

# A PRIMER ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS: FROM THE PERSPECTIVE OF THE UNIFORM COMMERCIAL CODE

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## I. INTRODUCTION

This article compares the major provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>1</sup> with the sale of goods sections under Article II of the Uniform Commercial Code (UCC).<sup>2</sup> The following major areas are discussed: contract formation; warranties; inspection of goods; delivery; payment; seller's right to cure; breach and remedies; damages; and risk of loss.

## II. SCOPE

The United Nations Convention for the International Sale of Goods applies to contracts for the sale of goods between parties whose places of business are in different States [countries] and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State.

Under the CISG, contracts of sale are distinguished from contracts for services.<sup>3</sup> A contract for the supply of manufactured goods is a sale unless the ordering party supplies a substantial amount of the materials necessary for the manufacture of the goods.<sup>4</sup> In that instance, the CISG would not apply.

The following types of sales are excluded from the CISG: (1) sales in which goods are bought for personal, family, or household use; (2) sales by auction, on execution, or otherwise by law; (3) sales involving stocks, investment securities, ships, aircraft, or electricity. In most States, these sales are governed by special rules reflecting the esoteric nature of the goods.<sup>5</sup>

Article II of the UCC applies to "transactions in goods."<sup>6</sup> As with the CISG, a scope problem in the UCC arises when contracts involve both goods and services.

Article II does not apply to several types of transactions, such as

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1. *United Nations Convention on Contracts for the International Sale of Goods, Final Act*, U.N. Doc. A/CONF. 97/18 (1980), reprinted in S. Treaty Doc. No. 9, 98th Cong., 1st Sess., and in 19 INT'L LEGAL MATERIALS. 668 (1980) [hereinafter C.I.S.G.].

2. U.C.C. art. II (1996).

3. C.I.S.G. art. 3.

4. *Id.* art. 3(1).

5. *Id.* art. 2.

6. U.C.C. § 2-102.

transactions involving real estate.<sup>7</sup> Also, as with the CISG, Article II does not apply to construction contracts, service contracts, or employment contracts.<sup>8</sup> Furthermore, it does not apply to corporate stocks and bonds, or to leases.<sup>9</sup>

### III. FORMATION OF THE CONTRACT

Both the CISG and the UCC are based on the premise of freedom of contract, and both presume that a party's intent should determine the enforceability of the contract.

Like the UCC, Article 14(2) of the CISG indicates that an offer need not specifically set forth all the terms, and that the primary determination of an offer's sufficiency and validity will be the offeror's intent.<sup>10</sup> However, Article 14(1) differs from the UCC by proposing a test to determine whether an offer is sufficiently definite enough to be valid. While § 2-204(3) of the UCC does not specify which open terms will affect the sufficiency of an offer, Article 14(1) requires that an offer "indicate[] the goods and expressly or implicitly fix[] or make[] provision for determining the quantity and the price."<sup>11</sup> Conversely, the UCC test is not certain as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough, of itself, to defeat an otherwise adequate agreement if the parties intend to enter into a binding agreement. UCC § 2-204 recognizes that an agreement is valid, despite missing terms, if there is any reasonably certain basis for granting a remedy.<sup>12</sup>

Although the CISG Article 14(1) requires greater specificity than the UCC, the practical effect of this requirement is minimal because of Article 14(2)'s exception to the specificity requirement, which allows a general proposal to constitute a valid offer if the proposal so intends.<sup>13</sup> To meet Article 14(1)'s specificity requirement, the offer must identify the goods and the quantity of the goods to be sold.<sup>14</sup> However, this provision requires little more than a mere indication, by either buyer or seller, of which goods are being offered.

The CISG requires greater specificity of an offer than the UCC because the Convention provides greater protection to the offeree once an offeror extends a valid offer. Article 14's specificity requirement serves as evidence of the offeror's intent to be bound, thus enabling the offeree's response to

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7. *Id.*

8. *Id.*

9. *Id.*

10. C.I.S.G. art. 14(2).

11. *Id.* art. 14(1).

12. U.C.C. § 2-204(3).

13. C.I.S.G. art. 14(2).

14. *Id.* art. 14(1).

conform to the terms of the offer. Definiteness and conformity of terms are essential in contract formation, for under the CISG, an offeree's acceptance must match the original offer to be enforceable.<sup>15</sup> In other words, the CISG follows the "mirror image" rule of the pre-UCC common law. If new or different terms are added, the offer is rejected and the power of acceptance is terminated. The new terms constitute a counter-offer, not an enforceable contract, unless the offeror assents to the new bargain. Adopting the common law mirror image rule, the CISG's approach to contract formation, unlike that of the UCC, allows the offeror to be master of the offer.

#### A. *Statute of Frauds*

The counterpart to UCC § 2-201 is the CISG Article 11. UCC § 2-201 requires that all contracts for the sale of goods in excess of \$500 be written.<sup>16</sup> Article 11 eliminates the requirement of a writing to evidence the agreement, specifically noting that "[a] Contract of sale need not be concluded in or evidenced by writing."<sup>17</sup> Article 11 also eliminates any mandatory requirement for enforcement based on any domestic form requirement.<sup>18</sup> However, Article 11 does not prevent the parties from imposing their own contractual requirements.<sup>19</sup> Article 29 provides that parties, by a contract in writing, may require any modifications or termination by agreement to be in writing.<sup>20</sup> Thus, Article 11 must be read in conjunction with Article 29.

Article 12 allows Contracting States to opt out of Article 11, thereby requiring a writing to evidence the agreement.<sup>21</sup> Article 11 would not apply where any party has his place of business in a state that has decided, under Article 12, to require a writing as a necessary element of a valid contract.<sup>22</sup>

#### B. *Parol or Extrinsic Evidence*

Article 8 is the general CISG provision that governs the interpretation of the statements and conduct of the parties. Under the CISG, both the subjective and objective intent of the parties are relevant for questions of interpretation.<sup>23</sup> Subjective intent is given primary consideration, and objective intent governs only if the subjective intent of a party is not

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15. *Id.* art. 14.

16. U.C.C. § 2-201(1).

17. C.I.S.G. art. 11.

18. *Id.*

19. *Id.*

20. *Id.* art. 29(2).

21. *Id.* art. 12.

22. *Id.* art. 11.

23. *Id.* art. 8.

discernable.<sup>24</sup> In addition, this article allows open-ended reliance on parol evidence, as well as subsequent behavior. For example, one may consider "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."<sup>25</sup> Article 8 does not relate to questions of whether the terms contradict a written agreement or whether the agreement between the parties is intended to be the final complete statement of the parties. Rather, Article 8 deals with interpreting statements and conduct, not contract formation.<sup>26</sup>

The UCC adopts a more structured hierarchy to determine the intent of the parties. The UCC § 1-205 provides that express terms of the agreement shall control course of performance and that course of performance shall control both course of dealing and usage of trade.<sup>27</sup> Under the UCC § 1-205, as with the CISG, the express words of the contract trump all other interpretations. Furthermore, under the UCC, course of performance, course of dealing, and usage of trade are only relevant for interpretation when the express language of the agreement does not indicate the parties' intent.<sup>28</sup>

The UCC limits the use of parol evidence to a greater extent than the CISG. When the parties have a written final agreement, that agreement may not be contradicted by parol evidence.<sup>29</sup> However, the parties may seek to explain or supplement the terms of their agreement by parol evidence concerning course of dealing, usage of trade, or course of performance.<sup>30</sup> In general, the approach of the UCC § 2-202 is much less receptive to this type of evidence than is the Convention's "all relevant circumstances" approach.<sup>31</sup>

As with the UCC, the CISG provides that the parties' behavior may serve as a guide to contract interpretation. The CISG Article 9, which is the counterpart to the UCC §§ 1-205 and 2-208, sets out the role of usages and practices and their effect in interpreting contracts.<sup>32</sup>

Under the CISG, parties are bound by the present course of performance and prior course of dealing if they are relevant to interpreting the present contract; the parties are also bound by any practices which they have established between themselves.<sup>33</sup> Additionally, the parties are bound by relevant trade usage.<sup>34</sup>

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24. *Id.*

25. *Id.* art. 8(3).

26. *Id.*

27. U.C.C. §§ 1-205(4), 2-208(2).

28. *Id.*

29. *Id.* § 2-202.

30. *Id.* § 2-202(a).

31. C.I.S.G. art. 8(3).

32. *Id.* art. 9.

33. *Id.*

34. *Id.*

As with the Convention, the UCC allows for usage of trade, present course of performance, and past course of dealing to help interpret expectations and the intent of the parties.<sup>35</sup> However, Article 9 and the UCC § 2-208 vary in that Article 9 does not set out a hierarchical structure for interpretation as does the UCC.<sup>36</sup> The UCC § 2-208(2) provides that “when . . . construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.”<sup>37</sup>

### C. *Battle of the Forms*

The CISG adopts the traditional common law rule that an acceptance must be a “mirror image” of an offer.<sup>38</sup> The Convention presumes that any material variance in an offeree’s acceptance constitutes a rejection of the offer and is a counter-offer. The Convention, however, provides for an exception to this general principle where additions or modifications to the offer do not “materially alter” the terms of the offer.<sup>39</sup> Article 19(2) contemplates that a varying response can form a contract if the varying response lacks material alteration.<sup>40</sup> However, this exception to the non-formation counter-offer principle of 19(1) is narrow and is practically useless because Article 19(3)’s list of material alterations includes those elements most typically found in sale of goods contracts.<sup>41</sup> Thus, almost any alteration is material. Conversely, the UCC rejected the common law “mirror image” rule and adopted the “battle of the forms” provision.<sup>42</sup>

Under the UCC § 2-207, a varying response will not prevent contract formation where there is otherwise demonstrated an intent to deal.<sup>43</sup> The UCC § 2-207(1) provides that an acceptance or confirmation that contains additional or different terms operates as a valid acceptance, unless acceptance is expressly made conditional on assent to the additional or different terms.<sup>44</sup> Once a valid acceptance under § 2-207(1) exists, § 2-207(2) operates to determine the exact terms of the bargain, given the disparity in the documents involved.<sup>45</sup> The UCC § 2-207(2) provides the offeree a limited power to unilaterally alter the terms of an agreement or a proposed bargain when the

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35. U.C.C. § 2-208.

36. C.I.S.G. art. 9; U.C.C. § 2-208.

37. U.C.C. § 2-208(2).

38. C.I.S.G. art. 19(1).

39. *Id.* art. 19(2).

40. *Id.*

41. *Id.* art. 19(3).

42. U.C.C. § 2-207.

43. *Id.*

44. *Id.* § 2-207(1).

45. *Id.* § 2-207(2).

parties are merchants.<sup>46</sup> Where the offeree's proposed alterations are "material" (a term not precisely defined in § 2-207), yet the responsive document constitutes the requisite "definite and seasonable expression of acceptance[.]" a contract is formed on the offeror's terms.<sup>47</sup>

Theoretically, the CISG and the UCC take opposite stances on what constitutes acceptance. The UCC's theory is that business people rarely read the "boilerplate" language on purchase forms and that both parties are relying on the existence of a contract despite their clashing forms. As a result, the UCC allows contract formation unless the responding offeree specifically states that there will be no contract unless the original offeror expressly accepts the second set of terms.<sup>48</sup> If the offeree specifically limits the contract to these new terms, the response is treated as merely a counter-offer.<sup>49</sup> If no such limitation exists, a contract is created by the nonmatching response, even though it contains new or different terms.<sup>50</sup> For merchants, these new or different terms become part of the contract unless the offeror objects within a reasonable time after notice of them is received, or unless the new or different terms materially alter the original terms.<sup>51</sup> When material alterations exist, the alterations are excluded from the contract, and the remaining terms create a valid contract.<sup>52</sup>

Furthermore, § 2-207(3) enforces an agreement where the writings of the parties do not create a contract, but the parties nevertheless act as though one exists.<sup>53</sup> In this case, the UCC looks to the writings and supplements the missing terms.<sup>54</sup>

The central difference between the UCC and the CISG emerges when an offeror objects to the variant term or when the variant term constitutes a material alteration. In such cases, the UCC preserves the contract and omits the offensive term.<sup>55</sup> Conversely, the CISG strikes the contract and recognizes the alteration as a counter-offer.<sup>56</sup> Additionally, the CISG appears to allow offerors to prevent contract formation by objecting to even non-material discrepancies.<sup>57</sup> The CISG's theory is that most of the terms and conditions on the backs of the forms are important; therefore, no contract exists unless both parties agree to the same terms.

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46. *Id.*

47. *Id.*

48. *Id.* § 2-207(1).

49. *Id.* § 2-207(2).

50. *Id.* § 2-207(3).

51. *Id.* § 2-207(2).

52. *Id.* § 2-207(1).

53. *Id.* § 2-207(3).

54. *Id.*

55. *Id.* § 2-207(2).

56. C.I.S.G. art. 19(1).

57. *Id.* art. 19(2).

The theoretical differences between the CISG and the UCC may have little practical effect because both the UCC and CISG have provisions that make a contract enforceable after delivery and acceptance. Also, the majority of disputes arise after the goods have been delivered and are found to be defective or not what the buyer wanted.

#### IV. WARRANTIES

##### A. *Warranty of Title*

The CISG Article 41 sets forth the seller's duty to deliver to the buyer goods that are free from any third-party right or claim.<sup>58</sup> The time contemplated by Article 41 is the time of delivery rather than the time of contract formation.<sup>59</sup> Also, Article 41 works in conjunction with Article 43(1), which requires the buyer to notify the seller of such a claim within a reasonable time.<sup>60</sup>

As with the UCC § 2-312, which requires that goods be delivered free from any security interest or other lien or encumbrance, the purpose of Article 41 is to protect the buyer from a potential third-party lawsuit. The seller is obligated to reimburse the buyer for any expense or loss resulting from the third-party claim.<sup>61</sup> As with the CISG, the UCC also requires the buyer to notify the seller of a breach of title within a reasonable time.<sup>62</sup>

In addition, one should look to Article 42 when analyzing the warranty of title. Article 42 sets out the seller's obligations for third-party claims based on industrial or intellectual property, such as infringement of a copyright, a trademark, or a patent.<sup>63</sup> Article 42 limits the seller's responsibilities for third-party claims against the buyer to certain specified places: (1) in the state where the goods will be resold or used if the parties contemplated use or resale in that state or (2) in the state of the buyer's place of business.<sup>64</sup>

The second paragraph of Article 42 limits the seller's obligations for third-party claims or rights in two situations: (1) where the buyer had actual or constructive knowledge of the third-party claims at the conclusion of the contract; and (2) where the claim arises because the seller followed the buyer's specifications for design, drawings, or formulae.<sup>65</sup> Article 42, like Article 41, protects the buyer from having to litigate third-party claims.

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58. *Id.* art. 41.

59. *Id.*

60. *Id.* art. 43(1).

61. *Id.* art. 41.

62. U.C.C. § 2-312 cmt. 2.

63. C.I.S.G. art. 42.

64. *Id.* art. 42(1)(a)-(b).

65. *Id.* art. 42(2)(a)-(b).

While the UCC has no perfectly analogous provision to Article 42 of the CISG, § 2-312 is similar because it embodies the concept of infringement and it relieves the merchant seller of liability for infringement when the seller followed the buyer's specifications.<sup>66</sup> In addition, UCC § 2-312(2) is similar to Article 42(2)(a) because it excludes or modifies the warranty if the buyer has reason to know "that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have."<sup>67</sup>

### B. *Express and Implied Warranties*

The warranty provisions found in the UCC § 2-313 (express warranties), § 2-314 (implied warranties of merchantability), § 2-315 (implied warranties of fitness for a particular purpose), and § 2-316 (disclaimer and modification of warranties) are combined into two articles in the CISG—Articles 35 and 36. The requirements of the warranty provisions under the CISG will be familiar to any American commercial lawyer familiar with the UCC provisions.

Article 35 of the CISG covers the seller's obligation to deliver goods that are of a specified quality. Under paragraph (1) of Article 35, goods must conform to the contract with respect to quantity, quality, description, and packaging.<sup>68</sup> Paragraph (2) of Article 35 describes the ways in which goods "conform" to the contract, and Article 35(3) relieves the seller of liability under paragraph (2) if the buyer knew of the nonconformity at the time the contract was concluded.<sup>69</sup>

Under the UCC, the provisions on the quality of the goods are embodied in the sections on warranties: § 2-313 (express warranties), § 2-314 (implied warranty of merchantable quality), and § 2-315 (implied warranty of fitness for a particular purpose).<sup>70</sup>

Paragraph (1) of the CISG Article 35 reinforces the principle that the parties must comply with the terms of the contract.<sup>71</sup> Concomitantly, the UCC § 2-313 requires the goods to conform to any contract description.<sup>72</sup>

Paragraph (2)(a) of Article 35 and UCC § 2-314(2) both require that goods be fit for the ordinary purposes for which such goods are used.<sup>73</sup> However, the § UCC 2-314 (implied warranty of merchantability) also

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66. U.C.C. § 2-312(3).

67. *Id.* § 2-312(2).

68. C.I.S.G. art. 35(1).

69. *Id.* arts. 35(2), 35(3).

70. U.C.C. §§ 2-313, 2-314, 2-315.

71. C.I.S.G. art. 35(1).

72. U.C.C. § 2-313(1)(b).

73. C.I.S.G. art. 35(2)(a); U.C.C. § 2-314(2)(c).



imposes the additional requirement that the goods be merchantable.<sup>74</sup>

Paragraph 2(b) of Article 35 deals with the seller's express obligation to deliver goods that are fit for a particular purpose.<sup>75</sup> However, the seller's obligation under this provision is limited to instances where the buyer actually relied on the seller's skill and judgment to provide goods for a particular purpose.<sup>76</sup> Under the UCC § 2-315, an implied warranty of fitness for a particular purpose arises when the seller has reason to know at the time of contracting that the buyer "is relying on the seller's skill or judgment to select or furnish suitable goods."<sup>77</sup>

As with the UCC § 2-313(c), the CISG Article 35(2)(c) requires that the goods possess the same qualities as goods in the sample or model that were held out to the buyer.<sup>78</sup> Paragraph (2)(d) of CISG Article 35 requires the goods to be packaged in an appropriate manner.<sup>79</sup> In this regard, it mirrors the UCC § 2-314(2)(e), which requires that goods be "adequately contained, packaged, and labeled as the agreement may require" to be merchantable.<sup>80</sup>

As to knowledge of defects as a basis for excluding warranties, the CISG and the UCC differ. While the UCC § 2-316(3)(b) provides that "there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to [the buyer,]" Article 35 of the CISG only holds the buyer to defects of which the buyer "could not have been unaware."<sup>81</sup> In other words, the CISG does not impose upon the buyer a duty to investigate.

In contrast, the UCC imposes a greater duty upon the buyer to examine the goods for defects than does the CISG. The UCC excludes an implied warranty when the buyer refuses to examine the goods before entering into the contract.<sup>82</sup> The UCC also excludes an implied warranty when the buyer did investigate the goods but failed to discover a defect which the buyer ought to have discovered.<sup>83</sup> However, the Official Comment to § 2-316 maintains that, for the implied warranty not to apply to the buyer who has refused to examine goods, the goods must have been available for examination, and the seller also must have requested the buyer to examine the goods.<sup>84</sup>

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74. U.C.C. § 2-314.

75. C.I.S.G. art. 35(2).

76. *Id.*

77. U.C.C. § 2-315.

78. C.I.S.G. art. 35(2)(c).

79. *Id.* art. 35(2)(d).

80. U.C.C. § 2-314(2)(e).

81. *Id.* § 2-316(3)(b); C.I.S.G. art. 35(3).

82. U.C.C. § 2-316(3)(b).

83. *Id.*

84. *Id.* § 2-316 cmt. 8.

## V. RIGHT TO INSPECT

The CISG Article 58 gives the buyer a right to inspect the goods before payment.<sup>85</sup> The buyer need not pay for the goods until he has had an opportunity to inspect them, unless the procedures for payment or delivery are inconsistent with such an opportunity.<sup>86</sup>

Similarly, the UCC gives the buyer the same right to inspect. The UCC § 2-310 states that in a shipment under reservation, "the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract."<sup>87</sup> The comments to this section recognize that the buyer has no obligation to pay prior to inspection unless otherwise agreed.<sup>88</sup> Thus, under both the UCC and the Convention, the parties should contractually indicate the time for payment to avoid the assumption of unintended risks.

## VI. DELIVERY

### A. *Early Delivery*

Article 52 gives the buyer the option of either taking goods early or refusing delivery if the seller delivers the goods before the date specified in the contract.<sup>89</sup> The buyer's option to refuse only applies if the date of delivery is inconsistent with the contract.<sup>90</sup> If the seller delivers more goods than the contract calls for, the buyer may either accept or reject the excess goods; however, if the buyer accepts the extra goods, then the buyer must pay for them at the contract rate.<sup>91</sup>

The UCC has no perfectly comparable provision to Article 52. However, the UCC § 2-607(1) requires the buyer to pay at the contract rate for any goods accepted.<sup>92</sup> While it is unclear whether this provision also applies to excess goods that the buyer chooses to accept, a literal reading of the statute would indicate that it does. The concept of early delivery, though not specifically mentioned in the UCC, is embedded within § 2-508(1), which allows the seller to remedy any defect in goods already delivered up until the delivery date specified in the contract.<sup>93</sup>

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85. C.I.S.G. art. 58(3).

86. *Id.*

87. U.C.C. § 2-310(b).

88. *See id.* § 2-310 cmt. 1.

89. C.I.S.G. art. 52(1).

90. *Id.*

91. *Id.* art. 52(2).

92. U.C.C. § 2-607(1).

93. *Id.* § 2-508(1).

### B. *Partial Delivery*

Article 51 of the CISG applies when only a portion of the goods are delivered or only a portion of them conforms to the contract. In this situation, paragraph (1) of Article 51 makes available to the buyer a whole range of remedies. These remedies allow the buyer to: (1) require the seller to deliver substitute goods or repair defective goods; (2) avoid the contract for the defective goods; (3) reduce the price of defective goods; or (4) claim damages.<sup>94</sup> The buyer may also avoid the entire contract if the non-delivery or nonconformity as to part of the goods results in a fundamental breach of the whole contract.<sup>95</sup>

The UCC § 2-601 allows the buyer to reject any nonconforming commercial unit or units.<sup>96</sup> If the buyer makes a rightful rejection under § 2-601, then he may also take advantage of the other remedies available under the UCC, including "cover," recovery of goods and damages, specific performance, and replevin.<sup>97</sup>

Paragraph (2) of Article 51, which allows the buyer to declare the entire contract avoided if the breach amounts to a fundamental breach, is similar to the UCC § 2-608, which allows the buyer to revoke acceptance of a commercial unit whose nonconformity substantially impairs its value.<sup>98</sup> The UCC § 2-612 on installment contracts also parallels the CISG Article 51(2). This provision allows the buyer to reject any nonconforming installment "if the non-conformity substantially impairs the value of that installment and cannot be cured."<sup>99</sup> If a nonconforming installment substantially impairs the value of the whole contract, then a breach of the entire contract results.<sup>100</sup>

### C. *Improper Delivery*

Article 49 of the CISG addresses the buyer's rights on improper delivery, allowing the buyer to avoid the contract in two situations: (1) when the seller's failure to perform any of his obligations results in a fundamental breach as defined by Article 25 or (2) when the seller fails or refuses to deliver the goods in the additional period of time allowed by the buyer in conjunction with Article 47(1).<sup>101</sup>

The buyer must avoid the contract within a reasonable time after late

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94. C.I.S.G. art. 51(1).

95. *Id.* art. 51(2).

96. U.C.C. § 2-601.

97. *Id.* § 2-711.

98. C.I.S.G. art. 51(2); U.C.C. § 2-608(1).

99. U.C.C. § 2-612(2).

100. *Id.* § 2-612(3).

101. C.I.S.G. art. 49(1).

delivery or, in the case of non-conforming goods, within a reasonable time after learning of the breach by either actual or constructive knowledge.<sup>102</sup> In other cases, the buyer must also avoid the contract within a reasonable time.<sup>103</sup>

Under the Convention, 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 . . . ."<sup>104</sup> The concept of fundamental breach in the Convention is probably most similar to the term "substantial impairment" as used in various UCC Article II provisions.

The UCC § 2-601 sets forth the basic principle that the buyer may reject the goods if they "fail in any respect to conform to the contract."<sup>105</sup> Thus, unlike the CISG requirement of a "fundamental breach" as a basis for contract avoidance, under the UCC, the buyer may reject the contract if the goods or tender of the goods fail to conform to the contract in any respect.

However, as with the CISG, under the UCC, if the buyer rejects goods, he must do so within a reasonable time after their delivery or tender, and he must also seasonably notify the seller of the rejection.<sup>106</sup> The "reasonable time" requirement of the UCC is similar to the Convention's requirement of proper avoidance under Article 49.

Furthermore, the UCC requires the buyer to particularize the defect that is the cause of the rejection.<sup>107</sup> If the buyer fails to particularize, the buyer will be unable to rely on the defect to establish breach or to justify rejection.<sup>108</sup> The CISG differs from the UCC in that the former does not require the particularization of defects.<sup>109</sup>

Under domestic law, a buyer is deemed to have accepted goods if the buyer has failed to make an effective rejection under § 2-602 or has accepted goods despite their nonconformity.<sup>110</sup> If the buyer accepts the goods, the buyer must notify the seller within a reasonable time after the buyer discovers or should have discovered any breach or he is barred from any remedy.<sup>111</sup> The requirements of UCC § 2-602(1) are similar to the notice requirements imposed on the buyer by Article 49(2) of the Convention.

Once the buyer accepts goods under the UCC § 2-606, the buyer may then revoke acceptance only if the nonconformity substantially impairs the value of the goods to the buyer.<sup>112</sup> The requirement of "substantial

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102. *Id.* art. 49(2)(a).

103. *Id.* art. 49(2)(b).

104. *Id.* art. 25.

105. U.C.C. § 2-601.

106. *Id.* § 2-602(1).

107. *Id.* § 2-605(1).

108. *Id.*

109. C.I.S.G. art. 49.

110. U.C.C. § 2-606(1)(a)-(b).

111. *Id.* § 2-607(3)(a).

112. *Id.* § 2-608(1).

impairment" is also present in § 2-612(2) on installment contracts.<sup>113</sup> The "substantial impairment" standard of §§ 2-608 and 612 is similar to the requirement of Article 49(1) in that the buyer may only avoid the contract if the breach is "fundamental." Revocation of acceptance in the UCC must also occur within a reasonable time after the buyer discovers or should have discovered any breach.<sup>114</sup> This requirement is similar to the restrictions imposed by Articles 49(2)(a) and 49(2)(b)(i) of the CISG.<sup>115</sup>

#### D. *Non-Conforming Goods*

Article 50 applies when the goods delivered do not conform to the contract. Under this Article, the buyer may reduce the price in proportion to the value of the goods actually delivered over the value that conforming goods would have had at that time.<sup>116</sup> However, if the seller has remedied any defective goods that were delivered before the delivery date specified in the contract, the buyer may not reduce the price.<sup>117</sup>

The scope of Article 50 is narrow: it usually applies only when the buyer accepts and keeps defective goods and the seller is not liable for damages. If the price of the goods rises, the buyer will probably choose not to reduce the price in accordance with Article 50, but rather will choose to claim damages under Article 74.

While § 2-714 of the UCC sets forth the buyer's damages for accepted goods, this section does not use the proportion method of the Convention.<sup>118</sup> Under the UCC § 2-714, if the buyer has accepted non-conforming goods and has given notice to the seller of the nonconformity, he may recover damages for breach of warranty.<sup>119</sup> The measure of damages under this section is the difference between the value of the goods accepted and the value the goods would have had if they had been as warranted.<sup>120</sup>

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113. *Id.* § 2-612(2).

114. *Id.* § 2-608(2).

115. C.I.S.G. arts. 49(2)(a), 49(2)(b)(i).

116. *Id.* art. 50.

117. *Id.*

118. U.C.C. § 2-714.

119. *Id.* § 2-714(1).

120. *Id.* § 2-714(2).

## VII. PAYMENT

### A. *Open Price Terms*

Article 55 is a gap-filling provision for an omitted or indefinite price term. Under Article 55, where a valid contract exists, and the contracting parties have made no provision for determining the price, the parties are presumed to have agreed to the price generally charged at the time the contract is concluded.<sup>121</sup>

Article 55 presupposes a validly concluded contract, and therefore the Article only applies after the contracting parties establish the existence of a valid contract. Article 14 defines when a proposal is sufficient to become an offer.<sup>122</sup> Article 55 describes the method for determining price when the price has been omitted from a validly concluded contract.<sup>123</sup> If the lack of a price brings into question the existence of a contract, Article 14 applies, and the contract may be invalidated for indefiniteness or for lack of clear intent to be bound.<sup>124</sup>

The UCC has a similar approach to open price terms. Like the Convention, the UCC distinguishes between the validity of an open price contract and the method for determining price if an open price contract is valid. An open price contract is provided for in § 2-305(1): "The parties . . . can conclude a contract for sale even though the price is not settled."<sup>125</sup>

Similar to the Convention, the UCC takes an objective approach to filling missing price terms. The UCC § 2-305(1) provides that when the parties intend to have an enforceable contract but omit the price, "the price is a reasonable price at the time for delivery."<sup>126</sup> This is probably indistinguishable from the meaning of the "price generally charged" in Article 55.

### B. *Location of Payment*

Article 57 designates the location for payment when the parties fail to do so in the contract. This section only applies when the contract neither explicitly nor implicitly designates a place for delivery. However, when the contract does not designate a place of payment, paragraph (1) selects as the default location for payment either the seller's place of business or the place where the transfer of the documents or goods occurs.<sup>127</sup>

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121. C.I.S.G. art. 55.

122. *Id.* art. 14(1).

123. *Id.* art. 55.

124. *Id.* art. 14.

125. U.C.C. § 2-305(1).

126. *Id.*

127. C.I.S.G. art. 57(1)(a)-(b).

Paragraph (2) of Article 57 sets out the seller's obligation to pay incidental expenses caused by a change in his place of business after the conclusion of the contract but before payment.<sup>128</sup>

Section 2-308 of the UCC is almost identical to CISG Article 57. Section 2-308(a) provides that "the place for delivery of goods is the seller's place of business."<sup>129</sup> Like Article 57, § 2-308 applies only in the absence of an agreement between the parties.<sup>130</sup> The UCC § 2-310(c) provides that "if delivery is authorized and made by way of documents of title . . . then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received."<sup>131</sup> Thus, if read together, UCC §§ 2-308(c) and 2-310(c) yield the same result as CISG Article 57(1)(b).

Although the UCC does not have a provision equivalent to Article 57(2), any increases in cost based upon the seller's abrupt change in his place of business would likely be recoverable under § 2-715(1).

### C. *Time of Payment*

Paragraph (1) of Article 58 sets out two principles: (1) that the buyer need not pay until the seller places the goods (or documents representing the goods) in the buyer's control and (2) that the seller need not hand over the goods until the buyer pays the price.<sup>132</sup> The result under the UCC is the same as under the CISG. The UCC § 2-310(a) provides that "payment is due at the time and place at which the buyer is to receive the goods."<sup>133</sup> However, the buyer may condition his payment on the seller's tender of delivery of the goods under UCC § 2-507.<sup>134</sup> Thus, under the UCC, as well as under the Convention, the responsibility for payment is based on receipt of the goods (or the equivalent).

Paragraph (2) of CISG Article 58 imposes a payment term when the goods are to be shipped by carrier. As with paragraph (1), a concurrent exchange of the goods for the price is required. When the contract authorizes or requires the seller to ship the goods, the seller may require that the goods, or the documents representing the goods, not be handed over to the buyer except against payment of the price.<sup>135</sup>

UCC § 2-310, like Article 58(2) of the Convention, permits shipment by

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128. *Id.* art. 57(2).

129. U.C.C. § 2-308(a).

130. C.I.S.G. art. 57; U.C.C. § 2-308.

131. U.C.C. § 2-310(c).

132. C.I.S.G. art. 58(1).

133. U.C.C. § 2-310(a).

134. *Id.* § 2-507.

135. C.I.S.G. art. 58(2).

the seller under reservation of payment. The UCC § 2-310 provides that, unless the parties otherwise agree, "if the seller is authorized to send the goods he may ship them under reservation."<sup>136</sup> The comments to UCC § 2-310 state that the seller need not give up possession of the goods until he has received payment.<sup>137</sup> The buyer's responsibility for payment does not arise until the seller has "tendered" the goods. Thus, the Convention and the UCC have similar protections for both the seller's and buyer's interests.

## VIII. SELLER'S RIGHT TO CURE

### A. *Prior to Date of Delivery*

Article 37 sets forth the principle that the seller may cure any non-conformities in goods already delivered up to the delivery date provided in the contract.<sup>138</sup> The only caveat is that the exercise of this right by the seller must not cause the buyer any "unreasonable inconvenience or unreasonable expense."<sup>139</sup> This Article applies to various nonconformities such as missing or defective goods or parts and allows the seller to cure by either repair or replacement. Implied in this section is the seller's obligation to bear the cost of replacement.

The CISG Article 37 is both different from and similar to the U.C.C. § 2-508(1). Like the CISG Article 37, the UCC § 2-508(1) allows the seller to cure up to the time for performance; however, § 2-508(1) differs from Article 37 in that it requires the seller to notify the buyer of her or his intention to cure.<sup>140</sup> Although Article 37 does not require notice of intention to cure, failure to do so may implicate Article 37 as it may "cause the buyer unreasonable inconvenience or unreasonable expense."<sup>141</sup>

### B. *After Time of Delivery*

Article 48 allows the seller to remedy any defective goods or documents that have already been delivered. The seller may remedy either by repair, replacement, or substitution.<sup>142</sup> Under paragraph (2), the seller may request that the buyer inform him if the buyer will accept his remedy.<sup>143</sup> If the buyer fails to provide an answer, the seller may perform within the time indicated

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136. U.C.C. § 2-310(b).

137. *See id.* § 2-310 cmt. 2.

138. C.I.S.G. art. 37.

139. *Id.*

140. U.C.C. § 2-508(1).

141. C.I.S.G. art. 37.

142. *Id.* art. 48.

143. *Id.* art. 48(2).



in the request, and the buyer may not invoke a remedy which is inconsistent with the seller's performance (such as avoidance of the contract) during this time.<sup>144</sup> The risk of loss of giving notice under paragraphs (2) or (3) of Article 48 is on the seller, because the seller is the one who has not performed his obligations.

The UCC allows the seller the right to substitute a conforming tender for a nonconforming tender.<sup>145</sup> To do so, the seller must have reasonable grounds to believe that the first delivery would be acceptable to the buyer.<sup>146</sup> Like CISG Article 48, the UCC § 2-508(2) requires the seller to give the buyer reasonable notice of his intention to substitute.<sup>147</sup> In addition, this section also refers to tender of documents, as does CISG Article 48.<sup>148</sup> Both the CISG and the UCC protect the seller's right to cure from surprise rejection by the buyer. However, in domestic law, either a prior course of dealing or an express provision in the contract may strictly preclude the seller from replacement.<sup>149</sup>

## IX. CONCEPT OF FUNDAMENTAL BREACH

Under the CISG, 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 . . ."<sup>150</sup> The Article 25 definition of a fundamental breach also includes the principle that parties cannot be deprived of their expectations under the contract.<sup>151</sup> For a breach to be fundamental, the consequences of the breach must be foreseeable to the breaching party.<sup>152</sup> However, Article 25 does not specify whether foreseeability should be measured at the time of contract formation or at the time of the breach. The concept of fundamental breach in the Convention is probably most similar to the term "substantial impairment" as used in various UCC Article II provisions.

Article 25 defines "fundamental breach" in general terms and applies to both buyer and seller.<sup>153</sup> The most significant remedies for a "fundamental breach" occur in Articles 49(1)(a) (the buyer's right to avoid the contract) and 64(1)(a) (the seller's right to avoid the contract).<sup>154</sup> If one party to the contract commits a fundamental breach, the other party may "avoid" the contract and

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144. *Id.*

145. U.C.C. § 2-508(2).

146. *Id.*

147. *Id.*

148. *Id.*

149. U.C.C. § 2-508 cmt. 2.

150. C.I.S.G. art. 25.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* arts. 49(1)(a), 64(1)(a).

be released from any further contractual obligations.<sup>155</sup>

## X. SELLER'S REMEDIES

Article 61 summarizes the remedies available to an aggrieved seller upon the buyer's breach of contract. Under this Article, the seller may select any of the following options: (1) require the buyer to pay the price; (2) fix an additional time for the buyer's performance; (3) avoid the contract; (4) select the measurement or form of the goods (if it is the buyer's duty to so select); or (5) claim damages.<sup>156</sup> The seller's selection of one remedy under this section does not exclude application of any other remedies.

Article 61 provides a blueprint of remedies available to a seller upon the buyer's breach of contract. The seller has three main remedies under this section. If the buyer fails to take delivery of the goods, the seller may require him to do so, declare the contract avoided, and claim damages.<sup>157</sup> The seller also has the option of setting a future time for performance by the buyer and selecting a form or measurement of the goods if such a selection is necessary.<sup>158</sup> The remedial scheme of the Convention strikes a balance between avoidance and non-avoidance of the contract. Under Article 64, if the buyer has committed a fundamental breach, a seller may avoid the contract, and may then pursue damages under the CISG Articles 74-77.<sup>159</sup>

Alternatively, the seller may attempt to enforce the contract under the CISG Article 62.<sup>160</sup> In this case, "the Convention contemplates that the basic exchange of goods and price will be completed despite a breach, with damages or other remedies to compensate for defects in the exchange."<sup>161</sup> Thus, under both alternatives, the seller is made whole by a combination of available remedies.

The UCC approaches remedies in a narrower fashion. Like the Convention, the UCC focuses on two distinct situations: (1) when the buyer has accepted the goods but has breached the contract and (2) when the exchange has not yet been completed. In the first case, the UCC normally completes the transaction, despite the breach, based upon the buyer's acceptance.<sup>162</sup> The seller still has available remedies for the incidental

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155. *Id.*

156. *Id.* art. 61.

157. *Id.*

158. *Id.* art. 63.

159. *Id.* art. 64.

160. *Id.* art. 62.

161. Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 56 (1988).

162. U.C.C. § 2-607(2).

damages arising from the buyer's breach.<sup>163</sup>

Alternatively, when the buyer does not accept the goods, or when he has rejected or revoked them, the general remedy is either resale damages or market price differential damages.<sup>164</sup> Thus, monetary damages are the usual compensation when the exchange has not yet been completed. Both the Convention and the UCC have cumulative remedy provisions that allow the aggrieved seller to select the most beneficial result.<sup>165</sup>

Article 64 provides the seller with the possibility of avoiding the contract upon the buyer's breach.<sup>166</sup> Paragraph (1) considers the two general methods for avoidance when the buyer breaches the contract: (1) if the buyer's breach is fundamental, then the seller may exercise this remedy or (2) if the seller has provided additional time for the buyer to pay or take delivery under Article 63 and the buyer did not do so within that extra period, or if the buyer otherwise notifies the seller of his intention not to comply, then the seller may avoid the contract.<sup>167</sup>

The second paragraph of Article 64 gives the grounds for avoidance after the buyer has paid.<sup>168</sup> First, if the buyer is late in taking delivery or in taking steps necessary to enable delivery, the seller may avoid the contract if the seller does so before he becomes aware that the late performance has been rendered.<sup>169</sup> Second, in all other circumstances other than the buyer's failure to take delivery, the seller may avoid the contract within a reasonable time (a) after the seller knew or should have known of the breach or (b) after the expiration or rejection of any additional period granted to the seller under the CISG Article 63.<sup>170</sup>

Avoidance of the contract is one of the most powerful remedies available under the Convention. However, because this is a drastic remedy, the Convention has placed limitations on its usage.<sup>171</sup> Paragraph (1) of Article 64 gives the two grounds for the seller's avoidance.<sup>172</sup> First, if a breach is fundamental, then the seller may avoid the transaction even though the buyer may or may not have possession of the goods.<sup>173</sup> Second, if the buyer fails to pay the price or take delivery of the goods within an additional period set by the seller under Article 63, the contract may be avoided.<sup>174</sup> Article 64(1)(b)

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163. *Id.* § 2-710.

164. *Id.* §§ 2-708(1), 2-710.

165. *Id.* § 2-703; C.I.S.G. art. 61.

166. C.I.S.G. art. 64.

167. *Id.* art. 64(1)(a)-(b).

168. *Id.* art. 64(2).

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

170. *Id.* art. 64(2)(b)(i)-(ii).

171. *Id.* art. 64.

172. *Id.* art. 64(1).

173. *Id.* art. 64(1)(a).

174. *Id.* art. 64(1)(b).

only applies when the notice under Article 63 calls for performance of the buyer's basic obligations to pay the price or to take delivery of the goods.<sup>175</sup> Thus, any buyer's obligations outside of the limited definition will not support avoidance under this paragraph.

Paragraph (1) of Article 64 has no time limitations.<sup>176</sup> This provision allows a seller to delay making a decision to avoid a contract or wait for performance. If a seller is unsure whether the buyer's delay in payment or refusal to take the goods is a "fundamental breach," the situation can be clarified by sending a Nachfrist notice to the buyer. The seller's right to reclaim the goods in such an instance would be determined by the law of the forum.

Paragraph (2) of this article allows the seller to avoid the contract in two circumstances after the buyer has paid the price: (1) late performance by the buyer and (2) any other breach within a reasonable time.<sup>177</sup> First, when the buyer has paid the price, the seller may avoid the contract based on the buyer's delay in taking delivery of the goods.<sup>178</sup> This remedy is limited by the requirement that the seller must avoid the contract before he becomes aware that performance has been rendered by the overdue buyer.<sup>179</sup>

The second possibility for avoidance after the seller has received payment involves any of the buyer's duties other than taking delivery of the goods. Under this paragraph, the seller may avoid the contract within a reasonable time after the seller knew or should have known of the breach, or after the applicable time periods for a Nachfrist notice have passed or have been repudiated by the buyer.<sup>180</sup> If the seller is unsure whether the breach is fundamental, the seller may send a Nachfrist notice to the buyer setting a final date for performance of the contractual duty. Under the second section of this paragraph, the seller may avoid the contract after the expiration of this additional period or after the buyer declares that he will not perform within the period.<sup>181</sup> Thus, paragraph (2) provides a focused limitation on the usage of avoidance after the seller has received payment.

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175. *Id.* art. 64(1)(b).

176. *Id.* art. 64(1).

177. *Id.* art. 64(2).

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

179. *Id.*

180. *Id.* art. 64(2)(b)(i)-(ii).

181. *Id.* art. 64(2)(b)(ii).

## XI. BUYER'S REMEDIES

### A. *Fundamental Breach*

Under Article 70, if the seller commits a fundamental breach, the buyer retains all rights to which the buyer is entitled, irrespective of the fact that the risk of loss may have passed to the buyer.<sup>182</sup> The specific rights preserved by the buyer consist of the right to elect to avoid the contract under Article 49(1), or the right to require the seller to deliver substitute goods under Article 46(2).<sup>183</sup> By exercising either of these options, the buyer places the risk of loss on the seller because of the buyer's right to avoid the contract. If shipment of the goods constitutes a fundamental breach of the contract as a whole, the buyer's right to avoid or compel substitute delivery is not lost because the goods were damaged in transit. In addition, the Convention allows avoidance where the goods have perished or deteriorated as a result of the examination and where the goods have been sold or consumed in the normal course of business before discovery of the lack of conformity.<sup>184</sup> Although the Convention gives the buyer the right to avoid the contract even where the goods have been sold or consumed in the normal course of business, the buyer will be required to "account to the seller for all benefits which he has derived from the goods."<sup>185</sup>

### B. *Anticipatory Breach*

Articles 71 and 72 provide the general provisions on anticipatory breach. Article 71 permits the aggrieved party to "suspend the performance of his obligations."<sup>186</sup> The aggrieved party is completely relieved of his obligations to perform or to accept performance only by avoiding the contract under Articles 49, 64, or 72. Paragraph (1) of Article 71 applies to non-performance by either party; paragraph (2) applies specifically to the threat of non-payment that becomes apparent to the seller while the goods are in transit to the buyer.<sup>187</sup> Paragraph (3) requires the suspending party to "continue with performance if the other party provides adequate assurance of his performance."<sup>188</sup>

Like Article 71, Article 72 addresses the situations when breach is threatened prior to the date for performance. Under Article 72, the aggrieved

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182. *Id.* art. 70.

183. *Id.*

184. *Id.* art. 82.

185. *Id.* art. 84.

186. *Id.* art. 71(1).

187. *Id.* art. 71(1)-(2).

188. *Id.* art. 71(3).

party may avoid the contract when "it is clear" that the other party "will commit a fundamental breach."<sup>189</sup> Advance notice of avoidance must be given "[i]f time allows."<sup>190</sup>

The standards for avoidance under Article 72 are more rigorous than the standards for suspension under Article 71 because of the difference in severity. Article 72 authorizes a party to avoid a contract prior to the date of performance only when "it is clear" that the other party "will commit a fundamental breach."<sup>191</sup> Paragraph (3) limits this restriction when the other party has declared that he will not perform his obligations.<sup>192</sup> In that case, the aggrieved party may proceed without regard to the limits of Article 72.

Articles 71 and 72 parallel the UCC § 2-609 (the right to suspend performance if reasonable grounds for insecurity arise with respect to the other party's performance and the right to treat a failure to provide adequate assurances as a repudiation of the contract) and § 2-610 (options and remedies upon anticipatory repudiation) respectively.<sup>193</sup> Article 72 combines the functions of UCC § 2-609(4), which treats a failure to meet a justified demand for adequate assurances as a repudiation of the contract, and of § 2-610, which specifies the aggrieved party's rights where there has been a repudiation of the contract.<sup>194</sup>

Section 2-609 of the UCC requires that when "reasonable grounds for insecurity arise with respect to the performance . . . [the aggrieved party] may in writing demand adequate assurance of the performance and until he receives such assurance may if commercially reasonable suspend any performance . . ."<sup>195</sup> The CISG provides that "[i]f time allows, [the aggrieved party] must give reasonable notice" in order to provide "adequate assurance of his performance."<sup>196</sup> Although the actual wording of the CISG and the UCC differs slightly, the result is quite similar, as both require the aggrieved party to affirmatively act to initiate the right of avoidance. The UCC § 2-610 on anticipatory repudiation is operative if a party repudiates prior to the date for performance and the loss "will substantially impair the value of the contract to the other [party]."<sup>197</sup> In that case, the aggrieved party may (1) await performance for a commercially reasonable time or (2) resort to any remedy for breach and suspend his own performance.<sup>198</sup> The effect of this

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189. *Id.* art. 72(1).

190. *Id.* art. 72(2).

191. *Id.* art. 72(1).

192. *Id.* art. 72(3).

193. *Id.* arts. 71-72.

194. *Id.* art. 72.

195. U.C.C. § 2-609(1).

196. C.I.S.G. art. 72(2).

197. U.C.C. § 2-610.

198. *Id.* § 2-610(a)-(b).

provision is similar to the CISG. The phrase of UCC § 2-610—repudiation “which will substantially impair”—encompasses the same principle of a “fundamental breach” under the CISG.

## XII. DAMAGES

Article 74 provides the general rule for calculation of damages. The basic premise of the damages provisions of the CISG is to put the injured party in the same position he would have been in if the contract had been performed; that is, to give the injured party the “benefit of the bargain,” as measured by expectation interests as well as reliance expenditures. This principle is embedded in Article 74 by the language “[d]amages . . . consist of a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach.”<sup>199</sup>

Article 74 does not specify the time or place for measuring the loss.<sup>200</sup> This lack of specificity is important in transactions involving goods which fluctuate significantly in price. The 1978 Commentary on Article 70 offers some explanation: “[T]he place for measurement should be where the seller delivered the goods,” and suggests that the time chosen should be an appropriate one; for example, when the goods were delivered, or when the buyer learned that the nonconformity would not be remedied by the seller under any other articles of this Convention.<sup>201</sup> A clause that specifies the time and place for measuring damages would resolve this problem.

Damages are limited by foreseeability. This limitation is similar to the common law requirement of foreseeability derived from the old English case of *Hadley v. Baxendale*.<sup>202</sup> The “only significant difference” between the UCC view of foreseeability and the view of CISG Article 74 is that the Convention includes a subjective as well as an objective test of foreseeability. The language of UCC § 2-715(2)(a) is stated only in objective terms—referring to a seller who “at the time of contracting had reason to know”—as is the language of the Restatement, allowing recoveries for injuries that the defendant had “reason to foresee as a probable result of the breach when the contract was made.”<sup>203</sup>

Article 74, on the other hand, provides an objective and subjective foreseeability test: “[D]amages may not exceed the loss which the party in breach foresaw or ought to have foreseen.”<sup>204</sup>

Article 5 imposes a limitation of damages which excludes claims

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199. C.I.S.G. art. 74.

200. *Id.*

201. *Id.* art. 70 (official commentary).

202. 156 Eng. Rep. 145 (1854).

203. RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981).

204. C.I.S.G. art. 74.

concerning the "liability of the seller for death or personal injury caused by the goods to any person."<sup>205</sup> Only commercial measures of damages are authorized by Article 74.<sup>206</sup> Unlike the Convention, the UCC authorizes personal injury awards in breach of warranty actions.<sup>207</sup>

Articles 75 and 76 give two alternative approaches for measuring damages when the contract is avoided due to a fundamental breach of the contract.<sup>208</sup> Both articles represent a specific application of Article 74 and should be read in conjunction with it.<sup>209</sup> Article 74 embodies the general rule for the measurement of damages whenever and to the extent that Articles 75 and 76 do not apply.

Article 75 establishes the measure for damages based on a substitute transaction.<sup>210</sup> If the contract is avoided in a reasonable manner and within a reasonable time after avoidance, and the buyer has bought goods in replacement or the seller has resold the goods, the party claiming the damages may recover the difference between the contract price and the price in the substitute transaction, as well as any further damages recoverable under the article.<sup>211</sup> The advantage of Article 75 is that resale by an aggrieved seller and repurchase by an aggrieved buyer establishes damages, and the aggrieved party need not prove the current or market price for the goods. The substitute transaction must be made in a "reasonable manner and within a reasonable time."<sup>212</sup> If it is not, the injured party must resort to Article 76, which provides the rule for measuring damages based on the current or market price.<sup>213</sup>

Article 76 sets the measure of damages on the price differential of a substitute transaction which is based on the current or market price for the goods at the time of avoidance.<sup>214</sup> If the aggrieved party does not set the damages under Article 75, then the party is limited under Article 76 to the measure of damages which is based on the current market price.<sup>215</sup> The current market price is determined "at the time of avoidance,"<sup>216</sup> and the price prevailing is determined "at the place where delivery of the goods should have been made."<sup>217</sup>

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205. *Id.* art. 5.

206. *Id.* art. 74.

207. U.C.C. § 2-715(2)(b).

208. C.I.S.G. arts. 75, 76.

209. *Id.*

210. *Id.* art. 75.

211. *Id.*

212. *Id.*

213. *Id.* art. 76.

214. *Id.* art. 76(1).

215. *Id.*

216. *Id.*

217. *Id.* art. 76(2).



Article 76 applies when resale or repurchase is not reasonable under Article 75, when no resale or repurchase occurs, or when it is impossible to determine the resale or repurchase contract in replacement.<sup>218</sup> The UCC equivalents to Article 75 are the UCC §§ 2-706 and 2-712. The UCC equivalents to Article 76 are the UCC §§ 2-708(1) and 2-713.

### XIII. RISK OF LOSS

Article 66 sets up the basic rule that once the risk passes to the buyer, he is obligated to pay the price.<sup>219</sup> The seller is liable for any lack of conformity—caused by a breach of the seller's obligations—that occurs before or after risk passes.

The most similar provision in the UCC is § 2-709(1)(a). This article gives the aggrieved seller the right to recover the price (and incidental costs) of "conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer . . . ."<sup>220</sup> Thus, under the Code, the risk of loss for wrongfully rejected goods falls initially on the buyer, but only for a reasonable time. After that, the risk of loss reverts to the seller.

Paragraph (1) of Article 67 governs several types of contracts. The first sentence sets out the risk of loss in shipment contracts.<sup>221</sup> The second sentence sets out the risk of loss in contracts that require the seller to hand the goods over to a carrier at a particular place other than the seller's place of business, such as at an intermediary port.<sup>222</sup> Risk passes differently in each case.

#### A. *Article 67(1)—First Sentence*

Under the Convention, in shipment contracts, risk of loss passes when the goods are handed over to the "first carrier."<sup>223</sup> Like the Convention, the UCC provides that goods transported by the seller travel at the seller's risk.<sup>224</sup> Risk passes in shipment contracts when conforming goods are "duly delivered" to the carrier. Three conditions must be satisfied in order for the goods in a shipment contract to be duly delivered: (1) the seller must put the goods in the possession of the carrier and make a reasonable contract for carriage; (2) the seller must deliver any documents necessary for the buyer to obtain possession; and (3) the seller must promptly notify the buyer of the

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218. *Id.* art. 76.

219. *Id.* art. 66.

220. U.C.C. § 2-709(1)(a).

221. C.I.S.G. art. 67(1).

222. *Id.*

223. *Id.*

224. U.C.C. § 2-320(2).

shipment.<sup>225</sup>

Unlike the Convention, the UCC requires the seller to notify the buyer of the shipment in all cases.<sup>226</sup> However, the seller's failure to notify the buyer, or his failure to make a proper contract, are grounds for rejection only if material delay or loss ensues.<sup>227</sup>

#### B. *Article 67(1)—Second Sentence*

The second sentence of Article 67(1) governs contracts that require the seller to hand the goods over to a carrier at a particular place other than at the seller's place of business.<sup>228</sup> If the sales contract requires the seller to hand the goods over to a subsequent carrier at an intermediary port, the risk passes when and where the goods are handed over to that carrier.<sup>229</sup> This provision relieves the buyer from liability during the initial leg of the voyage.

The UCC does not have a special section dealing with the passage of risk at an intermediary port. But, the risk of loss in this situation would pass in accordance with § 2-509(b), which also governs risk of loss in destination contracts.<sup>230</sup>

#### C. *Article 67(1)—Third Sentence*

The third sentence of Article 67(1) recognizes that in sales involving documentary exchange, the buyer may receive the documents before or after he receives the goods. This section makes clear that control of the shipping documents does not affect passage of the risk.<sup>231</sup> In a shipment contract, the risk passes when the seller hands over the goods to the first carrier, even if the seller retains control of the goods by holding a bill of lading naming himself as consignee.<sup>232</sup>

This provision effectuates the Convention's underlying rule that the risk should be on the party who controls the goods. It recognizes that documentary exchanges are intended to be a means of payment rather than a means of shifting risk.

The UCC effectuates the same policy in § 2-509(1). Under subsection (a), risk of loss in shipment contracts is not affected by the seller's decision

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225. *Id.* § 2-504(a)-(c).

226. *Id.* § 2-504 cmt. 5.

227. *Id.*

228. C.I.S.G. art. 67(1).

229. *Id.*

230. U.C.C. § 2-509(b).

231. C.I.S.G. art. 67(1).

232. *Id.*

to retain a security interest in the goods.<sup>233</sup> Risk of loss passes as if the seller had not retained a security interest. However, both the CISG and the UCC require the seller to tender any documents of title necessary to enable the buyer to take delivery.<sup>234</sup> Under the Convention, the seller's failure to tender documents of title gives the buyer the right to exercise rights provided in Articles 46 to 52 and to claim damages as provided in Articles 74-77.<sup>235</sup> The buyer can reject the goods only if the improper tender results in a fundamental breach under Article 25.<sup>236</sup> Under the UCC, the seller's failure to tender documents of title entitles the buyer to reject the goods or to pursue remedies under § 2-508.<sup>237</sup>

Paragraph (2) of Article 67 ensures that the risk of loss will not pass to the buyer unless the goods are clearly identified to the contract. The goods must be sufficiently linked to the buyer.<sup>238</sup> The identification requirement prevents an unscrupulous seller from falsely claiming that the goods were damaged after they were purchased by the buyer. The rule lists three ways in which the goods can be identified. First, the seller can identify the goods to the buyer by marking them.<sup>239</sup> Second, the seller can identify the goods to the buyer through the shipping documents.<sup>240</sup> In a typical sale involving carriage of goods, a bill of lading naming the buyer as consignee will identify the goods to the buyer. However, if the seller names himself as consignee in order to maintain control over the goods upon arrival, the bill of lading will probably not sufficiently link the goods to the buyer. Nonetheless, in that case, the invoice or other correspondence will probably suffice. Third, the seller can identify the goods by notifying the buyer that the goods have been dispatched to the carrier, as provided in Article 32(1).<sup>241</sup>

Under the UCC, the identification of goods serves a more limited role. The primary significance is that identification gives the buyer and seller remedies not otherwise available. If goods identified to the contract suffer casualty without the fault of either party, and the casualty occurs before the risk of loss passes, then the contract is avoided.<sup>242</sup> If the loss is partial, the buyer may treat the contract as avoided or accept the goods with due allowance for the non-conformity.<sup>243</sup> Furthermore, if the buyer refuses to pay for goods already identified to the contract, the seller has an action for the

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233. U.C.C. § 2-509(1)(a).

234. C.I.S.G. art. 30; U.C.C. § 2-503(3).

235. C.I.S.G. art. 45.

236. *Id.* art. 49.

237. U.C.C. §§ 2-601, 2-508.

238. C.I.S.G. art. 67(2).

239. *Id.*

240. *Id.*

241. *Id.*

242. U.C.C. § 2-613(a).

243. *Id.* § 2-613(b).

price of the goods that he is unable to resell.<sup>244</sup> Similarly, both the buyer's right to recover goods on the seller's insolvency, and his right to replevin, depend on the goods being identified to the contract.<sup>245</sup> However, the buyer's right to specific performance is not limited to goods that have been identified to the contract.<sup>246</sup> For example, a buyer can demand specific performance under an output contract even though the goods have not been produced.

Like the Convention, the UCC provides numerous means by which the goods can be identified to the contract. These are essentially the same means as provided in the Convention. If the contract relates to goods already identified, identification occurs when the contract is made.<sup>247</sup> If the contract relates to future goods, identification occurs "when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers."<sup>248</sup> In addition, § 2-501 provides that identification may occur by explicit agreement of the parties.<sup>249</sup>

Article 68 provides for risk of loss for goods sold in transit.<sup>250</sup> This provision applies primarily where a middleman arranges for shipment of the goods and resells the goods while they are in transit.<sup>251</sup>

The basic rule for goods sold in transit is that risk passes from the time when the contract is concluded.<sup>252</sup> In cases where the goods are destroyed by a single, identifiable event, such as fire, collision, or explosion, the rule allowing for risk to pass would be relatively simple to administer. However, to allow the risk to pass mid-shipment can lead to practical difficulties if the damage is caused by a less identifiable event. To avoid this difficulty, Article 68 provides that "if the circumstances so indicate," the buyer assumes the risk retroactively, i.e., from the time when the goods were handed over to the first carrier.<sup>253</sup> The UCC does not provide a separate rule for goods sold in transit.

Article 69(1) applies if the contract requires the buyer to pick up the goods at the seller's place of business.<sup>254</sup> The risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal.<sup>255</sup>

Under the UCC, contracts that require the buyer to pick up the goods are governed by § 2-509(3). This subsection also governs the risk of loss where

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244. *Id.* § 2-706.

245. *Id.* §§ 2-502(2), 2-716(3).

246. *Id.* § 2-716.

247. *Id.* § 2-501(1)(a).

248. *Id.* § 2-501(1)(b).

249. *Id.* § 2-501(1).

250. C.I.S.G. art. 68.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* art. 69(1).

255. *Id.*

the seller transports the goods.<sup>256</sup> In either case, passage of risk depends on whether or not the seller is a merchant.<sup>257</sup> If the seller is a merchant, the risk of loss passes when the buyer receives the goods.<sup>258</sup> If the seller is not a merchant, the risk passes on tender of delivery.<sup>259</sup> The seller must put, and hold, conforming goods at the buyer's disposal and give the buyer any notice reasonably necessary to enable him to take delivery.<sup>260</sup>

Under Article 70, if the seller commits a fundamental breach, the buyer retains all rights to which the buyer is entitled, irrespective of the fact that the risk of loss may have passed to the buyer under Articles 67, 68, or 69.<sup>261</sup> The specific rights preserved by the buyer are the election to avoid the contract under Article 49(1) or to require the seller to deliver substitute goods under Article 46(2).<sup>262</sup> By exercising either of these options, the buyer places the risk of loss on the seller because of the buyer's right to avoid the contract. If shipment of the goods constitutes a fundamental breach of the contract as a whole, the buyer's right to avoid or compel substitute delivery is not lost because the goods were damaged in transit.

Under the UCC, the buyer also retains rights accrued by the seller's breach; however, under the UCC, the breach shifts the risk of loss back to the seller.<sup>263</sup> In this way, the UCC is unlike the CISG, where the shifting back of the risk is a necessary result of the buyer's right to avoid the contract. However, unlike the requirement of a fundamental breach in the CISG, the UCC allows the buyer to shift the risk back to the seller based on any breach, regardless of its extent.<sup>264</sup>

#### XIV. IMPOSSIBILITY AND FRUSTRATION OF PURPOSE

Article 79 embodies the CISG's provisions for frustration of purpose and impossibility.<sup>265</sup> There are three factors which must be proven by a non-performing party who seeks to establish that he is not "liable for a failure to perform": (1) the failure was "due to an impediment beyond his control"; (2) at the time of the contract "he could not reasonably be expected to have taken the impediment into account"; and (3) following the contract, he could not reasonably be expected "to have avoided or overcome [the impediment to

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256. U.C.C. § 2-509(3).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* § 2-503(1).

261. C.I.S.G. art. 70.

262. *Id.* arts. 49(1), 46(2).

263. U.C.C. § 2-510(1).

264. *Id.*

265. C.I.S.G. art. 79.

performance] or its consequences.”<sup>266</sup>

The second paragraph of Article 79 narrows the grounds for exemption of a seller by treating the failure by the third person as if it were the failure by the seller. The seller will be exempt only if the third party would be exempt under the general standards of paragraph (1).<sup>267</sup>

Paragraph (3) acknowledges that impediments may only be temporary and that the Convention may not allow a total exemption if the condition is temporary.<sup>268</sup>

Paragraph (4) provides the requirement that notice be given by the non-performing party within a reasonable time. Without this notice, the non-performing party is liable for the damages resulting from the breach and has no right to claim immunity from liability under the provisions of this or other articles.<sup>269</sup>

Paragraph (5) provides that “[n]othing in this article prevents either party from exercising any right other than to claim damages.”<sup>270</sup> This section emphasizes the fact that this exemption provision does not negate the adverse party’s right to avoid the contract.

The UCC differs from the CISG in that the CISG is much closer to the Civilian approach to frustration of purpose, and is more permissive than the common law. For example, the UCC only provides the defense for the seller, and then only with respect to two aspects of performance—“delay in delivery” and “non-delivery.”<sup>271</sup> Article 79 of the Convention follows the approach of most civil law systems in extending the rules on excuse to all aspects of a party’s performance. Either party may be excused from liability “for a failure to perform any of his obligations.”<sup>272</sup>

The differences are not as great as a literal reading of the two codes would suggest. The buyer would probably be able to claim frustration of purpose in most American courts, and both the first and second Restatement of Contracts adopt this broader view.

## XV. PRESERVATION AND RESALE OF REJECTED GOODS

Article 86(1) imposes a duty on the buyer to preserve goods when the buyer is in possession of the goods and intends to reject them.<sup>273</sup> The buyer essentially has a lien on the goods against the seller for reimbursement of the

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266. *Id.* art. 79(1).

267. *Id.* art. 79(2).

268. *Id.* art. 79(3).

269. *Id.* art. 79(4).

270. *Id.* art. 79(5).

271. U.C.C. § 2-615(a).

272. C.I.S.G. art. 79(1).

273. *Id.* art. 86(1).

cost of storage. If goods are dispatched to the buyer and the buyer intends to reject them, Article 86(2) imposes a duty on the buyer to take possession of the goods.<sup>274</sup> Thus, the rejecting buyer cannot avoid the obligation to preserve the goods by not taking possession of the goods. The obligation can be avoided if the seller or the seller's agent is able to take possession of the goods at their destination.<sup>275</sup> The buyer need not care for the goods indefinitely.<sup>276</sup> If the delay by the other party becomes unreasonable, then the preserving party may sell the goods under Article 88.<sup>277</sup>

For rightfully rejected goods in the possession of the buyer, the UCC imposes a duty on the merchant buyer "to follow any reasonable instructions received from the seller."<sup>278</sup> If the seller does not provide such instructions, then the buyer may sell the goods if they are perishable or if the value of the goods threatens to decline.<sup>279</sup> The UCC provides other options for non-perishable, rightfully rejected goods that may be exercised by merchants and non-merchants. The buyer may store the goods for the seller's account,<sup>280</sup> reship the goods to the seller, or sell the goods for the seller's account and deduct expenses.<sup>281</sup> If the buyer uses the goods after rejecting them, then the buyer will have to account to the seller for such use.<sup>282</sup> The non-merchant buyer has a duty not to convert the goods and to hold them for a reasonable time until the seller may remove them.<sup>283</sup>

Under Article 88(1), the buyer in possession of goods for which there is a duty of preservation may sell the goods in two circumstances.<sup>284</sup> First, he may sell the goods if the seller delays unreasonably in taking possession of, or taking back, the goods.<sup>285</sup> Second, if it appears that the buyer would be left with storage costs, the buyer may seek to offset the costs by selling the goods.<sup>286</sup> In either event, the buyer seeking to sell the goods must give the seller notice of the intention to sell.<sup>287</sup> Article 88(2) deals with the sale of perishables or goods for which storage would be financially impractical. In both situations the preserving party must sell the goods and a good faith effort

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274. *Id.* art. 86(2).

275. *Id.*

276. *Id.*

277. *Id.* art. 88.

278. U.C.C. § 2-603(1).

279. *Id.*

280. *Id.* § 2-604.

281. *Id.*

282. *Id.* § 2-606(1)(c).

283. *Id.* § 2-604.

284. C.I.S.G. art. 88(1).

285. *Id.*

286. *Id.*

287. *Id.*

at notice would still be required.<sup>288</sup>

Under the Convention, resale is allowed "if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation."<sup>289</sup> Article 88(1) states only that a sale may be made by "appropriate means."<sup>290</sup>

The Convention does not limit the duty to deal with perishables to merchants, as does the UCC; but since the Convention itself will not apply to sales "of goods bought for personal, family or household use," the parties to a Convention transaction will most likely be of a "merchant" character. The parties required to make the "salvage sale" will be similar under both the UCC and the Convention. The UCC requires the buyer to follow reasonable instructions before making a salvage sale.<sup>291</sup> Although the Convention does not have a "reasonable instructions" provision, it adds the requirement of notice "[t]o the extent possible" of the intention to sell.<sup>292</sup>

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288. *Id.* art. 88(2).

289. *Id.* art. 88(1).

290. *Id.*

291. U.C.C. § 2-604.

292. C.I.S.G. art. 88(2).