Remedies Under the U.N. Convention for the International Sale of Goods

by
Olga Gonzalez†

I
INTRODUCTION

On September 21, 1983, President Reagan submitted to the United States Senate his recommendation that it give its advice and consent to the United Nations Convention for the International Sale of Goods (hereinafter the Convention).[1] This uniform law on international sales and contract formation will become effective once ratified by ten States.[2] Six States have already ratified or acceded to the Convention, and five more, including the United States, are in the process of ratification.[3] The increasing likelihood of U.S. approval warrants a close examination of the provisions of the Convention.

This Article examines how certain remedy provisions in the Convention differ from their counterparts in the Uniform Commercial Code (U.C.C.) and how American practitioners may compensate for those differences. After a brief discussion of the history of the Convention, and its scope of application, this Article discusses the remedy provisions concerning fundamental breach, the conformity of goods, seller's right of cure,

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† B.A., 1982, Pomona College; J.D. Candidate, 1985, University of California, Berkeley. The author extends special thanks to Professor Bernhard Gomard of the University of Copenhagen for his assistance in the preparation of this Article.

1. Letter of the President to the Senate, 129 CONG. REC. 12655 (September 21, 1983). For the text of the Convention, see U.N. Doc. A/CONF.97/18 (April 10, 1980), *reprinted in* 19 I.L.M. 671 (1980).

2. Convention, *supra* note 1, art. 99(1).

3. During the eighteen month period for signing the Convention after the 1980 Conference, the following became signatory States: Austria, Chile, Czechoslovakia, Denmark, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Hungary, Italy, Lesotho, the Netherlands, Norway, People's Republic of China, Poland, Singapore, Sweden, United States of America, Venezuela, and Yugoslavia. Argentina, Egypt, France, Hungary, Lesotho, and Syria have already ratified. *See Message from the President of the United States Transmitting the United Nations Convention On Contracts For the International Sale of Goods*, S. TREATY DOC. NO. 98-9, 98th Cong., 1st Sess., at VI (1983) [hereinafter cited as *Message from the President*]. Austria, Bulgaria, Venezuela, and Yugoslavia are in the constitutional process of ratification. Remarks of Professor Kazukai Sono, Chief of International Trade Law Branch of the U.N. Office of International Affairs, Parker School Program Luncheon, Colombia University, October 21, 1983.

buyer's examination of goods and notice, price reduction, and specific performance. The primary focus will be on the remedies of specific performance and price reduction.

II
HISTORICAL BACKGROUND

The origins of the Convention date back to 1930, when, under the sponsorship of the International Institute for the Unification of Private Law (UNIDROIT), a group of European scholars produced a preliminary draft of a uniform law for the international sale of goods.[4] With the assistance of the League of Nations, UNIDROIT eventually produced a completed draft after World War II.[5] In 1951, a conference was held at The Hague to review the UNIDROIT draft for a uniform international sales law.[6] After a Special Commission produced a final text, interested States were invited to attend a diplomatic conference for the final revision.[7] The Conference was held at The Hague in April 1964.[8] Twenty-eight States finalized two Conventions: the Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter ULF) and the Uniform Law on the International Sale of Goods (hereinafter ULIS). [9] Both Conventions entered into force in 1972, following ratification by five States.[10]

After it became evident that ULIS would not receive wide acceptance, the United Nations Commission on International Trade Law (UNCITRAL) started its own project for a uniform law of international sales and contract formation.[11] UNCITRAL established a Working Group of fourteen States, comprised of a cross-section of its worldwide membership, and authorized it to prepare a text that would facilitate wider acceptance by countries of different legal, social, and economic systems.[12] In 1978, the Working Group completed its revision of the ULIS and combined it with its completed revision of the ULF.[13] The full Commission then gave unan-

4. *See* Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview*, 27 AM. J. COMP. L. 223 (1979).

5. Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 461–62 (1979).

6. *Id.*

7. *Id.*

8. *Id.*

9. Honnold, *supra* note 4, at 224. For the text of ULIS, see I U.N. REGISTER OF TRADE LAW TEXTS 39, *reprinted in* 13 AM. J. COMP. L. 451, 453 (1964).

10. These five States were, for the most part, European. The Sales Convention was ratified by Belgium, Federal Republic of Germany, United Kingdom, Gambia, Israel, Italy, the Netherlands, and San Marino. Ratification by the United Kingdom was subject to a reservation permitted under article V, making ULIS applicable only when the parties had chosen it as the law of the contract. *See* Honnold, *supra* note 4, at 224.

11. Berman & Kaufman, *The Law of International Commercial Transactions*, 19 HARV. INT'L L.J. 221, 270 (1978).

12. Honnold, *supra* note 4, at 225–26.

13. *Id.*

imous approval to this 1978 Draft Convention on Contracts for the International Sale of Goods.[14] In March 1980, representatives of sixty-two States and eight international organizations met in Vienna and unanimously adopted the finalized draft of the Convention.[15] Thus, adoption of the Convention culminated nearly half a century's work.

As the product of States comprising a wide range of differing legal systems, the Convention necessarily includes a number of compromise measures which may produce incongruencies in the application of its terms. While such compromise measures will, to a certain degree, undermine the Convention's goal of complete uniformity, they are necessary to enable continued progress in the effort to standardize international trade law. The following Parts of this Article illustrate how the Convention transformed the law of international sales from a civil law bias to a compromise between civil and common law systems.[16]

III
SCOPE OF APPLICATION

Article 1 of the Convention supplies a simple formula for determining the Convention's scope of application. The terms of the Convention will apply only to contracts for the sale of goods between parties whose places of business are in different Contracting States or to cases in which the rules of private international law lead to the application of the law of a Contracting State.[17] According to some authorities, the parties must have their places of business in different States at the time they enter into the contract.[18] If a party has more than one place of business, article 10 of the Convention defines the place of business as that which has the closest relationship to the contract and its performance.[19] If a party does not have a place of business, reference is made to the habitual residence of that party.[20] Article 2 specifi-

14. *Id. See also* UNCITRAL, *Report on Eleventh Session* 9–30 (1978). The text of the 1978 Draft Convention is reprinted in 27 AM. J. COMP. L. 325 (1979).

15. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 47 (1982).

16. This may be attributed to U.S. influence which was not substantial until late in the 1978 Draft Convention. *See* Ziontz, *A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?*, 2 N.W. J. INT'L L. & BUS. 129, 150 (1980).

17. Convention, *supra* note 1, art. 1.

18. It is argued that the requirement that the parties have their places of business in different States is to be met at the time of entry into the contract, for this would seem to follow from the text set out in article 6(a) of the Limitations Convention. *See* Sutton, *The Draft Convention on the International Sale of Goods—Part One*, 4 AUSTRALIAN BUS. L. REV. 269, 271 (1976).

19. Convention, *supra* note 1, art. 10(a):

> [I]f a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

20. *Id.*, art. 10(b): "[I]f a party does not have a place of business, reference is made to his habitual residence."

cally excludes certain sales from the terms of the Convention, such as consumer sales and sales of investment securities.[21] Similarly, article 3 excludes contracts in which the obligations of one party consist mainly of supplying labor or other services.[22]

The Convention governs only the formation of the sales contract and the rights and obligations of the parties arising under the contract. Under article 4, the Convention defers to the laws of the forum on the question of the validity of the contract or any of its provisions.[23] However, this deference raises potentially troubling problems of differential enforcement, which threaten to undermine the very objective of a uniform law.[24] For example, the enforcement of a penalty clause may depend on relevant legislation in the particular forum. In U.C.C. jurisdictions, a penalty clause would not be enforced, as such clauses are invalid per se under the U.C.C.[25] However, if the laws of the forum did consider penalty clauses valid, such a clause would most certainly be enforced.

Article 4 also fails to address the problem of direct conflicts between domestic validity rules and the provisions of the Convention. By delegating the question of validity to domestic courts the Convention may provide a method for domestic courts to get around certain provisions of the Convention. For example, American courts applying U.C.C. section 2–302 have found that, under certain circumstances, a contract containing a warranty disclaimer is unconscionable and therefore invalid.[26] Yet, under article 35 of the Convention, such a disclaimer would serve as the standard of conformity for the goods sold so long as the disclaimer was expressly set out in the contract.[27] Under circumstances such as these, the forum court could

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21. Article 2 also excludes sales by auction, execution, or otherwise by authority of law, stock, shares, negotiable instruments, money, ships, hovercraft or aircraft, and electricity.

22. Convention, *supra* note 1, art. 3(2): "This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

23. *Id.*, art. 4:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
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> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) the effect which the contract may have on the property in the goods sold.

24. *See* J. HONNOLD, *supra* note 15, at 260–64, for a discussion on how domestic rules of validity, not dealing with consumer protection (for example The Standard Terms Act in the Federal Republic of Germany or mistake legislation in France), interact with article 4 of the Convention. *See also* Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231, 232 (1979). Nicholas argues that the Conference left the question of validity to national law, but it does deal with the question of nonconformity. However, in some systems, such as the French, the scope of mistake doctrine provides an accomodating alternative to the stricter remedies for nonconformity. This situation poses the problem of whether the conference will exclude remedies for nonconformity even if it stops short of legislating on validity.

25. Uniform Commercial Code (U.C.C.) (1977), § 2–718.

26. *See, e.g.*, Henningsen v. Bloomingfield Motors, Inc., 23 N.J. 358, 161 A.2d 69 (1960).

27. *See infra* note 60 and accompanying text.

take advantage of such a conflict and avoid applying specific provisions of the contract by declaring the entire contract invalid under domestic law.[28] Since the concept of unconscionability has been largely confined to consumer sales, to which the Convention does not apply, this particular situation should not present any significant problem. The example does, however, serve to demonstrate the difficulties which may arise when the Convention and domestic law are jointly applicable.

Although the formula set out in article 1 of the Convention is a significant improvement over the complex choice of law provision found in ULIS,[29] the Convention has not completely succeeded in avoiding criticism for an overzealous sphere of application. Much of this criticism surrounds the controversial subparagraph (1)(b), which extends the Convention's application to situations in which the conflict of laws rules of the forum State lead to the application of the law of a State which has ratified the Convention.[30] Despite its controversial nature, a proposal to delete subparagraph (1)(b) was defeated.[31] Instead, the delegates adopted article 95 as a compromise measure.[32]

Article 95 provides that, at the time of the deposit of its instrument of ratification, acceptance, approval, or accession, any State may declare that it will not be bound by subparagraph (1)(b) of article 1. A country whose domestic law is well-suited to international transactions may want to make

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28. *But see* J. HONNOLD, *supra* note 15, at 259–60. Honnold states that article 4 of the Convention may not be read so broadly as to import domestic rules that would supplant other articles of the Convention.

29. Article 1 of ULIS reads:

> 1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:
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> (a) Where the contract involves the sale of goods which are at the time the conclusion of the contract in the course of carriage or will be carried from the territory of one state to the territory of another;
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> (b) Where the acts constituting the offer and the acceptance have been effected in the territories of the states;
>
> (c) Where delivery of the goods is to be made in the territory of a state other than that within whose territory the acts constituting the offer and the acceptance have been effected.

30. *See* Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L.J. 449, 457 (1965). Nadelmann discusses how two litigants from non-Contracting States can take advantage of the laws under ULIS simply by bringing suit in a "contracting" State which will automatically apply the Uniform Law. This same result can be achieved under the Convention if the forum in which the case is brought determines upon application of its own conflicts rules that the law of a contracting state will apply. *See* Ziontz, *supra* note 16, at 151. *See also* Reczei, *The Area of Operation of the International Sales Convention*, 29 AM. J. COMP. L. 513, 518–19 (1981). Reczei suggests that the rules of private international law might in some circumstances point to the law of one State with respect to formation of the contract and to the law of another State with respect to various aspects of performance. This dichotomy could result in application of only parts of the Convention, even though it was designed to be a unified whole.

31. *Message from the President*, *supra* note 3, at 21.

32. *See* U.N. Doc. A/CN.9/146, para. 33.

the declaration under article 95. Conversely, States whose domestic law is ill-suited for international transactions may well prefer the wider applicability of the Convention that results from subparagraph (1)(b).[33]

Article 95 has both favorable and unfavorable effects. While it allows contracting parties from States making the declaration to avoid the uncertainties which might result under subsection (1)(b), it narrows the applicability of the Convention in countries opting for an article 95 declaration.[34] No country has yet made the declaration under article 95.[35] This fact is not necessarily significant, since only six countries have ratified the Convention.[36] However, in his Message to the Senate, President Reagan recommended that the United States ratify with an article 95 reservation.[37]

Article 95 only provides for a partial exclusion of the Convention by authorizing States to elect not to enforce subparagraph (1)(b). Other provisions of the Convention provide for total exclusion of the Convention in cases where its terms would otherwise apply. Article 6 of the Convention, for example, allows the parties to exclude the application of the Convention in whole or in part, or to vary the effects of any of its provisions.[38] This provision is reminiscent of article V of ULIS, which was not carried over to the Convention. Article V of ULIS allowed a State to ratify with the reservation that ULIS would only apply if the parties expressly made ULIS the applicable law by so stating in the contract.[39] As a result, a country could ratify ULIS without even a semblance of applying its terms.[40] In contrast, the language of article 6 of the Convention does not permit such a complete contravention of the uniform terms, but simply allows for two results already available under the U.C.C. First, contracting parties can derogate from any rule by stating their intentions clearly in the contract. Second,

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33. J. HONNOLD, *supra* note 15, at 83.

34. Honnold states that, while an article 95 declaration enlarges the applicability of the domestic law of the declaring state, only rarely will an article 95 declaration by one state affect the applicability of the Convention to the domestic law of another contracting State, because the article permits a separate decision from each State. *Id.*

35. *See* U.N. Doc. A/CN.9/241, at 3.

36. *Id.*

37. *Message from the President, supra* note 3, at 21. The President offered two reasons for this position. He noted first that the rules of private international law, the test under subparagraph 1(b), are far more uncertain than the clear-cut test of subparagraph 1(a). Secondly, he asserted that the use of subparagraph 1(b) would displace U.S. domestic law in favor of the Convention far more often than it would displace foreign law, for the simple reason that 1(b) applies only to transactions between contracting (i.e. U.S.) and non-Contracting States. *Id.*, at 21.

38. Convention, *supra* note 1, art. 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

39. ULIS, *supra* note 9, art. V. The United Kingdom was the promoter of this reservation, which was adopted after substantial initial opposition. *See* Nadelmann, *supra* note 30, at 455.

40. Ratification by the U.K. of the Sales Convention was under an article V reservation. There is nothing to suggest that U.K. traders made any substantial use of their opportunity to trade on terms of the Uniform Laws. *See* Feltham, *The United Nations Convention on Contracts for the International Sale of Goods*, 1981 J. BUS. L. 346 (1981).

contracting parties can preselect the law of a particular legal system by including a choice of law clause in the contract. In the absence of such an explicit restrictive clause, the terms of the Convention will govern the contract.[41]

Similarly, article 94 allows two or more Contracting States (or a Contracting State and one or more non-Contracting States), which have the same or closely related legal rules on matters governed by the Convention, to declare that the Convention is not to apply to contracts of sale or to their formation where the contracting parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.[42] Groups of countries which have similar laws or their own well-established trade laws and practices, such as Commonwealth or COMECON countries, may find a change to the Uniform Law system more disruptive than beneficial. For these countries, and others in similar situations, article 94 provides a mechanism for exclusion of the terms of the Convention.

Article 94 provides needed flexibility without sacrificing the Convention's international character. Excluding the Convention in the case of Commonwealth or COMECON countries would not reflect on the international character of the Convention because trade within these areas can be seen as other than international. At the same time, the Convention exists to facilitate trade between countries belonging to different legal systems, such as East-West trade. It is also valuable for countries which do not have well-developed trade laws, such as some lesser developed countries (LDCs).

Contracting parties whose main places of business are located in States which have not made unilateral or joint declarations under article 94 may obtain the same results using an article 6 declaration. Unlike article 94, however, article 6 may also be used under circumstances where, because of unequal bargaining position, one party may dictate which laws shall apply. This situation might arise with an LDC agreeing to use the more sophisticated trade laws of a trading partner on the other partner's insistence, when the LDC would otherwise benefit from the laws of the Convention. Yet, it is exactly in situations where the trading partners are from different legal systems, such as North-South trade, that the Convention is most helpful. In

41. The Convention gives great deference to the intent of the parties in that article 6 provides a mechanism to deviate from all or any part of the Convention. It is therefore likely that standardized contracts will be binding under the Convention in the same manner as before. This presumes that article 6 does not require an express exclusion of the Convention but allows for one implied by the terms of the contract. *See* Feltham, *supra* note 40, at 348.

42. Convention, *supra* note 1, art. 94(1):

> Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

this way, article 6 may actually serve to undermine one of the important benefits of the Convention.

IV
REMEDIES GENERALLY

Before examining the remedies of specific performance and price reduction, complementary provisions of the Convention and the U.C.C. regarding fundamental breach, conformity of goods, cure, and buyer's examination of goods will be briefly discussed.

A. Fundamental Breach

Fundamental breach is an important concept because it enables an innocent party to avoid the contract without losing any rights to damages. Article 25 of the Convention defines a fundamental breach as: "[a] breach of contract committed by one of the parties which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract." Article 25 further adds that the breach will not be considered 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. The Convention's definition of fundamental breach makes it possible to reconcile the interests of the parties in cases where an insignificant deviation from the contract produces surprising and serious consequences.[43]

The new definition of fundamental breach is a significant improvement over that found in ULIS.[44] ULIS required a buyer claiming fundamental breach to prove that a reasonable person would not have entered the contract had he foreseen the breach and its effects, and that the breaching party knew or ought to have known that a reasonable person would not have entered the contract.[45] The new definition under the Convention shifts the burden of proving foreseeability to the party in breach, thereby alleviating the significant burden of proof which ULIS placed on the buyer.[46] The Convention also provides a more objective test than the ULIS definition by focusing on the degree of detriment resulting from the breach,[47] rather than on the potential actions of a party had he known of the breach at the time

43. *See* J. HONNOLD, *supra* note 15, at 212.

44. *See* Convention, *supra* note 1, art. 25:

> A breach of contract committed by one of the parties 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 a result.

45. *See* ULIS, *supra* note 9, art. 1. *See also* Ziontz, *supra* note 16, at 154.

46. *See* Michida, *Cancellation of Contract*, 27 AM. J. COMP. L. 279, 285 (1979).

47. Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 338 (1983). *See also* J. HONNOLD, *supra* note 15, at 212.

of contracting.[48]

Under the Convention, the fundamental nature of the breach is the test for immediate cancellation in all cases, whether the breach is effected by the buyer or the seller and whether it occurs before or after the acceptance of the goods.[49] In contrast, under the U.C.C., fundamental breach applies only after goods are accepted.[50] Prior to acceptance, perfect tender is the rule; the innocent party may avoid a contract if the goods delivered, but not accepted, deviate in any way from the goods contracted for.[51] The U.C.C. perfect tender rule is less appropriate in the international context, however, where there is no guarantee of efficient communication facilities, storage facilities, or a market for the goods at the destination point. In addition, the U.C.C. perfect tender rule is somewhat oriented toward consumer protection, an area completely beyond the scope of the Convention.[52]

The Convention's definition of fundamental breach has received some criticism because it fails to specify the point in time at which the issue of foreseeability of the resulting detriment is to be considered.[53] As a result, a breach which becomes foreseeable after the conclusion of the contract, but before the time of delivery of the goods, may fall within the definition of fundamental breach.[54] Yet this result is not necessarily detrimental to the purposes of the Convention. If a buyer makes known to the seller any special problems which may arise if the goods are nonconforming after the contract is made, the buyer should be allowed to reject the nonconforming goods. Article 25 certainly aligns more closely with the notion of avoidability under the U.C.C. than did the old ULIS definition of fundamental breach.

B. Conformity of Goods

Although there are differences between the warranty approach in the U.C.C. and the articles dealing with conformity in the Convention, the remedies they provide are functionally equivalent. Both delineate a method by which a buyer may obtain damages.[55] Article 35 of the Convention requires the seller to deliver goods of the quantity, quality, and description

48. Eorsi, *supra* note 47, at 337.
49. Michida, *supra* note 46, at 279–80.
50. U.C.C., § 2–601 (1977).
51. *Id.*
52. *See* Michida, *supra* note 46, at 281.
53. Feltham, *supra* note 40, at 353.
54. *Id.*
55. Their equivalency may depend on how closely the Convention doctrine of *force majeure* resembles the U.C.C. notion of impossibility, as these doctrines will determine when the seller is exempt from paying damages. There seems to be a substantial difference in how common law systems treat impossibility and civil law systems treat *force majeure*. Consequently, the analogy between warranty sections in the U.C.C. and the conformity sections of the Convention is perhaps tenuous. *See* Nicholas, *supra* note 24, at 237. The two sections do discuss very similar matters however.

established in the contract and to package the goods in the manner described therein.[56] These provisions reflect many of the same interests found in U.C.C. warranty sections 2–313, 2–314, and 2–315.[57] Similarly, article 36 of the Convention extends the seller's liability beyond the time of physical transfer of the goods. Under article 36, a seller may be held liable for any nonconformity which constitutes a breach of a contract obligation, including "a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose, for some particular purpose, or will retain specified qualities or characteristics."[58] Nonconformity constituting an article 36 breach may arise even after the risk of loss passes to the buyer.[59]

One area of potential conflict does exist between the U.C.C. warranty sections and the Convention's provisions on conformity. The language of article 35 of the Convention emphasizes that the contract between the par-

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56. Convention, *supra* note 1, art. 35(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."

57. *See, e.g.*, U.C.C. § 2–313(1):

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

U.C.C. § 2–314:

> (1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises and affirmations of fact made on the container or label if any.

U.C.C. § 2–315:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

See also J. HONNOLD, *supra* note 15, at 249.

58. Convention, *supra* note 1, art. 36(2).

59. Article 36 is subject to the two year cut-off of article 39, however, so is not like a full-fledged warranty.

ties is the primary source for the standard of conformity.[60] This provision runs contrary to section 2-316 of the U.C.C. which enforces the implied warranties provided by sections 2-314 and 2-315 absent explicit language excluding these warranties.[61] As U.C.C. section 2-316 would not be considered a rule of validity under article 4 of the Convention, any conflict would not necessarily be resolved in favor of the domestic legislation.[62] This conflict is rather more apparent than real, however, as both the Convention and the U.C.C. provide that the language of the contract shall be interpreted according to the objective understanding of a reasonable person.[63] Thus, the application of article 35 would provide, in most situations, essentially the same protection against surprising or unconscionable results as would use of section 2-316.

C. *Seller's Right to Cure*

Article 37 of the Convention enables the seller to cure any nonconformity in goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.[64] This provision includes the right to cure any fundamental breach as long as the buyer has not notified the seller of his intention to avoid the contract as provided in article 26.[65] The buyer, however, retains any right to claim damages as provided for in the Convention.[66] Again, this provision is similar to its U.C.C. counterpart, section 2-508. Both sections restrict the time for cure to the period ending at the time for performance.[67] Article 37 is somewhat less restrictive than section 2-508 in that it does not specifically

60. As article 6 allows the parties to derogate from or vary the effect of any of the provisions in the Convention, article 35 emphasizes that the standard of conformity is established by what the parties agree to in the contract. *See* J. HONNOLD, *supra* note 15, at 257.

61. *See* the text of U.C.C. §§ 2-314 and 2-315, *supra* note 57.

62. *See* J. HONNOLD, *supra* note 15, at 259.

63. *Id. Compare* the Convention, art. 8(2) ("[S]tatements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.") *with* U.C.C. § 2-316(3)(a) ("[A]ll implied warranties are excluded by expressions . . . which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty . . .").

64. Article 37 provides:

> 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 nonconforming 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.

While the buyer can request reimbursement if the expense of a cure is unreasonable, article 37 does not require the buyer to accept a cure under these circumstances.

65. *Id.*

66. *Id.*

67. While U.C.C. § 2-508 allows cure until the time of performance, article 47 of the Convention extends the period for cure up to the time of delivery, when the risk of loss passes.

require the seller to notify the buyer of the intention to cure. However, an attempt to cure without notice may be barred under the Convention if it would cause the buyer unreasonable inconvenience or unreasonable expense.[68]

D. Examination of Goods and Notice by the Buyer

Article 38 stipulates that the buyer should examine the goods as early as is possible under the circumstances.[69] By specifying "as short a period as is practicable in the circumstances," article 38 may allow a result different from that arising under the reasonable time standard of U.C.C. section 2–607. For example, a reasonable time under section 2–607 would probably be the same for a buyer in a modern port as it would be for a buyer at a place with less sophisticated equipment. Under the language of article 38, however, a buyer accepting goods in a well-equipped port might be held to a stricter standard than would a buyer in a port with less sophisticated facilities.

Article 39 states that the buyer must give notice to the seller, specifying the nature of the nonconformity, within a reasonable time after the buyer discovered or should have discovered the nonconformity.[70] Significantly, the Convention has a two year cut-off for notice and discovery of any nonconformity.[71] In contrast, the U.C.C. does not require specification of the nonconformity, and provides no ultimate cut-off date for notice to the seller. The U.C.C. requires only that notice and discovery be within a reasonable time.[72] Therefore, the U.C.C. would not bar recovery for a latent defect in the goods, not discovered until more than two years had passed. Conversely, article 39 would bar any such recovery, even if it was not possible to discover the nonconformity before the two year period expired.

Despite the two year cut-off provision in article 39, it may still be possible for the buyer to recover damages for a latent defect under article 36 of the Convention. A buyer could argue that a lack of conformity existed at the time the risk passed to the buyer, but became apparent only after that

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68. J. HONNOLD, *supra* note 15, at 273.

69. Convention, *supra* note 1, art. 38(1): "The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances."

70. *Id.*, art. 39(1): "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

71. *Id.*, art. 39(2):

> In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

72. U.C.C. § 2–607(3)(a) (1977): "[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ."

time.[73] Article 39, however, does purport to apply "in any event," and therefore it seems unlikely that article 36 can be used in this manner. A buyer could, however, ensure the extension of the notice and discovery requirements of article 36 beyond the two year cut-off by obtaining a contractual guarantee from the seller for a specified period of time longer than two years. Article 36 would then clearly come into play and provide a remedy for nonconformity for the length of the guarantee.[74]

V
REMEDIES SPECIFICALLY

A. Price Reduction

Price reduction is a remedy unfamiliar to common law practioners, but one which plays an important function in civil law systems.[75] Reduction of price originates from the Roman law remedy of *actio quanti minoris*.[76] This remedy allowed for a reduction in price for certain specific defects which the vendor did not declare and of which the buyer was not aware at the time of sale, if the defect would have led the buyer to pay a lesser price or to avoid the contract.[77] Since, under traditional civil law, a seller is only liable for damages caused by defective goods when the seller is at fault or guilty of fraud, price reduction can prevent unjust enrichment of the seller who might otherwise receive the full price for defective goods.[78] This aspect of price reduction is not present in the Convention, however, since, under the Convention, the buyer need not show fault on the part of the seller in order to claim damages.[79]

Price Reduction under the Convention. Article 50 of the Convention provides:

> 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 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 acccordance with those articles, the buyer may not reduce price.

This remedy applies only when the buyer accepts and retains noncon-

73. Article 36(1) provides: "The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer even though the lack of conformity becomes apparent only after that time."

74. *Id.*

75. *See, e.g.*, the French Code Civil, art. 1644, sec. 459.

76. Bergsten & Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 256 (1979).

77. *Id.*

78. *See* J. HONNOLD, *supra* note 15, at 326.

79. Damages under the Convention are calculated in much the same way as damages under the U.C.C. *See* Convention, *supra* note 1, arts. 74–77. *See generally* Farnsworth, *Damages and Specific Performance*, 27 AM. J. COMP. L. 247 (1977).

forming goods.[80] Under article 45(2), the right to reduce price does not preclude the buyer from claiming any consequential damages he has suffered. These damages would include such additional expenses as preparing for the goods or loss of production due to reduced efficiency caused by defective machinery.

The remedy of price reduction is effectuated by the unilateral declaration of the buyer. No court action is required, unless the seller disagrees with the buyer as to the existence of a nonconformity or to the monetary consequences of that nonconformity.[81] The unilateral nature of price reduction makes it unique among the remedy provisions of the Convention. The only other remedy which functions on the unilateral act of the buyer is avoidance, and avoidance has strict rules regarding notice which do not apply to price reduction.[82]

Price reduction under the Convention will be of consequence only when the buyer cannot claim damages or avoid the contract. While such a situation is rare, some circumstances do arise which excuse the seller from liability. When, for example, nonconformity or nondelivery is due to an intervening cause, article 79 exempts the seller from damages.[83] Similarly, when a nonconformity is due to unforeseen circumstances, the article 25 foreseeability requirement prevents the buyer from avoiding the contract.[84] The following examples demonstrate circumstances where price reduction is most significant.[85]

Example A. On July 26, the seller contracted to sell $300,000 worth of wheat to the buyer in Iran. Delivery was to be by August 31, "Ex Ship" from the United States to a port in the buyer's country. The seller dispatched the goods in conformance with the contract. Due to unforeseen hostilities, the ship was delayed at the Suez canal for one month, and the wheat deteriorated so that it was of lower grade than the wheat contracted for. At the time of delivery, wheat of the quantity and quality contracted

80. Convention, *supra* note 1, art. 50.

81. Bergsten & Miller, *supra* note 76, at 263–64.

82. *Id.* at 263. Article 39 formal notice is not required.

83. Article 79(1) provides:

> 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.

84. If the nonconformity is found not to have been foreseeable, the buyer cannot avoid the contract, as the nonconformity will not constitute a fundamental breach under article 25. If there were no price reduction, the buyer would be liable for the full contract price. *See* the text of article 25, *supra* note 44.

85. Examples taken from Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) and from J. HONNOLD, *supra* note 15, at 322. *See also* Bergsten & Miller, *supra* note 76, at 260–63 for similar examples.

for was valued at the contract price, while the nonconforming wheat sold for one-half the contract price, or $150,000.

The buyer elected to keep the wheat and to reduce the price as provided for in article 50 of the Convention. Under article 50, the buyer could reduce the price of the contract by one-half, which would be the proportional value of the wheat actually delivered to the value of conforming wheat at the time of delivery. More significant results occur when the price level changes.

Example B. The same facts as in example A, except that, due to a shortage of wheat, the price of wheat doubles in the world market so that, at the time of delivery, conforming wheat is worth $600,000 and the nonconforming wheat $300,000. Under these facts, the buyer may reduce the price of the contract by the requisite proportion of one-half. Therefore, the price he must pay for the wheat is $150,000, even though it is now worth $300,000 on the market. In this way, the buyer retains the benefit of a good bargain. But, if the buyer could claim damages in a price increase situation, he would normally do so. Under article 74, the buyer could receive the difference between the value of conforming wheat and the wheat actually received. This would mean that the buyer could get $300,000 in damages, as compared to $150,000 for price reduction.

Example C. The same facts as in example A, except that the price of wheat has fallen. At the time of delivery, the conforming grade of wheat is worth $150,000 and the nonconforming wheat $75,000.

In this situation, the price reduction remedy would result in the buyer paying $150,000 for wheat that has a market value of $75,000. If the buyer could avoid the contract under article 25, he would most certainly do so under these circumstances. In each of the illustrations above, the ratio between the value of the conforming goods and the nonconforming goods from the time of the contract to the time of delivery has remained constant. This will not necessarily happen in all cases. Under some situations the price of nonconforming goods may rise or fall disproportionately to that of conforming goods.

For this reason the point in time at which the proportion is measured may be significant. Under the Convention, the proportion of the value of nonconforming to the value of conforming goods for price reduction purposes is measured as of the time of delivery. This position represents a change from the 1978 Draft, which had measured the proportion as of the time of the contract formation.[86] The proposal to change the time at which the value of the nonconforming goods should be assessed was introduced by the Norwegian and Finnish delegations.[87] They stated that the time of

86. 1978 Draft Convention, *supra* note 14, art. 46 (proportion for price reduction).
87. *See* U.N. Doc. A/CN.97/C.1/SR.23, para. 23.

delivery would be preferable because the nonconforming goods might not have existed at the time of the contract and because the value at the time of delivery would be a more adequate substitute for damages.[88] They noted that, in most cases, the time chosen for measurement is not particularly significant. The important point is that the comparison between the values of conforming and nonconforming refer to the same time.[89] The proposal was thus intended merely to simplify the text. The United States indicated that it could support either of the draft proposals, but it suggested that the proposed text would be more consistent and easier to explain to U.S. lawyers familiar with U.C.C. provisions calculating damages as of the time of delivery.[90] The United Kingdom delegation expressed concern, however, that repair costs would not necessarily vary in the same proportion as the price of the goods, so that, in fact, a decision on the time of damage calculation did involve a matter of substance.[91]

Using the facts in example A and once again adjusting the price level from the time of contract to the time of delivery, it is clear that the time at which the proportion is assessed can make a significant difference. Suppose that the price of the conforming wheat doubled, so that it had a market value at the time of delivery of $600,000, but that the price of the nonconforming wheat actually delivered increased only by thirty-three percent so that at the time of delivery it had a market value of $200,000. If the price reduction proportion is assessed at the time of the contract, the contract price would be reduced by one-half, or $150,000. If, on the other hand, the time of delivery is chosen, the price will be reduced by one third, or $100,000. If the time of the contract is used to assess the proportion, there may be times where, due to price fluctuations, the remedy of price reduction would actually be more advantageous than normal damages. For example, if the price of the conforming wheat doubled so that it was worth $600,000, but the value of the nonconforming wheat more than doubled, such that it was worth $500,000, damages would only amount to $100,000. Under price reduction, however, the buyer would be entitled to $150,000, because, at the time of contract, the relationship between the conforming wheat and the nonconforming wheat was one-half. Despite the change in the relative value of conforming wheat to the wheat delivered, the contract price of $300,000 would still be reduced by one-half, or $150,000. However, if the time of delivery, rather than the time of contract formation, is used, price reduction will only yield a remedy of $50,000. Thus, by choosing the time of delivery to measure the proportion of conforming to nonconforming value, the Convention limits the circumstances under which the price reduction remedy might be used.

88. *Id.*
89. *Id.*
90. *Id.* at para. 39.
91. *Id.* at para. 26.

Price Reduction under the U.C.C. Section 2–613 of the U.C.C. bears a sufficiently close resemblance to the price reduction remedy in the Convention to warrant a comparison of the two provisions. Section 2–613 applies when the contract requires specific goods identified at the time of contract and such goods suffer casualty without fault of either party before the risk of loss passes to the buyer (or, in a proper case, under a "no arrival, no sale" term). Under section 2–613, the buyer may either avoid the contract or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity, but without further right against the seller. As with article 50 of the Convention, section 2–613 applies only to situations where the seller is not liable for ordinary damages. In addition, both provisions allow price reduction at the election of the buyer.

Section 2–613 applies in only very limited circumstances, however. It would not apply to fungible goods, which constitute a major portion of international trade. In this sense, article 50 has a much wider scope of application because it applies to all goods, whether identified to the contract or not. Further, section 2–613 does not specify the method by which the buyer may exercise the options given to him, nor the standard to be used in valuing the goods when there has been a partial loss or a deterioration. If there is a partial deterioration of the type of goods specified under section 2–613, subsection (b) allows the buyer to "demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." Although the section allows for a liberal application of avoidance, "due allowance" is never defined, nor a formula suggested to derive a definition. The contracting parties are left to decide between themselves how much the price should be reduced.

The remedy provisions of article 50 should not present too many problems for American business interests. Even though price reduction seems unfamiliar to the common law practitioner, commercial practice in America long ago adopted it as a practical measure. A study thirty years ago of commercial practices and mercantile rules led to the conclusion that there was "a marked tendency, particularly in the basic raw commodity markets, expressly to limit the remedy of rejection, and to substitute with price adjustments."[92] International contracts for the sale of fungible goods frequently provide for reduction of price in cases of nonconforming goods. In this way, article 50 can be seen as a codification of existing commercial practices.[93] Of course, it is easy enough for the contracting parties to avoid article 50 price reduction terms by making an explicit article 6 exclusion. Price reduction may have certain benefits, however, which would encourage American business to make use of article 50. By providing a

92. *See* Michida, *supra* note 46, at 280.

93. *See* IV U.N. Yearbook 94, A/CN.9/78, paras. 154–60. *See also* Bergsten & Miller, *supra* note 76, at 272.

mechanism to recover for the loss in value of nonconforming goods, article 50 tends to encourage accceptance of goods by the buyer and reduce the instance of rejection—always a favorable commercial result.[94]

B. Specific Performance

The rules of the Convention granting reciprocal remedies to buyer and seller make it clear that it is the absolute right of an innocent party to obtain specific performance if he so chooses. Under article 46(1), the buyer may require performance by the seller unless the buyer has resorted to a remedy which is inconsistent with this requirement.[95] Article 46 further provides that, where the goods do not conform and the nonconformity constitutes a fundamental breach of the contract, the buyer may require delivery of substitute goods, may repair the goods himself, or may require the seller to repair, unless unreasonable under the circumstances.[96] Under article 62, the seller may require the buyer to pay the price, take delivery, or perform obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.[97]

The approach taken under the Convention is clearly at odds with practice in the United States under the U.C.C. It is a basic tenet of all common law systems that relief should be substitutional rather than specific.[98] This bias is well reflected in the U.C.C. remedies sections. Under section 2–716 of the U.C.C., for example, a buyer's right to specific performance is usually limited to cases where the goods are unique, and the decision to grant specific performance rests within the sole discretion of the court.[99] Under U.C.C. section 2–709, a seller's action for price, where the buyer has not accepted the goods, is generally confined to those cases where resale of the goods is impracticable or where they have been destroyed after the risk of loss has passed to the buyer.[100]

The bias of the Convention toward specific rather than substitutional relief is not surprising in view of the preference of civil law systems, both capitalist and socialist, for specific relief.[101] Due to the conflicting stances of the different legal systems participating in the Convention, the Convention contains a provision which makes an exception for countries whose legal systems differ from the specific performance bias of the Convention. Article 28 provides that if, in acccordance with the provisions of the Convention, one party is entitled to specific performance of an obligation by the

94. Ziontz, *supra* note 16, at 172–73.
95. Convention, *supra* note 1, art. 46(1).
96. *Id.*, art. 46(2)–(3).
97. *Id.*, art. 62.
98. Farnsworth, *supra* note 79, at 247.
99. U.C.C. § 2–716(1) (1977): "Specific performance may be decreed where the goods are unique or in other proper circumstances."
100. U.C.C. § 2–709, Official Comment, para. 2 (1977).
101. Farnsworth, *supra* note 79, at 249.

other party, a forum court is not bound to enter judgment for specific performance unless it would do so under its own law in respect to similar contracts for sale not governed by the Convention.[102] The forum court may still enforce the Convention's broader scope of specific peformance. Under article 28 it is simply not required to do so.

Article 28 is a compromise acceptance of specific performance as a general remedy. This provision, advocated by both the United Kingdom and the United States, was adopted by a vote of 26 to 10.[103] The language of article 28 is particularly important in view of the history of specific performance under the Convention. ULIS significantly limited the circumstances under which the innocent party could request specific performance.[104] Article 25 of ULIS provided that the buyer could not require performance of the contract if it was in conformity with usage and reasonably possible for the buyer to cover. Article 61(2) contained a similar qualification on the seller's action for the price of non-accepted goods. These provisions were compatible with the orientation of the common law countries, as reflected in the U.C.C. remedy sections on specific performance. The deletion of these provisions from the 1978 Draft Convention and the final text, however, clearly tipped the scales toward a specific relief bias.[105]

The 1978 Draft Convention made an attempt at compromise in article 26. The amended article 26 provided that a court was not bound to enter judgment for specific performance unless the court *could* do so under domestic laws with respect to similar contracts of sale not governed by the Convention. This effort at compromise proved to be unsatisfactory for the United States and the United Kingdom, however.

The United Kingdom delegation protested that the law relating to equitable relief in any common-law system is sufficiently discretionary that, given appropriate facts, a court *could* render a judgment of specific performance in respect to many types of contracts, although it actually *would* render such a judgment in respect of very few.[106] Article 26, as worded, would lead to the result that if a court "could" grant specific performance it would be required to do so at the buyer's request.[107] As a compromise, the amended article 26 was clearly not sufficient.

While the Convention, with its article 28 compromise, eliminates some of the problems of specific performance under the 1978 Draft, certain commentators have criticized the Convention's approach to specific performance as incompatible with the provision in the Convention requiring mitigation. By allowing the innocent party to wait for specific performance,

102. Convention, *supra* note 1, art. 28.
103. U.N. Doc. A/CN.97/C.1/SR.3 ¶ 41–43.
104. Farnsworth, *supra* note 79, at 250.
105. *Id.*
106. *See* U.N. Doc. A/CN.97/C.1/SR.3, ¶ 41–43.
107. *Id.*

damages may increase.[108] Other commentators have charged that the provision is deliberately vague in order to accomodate the conflicting philosophies of differing legal systems.[109] Perhaps the greatest problem of the article 28 compromise, however, is that it poses a significant risk of forum shopping by contracting parties, a practice disruptive to the Convention's underlying goal of uniformity. In effect, article 28 limits mandatory specific performance to situations where it would necessarily be applied under the U.C.C. or other common law jurisdictions.

Given the existence of article 28, contracting parties who choose to avoid specific performance may do so by adding a choice of forum clause to the contract. A forum would only be bound to enforce specific performance where it *would* do so under its own domestic law. The contracting parties may also avoid specific performance by adding a choice of law clause to the contract and by excluding the application of articles of the Convention dealing with specific performance. As discussed above, article 6 permits the parties to exclude application of the Convention as specified in the contract. Thus, the alternative law chosen could limit the circumstances under which specific performance would be allowed to those arising under the common law.

The existence of article 6 calls into question the need for a special escape clause such as article 28. If parties from two common law countries do not wish to apply specific performance, article 6 provides the mechanism to contract around it. The outcome of a conflict between parties from two different legal systems should not depend on the laws of the forum, but rather on the intent of the contracting parties. In the absence of a specific article 6 exclusion, it could be implied that the parties desired the result under the specific performance provisions of the Convention.[110]

Although an American court may find it odd to apply the rules of specific performance liberally, the bias of the Convention in this area should

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108. *See* Feltham, *supra* note 40, at 355. Feltham believes article 77 of the Convention may require the non-breaching party to mitigate damages if his request for specific performance is unreasonable. Article 77 provides:

> 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.

See also, Farnsworth, *supra* note 79, at 250. Farnsworth argues for article 77 mitigation but this would not be consistent in light of the historical trend in the Convention towards specific performance.

109. Sutton, *The Draft Convention on the International Sale of Goods—Part II*, 5 AUSTRALIAN BUS. L. REV. 28, 55–56 (1977). Article 28 does not state categorically that the buyer can obtain a decree from the court enforcing the right, nor does it state the consequences of noncompliance.

110. Article 6 may, however, be an unsatifactory solution for American contracting parties who wish to preclude the possibility of specific performance, because discussing such things as remedy for breach may stifle the negotiations process. This is probably why a solution such as article 28 was sought by common law delegations.

not present an insurmountable obstacle. The application of foreign legislation to a particular case is not new to U.S. courts. In addition, the much touted disparity between common law and civil law uses of specific performance tends to disappear at the practical level. There is a growing trend in the United States to increase the use of equitable remedies.[111] Conversely, in civil law countries, where specific performance is more institutionally acceptable, courts have shown some reluctance to liberally apply this form of relief.[112] In any case, because international commercial practice tends to favor price reduction over other types of contract remedies, cases requiring the application of specific performance under the Convention are not likely to arise often enough to create serious difficulties.[113]

VI
CONCLUSION

American interests are well served by the Convention because it provides a vehicle for increased harmony in world trade. In many ways the Convention serves the same function for international sales as the U.C.C. does for U.S. domestic sales and indeed reflects existing domestic practice under the U.C.C. While great deference is given to the terms of the contract made by the parties, the Convention provides prophylactic rules for those situations where gaps appear in the contract which could lead to legal uncertainties. By providing a uniform law which will apply in situations where the intentions of the contracting parties are not clear, the Convention reduces the risk of uncertainty inherent in international trade.

Potential for conflict between the uniform laws of the Convention and the U.C.C. does exist. In the area of remedies, the two basic provisions of specific performance and price reduction are of particular concern. The Convention does exhibit a bias toward specific performance remedies. This bias should not present a significant problem, however, as the contracting parties may easily eliminate it in several ways. In any case, the difference between specific performance enforcement in common law and civil law countries is more theoretical than practical.[114] Price reduction, although possibly a new concept to American practitioners, warrants little concern due to its existing commercial acceptance and its limited applicability.[115] Also, as with specific performance, price reduction can be expressly eliminated by the contracting parties within the terms of the contract, by use of an article 6 declaration.

The Convention makes many compromises in order to facilitate its ratification. While these compromises may ultimately reduce the uniformity

111. *See* Eorsi, *supra* note 47, at 333.
112. *Id.*
113. *See supra* the discussion of commercial practices accompanying notes 92 & 93.
114. *See supra* the discussion accompanying note 110.
115. *See supra* the discussion of the limited use of price reduction remedies in section V.A.

and neutrality of the Convention, they are necessary in order to encourage further participation and work in the field of international sales law. President Reagan's recent recommendation to the Senate that the United States ratify the Convention demonstrates how much progress has been achieved in the field since ULIS.[116] The inconvenience of any conflict between the Convention and the U.C.C. is greatly outweighed by the benefits of having a uniform law for international sales. Thus, American business should welcome United States ratification of the Convention as a chance to increase cooperation and decrease uncertainty in international trade.

116. Participation by the United States, as a major commercial actor, would contribute to the success of the Convention. This would be the first Convention on substantive law of international commercial transactions which the United States has ratified.