

The Convention on Contracts for the International Sale of Goods¹ and the Uniform Commercial Code² Remedies in Light of Remedial Principles Recognized under U.S. Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price Fair and Efficient Ones?

*Catherine Piché**

Introduction

The area of remedies is, and will remain, an area of key interest to parties to international sales contracts. American businessmen entering into such contracts with foreign parties, and the attorneys counseling them, must know the appropriate legal systems and the corresponding obligations, liabilities, and remedies that may be alleged in case of breach. This article will examine remedies provisions found under the *Convention on Contracts for the International Sale of Goods* (CISG) and under the *Uniform Commercial Code* (UCC).³ In particular, the article will address two remedies under the CISG that are still not fully understood by scholars: the granting of additional time and price reduction. Furthermore, this article will determine whether these two remedies lead to fair and efficient results. Finally, the article will examine how those remedies depart from traditional remedial concepts and how they establish new remedial principles of

¹ UNITED NATIONS, CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CN.97/18 (1980) [hereinafter CISG].

² U.C.C. (2002).

* Catherine Piché (LL.L., *magna cum laude*, University of Ottawa; LL.B., University of Dalhousie; LL.M. (in International Commercial Law), New York University) is currently an attorney in commercial litigation at the New York law firm of Weil, Gotshal & Manges, LLP, and will soon join the Montreal law firm of Ogilvy Renault, as an attorney in their litigation department. She is grateful to Professor Clayton P. Gillette, at New York University School of Law, for his precious help in writing this article. All errors remain the author's alone.

³ This analysis will emphasize remedies available to the buyer, since the buyer is the one who receives the goods.

substantial potential significance in certain scenarios.

Part I deals with the breach of contract and compares the “perfect tender rule” under the UCC and the “fundamental breach” and “avoidance” principles under the CISG. It further evaluates the two schemes in light of creating efficient and fair results.⁴ Part II discusses the complex remedy of granting additional time for performance to a defaulting party (or “*Nachfrist*”) under the CISG.⁵ It examines the CISG’s primary purpose and functions, the conditions for fixing the *Nachfrist* period, the binding effect of that period on the parties, and the efficiency and fairness aspects of *Nachfrist*. Part III discusses another complex remedy, the reduction of price under Article 50 CISG.⁶ It examines Article 50’s origin, uses, conditions, and calculation. Furthermore, the Article 50 remedy is contrasted with an award of damages and with the provisions of the UCC. Finally, some justifications to the reduction of price are suggested. This article will answer the following questions: Do the two schemes of the UCC and the CISG comply with the two main objectives of commercial law, fairness and efficiency? More specifically, do reduction of price and *Nachfrist* fill the same objectives, and if not, are they justifiable otherwise?

I. Breach of Contract for the Sale of Goods

The rules concerning rejection of goods and cancellation for breach of contract are very different under the schemes of the CISG and the UCC. These differences can cause varying results on the economic level. Although it cannot be said that there exists a true underlying policy of minimization of costs, both the UCC and the CISG induce commercial parties to minimize their risks and losses.⁷ The most important difference between U.S. domestic sales law and international sales law is the elimination of the “perfect tender” rule.⁸

⁴ See *infra* notes 7–126 and accompanying text.

⁵ See *infra* notes 127–183 and accompanying text.

⁶ See *infra* notes 184–173 and accompanying text.

⁷ CLAYTON P. GILLETTE & STEVEN D. WALT, *SALES LAW: DOMESTIC AND INTERNATIONAL* 167 (1st ed. 1999).

⁸ See generally Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *IND. INT'L & COMP. L. REV.* 279 (1997).

A. Concept of "Perfect Tender" Under the UCC

The perfect tender rule permits the buyer to reject a tender of delivery under a one-delivery contract of sale that fails *in any respect* to conform to the contract.⁹ In fact, both the goods and their tender must conform to the contract.¹⁰ The rule excludes the extent of the nonconformity as a condition for rejection. Thus, if the tender is not "perfect," the buyer may reject it for any reason at all, or may accept the defective tender and sue for breach of warranty.¹¹ The perfect tender rule gives the buyer three options in case of a defective tender: first, the goods may be rejected as a whole; second, they may be accepted as a whole; and third, any commercial unit or units may be accepted and the rest rejected.¹²

A buyer is deemed to have accepted the goods if he or she fails to make an effective rejection under Section 2-601(1)(b) UCC.¹³ There are arguably two components to a rejection: a procedural part and a substantive part.¹⁴ The procedural part of a rejection refers to Section 2-602 UCC, which requires the buyer to reject within a reasonable time after delivery or tender and to seasonably notify the seller.¹⁵ Section 2-605 UCC requires the buyer to advise

⁹ U.C.C. § 2-601 (2002). The perfect tender rule "is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance." *Id.* § 2-601 cmt. 2.

¹⁰ *See* NORDSTROM, HANDBOOK ON THE LAW OF SALES 311 (1970).

¹¹ *See id.*

¹² U.C.C. § 2-601 (2002). The UCC establishes a different standard for the perfect tender rule for installment contracts, under Section 2-612, and for revocation of acceptance, under Section 2-608. *See id.* §§ 2-608, 2-612. In the case of installment contracts, the perfect tender rule is still valid in case of a failure to perform completely, but something short of a perfect tender will obligate the installment contract buyer to accept and pay the price of the goods under Section 2-612. *Id.* § 2-612. The perfect tender rule is also inapplicable if a buyer revokes acceptance under Section 2-608, where a tender's nonconformity "substantially impairs its value to him." *Id.* § 2-608. Situations in which the parties have agreed to limit their remedies are also exempted from the ambit of the rule and from the requirement that the tender be "perfect." Indeed, the parties may agree to limit their remedies in case of default, for example by drafting a liquidated damages clause, or by including an agreement that provides for remedies in addition to or in substitution for those of Section 2. *Id.*

¹³ *Id.* § 2-601(1)(d).

¹⁴ ALAN SCHWARTZ & ROBERT E. SCOTT, SALES LAW AND THE CONTRACTING PROCESS 245 (2d ed. 1991).

¹⁵ *See* U.C.C. § 2-602 (2002).

the seller in the notification of rejection of any defect that is ascertainable by reasonable inspection, if the seller would be able to cure the defect if given reasonable notice.¹⁶ Failure to do so will preclude the buyer from relying on the unstated defect to justify rejection of the goods or to establish breach.¹⁷ This section reflects a policy that it is often more cost-minimizing to salvage the transaction than to avoid it.¹⁸ The substantive part or aspect of rejection is that it can be completely unjustified. Indeed, the buyer has the absolute right to reject even if the seller believes that the goods are conforming, provided that the rejection is effective.¹⁹ If a court cannot determine whether the rejection was in conformity with the procedural requirement, it must look at which party would be the best reseller and have him or her bear the transaction costs.²⁰ Of course, this is in view of minimizing costs associated with a failed transaction.²¹ More often than not, the best reseller will be the seller, who has the expertise, the market, and the available resources.²²

If the time for performance has not expired and the buyer rejects a tender of goods for nonconformity, the seller retains an unconditional right to cure by making a conforming delivery within the time allowed under the contract.²³ After the seller

¹⁶ *Id.* § 2-605.

¹⁷ *Id.* There is a similar penalty if the buyer fails to specify objections to the tender in a transaction “between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.” *See id.*

¹⁸ *See id.* § 2-605 cmt. 2 (“[T]he general policy of this Article . . . [is to preserve] the deal wherever possible . . .”).

¹⁹ *See id.* § 2-602.

²⁰ GILLETTE & WALT, *supra* note 7, at 197.

²¹ *See id.* Indeed, courts must afford default rules that maximize the surplus to the parties. They must interpret contracts in a way that they believe would be socially desirable; they must allocate obligations efficiently and to do so, they must look at who could bear the risk at the least cost, *i.e.*, who is the most efficient risk-bearer. *Id.*

²² *See* George L. Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 965 (1978).

²³ U.C.C. § 2-508(1) (2002). This first situation may be one based on fairness to the seller without causing harm to the buyer, assuming that the buyer rejected the tender because it was truly nonconforming and not because the buyer wanted to behave opportunistically. It should be noted that parties to a contract may agree that the seller is

cures, the buyer may recover damages.²⁴ In fact, the seller can even cure the nonconforming tender after the time for performance has passed if the seller had reasonable grounds to believe that the tender would be accepted “with or without money allowance,” and if the seller “seasonably notifies the buyer” of the seller’s intention to cure and cures the non-conforming tender “within a further reasonable time.”²⁵ This subsection permits the seller to force the buyer in good faith to accept cure when the agreed delay for performance has expired.²⁶

Cure is allowed in view of avoiding bad faith rejections, where the circumstances and the buyer’s valuation of the goods have changed between the time of signature and the time of performance of the contract.²⁷ There are three kinds of cure: (1)

not to be allowed to cure the non-conforming tender. These agreements are usually upheld by courts because of Section 1-102(3) and (4) UCC. *See id.* §§ 1-102(3), (4). Parties may also agree to expand the seller’s right to cure a defective tender with, for example, a repair and replacement clause. At last, if the parties want to give the buyer a right to ask for cure of a defective tender, they may do so, still under the provision for freedom of contract under the UCC.

²⁴ SCHWARTZ & SCOTT, *supra* note 14, at 273.

²⁵ U.C.C. § 2-508(2) (2002).

²⁶ *T. W. Oil Inc. v. Cons. Edison Co.*, 57 N.Y.2d 574 (N.Y. 1982). In this case, the plaintiff had purchased a cargo of fuel oil. *Id.* at 577. The sulfur content of the oil was supposed to be no greater than 1%. *Id.* The oil ended up at its arrival to be at 0.52%. *Id.* The plaintiff sold that oil to the defendant, agreeing that the sulfur content was to be 0.5%, consistent with trade practice. *Id.* The defendant ended up receiving oil that bore a sulfur content of 0.92%. *Id.* at 578. The defendant rejected the tender and refused to accept the oil at an adjusted price. *Id.* Instead, the defendant insisted on paying no more than the latest prevailing price for the oil, and further, rejected an offer to cure the defect with a subsequent shipment of conforming oil, adamant to prevail itself of the intervening drop in prices. *Id.* The court found the function of cure to be to prevent undue surprise to a seller as a result of some technical nonconformity claimed by the buyer. *Id.* at 586. It subjected the right to refuse cure to a good faith test, explaining that this is to prevent chiseling by buyers who reject goods following market price fluctuations. *Id.* The court stated:

[A] seller should have recourse to a relief afforded by the Uniform Commercial Code, § 2-508 as long as it can establish that it had reasonable grounds, tested objectively, for its belief that the goods would be accepted. The test for reasonableness, in this context, must encompass the concepts of “good faith” and “commercial standards of fair dealing,” which permeate the Code.

Id.

²⁷ *See id.*

by repair, (2) by money, and (3) by replacement.²⁸ Cure may be objectionable, since it has bad incentive effects; the seller may devote insufficient attention to getting the perfect tender due to the second chance at performance.²⁹ In particular, cure by repair is objectionable since it can reduce the value of the goods when the defect relates to product reliability.³⁰ Cure by repair might thus not be a “perfect” and fair tender without the price reduction. However, the inability to cure generally may also have bad incentive effects, allowing parties to act strategically by rejecting tenders in bad faith. The issue thus becomes, which situation is more likely? As this article demonstrates, the analysis of the various possibilities of strategic behavior is, in fact, a complex one.

Subsection 2-508(2) UCC is difficult to interpret and justify. It reads as follows: “Where the buyer rejects a non-conforming tender *which* the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.”³¹ As Nordstrom explains, there are two plausible readings: “Which [tender] the seller had reasonable grounds to believe would be acceptable,” or “which [non-conforming tender] the seller had reasonable grounds to believe would be acceptable.”³² He believes that the first reading

²⁸ See SCHWARTZ & SCOTT, *supra* note 14, at 288.

²⁹ *Id.* at 282.

³⁰ *Id.* An example of a case where the court referred to the fact that the seller might have a second chance at performance is *Wilson v. Scampoli*, 228 A.2d 848 (D.C. 1967), where a customer had bought a color television set that later revealed itself to have an excessive red tinge to the picture. The customer asserted that she did not want the television “repaired,” but wanted a “brand new” television set. *Id.* The issue was thus whether the dealer had to conform his tender by adjustment or minor repair or whether he must conform by substituting brand new merchandise. *Id.* at 849. Judge Myers held that:

We do not hold that appellant has no liability to appellee, but as he was denied access and a reasonable opportunity to repair, appellee has not shown a breach of warranty entitling him either to a brand new set or to rescission. We therefore reverse the judgment of the trial court granting rescission and directing the return of the purchase price of the set.

Id. at 850.

³¹ U.C.C. § 2-508(2) (2002).

³² NORDSTROM, *supra* note 10, at 319.

should be rejected.³³ Section 2-508(2) should thus be restricted to cases where a seller knew that his tender was non-conforming and reasonably thought that the buyer would still accept the non-conforming tender, but the seller was surprised by the rejection.

Actually, the latter provision is intended to be a safeguard against surprise that occurs as a result of the perfect tender rule.³⁴ Some commentators have suggested that there is an important flaw found in the application of Section 2-508(2), explaining that cases to which that subsection purports to apply—where the seller is surprised at the rejection of a nonconforming tender—do not seem to exist.³⁵ Indeed, Schwartz and Scott explain that this subsection is contradictory because it supposes that a seller could be surprised by rejection of the non-conforming tender, but in fact, “[i]n any case where the seller is reasonably ‘surprised’ by rejection, the rejection will be wrongful because the goods will, in fact, conform to the contract.”³⁶ This view neglects that the seller could, in fact, not have realized that the tender was nonconforming; the seller could very well have made all efforts to produce a complying tender, but without success. Moreover, it should not be forgotten that Section 2-508(2) requires the seller to have had “reasonable grounds to believe” that the tender would be acceptable.³⁷ The latter requirement limits the extent of bad faith on the part of the seller and broadens the number of cases where the subsection may apply. Other authors have said that they believe Section 2-508(2) to be useful, explaining that cure by the seller avoids economic waste of an unlimited right to reject for any technical nonconformity, and that it prevents bad faith rejections.³⁸

³³ *Id.* at 321.

³⁴ U.C.C. §§ 2-106(2) cmt. 2, 2-508 (2002).

³⁵ SCHWARTZ & SCOTT, *supra* note 14, at 275.

³⁶ *Id.* at 274. Indeed, according to the authors, where a seller is surprised by the rejection of one hundred cases of perfectly fresh tomatoes, the buyer probably rejected for a bad reason, that is, one other than an alleged nonconformity of the tomatoes to the original bargain. *Id.* It must be emphasized, again, that it does not matter whether the rejection is wrongful, so long as it is made in an effective manner. *See supra* note 12 and accompanying text.

³⁷ U.C.C. § 2-508(2) (2002). And in fact, Comment 2 to Section 2-508 states that “[s]uch reasonable grounds can lie in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract.” *Id.* § 2-508 cmt. 2.

³⁸ SCHWARTZ & SCOTT, *supra* note 14, at 276. Schwartz and Scott also criticize the

Once the goods are accepted, the buyer may only force the seller to take them back if he or she revokes acceptance, in cases where the nonconformity *substantially impairs* the value of the goods to the buyer.³⁹ At that point, the fact that the tender was not “perfect” becomes irrelevant in determining whether the buyer must accept and pay for the goods. Any nonconformity will be compensated in damages, which can be deducted from the price if it is still due under the same contract.⁴⁰ This requirement of substantiality in the defect or nonconformity of the tender is similar to the CISG instance of “fundamental breach,”⁴¹ where the nonconformity causing injury is found to be “substantial.” But more precisely, how do the CISG provisions differ from those of the UCC?

B. The Concepts of “Fundamental Breach” and “Avoidance” Under the CISG

Avoidance under the CISG is the process through which an aggrieved party, by notice to the other side, terminates the contractual obligations of the parties.⁴² In fact, it relieves both parties of executory performance obligations.⁴³ The buyer can “avoid” the contract in two instances: (1) if the seller’s failure to perform any obligation amounts to a “fundamental breach,”⁴⁴ or (2) if, in the case of non-delivery of goods, the seller does not

“economic waste” argument, saying that it is unlikely that a seller will be forced to take back the tender upon rejection, since the buyer will often opt for a price reduction and keep the goods. *Id.*

³⁹ U.C.C. § 2-608(1) (2002). See SCHWARTZ & SCOTT, *supra* note 14, at 309, for an essay on the substantial impairment requirement.

⁴⁰ U.C.C. § 2-717 (2002). It must be noted that this remedy is distinguishable from the remedy of reduction of price under Article 50 CISG. See *infra* Section III.D.2 and accompanying text.

⁴¹ CISG, *supra* note 1, art. 46.

⁴² See *id.* art. 49. If the goods received are non-conforming and the buyer wants to make an effective avoidance of the contract, a notice must be given to the seller, as provided under Article 26 CISG. *Id.* art. 26. Power to avoid for quality or quantity defects expires at a reasonable time after the buyer knew or ought to have known of the breach, *id.* art. 49(2)(b)(i), and power to avoid for late delivery that constitutes fundamental breach expires at a reasonable time after the buyer has become aware that delivery has been made. *Id.* art. 49(2)(a).

⁴³ *Id.* art. 81(1).

⁴⁴ *Id.* art. 49(1)(a).

deliver them within the additional period of time fixed by the buyer, the *Nachfrist* notice.⁴⁵ The seller may also “avoid” the contract in a similar manner, when there is fundamental breach, or when the buyer fails to pay or take delivery of the goods during the *Nachfrist* period.⁴⁶

In fact, “avoidance” under the CISG and “rejection” under the UCC are two different principles, which create different remedies where a buyer has received and retained the goods.⁴⁷ Indeed, the aggrieved seller’s right under the CISG to avoid the contract where the buyer has possession of the goods has no Section 2 parallel.⁴⁸ Under the UCC, the seller’s normal remedy if the buyer accepts the goods is an action for the price under Section 2-709.⁴⁹ In contrast, under the CISG the seller may avoid the contract,⁵⁰ claim restitution of the goods accepted,⁵¹ recover resale,⁵² or obtain market-price damages.⁵³ Where the seller is in breach, the buyer’s option to avoid even though the buyer has received the goods yields results similar to those under Section 2 UCC. In cases other than those where the buyer has accepted the goods and has breached the contract, avoidance triggers the avoiding party’s right to resale/cover or to market price damages,⁵⁴ which are specific remedies similar to those under Section 2 UCC.⁵⁵

If the contract is not avoided, the CISG provides that the

⁴⁵ *Id.* art. 49(1)(b); see FRITZ ENDERLIEN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 192–93 (1992). We will study the *Nachfrist* notice in Section 11, *infra*.

⁴⁶ CISG, *supra* note 1, art. 63, 64.

⁴⁷ See Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective From Article 2 of the UCC*, 8 J.L. & COM. 53 (1988).

⁴⁸ *Id.*

⁴⁹ See U.C.C. § 2-709 (2002).

⁵⁰ CISG, *supra* note 1, art. 64.

⁵¹ *Id.* art. 81(2).

⁵² *Id.* art. 75.

⁵³ *Id.* art. 76

⁵⁴ *Id.* art. 75, 76.

⁵⁵ See U.C.C. § 2-711(1) (2002). Where the seller is the aggrieved party, the seller is relieved of performance under the contract. CISG, *supra* note 1, art. 81(1). The seller can claim restitution from the buyer, *id.* art. 81(2)(4), as well as market-price differential or resale damages. *Id.* art. 75. A Section 2 UCC seller has similar rights and obligations, since he can “cancel,” U.C.C. § 2-703 (f) (2002), and recover resale or market-price differential damages. *Id.* §§ 2-703(e), 2-708(1).

exchange of goods and services will be completed despite a breach, with damages or other remedies to compensate for defects in the exchange.⁵⁶ If the buyer has possession of the goods, non-avoidance produces a result similar to those under Section 2 UCC where the buyer has accepted and not revoked; the seller has a right to the price and the buyer can claim damages for losses caused by the breach.⁵⁷ Further, the non-avoiding buyer has certain remedies not available under Section 2 UCC, such as the right to demand substitute goods in case of fundamental breach⁵⁸ and the right to demand repair unless that would be “unreasonable in the circumstances.”⁵⁹ Last, he or she can resort to the reduction of price remedy under Article 50 CISG.⁶⁰

Under the CISG, a buyer can “avoid” the contract if nonconformity *substantially* deprives the buyer of what the buyer was entitled to expect under the contract only if the seller foresaw, or a party in his position would have foreseen, such a result.⁶¹

⁵⁶ In general, remedies available to the buyer where the seller fails to perform his duties under Articles 30–44 CISG are provided for under Articles 45–52 CISG. *See* CISG, *supra* note 1, art. 30–44, 45–52. Comparable remedies to the seller for breach by the buyer are found under Articles 60–65 CISG (and obligations of the buyer are found under Articles 53–65 CISG). *See id.* art. 53–65. Both sections are supplemented by remedial provisions in Articles 71–88 CISG that apply to both parties (e.g., anticipatory breach, measurement of damages and interests, exemption from damages, and effects of avoidance of the contract). *See id.* art. 71–88.

⁵⁷ *Id.* art. 62; U.C.C. § 2-709(1)(a) (2002). Under the CISG, the aggrieved party that chooses not to avoid the contract may recover damages “equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach,” provided that that loss was foreseeable. CISG, *supra* note 1, art. 74. Under the UCC, similarly, the aggrieved party may recover damages under Sections 2-709(1) and 2-714, in case of acceptance. U.C.C. §§ 2-709(1), 2-714 (2002).

⁵⁸ CISG, *supra* note 1, art. 46(2).

⁵⁹ *Id.* art. 46(3). Under the Section 2-508 UCC, an aggrieved buyer could only obtain substitute goods or repair if the seller volunteers to that effect. U.C.C. § 2-508 (2002).

⁶⁰ CISG, *supra* note 1, art. 50.

⁶¹ *See id.* art. 25 (emphasis added). For an example of a case where the court held that there had been a fundamental breach, see *Magellan Int'l Corp. v. Salzgitter Handel GmbH*, 76 F. Supp. 2d 919 (N.D. Ill. 1999). The court explained:

[Article 25's] plain language reveals that under the Convention an anticipatory repudiation pleader need simply allege (1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental. Here [buyer] has pleaded that [seller's] March 29 letter indicated its pre-performance intention not to perform the contract, coupled with

This follows from Article 49(1) CISG, which permits a buyer to avoid the contract only if the seller's failure to perform amounts to a "fundamental breach," as defined under Article 25 CISG.⁶² As author Peter Schlechtriem explains, there is a "fundamental" breach of contract, which justifies avoidance or a demand for substitute goods, "if the injured party has no further interest in the performance of the contract after the particular breach."⁶³ For example, a violation of the time for performance can constitute a fundamental breach of contract when the other party cannot use the late delivery for the purpose envisaged in the contract.⁶⁴ "Fundamentality" will not be deduced from the facts of the case, but rather, the facts will be "interpreted according to the legal consequence which is intuitively felt to be the just one."⁶⁵

More specifically, the definition of "fundamental breach" has two components: the first is the detriment/expectation component and the second is the foreseeability component.⁶⁶ Although the detriment/expectation component is what makes a breach "fundamental," liability for such a breach is limited by the affirmative defense of foreseeability.⁶⁷ The decisive criterion is thus whether the injury is sufficiently "substantial," as is

[buyer's] allegation that the bill of lading requirement was an essential part of the parties' bargain. That being the case, [seller's] insistence upon an amendment of that requirement would indeed be a fundamental breach.

Id. at 925–26; see also Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J.L. & COM. 221 (2000).

⁶² CISG, *supra* note 1, art. 25. Article 25 of the CISG defines "fundamental breach" as a breach that "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." *Id.*

⁶³ PETER SCHLECHTRIEM, *UNIFORM SALES LAW: THE U.N. CONVENTION FOR THE INTERNATIONAL SALE OF GOODS 22* (1986), available at CISG W3 Database, Pace University School of Law.

⁶⁴ ENDERLEIN & MASKOW, *supra* note 45, at 113.

⁶⁵ *Id.* at 111.

⁶⁶ Andrew Babiak, *Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMPLE INT'L & COMP. L. J. 113, 118 (1992).

⁶⁷ See CISG, *supra* note 1, art. 25. Indeed, the party in breach may prove that she did not see and had no reason to foresee a particular result. This is both an objective and a subjective criterion. See Babiak, *supra*, note 66, at 119–20.

determined in light of the circumstances of each case. Factors that are taken into consideration to determine whether the injury is substantial are “the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.”⁶⁸ The “importance of the interest which the contract and its individual obligations actually create for the promisee” is what should truly be assessed.⁶⁹ As for the foreseeability component, the question is whether the breaching party foresaw the substantial detriment or loss of expectation interest it caused to the non-breaching party, and whether a reasonable person of the same kind and in the same circumstances would foresee that the breach of contract would cause the non-breaching party substantial detriment. The lack of foreseeability and knowledge is a subjective ground for excusing the party in breach,⁷⁰ measured as of the time of contract formation.⁷¹ In fact, it serves to “eliminate unreasonable persons.”⁷²

As under the UCC provisions, if the seller delivers nonconforming goods, he or she may cure the defect, “provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.”⁷³ If the seller fails to cure the defect, the buyer may then do one of two things. First, he or she may exercise rights found in Articles 46 through 52 of the CISG through court orders, such as claiming performance or a “second tendering,” avoidance of the contract, or

⁶⁸ UNITRAL SECRETARIAT, COMMENTARY ON THE 1978 DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, UN Doc. A/Conf. 97/5 (1979), available at CISG W3 Database, Pace University School of Law [hereinafter COMMENTARY ON DRAFT]; see also John C. Duncan, *Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts For the International Sale of Goods in Revising the Uniform Commercial Code*, 2000 B.Y.U L. REV. 1363; Babiak, *supra* note 66, at 119–120.

⁶⁹ PETER SCHLECHTRIEM, COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS 177 (2d ed. 1998). See also Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839, 904 (1998).

⁷⁰ SCHLECHTRIEM, *supra* note 69, at 178.

⁷¹ *Id.* at 180; Flechtner, *supra* note 47, at 7.

⁷² Taylor, *supra* note 69, at 24.

⁷³ CISG, *supra* note 1, art. 37.

reduction of the price.⁷⁴ Substitute goods may be ordered only if the deficiency in the original delivery was a fundamental breach,⁷⁵ and an order to repair is permitted unless repair is unreasonable in the circumstances.⁷⁶ Second, the buyer may claim damages, as provided under Articles 74 through 77.⁷⁷ Finally and very importantly, Article 39 of the CISG requires the buyer to notify the seller about any nonconformity that the buyer has discovered or should have discovered upon a proper examination of the goods if the buyer expects it to be repaired or replaced.⁷⁸

In sum, the CISG adopts an attitude in favor of keeping a contract for an international sale intact, i.e., the principle of preservation of the contract.⁷⁹ The philosophy of the CISG is that the high expenses usually associated with an international sale should deter a severe reaction, such as avoidance as a result of an obligor's non-performance.⁸⁰ Also, avoidance should not be available for trivial departures that would readily be redressed by damages.⁸¹ This attitude is illustrated throughout the CISG by a

⁷⁴ *Id.* art. 46–52.

⁷⁵ *Id.* art. 46(2).

⁷⁶ *Id.* art. 46(3).

⁷⁷ *Id.* art. 74–77.

⁷⁸ *Id.* art. 39. The notice must allow the seller to take the necessary steps to remedy the defect and should be specific as to “the nature of the lack of nonconformity.” *Id.* If that notice is not given, the buyer loses the right to rely on the lack of conformity of the goods. *Id.*

⁷⁹ Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE 105, 121 (1997). This principle of preservation has been called “[t]he ultimate unifying general principle of the Convention.” *Id.*; see also ENDERLEIN & MASKOW, *supra* note 45, at 87 (“The fact that the fundamentality of a breach of contract in many cases is the condition for an avoidance of contract is the expression of the *trend of the CISG to preserve contracts*, which we consider as *essential* in international trade.”) (emphasis added); Evelien Visser, *Gaps in the CISG: In General and With Specific Emphasis on the Interpretation of the Remedial Provisions of the Convention in Light of the General Principles of the CISG* (1998) (unpublished LLM thesis, University of Georgia School of Law) (on file with the North Carolina Journal of International Law and Commercial Regulation), available at CISG W3 database, Pace University School of Law, January 24, 2003; Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION, 173, 190 (Carbonneau ed., rev. ed. 1998).

⁸⁰ Koneru, *supra* note 79, at 116–21.

⁸¹ CISG, *supra* note 1, art. 74; JOHN O. HONNOLD, UNIFORM LAW FOR

strong emphasis on cure, the adoption of the *Nachfrist* procedure, and the limitations placed on an aggrieved party's power to cancel the contract.⁸² In fact, the policy is in part founded on the civil law approach to specific performance and in part on "the nature of international contracts, where the need for judicial intervention is negated."⁸³

Some authors have remarked that if the perfect tender rule were to be applied in the international sales context, there would be great consequences and excessive waste.⁸⁴ These authors are arguably mistaken, as the application of the perfect tender rule to certain product environments in the international sales context might very well be a more adequate approach. For instance, in the fungible, easily replaceable commodities market, there is good sense in applying a "perfect tender" rule, while in the market for complex, specially-designed machinery, making avoidance difficult should be the preferred approach. Furthermore, these authors seem to forget that the perfect tender rule comes with an unconditional right to cure a defective tender,⁸⁵ which may in fact impose much higher costs and burdens on the parties. This, in practice, creates a legal scheme similar to that of "fundamental breach" under the CISG.⁸⁶ Indeed, even in a case where a buyer decides to opt out of the contract for a trivial default in the tender, the cure provision automatically gives the seller a right to submit a new complying tender, which the buyer will have to accept. It can, therefore, be argued that the perfect tender rule under the UCC, doubled with its comprehensive cure provisions, amounts to a "substantial performance" requirement equivalent to the CISG "fundamental breach" rule.

C. Evaluation of the Two Concepts In Terms of Creating Efficient and Fair Rules and Results

The two schemes for performance under the CISG and the UCC must be analyzed in light of two important norms in the

INTERNATIONAL SALES 327 (3d ed. 1999).

⁸² See Duncan, *supra* note 68, at n.88.

⁸³ *Id.*

⁸⁴ *Id.* at 1378.

⁸⁵ *Id.* at 1377-79.

⁸⁶ See discussion *infra* Section C.

contract doctrine: efficiency and fairness. Efficiency is concerned with enforcement of contracts for the purpose of an efficient use of resources or for the maximization of wealth.⁸⁷ The theory of “efficient breach” requires that each party breach the contract if the benefits in breaching outweigh the costs of preserving the bargain.⁸⁸ As for the larger concept of “efficiency,” it requires a maximization of the sum of the payoffs to the promisor and to the promisee; that is, both must enter into mutually beneficial transactions at minimal cost and each must receive a net benefit.⁸⁹ Fairness is a norm of equity, and is much harder to define. The notion of a fair exchange seems to attract feelings of compassion and morality from judges having to interpret contracts and requires that a fair allocation of losses be present between parties to a contract. In fact, the fairness inquiry allows judges to venture outside the realm of contract law and search for “true justice.”⁹⁰ Of course, the latter concept of “true justice” should not permit judges to venture too far from the realm of contract law, as that may paradoxically create unfair results.

Legal rules establishing rights and remedies for contracting parties affect the costs of reaching a contract.⁹¹ The rules are usually efficient and cost-minimizing, since they anticipate the allocation of rights and risks for which the parties would have bargained.⁹² The rules will also resolve disputes in the same way parties would have resolved them had they explicitly been provided for in the contract, so that costs of outside litigation are avoided.⁹³ Otherwise, parties will choose to opt out of the legal scheme. Thus, the CISG and the UCC both induce commercial actors to minimize the risk of defective performance and the losses that result in such a case.⁹⁴ The cure provisions are but one

⁸⁷ Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the “Law of Satisfaction”*: A Nonunified Theory, 24 HOFSTRA L. REV. 349, 441 (1995).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 380–81.

⁹¹ Priest, *supra* note 22, at 961; *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts*, in RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW 22 (1994).

⁹² Priest, *supra* note 22, at 961–62.

⁹³ *Id.* at 962.

⁹⁴ GILLETTE & WALT, *supra* note 7, at 167.

example of this trend within the two systems.⁹⁵ But are the UCC and CISG schemes truly efficient?

The UCC perfect tender rule's test for performance may at the outset appear to create a much more lenient system, where a slight nonconformity allows the buyer to escape the contract by rejecting the nonconforming goods or tender.⁹⁶ Some may think that it provides for an important privilege of rejection for trivialities. However, the provisions on cure under the UCC greatly limit this possibility.⁹⁷ Indeed, as explained above, the seller will always have an absolute right to cure a defective tender made before the time for performance has expired.⁹⁸ Even after the expiry of the time for delivery, the seller may have an additional reasonable time to substitute a conforming tender, if he had "reasonable grounds to believe" that the nonconforming tender would be accepted.⁹⁹

The structure of the CISG remedial scheme places more emphasis on performance remedies, than the damages as in common law systems.¹⁰⁰ The CISG drafters are said to have wanted to preserve the sanctity of international contracts,¹⁰¹ thinking that the high expenses usually associated with such contracts should deter a severe reaction such as rescission in reaction to non-performance.¹⁰² In fact, one could argue that the uncertainty associated with the definition of "fundamental breach"

⁹⁵ In fact, cure is an efficient default rule as it allows parties to solve the problem by themselves and saves transaction costs, while also putting the burden on the one who can solve it more cheaply. For example, a car salesman could repair a car at the cheapest cost. This idea is conducive to the goal of greater social welfare.

⁹⁶ See U.C.C. § 2-508 (2002).

⁹⁷ See *id.*

⁹⁸ See *id.* § 2-508(1).

⁹⁹ *Id.* § 2-508(2).

¹⁰⁰ Visser, *supra* note 79, at 6.

¹⁰¹ See *supra* note 79 and accompanying text. In fact, this principle of sanctity of contracts is an universally accepted principle. See Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus The Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 SYRACUSE J. INT'L L. & COM. 67 (1997).

¹⁰² Alberto L. Zuppi, *A Comparison of Buyer's Remedies Under the CISG with the Latin American Legal Tradition*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1998, 3-39 (Kluwer Law International 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/zuppi.html>, at 4.

encourages parties to honor all provisions of the original bargain.

Although the rejection and avoidance schemes are often said to create very different principles and remedies, they are also in some ways essentially equivalent. The rejection scheme under the UCC comes with a cure provision, which creates a stricter scheme and reduces the possibility of strategic behavior.¹⁰³ Furthermore, the requirement of seriousness of the nonconformity is reintroduced by a number of words and phrases in the UCC such as “reasonable grounds to believe,”¹⁰⁴ or “substantial impairment of value.”¹⁰⁵ These expressions bring the concept of “perfect tender” closer to the CISG requirement of “fundamental breach.” At last, it must also be kept in mind that the buyer’s right of rejection under Section 2-601 UCC is always subject to the good faith proviso of Section 1-203 UCC.¹⁰⁶ This proviso further attenuates the effect of the perfect tender rule and its possibilities of strategic behavior.

Both the substantial performance rule and the perfect tender rule create incentives for parties to chisel on the contract.¹⁰⁷ Under the system of substantial performance, buyers are required to accept goods that deviate immaterially from what was originally contracted for, and they consequently bear the cost of nonconformity, unless they recover the cost by a claim for damages.¹⁰⁸ Sellers then have incentives to chisel on the deal and opt for an insubstantially nonconforming tender.¹⁰⁹ Indeed, sellers may think that they do not have to produce a perfectly conforming product, because there is not a “fundamental breach,” such as to allow avoidance of the contract by the buyers.

Under the UCC perfect tender rule, buyers have incentives to make bad faith rejections when the deal turns out to be less

¹⁰³ See U.C.C. § 2-508 (2002).

¹⁰⁴ *Id.* § 2-508(2). See ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS 202 (Kluwer Law and Taxation 1989).

¹⁰⁵ U.C.C. § 2-608 (2002) (the buyer may revoke acceptance when the nonconformity “substantially impairs” its value to him).

¹⁰⁶ *Id.* §§ 2-601, 1-304.

¹⁰⁷ GILLETTE & WALT, *supra* note 7, at 189.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* The architect of the UCC’s perfect tender provisions, Karl Lewellyn, stated that rules limiting the buyer’s right of rejection often give the seller extraordinary power to enforce a sale in bad faith. Priest, *supra* note 22, at 969.

profitable than expected because of a drop in market price for the goods.¹¹⁰ Sellers too have incentives to behave opportunistically under the UCC scheme, especially on the initial tender, since they can always cure it.¹¹¹ Also, since buyers *must* accept the new conforming tenders offered as a cure,¹¹² sellers may think that they can submit another “close-to-perfect,” but not perfect, tender. Sellers can even cure after the date for performance has passed and have a “further reasonable time to substitute a conforming tender,” if they are surprised by the rejection of a nonconforming tender.¹¹³ The question of what is a “further reasonable time” is a vague notion that will depend upon the circumstances.¹¹⁴ Sellers may thus take advantage of this additional delay, and perhaps take advantage of an eventual rise or drop in the market price of goods.

Nevertheless, three factors limit the extent of the chiseling done by parties to both a UCC and CISG contract.¹¹⁵ First, sellers can always cure the defective tender.¹¹⁶ That option limits the buyer’s motivation to reject. Second, buyers and sellers have strong incentives to maintain their reputation in commercial markets.¹¹⁷ Therefore, they hesitate before acting strategically and acquiring a bad reputation among current or future business partners. Third, vulnerability to a claim for damages is always a consideration.

¹¹⁰ GILLETTE & WALT, *supra* note 7, at 199–200.

¹¹¹ *Id.* at 200.

¹¹² *Id.* at 201 (emphasis added).

¹¹³ *Id.* at 201–02.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 191.

¹¹⁶ U.C.C. § 2-508 (2002); CISG, *supra* note 1, art. 37. Article 37 CISG provides that the seller has the right to cure any “deficiency” in the goods so long as the “date for delivery” has not passed. CISG, *supra* note 1, art. 37. Article 34 extends the right to cure to deficiencies in documents up to the date of delivery, “if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense.” *Id.* art. 34. The right to cure even extends beyond the date for delivery if cure occurs “without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.” *Id.* art. 48(1). The seller’s cure of a defective tender, both under the CISG and under the UCC, is only efficient when it is done at a cost less than the diminution in value of the goods because of the defect. Priest, *supra* note 22, at 973. However, this difference in value is difficult to determine, since both parties usually have different valuations of the goods.

¹¹⁷ GILLETTE & WALT, *supra* note 7, at 191.

A perfect tender rule is considered by some to reduce the costs associated with a defective tender more than a substantive performance rule, thereby encouraging efficiency in results.¹¹⁸ Indeed, negotiations are facilitated when consequences of any nonconformity are clearly indicated, such as under a perfect tender rule. Since sellers know that even a slight variation may constitute breach, they are encouraged to allocate explicitly the risk of variations from the contract description.¹¹⁹ Once a breach has occurred, the certainty of the result of any litigation encourages the parties to settle their dispute through private bargaining and reduces the opportunities for strategic behavior.¹²⁰ It may further be argued that avoiding a bad contract will prevent or reduce a loss by enabling a favorable substitute transaction to be made or an expenditure to be avoided. By encouraging avoidance for bad faith contracts, the perfect tender rule would thus create efficient results. Nevertheless, this argument is offset against the risk of strategic rejection discussed above.

Moreover, one must not lose sight of the fact that according to the theory of “efficient breach,” there are circumstances where a breach of contract is more efficient than performance.¹²¹ Breaching is more efficient than performing “when the costs of performing exceed the benefits to all parties.”¹²² This happens when there is a contingency that arises that makes the resources needed for performance more valuable in an alternative use.¹²³ The perfect tender rule may encourage opportunistic behavior by parties in some cases, but it also allows parties to breach efficiently in some cases.¹²⁴

¹¹⁸ Priest, *supra* note 22, at 963–68.

¹¹⁹ *Id.* at 968.

¹²⁰ *Id.*

¹²¹ DiMatteo, *supra* note 87, at 441.

¹²² ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 238 (3d ed. 2000).

¹²³ *Id.*

¹²⁴ *Id.* For example, an efficient breach occurs when A values living in his house at \$90,000, and B values living in A’s house at \$110,000. *Id.* at 241. A promises to sell the house to B for \$100,000, thus creating a surplus of \$20,000. *Id.* However, before they complete the sale, C shows up and wants to buy the house. *Id.* C values living in the house at \$126,000 and offers to pay \$118,000 for it. *Id.* If A transfers the house to C, the surplus is now of \$36,000. *Id.* In that case, there is thus more efficiency in A breaching his contract with B, in order to sell to C. *Id.* at 242. The perfect tender rule

In conclusion, the “perfect tender rule” and the “fundamental breach” rules are fair and efficient. Although fairness is a hard standard to define, it arguably is met under both schemes, since parties generally get fully compensated.¹²⁵ Furthermore, the default rules under the two schemes are efficient ones, as they allow parties to secure optimal commitment to performing, as well as optimal reliance. Be it under the CISG “fundamental breach” standard or under the UCC perfect tender rule, coupled with their cure provisions, the results are symmetric and equivalent to a “substantial performance” requirement.¹²⁶

II. GRANTING ADDITIONAL TIME TO DEFAULTING PARTIES UNDER ARTICLES 47 AND 63 CISG

A. *Primary Purpose and Functions of Articles 47 and 63 CISG*

1. *Primary Purpose*

If the other party’s breach is not fundamental, the only way to avoid the contract is through the *Nachfrist* procedure in Articles 47 and 63, where an aggrieved party may “fix an additional period of time of reasonable length for performance” by the other side.¹²⁷ *Nachfrist* is not mandatory, and it provides identical obligations

allows for such a breach. However, the problem is that this happens necessarily in an opportunistic manner. Therefore, the efficiency is, again, offset by the strategic behavior.

¹²⁵ The only time parties do not get fully compensated is when there is cure by repair, as in *Wilson v. Scampoli*, 228 A.2d 848, 850 (D.C. 1967).

¹²⁶ And in fact, the perfect tender rule’s interpretation by state courts moves more and more toward a right to reject for substantial nonconformity. The rule was criticized and was in decline even before the enactment of the UCC. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 8-3(b) (4th ed. 1995).

¹²⁷ *Nachfrist* can be translated literally as “prolonged deadline.” Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom*, 2000–2001 Pace Review of the Convention of Contracts for the International Sale of Goods, 9, 47, available at CISG Database, Pace University School of Law. Generally, the Convention deals separately with (a) *Nachfrist* obligations of the seller and buyer’s remedies for breach of contract by the seller and with (b) *Nachfrist* obligations of the buyer and seller’s remedies for breach of contract by the buyer. Maryellen DiPalma, *Nachfrist under National Law, the CISG, and the UNIDROIT and European Principles: A Comparison*, 5 International Contract Adviser 28 (1995), available at CISG Database, Pace University School of Law.

for the buyer and the seller about adherence, notice, and reasonable length of time.¹²⁸ In fact, *Nachfrist* is not truly a remedy of its own, but rather, it is meant to fit into the CISG concept of fundamental breach.¹²⁹ Also, it is restricted to cases of non-delivery, as per Article 49(1)(b).¹³⁰ It has a close counterpart in the right to provide adequate assurances for performance in the UCC.¹³¹

The primary purpose of granting additional time for performance under Articles 47 and 63 is to protect the buyer who is waiting for a delayed delivery, or the seller waiting for the buyer to take delivery or pay the price.¹³² At some point, either could declare the contract avoided or repudiate the contract, claiming that there was a fundamental breach.¹³³ Alternatively, if either is unsure of whether the breach is “fundamental,” they could declare an additional period of time under Article 47 or Article 63 for performance of the contract.¹³⁴ After the expiry of that period, they could then affirmatively consider a fundamental breach to

¹²⁸ See DiPalma, *supra* note 127, at 2; see also Ericson P. Kimbel, *Nachfrist Notice and Avoidance Under the CISG*, 18 J.L. & COM. 301–31 (1999); David G. Fagan, *The Remedial Provisions of the Vienna Convention on the International Sale of Goods 1980: A Small Business Perspective*, 2 J. SMALL & EMERGING BUS. L. 317 (1998).

¹²⁹ See COMMENTARY ON DRAFT, *supra* note 68.

¹³⁰ Article 49(1)(b) CISG provides: “In case of *non-delivery*, if the seller *does not deliver the goods*” within the time fixed by the buyer under Article 47 CISG, the buyer may declare the contract avoided. CISG, *supra* note 1, art. 49(1)(b) (emphasis added). However, in UNCITRAL and at the Diplomatic Conference, proposals were made to make possible the *Nachfrist* procedure to cases where the seller delivers non-conforming goods. HONNOLD, *supra* note 81, at 314. UNCITRAL rejected these proposals on the basis of the fact that the notice-avoidance procedure could be abused to convert a trivial breach into a ground for avoidance. *Id.* at 314; see also Harry M. Flechtner, *Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More*, 18 J. L. & COM. 191–258 (1999).

¹³¹ U.C.C. § 2-609 (2002); see also Taylor, *supra* note 69, at 902–03 (explaining that it is similar to demanding adequate assurances from the breaching party, but that *Nachfrist* reduces the risks to an aggrieved party in invoking self-help).

¹³² Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?*, 12 PACE INT’L L. REV. 1, 21 (2000).

¹³³ *Id.*

¹³⁴ *Id.*

have occurred and avoid the contract.¹³⁵

2. *Advantages to the Buyer*

The first advantage to the buyer is the certainty brought to the transaction. “[The] *Nachfrist* notice provides a basis for avoidance without proof that delay beyond the ‘additional period’ fixed in the notice constitutes ‘fundamental breach.’”¹³⁶ Indeed, if the goods are still in the hands of the seller and the buyer fixes an additional period of time for delivery, the buyer gains the right to declare the contract avoided if the seller fails to deliver within that period.¹³⁷ Consequently, the notion of “fundamental breach” becomes irrelevant to the failure to deliver the goods, thereby relieving the buyer of the difficulty of establishing the presence of such a

¹³⁵ The buyer can avoid under Article 49(1)(b) CISG. CISG, *supra* note 1, art. 49(1)(b). The seller can avoid under Article 64(1)(a) CISG, which applies when the buyer's obligation to take delivery or pay the price is not met. *Id.* art. 64(1)(a). For example, a decision of an International Chamber of Commerce arbitration panel awarded damages to an Austrian seller where a Bulgarian buyer had failed to perform its obligation of opening a document of credit for payment within the additional period of time fixed for such performance by the seller. MICHAEL J. BONELL, INTERNATIONAL CASE LAW AND BIBLIOGRAPHY ON THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § D 1992-2 (2001). In so ruling, the court held that the suspension of payment of foreign debts ordered by the Bulgarian government did not constitute *force majeure* that prevented the buyer from opening a documentary credit. *Id.* Another example is an arbitral award that was also rendered by the ICC Court of Arbitration, where, although the delay in opening a documentary credit was not by itself considered to amount to fundamental breach, the Italian seller was nevertheless entitled to avoid the contract. *Id.* § D 1992-32. In that award, the fact that the seller waited several months before declaring the contract avoided was “equivalent to the fixing of an ‘additional period of time’ for performance pursuant to Article 63 CISG” with the consequence that failure by the Finnish buyer to perform within that period of time entitled the seller to avoid the contract under CISG Article 64(1)(b). *Id.*

¹³⁶ HONNOLD, *supra* note 81, at 329.

¹³⁷ CISG, *supra* note 1, art. 49(1)(b). For example, in Judgment of May 24, 1995 [OLG] [trial court for selected criminal matters and court of appeals], 20 U 76/94, available at Pace CISG Database, a German court, applying the relevant provisions of the CISG, held that an Egyptian buyer was entitled to avoid the contract where the German seller failed to deliver goods within an eleven-day extension period fixed by the buyer for performance of the remainder of an installment contract that the seller had only partially performed. The court found that the additional eleven-day period was not an unreasonable one in the context of the particular transaction. *Id.* Accordingly, the court awarded the buyer the amount by which pre-payment exceeded the amount due for the limited amount of goods actually delivered. *Id.*

breach.¹³⁸ The setting of a *Nachfrist* notice also provides certainty with regard to the buyer's interest in fulfillment of the contract.¹³⁹ In general, on the economic level, bringing certainty to the transaction reduces costs associated with uncertainty, or risk.¹⁴⁰ Indeed, the *Nachfrist* period annihilates the possibility of a change of circumstances such as to cause the defect to fall below the threshold of "fundamental breach."

A second important advantage to the buyer is that the buyer may regain a lost right of avoidance of the contract by fixing an additional period of time.¹⁴¹ In a case where there is a breach of an obligation other than failure to deliver, the buyer's right to avoid the contract depends solely on whether or not the breach of the contract is "fundamental."¹⁴² If there is such a "fundamental breach" of contract, the buyer may declare the contract avoided under Article 49(1)(a), but the buyer must do so within a reasonable period of time after the buyer knew or ought to have known of the breach of contract.¹⁴³ If the buyer chooses not to avoid the contract and does not give any notice during that period, the buyer regains the right to avoid the contract by fixing an additional period of time.¹⁴⁴

3. *Advantages to the Seller*

When an additional period of time for performance is fixed, the seller is granted an important benefit. Indeed, the buyer is

¹³⁸ CISG, *supra* note 1, art. 49(1)(a), (b); SCHLECHTRIEM, *supra* note 69, at 394–95. The mirror provision in the case where the buyer fails to pay the price or take delivery of the goods within the period fixed originally is Article 64(1)(b) CISG. CISG, *supra* note 1, art. 64(1)(b). That Article provides that the seller is then entitled to avoid the contract without the need for the existence of a fundamental breach of contract. *Id.*

¹³⁹ ENDERLEIN & MASKOW, *supra* note 45, at 146.

¹⁴⁰ Priest, *supra* note 22, at 966.

¹⁴¹ SCHLECHTRIEM, *supra* note 69, at 395.

¹⁴² This derives from a combined reading of Articles 47 and 49(1)(b) CISG, as the latter Article refers only to avoidance in regards to the delivery obligation. *See* Piliounis, *supra* note 132, at 10. The mirror provision on avoidance by the seller in case of breach by the buyer of obligations other than payment of the price or taking delivery of the goods, is Article 64(1)(a) CISG. CISG, *supra* note 1, art. 64(1)(a).

¹⁴³ CISG, *supra* note 1, art. 49(2)(b)(i). The mirror provision on time limits on the seller's right to avoid the contract is Article 64(2)(b)(1) CISG. *Id.* art. 64(2)(b)(1).

¹⁴⁴ SCHLECHTRIEM, *supra* note 69, at 395.

bound by that period and may not during that time "resort to any remedy for breach of contract," or declare the contract avoided on account of a fundamental breach, unless the seller gives notice that it "will not perform within the period so fixed."¹⁴⁵ Indeed, as Professor Honnold explains: "A party may not refuse performance that he has invited."¹⁴⁶ The seller may thus fully rely on the additional period fixed, knowing that he will not be subject to any other recourse.

B. Fixing the Additional Period of Time

1. General Conditions

An additional period of time may only be fixed once the original delivery date has passed.¹⁴⁷ There are no particular requirements as to form, and only Article 27 requires the buyer to use "means appropriate in the circumstances," in order to put transmission risks on the seller.¹⁴⁸ The CISG is silent as to whether the notice can be presented orally, or whether it must absolutely be presented in writing. Some authors believe that a broad interpretation of Article 11 CISG leads to the conclusion that the notice may be presented by any means.¹⁴⁹

2. Specific Contents

When the buyer or seller fixes the additional period, he or she must stipulate performance by a particular date, and cannot merely demand performance in itself.¹⁵⁰ He or she must explicitly demand performance on a fixed and final date, rather than use precatory language,¹⁵¹ and he or she needs not threaten to refuse to

¹⁴⁵ CISG, *supra* note 1, art. 47(2). The mirror provision for the seller is Article 63(2) CISG.

¹⁴⁶ HONNOLD, *supra* note 81, at 317.

¹⁴⁷ CISG, *supra* note 1, art. 45(1)(a).

¹⁴⁸ SCHLECHTRIEM, *supra* note 69, at 191.

¹⁴⁹ See DiPalma, *supra* note 127, at 3 (citing VICTOR KNAPP, COMMENTARY ON THE INTERNATIONAL SALES LAW 463 (C.M. Bianca & M.J. Bonell eds., Giuffrè: Milan, 1987)).

¹⁵⁰ SCHLECHTRIEM, *supra* note 69, at 395.

¹⁵¹ Duncan, *supra* note 68, at 6. Professor Honnold explains that "a communication that invites performance without making clear that a final deadline has been set could mislead the seller into an attempt at substantial performance." HONNOLD, *supra* note 81,

accept performance.¹⁵² As stated in the Secretariat Commentary to the 1978 draft of the CISG:

[This] period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g., within one month from today). A general demand by the buyer that the seller perform or that he perform 'promptly' or the like is not a 'fixing' of a period of time¹⁵³

3. *Period Must be Reasonable*

The time for performance must be a period of "reasonable length." Professor Honnold contends that faced with the CISG's flexible language and the subjective determination of what constitutes a "reasonable" period, "the choice is given to the buyer—the innocent party who faces breach by the seller."¹⁵⁴ He adds that the "reasonableness" of this period should be considered in light of the basic policy in Articles 25, 49, and 64 that contracts should not be avoided on insubstantial grounds.¹⁵⁵ The circumstances to be taken into account in determining whether a period of time is reasonable are, according to Professor Peter Schlechtriem:

[The] length of the contractual delivery period (transactions with short delivery dates justify a shorter additional period, long delivery dates require a longer additional period); the buyer's recognizable interest in rapid delivery, if the seller should have been aware of that interest upon conclusion of the contract; the nature of the seller's obligation (a longer period is reasonable for delivery of complicated apparatus and machinery of the seller's own manufacture than for delivery of fungible goods by a wholesaler); the nature of the impediment to delivery (if the seller is affected by a fire or strike, a buyer can be expected to

at 315. However, as Schlechtriem explains, a statement by the buyer, for example, which is more of a permission to postpone performance of obligations than fixing a period of additional time still binds him. SCHLECHTRIEM, *supra* note 69, at 396.

¹⁵² SCHLECHTRIEM, *supra* note 69, at 396.

¹⁵³ COMMENTARY ON DRAFT, *supra* note 68.

¹⁵⁴ HONNOLD, *supra* note 81, at 315.

¹⁵⁵ *Id.*

wait for a certain time if the delivery is not particularly urgent).¹⁵⁶

Professor Honnold believes that the most important consideration is whether the buyer needs to have the goods delivered without further delay.¹⁵⁷ Furthermore, Professor Schlechtriem comments that where a party has fixed a period of time that is too short and seeks to avoid the contract after the unreasonably short length, that party may only do so if a fundamental breach has occurred, as if that party is considered to have breached the contract.¹⁵⁸ However, if that party waits until after a reasonable period of time has passed, then Professor Schlechtriem explains that the party should have the right to avoid the contract.¹⁵⁹ At last, where a period of time has been fixed that is longer than a reasonable time, the party fixing it is bound by it.¹⁶⁰

C. *Binding Effect*

Serving a notice granting additional time has two effects. First, and as seen above,¹⁶¹ when an aggrieved party fixes an additional period of time, he or she may not resort to any remedy for breach of contract until the additional period has passed, even if nonperformance by the other party otherwise constitutes fundamental breach.¹⁶² However, he or she ceases to be bound even before the expiration of the fixed additional period if notice is received from the breaching party declaring that he or she will not perform the obligation during that period.¹⁶³ The aggrieved party who serves the notice of additional time is not only precluded from avoiding the contract, but also from bringing an

¹⁵⁶ SCHLECHTRIEM, *supra* note 69, at 396.

¹⁵⁷ HONNOLD, *supra* note 81, at 315.

¹⁵⁸ SCHLECHTRIEM, *supra* note 69, at 397.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See supra* Section II.A.3.

¹⁶² CISG, *supra* note 1, art. 47(2), 63(2). *See also* SCHLECHTRIEM, *supra* note 69, at 399. *Contra* ENDERLEIN & MASKOW, *supra* note 45, at 183–84 (“If the seller delivers within the *Nachfrist* and a lack of quality becomes apparent the buyer may well invoke his rights under non-conforming delivery before the period set has expired.”).

¹⁶³ CISG, *supra* note 1, art. 47(2), 63(2).

action for performance, claiming a reduction of price, or asking for delivery of substitute goods.¹⁶⁴ However, an aggrieved party may claim damages for delay in performance.¹⁶⁵

Second, if the breaching party does not take advantage of its right to perform once again prior to the expiration of the additional period, the aggrieved party is entitled to declare the contract avoided.¹⁶⁶ Indeed, the *Nachfrist* procedure makes performance of basic contractual obligations within the fixed period of time provided for in the notice of the essence of the contract.¹⁶⁷ This time, as we have seen above,¹⁶⁸ there is no requirement of showing that the failure to perform during the additional time amounted to a “fundamental breach.” The uncertainty concerning the exact amount of delay that would be considered serious enough to justify avoiding the contract is thus eliminated.

Finally, it must be noted that the *Nachfrist* provision in the CISG goes beyond the common law in one respect. At common law, an extension of time granted by the buyer (or the seller), when not supported by consideration, is only binding on him or her to the extent that the seller (or buyer) has relied on the extension.¹⁶⁹ *Nachfrist* somehow resembles the doctrines of estoppel and waiver at common law.¹⁷⁰ Similarly, the buyer may not resort to any of the remedies available to him or her during the *Nachfrist* period and the effect is to suspend performance rather than extinguish contractual rights.¹⁷¹

¹⁶⁴ SCHLECHTRIEM, *supra* note 69, at 399; Anette Gärtner, *The Vienna Convention on the International Sale of Goods Contains Some Well-Known Inconsistencies, but There is Much in it Which is Worth Preserving and Which Better Accords with Commercial Reality Than the Sale of Goods Act 1979*, (2000) (dissertation, on file with Pace University School of Law), available at CISG Database, Pace University School of Law.

¹⁶⁵ CISG, *supra* note 1, art. 47(2), 63(2); see SCHLECHTRIEM, *supra* note 69, at 399-400, 487.

¹⁶⁶ CISG, *supra* note 1, art. 49(1)(b), 64(1)(b).

¹⁶⁷ HONNOLD, *supra* note 81, at 317.

¹⁶⁸ See *supra* Section II.A.2.

¹⁶⁹ Zuppi, *supra* note 102, at 1.

¹⁷⁰ Williams, *supra* note 127, at 1.

¹⁷¹ *Id.* Williams notes that there are also differences between the estoppel and waiver doctrines and the *Nachfrist* doctrine. *Id.* She explains that promissory estoppel can be used “as a shield and not as a sword,” but that in case of non-delivery at the end of the *Nachfrist* period, the right of avoidance arises automatically and can be used as a

D. Efficiency and Fairness of the Remedy—Evaluation and Justifications

Several CISG commentators have recommended the inclusion of the *Nachfrist* provision in the UCC scheme, because it is “carefully structured to serve the underlying principles of protecting each party’s interests,” and encourages communication and preserving contracts, which increases the chances that expectation interests are fulfilled.¹⁷² *Nachfrist* empowers parties to protect their interests by being more cooperative, rather than by resorting to judicial remedies. Moreover, *Nachfrist* tremendously increases clarity and certainty in contracts. Indeed, an aggrieved party can protect his or her interests and expectations by notifying the breaching party that he or she has additional time to conform to the contract, and that failing to conform to the deadline will lead to termination. Generally, as Celia Taylor explains, “by encouraging future exchange, self-help furthers society’s interest that each economic unit shift its resources whenever this would be efficient.”¹⁷³

Major advantages to self-help remedies,¹⁷⁴ such as the *Nachfrist* notice, are: they are quick and readily available; they produce an immediate result that is certain; they reduce later evidentiary problems (and therefore increase certainty); and they further the constant desire of parties to control the situation and be

sword. *Id.*

¹⁷² Taylor, *supra* note 69, at 24–25. An example of the importance of communicating within the *Nachfrist* system can be found in Judgment of Apr. 24, 1990 [AG] [District Court], 5 C 73/89, available at CISG Database, Pace University School of Law. In that case, a German buyer and an Italian seller of fashion goods entered into a contract that specified that the goods were “to be delivered July, August, September.” *Id.* The seller made the first delivery in September, but the buyer refused the goods claiming that the quoted language required that one-third of the goods should have been delivered in July, one-third in August, and one-third in September. *Id.* The court held that the seller was entitled to be paid the full purchase price, even if the goods had been delivered late, because the buyer had not established a fundamental breach by the seller or offered the seller an additional reasonable period of time for performance. *Id.* If *Nachfrist* was in fact included in the UCC, it would fall within the performance-based category, as set out by Professor Farnsworth. Duncan, *supra* note 68, at 164.

¹⁷³ Taylor, *supra* note 69, at 849.

¹⁷⁴ Self-help means “private actions taken by those interested in the controversy to prevent or resolve disputes without official assistance of a governmental official or disinterested third party.” *Id.* at 841.

autonomous.¹⁷⁵ They are also cheaper than judicial action.¹⁷⁶ Furthermore, by keeping things private, parties end up being less confrontational and more reasonable than they would have been in a courtroom.¹⁷⁷ On a societal level, *Nachfrist* and self-help remedies generally free judicial courts and thus judicial resources for other uses, which, in itself, is conducive of efficiency and greater social welfare.¹⁷⁸ Parties granted additional time for performance under the CISG obviate judicial interpretation and create efficiency by saving important costs, solving the problem between them. Indeed, sellers, for example, have strong incentives to resort to *Nachfrist*, since they will not have to disburse any further costs in order to get paid. On a more philosophical level, self-help remedies, by giving parties a powerful option and a corresponding impression of freedom, encourage individuals to enter into commercial relations.¹⁷⁹

More specifically, another indication of the efficiency of *Nachfrist* as a remedy can be found when comparing it to both Sections 2-609 and 2-508(2) UCC. Indeed, all three remedies provide for a post-delivery performance, and all three serve two important purposes of contract law: securing optimal commitment to performing and securing optimal reliance.¹⁸⁰ Section 2-609 UCC provides that an aggrieved party may ask for adequate assurances of due performance, suspend his own performance, and treat the contract as broken if his reasonable grounds for insecurity are not cleared up within a reasonable time.¹⁸¹ That Section rests on the recognition of the fact that “the essential purpose of a contract between commercial men is actual performance . . . [;] they do not bargain merely for a promise . . . and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the

¹⁷⁵ *Id.* at 847.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 848.

¹⁷⁸ *Id.* Although in many cases, self-help is only the first remedy, and a series of judicial actions may follow. *Id.* at 851.

¹⁷⁹ *Id.* at 848–49.

¹⁸⁰ See COOTER & ULEN, *supra* note 122, at 189.

¹⁸¹ U.C.C. § 2-609 (2002).

bargain.”¹⁸² Section 2-508(2) UCC provides that the seller can cure a non-conforming tender after the time set for delivery, under certain specific conditions, seen above.¹⁸³ Both the latter provision and the *Nachfrist* provision are remedies that secure the future bargained-for commitment and allow parties to a contract to rely upon the assurance of performance. Overall, greater efficiency is thus obtained.

Not only is *Nachfrist* an efficient remedy, but it also seems to be a fair one. Under the *Nachfrist* procedure, aggrieved parties recover what they originally contracted for in a fair and equitable manner. The buyer waiting for a delayed delivery gets a conforming tender at the expiration of the extended time for performance, and the seller waiting for the buyer to take delivery or pay the price is satisfied. In conclusion, the *Nachfrist* procedure fulfills both fundamental principles of commercial law: fairness and efficiency.

III. REDUCTION OF PRICE UNDER ARTICLE 50 CISG

A. *Its Origins and Uses*

The legal principle of reduction of price can be traced back to the *actio quanti minoris* of Roman law, through the Justinian Compilations.¹⁸⁴ Under Roman law, a buyer, having discovered after delivery certain hidden defects that would have led him to pay a lesser price had he known of them, could bring an action for reduction of price or for rescission of contract.¹⁸⁵

The CISG remedy of reduction of price provides the buyer with the unilateral right to reduce the price of purchased goods if they do not conform to the contract, to the amount that he or she would have paid had he or she known of the nonconformity, unless the seller cures the nonconformity.¹⁸⁶ Since the Convention

¹⁸² *Id.* § 2-609 cmt. 1.

¹⁸³ See *supra* Part I.A.

¹⁸⁴ A.M. Tuñón, *The Actio Quanti Minoris and Sales of Goods Between Mexico and the U.S.: An Analysis of the Remedy of Reduction of the Price in the UN Sales Convention, CISG Article 50 and Its Civil Law Antecedents*, 2.1 (1998) (unpublished thesis, Pace University), available at CISG Database, Pace University School of Law.

¹⁸⁵ Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255-77 (1979).

¹⁸⁶ Article 50(2) CISG states that if the seller has remedied any failure to perform in

does not adhere to the civil law doctrine that a seller is only liable for damages caused by defective goods when he is guilty of bad faith, fraud, or fault,¹⁸⁷ the buyer can to his great advantage claim damages or declare the price reduced without showing fault.¹⁸⁸ This was said to deprive the reduction of price remedy of a *ratio legis*,¹⁸⁹ but as this article demonstrates, the remedy can still be amply justified.¹⁹⁰

The very purpose of the remedy, used primarily as a counterclaim or as a defense to an action by the seller for the purchase price,¹⁹¹ is to allow the buyer to keep the non-conforming goods and pay the price he or she would have paid had he or she been aware of the defects in the goods.¹⁹² The rationale for this is that it would be unjust to require the buyer to pay the full price for non-conforming goods.¹⁹³ Therefore, the price is reduced just as if the subject-matter of the contract had been nonconforming from the outset.¹⁹⁴ As Schlechtriem explains, this remedy is an “adaptation of the contract, not an award of damages.”¹⁹⁵

B. Conditions

First, reduction of price only applies if the goods do not “conform with the contract,” as understood under Articles 35 and 36.¹⁹⁶ Under Article 35, the seller must deliver goods, which are

accordance with Article 37 CISG or Article 48 CISG, or if the buyer refused performance under these articles, he cannot reduce the price. CISG, *supra* note 1, art. 50(2).

¹⁸⁷ KRITZER, *supra* note 104, at 437; Tuñón, *supra* note 184, at 2.

¹⁸⁸ Bergsten & Miller, *supra* note 185, at 275–76.

¹⁸⁹ Tuñón, *supra* note 184, at 10. Tuñón explains that the oediles set the *actio quanti minoris* to avoid the harsh effects of the rule *caveat emptor* (“let the buyer beware”) that limited the *actio empti* (the ordinary remedy available to an aggrieved buyer). *Id.* at 2.1

¹⁹⁰ See *infra* Part III.E.

¹⁹¹ Piliounis, *supra* note 132, at 15; Tuñón, *supra* note 184, at 10.

¹⁹² Tuñón, *supra* note 184, at 10.

¹⁹³ Zuppi, *supra* note 102, at 7.

¹⁹⁴ SCHLECHTRIEM, *supra* note 69, at 438.

¹⁹⁵ *Id.*

¹⁹⁶ The delivery of the wrong quantity of goods is covered by Article 35(1) CISG, but is also subject to Article 51(1) CISG, which takes priority over Article 50 CISG and provides:

of the quantity, quality, or description required by the contract and contained or packaged in the manner required by the contract.¹⁹⁷ Since the seller's liability will usually only arise when the risk has passed, nonconformity is assessed as of that time.¹⁹⁸ Furthermore, the question of whether the defect is "fundamental" or not is irrelevant, along with that of whether the seller is responsible for the defect or not.¹⁹⁹

Some commentators have held that the expression "if the goods do not conform to the contract" under Article 50 means that the remedy is applicable only in situations where the goods fail to meet the quality—and not the quantity—obligations of the contract.²⁰⁰ This proposition is based on the following arguments: that Article 35(1) does not explicitly state that delivery of an insufficient quantity is a "nonconformity" of the tender; that according to Article 35(2), goods do not conform to the contract unless they meet quality specifications; and that there is a distinction between a "deficiency in the quantity of goods" and

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 and 50 CISG apply in respect of the part which is missing or which does not conform; (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

CISG, *supra* note 1, art. 50.

¹⁹⁷ *Id.* art. 35(1). It must also be noted that there is no price reduction for defects in title, since Article 50 CISG limits price reduction to goods that "do not conform with the contract." In fact, Tuñón, *supra* note 184, at 4.2.3, explains why third-party claims do not fall within the ambit of Article 50 CISG. They must conform to an implied warranty of fitness for a particular purpose and to an implied warranty of merchantability. CISG, *supra* note 1, art. 35(2).

¹⁹⁸ CISG, *supra* note 1, art. 50(2). Article 36 CISG provides that the seller is liable if there are defects in the goods at the time when the risk passes. *Id.* art. 36. See also SCHLECHTRIEM, *supra* note 69, at 439 (explaining in what case there could be reduction of price even though the risk still has not passed).

¹⁹⁹ Indeed, as seen above, *supra* in Part III.A, fault does not count in reduction of price.

²⁰⁰ Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J. L. & COM. 153, 170 (1995) (citing HONNOLD, *supra* note 81, ¶313.1). Honnold explains: "[Q]uestions have been raised as to whether price-reduction under Article 50 applies to other types of non-performance such as delay, delivery at the wrong place, defects in documents and the like." HONNOLD, *supra* note 81, ¶313.1

“non-conforming goods” in Article 37.²⁰¹

In my view, these arguments are not persuasive. First of all, it would generally not make much sense to apply Article 50 CISG only to quality defects. It is more logical to let a buyer who receives fewer widgets than contracted for simply pay for the amount received and later contract again for the balance.²⁰² Second, consider the fact that Article 51 provides that the remedies set forth in Articles 46 to 50 may be applied to the “part” of the delivery that is *missing* or that fails to conform to the contract.²⁰³ The buyer may thus require the seller to deliver substitute goods under Article 46(2), avoid the contract with respect to the defective units under Article 49(1)(a), accept the defective tender and reduce the price of the goods under Article 50, or claim damages under Article 74.²⁰⁴ As a consequence, it is obvious that reduction of price would still be available in case of a tender of the wrong quantity of goods. Third, Article 50 is clearly applicable in cases where “the seller fails to perform *any of its obligations*,” which includes those under Article 35(1).²⁰⁵ Generally, when one interprets all provisions under Section II, entitled “Conformity of the Goods and Third Party Claims,” it is manifest that the intention was to have both defects in quantity and in quality fall under the concept of “nonconformity.”

Second, to claim a price reduction, the seller must have given a valid and timely notice of the defect as pertaining to Articles 39 and 40, unless he has a valid excuse under Article 44 for his failure.²⁰⁶ The notice may be given by a simple declaration of the

²⁰¹ Fletcher, *supra* note 200, at n.68.

²⁰² This is, of course, assuming that there has been no offer to cure the defective tender by the seller.

²⁰³ CISG, *supra* note 1, art. 51.

²⁰⁴ *Id.*

²⁰⁵ *Id.* art. 50 (emphasis added).

²⁰⁶ For an example of a case where the buyer was held to not be entitled to a reduction of the purchase price under Art. 50 CISG, because she could not prove that she notified the seller of the alleged nonconformity of the goods, see Judgment of Oct. 12, 2000 [LG] [District Court], 22 S 234/94, *available at* CISG Database, Pace University School of Law.

The buyer loses the right to demand a reduction in price under Art. 50(1) CISG if she does not give a proper notice specifying the lack of conformity of the goods This corresponds to the general rule contained in Art. 39(1) CISG

buyer; there is no need for the seller's agreement.²⁰⁷ Indeed, the right to reduction of price is characterized as one that the buyer "may exercise unilaterally."²⁰⁸

Third, it is manifest that in a case where the seller has a right to cure the defective tender under Articles 37 or 48, that right prevails over the buyer's right to a price reduction.²⁰⁹ Professor Schlechtriem explains this very clearly, using a few hypotheticals:

If the buyer immediately . . . claims a price reduction without first giving the seller an opportunity to remedy the defect and if the seller subsequently offers to remedy the defects within the period set out in Articles 37 or 48(1) or, without objection by the buyer, indicates a period within which he will remedy the defect under Article 48(2) and (3), the buyer's claim for a price reduction is ineffective. If the buyer rejects the seller's timely offer to remedy the defect, he loses the right to claim price reduction. On the other hand, if the seller wrongly disputes the defect and wrongly rejects the notice of lack of conformity as being out of time or declares that he is not able to cure the defect, the buyer is entitled to a price reduction. If it is unclear whether the seller is willing to remove the defect, the buyer can fix an additional reasonable period for performance under Article 47. Article 47(2) then prevents the buyer from claiming a price reduction until the expiration of that period.²¹⁰

All these hypotheticals are consistent with a goal of preserving contracts and awarding the seller a second chance at tendering conforming goods.

Finally, it must be emphasized that it does not matter "whether

which stipulates that the buyer loses the right to rely on a lack of conformity of the goods if she does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after she has discovered it or ought to have discovered it. While the [buyer] submits that her employee, witness G., had informed the [seller] of the defective material immediately after it had been delivered in October of 1996, [buyer] has not offered sufficient proof to convince the Court of the accuracy of her submission.

Id.

²⁰⁷ ENDERLEIN & MASKOW, *supra* note 45, at 163.

²⁰⁸ Tuñón, *supra* note 184, at 4.2.1.

²⁰⁹ CISG, *supra* note 1, art. 50; SCHLECHTRIEM, *supra* note 69, at 440; Tuñón, *supra* note 184, at 12. This is consistent with the general philosophy of the CISG in preserving contracts.

²¹⁰ SCHLECHTRIEM, *supra* note 69, at 439.

the price has already been paid.”²¹¹ A buyer may reduce the price even though he or she has already paid.²¹² The buyer will then simply ask the seller for a refund of a part of the purchase price.²¹³ On the contrary, if the price has not been paid yet, the buyer will simply deduct the difference in value from what he or she owes the seller.²¹⁴

C. *Its Calculation*

1. *The Formula*

Essentially, reduction of price is a proportional reduction of the contract price, which must be proven by the buyer.²¹⁵ The reduced price must bear the same relationship to the price originally agreed to as the value of the nonconforming goods actually delivered bears to the value of conforming goods.²¹⁶ The best and simplest way to calculate the price reduction is as follows:

$$\frac{\text{Stipulated price}}{\text{Reduced price}} = \frac{\text{Value of conforming goods}}{\text{Value of non-conforming goods}}$$

(price owed by the buyer)

or:

$$\text{Reduced price} = \frac{\text{Value of the goods delivered} \times \text{Contract price}}{\text{Hypothetical value of conforming goods}}^{217}$$

²¹¹ CISG, *supra* note 1, art. 50.

²¹² COMMENTARY ON DRAFT, *supra* note 68.

²¹³ Piliounis, *supra* note 132, at 15; SCHLECHTRIEM, *supra* note 69, at 443; ENDERLEIN & MASKOW, *supra* note 45, at 159 (“[the buyer (who has already paid)] has a right to be reimbursed in the amount of the reduction.”).

²¹⁴ Piliounis, *supra* note 132, at 15.

²¹⁵ SCHLECHTRIEM, *supra* note 69, at 443.

²¹⁶ *Id.* at 438. The author calls this calculation method the “proportional calculation method.” *Id.* Also, he explains that the buyer cannot take the estimated value of the goods delivered nor simply deduct the cost of repair to determine the reduced price. *Id.*

²¹⁷ Tuñón, *supra* note 184, at 11; SCHLECHTRIEM, *supra* note 69, at 441. An example of a case where this formula was used is Judgment of Apr. 3, 1990 [LG] [Trial

Again, what these formulas demonstrate is that the goal of reduction of price is to enable the buyer to preserve the bargain, be it a good one or a bad one.²¹⁸ Of course, proportions of quality defects may be much harder to calculate than proportions of quantity defects.²¹⁹ Indeed, a buyer who receives seventy cases of wine instead of one hundred can easily declare that he will only pay seventy percent of the original purchase price. However, if the defect is for example an overly sour tinge in some wine bottles and not others, then the proportion is much harder to establish.

Furthermore, it should be mentioned that in a case where the goods are without value, the reduction of the contract price is brought down to zero, or the contract is declared avoided.²²⁰ Since reduction of price does not take into account the true loss suffered by the buyer, the latter may claim damages under Article 45(1)(b) and (2) on top of the price reduction.²²¹ In fact, the buyer may

Court], 41 O 198/89, available at <http://unilex.info/case.cfm?pid=1&do=case&id=24&step+Abstract> (last visited Jan. 25, 2003) (on file with the North Carolina Journal of International Law and Commercial Regulation). In that case, the reduction of price remedy was resorted to where a German buyer and an Italian seller entered a contract for the sale of shoes, and where the buyer paid only half the purchase price, claiming that the goods were nonconforming under the contract. *Id.* para. 1. The seller sued for the entire purchase price. *Id.* The German court found that because the buyer had satisfied its obligations to timely inspect the goods and notify the seller of the defects, it was entitled to a reduction of price of the goods. *Id.* para. 3. However, the court explained that the reduction of price needed to reflect the difference between the value of the goods as delivered and the value the goods would have had if they had been in conformity with the contract. *Id.* Thus, the court held that the seller was entitled to recover the difference between the price reduction the buyer actually took and the reduction of price the buyer was entitled to take. *Id.* For a similar case, see Judgment of Apr. 27, 1992, Pretore della giurisdizione [District Court], 6252, available at <http://www.cisg.law.pace.edu/cases/920427s1.html> (last modified May 3, 2002).

Pursuant to well-settled case law, reduction of the price is performed in accordance with the following formula: reduced price: convened price = objective value of the non-conforming goods: value of conforming goods. The objective value of the conforming goods is presumed to correspond to the agreed upon price. The difference between the value of the conforming goods and the value of the non-conforming goods does not necessarily coincide with the cost to repair, but most of the time it does.

Id.

²¹⁸ Tuñón, *supra* note 184, at 11.

²¹⁹ Piliounis, *supra* note 132, at 32–33.

²²⁰ SCHLECHTRIEM, *supra* note 69, at 443.

²²¹ Piliounis, *supra* note 132, at 16; SCHLECHTRIEM, *supra* note 69, at 444.

choose the method of calculation of reduction of price that is most favorable to him: calculation under Articles 45(1)(b) and 74 or under Article 50.²²²

2. *Time and Place at Which Calculated*

The relevant time to assess both the value of defective goods and the hypothetical value of conforming goods is the time of delivery.²²³ Indeed, Article 50 provides that: “[T]he buyer may reduce the price in the same proportion as the value that the goods actually delivered *had at the time of the delivery* bears to the value that conforming goods *would have had at that time*[,]” making the time of measurement clear.²²⁴

As for the relevant place where the market value of the goods is calculated, the Convention leaves open where the value of the conforming and/or non-conforming goods will be assessed. Nevertheless, eminent commentators have explained that it must be the place of destination of the transport organized by the seller pursuant to Article 31(a) CISG or pursuant to the contract.²²⁵ Local circumstances are relevant to the value of the goods delivered and to the hypothetical value of conforming goods, but those of the place of dispatch should never be taken as an alternative to those at the destination.²²⁶

D. *Contrasts and Comparisons*

1. *Goal of Article 50 CISG vs. Goal of Awarding Damages*

Reduction of price saves the bargain between the parties and prevents unfair enrichment of the seller.²²⁷ Awarding damages

²²² SCHLECHTRIEM, *supra* note 69, at 444.

²²³ *Id.* at 441. Article 30 CISG indicates that the seller must deliver the goods and hand over any documents and transfer property in the goods. CISG, *supra* note 1, art. 30.

²²⁴ *Id.* (emphasis added).

²²⁵ SCHLECHTRIEM, *supra* note 69, at 442; ENDERLEIN & MASKOW, *supra* note 45, at 307. For example, in the case of carriage of goods, it should be the place of destination of the goods.

²²⁶ SCHLECHTRIEM, *supra* note 69, at 442.

²²⁷ Tuñón, *supra* note 184, at 7.

places the aggrieved party in the same position as he or she would have been had it not been for the breach,²²⁸ thereby giving the aggrieved party his or her expectation interest. The reduction of price remedy is not designed to protect the expectation interest, the reliance interest, or the restitution interest.²²⁹ As seen above, Article 50 puts an aggrieved party in the position he or she would have been in had he or she purchased the goods actually delivered rather than the ones promised.²³⁰ Put differently, “expectation damages are designed to preserve for an aggrieved party the benefit of her bargain; reduction of price under Article 50 attempts to preserve the proportion of her bargain.”²³¹

What flows from all this is that reduction of price will not be subject to either the mitigation of damages or the foreseeability requirements.²³² Mitigation, notably, is required under Article 77 CISG in all cases of liability to pay damages for breach of contract,²³³ and thus not for reduction of price.²³⁴ But in fact, this

²²⁸ CRASWELL & SCHWARTZ, *supra* note 91, at 39. See Jeffrey S. Sutton, *Measuring Damages Under the United Nations Convention on the International Sale of Goods*, 50 OHIO ST. L. J. 737–52 (1989), for measuring such damages under the CISG.

²²⁹ Fletcher, *supra* note 200, at 172.

²³⁰ See *supra* Section III.C.1.

²³¹ Fletcher, *supra* note 200, at 174.

²³² GILLETTE & WALT, *supra* note 7, at 326. As Gillette and Walt explain, that is also why an aggrieved buyer or seller can combine the reduction of price and a claim for damages. *Id.* Nevertheless, commentators have adopted different views on the issue of whether the obligation to mitigate losses refers only to the reduction of damages under Article 77 of the CISG (which codifies the mitigation principle). For instance, Enderlein and Maskow explain that an American proposal to extend the mitigation principle to other remedies was rejected. ENDERLEIN & MASKOW, *supra* note 45, at 308. Nevertheless, they also explain that it was suggested by other commentators to treat the obligation to mitigate losses as a genuine obligation whose breach will entail the obligation to compensate for damages. *Id.* at 309. They sustain that “[o]ne could also imagine invoking Article 77 analogously on the basis of the principle of good faith.” *Id.* Thus, based on these views and theories, one could seek to give the mitigation principle a broader reach than “damages” pursuant to Article 77, and put the concept into play in a situation of reduction of price under Article 50 of the CISG. On the mitigation principle, see Djakhongir Saidov, *Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods*, (Dec. 2001), <http://www.cisg.law.pace/cisg/biblio/saidov.html> (on file with the North Carolina Journal of International Law and Commercial Regulation).

²³³ SCHLECHTRIEM, *supra* note 69, at 584. The underlying principle to this provision is that loss resulting from a breach of contract, including loss of profit, should not be compensated to the extent that it could have been reduced by the taking of reasonable

is contrary to the efficiency rationale, as costs/losses may end up being much more important to the breaching party who may have to pay high consequential damages under Article 45(1)(b) CISG on top of agreeing to reduce the price. These costs could be lessened or prevented if the aggrieved party takes appropriate measures to minimize his or her losses.

2. Provisions of the UCC

There is no direct equivalent to Section 50 CISG in the UCC.²³⁵ The closest counterpart is the remedy provided in Section 2-717 UCC, which allows the buyer to deduct all or part of his damages from any breach of contract from any part of the price still due.²³⁶ However, the remedy of reduction of price should be separate from damages and should not be confused with the right to set-off.²³⁷ In fact, that mistake was made during the deliberations of the Draft Convention, where some common law participants appeared to confuse the two remedies.²³⁸ Today, that mistaken belief still haunts U.S. commentators on the Convention.²³⁹

Furthermore, the reduction of price remedy under Article 50 CISG must be distinguished from the Section 2-508(2) UCC

measures. *Id.*

²³⁴ Unless of course one adopts the view that the right to price reduction will be lost when the buyer refuses to have the defect cured by the seller, thus refusing to mitigate his loss. ENDERLEIN & MASKOW, *supra* note 45, at 308.

²³⁵ KRITZER, *supra* note 104, at 375.

²³⁶ *Id.* Kritzer further mentions Section 2-613 UCC, which also authorizes price adjustment. *Id.*

²³⁷ Bergsten & Miller, *supra* note 185, at 256; Visser, *supra* note 79, at 290, explains:

[T]he right to set-off reflected in paragraph 2-717 of the UCC allows for the reduction of the price by the buyer to compensate damages in general; Article 50 CISG only allows a proportional reduction of price for non-conforming goods. Thus the basis of paragraph 2-717 and Article 50 CISG are substantially different as the remedy provided for in Article 50 CISG is limited to only a proportional reduction of price.

Visser, *supra* note 79, n.290

²³⁸ Bergsten & Miller, *supra* note 186, at 255; Gärtner, *supra* note 164, at 62; Tuñón, *supra* note 184, at 11.

²³⁹ Tuñón, *supra* note 184, at 11.

provision on cure of a non-conforming tender.²⁴⁰ That provision contemplates that the buyer may accept a money allowance to cure the non-conforming tender.²⁴¹ However, the reduction of price is a remedy for the buyer, and the right to cure under Section 2-508(2) UCC is one for the seller.²⁴² Also, as the author Tuñón explains: “The money allowance seems more like an indemnity of the damages suffered by the buyer when taking non-conforming goods rather than a reduction of the price to the amount the buyer would have paid knowing the defects were present in the goods.”²⁴³ In both cases, the practical result is the same: the buyer ends up paying for the value of the goods as delivered. In the case of reduction of price, the original price is reduced so that the buyer pays the price of the goods received, and similarly, in the case of cure with a money allowance, the seller will often simply deduct the money allowance from the price paid or to be paid by the buyer.

E. Its Justifications

Authors have problems finding a justification for Article 50 CISG.²⁴⁴ In fact, omitting price reduction was considered in the original deliberations; but in the end the remedy was preserved, because of its widespread nature, especially in civil law countries, and because it could benefit the buyer more in certain circumstances.²⁴⁵ As seen above, the price reduction remedy

²⁴⁰ As seen above, Section 2-508(2) UCC gives the seller the right to cure a non-conforming tender and provides that the buyer may accept a money allowance to cure a non-conforming delivery. U.C.C. § 2-508(2) (2002).

²⁴¹ *Id.* Section 2-508(2) UCC provides “with or without money allowance.” *Id.* (emphasis added). Indeed, as seen above, cure presents the seller with four choices: (1) to compensate the buyer for the goods’ decrease in value if the buyer retains them; (2) to repair the goods; (3) to replace the good; and (4) to let the deal go. SCHWARTZ & SCOTT, *supra* note 14, at 288.

²⁴² Tuñón, *supra* note 184, at 5.

²⁴³ *Id.*

²⁴⁴ See John P. McMahon, *Applying The CISG: Guides for Business Managers and Counsel, Part I*, in 1 GUIDE TO THE INTERNATIONAL SALE OF GOODS CONVENTION, at 153.007 (William A. Hancock ed., Business Laws, Inc. 2000) (quoting Professor Farnsworth for explaining the U.S. reaction to Article 50 in the following terms: “Price Reduction—We don’t understand it, and we don’t like it.”); GILLETTE & WALT, *supra* note 7, at 327.

²⁴⁵ SCHLECHTRIEM, *supra* note 69, at 439.

yields results inconsistent with the protection of the expectation interest of parties to a commercial bargain.²⁴⁶ Further, it brings doubt as to whether it leads to fair results.²⁴⁷ So what are its possible justifications?

1. *Case of Force Majeure*

The reduction of price remedy is an important right independent from the damages provisions in several instances. The first and most important one is where the buyer accepts defective goods under circumstances in which the seller is not liable for damages.²⁴⁸ For instance, there is such a case where the seller can claim exemption under the *force majeure* exception for failure to perform “due to an impediment beyond . . . control” under Article 79 CISG.²⁴⁹ There is no problem if the seller’s failure amounts to a “fundamental breach” under Article 25 CISG, as the buyer may then simply reject the goods and declare the contract avoided. But where the buyer accepts the goods, the seller is free from liability for *force majeure* under Article 79(1) CISG and the buyer cannot claim damages. In that specific instance, reduction of the price is the only possible remedy for the

²⁴⁶ Except where the market price stays the same, where damages and reduction of price give the same recovery. In that case, the expectation interest of the parties is met. See GILLETTE & WALT, *supra* note 7, at 199–200; *supra* Section III- D.1; *infra* Section E. 2. An example clarifies this conclusion. Suppose that on June 1, the seller contracts with the buyer, “Mama Pasta,” to sell 100,000 cases of Grade 1 tomatoes for \$25 a case, delivery on July 1. On the delivery date, the seller delivers 100,000 cases of Grade 2 tomatoes, and the buyer, although disappointed, elects to accept the shipment (he will make tomato paste instead of tomato sauce with the Grade 2 tomatoes). By July 1, the market value of Grade 1 tomatoes is only \$20 per case and the Grade 2 tomatoes actually delivered are worth \$15 a case. If Mama Pasta chooses to recover damages under Article 74 CISG, it will get the difference between the value that the tomatoes originally contracted for would have had and the value of the tomatoes as actually delivered. It will thus get \$5 per case damages, and pay \$20 a case, instead of the \$25 a case as originally contracted for. But if Mama Pasta chooses to reduce the price, it will pay only \$18.75 per case ($15 \times 25 = 375$, and then $375/20 = 18.75 =$ reduced price, per case). The latter result is thus far from an award of expectation damages, as calculated under Article 74 CISG. See Fletcher, *supra* note 200, at 171.

²⁴⁷ Since in some cases, it overcompensates the buyer, at the expense of the seller.

²⁴⁸ HONNOLD, *supra* note 81, at 312.

²⁴⁹ CISG, *supra* note 1, art. 79. That is, when the seller’s failure to perform is due to unexpected circumstances, the equivalent of act of god, or *fait du prince*. See COMMENTARY ON DRAFT, *supra* note 68, at 2; Gärtner, *supra* note 164, at 3–4.

buyer.²⁵⁰

2. Case of Falling Market

According to Article 45(2) CISG, the buyer can resort to a claim for damages in addition to declaring the reduction of price in cases where damages would provide better monetary relief than a reduction in the price.²⁵¹ Under this remedy, the buyer would get immediate relief from the reduction of price, while the rest of its claim would be under negotiation or litigation. But in what cases should a buyer resort to such measures?

The most important and frequent situation is where the market price of the goods changes substantially between the time of contracting and the time of delivery. In fact, where the market price stays the same as the contract price, there is no difference in the amount of damages and the amount of price reduction.²⁵² When the market price rises, a buyer normally will claim damages under Article 74 CISG, since this will protect his or her expectation interest.²⁵³ When the market price falls, the buyer will often reject the goods in order to obtain conforming replacement

²⁵⁰ See Bergsten & Miller, *supra* note 185, at 273; Gärtner, *supra* note 164, at 65.

²⁵¹ See COMMENTARY ON DRAFT, *supra* note 68, art. 41.

²⁵² For example, if contract price is \$100, the value of conforming goods is \$100 and the value of non-conforming goods is \$90. Damages that are recoverable under Article 74 CISG are: $\$100 - \$90 = \$10$. Under Article 50 CISG, the reduced price is in the amount of $\$90/\$100 \times \$100 = \90 . The price is thus reduced by \$10. See CISG, *supra* note 1, art. 50, 74.

²⁵³ To fully illustrate this point, imagine that a seller contracts with a buyer, "Mama Pasta," on September 1 to sell a \$100,000 cargo of tomatoes, with delivery in three months, on December 1. The seller dispatches the tomatoes that conform to the contract, but during the trip, the ship is stuck at a nearby port for a month or so for truly unexpected reasons. The result is that the cargo of tomatoes arrives at the destination one month or so later than the due date, and the tomatoes are moldy and unusable for their originally contracted for purposes. The tomatoes could still be used by "Mama Pasta" to make tomato paste (instead of tomato sauce), but the price of the cargo of tomatoes is now worth one-fifth of the contract price. The buyer, "Mama Pasta," elects to keep the tomatoes, but all the trouble and expenses required to make tomato paste instead of tomato sauce results in a loss of \$10,000. The last important fact is that the price of tomatoes has doubled between the time of dispatch and the time of arrival: the original tomatoes would have sold for \$200,000, and the bad ones (used for tomato paste) would have sold for \$40,000. If the buyer were to claim damages under Article 74 CISG, he would get an amount of \$160,000 ($\$200,000 - \$40,000$), whereas if he were to ask for a reduction of price, he would pay \$20,000 as a result of a price reduction of \$80,000. See HONNOLD, *supra* note 81, at 335-38.

goods on the open market at less than the contract price, and in that case, the buyer would not be able to claim a price reduction. But on the contrary, if he accepts the goods, price reduction could sometimes favor him tremendously.²⁵⁴ At last, it should not be forgotten that the buyer may very well resort to both the reduction of price and a claim for damages.²⁵⁵

3. *Where the Buyer Has Difficulties in Proving Loss*

One eminent commentator, Peter Schlechtriem, has explained this specific justification in the following terms:

[P]rice reduction is important as an independent right . . . where the buyer has difficulty in proving his loss, *e.g.* because he did not buy the goods for resale but for altruistic purposes (*e.g.*, the seller delivers defective corn and the buyer's intention had been to distribute it free of charge in an area suffering from famine).²⁵⁶

This justification is, of course, extremely narrow and will only apply in very exceptional cases.

4. *Reformation of the Original Contract Versus Alternative Form of Monetary Relief*

The reduction of price remedy for quality defects can also be justified as a reformation of the original contract; the seller shipping out non-conforming goods; and the buyer accepting the offer to keep the goods and pay a lower price.²⁵⁷ This proposition seems to be an efficient one, as it allows parties to reduce

²⁵⁴ See SCHLECHTRIEM, *supra* note 69, at 438; HONNOLD, *supra* note 81, at 338; Gärtner, *supra* note 164, at 4. For example, take the same fact-pattern as in note 246, above, except that instead of rising, the market price drops by one-half. In that case, if the buyer resorts to the reduction of price, he again pays \$20,000, as a result of the \$80,000 reduction in price. But if the buyer claims damages under Article 74 CISG, he gets the difference between the value of conforming goods at the low price (half of \$100,000, which is \$50,000) and the value of goods actually received (half of \$20,000, which is \$10,000). He would thus get an amount of \$40,000 in damages, and \$80,000 in reduction of price. If the amount of consequential damages was higher than \$10,000, then claiming damages might be a good option. (But it isn't here, since that would amount to \$50,000, which is still a lesser amount than the reduction of price.) See HONNOLD, *supra* note 81, at 335–38.

²⁵⁵ CISG, *supra* note 1, art. 45(1), (2).

²⁵⁶ SCHLECHTRIEM, *supra* note 69, at 439.

²⁵⁷ Fletcher, *supra* note 200, at 9; Bergsten & Miller, *supra* note 185, at 274.

transaction costs that would be otherwise incurred, and it maximizes their surplus. Furthermore, reduction of price can be seen as an alternative form of monetary relief.²⁵⁸ However, in my view, that would too closely resemble the right to set-off damages discussed above,²⁵⁹ and therefore, any such justification should be rejected.

5. *Restitutory Measure*

As explained above,²⁶⁰ reduction of price seeks to both preserve the bargain and prevent unjust enrichment of the seller. Flowing from this, some authors have argued that the Article 50 remedy is really a restitutory measure, non-contractual in nature, and that it is aimed at eliminating the amount by which the seller has been unjustly enriched by delivering nonconforming goods.²⁶¹ However, Gillette and Walt have rejected this justification, explaining that the Article 50 calculation does not satisfy a restitutory aim.²⁶² Indeed, as we have seen above, when the market price falls, a buyer resorting to reduction of price receives more than the seller's gain from the breach.²⁶³

6. *Partial Avoidance of the Contract*

According to authors Bergsten and Miller, who commented on Article 46 of the Draft Convention (now Article 50 CISG), the remedy is justified if seen as a partial avoidance of the contract.²⁶⁴ They explain that:

viewed this way [as partial avoidance of contract], the monetary relief given under art. 46 can be compared not only with damages, but also with the monetary relief given the buyer when he declares the contract avoided . . . where the buyer has made an unfavorable contract, reduction of price gives the buyer more than he would get from claiming damages and less than he would get from declaring the entire contract avoided.

²⁵⁸ Bergsten & Miller, *supra* note 185, at 72–74.

²⁵⁹ See discussion *supra* Section III.D.2.

²⁶⁰ See *supra* Section III.A.

²⁶¹ GILLETTE & WALT, *supra* note 7, at 328.

²⁶² *Id.*

²⁶³ See *supra* note 240 and accompanying text.

²⁶⁴ Bergsten & Miller, *supra* note 185, at 275.

There is a practical side to this justification. Where the buyer has made a bad bargain, he is encouraged by the traditional measure of damages to seek avoidance of the entire contract in order to be able to purchase substitute goods at the lower prevailing price. Courts tend to be suspicious of the buyer's evaluation of the seriousness of the defect of the goods in such a situation, and well they might. Reduction of price goes part way towards meeting the buyer's desire to get out of the entire contract. By doing so it may cause some buyers to keep goods [sic] which they might otherwise reject, a policy greatly to be favored when it is remembered that the rejected goods in a case falling under the Draft Convention will be in a country other than that of the seller. To this extent art. 46 reinforces the policy which [sic] lies behind the rule in the Draft Convention that a party can declare the contract avoided only if the breach is fundamental.²⁶⁵

In my view, this explanation is logical and the justification of Article 50 CISG is a good one. However, again, one must be careful not to confuse damages and reduction of price, since the two are truly distinguishable.²⁶⁶ Bergsten and Miller do not make this distinction so clear.²⁶⁷ Nevertheless, I do agree with them that reduction of price amounts to a partial avoidance: if the buyer rejects part of the tender because it is non-conforming quality-wise, then he is only obliged to pay for the part of the tender that he keeps, and thus the price to pay is correspondingly reduced. But what about cases where the defect is one of quantity? In that case, it seems as though the justification would fail: a buyer cannot avoid the non-conforming part of the tender that he has not received yet.

At last, if avoidance is the rationale, why base the formula under Article 50 CISG on value, rather than on a percentage of the contract price? The answer is simply that such a formula would not adequately address all hypothetical situations, especially those where the value of goods changes after the conclusion of the contract. Indeed, "the more complicated proportional method of calculation [of the reduction of price]," where both the value of

²⁶⁵ *Id.*

²⁶⁶ *See supra* Section III.D.1.

²⁶⁷ Bergsten & Miller, *supra* note 185, at 256.

goods delivered and the hypothetical value of conforming goods are taken into account, is notably "intended for use in cases in which the market price of the goods has changed between the conclusion of the contract and delivery."²⁶⁸ Where the price of goods at time of delivery is "[equal] to the real value of conforming goods at the time of the conclusion of the contract . . . the reduced price simply equals the estimated value of the defective goods."²⁶⁹ Only in that case can the reduced price be equivalent to a percentage of the contract price. But even then, it seems as though the notion of percentage fits cases of quantity defects much better than those of quality defects.

7. *Moral Justification*

Finally, one last possible justification to reduction of price is to argue that there is an interest other than economic here.²⁷⁰ The interest is the willingness to bind the buyer to his original promise, but only in a proportionate manner.²⁷¹ Proponents of this justification say that the Article 50 remedy is concerned with "the promise, the moral duty to keep it, and more specifically, with the moral right of the buyer to have the promise kept," and not with the actual efficiency of the promise.²⁷² They also explain that the philosophy of giving the buyer only what he or she paid for, or allowing him or her to pay only to the extent of compliance with the original tender, is based on the same principles and policy as those underlying the specific performance remedy.²⁷³

In my view, this justification is illustrated to a small extent every time a commercial party invokes reduction of price in view of enforcing the original bargain. Nevertheless, this justification may also be criticized, assuming that it is valid, by asserting that the willingness to bind the original seller to the bargain yields to inefficient performances and makes coerced performances less valuable and even worthless. Indeed, if the seller knows that the buyer will accept the goods but ask for a reduction of price, he

²⁶⁸ SCHLECHTRIEM, *supra* note 69, at 441.

²⁶⁹ *Id.*

²⁷⁰ Tuñón, *supra* note 184, at 17.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

may tend to submit non-conforming tenders and stop all efforts to perform efficiently.

Conclusion

This comment has analyzed the scheme of remedies under the CISG and the UCC, and more particularly, the remedies of reduction of price and of granting additional time for performance (or "*Nachfrist*"), in light of fairness and efficiency considerations or of other justifications. At the outset, I asked: do the two general schemes of remedies comply with the two commercial law objectives, fairness and efficiency?

I have argued that the "perfect tender rule" and the "fundamental breach" rule are probably fair and efficient ones. Although fairness is a hard standard to define, I have noted that both schemes are fair ones, since parties to these contracts generally get fully compensated and are subject to a fair allocation of burden and losses. Furthermore, I have explained that the default rules under the two schemes are efficient ones, since they allow parties to secure optimal commitment to performing, as well as optimal reliance by parties. This comment thus serves to conclude that both schemes basically amount to one of "substantial performance." Indeed, the CISG's "fundamental breach" standard and the UCC's "perfect tender rule," coupled with their cure provisions, both create an efficient, equivalent system for the sale of goods.

This comment has further concluded that granting an additional period of time or "*Nachfrist*," as a self-help remedy, has a number of great advantages. Notably, it frees judicial courts and judicial resources for other uses and promotes efficiency. Moreover, *Nachfrist* tremendously increases clarity and certainty in contracts by encouraging negotiation between contracting parties. On a more philosophical level, by giving parties a powerful option and a corresponding impression of freedom, it encourages individuals to enter into commercial relations. Further, this comment explained that not only is *Nachfrist* an efficient remedy, but it also seems to be a fair one, allowing parties to the transaction to receive the exact benefit of their bargain.

Finally, this comment concluded that reduction of price is analyzed differently than the *Nachfrist* period and any other

remedy. In fact, it does not award the expectation interest that parties thrive to obtain in common law damages. Instead, it places the aggrieved party in the position he would have been in had he purchased the goods actually delivered rather than the ones promised. I have questioned whether there is any doubt as to whether reduction of price always leads to fair results. In my opinion, the real question is: what possible justifications can be attributed to reduction of price? I have concluded that it retains its primary justification by insulating the buyer from impediments that would exempt the seller from liability for damages, such as in a case of *force majeure*. A second important justification is where the market price for the goods changes substantially between the time of contracting and the time of delivery, a case where the buyer obtains much more by claiming reduction of price than by claiming damages. Finally, I have explained that there may be a moral justification, where the Article 50 remedy is concerned, with "the promise, the moral duty to keep it and more specifically with the moral right of the buyer to have the promise kept."²⁷⁴

²⁷⁴ *Id.*