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Substantive and Jurisdictional Aspects of International Contract Remedies: A Comment on Avery Katz's "Remedies for Breach of Contract Under the CISG"

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Abstract

This work, which comments on Avery Katz's paper on "Remedies under the CISG" (that is the United Nation Convention on Contracts for the International Sale of Goods), focuses on the transactional design of contract remedies and on the legal and economic implications of contracts taking place in a transnational context, as opposed to a purely domestic context. The point is made that the most characterizing feature of international contracts governed by the CISG lies in the their multi-jurisdictional aspect, whereas other features, such as the mercantile character and the long-distance shipment, although relevant in the concrete assessment of transaction costs, do not significantly differentiate international contracts vis-à-vis domestic ones. In fact, the multi-jurisdictional aspect of international contracts justifies the adoption of default rules on remedies different from those applicable to domestic contracts not only with respect to contract avoidance, but also with respect to specific performance and monetary remedies.

Keywords: Remedies; Breach of contract; International contracts; Specific performance; Damages

Twenty-five years after the adoption of the Convention, papers dealing with the United Nations Convention on Contracts for the International Sale of Goods (CISG) are certainly not a rare occurrence in scholarly writings.[1] Nevertheless, *CISG-enthusiasts* cannot but welcome papers using economic analysis to study the law of international sales, because

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[1] For a comprehensive and updated bibliography on the CISG, see the Pace University's database available at: <www.cisg.pace.edu/cisg/biblio/biblio.html>.

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it is apparent that this approach has been employed way too rarely by private international lawyers, while it can certainly bring an extremely fruitful and stimulating contribution to the understanding of supranational contract law. The reading of Avery Katz's paper on "Remedies for Breach of Contract under the CISG" (hereinafter: the "Paper") testifies, more than any further acknowledgment could do, to that significant contribution. However, the qualities and benefits of the Paper shall be left aside here, while the attempt shall be made at identifying and pointing out the paper's shortcomings.

The main goal of Avery Katz's Paper is set forth at the outset: evaluating CISG remedies in order to "determine whether those remedies maximize contractual value for international traders or, conversely, whether such traders would do better to contract out of the Convention's default rules and into their own arrangements".

The Paper thus deals with the international uniform rules as it would with any other domestic set of rules on remedies for breach of contract, on the basis of the largely shared assumption that remedial terms are just one of the terms of the contract, creating substantive incentives and risk allocation effects as other contract terms do. Accordingly, the Paper emphasizes the role of freedom of contract under Article 6 CISG and focuses on the transactional design of contract remedies. The analysis is carried out on the basis of the literature devoted to remedies in domestic contract law, in particular on the basis of the American literature on US domestic law.[2]

This approach, however, requires the distinction to be made between the two sets of rules considered: on the one hand, the CISG, that is an international set of non-exhaustive uniform default rules to be applied by the domestic courts of the contracting States[3]; on the other hand, domestic law, that is (irrespective of the legal system considered) a coherent and exhaustive set of default, as well as mandatory, rules ranging from jurisdictional ones, to procedural ones, to substantive ones. Furthermore, the approach adopted in the Paper also requires the distinction – which is, of course, closely related to the former one – between CISG contracts and non-CISG (domestic) contracts.[4]

How the distinction is made between the CISG and domestic law (as well as between CISG contracts and domestic contracts) is a crucial point, capable of affecting all subsequent steps of the analysis. In particular, it is here suggested that any work on remedies under the CISG should clarify at the outset two fundamental points: on the one hand, under what conditions it is worth to opt-out of the CISG and to make tailored arrangements on remedies (as well as on other contractual aspects); on the other hand – and only with respect to those kinds of transactions in which the making of tailored arrangements proves to be desirable – what makes making international tailored arrangements different from making domestic tailored arrangements; or, to put it differently, what's the difference between CISG contracts and domestic contracts.

[2] In fact, the analysis is carried out almost entirely on the basis of US literature, which, however, is fully justified in light of the role that economic analysis plays in American scholarship, which has no comparison in any other legal system.

[3] For a study of the CISG's distinctive features and of its impact on the drafting of subsequent conventions, let us refer to Marco Torsello, *Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law* (Munich, 2004).

[4] Of course, not only domestic contracts, but also many international ones exist, which are not governed by the CISG as a consequence of the Convention's criteria of application not being met.

Those questions are well identified in the Paper, but the answers provided to them are not always convincing. As far as the appropriateness of the opting-out is concerned, we cannot agree with the Paper when the statement is made according to which "the overall spirit of the Convention, and the fact that most disputes under it are heard by private arbitral tribunals, plainly encourages parties to choose remedial options that best suit the needs of their transactions". The analysis of existing case law suggests a different conclusion: the very large majority of decisions applying the CISG has been adopted by domestic courts in low-value contracts where the parties did not agree on any tailored rules; in many cases it is apparent that the parties were not even aware of the existence, let alone of the applicability, of the CISG. As a matter of fact, the very purpose of the CISG is to set forth uniform default rules which the parties may conveniently fall back on whenever the costs of making tailored rules is too high; and the advantage of falling back on uniform rules rather than on domestic ones consists in that uniform rules are not entirely foreign to anyone of the parties and represent a single set of default rules to become acquainted with when entering the international market, as opposed to the many legal systems of several contractual partners located in many different jurisdictions.

Notwithstanding the nature of the CISG as a set of default rules applicable whenever the parties do not make their own arrangements, the focus of the Paper is primarily on transactional design, which brings us back to the other relevant distinction pointed out above, between "CISG contracts" and "domestic contracts". In this respect the Paper identifies three distinctive features which, in the Author's view, characterize CISG contracts: first, CISG contracts are "all merchant-to-merchant transactions"; secondly, they are "all transnational transactions in which the parties must contend with the reach of multiple legal systems"; thirdly, they "typically involve shipment of goods across national borders and, on average, over longer distances". These features require further analysis, as does the role that they play in characterizing CISG contracts.

The first statement (the mercantile character of CISG transactions), although disputable,[5] in fact describes the very large majority of CISG contracts, which are commercial sales, to the exclusion of consumer sales. Yet, is this a distinctive feature of CISG contracts vis-à-vis domestic ones? I would argue that it is not, as it merely indicates the outer limits of the kind of transactions that we are dealing with, without providing any positive description of characterizing elements which differentiate those transactions when they take place in the international context vis-à-vis those same transactions at the domestic level.

Similarly, I would also express a doubtful view as to the idea that what differentiates CISG contracts is the very fact that those contracts involve trans-border, long-distance shipment. First of all, this is not necessarily the case. Under the Convention the international character of the transaction is assessed on the sole (subjective) basis of the location of the

[5] Indeed, the statement is not accurate in the light of the text of Art. 2 CISG, which excludes from the Convention's sphere of application contracts concluded for "personal, family, or household use", that is consumer contracts; the exclusion, however, operates only insofar as the purpose of the purchase was apparent to the seller ("unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use"), which in turn makes the Convention applicable to consumer contracts whenever the consumer nature of the transaction was not known nor recognizable.

parties' places of business in different States,[6] irrespective of any objective element of internationality, such as the trans-border transportation of the goods.[7] Accordingly, a sale contract between an Italian seller and a US buyer is governed by the CISG even if the goods do not travel at all, or they are already traveling at the time of the conclusion of the contract, or they merely travel from the Bronx to Manhattan. On the other hand, with respect to the long-distance range of the shipment, it is apparent that the shipment from Los Angeles to New York is much longer-distance than the "CISG-shipment" from Amsterdam to Hamburg, from Bologna to Vienna, or from Montreal to New York. The point is that the long-distance range of the shipment cannot be pointed out as a characterizing feature of CISG contracts simply because it is a variable element in the same way it is in domestic contracting. As such, it determines in concrete situations (whether domestic or international) the amount of transaction costs involved, but those costs are independent from the domestic or international character of the contract: accordingly, other costs equal, the parties should prefer the less costly domestic shipment (e.g. from Pittsburgh to New York) rather than the more expensive shipment from Los Angeles to New York, in the same way that they should prefer the less costly international shipment (e.g. from Montreal to New York) rather than the more expensive shipment from Los Angeles.

The critical remarks on the other characterizing factors suggest that the most relevant element in making a distinction between CISG contracts and domestic ones should be considered as the "multi-jurisdictional" character of CISG contracts; in referring to this character the Paper stresses the fact that all CISG contracts are "transnational transactions in which the parties must contend with the reach of multiple legal systems". Whether this is the only characterizing element of CISG contracts may be disputed; however, it is here suggested that the "multi-jurisdictional" character of the transaction is the only significant feature, among the three pointed out in the Paper, which undoubtedly differentiates CISG contracts from domestic ones. What thus stands as quite surprising is the fact that the economic implications of that characterizing feature are given relatively little relevance in the Paper.

Let us then try to summarize a partially different starting point for the economic analysis of the uniform rules on remedies in international sales contracts provided for under the Convention.

First of all, as mentioned above, there stands the question regarding the reason for setting forth uniform rules on remedies. In fact, the CISG does not aim at entirely displacing domestic rules governing an international sale of goods falling within the scope of the Convention[8]; nor does it aim at creating an autonomous legal system governing international contracts for

[6] For a similar statement in case law, see Tribunale Vigevano (Italy), 12 July 2000, Giur. It. 281 (2001), an English translation of the decision is available at: <http://cisgw3.law.pace.edu/cases/000712i3>.

[7] Conversely, the objective element, in addition to the subjective one, was required to assess the international character of the transaction under the two 1964 Hague Conventions setting forth the Uniform Law on the International Sale of Goods (ULIS), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC); see Peter Schlechtriem, *From The Hague to Vienna – Progress in Unification of the Law of International Sales Contracts*, *in* The Transnational Law of International Commercial Transactions – Studies in Transnational Economic Law 125, at 127 (Norbert Horn and Clive M. Schmitthoff, editors, Deventer, 1982).

[8] See Franco Ferrari, '*Forum Shopping' Despite International Uniform Contract Law Conventions*, 51 Int'l & Comp. L. Quart. 689, 691 (2002).

the sale of goods.[9] The Convention, although drafted by a supranational legislative agency (i.e. Uncitral, the United Nations Commission on International Trade Law), is to be applied by decentralized national courts.[10] To put it differently, the CISG relies on the authority of the domestic legal systems, which have agreed on its application (i.e. the authority of the *forum* State),[11] in order to enforce the rules set forth in the Convention. The unification strategy adopted by the drafters of the CISG thus entails the coexistence of a unified set of substantive rules produced by a supranational lawmaker with the multiplicity of domestic legal systems which persist in maintaining the authority to adjudicate any dispute regarding the uniform rules and to enforce those rules where appropriate.[12]

The line between the competence of the supranational lawmaker and that of the national adjudicators seems, in general terms, to be drawn in rather clear terms: the former sets forth the rules; the latter ones enforce them. However, when it comes to the issue of remedies, one has to acknowledge the ambiguity of this legal term. On the one hand, a remedy may be regarded as the right of the aggrieved party to do, not to do, or claim for, something in the event of a breach committed by the other party to the contract. This profile, which stresses the substantive aspect of a remedy, refers to the right attributed to the aggrieved party in the event of non-compliance by the breaching party: a secondary right which supplements or substitutes the original right to obtain performance as contractually agreed upon. On the other hand, however, a remedy may also be regarded as the possibility of obtaining judicial intervention and the use of public force either to enforce the contractual arrangements, or to assure that the substitute secondary rights granted in the event of default are enforced to the benefit of the aggrieved party entitled to them.[13] We shall refer to this profile as to the jurisdictional (or procedural) aspect of remedies, which necessarily coexists with the substantive one, but plays a much greater role in making international remedies for breach of contract significantly different from domestic ones.

Indeed, the peculiarities of international remedies due to their jurisdictional aspect emerge with respect to all different courses of actions available to the aggrieved party to react against the breach of a contractual obligation.[14] The kinds of remedies that the

[9] See Fritz Enderlein & Dietrich Maskow, *International Sales Law. United Nations Convention on Contracts for the International Sale of Goods – Convention on the Limitation Period in the International Sale of Goods* 56 (New York, 1992).

[10] See Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability and Adoptability*, *in* The International Sale of Goods Revisited 77, 81 (Petar Sarcevic & Paul Volken eds., The Hague/London/New York, 2001).

[11] In this respect, however, it is worth pointing out that the authority of the law of the *forum* mentioned in the text may well be that of a non-contracting State whenever the private international law rules of that State lead to the application of the CISG as part of the foreign law applicable to the contract in question; hence, the reference in the text to "domestic legal systems which agreed on [the CISG's] application" should be read as referring both to legal systems where the CISG has been adopted as part of the domestic legal system, and legal system where the CISG may apply as part of the foreign law applicable by virtue of the domestic conflict-of-laws rules.

[12] See Michael P. van Alstine, *The Role of National Courts: Treaty Law and the Legal Transition Costs*, 77 Chicago-Kent L. Rev. 1303, 1312 (2002).

[13] See J.R. Harker, *The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society*, 101 South African L. J. 121, 129 (1984).

[14] For a comprehensive comparative study, see Günter H. Treitel, *Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved)*, *in* International Encyclopedia of Comparative Law, vol. VII, ch. 16 (The Hague/Tübingen, 1976).

Paper keenly and satisfactorily deals with in the light of their multi-jurisdictional character are privately-administered remedies. These remedies include the main course of action in the event of a breach of contract, leading to the termination (or, in the language of the CISG, avoidance) of the contract. The traditional rule, common to most domestic legal systems,[15] imposes on the debtor to perfectly fulfill all of his contractual obligations in order to be discharged; whenever an inconsistency, even a very minor one, occurs between the terms of the promise and the concrete performance of the obligation, the performance is not deemed satisfactory and the debtor is not deemed discharged from his obligation to perfectly and fully perform.[16] This traditional solution, however, has been criticized because it enhances strategic behavior and moral hazard on the part of the creditor, who may opportunistically take advantage of the possibility to reject any tender which is less than perfect, in order to refuse a substantially correct performance, whenever he seeks to free himself from his obligations promised in consideration of the debtor's full performance. Alternatively, therefore, the debtor's performance may be evaluated according to a "substantial performance" standard. While this alternative solution reduces the possibility of strategic behavior on the part of the creditor, it enhances that of strategic behavior on the part of the debtor, who may opportunistically perform his obligation in a way that, although substantially fulfilling the required standard, ranges below the average standard performance.[17]

The foregoing dichotomy is reflected in the text of the CISG, which impliedly differentiates, in positive terms, between "perfect tender" and "substantial performance", in that it distinguishes, in negative terms, between consequences deriving from a "mere breach" of contract, and remedies available only in the event of a "fundamental breach".[18] Indeed, in all circumstances where a party has not fully performed his contractual obligations, nor has an impediment qualifying for an exemption occurred,[19] the party will be deemed to be in "breach of contract". Given this basic rule, however, the CISG clearly distinguishes between "fundamental breach" and "non-fundamental breach", although only the former notion is defined by the Convention.[20] The relevance of the rule, on the other hand, is (as is also the relevance of the implicit distinction between mere and fundamental breach) rather clear, as it preludes to the different remedies accessible by the aggrieved

[15] See Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 177 (Oxford/New York, 1998).

[16] For further details, see Marco Torsello, *Remedies for Breach of Contract under the 1980 Convention on Contracts for the International Sale of Goods (CISG)*, *in* Quo Vadis CISG? Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods 43, 54 (Franco Ferrari ed., Brussels/Munich/Paris, 2005).

[17] For a similar approach, aiming at "neutralizing strategic behavior", see Clayton P. Gillette & Steven D. Walt, *Sales Law. Domestic and International* 212 New York, 2002).

[18] For a similar statement see Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, 32-Feb Colorado Law. 11, 18 (2003).

[19] See Article 79 CISG.

[20] The structure of the rule under Article 25 is rather complex, as it combines circumstances that apply to the aggrieved party (substantial deprivation of contractual expectations) and others that regard the conduct of the party in breach as compared to the "reasonable person" standard (foreseeability). For a critical view of the vagueness of the provision at hand, see, Andrew Babiak, *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 Temple Int. & Comp. L. J. 113, 113 (1992).

party. Only a fundamental breach, in fact, entitles the aggrieved party to avoidance of the contract.[21]

As a result of the foregoing, it is apparent that the CISG actively favors the performance of the contract as far as possible, and thus limits avoidance to exceptional cases of "fundamental" breaches.[22] Most noticeably, the CISG's favor for the performance of the contract, and thus the completion of the contractual bargain, is substantially enhanced by the broad opportunity granted to the party in breach to "cure" the non-complying performance and therefore to prevent the avoidance of the contract.[23] Overall, the CISG aims at preserving the parties' commitments and at favoring the performance of their agreement and completion of the bargain, thus relying on a general principle of *favor contractus*.[24] The Convention does this by enhancing spontaneous cure of defective performance by the party in breach, but it also does this by favoring judicial claims leading to the same result over claims for the avoidance of the contract, which seem to be relegated to the role of *extrema ratio* remedies.[25]

A similar reasoning is contained also in the Paper, which, in fact, keenly highlights that the CISG advantages party-administered remedies over court-administered remedies, thus providing the argument to justify the Convention's enhancement of spontaneous cure and/or renegotiation of the contract. On the other hand the Paper also highlights that disputing costs (clearly, the most relevant costs generated by the multi-jurisdictional character of CISG contracts) are higher than monitoring or communications costs in international settings, making ex post remedial proceedings less attractive. The question must therefore be posed whether this observation justifies the significant difference observable between the CISG

[21] Moreover, with respect to the remedies available to the buyer, only in case of a fundamental breach can he reject non-conforming goods, claim delivery of substitute goods, and still be entitled to remedies after the passage of the risk to him under Article 70 CISG; similarly, the seller is entitled to declare the contract avoided only in so far as the buyer's non-performance (that is, his refusal to take delivery or, more commonly, his failure to pay the price) amounts to a fundamental breach of the contract.

[22] At the same time, the aggrieved party loses his right to declare the contract avoided if he does not do so within a reasonable time, by means of an express declaration of avoidance (Article 49 CISG), and the buyer's possibility of declaring the contract avoided is limited in that he can only do that if it is possible to make restitution of the goods "substantially in the condition in which he received them" (Article 82 CISG), although exceptions exist to that rule; furthermore, a similar rationale limiting avoidance underlies also the availability of anticipatory remedies, and that of remedies in installment contracts. For further considerations, see Torsello, *supra* note 16, at 58.

[23] See Article 49(1)(b) and Article 64(1)(b) CISG; on this feature of the CISG, see Michael Bridge, *The Vienna Sales Convention and English Law: Curing defective performance by the seller*, *in* Fistkrift til O. Lando 83 (Copenhagen, 1997); Catherine Piché, *The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code 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?*, 28 North Carolina J. Int'l L. & Comm. Reg. 519, 538 (2002–2003).

[24] For a similar statement, with regard to the raise of *favor contractus* to the status of general principle under the CISG, see Michael J. Bonell, *Uniform Law and Party Autonomy: What is wrong with the Current Approach?*, *in* International Uniform Law in Practice – Le Droit Uniforme International dans la Pratique 433, 433 (Unidroit ed., New York/London/Rome, 1988).

[25] In fact, the *Nachfrist* mechanism available under the Convention, possibly leading to the avoidance of the contract, can be triggered only in the "case of non-delivery" on the part of the seller (Article 49 CISG), or in the event of absolute failure to pay the price or take delivery on the part of the buyer (Article 64 CISG); partial performance, thus precludes the triggering of *Nachfrist*; for further considerations, see Torsello, *supra* note 16, at 56.

and the UCC with respect to the right to cure. The UCC, in fact, couples the right to cure with a "perfect tender" rule, whereas the CISG couples the right to cure with the requirement for substantive performance. This solution, which would be disputable under domestic law, is to be considered appropriate in the international context, not only in view of the reduction of restitutionary claims that it produces, but also and particularly in view of the overall reduction of international disputes, the benefits of which outweigh the negative effects of the undeniable higher risk of moral hazard on the part of the seller. In this regard, it is certainly of some relevance to point out that subsequent international instruments setting forth rules on remedies for breach of contract adopted exactly the same approach as the CISG: this is the case, in particular, with respect to the Unidroit Principles of International Commercial Contracts (hereinafter: PICC) and to the Principles of European Contract Law (hereinafter: PECL), both of which make termination of contract possible in the event of a "fundamental" non-performance,[26] but also grant a generalized right to cure the non-conforming performance. In fact, the Unidroit Principles are so much oriented in favor of the completion of the bargain and against termination of the contract that Article 7.1.4 PICC goes so far as to make the cure possible even after the notice of termination has been given by the aggrieved party: a solution which would be rather difficult to justify in any domestic jurisdiction.

While the Paper gives the appropriate relevance to the multi-jurisdictional character of CISG contracts when it analyses termination and other privately administered remedies, it seems to lose track of that guideline when it comes to analyzing specific relief under the CISG. In fact, the Paper summarizes the solution adopted under the Convention in basically two statements: on the one hand, the CISG "sides with the civil law and establishes a preference for specific relief"; on the other hand, it endows the domestic courts with a "discretionary" power to deny specific relief under Article 28 CISG in cases where the remedy would be too burdensome. Both statements require further consideration (and re-consideration) in the light of the distinction between the substantive and the jurisdictional aspect of remedies.

Indeed, as a general rule, under the CISG the aggrieved party has the right to require performance in any event of non-performance.[27] In particular, as far as the remedies available to the buyer are concerned, Article 46 CISG recognizes him a generalized right to require performance from the seller: if the seller fails to perform his obligation in its entirety, the buyer has the right to require the full performance of that obligation[28]; if the seller delivers goods which do not conform with the contractual arrangements, the buyer has the right to require substitute goods or repair of the non-conforming goods. In the first situation (failure to perform the contractual obligation in its entirety) the aggrieved party may require performance and at the same time trigger the *Nachfrist* mechanism, possibly leading to

[26] See Article 7.3.1. PICC and Article 9:301 PECL; it should be noted, however, that unlike the CISG, the PICC and the PECL make the *Nachfrist* mechanism available not only in the event of absolute lack of performance, but also in any event of non-conformity: *cf.* Articles 7.1.1 and 7.1.5 PICC, and Article 8:106 PECL.

[27] See Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 Wash. L. Rev. 607, 614–615 (1988).

[28] See Steven D. Walt, *For Specific Performance under the United Nations Sales Convention*, 26 Texas Int'l L. J. 211, 214 (1991).

the avoidance of the contract if the seller does not cure the breach within the additional reasonable period of time granted by the buyer. In the second kind of situation (delivery of non-conforming goods), the buyer has the right to require substitute goods, or to require the repair of the goods. Both these remedies, however, are subject to limitations, although to different ones. The aggrieved buyer has a right to require substitute goods only in the event that the non-conformity of the goods amounts to a fundamental breach of contract, and the request for substitute goods is made in conjunction or shortly after the notice of non-conformity required under Article 39 CISG.[29] Should the non-conformity of the goods not amount to a fundamental breach, or should the buyer fail to make a timely request for substitute goods, the buyer can only require performance of the contractual obligations as originally agreed upon in the form of the repair of the goods by the seller. Yet, also this remedy is subject to limitations: not only is this remedy subject to the same time constraints as the request for substitute goods, but the possibility to require repair of the goods is also limited in that the request is not to be taken into account when it proves to be unreasonable having regard to all the circumstances of the case.[30]

To better describe the harshness of the stalemate in which the buyer may stand, suffice it to consider the following hypothetical case. First, Seller delivers goods to Buyer: as a consequence of "delivery" having taken place, the *Nachfrist* mechanism is precluded. Second, the goods delivered are non-conforming, but the non-conformity does not amount to a "fundamental breach": as a consequence, Buyer cannot require substitute goods. Third, the goods may be repaired, but the costs of repair compared to the decreased value of the non-conforming goods make this remedy "unreasonable": as a consequence, Buyer cannot require repair of the goods. The outcome in the case described is that the buyer cannot reject the goods and can only have access to monetary relief for the damage suffered as a consequence of the breach of contract committed by the seller.

Even if one did not consider the significant limits which have just been pointed out with respect to the concrete situations in which the aggrieved party has a right to require performance in kind, one would still need to acknowledge that having a right to require performance is of limited benefit if that right is not accompanied by legal tools making the enforcement of that right possible. This rather simple statement brings us back to the distinction between the substantive profile of contractual remedies, and their judicial, or procedural, profile, in that it recalls the need to resort to public force in order to enforce a right, whenever the latter requires the participation of a debtor who is not willing to cooperate in order to accomplish the creditor's request. As applied to the right to require performance of the contract in the event of a breach, the foregoing leads us to consider the availability of judicial intervention of domestic courts in contractual matters, in the form of a judgment for specific performance.[31] A judgment of this kind constitutes the necessary link between the abstract recognition of a party's substantive right to require performance

[29] For a comment on the rule set forth in Article 39 CISG, see Franco Ferrari, *La Vendita internazionale. Applicabilità e applicazioni della Convenzione di Vienna del 1980* 207 (Padova, 1997).

[30] For a court decision dealing with the remedy of repair of the goods, see Cour d'Appel Grenoble (France), 26 April 1995, available on the Internet at <http://cisgw3.law.pace.edu/cases/950426f2.html>.

[31] See Johan Erauw and Harry Flechtner, *Remedies Under the CISG and Limits to Their Uniform Charater*, *in* The International Sale of Goods Revisited 35, 44 (Petar Sarcevic & Paul Volken eds., The Hague, 2001).

and the concrete possibility to invoke public force to take all necessary steps to obtain performance. The latter stage refers to the enforcement of the right. Enforcement, however, in modern societies would not be possible without prior recognition of the existence of the right in the concrete case by the competent adjudicating court, which has the power to order the domestic public officials to make use of public authority in order to fully implement the creditor's right. As a very general rule, one may still state that, given the same circumstances, specific performance is most likely granted by courts located in civil law countries, while common law courts more often uphold a claim for damages and are more reluctant to enter an order for specific performance. However, the judicial aspect and the substantive one must be kept distinct, and the substantive right to require performance, given its contractual basis, cannot but be recognized in all legal systems, whereas the difference among legal systems is based on the different attitude towards granting judicial support to that substantive claim.

Given this basic observation, the Paper is right in pointing out that the drafters of the CISG had to face the challenging task of providing for a compromise solution[32]; however, the compromise reached under Article 28 CISG (according to which a national court "is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by" the CISG) is not a "substantive" compromise, granting a discretionary power to the domestic courts. Instead, Article 28 CISG is the result of a "judicial" compromise, which creates a gap in the uniform instrument, because it leaves the critical policy decision about the pre-conditions for the granting of specific performance to the domestic legal systems. This conclusion is confirmed by the change in the language of the provision at hand which was introduced at the Diplomatic Conference in Vienna, where the word "would" was substituted for the word "could".[33] Domestic courts are thus urged to proceed in the very same manner they "would" with respect to a domestic contract, rather than entering a judgment for specific performance on the basis of a discretionary evaluation.[34]

In the light of the foregoing, the solution adopted under the CISG can in no event be deemed satisfactory for the very reason that there is no single solution and the compromise has been reached by way of letting the law of the *forum* decide in each case. Interestingly, the need to provide for comprehensive sets of principles prevented the drafters of the PICC and those of the PECL from relying on the same gap-based compromise. As a result, both sets of international principles adopt as a general rule the availability of specific performance, but they both provide for very similar (although not identical) exceptions with respect to non-monetary obligations.[35] The aggrieved party may not claim specific performance if performance is impossible in law (unlawful) or in fact, if it is unreasonably burdensome, if performance may be obtained from another source, if it is of a personal character, if the

[32] For references to the history of the provision adopted under the CISG, see Rolf Herber, *The Rules of the Convention Relating to the Buyer's Remedies in Cases of Breach of Contract*, *in* Problems of Unification of International Sales Law 116 (New York, 1980).

[33] For a similar observation, see Peter Schlechtriem, *Uniform Sales Law. The UN-Convention on Contracts for the International Sale of Goods* 62 (Vienna, 1986).

[34] For further considerations on the "gap" created under Article 28 CISG, the consequences thereof, and the way in which the gap is to be filled by resort to the law of the *forum* State (to the exclusion of private international law rules), let us refer to Torsello, *supra* note 16, at 65.

[35] See Article 7.2.2 PICC and Article 9:102 PECL.

remedy is not required within a reasonable time. These rules, taken from recently adopted international instruments, provide an interesting alternative set of rules which parties to an international contract may want to opt-into. From a substantive point of view, the rules clearly improve on the CISG; from the jurisdictional viewpoint, however, in the absence of relevant case-law, it is rather difficult to predict whether a domestic court called upon to adjudicate a contract governed by either the PICC or the PECL would enter a judgment for specific performance in a situation where that court would not do so under its own law.

The last profile which deserves attention here relates to the availability of monetary relief in general, and to the remedy of price reduction in particular. The remedy at hand is to be kept distinct from damages, although in the Paper this distinction is not made clear enough. In fact, in the specific performance damages continuum, the remedy of price reduction ranges closer to the former extreme than to the latter one. Indeed, the CISG's reluctance to grant specific performance whenever the *lex fori* does not provide for this remedy should not in itself hinder the conclusion that the CISG disfavors avoidance of the contract, nor should it hinder the conclusion that the CISG favors remedies leading to the performance of the contractual bargain. However, the CISG's favor for the completion of the contractual bargain should not be intended as necessarily fostering the adoption of remedies which compel the performance of the parties' obligations as originally agreed upon. Instead, the very nature of the goal pursued by the CISG's remedial scheme appears when one considers the last remedial option left to the buyer in the event of a breach committed by the seller. In fact, should the non-conformity of the goods delivered not amount to a fundamental breach (thus preventing avoidance, or a claim for substitute goods), and should it prove unreasonable to claim for repair of the goods, the only option left to the buyer (besides a claim for damages) is the remedy of price reduction.[36]

The remedy of price reduction has been pointed out as one of the most efficient remedies for the buyer.[37] On the one hand, whenever the buyer has not yet paid the purchase price, this remedy may be adopted in the form of a self-defense on the part of the aggrieved party, since Article 50 CISG makes it clear that the buyer may make a declaration to the effect of reducing the price "whether or not the price has already been paid".[38] On the other hand, the remedy in question is an efficient one in that – in a situation where the buyer is not substantially deprived of his reasonable expectations[39] – it imposes on the parties to rearrange the terms of the contract on the basis of the new situation created by the non-compliance of the seller's performance with what had been thus far relied upon by the buyer. As a consequence, the CISG favors the completion of the contractual bargain, but it

[36] See Article 50 CISG; for papers dealing with this provision, see e.g. Erika Sondahl, *Understanding the Remedy of Price Reduction – A Means to Fostering a More Uniform Application of the United Nations Conventions on Contracts for the International Sale of Goods*, 7 Vindobona J. Int'l Comm. L. & Arb. 255 (2003); with respect to the draft version of the CISG, see also Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, 27 Am. J. Comp. L. 255 (1979); for a court decision dealing, among others, with the remedy at hand, see OLG Schleswig-Holstein, 22 August 2002, Internationales Handelsrecht 20 (2003), also available in English at <http://cisgw3.law.pace.edu/cases/020822g2.html>.

[37] For this observation, see Herber, *supra* note 32, at 125.

[38] See Piché, *supra* note 23, at 552–553.

[39] Cf. Article 25.

does that by favoring an adaptation of the contract to the new contingencies.[40] Therefore, the purpose of the remedy at hand is different from that of damages; accordingly, price reduction is available in all cases in which the performance does not conform with the terms of the contract, even if such non-conformity is justified under Article 79 CISG, thus precluding the availability of damages. The underlying rationale of the remedy is therefore not compensation, but rather completion of the contractual bargain.

Of course, given the aforementioned goal of favoring the completion of the original bargain in an adapted fashion, nothing would be more inappropriate than the adoption of a test to re-determine the price which altered the original synallagmatic equilibrium of the contract. In fact, however, according to the Paper in cases where the contract price "exceeds market value (i.e. when buyer has overpaid ex post), the CISG measure overcompensates the buyer relative to her expectation. Conversely, when contract price is less than market value (i.e. when the buyer has underpaid ex post), the CISG measure undercompensates the buyer relative to her expectation". This view cannot be shared.

Under Article 50 CISG "the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time". Accordingly,

$$V : V\alpha = P : P\alpha$$

Alternatively, if one focuses on the shortfall in value, as in the Paper:

$$V : \%V = P : \%P$$

where V is the value that conforming goods would have had if delivered to the buyer; $V\alpha$ the value of the goods actually delivered; $\%V$ the shortfall in value; P the contractual price; $P\alpha$ the reduced price to be paid by the buyer and $\%P$ is the part of the price to be set off (so that $P\alpha = P - \%P$).

We can agree with the Paper that in cases where the contract price is equal to the market value of the goods that should have been delivered, the CISG's ratio measure does not create any problem and it produces the same result as the compensation principle would have. Conversely, the Paper criticizes the results of the CISG's formula in the event that the contract price is set above or below the market value of conforming goods, so that the buyer has made either a bad ($P > V$), or a good ($P < V$) deal.

The conclusion drawn in the Paper cannot be shared. Let the contract price (P) be \$100, and the bad/good deal situations be reflected by a (would-be) value of the conforming goods (V) of \$80 and \$120, respectively. Let the real value of the non-conforming goods ($V\alpha$) be \$60.

In the bad deal scenario ($V = \$80$), the buyer would have overpaid the goods ($P = \$100$), and will consistently overpay also for the non-conforming goods ($V\alpha = 60$). In fact,

[40] For a similar conclusion, see Enderlein & Maskow, *supra* note 9, at 87; Piché, *supra* note 23, at 531, stating that "[i]n 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"; Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minnesota J. Global Trade 105, 121 (1987).

$$P\alpha = P\frac{V\alpha}{V} = 75$$

In the good deal scenario ($V = \$120$), the buyer would have underpaid the goods ($P = \$100$), and will consistently underpay also for the non-conforming goods ($V\alpha = 60$). In fact,

$$P\alpha = P\frac{V\alpha}{V} = 50$$

The point is that the formula under Article 50 CISG is not intended to measure damages and compensate them; instead, it is intended to indicate the proportion by which the price can be reduced in the event of inferior value of the goods delivered. The reduction of the price can take place whether or not the seller is liable for the non-conformity. If the seller is not liable, price reduction is the only remedy available, the purpose of which is to make sure that the bargain is performed to scale; if the seller is liable, the reduction of the price does not preclude an additional claim for damages, so that if the former undercompensates the buyer, the claim for damages assures full compensation.

In conclusion, we cannot but fully agree that "ultimately, it is economics that drives the demand for international trade, and international trade that drives the demand for transnational contract law". We also support the view according to which "international legal institutions should accordingly attend to the economic underpinnings of the transactions they govern, so as to facilitate their underlying purposes". However, we must also point out the CISG's key provision in this respect, that is Article 6,[41] contains in fact two separate rules.[42] On the one hand, there stands what is usually referred to as "freedom of contract",[43] according to which the parties may derogate from or vary the effects of any of the Convention's substantive provisions. On the other hand, the parties may opt out of the Convention as a whole on the basis of their "party autonomy", thus making applicable to their transaction a different set of domestic rules.[44] The effects of the parties' agreement to opt out of the Convention resemble those of a positive choice of law, in that the autonomy of the parties to an international contract is capable of affecting the law applicable to their contractual relationship. However, the wording of Article 6 should not induce one to think that in respect of international sales transactions there is no need whatsoever for mandatory

[41] See Article 6 CISG, according to which "the parties may exclude the application of this Convention or [...] derogate from or vary the effect of any of its provisions".

[42] For a similar distinction, see Filip De Ly, *Uniform Commercial Law and International Self-Regulation*, *in* The Unification of International Commercial Law 59, 63 (Franco Ferrari ed., Baden-Baden, 1998); a similar distinction is drawn, although in a broader context, by Sergio M. Carbone, *Autonomia privata e contratti internazionali*, 1992 Nuova Giurisprudenza Civile Commentata 282, 282 (1992).

[43] Scholarly writings on freedom of contract in general are extremely numerous; with specific regard to the CISG, see, *e.g.*, Bonell, *supra* note 24, at 433; Franco Ferrari, *Remarks on the Autonomy and the Uniform Application of the CISG on the Occasion of its Tenth Anniversary*, 1998 Int'l Contr. Adv. 33 (1998); Jan Ramberg, *Autonomy of contract and non-mandatory law*, *in* Scandinavian Studies in Law 143 (1993) Ulrich Schroeter, *Freedom of contract: Comparison between provisions of the CISG (Article 6) and counterpart provisions of the Principles of European Contract Law*, 6 Vindobona J. Int'l Comm. L. & Arb. 257 (2002).

[44] For a similar statement and a commentary on Article 6 of the CISG, see Franco Ferrari, Vendita internazionale di beni mobile – Art. 1–13. Ambito di applicazione. Disposizioni generali, *in* Commentario del Codice Civile Scialoja-Branca 109 (Bologna/Rome, 1994).

rules.[45] The political choice of the extent of the limits to the parties' freedom of contract is left to the national legislatures and judiciaries. Where applied to the issue of remedies, the foregoing requires a frequent reference to the distinction between the substantive and the judicial aspect of remedies. By virtue of Article 28 CISG, for instance, the drafters of the Convention intended to leave outside the scope of the CISG the procedural aspect of the enforcement, by resort to public force, of the right to require performance. Article 28 CISG is thus a provision addressed to the domestic courts called upon to apply the Convention and the purpose of this provision is to leave untouched the domestic competence to determine when and under what circumstances a court may enter a judgment for specific performance.[46]

The CISG is an international set of non-exhaustive uniform default rules to be applied by the domestic courts of the contracting States: reference to domestic law, whether that of the *forum*, or that of the law applicable by virtue of the private international law rules of the *forum*, is constantly necessary to provide the precise framework within which the CISG transaction takes place. Accordingly, among the many features of CISG contracts, the one which has proven to be the most fruitful to distinguish these contracts from domestic ones is the multi-jurisdictional character of CISG contracts. Where investigated in full, this character is capable of deeply affecting the economic analysis of the default rules applicable to international sales, as well as that of the tailored rules that private parties may want to agree upon. The Paper identifies the importance of the multi-jurisdictional character of CISG contracts and keenly highlights some of its economic implications, like the need to favor privately administered remedies. The overall analysis, however, would have probably benefited from a clearer identification of the starting points of the study and from a more accurate selection of the salient features of CISG contracts, leading to the exclusion from that list of features such as the mercantile character of the transactions and the cross-border/long-distance character of the shipment, which have proven not to be distinctive features vis-à-vis domestic contracts. The Paper certainly provides an excellent framework for the economic analysis of remedies under the CISG; we are convinced, however, that that framework would serve better the goals pursued in the study if the data included in the framework were chosen in a more selective way, aimed at determining which features of CISG contracts are really distinctive and unique vis-à-vis domestic contracts.

[45] See Uwe Blaurock, *The Law of Transnational Commerce*, *in* The Unification of International Commercial Law, 9, 21 (Franco Ferrari ed., Baden-Baden, 1998), where the Author observes that "the rules of international trade have always been based on the principle of party autonomy. While the notion of autonomy underpins both the Continental and the Anglo-American legal Systems, it remains that the state, nonetheless, reserves the right to restrict the independence of parties within its own legal order for such just and reasonable concerns as the protection of the economically weaker parties and the political direction of the economy"; moreover, in general terms, see Alina Kaczorowska, International Trade Conventions and Their Effectiveness. Present and Future (The Hague/London/Boston, 1995); Arthur S. Hartkamp, *Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope*, Unif. L. Rev. 81, 84–85 (2003).

[46] Article 28 does not set forth a substantive uniform provision addressed to the parties and, as a consequence, the parties cannot opt out of Article 28 CISG; a similar reasoning supports the conclusion that also the Final Provisions contained in Articles 89–101 CISG are not subject to the parties' opting-out, in that those rules are not substantive and are addressed to the contracting States and not to the parties; for a similar remark see Peter Winship, *Final Provisions of Uncitral's International Commercial Law Conventions*, 24 Int'l Law. 711 (1990).