Enderlein, Dietrich Maskow, infra. note 8.)

766 See Tallon, Denis in “Damages, Exemption Clauses, and Penalties”: 40 Am. J. Comp. L. (1992); pp. 678-679. TLD Document ID: 129100. Tallon states in this point: Foreseeability of harm is an interesting topic from a comparative point of view. Certain systems do not possess such a rule because foreseeability is merged with the notion of causality: it is the case of German, Swiss or Dutch law (art. 6-98 NBW). Other systems refer to foreseeability but have a different approach to it, despite superficial similarities. At common law, foreseeability is more or less a question of causality, and Section 2-715(2)(a) of the UCC speaks of “consequential damages.” Moreover, according to the rules in Hadley v. Baxendale, foreseeability is a test for remoteness: what was not foreseeable at the time of the contract is a loss too remote to be compensated. And this is why foreseeability is also used in tortious liability. In the civil law countries where foreseeability is one of the criteria, such as in article 1150 of the French Civil Code and article 1125 of the Italian Civil Code, art. 1225 C.Civ. italien, the rule is more refined: foreseeability is a limit to compensation for direct harm; it is an exception to the full compensation principle in favor of the performing party when the latter acted in good faith. The limit does not apply in case of deliberate or grossly negligent non-performance. This stems from the more acute “moralist approach” of the civil law. But there is also an economic justification: a party may estimate in advance the amount of damages to be paid (or for which insurance must be brought). The rule is, by necessity, specific to breaches of contract.

with the purpose of not penalizing a breaching party who did not know of special circumstances and could not take special precautions.\textsuperscript{768}

Textually speaking, in considering ways to limit the liability of the breaching party under Art. 74 \textit{CISG}, there is “seven clauses” referred to as “bare bones” which a court must analyze. These clauses are: “Such damages may not exceed” the loss which “the party in breach” “foresaw or ought to have foreseen” “at the time of the conclusion of the contract” in light of the “facts and matters of which he then knew or ought to have known” “as a possible” “consequence of the breach of contract”.\textsuperscript{769} And in the following paragraphs the author will selectively lucubrate into some of these “bare bones”.

\subsection*{14.2.2 Test for Foreseeability}

It is clear that the second sentence of Art. 74 \textit{CISG} provides for both subjective and objective standards with respect to foreseeability by using the wording “foresaw or ought to have foreseen”. What is meant here is to foresee subjectively, but the Convention does not stop at that. Insofar as damage is a completely normal consequence of a breach of contract, it should have been foreseen.\textsuperscript{770}

\begin{enumerate}
\item \textsuperscript{768} Several other articles of the \textit{CISG} further the goal of compensation. For example, Art. 75 stipulates that, a party’s substitute purchase or resale after the other’s default must be reasonable. Under this rule, a buyer cannot purchase more expensive goods after a breach and claim the difference between the contract price and the substitute price if goods were available at the contract rate.\textsuperscript{769} See Arthur G. Murphey, Jr. in “Consequential Damages in Contracts for the International Sale of Goods and the Legacy of Hadley”, 23 Geo. Wash. J. Int'l. L. and Econ. (1989); pp. 415-474. Available online at \url{http://www.cisg.law.pace.edu/cisg/biblio/murphey.html}
\end{enumerate}

In order to determine the foreseeability, it will be sufficient to prove either that the party actually foresaw the loss, or was objectively in a position to foresee it. Therefore, it is not necessary to prove that the party in breach actually foresaw the loss. The proof of an objective element will be sufficient to make the party liable for loss.\textsuperscript{771} However, such liability may be restricted on the basis of a reasonable allocation of risks under the contract. In particular, it is not quite exact to state that the subjective foreseeability does not matter. Subjective foreseeability plays a role when the resulting loss is above what would have been regarded as the normal measure by any reasonable person, but actually was foreseen by the party in breach.\textsuperscript{772} On the other hand, “it may explicitly or implicitly follow from the terms of the contract that certain losses should not be covered by the party’s liability, even though they were foreseen or objectively foreseeable.”\textsuperscript{773}

In short, the breaching party would be liable when proved either that the party actually foresaw the loss, or was objectively in a position to foresee it, in consideration of particular circumstances. To clarify this double test, there are more details needed discussing in the following paragraphs.

\subsection*{14.2.3 Party Concerned and Reference Point}

The first question is: who is required to foresee or to be in a position to foresee? It is said that “foreseeability, as understood in Article 74, depends on the knowledge of facts and matters which enable
the party concerned to foresee the results of the breach".\textsuperscript{774}

In this regard, it’s only “the party in breach” whose knowledge matters. This is clearly shown by the wording in Art. 74 “the loss which the party in breach foresaw or ought to have foreseen”. This position is somewhat different in English law. In particular, in Hadley v. Baxendale, the requirement was that the loss be “in the contemplation of both parties”.\textsuperscript{775} What's the idea underlying this formula of Art. 74 in stating that it is only “the party in breach” who is required to foresee or to be in a position to foresee? It is said that, “[t]he C.I.S.G. article, in limiting reference to the party in breach, surely does not envision delivering a windfall to the plaintiff, because the plaintiff recovers something not foreseen. Rather, this language reflects the view that the focus should be on the party who will have to answer for the amount of the loss.”\textsuperscript{776}

Then the second issue arises: What's the relevant time for evaluation of foreseeability? Adopting the same position as that set out in the Hadley rule or English law (where the relevant time for evaluation of foreseeability is generally the time of making the contract), Art. 74 CISG directly refers foreseeability to “the time of the conclusion of the contract” for determining what is foreseeable.

It follows: “It is not sufficient that the party in breach could at the time of the delivery of the defective goods or at the time of performance of the non-delivered goods foresee the damage to be caused by the breach of contract. The party in breach rather should have been able to foresee the damage at the time of the conclusion of the contract. He should at the time of the conclusion of the contract be in a position to calculate his risk”.\textsuperscript{777} Generally, the “at the time” language in Art. 74 seems to be “problem-free”, this rule is well settled and has proved remarkably resistant to change.\textsuperscript{778}

The purpose here is to emphasize the important role played by the time precision in assessing foreseeability. The fact that negotiating leading to the conclusion of the contract may last a certain period of time makes it clear that precision in relation to the time becomes very important. It is therefore to be noted that, careful attention should be paid to the requirements of some legal systems governing the conclusion of contract.

In any event, the moment of the conclusion of the contract is the decisive time in determination of the party’s foreseeability. "No possible foreseeability, which may take place after this moment, should have any legal consequences."\textsuperscript{779} It is only within such limits of the particular period of time, i.e., the time of the conclusion of the contract, that other important elements of foreseeability will be examined.

14.2.4 Evaluation of Foreseeability

Generally, the terms of the contract, together with knowledge of the party in breach, are among the first important factors in evaluation of foreseeability. Moreover, Art. 6 of the C.I.S.G clearly shows that in...
case there are hesitations as to the sequence or priority of application of these elements, precedence should be given to the “express or implied” intentions of the parties with respect to the terms of the contract. However, the party’s actual foresight and the ability to foresee may not always be explicitly reflected in the contract. “It would be more correct to say that foreseeability is partly reflected by the terms of the contract. Besides the contract terms, there are other elements, which are essential in evaluating foreseeability: knowledge and trade usage. These two elements may or may not be explicitly reflected in the contract.”

As mentioned above, the foreseeability was established at common law in the famous case Hadley v. Baxendale and further restated in Victoria Laundry v. Newman Industries. In this regard, it was once thought that Hadley v. Baxendale (1854) should be understood as establishing two rules, namely that “the damages should be such as may fairly and reasonably be considered as arising either: a) naturally, i.e. according to the usual course of things from such breach of contract itself; or b) as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.” This test was reformulated in Victoria Laundry v. Newman in what has been referred to as a classic statement of the law: The aggrieved party is only entitled to recover such part of loss actually resulting as was the time reasonably foreseeable as liable to result from the breach. What was at the time so foreseeable depends on the knowledge that the parties had at the time of the conclusion of the contract, or, “at all events”, the party in breach had at that time. The two rules of Hadley v. Baxendale become one. There is the imputed knowledge which every reasonable person is taken to know in the ordinary course of things and the actual knowledge of special circumstances of which the contract-breaker was aware at the time of entering into contract.

It follows that under English law, knowledge can be of two kinds: imputed knowledge (which in “the ordinary course of things” is possessed by any reasonable person (regardless of whether the party in breach actually possesses it or not) and actual knowledge (which means knowledge the party in breach actually has of some special circumstances, which lie beyond “the ordinary course of things”). In turn, the CISG does not directly establish the two parts of the Hadley rule, which subsequently gave way to the doctrine of two types of knowledge. Nonetheless, as to be furthered below, analogous subjective and objective standards have been established with respect to the party’s knowledge: “the facts and matters of which he then knew or ought to have known”. Therefore, such wording is likely to cover “the ordinary course of things” case as well as “the special circumstances” case.

It is here recalled the manifestation of objective and subjective standards with respect to the foreseeability test. What are the standards with respect to the knowledge itself, which has been established as an essential element for evaluation of foreseeability? It suggests that a similar approach has been taken on when Art. 74 uses the wording “in the light of the facts and matters of which he then knew or ought to have known” to define the foreseeability formula. “This wording serves to objectify the foreseeability. What matters is not anymore the actual foreseeability, rather, it is the foreseeability which can be expected from a reasonable party in the same situation.”

Interpreting this wording may involve the consideration of several sources as regards the “knowledge” available to the breaching party at the time of the conclusion. From one source, based on 781 Supra. note 17.
782 See Djakhongir Saidov, supra. note 3.
783 Supra. note 10.
a subjective standard: “The party in breach will also be considered as having known the facts and matters enabling him to foresee the possible consequences of the breach, and therefore, as having foreseen them, whenever the other party to the contract has drawn his attention to such possible consequences in due time. Should a party at the time of the conclusion of the contract consider that breach of contract by the other party would cause exceptionally heavy losses or losses of an unnatural nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered.”

Sutton also submits that, a party to a contract that may lead to unusually large losses may want to make these dangers known to the other contracting party in order to implicate the subjective prong of the Art. 74 foreseeability test. It is obvious that a party who fears suffering an extraordinary loss as a consequence of the breach of contract by the other party, should make this known to the latter at the conclusion of the contract so as to enable him to calculate the risk.

However, it is not the only available source. The CISG does not stop at actual knowledge but establish the imputed one as well. This is the other source, from which the breaching party will have the knowledge that merchants in general have. The party in breach will be considered as knowing the facts and matters enabling him to foresee the consequences of the breach of contract if such knowledge generally flows from the experience of a merchant or, in other words, if such knowledge can in the given case be expected of him having regard to his experience as a merchant. “Generally, knowledge, in the light of an objective standard, should be generally imputed to the party in breach if it can be objectively considered that such knowledge is based on the experience of the party as a merchant.”

At that, the circumstances of a concrete case should be taken into account as well. In this respect, to what extent the party in breach is capable of taking the circumstances into consideration may depend on his position, especially which has been affected greatly by advances today in technology. “Modern business practices (and equipment), accounting methods, and the extensive communication of information make more knowledge available to both parties. This increased knowledge may make potential amounts of loss easier to compute. A potential breacher today will have available a great deal more information about what can happen concerning the contract and hence ‘ought to know’ a great many more facts than a potential breacher in the nineteenth century.”

It seems that in some cases, a trade usage can also serve as an additional factor for evaluation of foreseeability. A trade usage can be relevant for determining both subjective and objective standards with respect to foreseeability. Where a trade usage is relevant in evaluation of foreseeability, the applicability of an objective or a subjective standard of foreseeability can be linked to the grounds provided for in Art. 9 CISG, which contains both subjective and objective grounds for applicability of a usage to the parties’ legal relationships.

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784 Supra. note 12.
786 Supra. note 3.
787 Supra. note 7.
788 See Djakhongir Saidov, supra. note 3.
789 See e.g., Bundesgerichtshof 24 October 1979 where the German Supreme Court held that: “The Court of Appeals was also correct that ULIS Article 82 requires a subjective and objective test, that the test can conclusively be met by a showing of trade custom as to foreseeability, and that a survey of persons in the trade is a proper means of determining those facts under Code of Civil Procedure, section 346.” Available online at <http://cisgw3.law.pace.edu/cases/791024g1.html> (The case was decided on the basis of Art. 82 ULIS, which contained the same rule of foreseeability as provided for in Art. 74 CISG.)
In this regard, Saidov states as follows: “If a subjective ground is applicable, i.e. if the parties have specifically agreed to a particular trade usage, or established a practice between themselves, or knew of a usage, then such a usage or practice will be likely to determine the actual knowledge of a party in breach. The actual knowledge, in turn, can, on the one hand, establish the actual foresight. On the other hand, the fact that a party actually knew of something does not necessarily mean that he actually foresaw the consequences in question. The actual knowledge can as well lead to the establishment of an objective standard, i.e. that a party, having known of certain conditions, was in a position to foresee the consequences of the breach, but did not in fact foresee them. If an objective ground for applicability of a usage comes into play, then this ground is likely to impute the knowledge of the party in breach. Provided that a party did not actually possess the knowledge, the imputed knowledge will be more likely to lead to determination of an objective foreseeability (‘ought to have foreseen’), rather than of an actual foresight. The reason for this conclusion is that it is highly unlikely that a party will actually foresee the consequences if he does not actually have necessary knowledge.”

In any event, “in deciding whether the party in breach can be considered as having known ‘the facts and matters’, a right balance has to be found in relying on available sources. This means that we will need to assess the proportion, in which each of the sources of information can be said to have contributed to the formation of the party’s knowledge. However, ultimately, the specific circumstances of a particular case should be decisive.”

14.2.5 Content of Foreseeability

The foreseeability established under Art. 74 CISG, directly refers to the loss “as a possible consequence of the breach of contract”. “The phrase ‘as a possible consequence’ appears in Article 74, while Hadley chose ‘as a probable result’. [...] Thus the language of the C.I.S.G. ostensibly widens the area of liability imposed upon a breaching party. Hopefully, ‘possible’ will not cause in international sales cases the same speculation that ‘probable’ has caused in the British cases.”

This makes it clear that, the foreseeability does not refer to a certain sum of money equal to the loss, even though the wording of this rule may suggest it, but to the possibility of a loss as a consequence of the breach of contract as such and the extent of the possible loss. It follows that foreseeability is a flexible concept falling within the wide discretion of the judge. What should have been foreseen in each case will often have to be judged retroactively by a court or an arbitral tribunal. Already in the jurisdiction in regard to ULIS, which in Art. 82 contained the same rule of foreseeability, the following cases became apparent: (a) the cost of a substitute transaction and the loss of resale profit are foreseeable; (b) missed uses of the goods to be delivered are also part of the generally foreseeable damage; (c) additional costs for transportation, storage and insurance are also foreseeable; and (d) even the loss of clients of the buyer because of the defect in the goods was characterized as foreseeable. Only the loss suffered from a decline in the currency which occurred as a consequence of the delay in

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790 Art. 9 CISG states: “(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.”

791 See Djakhongir Saidov, supra. note 3.

792 Supra. note 7.

793 Supra. note 12, p. 541.
payment was predominantly rejected as not foreseeable.\footnote{Supra. note 8, p. 302.}

And with regard to the crucial question on what concrete factors the party in breach had to foresee or ought to have foreseen to be liable for the loss, it is further summarized: "The first such factor is the possibility of the loss. This conclusion flows directly from Article 74, which provides that the loss must be foreseen as 'a possible consequence of the breach'. There is no doubt that the risk of loss is in direct connection with the type of a potential loss. Therefore, the second factor, which the party had to foresee or ought to have foreseen, is the type of the loss. It is further submitted that foreseeability should also relate to the possible extent of the loss (the third factor). The party in breach should not be held liable for the full extent of the loss, if he could not have reasonably foreseen or was not in the position to foresee that such extent would follow from the type of the loss which he foresaw or ought to have foreseen. The party should be liable only to the extent which he foresaw or ought to have foreseen as the possible extent of the loss. It is also to be noted that in evaluating the possible extent of the loss, the manner in which the loss was caused, or the events which led to the loss having acquired the extent in question, can often be decisive. Therefore, arguably, these aspects can be regarded as necessary factors that the party had to foresee or ought to have foreseen to be liable for the extent of the loss in question."\footnote{See Djakhongir Saidov, supra. note 3.}

On the other hand, it can be inferred from the wording "as a possible consequence of the breach of contract" that there is a requirement as to the presence of causal link between the breach and the loss. Although the concept of causation in different legal systems gave rise to the development of various theories of causation, the causal link, established in Art. 74, strongly overlaps the foreseeability rule. Thus, a loss may be considered to be caused by an event if the event is appropriate to bring it about and if a third person in the light of general experience and with knowledge of all the facts could have foreseen the possibility of loss. Foreseeability and causation are closely inter-related and hardly does it seem possible to rigidly separate them from each other. Indeed, foreseeability largely consists of an element of causation. Without an understanding of how events can affect each other and of "a degree of uniformity of sequence of events", it would be impossible to foresee anything whatsoever.

However, as criticized by some authors, such an inter-connection cannot serve as a basis to consider the two concepts as mutually exclusive. Nor is it correct to regard foreseeability as being capable, at least on a theoretical level, of fully replacing the potential effect of causation. Causation as a phenomenon exists on its own regardless of our knowledge of the world. It is an objective phenomenon. Therefore, it seems incorrect to bring an objective process, which exists independently of our perception of the world, entirely down to the way a person could foresee the potential causal processes. The foreseeability rule under the CISG includes both subjective and objective standards. The way a person had actually foreseen or been in the position to foresee the potential development of events, at the time of the conclusion of the contract, does not necessarily coincide with the way such a development has, in fact, taken place. Rather, these concepts should supplement and balance each other. The doctrines on foreseeability and causation could be applied in a rather consistent manner and Art. 74 is certainly flexible enough to accommodate an application of general principles.\footnote{Ibid. However, for the sake of practicing, as well as considering their explicit texts and the role played by uniform law instruments in avoiding those confusions caused by so close an inter-connection of these two concepts in different legal systems, one may advisably lay in international commercial disputes everything on the foreseeability rule, unless the applicable law provides for the determination of the loss independently of the foreseeability rule.}
14.2.6 Concluding Remarks

Under the foreseeability formulae, restricting the extent of the liability of the non-performing party, as provided for in Art. 74 CISG, "the emphasis is on loss which was actually foreseen or which the party ought to have foreseen in the light of circumstances known to him or of which he should have known as a possible consequence of the breach." 797

What was foreseeable is to be determined by reference to the time of the conclusion of the contract and to the non-performing party itself (including its servants or agents), and the test is what a normally diligent person could reasonably have foreseen as the consequences of non-performance in the ordinary course of things and the particular circumstances of the contract, such as the information supplied by the parties or their previous transactions. This limitation is related to the very nature of the contract: not all the benefits of which the aggrieved party is deprived fall within the scope of the contract and the non-performing party must not be saddled with compensation for harm which it could never have foreseen at the time of the conclusion of the contract and against the risk of which it could not have taken out insurance. Foreseeability relates to the nature or type of the harm but not to its extent unless the extent is such as to transform the harm into one of a different kind. In any event, foreseeability is a flexible concept which leaves a wide measure of discretion to the judge. 798

Also, it must be noted that, in some legal systems, the limitation of damages by foreseeability as such is restricted when the breach of contract was committed intentionally. Although in general the non-performing party is liable only for loss which it foresaw or ought to have foreseen at the time of the contract, the last part of Art. 9:503 PECL, which reads: "The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent", lays down a special rule in cases of intentional failure in performance or gross negligence. In this case the damages for which the non-performing party is liable are not limited by the foreseeability rule and the full damage has to be compensated, even if unforeseeable. 799

However, no such rule exists in the CISG. 800 The UNIDROIT Principles also stresses that the concept of foreseeability must be clarified since the solution contained therein does not correspond to certain national systems which allow compensation even for harm which is unforeseeable when the non-performance is due to willful misconduct or gross negligence. Unlike certain international conventions, particularly in the field of transport, the UNIDROIT Principles follows the CISG in not making provision for full compensation of harm, albeit unforeseeable, in the event of intentional non-performance. Since the present rule of UPICC Art. 7.4.4, which reads: "The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-

797 See Sieg Eiselen in “Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 74 of the CISG”. Available online at <http://www.cisg.law.pace.edu/cisg/principles/uni74.html>

798 See Comment on Art. 7.4.4 UPICC.


800 Such a rule could at best be deduced from the underlying general principles of the CISG (Arts. 7(2); 40 and 43(2)).
performance”, does not provide for such an exception, a narrow interpretation of the concept of foreseeability is called for.\textsuperscript{801} This is also important for the restrictive interpretation of article 74 \textit{CISG} in the light of the wide phrasing of Art. 74.\textsuperscript{802}

### 14.3 CERTAINTY OF HARM

Another important principle, together with the foreseeability rule, may be assumed from Art. 74 \textit{CISG}, i.e. the party is not liable for harm which has not occurred and which is not likely to occur, either. The requirement of foreseeability must be seen in conjunction with that of certainty of harm.\textsuperscript{803} Such an interpretation is strengthened by the interpretation of Art. 7.4.3 \textit{UPICC}: “It is submitted that article 7.4.3 of the \textit{UNIDROIT Principles} may be helpful in interpreting article 74 \textit{CISG} and to fill the apparent gap which exists. The \textit{UNIDROIT Principles} clearly accept the principle that the defaulting party is liable for future damages and provide a practical, reasonable and equitable approach for the determination of such damages.”\textsuperscript{804} “\textit{UNIDROIT Principles} article 7.4.3 complements \textit{CISG} article 74 by emphasizing that the existence and extent of the harm to be compensated must be established with a \textit{reasonable degree of certainty}.”\textsuperscript{805}

In this respect, Art. 7.4.3 \textit{UPICC} reads: “(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.” It appears that this Article establishes two principles, namely, (a) the defaulting party is liable; and (b) the calculation of the loss is in proportion to the probability of the occurrence of the chance.\textsuperscript{806} This Article reaffirms the well-known requirement of certainty of harm, since it is not possible to require the non-performing party to compensate harm which may not have occurred or which may never occur. Para. (1) of Art. 7.4.3 explicitly permits the compensation also of future harm, i.e. harm which has not yet occurred, provided that it is sufficiently certain. Para. (2) in addition covers loss of a chance, obviously only in proportion to the probability of its occurrence. Certainty relates not only to the existence of the harm but also to its extent.\textsuperscript{807} There may be harm whose existence cannot be disputed but which it is difficult to quantify. This will often be the case in respect of loss of a chance (there are not always “odds” as there are for a horse, for example a student preparing for a public examination) or of compensation for non-material harm (detriment to someone’s reputation, pain and suffering, etc.). According to para. (3), where the amount of damages cannot be established with a sufficient degree of certainty then, rather than refuse any compensation or award nominal damages, the court is empowered to make an equitable quantification of the harm sustained.\textsuperscript{808}

The view can be taken that certainty is a matter governed, but not expressly settled in the Convention. Certainty can be either treated as a procedural issue, “indirectly” governed by the \textit{CISG}, or merely as a substantive rule governed but not expressly settled in the Convention. Recourse in this case, must be, first, had to one of the general principles on which the Convention is based. If no relevant

\textsuperscript{801} Supra. note 36.

\textsuperscript{802} Supra. note 35.

\textsuperscript{803} Supra. note 36.

\textsuperscript{804} Supra. note 35.


\textsuperscript{806} Supra. note 35.

\textsuperscript{807} See Comment 1 on Art. 7.4.3 of \textit{UPICC}.

\textsuperscript{808} See Comment 2 on Art. 7.4.3 of \textit{UPICC}.
general principle is found, the matter must be settled in accordance with the applicable rules of Private International Law. It is to be stated that the issue of certainty of damages is directly related to the problem of proof. In practice, the proof of the precise amount of damages may not always be possible. Therefore, the extent of compensation can be determined on the basis of a mere discretion of a judge or an arbitrator. Such a solution of the problem of certainty can, first of all, derive from a relevant provision of an applicable law. This result may follow from either of the two approaches, i.e., where the issue of certainty is regarded as being either outside the scope of the CISG or “governed, but not expressly settled” in it, as well as from an application of the UNIDROIT Principles. This treatment of certainty represents a workable solution, which is conducive to maintaining the CISG international character and contributing to uniformity in its application.809

In short, according to the certainty test established under Art. 7.4.3 UPICC, there are two approaches that a court may follow in calculating the harm: Where the amount of harm, including future harm, can be established with certainty, the court will award that amount. However, where it is certain that harm has resulted or will result, but where the amount cannot be established with sufficient certainty, the court has a discretion in assessing the amount.

14.4 CONTRIBUTION TO HARM

14.4.1 In General

The next method of limiting damages, provided for in some legal systems and international documents such as the CISG, is the contribution rule. However, it is submitted that except indirectly, the CISG does not deal with the issue of contributory conduct of the aggrieved party which adds to the loss of harm suffered.810

In this respect, Art. 80 CISG is of particular relevance, which under the general heading of “Exemptions” establishes a general principle concerning the issue of contributory negligence and prescribes that: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.” This Article states the self-evident proposition that a party cannot rely on another party’s failure to perform if the failure was induced by the first party’s own conduct e.g., by supplying faulty specifications for the construction of a machine or vessel or instructing the seller to use the paint of a particular manufacturer which proves unsuitable for the purpose for which it is intended.811

In discussing the contribution rule under Art. 80 CISG, the rule of estoppel or venire contra factum proprium has to be mentioned. This principle is known in German and Swiss law by the maxim non concedit venire contra factum proprium and, in common law countries, as estoppel by representation. It is found in French law in the form of a principle of consistency and has also been recognized in arbitral case law.812 There is a general principle of law, both international and municipal, i.e. estoppel, which “requires that the party claiming it has relied on a representation by another party with a resulting detrimental consequence to its own interests”.813

“A man shall not be allowed to blow hot and cold - to affirm at one

809 See Djakhongir Saidov, supra. note 3.
810 Supra. note 35.
time and to deny at another ... Such a principle has its basis in common sense and common justice, and whether it is called estoppel or by any other name, it is one which courts of law have in modern times most usefully adopted. In a word, no one may set himself in contradiction to his own previous conduct. The ICJ has found estoppel to be "numbered among the general principles of law accepted by international law as forming part of the law of nations, and obeying the rules of interpretation relating thereto". Its content is obviously an expression of general principles, in particular that of good faith, respectively a concrete manifestation of it, the prohibition to contradict one’s own behaviour (venire contra factum proprium). Applying the principle that a party cannot contradict itself to the detriment of another, Art. 80 CISG was added at the Vienna out of an abundance of caution as a new rule which doesn’t appear in the 1978 Draft. Although no match-up of Art. 80 CISG with the 1978 Draft exists, and therefore no its counterpart in the Secretariat Commentary exists, there are various sources helping interpret this article. The general principle established under Art. 80 CISG, restricting remedies where non-performance is partly due to the conduct of the aggrieved party, can also be found in both Art. 814 See English Court of Exchequer, Cave v. Mills (1862), Hurlstone and Norman, 913 at 927. 815 Principle No. I.7 of the TLDB List. 816 See ICJ North Sea Continental Shelf Case, Separate Opinion of Judge Fouad Ammoun, ICJ Rep. (1969); pp. 120-121. TLDB Document ID: 300300. 817 Supra. note 8, p. 335. 818 This provision is based on a proposal by the German Democratic Republic. See A.Conf. 97/C.1/L.217 (O.R. 134). This provision resembles ULIS Art. 74 (3) which states: "The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible." 7.1.2 UPICC and Art. 8:101(3) PECL. Further, both the UPICC and the PECL deal with the application of this general principle respectively in Art. 7.4.7 and Art. 9:504. All of these sources will do much in my discussions below.

14.4.2 Ways of Contributing to the Harm

As for the ways of contributing to the harm, it follows from Art. 7.1.2 UPICC, which reads: "A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party’s act or omission or by another event as to which the first party bears the risk", that the contribution of the aggrieved party to the harm may consist either in its own conduct or in an event as to which it bears the risk. Art. 7.1.2 UPICC can be regarded as providing two excuses for non-performance. Two distinct situations are contemplated. In the first, one party is unable to perform either wholly or in part because the other party has done something which makes performance in whole or in part impossible. Another possibility is that non-performance may result from an event the risk of which is expressly or impliedly allocated by the contract to the party alleging non-performance. The Official Comment on UPICC Art. 7.4.7 also makes it clear: "The contribution of the aggrieved party to the harm may consist either in its own conduct or in an event as to which it bears the risk. The conduct may take the form of an act (e.g. it gave a carrier a mistaken address) or an omission (e.g. it failed to give all the necessary instructions to the constructor of the defective machinery). Most frequently such acts or omissions will result in the aggrieved party failing to perform one or another of its own contractual obligations; they may however equally consist in tortious conduct or non-performance of another contract. The external events for which the

819 See Comments 1, 2 on Art. 7.1.2 UPICC.
The remedies available for non-performance depend upon whether the non-performance results from the creditor’s conduct (act or omission) or the external events as to which it bears the risk. Generally, this effect may be total, that is to say that the creditor cannot exercise any remedy, or partial. The exact consequence of the creditor’s behaviour will be examined with each remedy.

14.4.3 Remedies Affected by the Contribution

There is agreement among the legal systems that a non-performance which is due solely to the other party’s wrongful prevention does not give the latter any remedy. These will mostly

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820 See Comment 2 on Art. 7.4.7 UPICC.
821 See Comment and Notes to the PECL: Art. 1:305. Comment C. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp80.html>
822 See Comment and Notes to the PECL: Art. 9:504. Comment A. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp74.html>
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breaches of contract on the part of the creditor. In most of the systems the party who has prevented performance will himself be the non-performing party against whom the remedies may be exercised.\textsuperscript{825}

Enderlein and Maskow submit that: The party in breach can, therefore, not assert any claims because of a breach of contract. It not only has no right to claim damages, as in the event of grounds for exemption in the meaning of Art. 79, it has no right to performance nor to avoidance. When the debtor is hindered in performing in time by the party in breach, e.g. because of belated communication of instructions for dispatch, the seller cannot dispatch the goods, the party in breach will have to accept the late delivery without having the right to require any sanction. When the party in breach has caused the non-conform or defective delivery, e.g. sub-supply of material having non-apparent defects, he cannot require delivery of substitute goods or repair or reduction of the price, etc. The acts by the creditor which cause the breach of contract will generally represent themselves as breach of contract committed by the former so that the debtor being the creditor of those acts can assert the respective claims. He will have the right to claim damages only to the extent to which the party in breach cannot rely on impediments. Among the rest of the claims, which are retained in any case, the right to avoid the contract is of special relevance. In asserting that right, the fate of the blocked contract can be decided once and for all.\textsuperscript{826}

Peter Schlechtriem confirms: “Article 80 releases a party from his obligations where the other party has impaired his performance. [...] In such cases, an obligor will generally be excused from liability on the basis of Article 79(1). But Article 80 reaches much further. Since Article 80 exempts all claims against the obligor, it gained importance when a proposal was rejected which would have extinguished the right to demand specific performance in a case where Article 79 exempts a party for liability for damages. If the buyer frustrated performance, such as by not providing drawings required for production or by not procuring an import permit, he can neither demand specific performance nor declare an avoidance. He also may not reduce the price for defects caused by mistakes in the drawings he provided. Of course, the obligor is excused only to the extent of the hindrance caused by the obligee. The obligee need not be responsible – in the sense of Article 79 – for the impairment he caused.”\textsuperscript{827}

Although it is said that “the view prevailed that it [Art. 80 CISG] is more closely related to exemptions and duty to cooperate in cases of impediments”,\textsuperscript{828} the Official Comment on Art. 7.1.2 \textit{UPICC} stresses that, when the interference or contribution rule applies, the relevant conduct doesn’t become excused non-performance but lose the quality of non-performance altogether.\textsuperscript{829}

\subsection*{14.4.3.2 Damages proportionately reduced due to partial contribution}

As discussed above, the conduct of the aggrieved party or the external events as to which it bears the risk may have made it absolutely impossible for the non-performing party to perform. In addition, it is also contemplated there is the possibility of one party’s interference acting only as a partial impediment to performance by the other party and in such cases it will be necessary to decide the

\begin{equation}
825\text{Ibid., Note 3.}
\end{equation}

\begin{equation}
826\text{Supra. note 8, p. 336.}
\end{equation}

\begin{equation}
827\text{Supra. note 5, p. 105-106.}
\end{equation}

\begin{equation}
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\begin{equation}
829\text{See Comment 1 on Art. 7.1.2 UPICC.}
\end{equation}
extent to which non-performance was caused by the first party’s interference and to which it was caused by other factors.\textsuperscript{830}

In application of the general principle established by Art. 7.1.2 UPICC (corresponding to the solution adopted by Art. 80 CISG) which restricts the exercised of remedies where non-performance is in part due to the conduct of the aggrieved party, Art. 7.4.7 UPICC limits the right to damages by providing that: “Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.” This article, together with its Official Comment can therefore be helpful in the interpretation of Art. 74 of the CISG read together with Arts. 77 and 80 in establishing the extent to which the defaulting party is excused from liability for damages due to the conduct of the aggrieved party.

Generally, it would indeed be unjust for an aggrieved party to obtain full compensation for harm for which it has itself been partly responsible.\textsuperscript{831} It would be contrary to good faith and fairness for the creditor to have a remedy when it is responsible for the non-performance. The most obvious situation is the so-called mora creditoris, where the creditor directly prevents performance (e.g. access refused to a building site). But there are other cases where the creditor’s behaviour has an influence on the breach and its consequences. For example, when there is a duty to give information to the other party, and the information given is wrong or incomplete, the contract is imperfectly performed. In other cases where there is also a non-performance by the debtor, the creditor may exercise the remedies for non-performance to a limited extent. When the loss is caused both by the debtor - which has not performed - and the creditor - which has partially caused the breach by its own behaviour - the creditor should not have the whole range of remedies.\textsuperscript{832} It is clear that in such a case the amount of damages ought to be reduced proportionally. Such apportionment of damages will often involve a judicial discretion in weighing the different facts contributing to the eventual damages suffered.\textsuperscript{833} However, the determination of each party’s contribution to the harm may well prove to be difficult and will to a large degree depend upon the exercise of judicial discretion. In order to give some guidance to the court this article provides that the court shall have regard to the respective behaviour of the parties. The more serious a party’s failing, the greater will be its contribution to the harm.\textsuperscript{834}

More specifically, Enderlein and Maskow present several principles which could, in their view, be inferred from the regulation governing the most important case groups as follows: (a) When the consequences of the different causes can be delimited from one another, every cause has to be attributed to its legal remedy. A distinction will, however, have to be made of what caused the breach of contract. (b) When a breach of contract by the debtor and an act or omission by the creditor act in combination having the same effect, the act or omission of the creditor dominates. But exemption will become effective only in regard to the conduct concerned. The party in breach can, therefore, not claim a breach of contract because of the consequences of the act or omission of the creditor. The result can be a stalemate in which the contract is neither performed nor can it be avoided by any of the parties. (c) The last case to be considered here is the one where the failures of the two parties are so closely interwoven that their effects cannot be delimited and attributed to the breach of contract which is the result of that situation, such as when the buyer provides drawings which cannot, in

\textsuperscript{830}Ibid.
\textsuperscript{831} See Comment 1 on Art. 7.4.7 UPICC.
\textsuperscript{832} Supra. note 62.
\textsuperscript{833} Supra. note 35.
\textsuperscript{834} Supra. note 64.
part, be realized, and the seller, without referring back to the buyer, proceeds with modifications in the realization which do not meet the intentions of the buyer. In their view, it is appropriate in these cases to reduce the legal consequences which would be the result of a breach of contract where the causes of the breach are not taken into consideration. The reduction can be merely quantitative as in the case of damages, insofar also grounds for exemption on the part of the debtor would have to be, taken into account. But it may also take on a qualitative character when the right to avoidance of the contract is turned into a claim for damages, which might then be thwarted because of grounds for exemption, for it is assessed that the breach of contract because of the act or omission of the creditor has passed the threshold toward a fundamental breach. Or, the right to performance may be judged to have elapsed and the part of the debtor in the breach of the contract is paid off because of a claim for damages by the creditor.  

Finally, it must be noted that Art. 80 CISG covers only one aspect of the issue at stake, which deals with the loss suffered by the aggrieved party which results from his own unreasonable behavior. There is another situation where the loss resulting from the non-performance could have been reduced or extinguished by appropriate steps in mitigation. This is clear from the fact that the issue of contributory conduct is dealt with separately in the UNIDROIT Principles in Art. 7.4.7, whereas the mitigation duty is dealt separately with in Art. 7.4.8 (respectively dealt with in Art. 9:504 and Art. 9:505 PECL) which is to be focused below.

14.5 DUTY TO MITIGATE

14.5.1 In General

The party who is true to the contract cannot sit and wait for the other party to breach the contract, but must become active in order to minimize the loss or to prevent it at all. In other words, even where the aggrieved party has not contributed either to the non-performance or to its effects, it cannot recover for loss it would have avoided if it had taken reasonable steps to do so.

In this respect, the mitigation doctrine, which is a generally admitted obligation in Common Law, though “not so largely and clearly consecrated in Civil Law”, deals with such an “obligation for a creditor to minimise the damage he suffers because of the non-fulfilment by the debtor of his own commitments.” Now, a number of international awards have applied it as a general principle of international trade, not referring in particular to a Common Law system. Indeed, it is said to “constitute the lex mercatoria in its present form”, and is regarded as “[o]ne of the most well-established general principles in arbitral case law”. Further, the awards in

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835 Supra. note 8, pp. 338-339.
836 Supra. note 12, p. 560.
838 See e.g. ICC Award, Case Nos. 2103/72, 101 Clunet 902 (1974); 2748/74, 102 Clunet 905 (1975); 2291/75, 103 Clunet 989 (1976); 2520/75, 103 Clunet 992 (1976).
Mitigation has gained under the three instruments, it is regarded as one of the principles “capable of general application” as expressed in provisions of the CISG. Under the CISG, Art. 77 is of particular relevance (the mitigation rule is also reflected in Arts. 85 and 86 concerning preservation of the goods), which limits damages by placing an obligation to mitigate damages on the aggrieved party: “A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.” Art. 77 CISG adopts the same principle as Art. 88 ULIS, but clarifies certain matters. In the Secretariat Commentary on Art. 73 of the 1978 Draft [draft available online at ‹http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-77.html›, note 78, n. 100.]

First of all, it makes clear that the aggrieved party’s duty to mitigate loss includes not only loss of assets (damnum emergens) but also loss of profit (lucrum cessans). The phrase “loss resulting from the breach” appears in the English versions of both the CISG and ULIS. However, a change in the wording of the French versions (la perte . . . resultant de la contravention) (CISG) instead of (la perte subie) (ULIS) is intended to indicate that the aggrieved party is obliged not only to take reasonable measures to mitigate loss which has already occurred, but also to counteract imminent loss. Art. 77, second sentence, clearly lays down that damages cannot be claimed in respect of loss which could have been mitigated by the aggrieved party, while Art. 88 ULIS leaves open the extent to which damages are to be reduced in the event of a failure to observe the requirement to mitigate loss. (Supra. note 11, p. 585.) Art. 88 of the ULIS reads: “The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages.”

It is stated that Art. 77 (together with Arts. 85-88) is one of several articles which states a duty owed by the injured party to the party in breach. However, “even if it is possible to refer to mitigation using such terms as a ‘duty’ or an ‘obligation’, the nature of this ‘duty’ is substantially different from other obligations under the CISG.” Because the first sentence of Art. 77 is worded in terms of a duty to mitigate, courts may require such mitigation, and allow a set-off in favor of the breaching party for failure of the non-breaching party to mitigate. The second sentence seems to take the approach that CISG Art. 77 was not intended to place liability on the injured party for failing to avoid damages but is meant to simply preclude an injured party from recovering damages which could have reasonably been avoided. A third interpretation of Art. 77 takes the position that mitigation of loss can become a sword as well as a damages shield – by drawing on the “general principles” provision of the CISG, Art. 7(2) to support on mitigation “rarely call up the lex mercatoria in so many words; they merely treat the principle as obvious.”

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841 See Mustill, supra. note 78, n. 100.
843 First of all, it makes clear that the aggrieved party’s duty to mitigate loss includes not only loss of assets (damnum emergens) but also loss of profit (lucrum cessans). The phrase “loss resulting from the breach” appears in the English versions of both the CISG and ULIS. However, a change in the wording of the French versions (la perte . . . resultant de la contravention) (CISG) instead of (la perte subie) (ULIS) is intended to indicate that the aggrieved party is obliged not only to take reasonable measures to mitigate loss which has already occurred, but also to counteract imminent loss. Art. 77, second sentence, clearly lays down that damages cannot be claimed in respect of loss which could have been mitigated by the aggrieved party, while Art. 88 ULIS leaves open the extent to which damages are to be reduced in the event of a failure to observe the requirement to mitigate loss. (Supra. note 11, p. 585.) Art. 88 of the ULIS reads: “The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages.”
create a duty of “loyalty to the other party to the contract”. Failure to mitigate damages may be a breach of this duty and result in recoverable damages. It appears that the parameters of the duty to mitigate under Art. 77 are not clear. Presumably it does not affect the aggrieved party's right to seek specific performance or his right to avoid the contract where a fundamental breach has occurred. Presumably too the greater particularity will have to be supplied in the light of the overall structure of the Convention, the general principles on which it is based (Art. 7), and the duty of good faith.

Nonetheless, the significance of the deliberations in Art. 77 CISG is of no doubt. This mitigation duty has been adopted under the two Principles. In the UPICC, this principle is reflected in Art. 7.4.8 under the heading “Mitigation of Harm” and has been formulated as: “(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.” Indeed, it has been stated that the provision of the UPICC on contribution to harm (supra. 14.4) “must be read together in conjunction with the following article on mitigation of harm (Art. 7.4.8). While the present article [Art. 7.4.7] is concerned with the conduct of the aggrieved party in regard to the cause of the initial harm, Art. 7.4.8 relates to that party's conduct subsequent thereto.” The purpose of this article is to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced. Any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated. It would be unreasonable from the economic standpoint to permit an increase in harm which could have been reduced by the taking of reasonable steps. And a rule concerning “Reduction of Loss” can also be found in Art. 9:505 of the PECL, which resembles Art. 7.4.8 UPICC: “(1) The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party could have reduced the loss by taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.”

14.5.2 Reasonable Measures Taken

The idea underlying mitigation is that the aggrieved party cannot recover damages with respect to loss which he could have reasonably avoided. However, no exceptional efforts are required from that party; he only has to take such measures to mitigate loss as are reasonable in the circumstances concerned. According to Art. 77 CISG, the aggrieved party must take measures “as are reasonable in the circumstances”. The type of measures that need to be undertaken depends on the criterion of reasonableness. The latter, in turn, depends on and will be construed in the light of the circumstances in question. It is said that the duty to mitigate applies to an anticipatory breach of contract as well as to a breach in respect of an obligation the performance of which is currently due. It follows that this provision refers the duty to mitigate to all kinds of loss. However, different types of loss can practically give rise to a great variety of situations. Although not specifically defined, on the one hand, reasonableness

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848 See Peter Schlechtriem in “Recent Developments in International Sales Law”: 18 Israel L.R. (1983); pp. 320-321.
850 See Comment 4 on Art. 7.4.7 UPICC.
851 See Comment 1 on Art. 7.4.8 UPICC.
852 See Djakhongir Saidov, supra. note 3.
853 Supra. note 84, Comment 4.
is specifically mentioned in thirty-seven provisions of the CISG and clearly alluded to elsewhere in the Uniform Sales Law. Reasonableness is a general principle of the CISG. As a general principle of the CISG, reasonableness has a strong bearing on the proper interpretation of all provisions of the CISG. On the other hand, the principle of “reasonableness” plays a dominant and recurrent role in almost all of the provisions of the UPICC. Although no blanket clause which defines the notion of reasonableness is found either in the CISG or the UNIDROIT Principles, reasonableness is generally defined in the PECL, which “also fits the manner in which this concept is used in the CISG [as well as the UPICC]. This definition can help researchers apply reasonableness to the CISG [as well as the UPICC] provisions in which it is specifically mentioned and as a general principle of the CISG [as well as the UPICC].”

In this respect, Art. 1:302 PECL specializes “Reasonableness” as: “Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.” Generally speaking, reasonableness is to be judged by what parties acting in good faith and the same situation as the parties would consider to be reasonable. In deciding what is reasonable all relevant factors should be taken into consideration. Account should be taken of the nature and purpose of the contract. The circumstances of the case will have to be considered. Furthermore, the usages and practices of the trade or profession should be taken into account. These generally reflect the behaviour of reasonable parties. “In general, it has been said that a measure is reasonable ‘if under the particular circumstances, it could be expected to be taken by a person acting in good faith, or if it is ‘adequate’ and preventive with respect to the loss. In the evaluation of the situation, regard should be also had to the party’s skills and position as a businessman, such as, for example, ‘ingenuity, experience, and financial resources’, etc. At that, relevant trade usage, if any, should be taken into account as well. The aggrieved party is not, in any way, obliged to take measures, which, in the circumstances concerned, are ‘excessive’ and entail unreasonably high expenses and risks. If the party refrains from such measures, he will not be considered as not having complied with Article 77.”

Although it does not seem possible to list every single measure which can be possibly implied in Art. 77 CISG, some examples of such measures will be given in order to illustrate how wide a range of possible mitigating measures can be. It is commented that such measures may frequently include a cover purchase or sale. It can also include the possibility that the buyer himself remedies defective goods delivered to the buyer. Although there is no obligation to avoid the contract even if the other party has committed or is expected to commit a fundamental breach of contract (Arts. 49 and 64 CISG), avoidance of the contract may be one of the reasonable measures which help to mitigate the losses of the injured party. If reasonable measures can be taken before an impending breach of contract, they have to be taken by the party threatened by loss. Such measures could include for instance suspension of performance under Art. 71.

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855 E.g., UPICC Arts. 1.8(2), 3.8, 3.9, 3.16, 4.1(2), 4.8(2)(d), 5.4(2), 5.6, 5.7(2), 5.8, 6.1.1(c), 6.1.16, 6.1.17, 7.1.6, 7.1.7, 7.2.2, 7.2.5, 7.3.2, 7.4.6(2), 7.4.8, 7.4.13.
856 Supra. note 93.
858 See Djakhongir Saidov, supra. note 3.
859 Supra. note 8, p. 308.
In sum, “[t]he steps to be taken by the aggrieved party may be directed either to limiting the extent of the harm, above all when there is a risk of it lasting for a long time if such steps are not taken (often they will consist in a replacement transaction: see Art. 7.4.5), or to avoiding any increase in the initial harm.”\textsuperscript{860} Indeed, the creditor should attempt to undertake everything possible in order to diminish the loss or at least to prevent its increase, and thus this rule may be regarded as just and fair.\textsuperscript{861} On the other hand, the failure to mitigate loss may arise either because the aggrieved party incurs unnecessary or unreasonable expenditure or because it fails to take reasonable steps which would result in reduction of loss or in offsetting gains. However, the aggrieved party will not necessarily be expected to take steps to mitigate its loss immediately it learns of the breach; it will depend on whether its actions are reasonable in the circumstances. The aggrieved party is only expected to take action which is reasonable, or to refrain from action which is unreasonable, in the circumstances. Thus it need not act in any way that will damage its commercial reputation just to reduce the non-performing party’s liability.\textsuperscript{862} Evidently, a party who has already suffered the consequences of non-performance of the contract cannot be required in addition to take time-consuming and costly measures.\textsuperscript{863} However, the decision on how and in what way an injured party should have mitigated his loss can be made only on the basis of careful examination of all circumstances of a concrete situation, criterion of reasonableness, and the type of loss in question.\textsuperscript{864}

\textsuperscript{860} Supra. note 90.
\textsuperscript{861} Supra. note 67, p. 252.
\textsuperscript{862} See Comment and Notes to the PECL: Art. 9:505. Comment A. Available online at \url{http://www.cisg.law.pace.edu/cisg/text/peclcomp77.html}
\textsuperscript{863} Supra. note 90.
\textsuperscript{864} See Djakhongir Saidov, supra. note 3.

\section*{14.5.3 Effects of Failure to Mitigate}

With regard to the legal effects of such failure, it follows from the wording of Art. 77 CISG “the party in breach may claim a reduction in the damages” that, non-fulfillment of this obligation by one party does not entail a claim for damages but rather leads to a situation where the party who is true to the contract cannot claim full compensation for damages. Reference is made here only to a party claiming damages. The rule of Art. 77 does not apply to other remedies.\textsuperscript{865} Therefore, the failure to mitigate will not affect the injured party’s claim for other remedies. The only exception is said to be the case where it was reasonable to expect the injured party to carry out certain actions, for example, in the form of avoidance of the contract or of the conclusion of a cover transaction, in order to mitigate the loss.\textsuperscript{866} As regards the amount, it follows from Art. 77 CISG that if the aggrieved party fails to mitigate, the party in breach will have the right to claim reduction in damages “\textit{in the amount by which the loss should have been mitigated}”. In this respect, similar approaches can also be found in UPICC Art. 7.4.8(1) and PECL Art. 9:505(1).

On the other hand, frequently the aggrieved party will have to incur some further expenditure in order to mitigate its loss. The problem is that mitigation itself can bring about certain forms of loss. In other words, mitigation can often be the source of loss. In taking certain mitigating measures, an injured party may have to incur a number of different expenses such as, for example, the costs of storage, repair costs or brokerage costs. Both Art. 7.4.8(2) UPICC and Art. 9:505(2) PECL allow the aggrieved party to recover expenses reasonably incurred in attempts to avoid or mitigate the loss. Expenses are to be reimbursed even if they increased the total loss,

\textsuperscript{866} See Djakhongir Saidov, supra. note 3.
provided they were reasonable. Costs which the party threatened by loss incurs for the measures he takes to mitigate his losses can also be claimed compensation for even when the, otherwise reasonable, measures were taken in vain.\textsuperscript{867} It is also argued that, the wording of Art. 77 CISG is broad enough to require that losses out of a measure aimed at mitigation should be mitigated.\textsuperscript{868}

One should note, however, despite any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated, the reduction in damages to the extent that the aggrieved party has failed to take the necessary steps to mitigate the harm must not however cause loss to that party. The aggrieved party may therefore recover from the non-performing party the expenses incurred by it in mitigating the harm, provided that those expenses were reasonable in the circumstances.\textsuperscript{869}

\textsuperscript{867} Supra. note 12, p. 561.
\textsuperscript{868} See Djakhongir Saidov, supra. note 3.
\textsuperscript{869} See Comment 2 on Art. 7.4.8 UPICC.
CHAPTER 15. DAMAGES UPON TERMINATION

The rule adopted in most legal systems, and the Vienna Convention as well, is that, in addition to avoidance, the party aggrieved by the breach may always claim damages to compensate for the loss caused by avoidance. The fact that, by virtue of termination, the contract is brought to an end, does not deprive the aggrieved party of its right to claim damages for non-performance.[...]

15.1 GENERAL CONSIDERATIONS

Under the CISG, Arts. 75 and 76 provide two methods, representing specific applications of Art. 74, for measuring damages when a party avoids a contract due to a fundamental breach of the contract by the other party.

When the contract is avoided, damages generally amount to the difference between the contract price and the costs of a cover transaction (Art. 75); the cover transaction must, of course, be undertaken within a reasonable time after avoidance. This coincides with the duty to mitigate damages in Art. 77. Where the goods have a market price, the injured party can also measure his damages “abstractly”, i.e., independently from any cover transaction, Art. 76. This method of measuring damages - the so-called market-price rule - presupposes that a cover transaction has not been undertaken with regard to the contract breached.

While Arts. 75 and 76 specify the types of damages measurements authorized by the Convention, they also include the residual phrase, “as well as any further damages recoverable under article 74”. Thus, losses which cannot be compensated invoking the latter two articles, can be so compensated under the broader rule of Art. 74 (see Chapter 13). In other words, Art. 74 establishes the rule for the measurement of damages whenever and to the extent that Arts. 75 and 76 are not applicable. Given the language and juxtaposition of the three articles, a tribunal could view Arts. 75 and 76 as specific applications of the sweeping language of the first sentence of Art. 74 and not as limitations placed on it. In a word, Arts. 75 and 76 appear to supplement Art. 74.

15.2 DAMAGES UPON SUBSTITUTE TRANSACTIONS

15.2.1 Introduction

Judicial discretion in the assessment of damages can be reduced by standardizing the damages in question. To this end, Art. 75 CISG measures damages concretely on the basis of a substitute transaction (a purchase in replacement or resale), and reads: “If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.”

References:

871 See Comment 2 on Art. 7.3.5 UNICPC.
874 Supra. note 3, p. 97.
Briefly speaking, damages under this provision are established by the action of the injured seller in reselling the goods and the action of the injured buyer in obtaining cover, that is, buying the goods elsewhere. The measure of damages is the difference between the price under the contract and the price of the substitute transaction, which allows the injured party to measure damages without having to show the market price for the goods. This article can be traced back to Art. 85 ULIS. However, a change between this provision and Art. 75 CISG has been noted by Stoll: “ULIS places abstract calculation of damages using the market price rule (Article 84) before concrete calculation of damages by reference to a substitute transaction (Article 85), whereas the Convention makes concrete calculation of damages the primary method and abstract calculation of damages using the market price rule is subsidiary to it (Article 76). That indicates the change in the relationship between the two rules. Moreover, Article 85 ULIS merely requires a substitute transaction to have been carried out ‘in a reasonable manner’, while the Convention adds by way of clarification that the substitute transaction must also have taken place ‘within a reasonable time after avoidance’. Finally, Article 75 adds that the party entitled to damages may claim ‘any further damages recoverable under Article 74’. This latter addition is not a substantial change, because under Article 86 ULIS the duty to pay damages is extended so as to include all further loss.

On the other hand, it is clear that, the only modification of Art. 75 CISG to its original provision, i.e. 1978 Draft Art. 71, was to change a conjunction to “as well as” rather than “and” (apart from an adjustment of the article reference to conform to the new sequence). The Secretariat Commentary on 1978 Draft Art. 71 should therefore be relevant to the interpretation of CISG Art. 75. In the UNIDROIT Principles, Art. 7.4.5 provides under the heading “Proof of harm in case of replacement transaction” that: “Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.” This article is regarded as corresponding “in substance to Art. 75 CISG” and establishing, alongside the general rules applicable to the proof of the existence and of the amount of the harm, one of the presumptions which may facilitate the task of the aggrieved party. The use of this provision and its Commentary as a potential aid to the interpretation of CISG Art. 75 is thus self-evident. The author thinks that it is the case for using of Art. 9:506 PECL, which reads similarly: “Where the aggrieved party has terminated the contract and has made a substitute transaction within a reasonable time and in a reasonable manner, it may recover the difference between the contract price and the price of the substitute transaction as well as damages for any further loss so far as these are recoverable under this Section.” With these relevant sources, as well as other scholarly

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875 See Stoll in “Commentary on the UN Convention on the International Sale of Goods”, Peter Schlechtriem ed. (Oxford 1998); p. 573. Available online at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-75.html. ULIS, Art. 85 reads: “If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.”

876 See the match-up, available online at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-75.html. Art. 71 of the 1978 Draft reads: “If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.”

877 See Comment 1 on Art. 7.4.5 UP/ICC.

878 See Albert H. Kritzer in “Editorial remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 75”. Available online at http://www.cisg.law.pace.edu/cisg/principles/uni75.html
writings concerned, the author will further the concrete calculation established under Art. 75 CISG below.

15.2.2 Presupposed Situations Calling for Concrete Calculation

The wording of Art. 75 makes it clear that, this provision concerns the measure of damages in situations where there has been an avoidance or cancellation of the contract by an aggrieved buyer or seller, and applies when the buyer, after the seller's breach, has bought goods in replacement of those that were the subject of the contract, or when the seller, after the buyer's breach, has sold the contract goods.

"It is a condition for the calculation of damages under Article 75 that the contract has been avoided (before) (c. Articles 49; 61 and 72; 73; and 81). Otherwise, if the seller has declared the contract avoided, he can sell the goods and if the buyer has declared the contract avoided, he can procure the goods."\(^{879}\) Further, "][the] presumption comes into play only if there is a replacement transaction and not where the aggrieved party has itself performed the obligation which lay upon the non-performing party (for example when a shipowner itself carries out the repairs to its vessel following the failure to do so of the shipyard which had been entrusted with the work).\(^{880}\) However, "[t]he party who is true to the contract does not always have an obligation to effect a substitute transaction, unless the loss can be mitigated in comparison to the calculation under Art. 76."\(^{881}\) Note in particular that Art. 75 imposes no duty on the seller to notify the buyer of his intention to resell and the fact that, literally construed, the article only applies to a resale of goods that have been identified to the contract at the time of the buyer’s breach.\(^{882}\)

Nonetheless, if the contract has been avoided, the formula contained in Art. 75 will often be the one used to calculate the damages owed the injured party since, in many commercial situations, a substitute transaction will have taken place.\(^{883}\) "Where the contract has been avoided, both parties are released from any future performance of their obligations and restitution of that which has already been delivered may be required. Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price as is provided under article 71 [draft counterpart of CISG article 75]."\(^{884}\)

In short, it is often appropriate to measure the aggrieved party's loss by the cost of procuring a substitute performance. Where the aggrieved party has in fact made a reasonable cover transaction, PECL Art. 9:506 (as well as Art. 7.4.5 UPICC and Art. 75 CISG) provides that the difference between the contract price and the cover price is recoverable.\(^{885}\)

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\(^{880}\) Supra. note 8.

\(^{881}\) Supra. note 10.


\(^{885}\) See Comment and Notes to the PECL: Art. 9:506. Comment A. Available online at [http://www.cisg.law.pace.edu/cisg/text/peclcomp75.html](http://www.cisg.law.pace.edu/cisg/text/peclcomp75.html)
15.2.3 Substitute Transaction must be Reasonable Substitute

As noted above, Art. 75 CISG “sets forth a means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.” In such cases, damages are to be measured by the difference between the cost of the substitute transaction and the contract price. However, it is subject to some restrictions. “The condition provided for in Art 75 is that the replacement purchase or the resale must be made ‘in a reasonable manner and within reasonable time’ after avoidance. Here the term ‘reasonable manner’ is to be interpreted as the duty of the buyer to buy the goods at the lowest possible price and of the seller to sell them at the highest possible price. The ‘reasonable time’ starts to run at the time when the aggrieve party avoided the contract.”

In other words, it is to be interpreted in such a way that the party who is true to the contract must try to effect the substitute transaction either as the buyer at the lowest possible price or as the seller at the highest possible price. Other contractual stipulations may have to be taken into account, e.g. the duration of the period of guarantee. An unreasonable substitute transaction cannot be considered to measure the damages. This follows, inter alia, from the obligation under Art. 77 to mitigate losses. Jurisdiction in regard to Art. 85 ULIS, which contains a relevant rule, in respect of the reasonable manner, called for a cautious and circumspect businessman. Furthermore, the substitute transaction has to be effected within a reasonable time. This is to prevent the loss from further increasing under worsening market conditions.

The Secretariat Commentary makes it clear: “For the substitute transaction to have been made in a reasonable manner within the context of article 71 [draft counterpart of CISG article 75], it must have been made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible. Therefore, the substitute transaction need not be on identical terms of sale in respect of such matters as quantity, credit or time of delivery so long as the transaction was in fact substitutive for the transaction which was avoided.” It should also be noted that the time limit within which the resale or cover purchase must be made for it to be the basis for calculating damages under article 71 [draft counterpart of CISG article 75] is ‘a reasonable time after avoidance’. Therefore, this time limit does not begin until the injured party has in fact declared the contract avoided. If the resale or cover purchase is not made in a reasonable manner or within a reasonable time after the contract was avoided, damages would be calculated as though no substitute transaction had taken place. Therefore, resort would be made to article 72 [draft counterpart of CISG article 76] and, if applicable, to article 70 [draft counterpart of CISG article 74].

However, the substitute transaction may occur in a different situation than that provided for in the contract. The amount of damages, therefore, will be altered to reflect any increased costs or expenses saved. On the other hand, the difference in price between the avoided contract and the contract which was newly concluded can, however, be the result of different terms, e.g. guarantee, or of different auxiliary costs, e.g. packaging, transportation. Due account has to be taken of this situation, i.e. the price difference has to be adjusted accordingly. Under the U.C.C. language, items

886 Supra. note 14, Comment 1.
887 Supra. note 1.
888 Supra. note 10.
such as transportation expenses saved by the aggrieved party in a substitute transaction are deducted from cover or resale damages. A similar result can be reached under Art. 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 Art. 74. It is supported by Art. 7.4.2 (1) UPICC which clearly requires in this respect "taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm" when applying the full compensation rule.

To sum up, where the aggrieved party has in fact made a cover transaction, the difference between the price of the substitute transaction and the price of the avoided original contract is the loss to be recovered. However, the replacement transaction must be performed within a reasonable time and in a reasonable manner so as to avoid the non-performing party being prejudiced by hasty or malicious conduct. If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs (such as increased transportation) less any expenses saved as a consequence of the breach. In any event, the aggrieved party cannot recover the difference between the contract price and the price of an alternative transaction which is so different from the original contract in value or kind as not to be a reasonable substitute.

894 Supra. note 8.
895 Supra. note 14.

### 15.3 DAMAGES UPON CURRENT PRICE

#### 15.3.1 Introduction

There are occasions when the buyer or seller does not make a replacement purchase or resale, respectively, but instead, due to a breach of contract, prefers to avoid the contract. In such cases the question arises as to how compensation should be calculated. This situation is known in all legal systems; in the civil law countries the so-called abstract damages are calculated, as opposed to concrete damages which occur when a purchase in replacement or resale took place and are thus easier to calculate.

Under the CISG, it is Art. 76 that measures such abstract damages, which reads: "(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance. (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods." Thus, instead of gauging damages by the price differential of a substitute transaction, Art. 76 CISG
authored damages on the basis of the market price at the time of avoidance.

This provision corresponds to Art. 84 ULIS, but differs from it in some important respects. With regard to its original provision, i.e. 1978 Draft Art. 72, it has been noted that: “Paragraph (2) of CISG article 76 and paragraph (2) of 1978 Draft article 72 are substantively identical. Nevertheless, the Secretariat Commentary on 1978 Draft article 72 is only of limited utility, as paragraph (1) is significantly different.” In the UNIDROIT Principles, Art. 7.4.6 pro-

vides under the heading “Proof of harm by current price” that: “(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm. (2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.” This article is said to “corresponds in substance to Art. 76 CISG”, and is prescribed to “facilitate proof of harm where no replacement transaction has been made, but there exists a current price for the performance contracted for.”

This provision and its Comments may thus play as a potential aid to the interpretation of CISG Art. 76. As is the case for Art. 9:507 PECL, which reads briefly: “Where the aggrieved party has terminated the contract and has not made a substitute transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further loss so far as these are recoverable under this Section.” and the Comments thereon. With these relevant sources, as well as other scholarly writings concerned, the author will further the abstract calculation established under Art. 76 CISG below.

898 ULIS treats abstract assessment of damages under the current price rule as having the same standing as concrete assessment of damages under Art. 85 ULIS, so that the promisee is free to choose between those methods of assessment where the goods have a current price. “Article 84 ULIS [sets abstract damages as] the current price on the day on which the contract was avoided. [CISG Article 76 applies a different formula]. ... Article 84(2) ULIS provides that the current price to be taken into account is that prevailing in the market in which the transaction took place, or, if this is inappropriate, the price in a market which serves as a reasonable substitute. The [CISG] made this rule more precise. ...” See the match-up available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-u-76.html>

899 See the match-up, available online at <http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-76.html>
15.3.2 Presupposed Situations Calling for Abstract Calculation

Just like Art. 75, Art. 76 CISG presupposes that the original contract has actually been avoided. However, the abstract calculation of the damages provided for in Art. 76 is possible only when the obligee has not effected a substitute transaction. The reasons for his inaction are irrelevant here. To meet the requirement, it is enough that no resale or cover purchase took place in fact or where it is impossible to determine which was the resale or purchase contract in replacement of the contract which was breached or where the resale or purchase was not made in a reasonable manner and within a reasonable time after avoidance, as is required by Art. 75.

The abstract method of calculating damages does not require the obligee to have tried concluding a substitute transaction. Unless the loss can be mitigated in comparison to the calculation under Art. 76. The obligee cannot ignore the results of an actual resale or covering purchase and claim higher damages. In other words, if the obligee effects a cover transaction and then measures his damages according to the abstract method because this is more favourable to him, he acts dishonestly and violates the principle of good faith. In such a case, the obligor can remind him of his duty to mitigate losses under Art. 77. On the other hand, it cannot be excluded that the obligee first measures the loss abstractly and then proceeds to a cover transaction. There can be no objection against it if this is more favourable to him and if, in so doing, he uses the market developments in his favour. Should it become clear, however, that a cover transaction is possible only under more unfavourable terms and this is transaction carried out within a reasonable time, additional differences in price can be claimed as further damages. In addition, when the obligee purchases and sells continuously and, therefore, no contract can be qualified as a substitute purchase or sale, losses can also be calculated abstractly under Art. 76. Some authors assume that it is always at the buyer’s discretion to decide whether he measures his losses according to the abstract or the concrete method, hence an abstract calculation would be admissible in the case of a substitute transaction. But an abstract calculation that is preceded by a cover transaction is admissible and advisable only when the cover transaction was not effected in a reasonable manner.

It appears that a party that has entered into a substitute transaction within the meaning of Art. 75, therefore, must proceed under that provision and cannot claim damages under Art. 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 Art. 76. 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 Art. 76, although the text of the Convention does not mandate this result.
15.3.3 Determination of “Current Price”

15.3.3.1 In general

A third requirement contained in Art. 76 calling for abstract damages is that “there is a current price for the goods”. The concept of “current price” is essential when applying Art. 76, since the abstract calculation is based on “the difference between the price fixed by the contract and the current price”.

Art. 7.4.6 (2) UPICC defines the “current price” as “the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference”. Its Official Comment states accordingly: “current price” is the price generally charged for the goods or services in question. The price will be determined in comparison with that which is charged for the same or similar goods or services. This will often, but not necessarily, be the price on an organised market. Evidence of the current price may be obtained from professional organizations, chambers of commerce, etc.

In this respect, Knapp notes that: “The concept of a current price does not presuppose official or unofficial market quotations as is required in the case of stock exchange goods. Any goods that are available on the market or elsewhere do have a market price. An exception could be goods which are made under special order by the buyer and for which damages would have to be calculated under Article 74 and not Article 76.”

15.3.3.2 Reference point

As for the reference point for the measure of damages, the 1978 Draft stated as the decisive time such time at which the injured party first had the right to declare the contract avoided. This was supposed to prevent speculation on the part of the obligee. “The rule was found to be objectionable in Vienna, however, because it was too uncertain and gave too much discretion to the courts, especially in cases of anticipatory breach. These objections finally led to choosing the ‘declaration of avoidance’ or the ‘taking over’ of the goods as the reference point for calculating damages, the earlier of the two being decisive.” Thus, CISG Art. 76 now contains two tests to determine the time of the current price and damages are thus generally measured by the market price “at the time of avoidance”; if the aggrieved party avoids the contract after “taking over the goods”, however, the reference point is “the time of such taking over”.

However, the time of avoidance of contract may in practice be difficult to ascertain and could therefore lead to abuse. For instance, the party who plans to avoid the contract may speculate by waiting to avoid the contract at a time which, financially speaking, is more

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903 Supra. note 10, pp. 305-306.
904 Supra. note 24.
905 See Comment 1 on Art. 7.4.6 UPICC.
favorable for him. To avoid speculation, the time limit for avoidance has to be taken into consideration. Insofar as there are no time limits for avoidance of a contract, Art. 77 is to be consulted in regard to the obligation to mitigate losses. If a party delays in declaring avoidance and the difference between the market and the contract price increases, he may be held to have violated his duty to mitigate damages. On the other hand, to largely exclude speculations, at least on the part of the buyer, another time was fixed for the taking over of the goods. The intention of fixing such an early time is to prevent the buyer from speculating on the movement of market prices and delaying avoidance of the contract. In order to keep possible abuses to a minimum, Art. 76 provides that in cases where the party claiming damages has avoided the contract “after taking the goods”, the “current price of such taking over shall be applied instead of the current price at the time of avoidance”. However, the latter alternative reference point of “after taking over the goods” is hardly understandable according to some other commentators. Nonetheless, it is broadly recognized that this alternative “prevents an avoiding buyer who has received delivery from manipulating the time of avoidance in order to increase the seller’s liability.” Moreover, Honnold holds that: Despite this apparent purpose, Art. 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. However, the alternative should not apply when an aggrieved buyer rejects the goods immediately after the inspection permitted by CISG Art. 38.

15.3.3.3 Relevant place

In regard to the place where the current price is to be determined, Art. 76 refers to: a) “the place where delivery of the goods should have been made”, or alternatively b) “if there is no current price at that place”, then “such other place as serves as a reasonable substitute”. It should also be mentioned that Art. 76 reminds the contracting parties that “the allowance for differences in the cost of transporting the goods” should be added.

In other words, the decisive place is the place where the delivery was supposed to take place or the place, if the goods were taken over, where the delivery actually took place. According to Art. 31, this is the place of delivery. While this place may indeed be rea-
sonable to the seller, it may well entail difficulties for the buyer. Since the place of delivery in many cases, e.g. handing over to the first carrier, is located in the seller’s country, it can be difficult for the buyer to prove damages based on market prices in the seller’s country. Sutton notes in this respect: “In traditional international sales contracts, the place of delivery is the port of the first carrier for transportation to the buyer. For the seller, this rule poses few problems, as the port is likely to be in his or her country, and the market information for the goods will normally be readily available. The buyer, on the other hand, often will be far removed both from the seller’s country and from current information concerning the markets in the seller’s country. In a destination contract, in which the seller is obligated to deliver the goods to a port in the buyer’s country, the reverse problem arises; the buyer has easy access to the local market, but the seller is often far removed from it.” Sutton thus advises that: “One solution to these problems is to seek cover under article 75, which eliminates the burden on the buyer or seller of establishing the market price of the goods in what may be a distant country. Another option is to include in the contract a more predictable reference point for measuring the current market price by, for example, establishing a specific locale as the determinative market.”

On the other hand, if no current market price exists at the place where delivery of the goods should have been made, Art. 76(2) states that the parties should look to another market that represents a “reasonable substitute”. When another place is found, the differing cost of transportation is to be included in calculating the price difference. It cannot be generally defined which other place might be considered as reasonable. One may find it difficult to imagine why there should be no current price at the contractual place of delivery. Rather it suggests that there is no current price at all. Presumably there is some flexibility in Art. 76(2) and a court may be able to substitute the price obtaining at the place of arrival of the goods where that is a more reasonable market for a hypothetical covering purchase. However, if a reasonable substitute market cannot be found, then the parties will not be able to measure damages under Art. 76. If no such price exists, damages must be calculated under Art. 74.

**15.4 FURTHER DAMAGES**

Both Arts. 75 and 76 of the CISG contain a phrase of “as well as any further damages recoverable under article 74”. Such provisions recognize that the injured party may incur additional losses, including loss of profit, which would not be compensated by the basic formula contained thereof. In such a case the additional losses may be recovered under Art. 74, provided that, of course, the conditions of Art. 74 are satisfied. It follows that the non-performing party may also be liable for any further loss which the aggrieved party proves it has suffered. In other words, the rule that the aggrieved party may recover the difference under both Arts. 75 and 76 establishes “a minimum right of recovery”. The aggrieved party may also obtain damages for additional harm which it may have sustained as a consequence of termination.

On the one hand, to carry out a substitute transaction requires additional costs which are not covered and compensated for by the difference in price. If the substitute transaction had been possible without avoidance of the original contract, the seller would suffer

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918 Supra. note 44.
919 Supra. note 4.
920 Supra. note 44.
921 Supra. note 13.
922 Supra. note 15, Comment 7.
923 Supra. note 14, Comment 8; also supra. note 15, Comment 8.
924 See Comment 2 on Art. 7.4.5 UPICC; see also Comment 3 on Art. 7.4.6 UPICC.
further losses in regard to the profit he missed. Additional cost in doing business or lost profit can also constitute further damages, even if there is no difference between the contract price and the price in the substitute transaction, e.g. if prices have fallen in the case of an intended resale of the goods. In such a case further damages are the only losses suffered.\(^\text{925}\) On the other hand, such further damages may occur when the loss is calculated abstractly at first, but it becomes clear later that a cover transaction is possible only under more unfavourable terms.\(^\text{926}\) Among other things, “[t]he most usual type of further damages to be recovered under article 70 [draft counterpart of CISG article 74] would be the additional expenses which may have been caused as a result of the receipt of non-conforming goods or the necessity to purchase substitute goods as well as losses which may have been caused if goods purchased in the substitute transaction could not be delivered by the original contract date.”\(^\text{927}\)

Finally, it is to be noted that any additional damages are recoverable only where conditions of the general rule of damages has been satisfied: “Further damages are recoverable under the general rule of Article 74. This means, however, that any further damage is limited as to its foreseeability. In this case, too, it is a prerequisite that the injured party claims damages and proves the loss.”\(^\text{928}\)

\(^{925}\) Supra. note 23.
\(^{926}\) Supra. note 43.
\(^{927}\) Supra. note 14, Comment 9.
\(^{928}\) Supra. notes 23, 43.
CHAPTER 16. AGREED PAYMENT FOR NON-PERFORMANCE

All legal systems appear to recognize the validity and social utility of a clause which estimates future damages, especially where proof of actual damage would be difficult. Such a clause, sometimes referred to as a “liquidated damages clause” and sometimes as a “penalty clause”, can serve both the function of estimating the damages which [one party] would suffer as a cause of the breach so as to ease the problems of proof and of creating a penalty sufficiently large to reduce the likelihood that the [other party] will fail to perform.  

Under the CISG, Art. 46/62, which deals with specific performance (see Chapter 3) does not have the effect of making such clauses valid in those legal systems which do not otherwise recognize their validity. In other words, the CISG consciously does not deal with penalty clauses, or so-called agreed payment for non-performance or liquidated damages. The CISG does, however, not exclude relevant contractual agreements. A liquidated damages clause agreed upon by the parties should be given full effect under the Art. 6 principle of contractual freedom to derogate from the Convention. Nonetheless, under Art. 4 CISG, which says that the Convention does not consider “the validity of the contract or any of its provisions”, the validity of a penalty clause will likely be determined by conflicts of law rules. The vagaries of private international law will therefore decide this issue.

However, while some legal systems approve of the use of a “penalty clause” to encourage performance of the principal obligations, in other legal systems such a clause is invalid.  

It is said that courts in many countries will enforce penalty clauses. Common law courts, however, do not enforce penalty clauses, for public policy reasons, but do allow liquidated damages, as provided in Uniform Commercial Code section 2-718. 

“National laws vary considerably with respect to the validity of the type of clauses in question, ranging from their acceptance in the civil law countries, with or without the possibility of judicial review of particularly onerous clauses, to the outright rejection in common law systems of clauses intended specifically to operate as a deterrent against non-performance, i.e. penalty clauses.”

Therefore, there is considerable support for the idea that the uniform law should regulate the subject of liquidated damages, which is not however explicitly covered in the CISG. In fact, the CISG drafting Committee felt that such regulation is particularly desirable because the rules on liquidated damages vary widely, and it would be a practical contribution to international trade to bring uniformity in their application. However, the Committee again could not agree on proper language that would avoid the technical problems associated with the proposed draft. As a result, the basic principle underlying the liquidated damages provision was not rejected in the Convention. The framers of the Convention agreed that the validity and application of such clauses were to be dealt with in terms of the applicable legal system due to widely divergent approaches in the different legal systems.

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931 Supra. note 1.


933 See Comment 2 on Art. 7.4.13 UPICC.

934 Supra. note 2.
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By contrast, in view of their frequency in international contract practice, both the UPICC and the PECL deal with the subject of liquidated damages. Art. 7.4.13 UPICC stipulates: "(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. (2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances." Art. 9:509 PECL resembles in substance Art. 7.4.13 UPICC and reads: "(1) Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual loss. (2) However, despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances."

It is stated in the Official Comment on Art. 7.4.13 UPICC that, this Article gives an intentionally broad definition of agreements to pay a specified sum in case of non-performance, whether such agreements be intended to facilitate the recovery of damages (liquidated damages according to the common law) or to operate as a deterrent against non-performance (penalty clauses proper), or both. Para. (1) of this article in principle acknowledges the validity of any clauses providing that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, with the consequence that the latter is entitled to the agreed sum irrespective of the harm actually suffered by it. The non-performing party may not allege that the aggrieved party sustained less harm or none at all.

However, the type of clauses dealt with in Art. 7.4.13 UPICC or PECL Art. 9:509 must be distinguished from forfeiture and other similar clauses which permit a party to withdraw from a contract either by paying a certain sum or by losing a deposit already made. On the other hand a clause according to which the aggrieved party may retain sums already paid as part of the price falls within the scope of this article. Further, the obligee is not entitled to the agreed sum if the obligor is not liable for the failure of performance. "Normally, the non-performance must be one for which the non-performing party is liable, since it is difficult to conceive a clause providing for the payment of an agreed sum in case of non-performance operating in a force majeure situation. Exceptionally, however, such a clause may be intended by the parties also to cover non-performance for which the non-performing party is not liable." With regard to the relationship between such agreed payment clauses and the right to performance, para. (2) of Art. 1622 Civil Code Québec (the Québec Code is seen as a “Vehicle for Modeling a Transnational lex mercatoria") reads: "A creditor has the right to avail himself of a penal clause instead of enforcing, in cases which admit of it, the specific performance of the obligation; but in no case may he exact both the performance and the penalty, unless the penalty has been stipulated for mere delay in the performance of the obligation." However, it seems to be more persuasive that Art. 6 of UNCITRAL Uniform Rules stipulates: "(1) If the contract provides that the obligee is entitled to the agreed sum upon delay in performance, he is entitled to both performance of the obligation...

937 See Comment 4 on Art. 7.4.13 UPICC.
939 Supra. note 5.
940 TLDB Document ID: 601400.
and the agreed sum. (2) If the contract provides that the obligee
is entitled to the agreed sum upon a failure of performance other
than delay, he is entitled either to performance or to the agreed
sum. If, however, the agreed sum cannot reasonably be regarded
as compensation for that failure of performance, the obligee is
entitled to both performance of the obligation and the agreed
sum.”

One should note, however, the sum stipulated may be reduced
by the court when it is manifestly excessive. In order to prevent
the possibility of abuse to which such clauses may give rise, para.
(2) of Art. 7.4.13 UPICC permits the reduction of the agreed sum
if it is grossly excessive “in relation to the harm resulting from the
non-performance and to the other circumstances”. The same para-
graph makes it clear that the parties may under no circumstances
exclude such a possibility of reduction. The agreed sum may only
be reduced, but not entirely disregarded as would be the case were
the judge, notwithstanding the agreement of the parties, to award
damages corresponding to the exact amount of the harm. It may
not be increased, at least under this article, where the agreed sum
is lower than the harm actually sustained. It is moreover necessary
that the amount agreed be “grossly excessive”, i.e. that it would
clearly appear to be so to any reasonable person. Regard should
in particular be had to the relationship between the sum agreed and
the harm actually sustained. However, the agreed sum shall not
be reduced by a court or arbitral tribunal unless the agreed sum is
substantially disproportionate in relation to the loss that has been
suffered by the obligee.

Finally, it is also to be noted that reduction may be made when
the principal obligation has been performed in part. In the case of

941 Art. 6, supra. note 10. Nonetheless, according to Art. 9 of UNCITRAL
Uniform Rules, the Parties may derogate from or vary the effect of Art. 6.
942 See Comment 3 on Art. 7.4.13 UPICC.
943 Art. 8 of UNCITRAL Uniform Rules, supra. note 10.
944 Supra. note 5.
CHAPTER 17. RECOVERY OF ATTORNEYS’ FEES

Given the money that can be expended by the parties in a lawsuit, the allocation of costs in most domestic courts and international commercial arbitrations is not an ancillary aspect of the proceeding, but rather an important, and often neglected, part of the legal process.\(^{945}\)

17.1 GENERAL CONSIDERATIONS

17.1.1 Introduction

As discussed previously, CISG Art. 74 sets forth the general principle measuring liabilities for non-performance. CISG damages are designed to compensate all kinds of loss, including loss of profit, suffered as a “consequence of the breach”. In this way CISG seeks to compensate the injured party for both expectation damages and reliance expenditures. It then turns to the question: should CISG Art. 74 be interpreted to cover attorneys’ fees in international commercial litigation governed by CISG?

Clearly, Art. 74 does not specifically name attorneys’ fees as damages; like the CISG, neither of the two widely accepted principles, the UPICC or the PECL, explicitly states that attorneys’ fees should be regarded as damages. Scholarly writings about the CISG have featured an increasing amount of debate about whether attorneys’ fees may fall under Art. 74 CISG on damages. And as to be shown below, it is an issue of particular importance to parties who sue or are sued in, e.g. the United States where so-called American Rule prevails, under contracts subject to the CISG.

The multifold progress in international communication techniques has made our globe smaller and shortened distances. All the more we are astonished if we discover, even within communities of equal economic standing, concepts and ideas that are important to one but almost unknown to the other community.\(^{946}\) Recovery of attorneys’ fees is such an issue. Whereas such recovery is unknown to most lawyers trained in, e.g. American, where so-called American Rule prevails; in much of the rest of the world, including most European jurisdictions, where the “loser-pays” principle apparently dominates,\(^{947}\) the general rule is that a party who prevails in litigation can recover some or all of the costs it incurred for legal representation (as well as other litigation costs) from the losing party – a “loser pays” or “costs follow the events” approach.\(^{948}\)

17.1.2 Recoverability under “Loser-pays” Principle

Some decisions, originating mostly (but not exclusively) in German fora, appear to award a prevailing litigant compensation for attorneys’ fees incurred in the course of the dispute. In this context, section 91 of the German Code of Civil Procedure (ZPO) is lex specialis to claims for damages for late performance in the form of costs of litigation.\(^ {949}\) However, these are particularly the costs for


\(^{947}\) Although the “loser-pays” principle apparently dominates the civil law jurisdictions of continental Europe, it is worth noting that the two different approaches to the attorney-fees issue do not represent a common law/civil law split: England, the homeland of the common law, has a loser-pays system. Indeed, in the United States the loser-pays approach is usually called “the English rule”. (See Harry M. Flechtner, infra. note 8.)


the pursuit of one’s rights outside the courts. “[S]uch costs were beyond the scope of the recovery afforded by the domestic ‘loser pays’ rule in Germany, and pre-litigation attorney expenses would be characterized as substantive damages under German national sales law.”

ZPO section 91 contains a general principle: The restriction of the reimbursement to costs necessary for the pursuit or defense of one’s rights in ZPO section 91(1) is an expression of the obligee’s duty to mitigate the loss, which does not allow for avoidable costs to be passed on to the other party. This is why in addition to the fees of its German lawyer, attorneys’ fees in the plaintiff’s home country must be reimbursed, if insofar as they were necessary. If a fee was agreed upon with a foreign attorney, e.g., a contingent fee, it will be necessary to thoroughly investigate, and as a plaintiff to prove, whether and why the agreed upon fee was necessary for the pursuit of the claim. If it was not necessary, it cannot be claimed as part of the damages for late performance.

In short, it is found that even in such loser-pays jurisdictions as German, it is procedural rules that determine that all attorney’s fees are compensated and they further limit the attorneys’ fees to those accumulated during the proceedings.

17.1.3 Excluded by “American Rule”

In contrast to so-called “loser pays” approach as discussed above, “the firmly-established ‘American rule’ on recovery of attorneys’ fees is that, in the absence of a statutory or contractual provision to

the contrary, each party to a dispute must bear his or her own attorneys’ fees.” The general rule in the United States is that each party to a lawsuit bears his or her own expenses of litigation, including the costs of attorneys, no matter who prevails in the dispute. The rule, whose origins are somewhat unclear, was adopted by the United States Supreme Court in 1796 and has repeatedly (and recently) been reaffirmed by the same court. Indeed, this method of dealing with attorneys’ fees is known (at least in the United States) as the “American rule”.

It is submitted that, “this American rule – which in breach of contract actions works as a ‘qualification’ upon the general ‘expectation’ measure of damages – applies in all types of cases (in all U.S. State and Federal courts), it is best understood as a general rule of procedure subject to lex fori.” However, such a general standard is established only as regards the absence of contractual, statutory or rule authorization. “There are several exceptions to the American rule that parties to litigation bear their own attorneys’ fees. Under U.S. law, a successful litigant can recover its attorneys’ fees from the losing party if that result is provided either by statute or by an enforceable contract provision between the parties. […] This exception has been narrowly construed. In particular,


953 Ibid. Flechtner also states: “The UnitedStates, however, is not alone in requiring that each party generally bear its own litigation costs. Japan has such a system for contract cases. Thus the two largest economies in the world have adopted this approach for domestic sales transactions.”

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courts have generally required that a statute explicitly and specifically authorize recovery of attorneys’ fees before it will trigger the statutory exception to the American rule." 955

Then the question arises: Does the damage provisions of the CISG, when invoked in international commercial litigation, trigger the statutory exception to the American rule? To resolve this issue, I will firstly take a look at some CISG decisions on the recovery of attorneys’ fees.

17.2 CISG DECISIONS CONCERNING ATTORNEYS’ FEES

Given that rules concerning the reimbursement of costs for the winning party vary worldwide, of interest here is the losing party’s duty to bear the costs and its support by CISG Art. 74, i.e., the decision to generally qualify the winning party’s attorneys’ fees as part of the consequential damages awarded according to CISG Art. 74. In this respect, I will review briefly some decisions, including the well-known Zapata case, holding that damages for a variety of attorney costs incurred by an aggrieved party are recoverable under Art. 74 of the CISG.

On the one hand, even in German, where the “loser-pays” principle apparently dominates, several decisions, appearing to award a prevailing litigant compensation for attorneys’ fees incurred during the course of the litigation, have done so not on the basis of a “loser-pays” principle in the tribunal’s own domestic law, but rather on the authority of the damages provisions of the CISG itself.956 On the other hand, several other Contracting Jurisdictions’ decisions appear to award CISG damages to cover the prevailing party’s attorneys’ fees incurred during the course of the litigation. Of the greatest attention here, is the recent decision issued by the U.S. District Court, Zapata Hermanos Sucesores, S.A v. Hearthside Baking Co., Inc., etc., 957 which appears at first sight to abandon the “American Rule” in international sales law cases and carves an exception that is generally in accordance with international practice. In Zapata, the court discusses, among other things, whether the winning party may have those attorneys’ fees, which were necessarily incurred in seeking relief from the court, reimbursed as part of the damages. The question is answered in the affirmative. The District Court held that Art. 74 CISG provides for the recovery of counsel’s fees incurred by a successful litigant in a breach of contract governed by the CISG, “so that [seller] may be made whole for the damages and expenses it has been forced to bear due to [buyer’s] misconduct”. However, the Circuit Court of Appeals reversed and remanded the District Court ruling on Zapata. The Appellate Court did not award the plaintiff attorney’s fees as damages under Art. 74 of the CISG. This court stated: “... it seems apparent that [loss] does not include attorneys’ fees incurred in the litigation of a suit

955 See Harry M. Flechtner, supra. note 8.
for breach of contract, though certain pre-litigation expenditures ... would probably be covered as incidental damages.  

Clearly, it is of utmost importance to the viability of the CISG that national concepts and labels do not hamper the uniformity that is critical for the functioning of the CISG and the certainty that is crucial to the functioning of international trade. The CISG is a multi-party international convention that creates treaty obligations on the part of Contracting Parties, including the obligation under Art. 7(1) to interpret the Convention in a fashion that reflects its "international character" and that promotes "uniformity in its application". In this respect, the court in Zapata established the parameters for the proper approach to the Convention’s interpretation by noting the explicit international character of the CISG and the mandate for its uniform application, as directed by Art. 7(1) CISG. However, it is understandable that, beyond taken into account with considerable weight in a comparative and critical manner, such an interpretation as in Zapata or more generally in loser-pays jurisdictions, e.g. German, that attorneys’ fees fall under Art. 74, cannot be binding on a court of another country in all circumstances, even bearing in mind the duty placed on them by the CISG to give due regard to the international character of the Convention. “The CISG did not create a de facto international court system in which foreign decisions must be treated as binding precedent as a matter of stare decisis. Courts remain free to disagree with positions taken by sister-tribunals from beyond their national borders. Article 7(1) itself does not require that those interpreting the CISG achieve strict uniformity in its application, but only that they have ‘regard’ for uniformity along with several other values – the Convention’s international character and the promotion of good faith in international trade.”

In fact, it has been found that those decisions issued by German courts “make a similar distinction between pre-litigation lawyer costs, which (the cases hold) are recoverable as damages under CISG Article 74, and attorneys’ fees for conducting the litigation itself.” Flechtner treats the issue of a prevailing litigant’s right to recover attorney fees as a procedural question beyond the scope of the CISG, and subject to the rules of the forum. It is even submitted that, although the court rightfully ruled that the buyer to pay the seller’s costs, Zapata should not be used as precedent for similar propositions in international sales law cases in U.S. courts. Briefly speaking, although it is to be noted that “[i]n international commercial arbitration it is also very common that a tribunal will order the loser to pay the ‘successful’ party a large percent of the winner’s costs, if not all of them”; it appears that there is little evidence that the cases granting CISG damages for attorneys’ fees represent a genuinely international consensus.

959 See Jarno Vanto, supra. note 6.
961 Ibid. On the contrary, another commentator states: “To regard the award of such fees as a procedural issue to be settled by reference to either the lex fori or the otherwise applicable domestic law instead, goes against the plain meaning of the Convention’s language and intent, as well as the available international jurisprudence.” (See John Felemegas in “The award of counsel’s fees under Article 74 CISG, in Zapata Hermanos Sucesores v. Hearthside Baking Co. (2001)”, 6 Vindobona Journal of International Commercial Law and Arbitration (2002); p. 39. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/felemegas1.html>)
962 See Joseph Lookofsky, supra. note 10. The decision, however, deserves the greatest attention. “The case has garnered major attention based on the amount of comments on it. The reason possibly is because the case emanates from the United States, a jurisdiction which so far does not have a large CISG jurisprudence but whose rulings resonate throughout the commercial community.” (See Jarno Vanto, supra. note 6.)
963 Supra. note 1.
17.3 PROBLEMATIC RECOVERY UNDER ART. 74

As discussed previously, no specific rules have been set forth in Art. 74 describing the appropriate method of determining “the loss ... suffered ... as a consequence of the breach”. Clearly, Art. 74 does not specifically name attorneys’ fees as damages anymore than it names other expenses incurred or losses experienced; on the other, it does not rule out attorneys’ fees as damages either. In fact, the Appellate Court in Zapata concluded that the CISG, by its wording or its “background”, as the court called it, does not suggest that loss was intended to include attorneys’ fees but that the CISG did not, by its wording, exclude attorneys’ fees either. It seems that the general language of Art. 74 (“damages ... consist of a sum equal to the loss ... suffered by the other party as a consequence of the breach”) is broad enough to encompass damages for attorneys’ fees.965

Clearly, if failure to construe the CISG damage provisions as encompassing compensation for attorneys’ fees meant that a successful litigant could not recover such expenses from the losing party in transactions governed by the CISG, it would certainly present a very difficult issue. Because much of the world follows a loser-pays principle. On the other hand, however, there is nothing in the travaux préparatoires of the Convention to suggest that these countries contemplated changing to the American rule for attorneys’ fees in litigation involving international sales. Therefore, a tough task remains: how should such pre-litigation attorneys’ fees – costs of the type covered by the loser-pays jurisdictions which are generally not compensable under the traditional American rule – be subjected to foreseeability as required by Art. 74?

Generally, full compensation rule seeks to place the injured party in the same position as he would have been had the debtor complied with the terms of his contract, and thus seems broad enough to encompass attorneys’ fees as consequential damages. However, it is only as regards such losses as meeting the requirements contained in the full compensation rule. The most problematic aspect of the issue at hand, returning to general considerations, may be the imbalance and uncertainty that allowing attorneys’ fees under Art. 74 would create. The standards for recovering attorney costs under the CISG, likely differ from the standards imposed by the loser-pays rules of the various Contracting States: recovery of damages under the CISG is limited by the foreseeability requirement in Art. 74 and the mitigation principle in Art. 77, whereas recovery of attorneys’ fees under domestic loser-pays rules undoubtedly are subject to different limitations and principles. Then the question arises on how to subject pre-litigation attorneys’ fees to foreseeability as required by Art. 74 in so-called American rule jurisdictions, where such costs are generally not compensable nonetheless covered by the loser-pays jurisdictions.

While in loser-pays jurisdictions, according to its cost shifting rules, the losing party would pay regardless of a breach and the prevailing party would be under no obligation to establish foreseeability as required by Art. 74 or to mitigate the loss (attorneys’ fees) as required by Art. 77. Even in such jurisdictions, it is unclear on what basis the distinction between pre- and post-litigation attorneys’ fees is made. Further, if no breach of contract or foreseeability were established concerning a CISG claim, an additional regard needs to be had to returning to the jurisdiction’s cost shifting rules or other means in order to resolve the disputes.

964 Supra. note 14.
965 Even though, the court or arbitral tribunal must calculate that loss in the manner that is best suited to the circumstances. This means that if attorneys’ fees are to be allowed under Art. 74, this happens through submission of the facts of the case under the norm in which the facts assume their meaning, i.e., interpretation. (See Jarno Vanto, supra. note 6.)
CHAPTER 18. PAYMENT OF INTEREST

In the modern world, interest generally acts as compensation for the loss of use of money. The importance of this loss, however, must not be understated. In certain disputed international transactions, involving parties from countries with high interest rates, the interest awarded to a debtor can substantially add to an award or even exceed the original amount sought. Thus, unless there is an equitable calculation of interest, the damages sought in an international proceeding could reflect only a fraction of a total debt a party in default may encounter. The determination of interest, therefore, is not an issue to be simply resolved after the establishment of liability, but a question that deserves the strictest scrutiny.  

18.1 INTRODUCTION

The modern institution of interest dates to Roman law, where it was a sum due from a debtor who delayed or defaulted in repayment of a loan. The measure of the amount due for the default or delay was the difference between the claimant’s current position and what it would have been had the loan been timely and fully repaid. In other words, interest existed as a penalty due from a debtor who delayed or defaulted in repayment of a loan. The measure of interest due for the delay or default was id quod interest.  

In the modern world, interest generally acts as compensation for the loss of use of money: 

“Today, interest is a standard form of compensation for the loss of the use of money. Ordinarily, it is recoverable without proof of actual loss; damages are presumed because the delay in payment deprives the claimant of the ability to invest the sum owed. The rationale for this practice was articulated by the United States Supreme Court in 1896 [Spalding v. Mason, 161 U.S. 375, 396 (1896) (quoting Curtis v. Innerarity, 47 U.S. (6 How.) 146, 154 (1848))]: It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach ... Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties.”

However, as stated at the outset, the determination of interest is not an issue to be simply resolved after the establishment of liability, but a question that deserves the strictest scrutiny. The provisions on interest were the subject of great controversy and differences of opinion both in ULIS and at the Vienna Convention: “Art. 78 is new and was added at Vienna at the request largely of various European delegates who felt keenly that the convention would be seriously incomplete without some provision on an aggrieved party’s entitlement to interest. However, there were sharp differences of opinion about the content of such a provision and art. 78 represents an uneasy compromise between those who were altogether opposed to an interest provision and those who wanted a statement, however bland, at least recognizing the right.”

The purpose of Art. 78, as

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967 Ibid.


969 See Jacob S. Ziegel in “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods”. Available online
a result of its general language and the prior rejections of specific formulas for calculating damages, may be limited – simply to authorizing interest damages and to leaving to the courts the task of formulating a method of determining the rate of interest.

Nonetheless, Art. 78 CISG clearly provides that if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, it is confirmed in the two Principles. In other words, the general entitlement to interest is established under each of the three instruments (infra. 18.2). In addition, the corresponding provisions indicate that any interest awards will not affect damages recoveries (infra. 18.3). However, whether interest on damages may be available is controversial and will be discussed separately (infra. 18.4). With regard to the calculation of interest, two aspects are involved: the period for accrual and applicable rate of interest. According to the prevailing view, interest accrues from the time when payment is due to the time of payment (infra. 18.5). However, Art. 78 CISG fails to stipulate how to determine what rate of interest to apply. Thus, it remains questionable in determining the applicable rate of interest, which seems to be appropriately resolved by referring to the similar approaches adopted both under the UNIDROIT Principles and the European Principles (infra. 18.6). Finally, it is to be noted that Art. 78 CISG does not apply to interest payments on interest and, thus, gives no right to compound interest; neither do the interest regulations under the two Principles take stand on the question of compound interest. One reason for this restriction is that compound interest, which in some national laws is subject to rules of public policy limiting compound interest with a view to protecting the non-performing party, does not appear to be widely accepted in international business transactions and therefore will not discussed in this Chapter.

18.2 GENERAL ENTITLEMENT TO INTEREST

Considering the commercial fact that the failure to receive funds is always a loss, for the very frequent case of delay in payment of money, most countries, either by statute or judicial decision, provide for the awarding of compensatory interest when a debtor has defaulted on a money payment. A few countries have laws that prohibit the payment of interest, primarily because it is inconsistent with their religious beliefs. Even in some of these countries, however, exceptions allow interest in certain commercial transactions. On the other hand, the practice of allowing interest in international arbitration is generally recognized. Furthermore, there is no cogent reason for objecting to awarding interest in international law because of the absence of a settled rule as to the rate of interest or the date from which it begins to run. And it is usually the special reasons that are adduced by arbitrators in those cases in which interest is disallowed — for instance, if the claimants are

With regard to the awarding of interest, Gotanda submits that: The practice of awarding interest as an element of damages is well established among the countries in Europe. Countries in North and South America generally authorize the awarding of interest to compensate a party for the loss of the use of money. Like their European and North and South American counterparts, Asian countries, such as China, India, Japan and the Republic of Korea, generally allow interest to be paid when a debtor defaults on a money payment. Several countries do not allow interest as part of an arbitral award. Most of these countries are in the Middle East and Africa, and have legal systems based on Shari’a (Islamic law). The Shari’a is based on the teachings of the Koran, Islam’s holy book, which expressly prohibits the taking of interest, or riba. Some Islamic countries, such as Egypt, have moved away from Shari’a toward more Western-style legal systems. In these countries, either the payment of interest is expressly permitted in certain circumstances or a similar fee is allowed as a “service” or as “administrative” costs. Other countries, such as Iran, have adopted fundamentalist Islamic law, which strictly adheres to the Shari’a principles, including the prohibition against the taking of interest. Even in Iran, however, there is a limited exception to this prohibition. (Supra. note 3, pp. 42-50.)
guilty of delay in the prosecution of their claim, or if the award of interest is expressly excluded by the arbitration convention.971

Under the Convention, two specific references to interest are contained respectively in Arts. 78 and 84(1). Art. 78 provides that: “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.” Art. 84(1) further states: “if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.” While Art. 84(1) refers solely to interest that can be collected by the buyer on the price (a liquidated amount), Art. 78 refers to interest that can be collected by the seller or the buyer and to interest on the price or any other sum that is in arrears. Under the UNIDROIT Principles, Art. 7.4.9 reaffirms the widely accepted rule according to which the harm resulting from delay in the payment of a sum of money is subject to a special regime, and Art. 7.4.9(1) provides in part that “[i]f a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum [...]”. Thus, interest is payable whenever the delay in payment is attributable to the non-performing party, without any need for the aggrieved party to give notice of the default.972 Similarly, PECL Art. 9:508 provides for interest and damages on failure to pay money and Art. 9:508(1) reads in part: “If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum [...]”.

These regulations make it clear that interest is to be paid. It is also clear that interest can be recovered with or without demonstration of actual damages. Moreover, from CISG Art. 74, UPICC Arts. 7.4.1, 7.4.2 or PECL Art. 9:502, it is clear that breach of contract damages cover the loss suffered by the party as a foreseeable consequence of the breach, including lost profits. Thus, in general, there is no problem in awarding interest under the heading of damages.973 Indeed, it is “a long-standing practice of international arbitrators” to consider the interest claim as part of the general claim for damages.974 Moreover, the reference in CISG Art. 78 to “any ... sum ... in arrears” intimates that parties may seek interest in a broad spectrum of situations. However, it is said that interest as part of damages must be distinguished from legal interest. This is because in many countries legal interest rates are very low, and are independent from market developments.975 Therefore, under the CISG, interest is addressed by Art. 78 while damages are governed by Art. 74. Thus, the CISG takes the position of those countries in which interest is not necessarily a component of damages when Art. 78 states that interest is recoverable “without prejudice to any claim for damages recoverable under Article 74”. Similar approaches are adopted under the two Principles by providing separate rules for damages and interest (although generally grouped under the same heading “Damages”). “The purpose of this provision is to make a distinction between interest and damages and to give compensation for the financial loss due to the mere fact that delay in payment has a financial cost” and “to prevent the debtor from taking advantage of the funds withheld.”

972 See Comment 1 on UPICC Art. 7.4.9.
975 Supra. note 8, p. 283. For instance, in Germany, the general rate of legal interest is 4% (Section 288 BGB), as compared to 5% when the parties are business and interest arises from commercial transactions (Section 353 HGB). The situation is now, or at least until recently, not much better in some other European countries. Obviously, plaintiffs – generally unpaid sellers – want to recover interest at higher rates.
976 See Phanesh Koneru in “A General Review of Interest Issues Under the CISG Citing the Ruling in this Case and other CISG Cases”: CISG Case
In this respect, one of the main ideas of Art. 78 CISG is the general entitlement to interest which is rather far-reaching in substance. In the view of Enderlein and Maskow, the entitlement to interest under the CISG is characterized above all by two features: its normativity and its absoluteness, and the absoluteness means that the impediments under Art. 79 (force majeure) do not free from the obligation to pay interest. “A point in favour of this is that the entitlement to interest is not mentioned in Article 79, paragraph 5, but could be explained with the genesis of the Convention. We believe, however, that the economic background is also justification for such a solution. The party who does not pay a debt that is due, disposes of the sum of money required for it and/or does not have to procure it. He thus has an advantage vis-à-vis the other party which is compensated by the entitlement to interest of that party. This applies, in particular, to restrictions in the transfer of currency, often cited as an example, which shall not have the effect of a reason for exemption here.”

Flambouras also holds the absoluteness of interest as: It is accepted that interest is owed even if the delay in the payment of price (or any other monetary obligation in general) is due to a force majeure event, since payment of interest is one of the rights that are referred to in CISG Art. 79(5). Indeed, UPICC Art. 7.4.9(1) expressly states in part that “the aggrieved party is entitled to interest [...] whether or not the non-payment is excused”. Furthermore, the force majeure provision of the UNIDROIT Principles clearly provides: “Nothing in this article prevents a party from exercising a right to [...] request interest on money due.” (UPICC Art. 7.1.7(4)). However, the Official Comment points out that: “If the delay is the consequence of force majeure (e.g. the non-performing party is prevented from obtaining the sum due by reason of the introduction of new exchange control regulations), interest will still be due not as damages but as compensation for the enrichment of the debtor as a result of the non-payment as the debtor continues to receive interest on the sum which it is prevented from paying.”

On the other hand, although in general, there is no problem in awarding interest under the heading of damages, it does not necessarily follow that the obligation to pay interest may be always classified as damages. This is because that (a) the three instruments clearly distinguishes between interest payment obligation and damages and (b) the obligation to pay interest commences where payment has been delayed even if the creditor of the payment obligation has not suffered any damage from such delay and the debtor is not liable.

The Official Comment on the PECL even states that: “Interest is not a species of ordinary damages. Therefore the general rules on damages do not apply. Interest is owed whether or not non-payment is excused under Article 8:108. Also, the aggrieved party is entitled to it without regard to any question whether it has taken reasonable steps to mitigate its loss.”

However, regulations on interest under CISG are at the same time very clear and very unsatisfactory. The interest issue in the CISG itself is very brief and perhaps vague. Art. 78 CISG “only sets forth


979 Supra. note 7.

980 Supra. note 13.

981 See Comment and Notes to the PECL: Art. 9:508. Comment B. Available online at .html
the obligation to pay interest as a general rule" but it does not “set forth a time starting from which interests may be calculated” nor does it “stipulate the rate of interest or how the rate is to be determined by a tribunal in the absence of explicit guidance from the Convention.”

Some court decisions have deemed it so vague, that in fact, it is seen as a gap. Nevertheless, interest is a remedy under the CISG. As Schlechtriem states: “The present version of Article 78 is the result of a compromise reached at the Plenary session and based upon a proposal submitted by a working group. It conceives the obligation to pay interest as a general rule, so that a debtor still remains liable for interest payments even if his default is due to an impediment beyond his control and he is, therefore, not liable for damages under Article 79. On the other hand, the details of the obligation to pay interest - in particular, the amount - are governed by the applicable domestic law chosen by conflicts rules. Damage claims under CISG remain unaffected even if they exceed the relevant interest rate.”

In sum, this separation of interest from damages will allow a party to recover interest when there is no other evidence of damage suffered or when impediments under Art. 79 CISG (as well as UPICC Art. 7.1.7 and PECL 8:108) have excused the other party from being liable for damages. Thus, the obligation to pay interest as a general rule is conceived under CISG Art. 78, UPICC Art. 7.4.9 and PECL Art. 9:508.

18.3 ADDITIONAL DAMAGES

As stated in the previous section, under the CISG neither the exemptions of Art. 79 nor other requirements necessary to invoke the right to damages apply to Art. 78. On the other hand, Art. 78 CISG gives the creditor a right to recover interest “without prejudice to any claim for damages recoverable under Article 74”.

In other words, Arts. 78 and 74 of CISG allow claims for damages when a claimant incurs additional interest costs and when losses are incurred because capital is tied up in the transaction at issue. It is also noted that “Article 84(1) contains a provision corresponding to Article 78 for the case of the seller’s obligation to refund the purchase price after avoidance of the contract. Although it is not explicitly stated, the creditor should also - on the basis of Article 7 in conjunction with Article 78 - be able to claim damages for a violation of the duty to refund the price and measure his damages from the time the refund was due and in the amount of his own credit costs.”

This clarification that the entitlement to interest does not preclude claims for damages indicates that damage which exceeds interest can be claimed, hence interest can be counted towards the damages even when the two claims have different features. If the requirements of Art. 74 are fulfilled, the creditor, thus, may claim the full interest under Art. 74 CISG. Art. 78 CISG, therefore, mainly becomes important if the requirements for a damage claim are not fulfilled.
Anyway, while the provisions of Art. 78 do not mean much to many, on the other hand, others consider them to be useful since they enable the creditor to claim not only interest but also compensation under Art. 74, which is not possible in some countries. This approach is followed under the UNIDROIT Principles, where Art. 7.4.9(3) reads: “The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.” Subject to this provision, interest is intended to compensate the harm normally sustained as a consequence of delay in payment of a sum of money. Such delay may however cause additional harm to the aggrieved party for which it may recover damages, always provided that it can prove the existence of such harm and that it meets the requirements of certainty and foreseeability. Similarly, PECL Art. 9:508(2) provides that: “The aggrieved party may in addition recover damages for any further loss so far as these are recoverable under this Section.” This provision makes it clear that the aggrieved party’s remedy for non-payment or delay in payment is not limited to interest. It extends to additional and other loss recoverable within the limits laid down by the general provisions on damages (see Chapter 14). This might include, for example, loss of profit on a transaction which the aggrieved party would have concluded with a third party had the money been paid when due; a fall in the internal value of the money, through inflation, between the due date and the actual date of payment, so far as this fall is not compensated by interest under Art. 9:508(1).

18.4 INTEREST ON DAMAGES

Another important aspect on interest is to clarify whether interest on damages can be claimed. As stated above, Art. 78 CISG grants the right to interest on the purchase price or “any other sum that is in arrears”. It is questionable whether this language also extends to claims for damages. Case law on this issue is very rare since most published decisions in which interest has been sought seem to deal with actions for the purchase price. Legal scholars, on the other hand, seem to agree that one has a right to interest on damage claims under Art. 78 if the amount in question has been liquidated vis-à-vis the other party. In this context, however, the question arose among authors from the Anglo-American legal family whether other sums were only meant to be such which are already liquidated, for which interest could be claimed under that legal system, or sums that have not yet been specified.

One could argue that the language of Art. 78 (“sum that is in arrears”) indicates that a right to interest on damages only exists if the amount in question is liquidated at the time it becomes due. However, Thiele doesn’t believe this textual argument is persuasive. Even if the amount of damages to be paid is not fixed yet, the claim for damages is still a claim for a “sum”. In case of a breach of contract, the breaching party has to compensate the other party for the loss which that party has suffered. When it fails to do so, this “sum” may be considered as being “in arrears”. Therefore, the textual interpretation may not be used as an argument against the application of Art. 78 to unliquidated damages. Thiele further sub-
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mits that the pertinent question, thus, does not appear to be if Art. 78 applies to damages at all, but rather when damages can be considered as being “in arrears” under Art. 78. If one party breaches the contract, the other party is entitled to damages. Regardless of whether the exact amount of damages has been specified yet, the breaching party still owes compensation to the other party from the time of the breach. Accordingly, the breaching party should be prevented from retaining the benefit from the sum owed to the creditor from that time until payment. Similarly, had the breaching party not breached the contract, the other party would not have suffered any loss. The basis for this loss, however, accrues at the moment of the breach of contract when the initial loss occurs. Therefore, the aggrieved party is deprived of the use of the money from the moment of the loss, even though that amount has not been specified yet. Accordingly, the non-breaching party should be entitled to interest payments on the loss from the time of the breach.992

Damages under Art. 78, therefore, become due at the moment the contract is breached and the initial loss occurs. Consequently, Art. 78 applies not only to liquidated but also to unliquidated damages. Unfortunately, the Official Comment to PECL Art. 9:508 states that Art. 9:508(1) confers a general right to interest on primary contractual obligations to pay; the provision does not cover interest on secondary monetary obligations, such as damages or interest.993 However, although takes no stand on the question of compound interest, UPICC Art. 7.4.10 clearly grants the right to interest on damages and gives further guidance by providing that: “Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.”

UPICC Art. 7.4.10 determines the time from which interest on damages accrues in cases of non-performance of obligations other than monetary obligations. In such cases, at the time of non-performance the amount of damages will usually not yet have been assessed in monetary terms. The assessment will only be made after the occurrence of the harm, either by agreement between the parties or by the court. The present article fixes as the starting point for the accrual of interest the date of the occurrence of the harm. This solution is that best suited to international trade where it is not the practice for businesspersons to leave their money idle. In effect, the aggrieved party’s assets are diminished as from the occurrence of the harm whereas the non-performing party, for as long as the damages are not paid, continues to enjoy the benefit of the interest on the sum which it will have to pay. It is only natural that this gain passes to the aggrieved party. However, when making the final assessment of the harm, regard is to be had to the fact that damages are awarded as from the date of the harm, so as to avoid double compensation, for instance when a currency depreciates in value.994

18.5 ACCRUAL OF INTEREST

When discussing above whether interest on damages is granted, the pertinent question appears to be rather the accrual of interest on damages. Without being able to enter into detail in respect of each concrete claim, I will examine below both the starting point and ending point for the accrual of interest from a general perspective.

As for the starting point, the significant condition in Art. 78 CISG is to be noted that the amount in question is “in arrears”. Although the language of Article 78 CISG expressly states this requirement only for ‘any other sum’, it likewise applies to the payment of the pur-
chase price. In this context, Article 58 CISG determines the time of payment of the purchase price. However, it is less clear when most of the other claims become due. In this respect, Enderlein and Maskow further submit that: “Without being able to enter into detail in respect of each concrete claim, we believe that in regard to claims for damages, reimbursement of expenses and reduction of the price, hence secondary claims which emerge only when primary obligations under the contract are breached, from the aspect of interest, one should proceed on the assumption that they become due when they have been liquidated vis-à-vis the other party and in the amount in which later they turn out to be justified. Another aspect is that they should have accrued at the time when they were charged and were not just expected in the future. In other words, all other claims become due when they arise. From the formulation that interest is to be paid on sums in arrears the conclusion can be drawn that interest is to be paid from the time when the respective sum is due. For lack of deviating agreements the becoming due is, in the event of price claims, determined by Art. 58. Furthermore, Art. 84(1) CISG expressly stipulates that on a price to be refunded, interest must be paid from the date on which the price was paid. This rule proceeds on the assumption that the seller, within the period in which he has disposal over the price, has a benefit from it, at least in the form of interest, and, therefore, sets the date of the payment as the date from which on interest begins to run. This is the day when the payment is actually made according to the contractually or legally (Arts. 57 and 58) provided procedure; also in cases where the seller in individual cases had disposal of the means only later.

As for the ending point, the obligation to pay interest ends with the time of payment which is relatively uncomplicated. The same rules apply for the payment of interest as for the payment of the principal claim. To the latter in turn Arts. 56, 57 and 58 should apply directly or by analogy. Since the payment in many cases is considered as effected only at a later date than that on which the debtor has caused it, a guess will have to be made as to the actual time of payment in calculating interest if the transfer of the principal claim and the interest is made simultaneously. Similarly, under CISG Art. 84(1), interest runs until the demand for the restitution of the price lapses, in particular by performance or effective setting off.

The position discussed above is convincingly supported by the two Principles: UPICC Art. 7.4.9(1) provides in part that “the aggrieved party is entitled to interest […] from the time when payment is due to the time of payment”; the PECL adopts the same position by stating identically that "the aggrieved party is entitled to interest […] from the time when payment is due to the time of payment".

18.6 RATE OF INTEREST

As stated above, CISG recognizes the duty to pay interest (Arts. 78, 84(1)), which exists under most legal systems and several international instruments such as the UPICC and the PECL. Contrary to all other instruments and statutes, CISG does not, however, fix a rate of interest because it proved impossible to agree upon a standard: the discount rate was thought to be inappropriate for measuring credit costs; nor could agreement be reached on whether the credit costs in the seller’s or the buyer’s country were to be selected.

\[995\] Supra. note 23.
\[996\] Supra. note 12, p. 314.
\[997\] Supra. note 26.
\[998\] Supra. note 12, p. 349.
\[999\] Supra. note 12, p. 316.
\[1000\] Supra. note 33.
\[1001\] Supra. note 16, Note 1.
Since the amount of interest is not determined under CISG, this shortcoming is to be compensated above all by agreement between the parties. A contract clause that clearly spells out the method for calculating the rate of interest and those scenarios in which interest may be included in a damages award should eliminate much of the uncertainty surrounding this provision. When the parties have agreed the amount of interest, only in regard to specific claims for payment, e.g. delay in paying the price, it is in the view of Enderlein and Maskow recommendable, because of the difficulties in determining the amount of interest to apply this solution analogously to other financial claims. Hence, the agreements between the parties should, so to speak, serve as the general basis for taking a decision by analogy, insofar as there are no other clues. However, where the parties have agreed nothing, it is to some extent complex on what basis the amount of interest under the CISG will have to be calculated.

Finding no clear guidance in CISG Arts. 78 and 84(1), many have referred to as a gap in the Convention with regard to which rate of interest judges and arbitrators should award to injured parties. However, in filling this gap in the Convention, one must above all ascertain whether the gap is considered lacuna intra legem, i.e., when the matter is outside the scope of the Convention, as opposed to a lacuna praeter legem, i.e., when the Convention applies to the issue but does not expressly resolve it. Although a majority of scholars considers the question of determining the interest rate as being intra legem, or outside the scope of the Convention since it does not expressly fix a rate of interest and is therefore governed by the domestic law applicable to the sales contract, there is merit to the view of other authorities who consider the gap lacuna praeter legem, and believe that the question should be resolved within the Convention itself. Their thesis is that interest payment is itself not excluded from the Convention (matter governed by the Convention), but rather the method of accomplishing it is not expressly resolved. The present author holds the latter view, i.e. the question should be resolved within the Convention itself.

The text of Art. 7(2) is clear in that it requires, where a matter is governed by the Convention, that the text of the Convention and the principles on which it is based have priority over any reference to rules of law applicable by virtue of the conflicts provisions of private international law. Only if the resolution of the problem cannot be found in the text of the Convention or its general principles should one consult the domestic law applicable to the contract. Therefore, since it is beyond dispute that payment of interest is a matter governed by the Convention, judges and arbitrators in deciding on an

Undoubtedly, the setting forth of a criterion to be used to decide whether a gap must be considered a lacuna intra legem or praeter legem would have favored the uniform application of the Convention. However, the CISG does not set forth any useful criterion to determine in concreto when a gap is to be considered as being a lacuna praeter legem as opposed to a lacuna intra legem. This will be evidenced by the different solutions proposed in relation to the issue of what formula should be used to calculate the rate of interest in international sales contracts. The absence of such guidance raises the question of whether the issue of determining the rate of interest has to be dealt with as a matter governed by the Convention, but not expressly settled in it (lacuna praeter legem), or as one excluded from the sphere of application of the Convention (lacuna intra legem).
applicable rate of interest in a decision should only refer to the applicable domestic law by virtue of the rules of private international law if there is an absence of general principles within the Convention to provide a solution. The first step in using the general principles of the CISG to fill a gap in the Convention is to determine what general principles, if any, are applicable. The Convention does not provide a list of these principles, nor does it indicate where any are to be found. However, it is said that close scrutiny of the underlying themes of the articles of the Convention provide a significant number of general principles with which one could fill the interest rate gap. They include principles derived from Arts. 74, 84, 55, 57, 75 and 76. In short, it is apparent that a number of general principles do exist which could assist one in the determination of an applicable rate of interest. Arbitrators and judges should feel free to select such principles in tailoring their interest awards for each factually sensitive situation. The general principles afford judges and arbitrators latitude to ensure that a fair and just award is reached without being constrained by national laws and procedures.

Even though many solutions which differ greatly from each other can be found both in scholarly writing and judicial practice, there seems to be the tendency to apply the lex contractus, i.e., the law which would be applicable to the sales contract if it were not subject to the Convention. Thus, in respect of the formula to calculate the rate of interest, the interest rate of the country of the seller generally applies, at least where the rules of private international law of the forum are based upon criteria comparable to those set forth by the 1980 EEC Convention on the Law Applicable to Contractual Obligations. Absent a choice of law, this Convention makes applicable the law with which the contract has the closest connection, as already mentioned above. This is presumed to be the law where the party who is to effect the “characteristic performance” has its habitual residence, and since the characteristic performance has to be effected by the seller, it is the interest rate of the country where the seller has its place of business which generally is applicable. Quid iuris, however, where the seller’s law does prohibit the payment of interest? In this line of cases, the claim does not become unenforceable as suggested by several authors. It is here suggested, that Art. 78 remains enforceable even in this line of cases, but that in order to calculate the rate of interest recourse should be had to the level of interest generally applied in international commerce in the particular trade concerned.

Alternatively, an ICC award, which suggests that the interest gap should be answered by the general principles on which the CISG is based, as Art. 7(2) stipulates, derives its solution not from the text of the Convention but instead by referring to UNIDROIT Principle Art. 7.4.9 and PECL Art. 9:508 (ex Art. 4:507) as the general principles on which the CISG. Such an approach, however, creates possible distortions in the application of the Convention by resorting to the UNIDROIT Principles as a component of the general principles referenced in Art. 7(2). It is worth noting at this point, however, that the two Principles provide clear guidance as to the rate of interest after all. The weight of all current judicial authority is to the effect that it is inappropriate to use the UNIDROIT Principles as an aid to the interpretation of CISG Art. 78. However, there is arbitral authority to the effect that it is appropriate to so use the UNIDROIT Principles.

1006 Supra. note 1.

1007 Supra. note 1.


1009 See Albert H. Kritzer in “Editorial remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 78”. Available online at <http://www.cisg.law.pace.edu/cisg/principles/unii78.html> See e.g., <http://cisgw3.law.pace.edu/cases/940615a4.html> Vienna Arbitration proceeding SCH-4318 of 14 June and <http://cisgw3.law.pace.edu/cases/940615a3.html> Vienna Arbitration proceeding
that the European Principles may function to the same effect in this point.

UPICC Art. 7.4.9(2) provides that: "The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment." This Article fixes in the first instance as the rate of interest the average bank short-term lending rate to prime borrowers. This solution seems to be that best suited to the needs of international trade and most appropriate to ensure an adequate compensation of the harm sustained. The rate in question is the rate at which the aggrieved party will normally borrow the money which it has not received from the non-performing party. That normal rate is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment. No such rate may however exist for the currency of payment at the place for payment. In such cases, reference is made in the first instance to the average prime rate in the State of the currency of payment. For instance, if a loan is made in pounds sterling payable at Tunis and there is no rate for loans in pounds on the Tunis financial market, reference will be made to the rate in the United Kingdom. In the absence of such a rate at either place, the rate of interest will be the "appropriate" rate fixed by the law of the State of the currency of payment. In most cases this will be the legal rate of interest and, as there may be more than one, that most appropriate for international transactions. If there is no legal rate of interest, the rate will be the most appropriate bank rate.\(^\text{1010}\)

This formula, although similar to the "joint proposal" raised at the Diplomatic Conference, is distinctly different. The main concern of the socialist and developing nation delegations was that by fixing the rate of interest in the seller’s country, socialist and developing nations who used their foreign export earnings to pay for their imports would be disadvantaged. This occurred since they would normally have to resort to credit on foreign markets well above what they would be compensated for under their own interest rates. UNIDROIT Principle Art. 7.4.9 remedies this concern by fixing the applicable interest at a rate equal to the lending rate prevailing for the currency of payment at the place of payment. Thus, socialist and developing nations, that maintain foreign accounts to pay for their imports and must resort to credit on those markets if a party defaults on the payment of the purchase price, are assured that they will receive adequate protection and an equal return of interest. However, one problem could arise for nations that do not maintain foreign accounts for imports and require payment in their own States. These States would undoubtedly be duly compensated by a rate of interest fixed at the place of payment, i.e., their own State, but Art. 7.4.9 does not guard against a debtor’s purposeful delay in payment so as to obtain cheap credit or accrue extra sums. Thus, if the UNIDROIT Principles are to be applied to fix an interest rate, judges and arbitrators must prevent buyers from taking advantage of such situations. By applying the general principle of “unjust enrichment” in Art. 84 in conjunction with Art. 7.4.9, the aggrieved party would be made whole and the party in bad faith disgorged of all unduly received benefits.\(^\text{1011}\)

In a more general manner, PECL Art. 9:508(1) reads in pertinent part that the applicable rate is "the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due". The rate of interest is fixed by reference to the average commercial bank

\(^{1010}\) See Comment 2 on UPICC Art. 7.4.9.

\(^{1011}\) Supra. note 1.
short-term lending rate. This rate applies also in the case of a long
delay of payment since the creditor at the due date cannot know
how long the debtor will delay payment. Since interest rates differ,
the lending rate for the currency of payment (Art. 7:108) at the due
place of payment (Art. 7:101) has been selected because this is
the best yardstick for assessing the creditor’s loss. Unless other-
wise agreed, interest is to be paid in the same currency and at the
same place as the principal sum. The parties are free to exclude
or modify para. (1) e.g. by fixing the rate of default interest and/or
its currency in their contract.1012

To conclude, it is to be noted that although the issue of applicable
rate under the CISG has been examined very often not only in legal
writing, but in many court decisions and several arbitral awards as
well, it still creates difficulties. The absence of a specific formula
to calculate the rate of interest on sums in arrears has led some
courts as well as several legal writers to consider, as already men-
tioned above, the question of whether the lack of a formula fixing
the rate of interest must be dealt with as a lacuna praeter legem
or as a lacuna intra legem. This had necessarily to lead to diverg-
ing solutions, since under the CISG, the aforementioned kinds of
gaps have to be dealt with differently. In particular, different so-
lutions have been adopted in a number of courts. These different
solutions can mainly be divided into two categories: those favoring
the view that the rate of interest has to be calculated on the basis
of the domestic law; and those holding that the issue de quo must
be resolved by resorting to the “need to promote uniformity in the
application” of the CISG and, thus, to the general principles of the
Convention. On the other hand, it is to be noted that the rates of
statutory interest and the methods of computing them vary consid-
erably. It is therefore recommended that the parties insert in their
contracts a clause that clearly spells out the method for calculating

1012 Supra. note 16.
PART V. EXCUSES
CHAPTER 19. CHANGE OF CIRCUMSTANCES

The term “change of circumstances” is used here to refer collectively to a host of different doctrines, applied nationally and internationally, that deal with changes in the economic, legal and business realities underlying a contractual agreement. On the national level, these doctrines include the American doctrine of commercial impracticability, the German doctrine of wegfall der geschäftsgrundlage, unmöglichkeit, the French doctrines of force majeure and imprévision, the English doctrine of frustration and the Swiss doctrine of impossibility without fault. On the international level, reference can be made to the Vienna Convention of the Law of Treaties of 1969, where article 61 deals with impossibility of performance, and article 62 defines “fundamental change of circumstances” in terms of rebus sic stantibus. Also, a number of international organizations and institutions have attempted to define instances in which the setting aside of a contract is warranted.

19.1 INTRODUCTION

As to be furthered below, it seems that the law has gradually changed from absolute contractual obligations, the strict pacta sunt servanda, towards more flexible attitudes, especially in relation to changed circumstances.

With regard to whether courts should intervene to provide relief or require an adjustment in the obligation of performance of a contract when an unforeseen frustrating event occurs, the Modernist camp urges, albeit on differing theoretical bases, that intervention by courts to fill a gap in the parties’ agreement is required. The occurrence of a contingency or frustrating event that was unforeseeable at the time of contracting creates circumstances that were not within the contemplation of the parties, and therefore performance exceeds the assent induced and given. Consequently, intervention is required. Economic theory and risk sharing based on “fairness” are two prevailing views on the methodology to be employed by the courts in gap-filling.

Generally speaking, this principle of changed circumstances will be a tool providing more equity than the harsh distinction between “possibility” and “impossibility” of performance of an obligation.


1015 See Sarah Howard Jenkins in “Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment”: 72 Tulane Law Review (1998); pp. 2017-2020. Available online at <http://www.cisg.law.pace.edu/cisg/biblio/jenkins.html> See also, Joseph M. Perillo: All contracts involve risks. Some contracts are almost purely aleatory. If one sells shares of stock on the stock exchange that one does not have – the so-called “short sale” – it is a contract of pure risk and I can conceive no circumstance (absent fraud or the like) in which a court should relieve the seller or buyer from a total loss even if unexpected and unforeseeable events disrupted the market. On the other hand, in the more typical contract involving the sale of goods or services, or the rental of real estate, each party expects to gain from the contract and each party understands that the other party also expects to gain. In such contracts, neither party expects to gain from the other’s loss, although both realize that such an imbalance may occur. In the common law, several kinds of events produce an almost automatic excuse for nonperformance: death of a person who is to personally perform, supervening illegality of a performance, and the destruction of the subject matter. When one goes beyond these three categories, relief is most justified if unexpected events inflict a loss on one party and provide a windfall gain for the other or where the excuse would save one party from an unexpected loss while leaving the other party in a position no worse than it would have without the contract. (Infra. note 14, pp. 119-120.)

1016 See Katsumoto, M. in “Kiyo no torihikippaku to jijohenko nogensoku”: NBL No. 55 (1974); p. 9. Impossibility is appropriately seen as an extreme example of changed circumstances.
It is to be noted that not all changes in circumstance may affect the contract. Only changes in circumstances which are known or should have been known by both parties to be an assumption upon which the contract is concluded are relevant. It is only if these circumstances no longer exist that the common Basis for the transaction disappears.\(^{1017}\) Further, an important restriction is to be borne in mind: a change in circumstances will not be taken into account if it occurred during a delay in performance of the person alleging application of the doctrine, this because the principle is based on the “good faith” concept.\(^{1018}\)

At the outset, it is to be clarified that the discussion below will be focused on changed circumstances relating to non-performance rather than invalidity and therefore, for example, initial impossibility will not be studied in this PART.\(^{1019}\) In this chapter, a brief review is firstly made upon the doctrine underlying the principle of changed circumstances, i.e. \textit{rebus sic stantibus}. Once this doctrine is examined generally, different approaches to changes of circumstances, nationally or internationally, are to be outlined briefly. Then the two major legal concepts, i.e. \textit{force majeure} and hardship which are exceptions to the basic rule \textit{pacta sunt servanda}, dealing with the problem of changed circumstances are to be considered on a general and theoretical basis. Finally, a particular regard will be had to the rights or relieves concerning changed circumstances established under the studied international instruments, namely the \textit{CISG, UPICC} and \textit{PECL}.

19.2 UNDERLYING DOCTRINE; \textit{REBUS SIC STANTIBUS}

Generally speaking, international commercial contracts impose legally binding obligations and a non-performing party is liable for damages. A basic and it seems universally accepted principle of contract law is “\textit{pacta sunt servanda}”. This principle means that each party to an agreement is responsible for its non-execution, even if the cause of the failure is beyond his power and was not or could not be foreseen at the time of signing the agreement.\(^{1020}\) It reflects natural justice and economic requirements because it binds a person to its promises and protects the interests of the promisee. Since effective economic activity is not possible without reliable promises, the importance of this principle has to be underlined.\(^{1021}\)

The sanctity of contract is, understandably, a paramount feature under the \textit{CISG}, rather than non-performance issue.\(^{1022}\)


\(^{1019}\) Several classifications of impossibility have been introduced in the literature. Their value would seem to be in distinguishing different kinds of situations from another where the legal consequences of impossibility should be different. Often a distinction has been made between initial (pre-existing, original) and subsequent (intervening) impossibility. Initial impossibility refers to a situation where performance has been impossible already at the moment the contract was concluded, whereas subsequent impossibility refers to situations where performance was initially possible but became impossible after the conclusion of the contract. The division of impossibility into initial and subsequent seems to be useful since different kinds of solutions have been introduced to manage some of these situations. Initial impossibility may, for example, lead to the use of rules related to mistake or perhaps fraud and subsequent impossibility to the rules on frustration. (Supra. note 2.) Both the \textit{UNIDROIT Principles} and the European Principles deal with such initial impossibility, respectively in Arts. 3.3 and 4:102, but such initial impossibility seems to be more appropriately related to the invalidity of contract caused by the defects of content, which is not covered

\(^{1020}\) Supra. note 6, p. 47.

of the law of contract. As a matter of principle, parties must adhere to the terms of their contract: “It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule pacta sunt servanda is the basis of every contractual relationship.”

No doubt international arbitrators stick, in principle, to pacta. Moreover, Pacta sunt servanda is considered a cornerstone of the lex mercatoria. However, practice has demonstrated that on many occasions this principle may lead to the opposite of its aim. That is to say, the situation existing at the conclusion of the contract may subsequently have changed so completely that the parties, acting as reasonable persons, would not have made the contract, or would have made it differently, had they known what was going to happen. As an exception, therefore, the obligation to perform may be excused if extraordinary circumstances render performance literally or virtually impossible. It is the application of the doctrine of changed circumstances or so-called (clausula) rebus sic stantibus

One trend of thought about the foundations of these excuses stems from one of the principal underpinnings of contractual obligations. Contract liability stems from consent. If an event occurs that is totally outside the contemplation of the parties and the event drastically shifts the nature of foreseen contractual risks, is there truly consent? Under this line of thinking, one can infer that the parties did not intend that performance would have to be rendered if an unexpected event would create a radical change in the nature of performance. If this inference is sound, one can conclude that the contract did not cover the unexpected event that has occurred. Under this reasoning, the court must then supply a term to cover an omitted case. Thus viewed, relief for impossibility or hardship does not interfere with freedom of contract. Therefore, not only lots of judicial or arbitral awards but also the majority of modern writers accept the doctrine of rebus sic stantibus, which “involves the implication of a term that the obligations of an agreement would end [or be adjusted] if there has been a change of circumstances.”

a simple structure where non-performances are exchanged for money. In international trade, however, many contracts are of a more complicated structure, and even if they are not long-term contracts, they frequently exist over a substantive period. International trade transactions generally imply a greater element of uncertainty because they are subject to political and economic influences in foreign countries. (See Horn in “Die Anpassung langfristiger Verträge im internationalen Wirtschaftsverkehr”: kotz 9, v. Bieberstein ed. (1984).)


See Brownlie, Ian, Principles of Public International Law, 4th ed., Oxford (1990); p. 620. TLDB Document ID: 100900. It is to be mentioned that some
An important aspect of the doctrine is that it focuses upon changes that would contradict the “parties’ shared expectations” and thereby “defeat their apparent objectives”. The main issue here is the choice to be made between the strict application of *pacta sunt servanda* or so-called “sanctity of contracts” and the possible application of the (clausula) *rebus sic stantibus*. In this respect, Goldman believes that *pacta sunt servanda* simply means that contracts which have legally come into existence and continue to be in force, must be observed. It means the inviolability, not unchangeability of contracts.

Nonetheless, there are some who seem to believe that the application of the doctrine (clausula) *rebus sic stantibus* (a contract is binding only as long and as far as (literally) matters remain the same as they were at the time of conclusion of the contract), if broadly interpreted, can be used to erode the binding nature of contractual promises very substantially. Therefore, the principle “Rebus sic stantibus” is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the “concept” of changed circumstances as an excuse for nonperformance, they will doubtless agree on the necessity to limit the application of the so-called “doctrine rebus sic stantibus” (sometimes referred to as “frustration”, “force majeure”, “imprévision”, and the like) to cases where compelling reasons justify it, having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case. As a general rule, one should be particularly reluctant to accept it when there is no gap or lacuna in the contract and when the intent of the parties has been clearly expressed. Caution is especially called for, moreover, in international transactions where it is generally much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely. For example, the parties to a contract may agree that *force majeure* will have certain specific consequences for their contractual performance or with respect to termination of the contract. They also can decide that their contractual obligations, or some of them, will not be affected by *force majeure*. It is clear, however, that a limitation on the right to invoke *force majeure* as an excuse for non-performance cannot be presumed, but requires instead an express contractual provision to that effect.

19.3 DIFFERENT APPROACHES TO CHANGED CIRCUMSTANCES

19.3.1 Historical Review

Historically, the concept *clausula rebus sic stantibus* was recog...
nized in international law and found its way into eighteenth century codifications of private law, but was subsequently criticized because of its vagueness and lack of certainty; not surprisingly, therefore, the clausula doctrine fell into oblivion in the late 18th and the 19th centuries: the heyday of “classical” contractual doctrine when freedom of contract, economic liberalism and certainty of law reigned supreme. Nineteenth century liberalism, which accorded absolute priority to party autonomy and thus to the literal contents of a contract, either set aside the clausula rebus concept or sharply reduced its influence in most civil law countries. The rule that the will of the parties as freely expressed in their contract is the law of the parties and must not be changed by the courts, became the leading principle of contract law. The clausula rebus sic stantibus principle survived mainly in public international law (the law of nations).

In our times, a backswing in legal thinking can be observed under the influence of the ideas of good faith and equity, contract law abandoned the doctrine of absolute obligations and legal systems started to provide for the discharge of one or both parties when a contract becomes impossible to perform. The results of this backswing differ, however, from country to country. In many systems this was achieved by referring to the concept of force majeure, in England by the doctrine of frustration. In the twentieth century a number of new theories emerged, for example imprévision, frustration of the common venture, impracticability and Wegfall der Geschäftsgrundlage. These extended the existing doctrines beyond the sphere of absolute impossibility to situations where unexpected changes in circumstances made performance far more expensive than anticipated. In some legal systems, like the French, such situations produce no effect. In other systems, like the English, it may be synonymous with impossibility, while in some, like the German or American, it may allow the court to adjust the contract.

Thus, the modern trend is to recognize the established doctrines of impossibility of performance and frustration of the venture and to add to it a doctrine of excessive hardship, where, because of changed circumstances, a contract has become excessively burdensome on one of the parties, the party subjected to that burden may request a discharge of the contract, or, alternatively, its modification to reflect an exchange of values in accordance with market values at the time of the changed circumstances.

19.3.2 National Doctrines

Arguably, under a variety of names, most, if not all, legal systems recognize changed circumstances as an excuse for contractual non-performance. In this respect, it should be observed that national concepts, when applied in the international arena, are modified to suit the needs of international transacting. It therefore, makes little sense to detail the different national practices in this respect. However, in order not to get confused and to dig out - perhaps - some common ground in this difficult area of basic problems of contract law, a brief comparison of these concepts is useful to help one understand the prevailing international definition of change of circumstances. For a full picture, however, the following review will focus on the remedial structure rather than individual provisions of different domestic legal systems.
In general, national legal systems contain a rule that changed circumstances may affect the binding force of a contract. This possibility is known under the maxim rebus sic stantibus: the contract remains binding “provided that things remain as they are”. However, the concept that a party’s contractual obligations can be excused because of changes in surrounding circumstances takes a different form in each national legal system. For instance, frustration under the common law is not the equivalent of force majeure or Unmöglichkeit nor is force majeure Unmöglichkeit in civil law; even force majeure under Belgian law is not force majeure under French law. As stated by Rimke: “The approach of municipal legal systems to the problem of changed circumstances varies from country to country. Although all these concepts are related to each other, since they share important features, the distinction between them is extremely important in drafting choice of law clauses in international contracts.”

In American law, section 2-615 of the UCC excuses contractual performance when presupposed conditions upon which the contract is based have not been met. Also, section 268 (2) of the Restatement (Second) of Contracts deals with the same contingency. Both provisions have departed from the old common law rule of impossibility and have adopted the new test of commercial impracticability. This test evolved from an “all-or-nothing remedy” to a “loss-sharing doctrine”. Thus, excuse or partial relief is awarded if the occurrence of a certain contingency has made the performance of a commercial contract impracticable, i.e., unnecessarily burdensome, unprofitable or unfair to one of its parties. The rationale behind this rule is that no one in the business world is expected to work for free, and parties should not be encouraged to take advantage unjustifiably of the misfortunes of their partners; otherwise, the general stability of the institution of contracting would be threatened. It was, thus, thought far better to introduce the “flexible adjustment machinery” of UCC section 2-615 and Restatement section 268 (2), instead of the common law test of impossibility.1038

In English law, the doctrine of “frustration of purpose” excuses performance when the circumstances have changed so much that the performance required by the contract is radically different from that which was initially undertaken by the parties.1039 However, though less far-reaching or more strictly than its American counterpart, this common law practice on the other side of the Atlantic is not substantially different from that of American courts. More recently, English judges have been generally reluctant to find that a particular contract has been frustrated.1040 English courts have shown a willingness to imply in all contracts a condition to the effect that if the performance of a contract becomes physically or legally impossible, or if possible only in a very different manner from that originally contemplated, then the contract is dischargeable. The frustrating circumstances, however, must have arisen without the fault of either party. Frustration of the contract may be brought on by a variety of situations, including, for example, physical destruction of the subject matter of the contract, or subsequent legal changes, provided the contingency was not within the parties’ contemplations. However, mere hardship is not sufficient under English common law to discharge, or even partially discharge, performance. Also, frustration affecting only part of the contract is subject to


1038 Supra. note 1, pp. 194-195.
1039 Supra. note 5, p. 113.
to the normal conditions of frustration, and only arises in connection with severable contracts or where the supervening event is temporary.\textsuperscript{1041}

In German law, the theory of \textit{Wegfall der Geschäftsgrundlage} (disappearance of the Basis of the transaction) covers the effect of changed circumstances on the contract. It ensues from German court practice and “unmöglichkeit”, as embodied in Art. 275 of the German Civil Code (BGB), and provides relief for cases where the original economic basis of the contract has changed. When the circumstances have unforeseeably and substantially changed, the foundations of the transaction have been destroyed and the parties are no longer bound to their original contractual commitments. Requesting the original performance of the contract would constitute bad faith (Art. 242 BGB requires that the contract be performed in good faith.). The \textit{Wegfall der Geschäftsgrundlage} was quite easily applied in the years of galloping inflation after both World Wars. However, it has been less easily accepted with regard to commercial contracts concluded between businessmen. At present \textit{Wegfall der Geschäftsgrundlage} is applied rather restrictively.\textsuperscript{1042}

\textit{French contract law} does not provide relief for changed circumstances which make contract performance more onerous but not impossible. The often quoted French doctrine of \textit{imprévision} is only applied by French administrative courts to contracts concluded with public entities. In commercial contracts, the agreed contract price is not affected by increased costs or currency depreciation.\textsuperscript{1043} The doctrine of \textit{imprévision} is developed by the \textit{Conseil d’Etat} in connection with contracts involving public services, derived from state practice and based only indirectly on Art. 1134 of the French Civil Code (good faith).\textsuperscript{1044} The \textit{Swiss law of contract} has much in common with the French law. In addition to drawing on parallel sources, they also provide for very similar solutions. The Swiss Federal Tribunal has admitted that some long-term contracts may be terminated because of an unforeseeable and fundamental change of circumstances on the basis of Art. 2 of the Code civil (good faith). Only changes which would unjustly enrich one of the parties give rise to such relief. \textit{Rebus sic stantibus}, however, has to be applied restrictively.\textsuperscript{1045}

The impossibility and foreseeability elements of the frustration doctrine make up the core of the French \textit{force majeure} and Swiss \textit{impossibility} doctrines. The French and Swiss doctrines are based on only a few statutory provisions. Both systems enjoy a wealth of court practice from which the details of the doctrines of \textit{force majeure} and \textit{impossibility} are drawn. Both permit excusing contractual obligations only in cases of impossibility, unless there is a contractual clause to the contrary. Mere hardship is not sufficient to excuse performance. In addition to demonstrating that performance was rendered impossible, one must show that the occurrence of a \textit{force majeure} event was unforeseen and not a result of either party’s fault. Also, the unforeseen event must have been unavoidable in the sense that the party seeking an excusal of performance could not have prevented it. The harshness of this rule is not as severe as it appears, for it is applied in light of the good faith and equity requirements encompassed in Art. 1134 of the French Civil Code and Art. 2 of the Swiss Civil Code. In fact, international tribunals have awarded relief in cases where the facts far from demonstrated impossibility of performance. This also seems to be the position adopted by the national courts of both states. This brings the definition of \textit{force majeure} or impossibility very near, if not identical, to that articulated in the doctrines of \textit{imprévision} and \textit{wegfall der geschäftsgrundlage}.\textsuperscript{1046}

\textsuperscript{1041} Supra. note 1, p. 196.  
\textsuperscript{1042} Supra. note 27.  
\textsuperscript{1043} Supra. note 5, p. 114.  
\textsuperscript{1044} Supra. note 1, p. 198.  
\textsuperscript{1045} Supra. note 27.  
\textsuperscript{1046} Supra. note 1, pp. 196-197.
Among other systems, in Italian law, Art. 1467 of the *Codice civile* provides relief when the performance of one party has become excessively onerous as a consequence of extraordinary and unforeseeable events and when the party has not assumed the risk for such changes. In Dutch law, Art. 6.5.3.11 of the *Nieuw Burgerlijk Wetboek* (New Civil Code) provides for the adaptation of the contract when circumstances have unforeseeably and substantially changed. However, the *travaux préparatoires* show that this possibility is exceptional and has to be applied with much restraint. Japanese law has a theory of changed circumstances, but applies it quite restrictively. Under Belgian law, even under Belgian administrative law, no general theory of *imprévision* is recognized.\(^{1047}\)

To sum up, different legal concepts deal with the doctrine of changed circumstances and provide for the discharge of the duty to perform of one or both parties when a contract has become unexpectedly onerous or impossible to perform. This principle is considered by some commentators to be a sort of contrariety to *pacta sunt servanda* but is really in healthy tension, an attenuation, covering all of the substantial varieties among different national systems of excuse concepts or varieties of relief from an unjust application of *pacta sunt servanda*. Lumping together related but not identical concepts, this includes impossibility, *imprévision*, frustration, *Wegfall der Geschäftsgrundlage* and *force majeure*.\(^{1048}\) However, it is to be noted that in most laws overlapping legal concepts can be found; for instance, English “frustration” and American “impracticability” contain elements of both impossibility and hardship. Nonetheless, the classic concept of *force majeure* is primarily directed at settling the problems resulting from non-performance, either by suspension or by termi-

\(^{1047}\) Supra. note 31.


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19.3.3 International Perspective

19.3.3.1 Public international law

A comparative look at public international law (the law of nations) is justified by the experience that general problems of contract law are more or less the same in private law and public international law. It is said that the assimilation of international contracts to which states are Parties to treaties is a technique resorted to in many texts.\(^{1050}\)

Under the law of treaties, the question of changed circumstances is quite settled, and the Vienna Convention on the Law of Treaties of 1969 (hereinafter in this Chapter “Vienna Convention”), under Arts. 61 and 62, recognizes two instances where performance can be excused because of extraneous events. Art. 61 deals with situations in which performance has become impossible because the object of the treaty is unavailable. The “unavailability of the object of a treaty” has been widely defined to include instances other than physical destruction. Accordingly, impossibility of performance has extended beyond cases of material impossibility to include those involving legal impossibility. In either case, the impossibility must to be absolute; otherwise, performance is not excused, but merely suspended. Art. 62 provides for instances where, due to a fundamental change in the circumstances in which a treaty was concluded, the parties’ obligations have become radically transformed. Such a change warrants withdrawing, terminating or suspending a treaty, and, in some cases, it may also be a sufficient ground for

\(^{1049}\) Supra. note 25, pp. 197-198.

the party disadvantaged by the change to request a revision of the original contract. There is a consensus among jurists that the doctrine of fundamental change of circumstances, kept within defined limits, embodies a general principle of law.\footnote{Supra. note 1, p. 200. The International Court of Justice has, on several occasions, examined the principle of fundamental change of circumstances, but has never outlined its exact scope and definition. In the Free Zones of Upper Savoy and the District of Gex, as well as the Fisheries Jurisdiction Case, the Court recognized the existence of the doctrine of rebus sic stantibus in principle, but held that it did not apply to the facts at hand.} However, it is carefully worded in the Vienna Convention so as not to encourage the over-use of the principle and thus to avoid uncertainties as to the sanctity of international treaties: The wording of Art. 62 demonstrates the exceptional character of rebus sic stantibus. It is subordinate to the more general principle of pacta sunt servanda, as set out in Art. 26 of the Vienna Convention. The change in circumstance has to be fundamental. It has to jeopardize the survival of the State. Simple loss of economic gain or currency reforms are insufficient. As the International Court stated in the Fisheries Jurisdiction case, the changes must be vital: they have to “imperil the existence or vital development of one of the parties”. Moreover, the change in circumstances has to be unforeseeable.\footnote{Supra. note 5, p. 107.}

It is to be noted that the Vienna Convention is applicable only to treaties between sovereign states on a political level. It is not applicable to contracts between private parties or to contracts with an international institution such as the World Bank. However, several articles of the convention provide a principle for treaty obligations capable of application to private contracts. Several arbitral decisions have cited the principle pacta sunt servanda as a basic principle of international law, often using the Vienna Convention for support.\footnote{Supra. note 1, p. 200. However, the advocates of this view almost always ignore the competing doctrine of international law which implies a clausula rebus sic stantibus in every treaty, making the treaty binding only in situations where the original conditions under which the treaty was made continue to exist.\footnote{Supra. note 38.} Nonetheless, Horn believes that “article 62 [of the Vienna Convention] is a strong argument for the existence of a general legal principle which might also be relevant to transnational contracts with or between private parties.”\footnote{Supra. note 22, p. 25.} The Iran-US Claims Tribunal also on the basis, among other things, of Art. 62 of the Vienna Convention rules: The concept of changed circumstances, also referred to as rebus sic stantibus, has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law; it has also found a widely recognized expression in Art. 62 of the Vienna Convention.\footnote{See Iran-US Claims Tribunal, Questech Inc. v. Iran, 9 IRAN-U.S. C.T.R. 9 - 122, TLDB Document ID: 231400.}

\subsection*{19.3.3.2 International commercial practice}

Does international practice, particularly international commercial arbitration, recognize the effects of changed circumstances on the performance of contracts? It is said that international commercial practice, whether emanating from the Iran-U.S. Claims Tribunal or other arbitral tribunals, regards rebus sic stantibus (sometimes referred to as “frustration”, “force majeure”, “imprévision”, and the like) as a general principle of law.\footnote{See Rivkin, David R. in “Lex Mercatoria and Force majeure”: Gaillard ed., Transnational Rules in International Commercial Arbitration, ICC Publ Nr. 480,4, Paris (1993); p. 165. TLDB Document ID: 116100.}
On more than one occasion, it is held that under a variety of names, most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law. The assertion is limited, however. Tribunals have adopted a reservation that the rebus sic stantibus doctrine, though general in the sense that it is applicable regardless of a clause to the effect, still should be regarded as an exception to the sanctity rule. Acting accordingly, tribunals have required parties to plead and prove the condition of rebus sic stantibus. In addition to pleading and proving force majeure, a party invoking it must have notified his contractual partner of the existence of the disruptive event and his intention to terminate or suspend the contractual relationship because of it. In a word, force majeure conditions have to be pleaded, proved, communicated to the other party and narrowly interpreted. Further, questions relating to force majeure are considered ones of fact, and, thus, their legal effects very much depend on the circumstances of each case.

Tribunals accepting the above definition of the scope and role of rebus sic stantibus are inclined to confine the application of the doctrine to its narrowest possible boundaries. This is particularly evident in tribunals’ allocations of losses ensuing from the occurrence of a force majeure. Even if performance is excused, arbitrators refrain, in general, from equitably allocating the ensuing losses. The rule is to let the loss lie where it falls, regardless of the equities of the situation. By contrast, other awards articulating a more liberal approach tend to attach to rebus sic stantibus a broader scope, and are more inclined to adapt the parties’ relationship to the new status quo that resulted from the force majeure conditions. Thus, the loss does not have to lie where it falls, but is equitably allocated. Each of these two approaches is the product of either the classical or modern contractual models. At this juncture, it should be mentioned that any excuse or suspension of contractual performance because of changed circumstances is, in principle, a departure from the strict application of the classical theory. Nonetheless, modern classical theorists do not adhere to such a strict model, which has been greatly modified to allow for more flexibility towards modern needs of contracting.

Finally, it should be noted that in practice, although “force majeure”, “rebus sic stantibus”, “frustration” and “changed circumstances” or the like are terms of frequent usage in international arbitral awards, arbitrators do not attach to these terms the same definitions as those articulated in national jurisdictions. A study of international arbitral awards will demonstrate how international tribunals have amalgamated these different national doctrines into what is generally referred to as changed circumstances, or so-called rebus sic stantibus. At the most, it can be claimed that a broad distinction is maintained between, on the one hand, absolute impossibility and, on the other hand, all the other above-stated doctrines that denote a change in the context in which the parties’ agreement was concluded.

19.3.4 Conclusion

As in municipal systems, so in international law, public or private, it is recognized that the doctrine of changed circumstances, also referred to as rebus sic stantibus (sometimes referred to as “frustration”, “force majeure”, “imprévision”, hardship and the like) may justify the non-performing party’s right to termination or adaptation of the contract. Although the various approaches contain very different responses, the doctrine of changed circumstances may be

systems and of certain differences in its practical application, it would not be easy to establish a common core of such a General principle of law. (Supra. note 44)  
1058 Supra. note 20.  
1059 Supra. note 1, pp. 201-203.  
1060 Supra. note 1, p. 203.
regarded as a general principle of law. Thus, if a change in the circumstances surrounding an international commercial contract occurs, a party to that contract seeking relief from contractual liability with a modification or termination of the contract, in the absence of any contractual provision on such issues, may have recourse to the objective norms of the law, national or international, applicable to the contract.

19.4 DEFINITIONS OF force majeure AND HARDSHIP

Generally, changes in circumstances may have two different effects on a contract: they can render the contractual performance either impossible or (only) more burdensome for a party so as to create a “hardship” for it.¹⁰⁶¹ This leads us to the important and crucial question as to the concepts of hardship and force majeure. However, a clear distinction of the meaning of both terms in commercial practice is not always easy. There are indeed borderline cases, which cannot be labelled as falling in one or the other basket exclusively. Practitioners of international arbitration will also agree that there is a great confusion as to the use of these two terms. Even in important international contracts, they are often inserted as synonyms.¹⁰⁶² Nonetheless, the following paragraphs attempt to review the two concepts on a general and theoretical basis.

19.4.1 Force Majeure

The concept of force majeure, providing for the discharge of one or both parties when a contract has become impossible to perform, “has evolved progressively in international trade practice by assuming many original and autonomous features distinct from similar legal concepts.”¹⁰⁶³ It is said that the roots of force majeure are in the Roman concept of vis maior, which serves as a limit to liability not based on fault.¹⁰⁶⁴ Others submit that the roots of the classic concept lie in the Code Napoléon, from which the words force majeure (an irresistible compulsion or coercion) are taken.¹⁰⁶⁵

The term force majeure does not have an authoritative definition. As outlined above, the approach of municipal legal systems to situations of force majeure varies from country to country. In the practice of the European Court of Justice, force majeure has been defined to be an event unusual, unforeseeable and beyond the trader’s control, the consequences of which could not have been avoided even if all due care had been exercised.¹⁰⁶⁶ On the other hand, the Court has emphasized that the concept of force majeure differs in content in different areas of law and in its various spheres of application and that the precise meaning of the concept therefore has to be decided by reference to the legal context in which it is intended to operate.¹⁰⁶⁷

Generally, the term may be used as a general term referring to some kind of event that serves as a basis for an exemption from liability, and therefore certain general characteristics of the conception of force majeure can be determined: “The legal elements for the qualification of an event as force majeure (vis maior, act of God, etc.) are essentially the same in most legislations, and court decisions show a universal trend to a comparable restrictive

¹⁰⁶¹ Supra. note 22.
¹⁰⁶⁴ Supra. note 2.
¹⁰⁶⁵ See, e.g., The Oxford Companion to Law (1980); p. 478; see also James Stroud’s Judiciational Dictionary II (1986); p. 1008.
¹⁰⁶⁷ See e.g., Case 158-73, ECR (1974) 101; Case 4-68, ECR (1968) 549.
interpretation. These elements are (i) that the event is of an external nature, (ii) that it could not be foreseen or prevented and (iii) that it renders performance of a contractual obligation impossible at all or for a certain time.\textsuperscript{1068} This is confirmed by Art. 7.1.7 of the\textit{UNIDROIT Principles} where, under the headline of “force majeure”, it is stated that a party’s non-performance is excused if that party proves that the non-performance was due to an impediment beyond its control, and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome the impediment or its consequences.

In most cases the term \textit{force majeure} refers to an external event that is unforeseeable and irresistible which makes the performance of the contract at least practically impossible. If we accept this definition we can also say that the relation of impossibility to \textit{force majeure} is that \textit{force majeure} can be defined as qualified impossibility: it is impossibility restricted by the type of cause and foreseeability.\textsuperscript{1069} In more general terms, it can be said that \textit{force majeure} occurs when the performance of a contract is impossible due to unforeseeable events beyond the control of the parties.\textsuperscript{1070}

\subsection*{19.4.2 Hardship}

As discussed above, \textit{force majeure}, which is aimed to settle the problems resulting from non-performance either by suspension or termination, is a fundamental change in the circumstances beyond the control of the parties that affects the existing contractual obligations and is ground for relief from some or all contractual duties.

But in many cases where either or both parties maintain an economic interest in continued contractual cooperation as is typical for long-term contracts interrupted halfway in their execution, there is a sort of consensus that other solutions must be found. Such solutions are usually found in the context of “hardship clauses”, which are frequently introduced into contracts in international trade.

Hardship can be understood as a situation, which does not quite amount to being a \textit{force majeure}. It means that the performance of a contract has become more onerous for the performing party. A typical example of hardship would be a steep rise in the prices of raw materials after the conclusion of the contract.\textsuperscript{1071} Although most modern legislations have rules to cope with such hardship situations (which roughly fall under the so-called \textit{clausula rebus sic stantibus}), accepted solutions by national laws as well as court decisions and legal doctrine show a remarkable degree of variation. Nonetheless, the circumstances in which hardship generally exists (as usually set out in hardship clauses) normally incorporate three elements. First, the circumstances must have arisen beyond the control of either party; self-induced hardship is irrelevant. Second, they must be of fundamental character. Third, they must be entirely uncontrolled and unforeseeable.\textsuperscript{1072}

A clear descriptive definition of hardship is contained in Art. 6.2.2 of the\textit{UNIDROIT Principles}. This article defines hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements laid down therein.\textsuperscript{1073} According to this definition, hardship can also occur in situations where the value of what the performing party is to receive in return for his performance has diminished.

\textsuperscript{1068}Supra. note 50.
\textsuperscript{1069}Supra. note 2.
\textsuperscript{1070}See Wouter Den Haerynck in “Drafting Hardship Clauses in International Contracts”: Structuring International Contracts, Dennis Campbell ed. (1996); pp. 231-232.

\textsuperscript{1071}Supra. note 2.
\textsuperscript{1073}See Comment 1 on Art. 6.2.2 \textit{UPICC}. 
whether or not this has affected his ability to perform. This definition of hardship would seem to include *force majeure* (qualified impossibility) and some cases of impossibility outside *force majeure* as well as other types of events that fundamentally affect the balance of the contract. Impossibility of performance is not necessarily required and there is no reference to not being able to avoid or overcome the situation.1074 The concept of hardship contained in the UNIDROIT Principles intends to solve problems of such fundamentally altered circumstances by adapting the contract to the new situation. It appears justifiable to speak today, with respect to complex long-term contracts, of a duty on the parties, to renegotiate in good faith on the needed adjustment.1075

19.4.3 Comparison

1193 The concepts of hardship and *force majeure* seem to be related to each other, particularly since they share some features: they both cater to situations of changed circumstances. The concepts of hardship and *force majeure* constitute exceptions to the principle *pacta sunt servanda*; they apply in situations where the circumstances existing at the conclusion of the contract have subsequently changed so drastically that the parties would not have made the contract, or would have made it differently had they known what was going to happen. This impression is intensified by the fact that contractual hardship clauses on the one hand and *force majeure* clauses on the other hand have developed a certain parallelism. To some extent, the concepts of *force majeure* and hardship overlap.

1194 Nevertheless, these conceptions also differ from each other and no specific overall trend may be traced.1076 They are implemented in different ways. The difference between the two concepts is most aptly described in such a way: hardship is at stake where the performance of the disadvantaged party has become much more burdensome, but not impossible, while *force majeure* means that the performance has become impossible for the party concerned, at least temporarily. Moreover, there seems to be a functional difference between the two concepts. Hardship constitutes a reason for a change in the contractual program of the parties and has a deeper influence on the implementation of the contract than normal variants which come up in this process, however hardship is nevertheless related to the fulfillment of the contract. The aim of the parties remains to implement the contract. *Force majeure*, however, is situated in the context of non-performance, and deals with the suspension or termination of the contract.1077 In other words, hardship occurs where the performance of the disadvantaged party has become much more burdensome, but not impossible. On the other hand, *force majeure*, means that the performance of the party concerned has, at least temporarily, become impossible. The classical concept of *force majeure* is primarily directed at settling the problems resulting from non-performance, either by suspension or by termination. The concept of hardship, however, is mainly directed at the adaptation of the contract.1078

The comparison of *force majeure* and hardship stated above may give a primary insight into the structure and functioning of these concepts in general. With the international contractual practice, measures oriented towards uniform general concepts of *force majeure* and hardship have been developed. In order to understand the two major concepts, a particular regard will be had below to the deliberations on *force majeure* and hardship in the three studied instruments, which are useful for the interpretation of *force majeure* or hardship clauses and even relevant to tackling contracts affected

1074 Supra. note 2.
1075 Supra. note 22, p. 27.
1076 Supra. note 25, p. 242.
1077 Supra. note 9, pp. 663-664; see also supra. note 24, pp. 201-202.
1078 Supra. note 64.
by changed circumstances in the absence of such clauses.

19.5 GENERAL APPROACHES IN THE STUDIED INSTRUMENTS

The doctrine of changed circumstances has found a widely recognized expression in the CISG, UNIDROIT Principles and PECL, inspired by public international law and international commercial practice. They combine the different domestic rules and compromise between various approaches. However, the relevant circumstances and their consequences concerning the two major concepts vary to some extent under the three international instruments. In the following, a brief review will be made, and more details on the relevant provisions will be found in Chapters 20 and 21.

19.5.1 Approach under the CISG

Under the CISG, Art. 79 deals with the circumstances in which the buyer or seller may be excused from performance of his contractual obligations because of an extraneous event that is judged sufficiently important to warrant the excuse—what in the common law is referred to as frustration of the contract and in civilian legal systems under such headings as force majeure, cause étrangère, and Wegfall der Geschäftsgrundlage. The Article is probably one of the most difficult in the whole convention for several reasons.

Given the complexities it is focused here mainly on some of the more salient features of Art. 79.

Art. 79 is a compromise between the civil law doctrine, which bases impossibility on the lack of fault of the obligor and bars on award of damages, and the common law approach, which views impossibility as an exception from absolute liability and therefore terminates the contract. Like the ULIS, the CISG in general, and its force majeure provision in particular, have been widely criticized as linguistic compromises lacking in substance. It has been suggested that “the outcome of a dispute governed by this CISG Provision may ultimately turn on whether a court chooses to emphasize the common law or civil law” view, or that of the other legal systems throughout the world. The provision’s malleability may undercut its ability to guide the international business person. Nevertheless, its existence demonstrates the universally held view that in certain circumstances, at least, a force majeure event should excuse the non-performance.

It is said that the CISG addresses the changed circumstances issue in Art. 79 in an attempt to create uniformity and tackle the problem of changed circumstances on an international level. Therefore, the solutions adopted in CISG Art. 79 do not follow any of the national laws as such. It does not use the terms force majeure, frustration or the like, and it forms a system of its own autonomic from the national systems. In other words, the CISG avoids reference to existing concepts as it develops a system of its own. However, this concept does not solve the problem entirely. It is likely that Art. 79 will be the Convention’s least successful provision. The most discussed problem in the context of Art. 79 is whether radically changed circumstances (hardship), where the performance of one of the parties has become much more onerous and difficult, but not impossible, falls within the scope of this provision. Because of Art. 79’s vagueness, however, it cannot be determined with sufficient certainty how this issue can be decided on the basis of the CISG. The adaptation of the contract by the judge is, moreover, not ex-
pressly allowed by the Convention, and must therefore be regarded as impossible. For these reasons, contracting parties are urged to include in their contracts a provision dealing with the matter of changed circumstances in the manner desired by the parties.\footnote{Supra. note 25, pp. 242-243.}

In this respect, the UNIDROIT Principles and the PECL serve once again as a supplementary source of CISG's interpretation and application.

\subsection*{19.5.2 Approach under the UNIDROIT Principles}

Generally speaking, the Convention limits exemption to impossibility of performance. Greater leeway and flexibility of exemption and remedial rights are granted in the UNIDROIT Principles. Under the UNIDROIT Principles, hardship is dealt with through Arts. 6.2.1 to 6.2.3. Art. 6.2.1 establishes the principle of \textit{pacta sunt servanda} as the main rule to be followed. Art. 6.2.2 then defines hardship and 6.2.3 provides for the effects of it. Where the equilibrium of the contract has been fundamentally altered, the disadvantaged party is entitled to request renegotiations. Where such negotiations fail to lead to an agreement within a reasonable time either party may resort to the court, which may, if reasonable, terminate the contract or adapt it with a view to restoring its equilibrium. It should be noted that hardship does not automatically lead to an exemption from performance. The disadvantaged party is still under obligation to perform even if renegotiations have commenced. Only an agreement or a court order may release the party from this obligation.

Art. 7.1.7 concerns \textit{force majeure} situations. According to Art. 7.1.1, the term non-performance refers to a failure by a party to perform any of its obligations under the contract, including defective performance or late performance. Art. 7.1.7 thereby applies to all such events. According to the Official Comment, this article concerns the area covered in common law systems by doctrines of frustration or impossibility and in civil law systems by doctrines such as \textit{force majeure}, \textit{Unmöglichkeit}, and the like, but it is identical with none of these doctrines. The term "force majeure" was chosen because it is widely known in international trade practice, as confirmed by the inclusion in many international contracts of so-called "force majeure" clauses.\footnote{See Comment 1 on Art. 7.1.7 UPICC.}

Further, Art. 7.2.2 provides for grounds of exemption in cases of non-performance of non-monetary obligations.\footnote{Paras. (a) and (b) of UPICC Art. 7.2.2 deal with impossibility and unreasonable burden respectively. Para. (c) requires that the obligee has a legitimate interest to demand performance. This rule could be seen as an expression of the principle of good faith or loyalty. It can also be seen to be directed towards a fair choice of remedies: where performance may reasonably be obtained elsewhere, the obligor's liability in damages is adequate to protect the obligee's interests. Para. (d) can be understood in conjunction with the laws, principles and international treaties on human rights: in many countries a person cannot be forced to work involuntarily. By contrast, Art. 7.2.1, which gives the obligee the right to require payment, does not contain any such grounds, so the party may only be exempted under the \textit{force majeure} rule. (For more details in this regard, see the discussion in Chapter 3.)} If the less strict criteria of Art. 7.2.2 are met, the obligor is exempt from performing specifically, but he may still be liable in damages if he cannot prove an impediment in accordance with 7.1.7.

In view of the respective definitions of hardship and \textit{force majeure} under the UNIDROIT Principles there may be factual situations which can at the same time be considered as cases of hardship and of \textit{force majeure}. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes \textit{force majeure}, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on
19.5.3 Approach under the PECL

Under the PECL, Art. 6:111 addresses the issue of a change of circumstances. Southerington submits in this respect: “Article 6.111 can clearly be classified as a hardship type of rule. It bears resemblance to the Article 6.2.2 of the UNIDROIT Principles. There is no express requirement for a fundamental disturbance of balance though, but a reference to excessive onerousness. However, this difference may be superficial. The commentary to this Article explains that the contract has to be completely overturned by events. Another difference is that the change of circumstances has to have occurred after the conclusion of the contract. Furthermore, 6.111 does not state whether or not the obligor is still under a duty to perform. The most interesting difference perhaps is the rule in 6.111(3)(c) which gives the court the power to award damages to compensate losses caused by the other party’s refusal to negotiate or his breaking off negotiations contrary to good faith and fair dealing. It should be noted that both of the parties are under the duty to negotiate in good faith, the purpose of the provision is to allow the contractual relationship to continue, not for example to give the party suffering hardship time to resist the other party’s demands.”

PECL Art. 8:108 provides for an excuse due to an impediment. “Article 8.101(2) [...] states that where a party’s non-performance is excused under Article 8.108, the aggrieved party may resort to any of the remedies set out in Chapter 4 except claiming performance and damages. According to the commentary on the EU Principles, under 8.108 the performance has to have become totally impossible, and furthermore, that the preconditions are those traditionally required for force majeure. The Article applies to any obligation, including monetary. The Article has been modelled after CISG Article 79(1), but according to some commentators resembles also the common law frustration in that both parties are automatically discharged. Article 8.108 read in conjunction with 8.101(2) is almost identical to the UNIDROIT Principles Article 7.1.7, [...]”

Again, Art. 9:102 PECL is very similar to Art. 7.2.2 of the UNIDROIT Principles, according to which an exception is provided for cases where the creditor is yet to perform and it is clear that the debtor is unwilling to receive performance. PECL Art. 9:103 explicitly states that an exemption from performing under Art. 9:102 does not lead to an exemption from damages. This question is to be decided under Art. 8:108.

19.5.4 Concluding Remarks

With respect to situations of changed circumstances, both the UNIDROIT Principles and the PECL could offer sufficiently elaborate and widely accepted rules on hardship and force majeure. By implementing these rules into their contract, parties could supplement the narrow and vague provisions of Art. 79 CISG.

Both the UNIDROIT Principles and the PECL contain what we could call the “full set” of juristic tools for coping with changed circumstances. They encompass rules exempting from specific per-

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1084 See Comment 6 on Art. 6.2.2 UPICC.
1085 Supra. note 2.
formance and from liability in damages and they provide for renegotiations and adjustment. Events of impossibility, force majeure, and hardship have been taken into consideration. Furthermore, the two Principles widen the applicability of the exemptions outside pure instances of impossibility or force majeure by references to unreasonableness or unconscionability as well as to loyalty or the observance of good faith.  

Both of the two Principles differ from the CISG. Though pacta sunt servanda still is the main rule, under the two Principles exemptions from obligations are granted on a more lenient basis and the contract can be more freely modified by the court. Furthermore, both Principles contain express references to the obligation of observing good faith and for example the hardship provisions seem to promote a more co-operative, loyalty-based notion of contract. It should also be noted that both sets of Principles were completed in the 1990’s. Therefore they represent the modern developments in the field of contract law. The provision may have positive effects. When the parties know from the beginning of their contractual relationship that changed circumstances may lead to renegotiations they may, for example, assume an attitude towards their relationship that emphasizes co-operation which may in turn make it easier to cope with changed circumstances and other such problems.

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1088 Supra. note 2.
1089 On the other hand, it is submitted that it may in many situations be artificial to require renegotiations from the parties. This may also cause unnecessary uncertainty. Furthermore, this may cause additional costs and take time, which may be against both of the parties’ interests. Moreover, the possibility to compel a party to negotiate by the risk of liability in damages might easily be abused despite of the obligations of good faith and co-operation. (Supra. note 2.)
CHAPTER 20. force majeure

It is generally recognized that force majeure is an excuse for non-performance of a contractual obligation which depends on the facts and circumstances. When there is a situation of force majeure, the performance of contractual obligations will, partially or totally, be suspended. Force majeure also can have the effect of terminating a contract if force majeure renders performance of the contract impossible in a definitive way or for a prolonged period of time.  

20.1 INTRODUCTION

As discussed previously in Chapter 19, different legal concepts exist in all legal systems dealing with the problem of changed circumstances and excusing a party from performance of its obligations when a contract has become unexpectedly onerous or impossible to perform. Some systems only accept a narrow range of excuses; others are more generous (e.g., the concepts of imprévisio n or hardship, force majeure or Wegfall der Geschäftsgrund lage).  

Generally speaking, the rules dealing with situations of changed or supervening contractual circumstances are oriented on the two basic concepts of hardship and force majeure - they constitute exceptions to the cardinal canon of pacta sunt servanda and ameliorate its strictness. Hardship refers to the performance of the disadvantaged party having become much more burdensome, but not impossible, while force majeure refers to the performance of one party’s obligations that has become impossible, even on a temporary basis. This chapter will now proceed with a more detailed review of the relevant provisions on force majeure. This Chapter chooses the term “force majeure”, which covers (nevertheless is identical with none of) the ground covered in common law systems by the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as force majeure, Unmöglichkeit, etc., as its heading because it is widely known in international trade practice, as confirmed by the inclusion in many international contracts of so-called “force majeure” clauses.

20.2 RELEVANT TEXTS

20.2.1 Exemptions: CISG Art. 79

Under the CISG, one of the most important reasons for exemption is force majeure which is described in Art. 79, though not denominated as such. Art. 79 is the provision of the CISG, that deals with situations of changed circumstances, which is like its predecessor, Art. 74 of ULIS, and again placed under the heading of PECL Articles 6:111, 8:108”. (2002) Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>

Another one is Art. 80, which reads: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.”  

ULIS Art. 74 reads as follows: “Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended. 2 Where the circumstances which gave rise to the non-performance of the obligation constituted only a
“Exemption”. Art. 79 reads as follows:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract. The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible.  

Two concepts are used which Maskow calls shortly the fault principle and the exemption principle, the first being more or less characteristic of the continental law, the second of the common law. While according to the fault principle a party is only liable if it has committed a fault, according to the exemption principle the party which has committed a breach is held to be liable, unless it can establish reasons for exemption. In general, this would lead to opposite the burden of proof, but, in certain cases, also under the fault principle, the party in breach has to prove its innocence. As far as the practical is concerned it is well known that the two principles do not greatly differ. This is partially due to the fact that a party can best prove its lack of fault, if it can establish exemptions. The CISG, the most important international document in contract law, uses the exemption principle. Interpretations which try to make clear that the fault principle is implemented in the CISG do not correspond to reality. (See Maskow, Dietrich, infra. note 11.)

period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.”

Art. 79 deals with the circumstances in which the buyer or seller may be excused from performance of his contractual obligations because of an extraneous event that is judged sufficiently important to warrant the excuse—what in the common law is referred to as frustration of the contract and in civilian legal systems under such headings as force majeure, cause étrangère, and Wegfall der Geschäftsgrundlage.  

Art. 79, like its predecessor, art. 74 of ULIS, is more civilian than common law in its conception, governing the extent to which a party is exempted from liability for a failure to perform any of his obligations because of an impediment beyond his control. Paras. (2) and (4) fill particular gaps left by the ULIS text, but do not raise any questions of wider interest. It is paras. (1), (3) and (5) which correspond to the ULIS text, and it will be seen that the most obvious changes are in matters of drafting: the new text is very much more economical and elegant in its formulation. So far as matters
of substance are concerned, the noticeable changes are (a) the substitution in para. (1) of “impediment” for “circumstances”, and (b) the replacement of the old para. 2 by the new, and very brief, para. (3).

Briefly speaking, para. (1) describes the circumstances when a party “is not liable” for a failure to perform any of his obligations. Para. (2) is an extension of the first paragraph and is concerned with the effect of non-performance by a third party whom the contracting party has engaged to perform some of his duties. Para. (3) regulates the period of the exemption and para. (4) imposes a duty of notification on the party failing to perform. Para. (5) deals with the consequences of the non-performance and the remedies available to the parties.

20.2.2 Force Majeure: UNIDROIT Principles Art. 6.1.7

Art. 7.1.7 of the UNIDROIT Principles seems to be very similar to Art. 79 CISG, and reads under the heading “force majeure” as follows:

“(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.”

Like the CISG, the UNIDROIT Principles rely on the same exemption principle. But it seems to approach the real problems in a more direct manner, corresponding to the situations in which these problems occur. In both cases the respective article starts with a paragraph saying that a party is not liable for a failure to perform or that a party’s nonperformance is excused if the said circumstances occur. In this respect, the prerequisites for an exemption in UPICC Art. 7.1.7 (1) are almost identical to those in CISG Art. 79(1).

However, UPICC Art. 7.1.7 contains no provisions such as CISG Art. 79(2) on third persons, and is therefore more lenient, but it is said that the same rule would follow from the concept of force majeure as defined in Art. 7.1.7(1) UPICC. In the remaining paragraphs of the provisions two differences may be noted. Para. (3) in
CISG Art. 79 provides for the case of a temporary non-performance that “the exemption provided by this article has effect for the period during which the impediment exists”. In the UNIDROIT Principles (para. (2)) the rule is framed more flexibly: “when the impediment is only temporary, the excuse shall have effect for such a period as is reasonable taking into account the effect of the impediment on performance of the contract.” Another difference is that, unlike in CISG Art. 79(5), Art. 7.1.7(4) does not limit the scope of the article to damages only. Art. 7.1.7 exempts the non-performing party both from performance and damages (at least for the time performance is affected by the impediment), though its primary aim is in releasing the obligor from liability in damages. It is said that para. (5) of CISG Art. 79, which seems to warrant the right to claim performance even if performance has become permanently impossible, has been replaced by a rule specifying that force majeure does not prevent a party from exercising a right to terminate the contract or withhold performance or request interest on money due (Art. 7.1.7(4)).

Thus, the function of force majeure under the UNIDROIT Principles as an exemption has been enlarged in comparison with the CISG. In Art. 79 CISG the effect of the exemption is reduced to claims for damages only. All other claims are allowed, so that one might even ask whether penalties are allowed, which in someone’s view would be absurd. But performance in general can be claimed in spite of the existence of exemptions which has led to a vivid discussion. The UNIDROIT Principles use quite the opposite approach. They adhere to the principle that the excuse is general, but in Art. 7.1.7(4) they make important exceptions in determining certain claims which are not affected by force majeure, namely the right to terminate the contract or withhold delivery or request interest on money due. That means that in case of force majeure, performance cannot be claimed, including, of course, damages and penalties.\(^{1102}\)

20.2.3 Excuse Due to an Impediment: PECL Art. 8:108

Under the PECL, a rule similar to CISG Art. 79 is provided for in Art. 8:108, which reads under the heading “Excuse Due to an Impediment” as follows:

\(1\)”(1) A party’s non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

(2) Where the impediment is only temporary the excuse provided by this Article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.

(3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.”

There is an apparent similarity in the wording of the corresponding

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PECL provisions to Art. 79 CISG, since the conditions laid down in the first paragraph for the operation of Art. 8:108 PECL are analogous to the conditions traditionally required for force majeure: (a) event outside the debtor’s sphere of control ("impediment beyond its control"); (b) which could not have not been taken into account ("it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract"); and (c) of insurmountable nature ("or to have avoided or overcome the impediment or its consequences").

However, the differences in the scope of the two regimes become clear when a regard is had to the PECL commentary, which helps explain its provisions. The scope of application of Art. 8:108 is defined by Comment A to the PECL, which states: “Article 8:108 governs the consequences when an event which is not the fault or responsibility of a party prevents it from performing. The Principles also contain a provision for revision of the contract if unforeseen circumstances supervene and makes performance excessively onerous (Article 6:111).” Thus, unlike the equivalent article of CISG […] Article 8:108 has to apply only in cases where an impediment prevents performance.1104

Furthermore, according to Art. 8:101(2) PECL, where there is an impediment which fulfils the conditions set by PECL Art. 8:108, the aggrieved party may resort to any of the remedies set out in PECL Chapter 9 except claiming performance and damages. Thus, in contrast with the approach adopted by the UNIDROIT Principles, which adhere to the principle that the excuse is general, but in Art. 7.1.7 (4) make important exceptions in determining certain claims which are not affected by force majeure, the PECL follows a similar approach to the CISG, which specifies the cases where the breaching party is exempted by such impediments; but on the other hand, expressly unlike the CISG, which only provides the breaching party with a defense against an action for damages, Art. 8:101(2) PECL provides that, if the non-performing party is excused under PECL Art. 8:108, he will have a defense against an action for specific performance (PECL Arts. 9:101 and 9:102) and damages (including liquidated damages).

20.2.4 Comparison

force majeure is one of the two major legal concepts dealing with the problem of changed circumstances. All the three texts mentioned above define it in the term “impediment”, although under different heading. The descriptions of events that constitute force majeure for the three texts are exactly the same: they all permit the exoneration of the party who was unable to perform its obligations due to an event beyond its control that was unforeseeable at the time of conclusion of the contract, and that is insurmountable. However, some take the view that the descriptions in the three texts are not exactly the same as force majeure as it is usually understood by international commercial arbitrators: “... force majeure as defined under anational law is the only possible case of impossibility of performance”. What is described in Art. 79 CISG, Art. 8:108 PECL and Art. 7.1.7 UNIDROIT Principles is a similar notion, but more flexible, as they do not require absolute, but rather only relative impossibility in order to be applicable.1105

However, neither Art. 7.1.7 UPICC nor Art. 8:108 PECL contains provisions such as CISG Art. 79(2) on third persons. Nonethe-

1104 See Comment and Notes to the PECL: Art. 8:108. Comment A. Available online at <http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html>
less, the same rule would follow from the term “impediment” used in Arts. 7.1.7(1) **UPICC** and 8:108(1) **PECL**. The term “impediment”, covers every sort of event (natural occurrences, restraints of princes, acts of third parties). In matters of temporary non-performance, for the European Principles, like the **CISG**, the excuse for non-performance is only available during the time that performance is impossible, not more, not less; whereas under the **UNIDROIT Principles** the excuse is available for “such period as is reasonable, having regard to the effect of the impediment on the performance of the contract”. Nonetheless, **PECL** Art. 8:108(3), similar to both **CISG** Art. 79(4) and **UPICC** Art. 7.1.7(3), provides for the non-performing party’s duty to notify the aggrieved party. It is apparent that the three texts put risk of non-receipt or delay on receipt of the notice (non-communication or delay in communication) on the **sender** in case of **force majeure**. If notice of the impediment and of its effect on its ability to perform is not received by the creditor of the obligation, the non-performing party will be liable for damages resulting from such non-receipt.

The most important thing is to consider the effects of such qualifying impediments or the fate of the contract in cases of **force majeure**. On the one hand, the **UNIDROIT Principles** adhere to the principle that the excuse is general, but in Art. 7.1.7(4) they make important exceptions in determining certain claims which are not affected by **force majeure**, namely the right to terminate the contract or withhold delivery or request interest on money due. By contrast, both the **CISG** and the **PECL** generally permit the aggrieved party to resort to any of the remedies in case of **force majeure**, but specify the remedies which the aggrieved party can’t resort to: respectively to claim damages under the **CISG** (Art. 79(5)), and to claim performance and damages under the **PECL** (Art. 8:101(2)). On the other hand, in case of temporary impediment (infra. 21.5) the **UNIDROIT Principles** provide that the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract (Art. 7.1.7(2)), while according to the **CISG** (Art. 79(3)) or the European Principles (Art. 8:108(2)) the effect of the excuse is limited to the period during which the impediment exists; even in case of total and permanent impediment the **CISG** (Art. 79(5)) or the **UNIDROIT Principles** (Art. 7.1.7(4)) make termination dependent on the initiative of the parties, while the European Principles provide for automatic termination of the contract in such cases (Art. 9:303(4)).

Finally, it is of great significance to note that international commercial contracts often contain much more precise and elaborate provisions in this regard, since none of the three texts is mandatory. The rules governing **force majeure** are expressed in fairly general terms, permitting the parties to provide more concise provisions in their agreement, adapted to their particular situation. The party may therefore find it appropriate to adapt the content of the three texts, and may modify the allocation of the risk of impossibility of performance, either in general or in relation to a particular impediment so as to take account of the particular features of the specific transaction. Usages (especially in carriage by sea) may have the same effect.

### 20.3 GENERAL RULE

#### 20.3.1 Scope of Excusable Non-performance

Paras. (1) of the three texts, namely Art. 79(1) **CISG**, Art. 7.1.7(1) **UPICC** and Art. 8:108(1) **PECL**, set out the conditions under which a party is not liable for a non-performance or his failure to perform any of his obligations. The expression “failure to perform” does not

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1106 Supra. note 15, Comment B.

1107 See Comment 4 on Art. 7.1.7 **UPICC**; also supra. note 15.
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specify the nature of the non-performance. Thus, the scope of this expression has to be analyzed first.

In this respect, one of the controversial issues is whether the texts may apply, especially under the CISG when the seller delivers defective goods as opposed to a situation of non-delivery or late delivery: “The possibilities of exemption in the case of non-conformity are unusual for the common law, so that differences of opinion become visible where interpretation is concerned. The CISG uses the notion ‘impediments’ [...] and no longer mentions ‘circumstances’ as in Article 74 ULIS, the discussion of which had been controversial already at that time. Honnold [...] has tried to assess this fact in such a way as to explain that this modification was to exclude exemption in the event of non-conformity. This is doubted even by other common law representatives [...], and this has been rightly contradicted by others [...]. The clear wording of the introductory part of the article cannot be changed by pretending that an impediment could not cause non-conformity [...]. But we, too, are of the opinion that these differences of opinion are of little practical weight, because impediments as defined in Article 79, paragraph 1 will seldom be the cause of non-conformity [...]. Anyway, according to the English text itself, excuse may be brought up by a party for failing to perform “any of his obligations”, and conformity of the goods is unquestionably an obligation of the seller. Therefore, the obligation to deliver conforming goods also comes within the scope of Art. 79.

Also, Art. 79 does not provide for the situation where only part of the performance is prevented. It refers to a failure of any obligation, but does not lay down the consequences of the non-performance of the contract as a whole. Honnold notes that the language of the provision permits exemption to the extent that the impediment applies. This can be supported by Art. 51(1) allowing remedies to apply in respect of partial breach. The promisee’s rights to other remedies would not be impaired.1109 The PECL also conceives partial impediment when discussing the consequences of force majeure: “It is primarily in the case of a partial impediment, when a divisible part of the main obligation or a secondary obligation becomes impossible, that the creditor has a real choice; it must be permitted to decide whether or not to maintain the contract according to whether partial performance will be of any value to it.”

In short, the term “failure to perform” must be considered here in the broadest sense of the word. With regard to excusable non-performance, apart from late performance and non-performance (at all) it includes, in particular, non-conforming performance and partial performance. Accordingly, the excused non-performance may be total or partial, delayed or defective and relates to the obligations of both parties.

20.3.2 Existence of Qualifying Impediment

20.3.2.1 Introduction of a new word

As mentioned above, the CISG Art. 79 uses the notion “impediments” and no longer mentions “circumstances” as in Art. 74 ULIS. Thus, for an exemption to be granted, the non-performance of the contract must be due to an “impediment”. The word “impediment” is all that emerged in the end from a lengthy attempt to escape


1110 Supra. note 15, Comment D.
from the elasticity and imprecision of the ULIS requirement that non-performance be “due to circumstances . . .” and to formulate some more certain and objective criterion.\textsuperscript{1111}

By adopting the word “impediment” the Vienna Conference’s aim was at emphasizing the objective nature of the hindrance rather than its personal aspect.\textsuperscript{1112} The CISG drafters chose the term “impediment” to denote an objective, outside force that interferes with performance. It is important to stress that the Convention has developed a concept of its own in regard to impediments, which cannot be directly traced back to any national law. This saves from borrowing from a domestic law in interpretation, which could be very misleading, especially when it comes to one’s own domestic law.\textsuperscript{1113} Both the UNIDROIT Principles and the PECL follow the CISG approach in using the same term “impediment”.

This wording, however, is very general and the actual meaning of the term “impediment” is unclear. None of the three texts specify the meaning of “impediment”. This causes problems in determining the scope of the exemption. Presumably it covers physical impediments (notably destruction of specific goods under a contract for the sale of specific goods) and legal impediments such as the outbreak of hostilities or the imposition of foreign exchange controls.\textsuperscript{1114}

\subsection*{20.3.2.2 Interpretation of the word}

In interpreting the concept of “impediment” we should, in the words of Honnold, “purge our minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of

\textsuperscript{1111}Supra. note 10.

\textsuperscript{1112}See Denis Tallon, Commentary on the International Sales Law - The 1980 Vienna Sales Convention, C.M. Bianca and M.J. Bonell eds. (1987); p. 579.

\textsuperscript{1113}Supra. note 19, p. 320.

\textsuperscript{1114}Supra. note 8.
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terial, strike constituting internal confrontation at a factory (a general strike, however, shall constitute an impediment), or excessive increase in the price of the raw material should not discharge the promisor from his obligation to perform.\textsuperscript{1117}

It is important to mention, however, that such events shall not per se constitute impediments for the purposes of CISG Art. 79 or the other two texts, since the characterization of an event as an impediment will depend upon the circumstances of each individual case. It must be characterized as beyond control, unforeseeable and unavoidable or insurmountable. Furthermore, the existence of a qualifying impediment to non-performance does not “frustrate” or automatically terminate the contract. The contract apparently continues to exist unless and until it is avoided. The only immediate effect is to excuse the non-performing party from certain liability for failure to perform.

20.3.2.3 Problematic situations

Generally speaking, the term “impediment” may cover every sort of event (natural occurrences, restraints of princes, acts of third parties).\textsuperscript{1118} However, there are some particular situations where controversies exist:

(a) Financial embarrassment

One of the controversial points in the preliminary UNCITRAL discussions was whether economic difficulties - “unaffordability” - constitute a ground for exemption. In the view of Schlechtriem, the general view in the end was probably that both physical and economic impossibility could exempt an obligor. It cannot be concluded, therefore, on the basis of the change in terminology from “circumstances” in ULIS Art. 74(1) to “impediments” that an impediment in the sense of Art. 79(1) of the Convention is only an occurrence that absolutely bars performance, but - under very narrow conditions - impediment also includes “unaffordability”. As a rule, however, since the obligor generally guarantees his financial capability to procure and produce the promised goods, increased procurement and production costs do not constitute exempting impediments.\textsuperscript{1119}

Perillo seems to deal with this situation in a stricter manner when studying Art. 7.1.7 UPICC: “Neither Article 7.1.7 nor the commentary to it refers to this kind of impediment. Under American law, it is quite clear that financial impediments provide no excuse; these are regarded as ‘subjective’ rather than ‘objective’ impossibility and there is unanimity in the case law and in doctrine that subjective impossibility provides no excuse, whether or not it was the result of conditions outside the control of the obligor. It is generally believed that the risk of financial ability to perform is such a basic assumption underlying all contracts that it cannot be excused, except by a decree in a bankruptcy proceeding. It is hard to believe that this general belief is suspended in international trade. Consequently, the phrase ‘beyond [the party’s] control’ should be given a broad meaning so that it will be deemed that financial health is always within a contracting party’s control.”\textsuperscript{1120}


\textsuperscript{1118} Supra. note 15, Comment B.


\textsuperscript{1120} See Joseph M. Perillo in “Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts”: Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, Universidad Nacional Autónoma de México - Universidad Panamericana (1998); pp. 121-122. Available online at
One should note, however, although it is probably true that the insolvency of the buyer by itself is not an impediment which exempts the buyer from liability for non-payment of the price, the unanticipated imposition of exchange controls, or other regulations of a similar nature may make it impossible for him to fulfill his obligation to pay the price at the time and in the manner agreed. The Official Comment to Art. 8:108 PECL also confirms: “While insolvency would not normally be an impediment within the meaning of the text, as it is not ‘beyond the control’ of the debtor, a government ban on transferring the sum due might be.”

(b) Frustration of purpose

Also, it is not clear to what extent “impediment” may embrace frustration of the purpose of the contract. The CISG drafters chose the term “impediment” to denote an objective, outside force that interferes with performance. According to Honnold, Art. 79 includes a causation element – the impediment must actually prevent performance. Other commentators, however, have noted that Art. 79 also encompasses the U.S. notion of “frustration of purpose.” Thus, Art. 79 may excuse performance where an impediment either renders performance impossible or frustrates the purpose of the contract. Notably, however, Art. 79 does not include the U.C.C. doctrine of “commercial impracticability” (§2-615). In addition, it is not entirely clear that frustration of purpose falls within the scope of Art. 79. Indeed, the plain language of Art. 79 suggests that it does not cover frustration of purpose because a frustration “impediment” does not obstruct performance. Instead, frustration merely makes a party not want to perform. Therefore, in order to protect clients engaging in CISG contracts, practitioners should consider including a carefully-drafted and -negotiated force majeure clause (see Chapter 22) that covers frustration of purpose, commercial impracticability, or both. Although Art. 79 does not use the term impossibility. The requirement that performance be prevented does, however, seem to refer to impossibility instead of impracticability or other less forceful event. According to Schlechtriem, however, it cannot be concluded that an impediment in the sense of Art. 79(1) of the Convention is only an occurrence that absolutely bars performance. The Official Comment to Art. 7.1.7 UPICC makes it clear that, this Article covers the ground covered in common law systems by the doctrines of frustration and impossibility of performance, but it is identical with none of these doctrines. Again, it is to be stressed that the Convention has developed a concept of its own in regard to impediments, which cannot be directly traced back to any national law. This saves from borrowing from a domestic law in interpretation, which could be very misleading, especially when it comes to one’s own domestic law.

(c) Pre-contractual impediment

Finally, the three texts are silent on the point of the time of the impediment’s occurrence. Therefore, the question arises as to whether they apply in situations where the impediment existed at the time of the conclusion of the contract and was unknown to both parties. The Secretariat Commentary affirms, without justifying its position, that Art. 79 applies to this case: “The impediment may have existed at the time of the conclusion of the contract. For example, goods which were unique and which were the subject of the
contract may have already perished at the time of the conclusion of the contract. From this point, Rimke submits that Art. 79, in its general wording, applies to non-performances that may have occurred at any time.

However, the two Principles seems to be more correct in regarding this situation as defects of content causing the invalidity of contracts, which is not covered under the CISG, rather than non-performance. The Official Comment to Art. 8:108 PECL makes it clear: “It is conceivable that an impediment at the time the contract was made existed without the parties knowing it. For example, the parties might sign a charter of a ship which, unknown to them, has just sunk. This situation is not covered by Article 8:108 but the contract affected by such impediments may be avoided under Arts. 3.4 and 3.5, i.e. relevant mistake.

20.3.3 Conditions for Exempting Impediment

The provisions on force majeure are rigid. The exemption becomes effective only when the “failure to perform” or non-performance is based on an impediment which is proved by the non-performing party to cumulatively fulfil the following four conditions:

20.3.3.1 Beyond control

First, the obstacle must be something outside the debtor’s sphere of control. According to Art. 79(1) CISG, Art. 7.1.7(1) UPICC or Art. 8:108(1) PECL, an exemption is permitted only when the impediment to performance is beyond the obligor’s control.

According to Stoll, this requirement is based on the assumption that there is a typical sphere of control: a sphere within which it is objectively possible for, and can be expected of, the promisor to be in control. Within the control of the seller are all those factors which are connected with an orderly organisation of his manufacturing and/or procurement process, as are the personnel's qualifications, the technical equipment and the disposition of the required financial means to ensure manufacture and procurement. His control also includes that he disposes of the required financial means to ensure manufacture and procurement, timely takes care of needed sub-supplies, and does all that is in his power to obtain authorizations by the State.

is not the subject to be discussed here.

Accordingly, Schlechtriem submits that the

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1128 Supra. note 9, Comment 4. However, the seller would not be exempted from liability under this article if he reasonably could have been expected to take the destruction of the goods into account at the time of the conclusion of the contract. Therefore, in order to be exempt from liability, the seller must not have known of their prior destruction and must have been reasonable in not expecting their destruction.

1129 Supra. note 14, p. 215.

1130 Supra. note 29.

1131 This can be supported by both Art. 3.3 UPICC and Art. 4:102 PECL deal with the initial impossibility and stipulate that a contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates. However, as clarified in Chapter 19, such initial impossibility 

1132 Supra. note 27, p. 610.

1133 Supra. note 19, pp. 322-323. Opinions may differ as to whether strikes are beyond the control of the party concerned, for their causes are often found in the enterprise. Eiderlein and Maskow believe that one should follow those authors who like Vischer take a careful stand in the matter and do not exclude strikes as impediments, except when they are internal confrontations at a factory and provided that the other conditions of impediments are fulfilled, too. Rudolph however believes that strikes could generally be considered as possible in the context of negotiations on pay and therefore would not constitute an impediment because they happen at specific intervals. This is true of strikes which can be foreseen at the time of the conclusion of the contract. Lockouts are, at least to a
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obligor is always responsible for impediments when he could have prevented them but, despite his control over preparation, organization, and execution, failed to do so. In this sense, the obligor “guarantees” his ability to perform. If he wishes to restrict his liability, he must specify the particular impediments for which he will not be liable.\(^{1134}\)

In requiring that the impediment must be beyond the control of the party concerned, the scope of risk of the latter is determined, though only roughly.\(^{1135}\) “The risk of its own activities it must bear itself. Thus the breakdown of a machine, even if unforeseeable and unpreventable, cannot be an impediment within the article and this avoids investigation of whether the breakdown was really unforeseeable and the consequences unpreventable. The same is true of the actions of persons for whom the debtor is responsible, and particularly the acts of the people it puts in charge of the performance. The debtor cannot invoke the default of a subcontractor unless it was outside its control - for instance because there was no other subcontractor which could have been employed to do the work; and the impediment must also be outside the subcontractor’s sphere of control.”\(^{1136}\)

20.3.3.2 Unforeseeable

Secondly, the impediment must be one that could not have been taken into account at the time the contract was made. The obligor is liable even for impediments beyond his control, as long as they were either reasonably foreseeable known to him at the conclusion of the contract. In lots of cases, the arbitrators have rejected the existence of force majeure because the element ofunforeseeability was lacking.\(^{1137}\) This rule has been adopted by most domestic systems and is consistent with the basic idea that if the event was foreseeable, the defaulting party should, in the absence of any contrary contractual provision(s), be considered as having assumed the risk of its realization.\(^{1138}\) If there is a realistic risk of an impediment to performance and the contract is nevertheless unconditionally entered into, the risk of the impediment has been assumed and exemption cannot be successfully claimed.\(^{1139}\)

However, the question of foreseeability is a difficult one. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future.\(^{1140}\) In this respect, it is said that the case law supports the following notion of foreseeability: An event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely.\(^{1141}\) In the end, most of the phenomena that might become impediments are foreseeable. It is, however, not expected that such events are taken into account which, given general foreseeability, are not expected to materialize before the contract is performed and/or if they do nevertheless, they are at least not expected to have an effect on it. These expectations are further qualified in stipulating that they will have to be reasonable,

\(^{1134}\) Supra. note 30, p. 101.
\(^{1135}\) Supra. note 19, p. 322.
\(^{1136}\) Supra. note 15, Comment C(i).
\(^{1137}\) E.g., 1974 Clunet 892; 1975 Clunet 929; 1975 Clunet 934; 1975, Clunet 917; 1980 Clunet 951.
\(^{1138}\) Supra. note 23, p. 580.
\(^{1139}\) Supra. note 27, p. 611.
\(^{1140}\) Supra. note 9, Comment 5.
i.e. that it is proceeded in the customary way, like comparable parties would do. Thereby, an objectivization is effected.\footnote{Supra. note 19, pp. 323-324.}

It may be relevant whether the parties could have taken into consideration not just the event itself but the date or period of its occurrence. Foreseeability must be appreciated at the time of the conclusion of the contract. Again, the initial impossibility is not to be discussed here. However, it is a question of whether the promisor ought to have reasonably foreseen a realistic possibility that an impediment to performance would occur. In this respect, Tallon submits: “Foreseeability should not only relate to the impediment \textit{per se}, but also to the time of its occurrence. The closure of the Suez Canal was, for example, foreseeable in the more or less distant future.”\footnote{Supra. note 23, pp. 580-581.} Nonetheless, according to Stoll, the judge or arbitrator should neither refer to an excessively concerned “pessimist who foresees all sorts of disasters” nor to a “resolute optimist who never anticipates the least misfortune”.\footnote{Supra. note 50.}

The Official Comment to the PECL confirms: “A price control for some period may be foreseeable, but it could be an excuse if the period for which it is kept in force was not foreseeable by the parties. Equally it is stated that the test is ‘reasonable’ foreseeability: \textit{that is to say, whether a normal person, placed in the same situation, could have foreseen it without either undue optimism or undue pessimism.} Thus in a particular area cyclones may be foreseeable at certain times of year, but not a cyclone at a time of year when they do not normally occur—that would not be reasonably foreseeable by the parties.”\footnote{Supra. note 15, Comment C(ii).}

Frequently, the parties to the contract have envisaged the possibility of the impediment which did occur. Sometimes they have explicitly stated whether the occurrence of the impending event would exonerate the non-performing party from the consequences of the non-performance. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even though certain impediments might arise. In either of these two classes of cases, Art. 6 CISG assures the enforceability of such explicit or implicit contractual stipulations. However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of the conclusion of the contract. In the final analysis this determination can only be made by a court or arbitral tribunal on a case-by-case basis.\footnote{Supra. note 15, Comment C(ii).}

Everything regarding foreseeability, therefore, is a matter of measure, and it seems difficult to provide more details in a general text.\footnote{Supra. note 50.} This second condition, which an impediment to cause an exemption will have to fulfill, describes in a very flexible manner the criterion of foreseeability, which may nevertheless be particularly specified from the force majeure clauses.\footnote{Supra. note 15, Comment C(ii).} However, it is important to understand that, in the assessment of the foreseeability factor, other circumstances should also be considered, such as the duration of the contract (the longer the duration, the less likely the contracting parties will be able to foresee possible impediments), the fact that the price of the goods sold tends to fluctuate in the international market, or the fact that early signs of the impediment were already obvious at the time of the conclusion of the contract.\footnote{Supra. note 15, Comment C(ii).}
20.3.3.3 Unavoidable or insurmountable

Thirdly, even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could have neither avoided the impediment nor overcome it or the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract.1150

As it does with regard to foreseeability, reasonableness also qualifies the condition that the impediment must be insurmountable or irresistible. It must be emphasised that both conditions - that the party could not have avoided it and could not have overcome it - must be fulfilled before an excuse can operate. The party to be excused must prove that it could not have done either.1151 It is in line with the general liability of the parties in regard to the obligations they have assumed that they have to counteract impediments. The two main forms of doing so are mentioned here. First, disturbances will have to be avoided. In order to achieve this, measures will have to be taken against such impediments which are generally looming ahead but cannot, a priori, be put in relation to the fulfillment of concrete obligations. These include measures of protection against accidents and specifically fire; a factory management which guarantees peaceful labour relations; etc. Above all, measures have to be taken against disturbances which are clearly approaching. Second, where a disturbance has already revealed itself, it has to be overcome as speedily as possible invoking, for instance, remedies against hindering decisions by the State insofar as they have a chance of succeeding. It is the requirement of overcoming which is aimed at removing the consequences of disturbances. Hence, the effects of accidents have to be removed fast.1152

Thus, the basis of reference is what can reasonably be expected from the party concerned, one cannot expect the debtor to take precautions out of proportion to the risk (e.g. the building of a virtual fortress) nor to adopt illegal means (e.g. the smuggling of funds to avoid a ban on their transfer) in order to avoid the risk.1153 “The yardstick used to measure the efforts of the party concerned is again what can reasonably be expected from him. And that is what is customary, or what similar individuals would do in a similar situation. The exemption is thus granted when efforts would have been necessary that go beyond the former.”1154 Therefore, an impediment may be avoided or overcome, for example, by choosing another form of transport or another route (like shipping the goods via the Cape of Good Hope instead of the Suez Canal) or even by delivering a commercially reasonable substitute for the performance which was required by the contract. However, the promisor should not be expected to risk his own existence by performing his obligations at all costs. Avoidance should take place in the most effective manner from an economic point of view, that is, with conclusion of an insurance contract (if this is the norm and it is available), with the insertion of special clauses in the contract of sale, or with the adaptation of the price in order to reflect assumption of the risks by

1146 Supra. note 9, Comments 5, 6.
1147 Supra. note 14, p. 216.
1148 Supra. note 46.
1149 Supra. note 28, p. 271.
1150 Supra. note 9, Comment 7.
1151 Supra. note 15, Comment C(iii).
1152 Supra. note 19, p. 324.
1153 Supra. note 62.
1154 Supra. note 63.
the seller or the buyer.\textsuperscript{1155}

In a word, again reference should be made to the reasonable person, and a case-by-case analysis will be necessary.\textsuperscript{1156} Whether an event could have been avoided or its consequences overcome depends on the facts.\textsuperscript{1157}

### 20.3.3.4 Causation

Finally, the decisive prerequisite for an impediment to be taken into consideration is its causality in regard to the breach of contract.

Tallon believes that impediment should be the only cause for the promisor’s non-performance so as to exempt the non-performance.\textsuperscript{1158} Unlike Tallon, Eiderlein and Maskow are of the opinion that, it cannot be required that the impediment is the exclusive cause of a breach of contract. This is true not only of cases in which it covers the breach of contract only partially, but the impediment should also be accepted when a cause overtakes another cause. It is decisive whether the impediment lastly has caused the breach of contract.\textsuperscript{1159}

Nevertheless, if a party has breached by delay and an impediment arises thereafter, the impediment will not excuse the non-performance. There will be no excuse if an unforeseeable event impedes performance of the contract when the event would not have affected the contract if the party had not been late in performing.\textsuperscript{1160}

### 20.4 RESPONSIBILITY FOR THIRD PARTIES

Another problem is how far the debtor is responsible for failure of a third person whom he has engaged to perform his obligations. Under modern conditions, most contracts are not performed in fact by the contracting parties personally.\textsuperscript{1161} It often happens that the non-performance of a party is due to the non-performance of a third person.\textsuperscript{1162}

Accordingly, Art. 79(2) CISG makes excuse for the debtor in these cases and stipulates that the promisor is liable for the conduct of a third person engaged to perform all or part of the contract on the promisor’s behalf. It is to be welcomed that the CISG, by contrast to Art. 74 ULIS, directly bears on the problem of exemption where a breach of contract is caused by a third party, even if an interpretation of the relevant rule in detail proves to be difficult.\textsuperscript{1163} Art. 8:107 PECL also deals with one aspect of this modern division of labour, namely the contracting party’s responsibility for non-performance, and reads: “A party which entrusts performance of the contract to another person remains responsible for performance.” The basic principle under Art. 8:107 PECL is that if a party does not perform a contract personally but entrusts performance to a third person, it remains nevertheless responsible for the proper performance of the contract.

\textsuperscript{1155}Supra. note 28, p. 272.

\textsuperscript{1156}Ibid.

\textsuperscript{1157}Supra. note 62. In an earthquake zone the effects of earthquakes can be overcome by special construction techniques, though it would be different in the case of a quake of much greater force than usual.

\textsuperscript{1158}Supra. note 23, p. 583.

\textsuperscript{1159}Supra. note 46.

\textsuperscript{1160}Supra. note 47. It is important to mention that the force majeure must have come about without the fault of either party under the European Principles; whereas interpretations which try to make clear that the fault principle is implemented in the CISG do not correspond to reality, the question of fault is not involved here since this concept has been set aside by the Convention.

\textsuperscript{1161}See Comment and Notes to the PECL: Art. 8:107. Comment A. Available online at \textit{http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html}

\textsuperscript{1162}Supra. note 9, Comment 11.

\textsuperscript{1163}Supra. note 19, p. 326.
the contract vis-à-vis the other party. The internal relationship between the party and the third person is irrelevant in this context. The third person may be subject to instructions of the party, such as an employee or an agent; or he may be an independent subcontractor.\footnote{Supra. note 72, Comment B.}

However, Art. 79(2) CISG seems to pose stricter conditions for the exemption of the promisor who must prove that the conditions of the Art. 79(1) CISG are fulfilled not only in relation to himself, but also in relation to the third person. It thus makes excuse for the debtor in these cases more difficult. To the contrary, Eiderlein and Maskow attempt to demonstrate in comparing a classic supplier and a classic sub-contractor, that the differences between the two paragraphs are not that great and that, above all, it cannot be said whether the one or the other of the two paragraphs offers a basis for stricter liability. The attempt to compare the strictness of the two norms is misleading. It seems to be correct to say that a differentiation of Art. 79 between paras. (1) and (2) aims toward finding proper solutions for different circumstances. This fiction has the effect that there will not necessarily be congruence in assessing the claims which are asserted vis-à-vis the engaging party, on the one hand, and his claims for recourse vis-à-vis the third party, on the other. This is the case, in particular, where the non-performance is caused by a carrier who can obtain exemption for other reasons.\footnote{Supra. note 28, p. 274.}

\footnote{Supra. note 72, Comment C.}

Practically speaking, the discussion of Art. 79(2) CISG revolved around the liability for secondary suppliers and subcontractors. Art. 79(2) does not illustrate the type of third party that was intended. In addition, the Article does not explain the meaning of “engaged to perform the whole or a part of the contract”. Thus, the scope of Art. 79 as applied to third parties is not entirely clear. It is particularly doubtful whether it includes the suppliers of the seller. In this respect, Flambouras suggests that the seller’s suppliers should not be considered third persons for the purposes of CISG Art. 79(2), since such persons simply create the preconditions or assist in the preparation for the performance of the promisor’s obligation without, however, performing all or part of the actual contract as CISG Art. 79(2) requires. This opinion is supported by recent judgments and arbitral awards.\footnote{See Sarah Howard Jenkins in “Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment”: 72 Tulane Law Review (1998); p. 2026. Available online at \url{http://www.cisg.law.pace.edu/cisg/biblio/jenkins.html}}

\footnote{Supra. note 19, pp. 327-330.} Jenkins submits: “Non-performance by a general supplier of goods would not constitute the kind of impediment necessary for the seller to qualify individually under article 79. Although more comprehensive in the types of third parties, the availability under the Convention is more restrictive because of the scope of impediment necessary to establish the right to an exemption.” These submissions are confirmed by the Secretariat Commentary, which states that the third party must be someone who has been engaged to perform the whole or a part of the contract. It does not include suppliers of the goods or of raw materials.
to the seller.\textsuperscript{1169} Rather, with regard to the meaning of “third person”, the history of \textit{CISG} Art. 79 suggests that it only covers persons who are acting independently and are neither within the promisor’s organizational sphere nor under his responsibility. \textit{Enderlein and Maskow} submit: “The fact that a third party carries out a performance directly vis-à-vis another party may indicate that he is a third party in the meaning of the \textit{CISG}. As to its definition, the third party has to be legally independent of the party for whom he works. But it is, in our opinion, not required and not necessary that he be economically independent.”\textsuperscript{1170} The legislative history behind Art. 79 suggests that the third party must be more than the seller’s general supplier. While not agreed to as the exclusive or sole source, the third party must stand in a delegated contractual relationship such as a subcontractor.\textsuperscript{1171} Nonetheless, according to \textit{Schlechtriem}, the seller is not liable for secondary suppliers when they are beyond his control and their failure could neither be taken into account nor cured. This would apply in cases where the seller could not choose nor control his suppliers and it was not possible to procure, produce or repair the goods in any other manner.\textsuperscript{1172} But it is a case applying the normal requirements under Art. 79(1) instead of Art. 79(2).

Thus, in the application of Art. 79 \textit{CISG}, three situations must be distinguished. First, the obligor is always responsible for his own personnel, as long as he organizes and controls their work. Deficiencies and poor performance caused by individual workers, therefore, do not exempt him from liability. Second, where third persons are involved, the seller’s liability depends on whether he engaged these persons in fulfillment of his contractual obligations to the other party. If he did so the obligor can only be exempted where the failure was, for the obligor himself, unforeseeable and beyond his control (Art. 79(2)(a) in conjunction with para. (1)) and the third party personally meets the requirements for exemption from Art. 79(1) (Art. 79(2)(b)). Finally, Art. 79(1) remains the controlling provision in cases where the third party’s performance is a mere precondition for the fulfillment of the obligor’s obligations, \textit{i.e.}, where a third party does not directly fulfill the obligor’s duty to the obligee. In particular, the seller is therefore not liable for secondary suppliers when they are beyond his control and their failure could neither be contemplated nor cured. This exemption will apply only in those very few cases when the seller could neither choose nor control his auxiliary suppliers and it was not possible to procure, produce or repair the goods in any other manner. Nevertheless, explicit limitations on such liability should probably be written into the contract.\textsuperscript{1173}

\section*{20.5 TEMPORARY IMPEDIMENT}

It is commonly agreed that a temporary impediment, in principle results in only a temporary excuse.\textsuperscript{1174} In other words, a temporary impediment constitutes grounds for exemption only for the length of its duration. This is what is provided by \textit{CISG} Art. 79(3). According to Art. 79(3) the exemption under Arts. 79(1) and 79(2) starts when the impediment occurs and lasts as long as the impediment exists. If an impediment is temporary, Art. 79 does not allow a permanent excuse.

With regard to Art. 79(3), it is to be noted that para. (3) of the 1978 Draft reads: “The exemption provided by this article has effect only for the period during which the impediment exists.” Such expression could be constructed as meaning that the exemption

\begin{footnotesize}
\textsuperscript{1169} Supra. note 9, Comment 12.
\textsuperscript{1170} Supra. note 19, p. 327.
\textsuperscript{1171} Supra. note 26, p. 433.
\textsuperscript{1172} Supra. note 30, p. 104.
\end{footnotesize}
ceased with the impediment, even if the later was of very long duration.\footnote{The Summary Records of the Vienna Diplomatic Conference contain the following explanation: “Mr. ROGNLIEN (Norway), introducing his delegation’s amendment [Change paragraph (3) to read: ‘Where the impediment is temporary, the exemption provided by this article has effect for the period during which the impediment exists. Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable.’ Alternatively, delete ‘only’. ] said that the [draft] text of paragraph (3) could be constructed as meaning that the exemption ceased with the impediment, even if the later was of very long duration. That result was undesirable because, in the case of a long-term impediment, circumstances could change radically and make it totally unrealistic to impose performance at that late stage. In reality, the problem of permanent relief had not been dealt with in the paragraph; the matter had been left to national law. Accordingly, his delegation proposed that the rule now embodied in the single sentence of paragraph 3 should relate to temporary impediment. His delegation’s proposal contained also a separate provision, in the form of a new second sentence, to deal with the problem which arose when, after the removal of the impediment, the circumstances were so radically changed that it would be manifestly unreasonable to hold liable the party concerned. The question had been discussed for a long time within UNCITRAL without arriving at any agreement. His delegation’s proposal, he hoped, provided a solution. If no agreement could be reached on the proposed formula, he would suggest the deletion of the word ‘only’ from paragraph 3, a second best solution based on the understanding that the paragraph and the whole of [CISG article 79] did not contain provisions regulating a possible permanent relief” (Official Records, p.381).}{http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-79.html} Therefore, the word “only” was deleted from para. (3) of the Official Text by the acceptance of a Norwegian proposal (AV-Conf. 97/C.1/L.191/Rev. 1 = O.R. 134). This deletion suggests that even if the original impediment is removed, it is still possible that a new exemption can arise for the debtor if there is a change in circumstances. The intention behind this amendment was to leave open the possibility that the exemption might continue even after the period during which the exemption existed.\footnote{Rognlien’s proposed language [Change paragraph (3) to read: ‘Where the impediment is temporary, the exemption provided by this article has effect for the period during which the impediment exists and may have permanent effect if after the impediment has ceased to exist the circumstances have so radically changed that it would be manifestly unreasonable to hold the non-performing party liable for damages’.] It has to be said, however, that even if the non-performing party persuades the court to adopt this interpretation, he may find that, though he is indeed exempt from liability in damages, he may still be compelled to perform” (Barry Nicholas). Available online at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-79.html} It is in pertinent relevance to refer to the analysis of Eiderlein and Maskow, who state: “While at the end of paragraph 1 a distinction is made between the impediment and its consequences because under that paragraph, they are addressed separately in relation to the obligation of avoidance or overcoming. Such a differentiation is not made here. But the ‘period during which the impediment exists’ has to be conceived in those cases in which there is a difference between it and his consequences, e.g. earthquake and its consequences in the period during which the impediment exists. Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable. ‘Alternatively, delete ‘only’. ’, which is similar to ULIS Art. 74(2), was not accepted. However, his “second best solution” was approved. Commentators’ assessments of the significance of the deletion of the word ‘only’ range from Tallon and Vilus, who do not appear to regard this as having any significance, to Honnold, Schlechtriem and Nicholas who advise: “[T]his change was designed to avoid any impression that paragraph (3) laid down a rigid rule requiring contract relations to resume on the original basis no matter how long the interruption or how great the change in the circumstances ... (John O. Honnold); “The Norwegian proposal concerned the case of temporary impediments which later vanish. In that case, consideration would be given to the fact that the economic situation of the debtor might fully have changed. Though the contractual agreement should be decisive in this situation, some delegates apparently assumed that recourse to domestic law would still be possible....By the acceptance of the Norwegian amendment to delete the work ‘only’ in article 79(3), it became clear that, even if the original impediment is removed, it is still possible that a new exemption can arise for the debtor if there is a change in circumstances” (Peter Schlechtriem); “The intention behind this amendment was to leave open the possibility that the exemption might continue even after the period during which the exemption existed. The paragraph therefore might be read as if it said something like the following: ‘The exemption has effect for the period during which the impediment exists and may have permanent effect if after the impediment has ceased to exist the circumstances have so radically changed that it would be manifestly unreasonable to hold the non-performing party liable for damages’. It has to be said, however, that even if the non-performing party persuades the court to adopt this interpretation, he may find that, though he is indeed exempt from liability in damages, he may still be compelled to perform” (Barry Nicholas). Available online at http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-79.html}
contrast to temporary ban on transportation, as including the period during which its consequences have an effect. However, not every period actually used to overcome the consequences is to be taken into account, but only that which is necessary provided that the party concerned makes appropriate efforts. A proposal by the former GDR, which provided for expressly mentioning the consequences, was referred to the Drafting Committee and taken into consideration and, in accordance with the Norwegian proposal, the word ‘only’ before ‘period’ was deleted.  

Practically speaking, Art. 79(3) will mainly concern damages caused by delay, but, of course, other grounds for exemption can arise during the existence of the original impediment, which will then finally discharge the obligor under Art. 79(1). Thus, as long as the temporary impediment exists, the obligor is still liable for non-performance (CISG Art. 79(5)). Even though not with the desirable clarity as to the substance and the legal techniques, Art. 79(3) has the effect of suspending the obligation to perform as it is often prescribed in international economic contracts and in some instances also in laws as the primary consequence of force majeure. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence and the removal of the impediment reinstates the obligations of both parties under the contract. Therefore, Schlechtriem submits 

that the importance of this provision is reduced by the fact that the obligor’s duty to perform remains unchanged in the event of exempting impediments.  

By contrast, in matters of temporary non-performance, under the UNIDROIT Principles the excuse is available for “such period as is reasonable, having regard to the effect of the impediment on the performance of the contract” (UPICC Art. 7.1.7(2)). Under the European Principles, Art. 8:108(2) reads: “Where the impediment is only temporary the excuse provided by this Article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.” With regard to this provision, several aspects must be clarified. First, although the first sentence of PECL Art. 8:108(2), unlike UPICC Art. 7.1.7(2), follows the CISG in stipulating that the excuse for non-performance is only available during the time that performance is impossible, not more, not less; unlike the CISG, the PECL makes it clear that where exemption is available, the aggrieved party can’t resort to performance (Art. 8:101(2) PECL). Secondly, the Official Comment to the PECL makes it clear that temporary impediment means not only the circumstances which cause the obstacle but also the consequences which follow; these may last longer than the circumstances themselves. The excuse covers the whole period during which the debtor is unable to perform. Finally, the second sentence of PECL Art. 8:108(2) and its Official Comment make it clear that, it may be that late performance will be of no use to the aggrieved party. Therefore it is given the right to terminate the contract provided that the delay is itself fundamental. Equally in the case of a temporary excuse, the aggrieved party can use the procedure laid down in PECL Art. 8:106(2) (Nachfrist, see Chapter 4) to serve a notice making time of the essence.  

1177 Supra. note 19, p. 331.  
1178 Supra. note 83. However, Art. 79(3) does not provide whether or not the performing party is under obligation to perform after the impediment has ceased to exist. Southerington submits that this should be clear since Art. 79(5) explicitly limits the application of Art. 79 to damages and the promisee’s duty to perform remains unchanged in the event of exempting impediments. (Supra. note 20.)  
1179 Supra. note 88.  
1180 Supra. note 9, Comment 14.  
1181 Supra. note 30, p. 105.  
1182 Supra. note 85.
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*CISG* Art. 79(3) does not address the question of termination in case of temporary impediment, but as seen above writers as well as the Secretariat Commentary support the rule laid down in the second sentence of *PECL* Art. 8:108(2). In this respect, *UPICC* Art. 7.1.7(4) also confirms that the right to terminate the contract or withhold the performance will not be affected.

**20.6 DUTY TO NOTIFY**

The duty of the defaulting party to give notice of the impediment has been specified in many domestic legal systems, either directly by legislative or case law or following indirectly from good faith or from the debtors' duty to warn of risks which may affect the performance due. Also, the party who is unable to fulfill his obligations must, according to Art. 79(4), give notice of the impediment and its effects on his ability to perform to the other party, regardless of whether the impediment is of a permanent or temporary nature. It is said that the rationale underlying this requirement is to safeguard the parties from unpleasant surprises.\(^{1183}\)

Under *CISG* Art. 79(4), the notice is effective upon receipt (sentence 2). The term “received” should be interpreted by analogy in the same way as the term “reaches” in Art. 24.\(^{1184}\) If a party fails to notify within a reasonable time after the party who fails to perform knows or should have known of the impediment, he must compensate for damages caused by the lack of notice, even if he would otherwise be exempt. It should be noted that the damages for which the non-performing party is liable are only those arising out of the failure of the other party to have received the notice and not those arising out of the non-performance.\(^{1185}\) This is the damage which is caused and/or could not have been avoided because the creditor of the performance concerned was not given proper notice of the impediment.\(^{1186}\) It is apparent that *CISG* Art. 79(4) puts the risk of loss of the notice or the risk of delay in the receipt of the notice on the sender, thus constituting an exception to the rule provided for by *CISG* Art. 27.\(^{1187}\)

Both the two sets of Principles are similar to *CISG* Art. 79(4) with regard to the duty to notify the impediment. It is an application of the obligation of good faith which governs the whole of the two sets of Principles. Again, the notice must, in effect, allow the other party the chance to take steps to avoid the consequences of non-performance. It is also necessary in order for it to be able to exercise any right it may have to terminate when performance is partial or late. The Official Comment to the *PECL* stresses that, the reasonable time may be a short one: circumstances may even require immediate notification. The time starts to run as soon as the impediment and its consequences for the contract become known; or from when the non-performing party should have known. Good faith may even require two successive notices, if for example the non-performing party cannot immediately tell what the consequences of the impediment will be.\(^{1188}\)

**20.7 EFFECTS**

**20.7.1 In General**

It is of particular importance to consider the fate of the contract in cases of *force majeure*. If the tribunal finds an impediment sufficient to excuse one or both of the parties from the non-performance, it will have to address the particular consequences


\(^{1184}\)Supra. note 88.

\(^{1185}\)Supra. note 9, Comment 15.

\(^{1186}\)Supra. note 88.

\(^{1187}\)Supra. note 28, p. 273.

\(^{1188}\)Supra. note 15, Comment F.
and the question will arise upon to what extent the legal effects of *force majeure* on the aggrieved party’s remedies may be determined.

It is said that questions relating to *force majeure* are considered ones of fact, and, thus, their legal effects very much depend on the circumstances of each case. In this connection, a leading illustration is *Sylvania Technical Systems, Inc. v. Iran*, where the Tribunal emphasizes that *force majeure* defenses “must always be analyzed in the context of the circumstances causing *force majeure*, taking into account the particular part affected by those circumstances and the specific obligations that party is prevented from performing.” Thus, *Sylvania* and like cases involved careful analysis of particular factual circumstances and particular legal obligations in determining the consequences of *force majeure*. Such analyses now seem characteristic of the Tribunals approach. For instance, the Tribunal in *Amoco International Finance Corporation v. Iran* states: “As *force majeure* arises out of and depends on factual circumstances, it will affect a contract as soon as the circumstances emerge which create the obstacle to performance. The factual effect of *force majeure* depends on the extent to which these circumstances, practically and objectively, render performance impossible.”

Generally speaking, an impediment to performance which fulfils the conditions just set out above relieves the party which has not performed from liability. But again it is necessary to define just what is meant by this rather general expression, which may be ambiguous. Here the approach is a pragmatic one: one must start with the remedies that are available to the aggrieved party, namely damages, specific performance (including repair and substitute replacement) and termination.

### 20.7.2 Effect on Right to Damages

It seems of no doubt that the three texts exempt the non-performing party from the liability for damages, respectively in Art. 79(5) CISG, Art. 7.17(4) UPICC and Art. 8:101(2) PECL.

However, it is to be noted that, the excuse granted in Art. 79 CISG exempts only the breaching party from liability for damages. All the other remedies of the other parties are not affected by this excuse, i.e. demand for performance, reduction of the price or avoidance of the contract. *Rimke* therefore believes that: “Paragraph (5) restrains the effects of the exemption to one remedy alone and reserves to the party who did not receive the agreed performance all of its remedies except damages. These remedies include the right to reduce price (Article 50), the right to compel performance (Articles 46 and 62), the right to avoid the contract (Articles 49 and 64) and the right to collect interest as separate from damages (Article 78).” Nonetheless, this laconic formulation in Art. 79(5) offers many tough nuts to crack in regard to interpretation. First of all, it will have to be clarified how far the notion of damages under the CISG Art. 79(5) reaches. In particular, the following two aspects must be made clear.

On the one hand, the question arises on whether the “damages” under Art. 79(5) include penalty or liquidated damages. In this respect, a proposal by the former GDR to expressly include penalties under the contract in their different manifestations (penalties and liquidated damages) was rejected without being put to a vote.

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1190 Supra. note 9, Comment 8.
but above all because penalties under the contract are not a claim following from the Convention and the shaping of contracts in that respect should not be influenced. Eiderlein and Maskow submit that this objection is not realistic insofar as penalties are agreed frequently without the question of possible exemptions being touched upon. If the latter happens, the contractual agreement will in any way supersede the Convention. The reasons given for the rejection do not exclude that, other contractual clues lacking, the grounds for exemption will also be extended to penalty claims.\textsuperscript{1195} The Secretariat Commentary states in this respect that: “It is a matter of domestic law not governed by this Convention as to whether the failure to perform exempts the non-performing party from paying a sum stipulated in the contract for liquidated damages or as a penalty for non performance or as to whether a court will order a party to perform in these circumstances and subject him to the sanctions provided in its procedural law for continued non-performance.”\textsuperscript{1196} By contrast, the issue of liquidated damages or agreed payment for non-performance is expressly dealt with both in the \textit{UNIDROIT Principles} (Art. 7.4.13) and in the \textit{European Principles} (Art. 9:509) (see Chapter 16). Therefore, it is clear that under the two sets of Principles, no damages of any kind, including “liquidated damages” and penalties, will apply where the non-performance has been excused by the qualifying impediments, unless the parties have agreed otherwise;\textsuperscript{1197} or unless the claimed damages are those entitled to the aggrieved party by the non-receipt of the impediments notice from the non-performing party (\textit{supra.} 21.6).

On the other hand, the question arises as to whether the right to interests is restricted by such qualifying impediments. In this respect, there are voices who, assuming that interest is a part of the damages, want to permit an exemption on the ground of impediments. Eiderlein and Maskow submit differently that: “The impediments under Article 79, however, do not free from the obligation to pay interest [see also Schlechtriem, Nicholas, and Stoll]. A point in favour of this is that the entitlement to interest is not mentioned in Article 79, paragraph 5, but could be explained with the genesis of the Convention. We believe, however, that the economic background is also justification for such a solution. The party who does not pay a debt that is due, disposes of the sum of money required for it and/or does not have to procure it. He thus has an advantage vis-à-vis the other party which is compensated by the entitlement to interest of that party.”\textsuperscript{1198} This applies, in particular, to restrictions in the transfer of currency, often cited as an example. Thus, if the impediment relates to the payment of money, as by governmental currency controls, interest accrues on the debt, the payment of which is impeded. It is the case for the \textit{PECL} Art. 8:107(2), since the entitlement to interest is not mentioned there, either. This is also confirmed by Art. 7.1.7(4) \textit{UPICC}, which expressly states: “\textit{Nothing in this article prevents a party from exercising a right to ... request interest on money due.}” (For more details in this respect, see the discussion in Chapter 18.)

\textbf{20.7.3 Effect on Right to Performance}

Another nut offered from Art. 79(5) to crack in regard to interpretation is the effects of such qualifying impediments on the right to performance. As stated above, Art. 79 \textit{CISG} exempts \textit{only} the breaching party from liability for damages. All the other remedies of the other parties are not affected by this excuse. The Secretariat Commentary clearly states: “Even if the impediment is of such a nature as to render impossible any further performance, the other party retains the right to require that performance under article 42

\textsuperscript{1195} Supra. note 19, p. 332.
\textsuperscript{1196} Supra. note 9, Comment 9.
\textsuperscript{1197} Supra. note 15, Comment D.
\textsuperscript{1198} Supra. note 19, p. 311.
or 58 [draft counterpart of CISG article 46 or 62].

Thus, even in case of impossibility, the other party could ask for specific performance – a result that is hardly convincing.

It is argued that para. (5) entails unrealistic results. It would allow an action for specific performance in a case where the goods are destroyed and thus, the performance is physically impossible. Some proposals to extinguish the obligor’s obligation to perform if the grounds for exemption existed was, however, rejected at the Vienna Conference. The foremost reason for the rejection was the fear that a release from the obligation to perform could also extinguish collateral rights and secondary claims such as interest. It was also argued that, in cases where obligations are physically impossible to fulfill, the domestic legal doctrine of impossibilium nulla est obligatio (applicable according to Art. 28) would generally prevent a demand for performance anyway. Stoll, in turn, states that upholding the right to require performance is sensible as a basic rule and acknowledges the fact that the right to require performance is not settled by Art. 79. He adds, however, that in a case of impossibility of performance the right to claim performance would be absurd.

Therefore, it is suggested that in such extreme situations where performance has been rendered impossible, a teleological interpretation should be adopted and a “limit of sacrifice” should be admitted beyond which the promisor of the obligation could not reasonably be expected to perform his obligation. Such a solution would be rational, especially in a situation where the performance of the promisor has subsequently become illegal. An example of such a situation is where the seller cannot provide the agreed quality of a chemical substance, which is the subject matter of the sale contract, since a ban has been imposed on its use and a penalty is threatened for any related trading. Arguably, in the latter situation the buyer could, in accordance with CISG Art. 79(5), require delivery of the agreed quantity of the chemical substance from the seller. However, under a teleological interpretation of CISG Arts. 46(1) and 28, the buyer should not be able to require the seller to deliver the goods, since in performing such act, he would break the avoidance on the basis of a fundamental breach. Especially in the case of incurable defects for which the seller may not be responsible under Art. 79(1), there is a danger the domestic courts will set fines or penalties based on their rules of procedure for failure to follow an order for specific performance. In the end, such fines or penalties could be the equivalent of granting damages and could even surpass them in amount. According to Schlechtriem, a German court could, however, on the basis of Art. 28, dismiss a complaint asking for specific performance in such a case. Moreover, recognition of a foreign judgment that ordered specific performance of an impossible act would conflict with German public policy.

Stoll, in turn, states...
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ban thus bearing the risk of paying a penalty or losing his trading license. This interpretation is supported by the fact that a similar solution is given under English law, where it is accepted that in the absence of any express terms regulating the rights of the parties, the contract would be treated as frustrated, if, as a result of a ban, the performance is rendered impossible or tender of performance would involve violation of the local law.\(^{1204}\)

In some cases, on the other hand, the problem can be solved in that it is assumed that the right to performance is aimed to deliver a commercially reasonable substitute. Of course, it should be mentioned that where the contract does not specify an "origin of goods" and a ban is local, then the seller will not be absolved from his obligation to procure the goods from "other possibly more expensive" available sources. The rights to delivery of substitute goods (Art. 46(2)) or repair (Art. 46(3)), persist where there are grounds for exemption.\(^{1205}\) Furthermore, if the party who is required to overcome an impediment does so by furnishing a substitute performance, the other party could avoid the contract and thereby reject the substitute performance only if that substitute performance was so deficient in comparison with the performance stipulated in the contract that it constituted a fundamental breach of contract.\(^{1206}\)

Nonetheless, Eiderlein and Maskow submit that: "We believe that the party affected by impediments can only be obligated to deliver such substitute in exceptional cases because this otherwise could lead to a far-reaching and, above all, undefined modification of his obligation to perform. When, for instance, payment in the agreed freely convertible currency is prohibited, but can be made in other such currencies, it will have to be assumed that the buyer has the obligation to switch to those currencies. By contrast, it may be too far-reaching when the seller in the event of a prohibition of fluorocarbons as propellant is obligated to use other propellants because he might lack the technological prerequisites for it. When the party concerned, because of the performance requirement offers substitutes, the other party would contradict his own behaviour and thus violate the principle of good faith in international trade (Article 7) were he to reject them, even though they are commercially equivalent. This offers in our view a basis for permanent objection to the claim for performance. The same applies when the seller offers the substitute on his own and its rejection would be considered as an harassment (Article 7)."\(^{1207}\)

After all above, it seems clear that Art. 79 only concerns exemptions from damages. It has no direct significance in relation to the right to require performance. The CISG seems to leave this question to be solved by the domestic laws of the court deciding the case according to CISG Art. 28. Above all, it may be hoped that the general belief expressed in Vienna that a judgment for a physically impossible performance would be neither sought nor obtained should lead to a reasonable limitation to Art. 79(5).\(^{1208}\) By contrast, Art. 8:101(2) PECL specifies that where there is an impediment which fulfils the conditions set by PECL Art. 8:108, the aggrieved party may resort to any of the remedies set out in PECL Chapter 9 except claiming performance and damages. Any form of specific performance(Article 9:101 and 9:102) is by definition impossible.\(^{1209}\) However, this rigid solution might lead to some unreasonable situations particularly in case of temporary impediments. Although as discussed above it seems to amount to an obvious contradiction because it is supposed that performance is not possible, it has become clear at least that the right to performance continues to exist

\(^{1204}\) Supra. note 28, pp. 275-276.

\(^{1205}\) Supra. note 19, p. 333. When the right to repair, however, hinders the satisfaction of exactly those rights, and is taken into account in the conditions for repair claims, the general problem of the right to performance will arise.

\(^{1206}\) Supra. note 104.

\(^{1207}\) Supra. note 19, p. 335.

\(^{1208}\) Supra. note 30, p. 103. See also supra. note 2, p. 642.

\(^{1209}\) Supra. note 108.
in the event of temporary grounds for exemption and that auxiliary claims that are related to it, like interest, continue to accumulate thus stimulating.\textsuperscript{1210}

In this respect, the \textit{UNIDROIT Principles} seems to find a flexible answer to the question of what is to become of the right to performance. As mentioned above, unlike both the \textit{CISG} and the \textit{PECL} which specify, though differing from each other slightly, the remedies which the aggrieved party can't resort to in case of exemption, the \textit{UNIDROIT Principles} adhere to the principle that the excuse is general, but in Art. 7.1.7(4) they make important exceptions in determining certain claims which are not affected by \textit{force majeure}, namely the right to terminate the contract or withhold delivery or request interest on money due. The Official Comment makes some of its dispositions clear: “In some cases the impediment will prevent any performance at all but in many others it will simply delay performance and the effect of the article will be to give extra time for performance. It should be noted that in this event the extra time may be greater (or less) than the length of the interruption because the crucial question will be what is the effect of the interruption on the progress of the contract.”\textsuperscript{1211}

\textbf{20.7.4 Effect on Right to Termination}

The existence of grounds for exemption without any doubts does not preclude the right to avoid the contract. According to the express provisions of \textit{CISG} Art. 79(5), nothing in the Article prevents either party from exercising any right other than to claim damages under the Convention. This means that even if the non-performance is exempted, the aggrieved party retains his right to declare the contract avoided. Consequently, restitution for any portion of the price paid or goods delivered can be demanded, as well as any benefit accruing to the party who received the part performance. That right is given above all when there is a fundamental breach of contract or if there is no delivery within the \textit{Nachfrist}. The two sets of Principles both follow the approach in the \textit{CISG} in not restricting in case of exemption the rights of the party who has not received performance to terminate if the non-performance is fundamental. However, however, the question of the terminating of the contract is more complex.

On the one hand, it follows from the discussion stated previously that the existence of an “impediment” does not automatically terminate the contract, and it is left to the other party to determine what remedies he wishes to pursue (other than in respect of damages) in the light of the supervening circumstances. The general system as applies in the three instruments concerning termination is: the aggrieved party may put an end to the contract by a unilateral declaration provided the non-performance is fundamental. It follows that in principle it will be for the creditor to exercise this right by giving notice of termination to the debtor even in such cases where the debtor has been exempted. However, as it would be

\textsuperscript{1210} Requests by Norway and the FRG, which had intended to avoid this, could not be carried through. Given today's far-spread practice of credit sales in international trade, the following situation is characteristic: The seller has delivered the goods, but because of currency transfer regulations introduced later, payment is prevented. The seller could withdraw from the contract in this case, but may not be interested in doing so because for commercial (the goods have effectively been sold to a third party) or foreign trade reasons (re-exportation is prohibited) he cannot again obtain possession of the goods or because he cannot use them for another purpose. Should he therefore be hindered to require payment? Such concerns as they have been articulated, in particular by Soviet delegates (O.R., 384), have prevented many delegations from supporting the FRG proposal. At the diplomatic conference, it was not possible to find a flexible answer to the question of what is to become of the right to performance. The rigid solution that has been adopted led to the most diverse interpretations which were guided by the idea of making it manageable in practice. (Supra. note 19, p. 333.)

\textsuperscript{1211} See Comment 2 on Art. 7.1.7 \textit{UPICC}.}

\textsuperscript{1211} See Comment 2 on Art. 7.1.7 \textit{UPICC}.
pointless to give the aggrieved party the right to keep in force a contract which has become totally and permanently impossible to perform, it follows that in such a case it is unnecessary to require a declaration of termination.\footnote{1212} Hence, Art. 9:303(4) PECL follows the approach which is of the same result as in those legal systems under which \textit{force majeure} brings automatic termination of the contract, and it reads: \textit{``If a party is excused under Article 8.108 through an impediment which is total and permanent, the contract is terminated automatically and without notice at the time the impediment arises.''} However, no similar rule is found either in the CISG or in the UNIDROIT Principles.

On the other hand, it is to be noted that, although there are some differences among the three texts with regard to temporary impediment, the doctrine of temporary \textit{force majeure} in the three texts does not inhibit the other party’s ability to terminate the contract, it merely forgives damages and/or performance. If the promisee is not justified in terminating the contract immediately or chooses not to, obviously the obligor may suspend performance. Temporary impediment gives rise to prospective inability to perform. Although the obligor may be excused by temporary impediment, the prospective inability will normally give the promisee a power to suspend performance and demand assurance of due performance. However, if the obligor is not able to provide assurance of due performance, the promisee may terminate the contract despite the impediment that may provide a defense in an action for damages. When the impossibility ceases, the obligor is usually expected to perform in full and is entitled to an appropriate extension of time for performance, but this is not a universal rule. When the delay will make performance substantially more burdensome, the rules on hardship must be consulted, which is to be discussed separately in next chapter.

\footnote{1212} Supra. note 108.
CHAPTER 21. HARDSHIP

The phenomenon of hardship has been acknowledged by various legal systems under the guise of other concepts such as frustration of purpose, Wegfall der Geschäftsgrundlage, imprévision, ecessiva onerosità sopravvenuta, etc. The term “hardship” was chosen because it is widely known in international trade practice as confirmed by the inclusion in many international contracts of so-called “hardship clauses.”

21.1 GAP IN THE CISG?

The problem of hardship and adaptation of a contract to changed circumstances as a legal consequence thereof is by far less elaborated, established and acknowledged than the principle pacta servanda sunt. Nonetheless, some legal systems exist in which the adaptation has found its expression in legislation, and others in which this principle is widely accepted by case law and legal literature. Furthermore, it seems that this principle has reached a breakthrough on the international level by avoiding any reference to existing domestic concepts. Art. 79 of CISG deals with the issue of changed circumstances on an international level by avoiding any reference to existing domestic concepts. Art. 79 of CISG uses the term “impediment” to describe the types of event beyond the contracting party’s control that will be acceptable as an excuse. However, “impediments” is not defined. There appear to be considerable difficulties, particularly because of the fact that the Convention has developed a system of its own with regard to impediments. “The Convention’s autonomy, illustrated by the lack of reference to accepted wording and concepts of domestic laws (force majeure, frustration, impracticability, Wegfall der Geschäftsgrundlage), renders the interpretation of Article 79 extremely difficult because one cannot resort to these laws as a guide.”

Nonetheless, many commentators state that Art. 79 is “vague or imprecise” and contains “elastic words” that will be read in the context of each system’s view. It is said that the general wording of Art. 79, which makes use of phrases like “due to an impediment” and “not reasonably expected to overcome”, leaves room for judicial interpretation. The judge or arbitrator will have a natural tendency to refer to similar concepts in his own law. Because Art. 79 is a “chameleon-like” example of “superficial harmony”, its character permits it to take on that meaning which best conforms to the reader’s background. However, one must bear in mind that such reference to domestic laws in interpreting Art. 79 jeopardizes uniformity in the application of the Convention, which is the Convention’s major goal, as set out in Art. 7(1). The fact that Art.

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1213 See Comment 2 on Art. 6.2.1 UPICC.
1215 Ibid., p. 320.
79 presents problems of application might tempt one to consider solving that problem by applying Art. 7(2). Art. 7(2) permits recourse to the applicable law by virtue of the rules of private international law when questions are not expressly settled by the Convention. The problem of hardship could thus be regulated by rules of domestic law if there was a gap in the Convention regarding the promisor’s invocation of radically changed circumstances, making its performance more onerous. The history of Art. 79, however, rules out the assumption of the existence of such a gap.\textsuperscript{1216}

All factors considered, it would seem that the decisive question ought to be whether the Convention intended for the principle of hardship to exist side by side with Art. 79. The drafting history of the Convention is a legitimate and valuable aid in the interpretation of the Convention’s provisions. It reveals that Art. 79 CIGS is indeed a stricter version of its predecessor, Art. 74 ULIS, which had been criticized for excusing non-performance too readily, such as where performance merely became more difficult. The legislative history of Art. 79 also indicates that a party cannot rely on the exemption merely on the ground that performance has become unforeseeably more difficult or unprofitable. The \textit{UNCITRAL} debates show that the CIGS drafters were opposed to allowing commercial or economic hardship as an excuse for non-performance and that this was the reason for adopting the requirement of an \textit{impediment} as a precondition for relief in place of the more liberal ULIS test of a change of circumstances. It is clear in the \textit{travaux préparatoires} that the purpose of Art. 79 CIGS is to set definite limits on the promisor’s liability for breach of contract and that the word “impediment” represents a unitary conception of exemption from liability in contracts governed by the Convention, as opposed to other theories of \textit{imprévision} or hardship that are based on “changed circumstances”.\textsuperscript{1217} Some submits that the majority of academic opinion supports that a disturbance which does not fully exclude performance, but makes it considerably more difficult / onerous (e.g., change of circumstances, hardship, economic impossibility, commercial impracticability, etc.) cannot be considered as an impediment (doctrine of \textit{clausula rebus sic standibus}).\textsuperscript{1218} On the other hand, \textit{Bund} submits oppositely: “Arguably, however, the hardship provisions could come into play during a CIGS excuse controversy since the Convention does not address the concept of hardship. Although the CIGS drafters opted not to include hardship provisions, their omission should not compel the conclusion that the drafters were opposed to the concept of hardship. More than likely, the delegates did not include hardship provisions because they were unable to agree on the appropriate language for the doctrine of hardship – a doctrine that is more amorphous than the impossibility-type standard in article 79.”\textsuperscript{1219} No doubt “impediment” is capable of many meanings. Lots of commentators, therefore, want to allow changes in the circumstances in serious cases to be impediments. It is said that although the reasoning differs, there is evidence that the barrier evoked by the use of the term “impediment” is not limited to physical or legal bars to performance. Despite the fact that Art. 79’s “impediment” connotes a barrier that prevents performance, it refers to a more flexible standard than \textit{force majeure}. It is, however, not evident how insurmountable the


\textsuperscript{1218}See Dionysios Flambouras, \textit{ibid}.

standard should be in practice. There may be a nuance between great difficulty of performance and absolute impossibility. Here, a case-by-case analysis is required.\(^{1220}\)

Anyway, the discussion shows that at present it cannot be determined with sufficient security how the issue of changed circumstances can be decided on the basis of the \textit{CISG}. The parties are, therefore, urgently recommended to make arrangements in the matter and/or to exclude adjustment.\(^{1221}\) Furthermore, the appropriate legal remedy in such cases of hardship or \textit{imprévision} is principally the right to renegotiate the contract and to adapt it to the changed circumstances. The adaptation of the contract by the judge, however, is not expressly allowed by the \textit{CISG}, and must therefore be regarded as impossible.\(^{1222}\)

\section*{21.2 INTERPLAY BETWEEN CISG EXCUSE AND UNIDROIT PRINCIPLES / PECL HARDSHIP}

As the term \textit{impediment} is not defined in Art. 79 \textit{CISG}, an interesting question is bound to arise whether the \textit{hardship} provisions in \textit{UPICC Arts. 6.2.1 through 6.2.3 and PECL Art. 6.111} can be invoked to expand the meaning of \textit{impediment} found in the \textit{CISG} to include cases of economic or commercial hardship. This is to be furthered below. In this respect, it seems fairly obvious that a tribunal would first have to examine the UNICTRAL debates to see what range of impediments the drafters had in mind before accepting the relevance of the \textit{UNIDROIT} (or the \textit{PECL}) hardship provisions as an interpretational aid.\(^{1223}\) Above all, the hardship provisions in the two Principles will be examined in general below, followed by the analysis of their gap-filling application.

\subsection*{21.2.1 HARDSHIP: UNIDROIT PRINCIPLES ARTS. 6.2.1 THROUGH 6.2.3}

In contrast to the \textit{CISG}, the \textit{UNIDROIT Principles} dedicate an entire section (Section 6.2)– comprised of three Articles, namely Arts. 6.2.1 through 6.2.3 – to hardship. At the outset, it is to be noted that the \textit{UNIDROIT Principles} deal with \textit{force majeure} in the chapter on \textit{Non-Performance}. Hardship is dealt with in the chapter on \textit{Performance}. The logic of this divided treatment is clear. If performance is impossible it will not be performed; whether the non-performance is excused or will be the basis for a money judgment for damages or restitution is a question dealt with under \textit{Non-Performance}. If performance is burdensome, the consequences of the burden is dealt with as an aspect of performance.\(^{1224}\) Nonetheless, the provisions on “hardship” contained in the chapter on \textit{Performance} should be compared with the provision on “\textit{force majeure}”, contained in the chapter on \textit{Non-Performance}.

To some extent, the concepts of excuse and hardship overlap. However, they are implemented in different ways. Essentially, if a non-performing party is “excused” it is relieved of its obligation to perform without incurring liability for damages; whereas, a party facing “hardship” is entitled to request renegotiation of the contract (or even have a court impose modifications), but is not

\begin{itemize}
  \item \textsuperscript{1220} Supra. note 4, p. 226.
  \item \textsuperscript{1221} Supra. note 2, p. 325.
  \item \textsuperscript{1223} See Jacob Ziegel in “Editorial remarks on the manner in which the \textit{UNIDROIT Principles} may be used to interpret or supplement CISG Article 79”.
  \item \textsuperscript{1224} See Joseph M. Perillo in “Force Majeure and Hardship under the \textit{UNIDROIT Principles} of International Commercial Contracts”: \textit{Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit}, Universidad Nacional Autónoma de México - Universidad Panamericana (1998); p. 120. Available online at \url{http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html}.
\end{itemize}
entitled to withhold performance. In addition, a primary distinction between excuse and hardship is that excuse is invoked after non-performance, while hardship is invoked in advance of non-performance. Most importantly, there seems to be a difference upon the trigger point between the two concepts. The rule of force majeure is draconian and unforgiving. Nothing short of total impossibility will excuse non-performance or partial non-performance. Impracticability will not suffice as an excuse. Rather, impracticability as well as hardship far short of impracticability must be tested under the Hardship articles.

Under the UNIDROIT Principles, hardship alone never forgives non-performance. It instead compels renegotiation and authorizes courts to “adapt” (revise) the contract to take the hardship into account. Nonetheless, the Section on Hardship starts with the caption: “Contracts to be observed”. Art. 6.2.1 provides: “Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.” This Article stresses the exceptional character of hardship by emphasizing the serious nature of the principle pacta sunt servanda. The purpose of this Article is to make it clear that even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected. This seems to be more or less self-evident, and is similarly mentioned in Art. 1.3. It is only repeated here in order to make clear that the UNIDROIT Principles also take the principle pacta servanda sunt as a basis, and that the possibility of adaptation is of an extraordinary character. Thus, the UNIDROIT Principles encompass the concept of pacta sunt servanda – the maxim that contractual promises must be kept. The principle of the binding character of the contract is not however an absolute one. When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in these Principles as “hardship” and dealt with in the following articles of this section. As an exception, the UNIDROIT Principles address the concept of hardship in the case of a change of circumstances in Arts. 6.2.2 and 6.2.3, something similar to the public law theory of rebus sic stantibus.

It should be emphasized that the notion of hardship does not mean that performance is prevented or rendered impossible - it makes it more onerous. Art. 6.2.2. sets out the characteristics of an event that makes the excuse of hardship available. According to this provision, a change in the market after the conclusion of the contract only amounts to hardship if the equilibrium of the contract has been fundamentally altered. The requirement of a fundamental alteration of the contract entails that normal economic risks is not to be regarded as hardship but only developments in the market that lie far beyond the normal economic development. The application of hardship is, according to Art. 6.2.2, further conditioned that the event occurs after the conclusion of the contract, that the event could not reasonable be taken into account, that the event is outside the disadvantaged party’s control, and that the risk of the hardship was not reasonably foreseeable. 

1225 Supra. note 7, p. 390.
1226 Supra. note 12, p. 126.
1227 See Comment 1 on Art. 6.2.1 UPICC.
event is not assumed by the disadvantaged party. After that, the effects of hardship is specified in Art. 6.2.3. According to this provision, it is important to recall that the existence of hardship does not permit a termination of the obligations, but gives the disadvantaged party a right to request that the parties renegotiate the contract so as to re-establish the equilibrium of the contract and to facilitate its survival. Upon failure to reach an agreement, the disadvantaged party can request the court or arbitral tribunal to either terminate or adapt the contract.

21.2.2 Change of Circumstances: PECL Art. 6:111

There is a trend beyond the UNIDROIT Principles to the effect that excessive hardship is a ground for relief. The Commission on European Contract Law has formulated a rule that is basically the same as UNIDROIT’s, and considered a hardship rule to be necessary and inserted it in one article, i.e. Art. 6:111 PECL, under the heading “Change of Circumstances”. As discussed previously, PECL Art. 8:108 contains a rule similar to CISG Art. 79 and UNIDROIT Art. 6:2(1). In addition, PECL Art. 6:111 contains a provision on hardship, which is not dealt with under the CISG nevertheless dedicated with an entire section (Section 6.2) under the UNIDROIT Principles. In contrast to the single paragraph found in Art. 79(1) CISG, which in only includes impediments which must be equated with actual impossibility, the European Principles deal with the issue of change of circumstances in a quite thorough way, providing not only a basic statement of principle (Art 6:111(1))1233 and the operational parameters of the concept (Art. 6:111 (2)), but also the mechanism for the adaptation or termination of the contract by the court (Art. 6:111(3)).1234

It is found that the majority of countries in the European Community have introduced into their law some mechanism intended to correct any injustice which results from an imbalance in the contract caused by supervening events which the parties could not reasonably have foreseen when they made the contract. In practice contracting parties adopt the same idea, supplementing the general rules of law with a variety of clauses, such as “hardship” clauses. The European Principles adopt such a mechanism, taking a broad and flexible approach, as befits the pursuit of contractual justice which runs through them: they prevent the cost caused by some unforeseen event from falling wholly on one of the parties. The same idea may be expressed in different terms: the risk of a change of circumstances which was unforeseen may not have been allocated by the original contract and the parties or, if they cannot agree, the court must now decide how the cost should be borne. The mechanism reflects the modern trend towards giving the court some power to moderate the rigours of freedom and sanctity of contract.1235

Unlike the UNIDROIT Principles, the European Principles do not expressly provide for the binding force of contracts in its general provisions. Art. 6:111 PECL which deals with changes in circumstances begins with the rule that “[a] party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.” In this one relatively long article, the European Principles set out almost the same conditions for hardship as the UNIDROIT Principles.1234

As stated above, Arts. 6.2.2 and 6.2.3 of the UNIDROIT Principles deal with the definition of hardship and the effects of hardship respectively. This splitting up is intended to achieve greater clarity.

See Comment and Notes to the PECL: Art. 6:111. Comment A. Available online at ‹http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html›. Admittedly, it can be argued that if sanctity of contract were applied strictly, and the idea that relief might be given when circumstances change unforeseeably were rejected, parties would be given a stronger incentive to introduce appropriate clauses into their contracts. But experience suggests that frequently the parties are not sufficiently sophisticated, or are too careless of their own interests, to do this; or they insert clauses which do not cover every eventuality. It can also happen that the operation of the clause itself runs into some unforeseen difficulty. For instance, a price fluctuation clause which operates by reference to the price of
But it should always be borne in mind that the rules adopted by the two Principles are not mandatory. The parties can adopt whatever they want in the way of adjustment or renegotiation, and they are perfectly free to agree that a particular change in circumstances shall not affect the terms of the contract - for instance, they may exclude any change on the grounds of a fall in the value of money. In any case, it will only be in exceptional circumstances that the rules permitting renegotiation will operate. They must not provide a means for a party which has entered a contract which has simply turned out badly to revise it.\footnote{Ibid.}

21.2.3 Gap-filling Application of Hardship Provisions?

As discussed above, the two Principles both include an excuse provision (respectively in \textit{UPICC} Art. 7.1.7; \textit{PECL} Art. 8:108) that parallels Art. 79 of the \textit{CISG}. In addition, however, the two Principles also contain provisions dealing with the concept of hardship (respectively in \textit{UPICC} Arts. 6.2.1 through 6.2.3; \textit{PECL} Art. 6:111). Generally speaking, the two sets of Principles serve a gap-filling role for the interpretation of \textit{CISG} contracts. The two Principles can be used to: (1) interpret the \textit{CISG}; (2) answer unresolved questions that fall within the scope of the \textit{CISG}; or (3) resolve issues that are not addressed in the \textit{CISG}. The purpose of the two Principles' gap-filling role is to preclude an easy resort to the domestic law indicated by the conflict of law rule of the forum. Thus, when the \textit{CISG} does not adequately resolve a given issue, a court may look to the two Principles (which are international in character) rather than resort to domestic law. Courts have not yet decided whether the hardship provisions of the \textit{UNIDROIT Principles} serve a gap-filling role for Art. 79 of the \textit{CISG}. Seemingly, for judges and arbitrators, the provisions on hardship of the two Principles may serve as a means of interpretation of, or supplementation to, Art. 79 \textit{CISG}. This requires that Art. 79 contain a gap with respect to situations of hardship. However, it is clear that the \textit{CISG} does not contain a specific provision dealing with hardship. It has also been shown that it cannot be determined with sufficient clarity how the issue of radically changed circumstances can be decided upon, on the basis of Art. 79 and the \textit{CISG} in general. Furthermore, the adaptation of the contract by the judge is not expressly allowed by the \textit{CISG}, and must therefore be regarded as impossible.

With regard to the interplay between \textit{CISG} Art. 79 and hardship provisions (Arts. 6.2.1 through 6.2.3) of the \textit{UNIDROIT Principles}, it is generally believed, (as is proven in the history of Art. 79) that Art. 79 does not contain a gap as to situations of \textit{imprévision} or hardship. Proposals brought forward during the drafting process of the \textit{CISG} to make provision for those situations were expressly rejected. The rejection of a hardship provision indicates the \textit{CISG} never intended that hardship should exist side by side with Art. 79. Moreover, the purpose of Art. 79 is to set definite limits on the promisor's liability for breach of contract. Judges and arbitrators, therefore, cannot use the provisions on hardship of the \textit{UNIDROIT Principles} to interpret or supplement the \textit{CISG}.\footnote{Supra. note 4, p. 240.} The Secretariat Commentary makes it clear: "Neither article 65 \textit{[draft counterpart of CISG article 79]} nor any other provision of this Convention would release the seller from the obligation to deliver the goods on the grounds that there had been such a major change in the circumstances that the contract was no longer that originally agreed upon. The parties could, of course, include such a provision in their con-
Nonetheless, according to the doctrine of party autonomy as stated in CISG Art. 6 and following the Secretariat Commentary, parties to a contract which is governed by the CISG are free to agree on the applicability of the UNIDROIT Principles to their contract. In this case, the UNIDROIT Principles’ provisions on hardship become a part of their agreement and thus supplement Art. 79 CISG. It is also possible for the parties to include only the UNIDROIT Principles’ hardship provisions into their contract. In view of the narrow scope of Art. 79 and the uncertainties surrounding it, the contractual supplementation of Art. 79 with the respective provisions of the UNIDROIT Principles may be strongly advisable. Depending on the needs and features of their transaction, the parties can adapt the provisions of the UNIDROIT Principles so as to take into account these needs and features.\textsuperscript{1239}

Regarding the possibility of application of the provisions of PECL Art. 6:111 as a means of specifying the meaning of the CISG’s general principles (Art. 7(2)) it is suggested that this solution should not be adopted for the following reasons. First, it is highly unlikely that a non-European Union judge or arbitrator will refer to the PECL in order to interpret the meaning of the CISG’s general principles when applying CISG Art. 7(2).\textsuperscript{1240} Second, even if CISG Art. 7(2) is applied by a European Union judge or arbitrator, it is hard to imagine that the latter would refer to PECL Art. 6:111 to justify renegotiation or adaptation of the contract, since CISG Art. 7(2) only requires settlement with reference to the general principles on which the CISG is based. Neither the legislative history nor the language of the CISG indicates the existence of any general principle allowing renegotiation or judicial adaptation in the case of changed circumstances or economic impossibility.\textsuperscript{1241} Only if a general principle exists within the CISG’s system (e.g., full compensation), may the PECL provisions be used in order to specify one of the possible meanings of that principle (e.g., the mode of calculation of the rate of interest).

Nonetheless, the principle of party autonomy as established not only in the CISG or the UNIDROIT Principles but also under the PECL requires such general inapplicability of the PECL Art. 6:111 not to disrespect the intentions of the contracting parties, which could have provided in their contracts for renegotiation or adaptation in the cases of hardship, economic impossibility, etc. One should note, however, although it is not expressly excluded the possibility of hardship being invoked in respect of other kinds of contracts, hardship will normally be of relevance to long-term contracts, i.e., those where the performance of at least one party extends over a certain period of time.\textsuperscript{1242}

Based on the foregoing analysis it is thus clear that PECL Art. 6:111 or UNIDROIT Principles Arts. 6.2.1 through 6.2.3 may only apply if the contracting parties agree on its incorporation into the contract of sale. In this situation, in accordance with CISG Art. 6, PECL Art. 6:111 or UPICC Arts. 6.2.1 through 6.2.3 will apply as a special provision of a contractually incorporated a set of terms. Taking into consideration the problems relating to the renegoti-
tion or adaptation in the cases of radical change of circumstances where the CISG applies, it is therefore suggested that the contracting parties should make clear their intentions, that is, whether they will provide for the possibility of renegotiation where the price of goods has been altered by inserting a hardship clause or for the possibility of mutual discharge from liability in the cases of economic impossibility or hardship by inserting a force majeure clause. Such provision will be desirable especially in situations where (a) there is a long term contract (e.g., distribution agreement consisting of a number of successive sale agreements between the same parties), (b) the price of goods sold tends to fluctuate in the international market, or (c) where, especially in contracts subjected to arbitration, the parties subject their contract to legal sources or principles of supranational character.  

21.3 CONDITIONS FOR INVOKING HARDSHIP

21.3.1 In General

Strict conditions must be fulfilled for the renegotiation mechanism to be triggered: these are set out respectively in Art. 6.2.2 UPICC and Art. 6:111(2) PECL.

Art. 6.2.2 UPICC contains the definition of hardship. This definition has the form of a general description and states that hardship is a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements which are laid down in subparas. (a) to (d). Under PECL Art. 6:111(2), it suggests that the renegotiation mechanism applies only where performance of the contract has become excessively onerous because of a change of circumstances, provided that the change of circumstances meets the requirements laid down in subparas. (a) to (c). In this respect, there is some generic similarity in language and the substantive requirements between the UNIDROIT Principles and the PECL. One should note, however, that unlike the European Principles, the UNIDROIT Principles require that the events in question be “beyond the control of the disadvantaged party”.

Generally speaking, hardship requires a change in circumstances so severe and fundamental that the promisor cannot be held to its promise in spite of the possibility of performance. If an unforeseeable event, (not within the control of the disadvantaged party) and the occurrence of which was not a risk assumed by the disadvantaged party, occurs or becomes known after contracting, and the equilibrium of the contract is fundamentally altered for either party because of an increased cost of performance or the decrease in value of the performance to be received, hardship results. This means that the two Principles have taken the objective approach, that is to say, hardship exists if these objective criteria are observed, and it is not necessary that the parties themselves in a subjective manner have made the maintenance of certain conditions a basis of their relationship.

21.3.2 Crucial Point: Fundamental Alteration of Equilibrium

The first condition is that the change in circumstances must have brought about a major imbalance in the contract. According to Art.


1244 See Comment 1 on Art. 6.2.2 UPICC.
6.2.2 UPICC, hardship occurs where “the occurrence of events fundamentally alters the equilibrium of the contract”. Under the PECL Art. 6:111(2), the renegotiation mechanism is triggered when “performance of the contract becomes excessively onerous because of a change of circumstances”.

Since the general principle is that a change in circumstances does not affect the obligation to perform (see Art. 6.2.1 UPICC and Art. 6:111(1) PECL), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. A subsequent change in the economic context is not enough to give rise to the right to have the contract revised. The mechanism only comes into play if the contract is completely overturned by events, so that although it still can be performed, this will involve completely exorbitant costs for one of the parties. The terms show clearly that the court should not interfere merely because of some disequilibrium. “The crucial point clearly is the definition of ‘fundamental’ change. This formula by no means should lead to the result that normal economic risks can be shifted to the other party. In practice a fundamental alteration in the equilibrium of the contract may manifest itself in two different but related ways – either there is an increase in the cost of the disadvantaged party’s performance, or a decrease in the value of what it has to receive. The “excessive onerosity” may be the direct result of increased cost in performance or it may be the result of the expected counter-performance becoming valueless. In neither situation is it possible to give precise rules to cover the diversity of situations which may arise.”

Nonetheless, the Official Comment on Art. 6.2.2 UPICC gives some guidance. The first is characterized by a substantial increase in the cost for one party of performing its obligation. This party will normally be the one who is to perform the non-monetary obligation. The substantial increase in the cost may, for instance, be due to a dramatic rise in the price of the raw materials necessary for the production of the goods or the rendering of the services, or to the introduction of new safety regulations requiring far more expensive production procedures. The second manifestation of hardship is characterized by a substantial decrease in the value of the performance received by one party, including cases where the performance no longer has any value at all for the receiving party. The performance may be that either of a monetary or of a non-monetary obligation. The substantial decrease in the value or the total loss of any value of the performance may be due either to drastic changes in market conditions (e.g. the effect of a dramatic increase in inflation on a contractually agreed price) or the frustration of the purpose for which the performance was required (e.g. the effect of a prohibition to build on a plot of land acquired for building purposes or the effect of an export embargo on goods acquired with a view to their subsequent export). Naturally the decrease in value of the performance must be capable of objective measurement: a mere...
change in the personal opinion of the receiving party as to the value of the performance is of no relevance.\textsuperscript{1250}

Although performance has become more onerous or burdensome, if performance is possible, such possibility of performance distinguishes hardship from, e.g. Art. 79 of the Convention, where performance is impossible. As to be shown below, some requirements for hardship to arise resemble the presuppositions of force majeure, although in fact they should only partly do so. Thus, there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms.\textsuperscript{1251} Additionally, hardship is distinguishable from frustration of purpose.\textsuperscript{1252} As to the frustration of the purpose of the performance, this can only be taken into account when the purpose in question was known or at least ought to have been known to both parties.\textsuperscript{1253}

Furthermore, it is to be noted that, on the one hand, by its very nature hardship can only become of relevance with respect to performances still to be rendered: once a party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance it receives as a consequence of a change in circumstances which occurs after such performance. On the other hand, if the fundamental alteration in the equilibrium of the contract occurs at a time when performance has been only partially rendered, hardship can be of relevance only to the parts of the performance still to be rendered.\textsuperscript{1254}

21.3.3 Additional Requirements for Hardship to Arise

As a factual matter, hardship exists if the equilibrium of the contract is “fundamentally altered” by the occurrence of some events or the performance becomes “excessively onerous” because of a change of circumstances. But the occurrence of some such events or the change of some circumstances forms a hardship case only if certain additional criteria are fulfilled. Among these additional criteria, except the only difference that unlike the European Principles, the UNIDROIT Principles require that the events in question be “beyond the control of the disadvantaged party” (Art. 6.2.2(c) \textit{UPICC}), the substantive requirements between the two Principles resemble. To invoke hardship a party must thus show the following criteria be met:

21.3.3.1 Time factor: occurrence after conclusion

The second condition (the first additional requirement) is that the

\textsuperscript{1250} Supra. note 33.
\textsuperscript{1251} See Comment 6 on Art. 6.2.2 \textit{UPICC}.
\textsuperscript{1252} Under the Restatement (Second) of Contracts which is available to buyers under section 1-103 of the UCC, section 265 only permits discharge when a party's principal purpose is substantially frustrated. The principal purpose “must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense.” The mere fact that the transaction has become less profitable is insufficient to establish frustration of purpose; the performance must become commercially valueless, which requires near total frustration. At least one author suggests that a fifty percent decrease in value of the performance to be received or a fifty percent increase in the cost of performance is sufficient to satisfy the “fundamental change” requirement of Art. 6.2.2 \textit{UPICC}, a substantial difference from the level reflected in section 265. (See Sarah Howard Jenkins, \textit{infra}. note 54, p. 2028.)
\textsuperscript{1253} Supra. note 33.
\textsuperscript{1254} See Comment 4 on Art. 6.2.2 \textit{UPICC}.  

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events fundamentally altering the equilibrium or the change of circumstances must have occurred after the contract was made. According to Art. 6.2.2(a) UPICC, the events causing hardship must “occur or become known to the disadvantaged party after the conclusion of the contract”; Art. 6:111(2)(a) reads similarly: “the change of circumstances occurred after the time of conclusion of the contract”.

On the one hand, if that party had known of those events when entering into the contract, it would have been able to take them into account at that time and may not subsequently rely on hardship. On the other hand, if unknown to either party circumstances which make the contract excessively onerous for one of them already existed at that date, the rules on mistake (see Arts. 3.4, 3.5 UPICC and Arts. 4:103, 4:105 PECL, which are not the subject here) will apply.

21.3.3.2 Unforeseeability

Thirdly (the second additional requirement), even if the events or change in circumstances occurs after the conclusion of the contract, such events cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded. In this respect, Art. 6.2.2(b) UPICC requires: “the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract”; Art. 6:111(2)(b) resembles: “the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract”.

This condition is parallel to that applicable to force majeure or im-

possibility of performance and should be interpreted in the same way. As is the case with allegations of force majeure, foreseeability is a central concern in hardship cases. The general notion is that if an event is foreseeable, the parties should deal with it in the contract; otherwise, the party disadvantaged by the event should bear its burden. Yet, as stated previously, almost everything that ever happens is in some sense foreseeable. Sometimes the change in circumstances is gradual, but the final result of those gradual changes may constitute a case of hardship. If the change began before the contract was concluded, hardship will not arise unless the pace of change increases dramatically during the life of the contract.

Again, the question is whether the event was so outside the bounds of probability that reasonable parties would not provide for it. Hardship cannot be invoked if the matter would have been foreseen and taken into account by a reasonable man in the same situation, by a person who is neither unduly optimistic or pessimistic, nor careless of his own interests.

21.3.3.3 Risk not assumed

There is a fourth criterion (the third additional requirement) which deliberately differs from force majeure. It excludes cases in which the disadvantaged party has assumed the risk relating to those events which have caused the hardship. (This is of course also possible in force majeure cases, but a presumption if it exists at all, runs in the opposite direction.) The taking of the risk can be made not only expressly, but also be derived from the nature of the con-

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1255 See Comment 3 on Art. 6.2.2 UPICC.
1256 Supra. note 34.
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Under Art. 6.2.2(d) UPICC, which requires that "the risk of the events was not assumed by the disadvantaged party", there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. The word "assumption" makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract. A party who enters into a speculative transaction is deemed to accept a certain degree of risk, even though it may not have been fully aware of that risk at the time it entered into the contract. The allocation must be express, or be inherent in the nature of the contract. Thus, if the contract is aleatory, such as an contract of insurance, the obligor cannot complain that the risk has occurred, even though the occurrence far exceeded what had been foreseen. Thus, if an insurer writes a policy covering the risks of war and civil insurrection, it must honor the policy even if war and civil insurrection breaks out in three countries in the same region. Art. 6:111(c) PECL requires similarly that "the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear". In sum, it must be lastly decided whether the party affected by a change in circumstances should be required to bear the risk of the change, either because it expressly undertook to do so (for instance by taking the risk of a shift in exchange rates) or because the contract is a speculative one (for instance a sale on the futures market). If so, the party cannot make use of hardship.

Finally, it is to be recalled again that the two Principles allow the parties broad autonomy to determine the terms of their relationship. The grounds for invoking hardship may be broadened or reined in by the terms of the contract. For example, the Official Comment on Art. 6.2.2 UPICC makes it clear: "The definition of hardship in this article is necessarily of a rather general character. International commercial contracts often contain much more precise and elaborate provisions in this regard. The parties may therefore find it appropriate to adapt the content of this article so as to take account of the particular features of the specific transaction."  

21.4 EFFECTS OF HARDSHIP  
21.4.1 In General

Once such events or change of circumstance discussed infra. 21.3 is established, the renegotiation mechanism will be triggered. Generally speaking, the effects of hardship have both a procedural and a substantive law aspect. The procedural aspect starts with renegotiation, either "the disadvantaged party is entitled to request" (Art. 6.2.3(1) UPICC) or "the parties are bound to enter into" (Art. 6:111(2)) such renegotiation, and may lead to a court decision in case of the failure "to reach agreement" within a reasonable time or period. In such cases of the parties' failure to reach agreement during renegotiation, either party is authorized to resort to the court (Art. 6.2.3(3) UPICC). "Here, the parties, in the first instance, are allocated the responsibility to resolve the disequilibrium or to fill the gap in their agreement. Only after an unsuccessful attempt for a reasonable time may either party request the intervention of a court or arbitral tribunal."

Once the matter is brought before a court (including an arbitral tri-

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1261 Supra. note 16, pp. 662-663.  
1262 Supra. note 43.  
1263 Supra. note 12, pp. 129-130.  
1264 Supra. note 34.  
1265 See Comment 7 on Art. 6.2.2 UPICC.  
bunal: Art. 1.10 *UPICC*; Art. 1:301 *PECL*), the court may either terminate or adapt the contract. The solution seems to be a problem in some jurisdictions since it includes to a certain degree the imposition of conditions by the judiciary. This is true even if the court only terminates the contract, since it has to fix the respective terms at the same time. A tendency in this direction, problematical enough if practiced in national law, causes even more concern in international trade, where the party autonomy is of particular importance. The judge usually has to decide what the law is and not to make decisions for the parties or anybody else. Nevertheless the two sets of Principles have proposed to put this burden on the shoulders of the judge in these exceptional cases and by adding certain substantive rules (Art. 6.2.3(4) *UPICC*; Art. 6:111(3) *PECL*) which give a certain legal basis for this constructive legal decision-making. It is said, however, the contract may only be terminated if this is reasonable. Otherwise the court must adapt the contract. Insofar the original equilibrium of the contract is given as a yardstick for adaptation. But the procedure adopted does not impinge on rules allowing the contract to be brought to an end in other circumstances, for example the right to terminate a contract of indefinite duration by giving notice.

One should note, however, as for the consequences of a change in circumstances, the two sets of Principles result in notably different results. While the *UNIDROIT Principles* permit (“the disadvantaged party is entitled to request” (Art. 6.2.3(1) *UPICC*) the parties to engage in renegotiations, the European Principles require (“the parties are bound to enter into negotiations with a view to adapting the contract or ending it”. Like many expressly agreed clauses, Art. 6:111 envisions at the outset a process of negotiation to reach an amicable agreement varying the contract.

Thus, once hardship is established, the disadvantaged party may request renegotiation of the contract. Furthermore, the other party, if it is concerned about maintaining the contractual relationship, may also seek to open negotiations. However, it is to be noted that, a request for renegotiations is not admissible where the contract itself already incorporates a clause providing for the automatic

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1267 Supra. note 16, p. 663.
1268 Ibid.
1269 Supra. note 23.

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adaptation of the contract (e.g. a clause providing for automatic indexation of the price if certain events occur). However, even in such a case renegotiation on account of hardship would not be precluded if the adaptation clause incorporated in the contract did not contemplate the events giving rise to hardship.  

21.4.2.2 Renegotiation in good faith

The second sentence of Art. 6.2.3(1) UPICC clearly states: “The request shall be made without undue delay and shall indicate the grounds on which it is based”. Accordingly, on the one hand, the request for renegotiations must be made as quickly as possible after the time at which hardship is alleged to have occurred. The precise time for requesting renegotiations will depend upon the circumstances of the case: it may, for instance, be longer when the change in circumstances takes place gradually. On the other hand, Art. 6.2.3(1) UPICC also imposes on the disadvantaged party a duty to indicate the grounds on which the request for renegotiations is based so as to permit the other party better to assess whether or not the request for renegotiations is justified. The UNIDROIT Principles stress communication. Therefore, it is important that the request state the grounds for the request, unless those grounds are obvious. An incomplete request is to be considered as not being raised in time, unless the grounds of the alleged hardship are so obvious that they need not be spelled out in the request.

Although no similar rule is found under Art. 6:111 PECL, its Official Comment makes it clear: “Under the general duty of good faith, the party which will suffer the hardship must initiate the negotiation within a reasonable time, specifying the effect the changed circumstances had upon the contract.” Nevertheless, a delayed or incomplete request is not automatically excluded. The disadvantaged party does not lose its right to request renegotiations simply because it fails to act without undue delay or to set forth the grounds on which the request for renegotiations is based in making the request. The delay or insufficiency in making the request may however affect the finding as to whether hardship actually existed and, if so, its consequences for the contract. On the other hand, if the hardship claim is justified, the other party is obligated to negotiate in good faith to adapt the contract to alleviate the burden. ” The negotiations must be conducted in good faith, that is to say, they must not be either protracted or broken off abusively. There will be bad faith if one party continues to negotiate after it has already entered another, incompatible contract with a third party. Normally the principle of good faith will require that every point of dispute between the parties should be brought up in the negotiations.

Clearly, although nothing is said (in Art. 6.2.3 UPICC or Art. 6:111 PECL) to that effect, both the initiation of renegotiations by either party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith (Art. 1.7 UPICC; Art. 1:201 PECL) and to the duty of cooperation (Art. 5.3 UPICC; Art. 1:202 PECL). Thus the initiating party must honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical manoeuvre. Similarly, once the request has been made, both parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form

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1273 Supra. note 59.
1274 See Comment 2 on Art. 6.2.3 UPICC.
1275 See Comment 3 on Art. 6.2.3 UPICC.
1276 Supra. note 12, p. 130.
1277 Supra. note 63.
1278 Supra. note 60.
1279 Supra. notes 62, 63.
1280 Supra. note 64.
1281 Supra. note 60.
of obstruction and by providing all the necessary information. A party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party (Art. 2.15(2) UPICC; Art. 2:301(2) PECL).

Finally, another application is specified in Art. 6.2.3(2) UPICC in stipulating: “The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.” The reason for this lies in the exceptional character of hardship and in the risk of possible abuses of the remedy. Withholding performance may be justified only in extraordinary circumstances. Although again no similar rule is found under Art. 6:111 PECL, its Official Comment clearly states: “The victim who withholds its performance on the grounds that it is excessively onerous (for instance during renegotiation) does so at its own risk.”

21.4.3 Court Measures in case of Hardship

If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, either party is authorized to resort to the court. Art. 6.2.3(3) UPICC reads: “Upon failure to reach agreement within a reasonable time either party may resort to the court.” Although no similar rule is found in Art. 6:111 PECL, as noted above, the obligation of the parties to enter into renegotiation established under Art. 6:111 PECL, which appears to be a divergency of technical nature from Art. 6.2.3 UPICC, has its repercussions if the parties are unable to agree and the matter is resolved by a court. Furthermore, the Official Comment on Art. 6:111 PECL makes it clear: “If the parties’ negotiations do not succeed, either of the parties may bring the matter before the court.”

Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not achieve a positive outcome. How long a party must wait before resorting to the court will depend on the complexity of the issues to be settled and the particular circumstances of the case.

Upon a showing of hardship, the court may react in a number of different ways. Art. 6.2.3(4) UPICC states: “If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.” Similarly, the first sentence of Art. 6:111(3) PECL reads: “If the parties fail to reach agreement within a reasonable period, the court may: (a) end the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.” Clearly, the court may, in effect, either terminate the contract or modify its terms. Thus, although the court will intervene only in the last resort, it is given wide powers. The court has great flexibility in its power to terminate or revise. The termination may be on such terms as the court deems just. It should be noted that in many cases, the reliance interest of the party not burdened by hardship ought to be redressed. Revision need not always be a price adjustment. The place of delivery could be changed.

Of course, as to be demonstrated below, there is a strong possibility that a court will refuse to revise the contract by a declaration that the contract be performed as originally agreed.

A first possibility is for it to terminate the contract. However, since

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1282 See, e.g. Comment 5 on Art. 6.2.3 UPICC.
1283 See Comment 4 on Art. 6.2.3 UPICC.
1284 Supra. note 22.
1285 Supra. note 22, Comment D.
1287 Supra. note 12, p. 131.
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termination in this case does not depend on a non-performance by one of the parties, its effects on the performances already rendered might be different from those provided for by the rules governing termination in general. Accordingly, Art. 6.2.3(4)(a) UPICC and Art. 6:111(3)(a) PECL both provide that termination shall take place at a date and on terms to be fixed or determined by the court. Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium. In so doing the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.\(^{1288}\)

In other words, the modification of the clauses of the contract must be aimed at re-establishing the balance within the contract by ensuring that the extra cost imposed by the unforeseen circumstances are borne equitably by the parties. They may not be placed solely on one of them. Unlike the risks which result from total impossibility, the risks of unforeseen events are to be shared. The court may intervene in a variety of ways. According to the texts, the proposed solutions are only options. First, the court may reject the application. It will do so if, in its opinion, the remedy would be worse than the harm: if, for instance, the remedy were to create a new hardship on the other party’s side. Second, it may extend the period for performance, increase or reduce the price or the contract quantity or order a compensatory payment. Much will depend on the procedural rules of the forum, but these will often permit similar results to be reached e.g. by granting a \(\text{de grâce}\) or by reducing the counter-performance to be rendered. It is to be noted that Art. 6:111(3)(b) PECL establishes a limit to the court power to adapt the contract: “in a just and equitable manner”. Moreover, the Official Comment on Art. 6:111 PECL clearly states that the court can modify clauses of the contract but it cannot rewrite the entire contract. The modifications made to the contract must not amount to imposing a new contract on the parties. Otherwise, the only option open to the court would be to declare the contract ended. It is obvious that if the parties fail to agree on a change to the contract, the resulting difficulties will usually be such that the court will end up declaring the contract ended. And the court will fix the date for the contract to end in such a way as to ensure that the aggrieved party is not unfairly prejudiced by the other party’s failure to agree ending the contract or to negotiate for adaptation of the contract.\(^{1289}\)

Finally, it is to be recalled that under the European Principles, the court has the power to sanction if the attitude of the parties during renegotiations merits sanction. The second sentence of Art. 6:111(3) PECL clearly states: “In either case [the court’s option to adapt or end the contract upon failure of parties’ renegotiation], the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.” Thus, the obligation to renegotiate is independent and carries its own sanction. The compensation provided here will normally consist of damages for the harm caused by a refusal to negotiate or a breaking off of negotiations in bad faith (for instance, the expenses of bringing the action insofar as these have not been recouped by an award of costs). It may be awarded against either party.\(^{1290}\)

\(^{1288}\) See Comment 7 on Art. 6.2.3 UPICC.

\(^{1289}\) Supra. note 73.

\(^{1290}\) Supra. note 60.
21.4.4 Concluding Remarks

Based on the foregoing discussion it is clear that the court's decision to terminate or to modify the contract is very much a last resort. The whole procedure is devised to encourage the parties to reach an amicable settlement through renegotiation. Furthermore, both the initiation of renegotiations by either party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith. A disadvantaged party may not during the tendency of renegotiation or resolution withhold its performance. It is only in cases where the negotiations are unsuccessful that the parties are entitled to resort to judicial system, where the court is authorised to make a decision on the merits in accordance with Art. 6.2.3(4) UPICC or Art. 6:111(3) PECL.

Clearly, the first aim should be to preserve the contract. The court could even require the parties to make a last effort at renegotiation if it believes that there is still a chance of saving the contract. It may employ any means that are permitted under its national law, such as appointing a mediator to assist the parties. In short, a court is authorized to grant four possible options of relief if it finds a hardship: (1) terminate the contract at a specified date and on terms to be fixed; (2) adapt the contract with a view to restoring its equilibrium; (3) direct the parties to resume negotiations to reach an agreement adapting the contract; (4) confirm the terms of the contract as originally agreed. However, a judge can only terminate or adapt a contract where it is reasonable under the circumstances. Art. 6.2.3(4) UPICC expressly states that the court may terminate or adapt the contract only when this is reasonable. The circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand.

In any event, it is in effect the court which declares the contract ended in case of hardship, in contrast to what happens when the non-performance is imputable to one of the parties or when performance becomes impossible. It may be that, after fruitless negotiations, one of the parties will take the initiative and announce unilaterally the end of the contract. If the other challenges this, the court must decide whether the party was justified in taking this attitude. In addition the court will have to fix the date as from which the contract is ended, taking into account how much of it has been performed. It is this date which will determine the extent of restitution which will become due. The hardship provisions in the two Principles also empower the court to end the contract upon terms, for instance provided that an indemnity is given. It may also order the payment of an addition to the price or of compensation for a limited period and the termination of the contract at the end of the period. So the mechanism adopted by Arts. 6.2.1 through 6.2.3 UPICC and Art. 6.111 PECL gives the court wide powers. These must be used in moderation, to avoid any reduction in the vital stability of contractual relations. This moderation is shown by the experience of countries which have already a similar rule.

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1291 Supra. note 73.
1292 Supra. note 54, p. 2029.
1293 Supra. note 76.
1294 Supra. note 73.
CHAPTER 22. FORCE MAJEURE and HARDSHIP CLAUSES

Force majeure and hardship clauses, frequently introduced into contracts for international sales transactions, deal with situations of changed circumstances. In these clauses, the contracting parties define impediments, excuses, and the consequences thereof. The sphere of operation and the purpose of force majeure and hardship clauses in international contracts will now be considered in more detail.1295

22.1 GENERAL CONSIDERATIONS

As discussed previously, the conceptions dealing with situations of changed circumstances are oriented on the two basic concepts of force majeure and hardship. Generally speaking, thus, parties to commercial contracts, whether they engage in domestic or international contracts, are protected as a rule under the doctrine of changed circumstances. However, the degree of protection they receive may vary depending on the applicable rules governing their contract. Nevertheless, it is commended to include carefully-negotiated and -drafted force majeure or hardship clauses in the contracts, because the excuse provisions in applicable instruments may not afford adequate protection under certain circumstances. It is especially the case where the contracts are governed by the CISG, which addresses the issue of changed circumstances in Art. 79 nevertheless does not solve the problem entirely.1296

With respect to situations of changed circumstances, the UNIDROIT Principles and the European Principles could offer sufficiently elaborate and widely accepted rules on hardship and force majeure. By implementing these rules into their contract, parties could supplement the narrow and vague provisions of Art. 79 CISG.1297 On the other hand, parties are expected to specify in more detail the contingencies which justify invoking hardship or force majeure, because most legal systems and international instruments generally recognize party autonomy to provide for varying clauses concerning changed circumstances so as to take account of the particular features of the specific transaction.1298 By including a force majeure or hardship clause, parties can delineate the types of extraordinary circumstances that will excuse non-performance, thereby increasing predictability. Where the express terms of the agreement delineate the standard to be applied for exemption, that express provision – even if extracted from the

most discussed problem in the context of Art. 79 is whether radically changed circumstances, where the performance of one of the parties has become much more onerous and difficult, but not impossible, falls within the scope of this provision. Because of Art. 79's vagueness, however, it cannot be determined with sufficient certainty how this issue can be decided on the basis of the CISG.1299 Supra. note 1, pp. 242-243.

Party autonomy is generally established under, e.g. CISG Art. 6; UPICC Art. 1.5 and PECL Art. 1.102(2). In pertinent part, for instance, the Official Comment on the UNIDROIT Principles deals with the relationship between hardship/force majeure and contract practice: “The definition of hardship in this article [Art. 6.2.2 UPICC] is necessarily of a rather general character. International commercial contracts often contain much more precise and elaborate provisions in this regard. The parties may therefore find it appropriate to adapt the content of this article so as to take account of the particular features of the specific transaction.” (Comment 7 on Art. 6.2.2 UPICC) ; similarly, “[t]he definition of force majeure in para. (1) of this article [Art. 7.1.7 UPICC] is necessarily of a rather general character. International commercial contracts often contain much more precise and elaborate provisions in this regard. The parties may therefore find it appropriate to adapt the content of this article so as to take account of the particular features of the specific transaction.” (Comment 4 on Art. 7.1.7 UPICC)

1296 It is likely that Art. 79 will be the Convention's least successful provision. The
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Indeed, the contracting parties in international trade are normally very experienced and aware of the risks involved. Therefore, they are likely to include special clauses in their contract, use pre-drafted contracts or use general terms specific to a particular trade. Such contractual arrangements may appear as force majeure or hardship clauses. In the former case, the clause generally covers future situations where events occur which are beyond the control of the parties and render execution of the contract impossible, either temporarily or permanently, and may or may not provide for the discharge of the debtor of the obligation in question where these events occur (e.g. force majeure events, embargoes, export/import limitations, etc.). A force majeure clause may impose more or less lenient conditions or may provide for the obligor’s liability in force majeure situations. On the other hand, a hardship clause attempts to anticipate and deal with the situation where unforeseen circumstances fundamentally change the contractual equilibrium such that an excessive, normally economic, burden is thrust upon one of the parties. Such a clause is likely to set some parameters for renegotiation of the contract in its entirety (or some contractual terms) and its objectives, should the circumstances change (e.g. if a dramatic devaluation of the currency occurs). Force majeure clauses are normally used in short term contracts of sale where the contracting parties’ obligations are limited to the delivery of the goods and the payment of the price. In these situations, the number of discharging events is normally limited and restrictively enumerated in the force majeure clauses. On the other hand, in contracts performed over a long period of time (e.g. distribution, agency agreements consisting of successive contracts of sale, supply contracts) the absolute application of the pacta sunt servanda rule appears quite harsh since during the existence of the contractual relationship unpredictable and otherwise unavoidable factors could render the performance of the contractual obligations excessively onerous or unfair. Consequently, in such situations the insertion of a hardship clause is often viewed as necessary.\textsuperscript{1300}

While it might be argued that, in view of wider and narrower formulations of the doctrine of changed circumstances or so-called (clausula) rebus sic stantibus in different legal systems or international instruments and of certain differences in its practical application it would not be easy to establish a common core of such a general principle of law, the consideration of changed circumstances in certain contexts is nevertheless warranted by the express wording contained in the contracts under so-called force majeure or hardship clauses. Contracts can and do take account of the conditions and needs presented by various types of transactions. Here the contractual practice can help to obtain ideas for the interpretation of the grounds presumed under the prepared instruments for excusing non-performance. Clauses, model contracts, and the like, which have prevailed in a certain context, can play a role in this regard.\textsuperscript{1301}

22.2 FORCE MAJEURE CLAUSE

22.2.1 Introduction

Force majeure clauses, often very detailed, are almost invariably included in international business contracts, irrespective of their proper or selected governing law. They only have relevance, however, if they differ from the doctrine of force majeure that would be applicable without the existence of such a clause. In this respect, force majeure clauses that parties include in their contracts either supplement the governing law or limit or supplant the default rule thereof. It seems clear that, when provision is made to anticipate the consequences of force majeure events, the parties tend to depend much more on the terms of their agreement than on the subjacent rules of the system of law applicable to the contract.

Under most circumstances, parties should include a force majeure clause in their contract to provide greater predictability and more appropriate protection than the doctrine of excuse governing the transaction – usually CISG Art. 79. Force majeure clauses can provide increased protection for clients in several ways. For example, Art. 79 CISG does not explicitly state whether an impediment excuses performance if partial performance is possible. Thus, the parties could draft a force majeure clause that explicitly states that a party must perform to the extent possible. By negotiating the issue of partial performance in advance, parties can avoid expensive litigation down the road. Similarly, parties could include a force majeure clause to overcome the obstacle of foreseeability. To some extent, every impediment is foreseeable; and where certain situations or “impediments” are foreseeable, parties generally assume their risk unless explicitly allocated in the contract. Therefore, since a force majeure clause in a CISG contract may limit or supersede the applicability of Art. 79, parties could negotiate force majeure excuses without regard to foreseeability. Thus, even if a party could not claim excuse under Art. 79 – because the impediment was foreseeable the party could be excused by an event delineated in the force majeure clause. The illustrations provided above do not exhaust the benefits that force majeure clauses provide for international contracts. Force majeure clauses can be tailored to meet the needs of parties, to account for exceptional circumstances, and to compensate for inadequate protection by the applicable doctrine of excuse.

However, in order to protect clients, practitioners should negotiate and draft the clauses very carefully. In particular, practitioners should consider the following tips when drafting force majeure clauses: force majeure clauses are generally drafted in such a way as to offer a definition of the concept, followed by a non-exhaustive list of the events agreed upon by the parties as constituting force majeure. Furthermore, a duty of notification, obligating the affected party to give notice of the force majeure event, is often provided.

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1301 Supra. note 1, p. 221.


Finally, force majeure clauses set out the legal effect of a force majeure situation.

22.2.2 Drafting Considerations

Drafters must firstly decide whether to list specific force majeure events, include a “catchall” category, or both. It is the recommended and usual practice that force majeure clauses, after defining the concept in a catch-all provision, set out a non-exhaustive list of agreed force majeure events. Examples of traditional events contained in such lists are tornadoes, lightning, floods, fires, earthquakes, and unusually severe weather conditions. The list of specific force majeure events included in international contracts has evolved in such a way as to include impediments to the ability of the parties to fulfill their obligations. These are in addition to the classical events of natural calamities and wars, and may be the result of: (a) the increasing participation of States or their entities in business activities (authorisations, approvals, concessions and regulations), or (b) turmoil of a social nature (strikes, lock-outs).

When the laundry list approach is utilized, the drafter should consider phrasing it as “including, but not limited to ...” Otherwise, a court could interpret the clause as excluding any event not specifically listed in the clause. On the other hand, the drafter could state that the catchall provision covers “any other event, whether or not similar to the causes specified above.” The drafter could avoid leaving room for judicial discretion in the laundry list approach by listing very precise events. However, drafters should remember that under the ejusdem generis rule of construction “general words following specific ones will be given a limited meaning.” Therefore, if the force majeure clause enumerates contingencies (i.e., a laundry list), the drafter must be very comprehensive. As an alternative, the force majeure clause could delineate excusing effects rather than excusing events.

Secondly, the force majeure clause should explicitly state what the performing party must do in order to properly invoke the clause. For example, the clause may require that a party that wishes to be excused from performance under the clause give prompt notice of such an intention to the other party, unless the other party has actual notice. Failure to provide such notice often results in drastic consequences where one cannot rely on the clause to excuse non-performance. Such a situation, however, is not thought to result automatically from a failure to provide timely notice; there is usually an express provision in the contract. Moreover, where notice is required, the drafter should address other notice issues, including: (1) when the excusing event is deemed to have occurred, i.e., when the duty to give notice arises; (2) time limits; (3) whether notice must be written; and (4) whether notice becomes effective on dispatch or upon receipt, etc.

Thirdly, the drafter should resolve any uncertainty as to the consequences of a situation of force majeure, which is generally to imply

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1428 Supra. note 9, p. 232.
1429 Supra. note 1, p. 230. In this respect, Bund believes that courts may be more willing to give effect to “laundry list” force majeure clauses that contain specific events, rather than to a catchall or combination-type clause for several reasons. First, a clause that merely lists general categories leaves judges discretion and, in certain situations, they could refuse to excuse performance since they are not bound by specified events. Second, under rules of construction, namely ejusdem generis, courts have refused to excuse performance for events that are dissimilar to events specifically listed in the clause (e.g., economic factors). Including a general catchall provision, therefore, may be a wasted effort. (Supra. note 11, p. 408.)
1430 Supra. note 8, p. 552.
1431 Supra. note 11, p. 408.
a disclaimer of liability for the effects of such an event. Generally, the promisor is not liable for damages where force majeure exists. However, e.g., it cannot be determined with sufficient security how the right to performance can be affected by the impediments under Art. 79 CISG. Unlike most municipal laws which adopt the notion of force majeure, in international trade practice force majeure does not necessarily result in the termination of the contract. More often, in international trade practice there is provision for two stages with respect to the effect of force majeure. In the first stage, either the duty to discharge the obligation is suspended for the duration of the force majeure condition or the time of performance of the contract is extended for a specific period. If the event which constitutes force majeure is permanent or continues after the expiration of that period, each party is entitled to terminate the contract. If the force majeure condition ceases before the expiration of the additional period of time, however, the contract revives without consequences.¹³¹⁴ Drafters should use very clear language when dealing with these issues so as to make their intention clear.

In short, in defining force majeure clause, the drafter should resolve any uncertainty left by default rule, e.g. Art. 79 CISG. Drafters should use very clear language and define the scope of the force majeure clause to avoid leaving a gap in the clause.

¹³¹⁴ Supra. note 1, pp. 231-232.

22.3 HARDSHIP CLAUSE

22.3.1 Introduction

In practice, specific clauses are used to give the possibility of adjusting the contract under certain circumstances. It is fairly common in contracts dealing with international trade, particularly those that have long durations, to make provisions for revision of the contract in case of changed circumstances.¹³¹⁵ Among these clauses, hardship clauses organise the revision of the contract whenever a change of circumstances significantly modifies the economy of the contract.¹³¹⁶ They apply to situations of changed circumstances in which the parties intend not to dissolve the contract but to continue it.¹³¹⁷

Perillo even believes that the widespread use of hardship clauses in long-term contracts has created a custom and the hardship clause must be implied in the contract even if it was not expressly included by parties: “Sophisticated international trade agreements of long duration typically contain a renegotiation or other adaptation clause that provides flexibility to the relationship – so typical as to perhaps rise to the strength of a usage. The absence of such a clause may reflect that such a clause has been rejected by one or both parties, but is more likely to have been overlooked by unsophisticated parties or deliberately omitted by a sophisticated drafter. In the last two cases, the court should consider the contracts as having an omitted term and fill the gap with the help of the UNIDROIT Principles.”¹³¹⁸ However, another commentator notes that the fact that parties

¹³¹⁴ Some of these clauses provide the contract will terminate when a specified change in circumstances has occurred. Other clauses, such as indexation clauses or price revision clauses provide the contract terms will be automatically changed if such circumstances arise. Finally, some clauses, adaptation clauses, merely order the parties to adapt the contract terms to the new circumstances.


¹³¹⁶ See Clive M. Schmitthoff, Schmitthoff’s Export Trade 146 (8 ed. 1986); p. 648.

¹³¹⁷ See Joseph M. Perillo in “Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts”: Contratación internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit, Universidad Nacional Autónoma de México - Universidad Panamericana (1998); p. 117. Available online at
sometimes include a hardship clause in the contract may prove that no general customary principle exists. Moreover, there is such a variety in these hardship clauses with regard to their scope, application and remedy, that it is difficult to base a customary principle on them.\(^\text{1319}\)

In fact, arbitrators have consistently refused to read customary hardship clauses into long-term contracts. Rather, they have ruled that hardship clauses should be interpreted strictly. Accordingly, a clause mentioning specific changes must be interpreted as meaning that no other changes should be taken into account. Therefore, parties are recommended to specifically instruct the arbitrators or tribunals to take account of the changed circumstances by inserting in advance a hardship clause in their contracts. As noted previously, the \textit{CISG} has not resolved the existing problems of hardship. Hardship clauses may, therefore, be highly desirable in cases where the \textit{CISG} applies. On the other hand, the mere presence of a hardship clause should not in itself exclude the application of the general law on changed circumstances. It would be too cumbersome if parties were obliged to negotiate and draft hardship clauses covering all possible events which may affect performance. Consequently, the general law on changed circumstances remains applicable to all changes not covered by a hardship clause.\(^\text{1320}\)

\section*{22.3.2 Drafting Considerations}

Hardship clauses are usually highly complex and vary significantly from case to case. However, in general terms, it can be stated that the provisions in current use have two basic common features, namely the determination of the events which may trigger the readjustment process and the establishment of an appropriate procedure for the adaptation of the relationship to new circumstances.\(^\text{1321}\) In other words, hardship clauses always consist of two main parts. The first part of the clause defines the hypothesis when the clause applies. The second part deals with the effects of hardship, i.e., what happens whenever the hypothesis is realised.\(^\text{1322}\) In a hardship clause it is important to stipulate when and how the parties will rearrange the contractual terms in case the contract loses its economic balance due to certain events which may or may not be specified.\(^\text{1323}\)

On the one hand, hardship clauses usually state that the circumstances at the time of the conclusion of the contract have changed. This change of circumstances must be serious or substantial and beyond the control of either party. Furthermore, the change must be entirely uncontemplated and unforeseeable. Then, a hardship clause often goes on to describe the effect of the change in circumstances, namely that the contract is out of balance, leading to a substantial economic hardship. Here, some clauses set out the requirement that a party is prejudiced. This, however, seems too extensive.\(^\text{1324}\) With regard to the wording of hardship clauses, it can be very broad and refer to "events" as the circumstances which are to be considered. Sometimes, the wording is more specific. For example, “monetary events”, or specific changes in environmental conditions are taken into account. However, it seems advisable to use broad wording, give a list of specific circumstances as examples, and insert the excluded circumstances. On the other hand,


\(^{1320}\) Ibid.

\(^{1321}\) Supra. note 10, p. 59.

\(^{1322}\) Supra. note 22, p. 235.


\(^{1324}\) Supra. note 1, pp. 228-229.
the use of more subjective criteria, such as “unfair” or “inequitable” should also be avoided due to their vagueness.\textsuperscript{1325} In short, the hypothesis of a hardship clause has two aspects: the clause sets out the circumstances in which hardship exists; it then describes the consequences or effect of these circumstances on the parties to the contract.\textsuperscript{1326}

On the other hand, hardship clauses usually provide for revision of the contract. Some clauses set out criteria for the revision of the contract. An example of such a clause is, “to restore the equilibrium between the parties as it was at the time of the conclusion of the contract.” A more subjective approach would be, for example, “with fairness” or “equitable adjustment”.\textsuperscript{1327} In a case where no agreement between the parties can be reached, hardship clauses provide for sanctions. The stipulation of revision of a contract is only useful if it is followed by a sanction that deals with the situation in which no agreement can reached. “A hardship clause without a sanction is hardly worth the paper on which it is written.” Sanctions are usually the termination of the contract or adaptation of the contract by a third person. In the latter case, provision can be made for the intervention of an arbitrator, an expert, or even a court.\textsuperscript{1328}

\section*{22.4 OVERLAPPING OF THE CLAUSES}

As discussed above, provision should be made for situations of changed circumstances in international commercial contracts. Such contractual arrangements may appear as force majeure or hardship clauses. Force majeure and hardship clauses traditionally differ in their sphere of application and their legal effects and, thus, in their aims in dealing with a situation of changed circumstances. Modern contract practice in international trade, however, has evolved in such a way that the difference between these two types of clauses has diminished.\textsuperscript{1329}

The prerequisites for a given event to constitute force majeure in international trade practice are less restrictive than in municipal law. Thus, in some modern clauses, events of force majeure are defined as events that do not necessarily render the contract performance impossible, but hamper the normal discharge of the contract obligation, or make it exorbitant from a commercial standpoint.\textsuperscript{1330} An overlap with situations of hardship is evident here. In departing from the traditional approach to drafting force majeure clauses, modern clauses of this kind contain renegotiation provisions, obligating the parties to renegotiate the terms of the contract and adapt it to the new circumstances. Whether or not drafters put such provisions into their force majeure clauses will, \textit{inter alia}, depend on what value they attach to their relationship. As an alternative to renegotiation, or in the case of its failure, force majeure clauses may also contemplate recourse to arbitration or some other kind of alternative dispute resolution, such as a technical expertise procedure. It is evident that these broad force majeure clauses providing for the adaptation of the contract overlap with hardship clauses.

Indeed, standard forms of contracts containing force majeure and hardship clauses are frequently introduced into international commercial contracts. When parties draft their own force majeure clauses, however, it is recommended that for the sake of uniformity, simplicity and efficiency the contract contain only one clause covering the problem of changed circumstances. Here, the scope

\begin{thebibliography}{9}
\bibitem{1325} Supra. note 22, pp. 237-238.
\bibitem{1326} See Clive M. Schmitthoff in “Hardship and Intervener Clauses”: \textit{J. Bus. L.} (1980); p. 85.
\bibitem{1327} Supra. note 22, p. 239.
\bibitem{1328} Supra. note 1, p. 229.
\end{thebibliography}
of a *force majeure* clause can be broadened as far as the limits of freedom of contract permit. As shown, this is already the case in modern contractual practice where *force majeure* clauses overlap to a great extent with provisions on hardship. Despite the fact that the concept of hardship also relates to changed circumstances, such a *force majeure* clause should be considered capable of covering the entire problem.\(^{1331}\)

### 22.5 USE OF STANDARD FORMS: ICC No. 421 (partial)

The use of standard forms of contract is widespread in international trade. They are valid if the parties have expressly or impliedly concluded their contract by reference to them. In general it must be said that, depending on the scope and duration of the transaction in question, the topic of changed circumstances is too important to be addressed in standardised *force majeure* or hardship clauses. In this respect, the ICC has promulgated its Document No. 421 (1985). There are two sets of provisions: The first lays down the conditions for relief from liability when performance has become literally or practically impossible (*force majeure*). The second covers the situation where changed conditions have made performance excessively onerous (*hardship*). One should note, however, ICC Document No. 421 contains a rather elaborate model *force majeure* clause and responds to many of the defects that have been ascribed to Art. 79 *CISG*. The clause, however, does not provide for the adaptation of the contract. The second set of provisions dealing with hardship do not provide a draft clause suitable for incorporation, but rather drafting suggestions. This is in recognition of the fact that the concept of “hardship” is relatively recent in international contract law. Alternatively, parties to international commercial contracts are recommended to agree that the *UNIDROIT Principles* or the European Principles, which could offer sufficiently elaborate and widely accepted rules on hardship and *force majeure*, shall govern their contract. The two sets of Principles may also have the function of standard forms of contracts. Here, the model *force majeure* clause contained in ICC Document No. 421 is appended as follows:

**Force majeure (exemption) clause**

"Grounds of relief from liability"

1. A party is not liable for a failure to perform any of his obligations in so far as he proves;
   - that the failure was due to an impediment beyond his control;
   - that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform into account at the time of the conclusion of the contract; and
   - that he could not reasonably have avoided or overcome it or at least its effects,

2. An impediment within paragraph (1) above, may result from events such as the following, this enumeration not being exhaustive
   (a) war, whether declared or not, civil war, riots and revolutions, acts of piracy, acts of sabotage;
   (b) natural disasters such as violent storms, cyclones, earthquakes, tidal waves, floods, destruction by lightning;
   (c) explosions, fires, destruction of machines, factories, and of any kind of installations;
   (d) boycotts, strikes and lock-outs of all kinds, go-slows, occupation of factories and premises, and work stoppages which occur in the enterprise of the party seeking relief;

\(^{1331}\) Supra. note 1, p. 241, 243.
(e) acts of authority, whether lawful or unlawful, apart from acts for which the party seeking relief has assumed the risk by virtue of other provisions of the contract; and apart from the matters mentioned in paragraph 3, below.

3. For the purposes of paragraph (1) above, and unless otherwise provided in the contract, impediment does not include lack of authorisations, of licences, of entry or residence permits, or of approvals necessary for the performance of the contract and to be issued by a public authority of any kind whatsoever in the country of the party seeking relief.

Duty to notify

4. A party seeking relief shall as soon as practicable after the impediment and its effects upon his ability to perform became known to him give notice to the other party of such impediment and its effects on his ability to perform. Notice shall also be given when the ground of relief ceases.

5. The ground of relief takes effect from the time of the impediment or, if notice is not timely given, from the time of notice. Failure to give notice makes the failing party liable in damages for loss which otherwise could have been avoided.

Effects of grounds of relief

6. A ground of relief under this clause relieves the failing party from damages, penalties and other contractual sanctions, except from duty to pay interest on money owing as long as and to the extent that the ground subsists.

7. Further it postpones the time for performance, for such period as may be reasonable, thereby excluding the other party’s right, if any, to terminate or rescind the contract. In determining what is a reasonable period, regard shall be had to the failing party’s ability to resume performance, and the other party’s interest in receiving performance despite the delay. Pending resumption of performance by the failing party the other party may suspend his own performance.

8. If the grounds of relief subsist for more than such period as the parties provide [the applicable period to be specified here by the parties, or in the absence of such provision for longer than a reasonable period, either party shall be entitled to terminate the contract with notice.

9. Each party may retain what he has received from the performance of the contract carried out prior to the termination. Each party must account to the other for any unjust enrichment resulting from such performance. The payment of the final balance shall be made without delay.”

Force Majeure clause - model reference clause

Parties who wish to incorporate this clause by reference in their contracts are recommended to use the following wording:

“The Force Majeure (Exemption) clause of the International Chamber of Commerce (ICC Publication No. 421) is hereby incorporated in this contract.”