

**The Remedy of Price Reduction  
under CISG: With Special Reference  
to Jordanian Civil Law and English  
Sale of Goods Law**

**Dr. Yusuf Obeidat,•**

**Abstract:**

This paper addresses the price reduction remedy established by Articles 50 of the United Nations Convention on Contracts for the International Sales of Goods (hereafter CISG). It begins with examining the prerequisites of price reduction, and exploring the advance declaration for exercising this remedy according to some selected courts' decisions. The paper argues that those decisions agree with the structure of remedial system of CISG, for Article 50 should be applied in conjunction with other provisions particularly those related to avoidance. It also examines whether price reduction is with unilateral nature in fact, and merits classification as a claim or defense. The scope of this paper expands its benefit to both legal systems by making a special reference to the position of Jordanian Civil Law, as one of the civil law systems, and English sales law, as one of common law systems.

**Keywords:**

Price Reduction, United Nations Convention on Contracts for the International Sales of Goods, (CISG) Article 50, Jordanian Law, English Law.

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• Associate Professor of Civil Law, Faculty of Law, Yarmouk University, Irbid, Jordan.

**[Dr. Yusuf Obeidat]**

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## **0 Introduction**

The 1980 United Nations Convention on Contracts for the International Sale of Goods becomes effective on the first of January 1988. The convention included some rules that were a compromise between civil law system and common law system, including the one provided for in Article 50 of CISG which is related to the remedy of price reductions. It provides that:

If the goods do not conform to the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles, the buyer may not reduce the price.

This paper is dedicated to introduce a thorough analysis of this Article through dealing with its prerequisites, particularly, whether using the remedy of price reduction requires separate declaration, and whether it is with unilateral nature in fact, and merits classification as a claim or defense.

Taking into account that Comparative Law plays a role in a better understanding of foreign legal systems, The scope of this paper expands its benefit to both legal systems by making a special reference to the position of Jordanian Civil Law, as one of the civil law systems, and English Sales Law, as one of common law systems (the two laws hereafter).

Under CISG Article 50<sup>(1)</sup> the remedy of price reduction requires that the

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(1) Although the basic concept of price reduction remains unchanged, CISG Article 50 differs from 1978 Draft Article 48 in several respects: First, the method of computing the price reduction is different."Mr. ROGNLIEN (Norway), introducing his proposal ... said that its main purpose was to amend the time at which the value of non-conforming goods should be assessed.... His delegation considered that the time of delivery would be preferable to that of the conclusion of the contract partly because the value at the time of the delivery would be a more adequate substitute for damages" (Official Records, p. 357). Second, CISG Article 50 contains a new reference: CISG Article 50 is made inapplicable if the seller remedies any failure to perform his obligations in accordance with CISG Article 37."Mr. KLINGSPORN (Federal Republic of Germany)... said his delegation believed that the second sentence of [CISG Article 50] should refer to [CISG Article 37 as well as to [CISG Article 48]. It seemed to him logical that a provision in regard to a buyer's declaration of reduction of price should apply not only to the case in which a seller

## [The Remedy of Price Reduction Under CISG]

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buyer receives non-conforming goods from the seller and he decides to accept them. Though, this remedy is known in Jordanian Civil Law, it does vary slightly from its forms of price reduction. On the other hand, it is unknown to the English Sales Law and therefore it is regarded as one of the potential areas of uncertainty based on the differences from the remedies available under this law. It is an opportunity for a brief examination, in this paper, of one of the key provisions of the CISG, namely, Article 50, with reference to Jordanian Civil Law and English Sales of Goods Act 1979.

Therefore this paper will be divided as follows: the issue whether price reduction is a right of unilateral nature under CISG, the precondition of price reduction remedy under CISG and the position of the two laws.

### **1 Price Reduction: A Right of Unilateral Nature?**

It is submitted that Article 50 of CISG is a self-help remedy since it gives the buyer the advantage to unilaterally declare the price reduction, i.e. the buyer has the power of determination solely without any requirement of court's or expert's intervention. Price-reduction as a remedy for contractual breach can, in many cases, be regarded as a pre-procedural remedy. This is in the sense that the buyer presumably often demands a reduction in price from the seller in case retaining the goods delivered serves his interests even though they do not conform entirely to what the parties had agreed on in the contract. If the requested price reduction is not accepted by the seller the dispute in all likelihood will be dealt with in court. It has been argued that when price-reduction is claimed in court it often assumes the nature of a defense rather than a claim. This is so when the seller claims the purchase price for delivered goods and the buyer brings forth a claim for price reduction on the basis of non-conforming goods. Even though in practice price-reduction has assumed a character of a defense rather than a claim, it must be emphasized that it is still

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remedied a failure to perform his obligations after the date for delivery [CISG Article 48], but also that case in which such a failure was remedied before the date for delivery [CISG Article 37]" (Official Records, p. 360). Also, a new Article has been added to the Official Text, CISG Article 44, which should be read in conjunction with CISG Article 50. The Secretariat Commentary on 1978 Draft Article 46 is only of limited relevance to CISG Article 50. The Legislative history of CISG Article 50: Match-up with 1978 Draft to assess relevance of Secretariat Commentary. available at: <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-d-50>.

**[Dr. Yusuf Obeidat]**

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a unilateral right of the buyer.<sup>(2)</sup>

On the other hand the Civil Law Systems, (such as Jordanian Civil Law) require expert advice or the court to determine the difference in value between the contract price and the actual value. Article 516 of Jordanian Civil Law for example states that: If defective goods perished, after delivery, for old hidden defect or consumed by a buyer before his knowledge of the defect, he could claim price reduction<sup>(3)</sup>. Under this Article price reduction remedy is not a self-help remedy since the matter should proceed to litigation. Once the matter proceeds to court, the buyer should provide evidence to his claim

In practice, the difference between price reduction by the buyer in light of article 50 of CISG and in light of Jordanian Law is deceptive since any price reduction by the buyer should be definitely reasonable; otherwise, it would be disputed by the seller and subject to review by the court.<sup>(4)</sup> Furthermore, it has been submitted that: "The self-help view of the remedy is further reduced where the buyer has already paid the purchase price. Article 50 applies "whether or not the price has already been paid." If the buyer chooses to reduce the price before it has paid, it can merely deduct the difference in value from what it pays to the seller. Where the price has already been paid, the buyer must seek a refund from the seller for a portion of the purchase price. Most parties would prefer to be the defendant in any action rather than the

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(2) Jarno Vanto, Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 50 of the CISG, (New York: Cambridge University Press, 2003), available at <http://cisgw3.law.pace.edu/cisg/text/peclcomp50.html#er>. See also Erika Sondahl, 'Understanding the Remedy of Price Reduction – A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods', 7 *Vindobona Journal of International Commercial Law and Arbitration* (2003) 255-276), where he says that: The CISG Article 50 remedy of the reduction of the price is quite unique in many respects. Perhaps, the most significant feature of Article 50 is the manner in which it operates. Article 50 gives the buyer the ability to unilaterally declare a price reduction, even before it has paid. Unlike a price reduction claim, a buyer's damage claim relies on the seller or the tribunal's decision to liquidate its claim.

(3) See also Articles 517 and 518 of Jordanian Civil Law.

(4) 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.* (2000) 1- 36, also available at <http://cisgw3.law.pace.edu/cisg/biblio/piliounis.html>

## [The Remedy of Price Reduction Under CISG]

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plaintiff, and this situation illustrates this principle if the seller refuses to cooperate with the price reduction, the buyer will be required to commence legal proceedings to recover the price difference. This is a much more onerous remedy than the buyer unilaterally determining a price reduction and deducting it from the price it pays to the seller<sup>(5)</sup>.

However applying the view of the unilateral nature of the buyer's right to reduce the price, would be problematic. As mentioned above, any price reduction by the buyer must certainly be reasonable, and if the buyer chooses to reduce the price before it has paid, he can merely deduct the difference in value from what he pays to the seller. In practice, in the absence of expert's and court's intervention, the practical issue that arises is how can reasonable deduction be measured? The matter would be discretionary to the buyer since there is not criterion or elements as basis for practicing the right of price reduction. Therefore the legal rules should be formulated in a way that can avoid dispute between the parties, and thus the law should exclude the self-help remedies rather than upholding them. This would preserve social peace and safety in conformity of law's purpose to preserve peace in the face of any conflict that may arise from practicing self-help remedies without any requirement to have the determination of the innocent party upheld by the court or expert.

It is submitted that upholding the unilateral nature of the price reduction remedy would encourage buyers to take their legal rights in their own hands unless there is a dispute with the seller as to the amount of the reduction. Therefore, the only case for the buyer to practice his right to reduce price unilaterally is that where there is an agreement with the seller about the price reduction. This leads us to distinguish between two situations.<sup>(6)</sup>

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(5) Piliounis, *ibid*.

(6) See for this also Eric E. Bergsten & Anthony J. Miller, 'The Remedy of Reduction of Price', 27 *American Journal of Comparative Law* (1979) 255-277. Available online at: <http://cisgw3.law.pace.edu/cisg/biblio/bergsten.html>. Where he stated that: "From the point of view of the final adjustment of the financial obligations of the parties, it is of no consequence that the price is reduced by the buyer's unilateral declaration. If the price has not yet been paid, he will offer to discharge his obligation by paying the reduced sum. If the price has been paid he will claim the amount of the reduction back from the seller. However the same result would occur if the buyer were to make a claim for damages. And in either case, if the seller disagrees

**[Dr. Yusuf Obeidat]**

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The first situation is when the price has been paid by the buyer and the seller refuses to accept the idea of price reduction. In this case the self-help view of price reduction remedy is reduced, as the buyer should proceed to court to claim refund of the amount of reduction.

The second situation is when the price has not been paid: in this case if the seller refused to accept the amount of reduction by the buyer or the existence of non-conformity in the goods, the matter will proceed to litigation and the remedy will not act in its intended manner as a self-help remedy. However, in case of acceptance by the seller on the amount of reduction the remedy would not be considered as acted in its normal way as a self-help remedy of the buyer, since the acceptance of the seller on amount of reduction which was the decisive element of not transforming the case to the court. In other words, if there was a dispute between the two parties as to the amount of reduction, the matter would ultimately come before the court to settle the issue. The aforementioned discussion leads to question whether the remedy of price reduction is still considered of a unilateral nature.<sup>(7)</sup>

Moreover, as it was pointed in a study conducted in 1998 of ten cases from multiple jurisdictions using Article 50, it was found that Article 50 was not used "offensively" by the buyer. Instead, it found use predominantly as a counterclaim or a defense to an action by the seller for the purchase price.<sup>(8)</sup>

Thereupon, it would be inappropriate to characterize the right to reduce price by the buyer as a defense in all situations. It seems that the buyer's action for price reduction constitute a defense when the seller initiates a lawsuit for the purchase price to be paid by the buyer. On the other hand, it is a claim when the price has already been paid since the buyer should proceed to claim refund of a proportion of the price from the seller.

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with the buyer as to the existence of a non-conformity in the goods -- or other failure of performance -- or as to the monetary consequences of that non-conformity, the issue must ultimately be settled in court".

(7) Therefore it is-with all due respect, inaccurate to say that: As to the effects it{price reduction remedy} differs from many models offered by national laws in that it gives the buyer a stronger position. If the buyer wants the non-conforming goods he can unilaterally adapt the contract to the new circumstances. He need not look to a judge, nor need he depend in any way on the seller. His unilateral declaration suffices. See for this will, supra note 1, at 368-376.

(8) Piliounis, supra note 5, at 1-46.

## [The Remedy of Price Reduction Under CISG]

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In addition, it became clear that the sole application for the price reduction remedy (and so characterizing the buyer's right of price reduction as of unilateral nature), is when the price has not been paid and the buyer declared unilaterally price reduction, followed by seller's acceptance. In other words, even in this situation the buyer's action is subject to the seller's acceptance to cooperate with the price reduction. Therefore, it must not be emphasized that price reduction is still a unilateral right of the buyer, for the matter is subject to the seller's decision.

### **2 Price Reduction Remedy under CISG and Under the Two Laws**

This section examines the Precondition of Price Reduction Remedy under CISG, and the remedy under the Jordanian Civil Law and the English Law.

#### **2.1 Precondition of Price Reduction Remedy under CISG**

In order to be entitled to a "price reduction" for the delivery of non-conforming goods, Article 50 of the Convention imposes a series of preconditions. It must be established that <sup>(9)</sup>:

1. The goods do not conform to the contract, <sup>(10)</sup> and the buyer gives notice of the lack of conformity. <sup>(11)</sup>
2. The seller did not remedy (or offer to remedy) the defect before or after the time of delivery. <sup>(12)</sup>

In addition some courts added a third condition which is an advance declaration addressed from the buyer to the seller to inform him of the intention of price reduction. These three conditions will now be examined.

##### **2.1.1 The Goods do not conform to the Contract**

It is a prerequisite for the application of Article 50 that the delivered goods

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(9) See for this the decision of court in Spain, the case of Audiencia Provincial de Barcelona People Fisheries (Pvt) Ltd v. Pescados Videla SA, (24 March 2009), Translation by Guillermo Coronado Aguilar, DATE OF DECISION: 20090324 (24 March 2009), JURISDICTION: Spain, TRIBUNAL: Audiencia Provincial de Barcelona, sección 13ª, available online at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/090324s4.html>

(10) Article 35 of CISG.

(11) Article 39 of CISG.

(12) Articles 37 and 48 of CISG.

**[Dr. Yusuf Obeidat]**

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do not conform to the contract. This means that price reduction remedy can only be used by the buyer in case of receiving non-conforming goods<sup>(13)</sup>. Article 35(1) of the Convention states that “the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract”. Therefore, the language of Article 35(1) shows clearly that the application of Article 50 is not limited to a certain case of non-conformity. The buyer can use the right of price reduction remedy irrespective of the reason for non-conformity mentioned in Article 35(1) i.e. either in relation to quantity, quality, description or packaging required by the contract. Additionally Article 35(2) of CISG states that:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

However non-conformity will not exist and therefore the seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.<sup>(14)</sup>

Therefore Article 35 CISG contains a rather comprehensive and explicit provision on determining the lack of conformity. Moreover, Article 35(1) CISG lays down the principle that the contract of the parties forms the primary basis for determining any lack of conformity. These words have already influenced the way in which the issue of conformity has been expressed in doctrinal terms in several jurisdictions, irrespective of whether the sales are domestic or

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(13) Article 50 of CISG.

(14) Article 35(3) of CISG.



## [The Remedy of Price Reduction Under CISG]

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international.<sup>(15)</sup> Except when the parties have agreed otherwise, the subsidiary provisions contained in Article 35(2) CISG apply setting forth a number of positively worded presumptions concerning the conformity of the goods. These rules may be regarded as aids in interpreting contracts and set out, at the same time, certain burden-of-proof rules. Finally,<sup>(16)</sup> Article 35(3) CISG contains an exemption to the seller's liability for lack of conformity if the buyer knew or could not have been unaware of the lack of conformity.<sup>(17)</sup>

One must note that the objective of CISG Article 50 is to give the buyer an opportunity to keep the received goods which, even though not entirely conforming to what had been agreed on in the contract, he may still make use of but may take the non-conformity into account when paying the purchase price. This means that price reduction is a remedy that is available to the buyer only if the goods are not in conformity with what the parties had agreed on in the contract and not, for example, in cases where the price of the contracted goods has gone down in the world market after the conclusion of the contract and the buyer feels trapped in a bad contract.<sup>(18)</sup>

Having established that, it can be added that the remedy of price reduction is not available in types of breach other than non-conformity of goods. Other types of breach contained in Articles 31-34 such as late delivery, handing over documents, etc. do not fall within the range of Article 50, and price reduction is not available.<sup>(19)</sup>

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(15) René Franz Henschel, Creation of Rules in National and International Business Law: A Non-National, Analytical-Synthetic Comparative Method, in Camilla B. Andersen & Ulrich G. Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, (Wildy: Simmonds & Hill Publishing, 2008), 177-202, online at:

<http://cisgw3.law.pace.edu/cisg/biblio/henschel1.html#iv>.

(16) Henschel, *ibid*.

(17) See for this *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd*, Australia Federal Court, (20 April 2011) <http://cisgw3.law.pace.edu/cases/110420a2.html>]

(18) Vanto, *supra* note 3.

(19) Alexander Lorenz Dinslaken, Germany/Canterbury, England, 'Fundamental Breach under the CISG, Pace essay submission, June 1998. Available online at:

<http://cisgw3.law.pace.edu/cisg/biblio/lorenz.html>

**[Dr. Yusuf Obeidat]**

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As with the remedy of damages, the remedy of price reduction does not require a "fundamental" breach but is available in case of simple breach, i.e. in any case of non-conformity of goods.<sup>(20)</sup>

The reason for requiring only a simple breach of contract to use the price reduction remedy,<sup>(21)</sup> lies in ensuring the CISG's purpose to preserve the parties' bargain wherever possible, i.e. ensuring the performance of the contract despite a (non-fundamental) breach to avoid considerable unnecessary and unproductive costs, such as those associated with the return or storage of the goods.<sup>(22)</sup>

However in all cases the buyer loses the right to demand a reduction in price under Art. 50(1) CISG, if it does not give a proper notice specifying the lack of conformity of the goods.<sup>(23)</sup>

It is a prerequisite for invoking price reduction that the buyer complies with giving notice as indicated in Article 39 of CISG. This Article provides that:

- (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

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(20) Dinslaken, *ibid*.

(21) That is also the reason for limiting particularly drastic legal consequences (such as the avoidance of the contract See CISG Arts. 49(1)(a), 51(2), 64(1)(a), 72(1), 73(1) & (2), and the buyer's entitlement to substitute delivery CISG art. 46(2)) to cases in which the breach of contract is fundamental.

(22) Franco Ferrari, 'Fundamental Breach of Contract under the UN Sales Convention- 25 Years of Article 25 CISG', -25 *Journal of Law and Commerce* (Spring 2006) 489-508.

(23) This was applied in a Germany case. TRIBUNAL: LG Stendal [LG = Landgericht = District Court], (12 October 2000), CASE NUMBER/DOCKET NUMBER: 22 S 234/94, available online at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001012g1.html>.

## [The Remedy of Price Reduction Under CISG]

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Article 39 tells that if the buyer fails to notify the seller within the prescribed period, he "loses the right to rely" on the non-conformity. This language, (subject to the exceptions examined underneath), would prevent the full range of remedies such as a claim for: damages, delivery of substitute goods, i.e. requiring performance, fixing an additional period of time for performance, declaring the contract avoided, and reduction of the price.

Under this language a seller's action to recover the price would not be subject to a set-off or counterclaim based on a defect which the buyer knew or ought to have discovered if the buyer fails to notify the seller within the periods stated in Article 39. <sup>(24)</sup> However this rigorous rule is subject to the following exceptions, in which the seller cannot rely on the buyer's failure to give that notice.

a- Excuse for Failure to Give the Required Notice.

It should be noted that at the Diplomatic Conference "the question of the consequences of a buyer's failure to give notice of lack of conformity and the question of the 2-year limitation period in Article 39(2) were amongst the most contentious issues in the entire Convention. There was no acceptance of a proposal by Ghana that Article 39(1) should be deleted in its entirety or that, if notice was not given, there should be no loss of rights; however, by way of compromise it was agreed to adopt Article 44" <sup>(25)</sup>. Article 44 of CISG provides that: Notwithstanding the provisions of paragraph (1) of Article 39 and paragraph (1) of Article 43, the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

It is understood from the language of the Article that this excuse is limited to failure to comply with *paragraph (1)* of Article 39 and does not affect the two-year cut-off period of Article 39(2), where the buyer loses his right to rely on non-conformity to claim price reduction.

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(24) See John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, (Hague, the Natherland: Kluwer Law International, 3rd ed. 1999), 282.

(25) See Schwenger in 'Commentary on the UN Convention on the International Sale of Goods', Peter Schlechtriem ed. (Oxford: Clarendon Press, 1998), 310-311. Also available online at <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-u-39.html>.

**[Dr. Yusuf Obeidat]**

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In addition it is further deducted that the buyer, as he wants to avail from the exception, who should shoulder the burden of proof. In a Germany case a court decided that: "The buyer who relies on this provision has the burden of showing that the actual requirements for its application, especially those concerning reasonable excuse, have been met".<sup>(26)</sup>

Consequently, it became clear that the sanction imposed by Article 39\1, causing the buyer to lose his right of price reduction, is severe, and therefore this would encourage buyers not to wait to make prompt complaint when they receive flawed goods. In any event, an undue delay in asserting a defect will continue to oppose the credibility of the claim.<sup>(27) (28)</sup>

Moreover it should be noted that since Article 44 of the CISG refers to paragraph 1 of Article 39 and not to paragraph 2, it does not affect the maximum period of two years for giving notice. In the absence of any notice within two years, the buyer loses all of his rights. Article 44, therefore, concerns the reasonable time requirement. During the discussion of Article 39 at the diplomatic conference, it was stressed that it would not always be possible to give notice within a reasonable time after discovery of the non-conformity of the goods.<sup>(29)</sup>

The most difficult question arose as to the application of Article 44 is to determine the type of excuses that might be held "reasonable" so as to accord buyers with relief in a given case. The legislative history of the Convention suggests that Article 44 was drafted to meet what representatives from developing countries considered as the drastic consequences of a failure to notify under Article 39(1). It has also been suggested that buyers in less

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(26) See the decision of a Germany case, TRIBUNAL: OLG Koblenz [OLG = Oberlandesgericht = Provincial Court of Appeal], date of decision (11 September 1998), case N. 2 U 580/96. Available online at <http://www.cisg.law.pace.edu/cases/980911g1.html>

(27) See Honnold, *supra* note 25, at 285-286.

(28) See for this the decision of a Germany case, TRIBUNAL: OLG Koblenz [OLG = Oberlandesgericht = Provincial Court of Appeal], (11 September 1998), case N. 2 U 580/96. Available online at <http://www.cisg.law.pace.edu/cases/980911g1.html>

(29) Fritz Enderlein, 'Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods'. Petar Sarcevic & Paul Volken eds., *International Sale of Goods: Dubrovnik Lectures*, (Oceana, 1996), Ch. 5, 133-201. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/enderlein1.html#io>.

## [The Remedy of Price Reduction Under CISG]

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developed regions may be among those likely to enjoy the benefits of a "reasonable excuse". While this surely ought not be taken to mean that Article 44 should be interpreted differently for parties situated in developing regions, it might be held that a party residing in an area where transportation and communication systems are less than well-developed has a "reasonable" excuse for the failure to discover and notify of a defect as promptly as might otherwise (elsewhere) be expected.<sup>(30)</sup>

At least one could think of impediments like a *force majeure*, which could have prevented the buyer from giving notice as a reasonable excuse<sup>(31)</sup>.

### B- Seller's Knowledge of the Non-Conformity

In the event of the seller's awareness of non-conformity, the failure of the buyer to give notice of non-conformity will not deprive him of claiming a price reduction remedy because of the non-conformity.

Article 40 of CISG provides that: "the seller is not entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer".<sup>(32)</sup> In this Article, the seller is not to be permitted to enjoy the protection of Article 39\1 of CISG. This is because the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer, constitutes wilful deceit which will have to be militated with sever sanction.

Although the rule in Article 40 is generally regarded as a 'safety valve' designed to function in exceptional circumstances, the rule - may be regarded as an expression of the 'general principle' which requires both CISG parties to act in good faith. A prime example of the application of Article 40 has been provided by the decision of an arbitral tribunal rendered in Sweden in 1998. In this case, the tribunal held that the buyer could rely on a non-conformity first discovered approximately 3 years after delivery of the machinery in question,

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(30) CROSS-REFERENCES AND EDITORIAL ANALYSIS-Article 44: Editor: Joseph Lookofsky available online at <http://cisgw3.law.pace.edu/cisg/text/cross/cross-44.html>

(31) Fritz Enderlein, supra note 30.

(32) See for this the Germany case No. 7 HO 78/95, TRIBUNAL: LG Trier [LG = Landgericht = District Court] 7 HO 78/95, date of decision (12 October 1995. Available online at <http://cisgw3.law.pace.edu/cases/951012g1.html>.

**[Dr. Yusuf Obeidat]**

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upon the rationale that the seller in question 'could not have been unaware' that improper installation of a certain substitute machine part could lead to a serious malfunction. In fact, the seller had not only done nothing to eliminate the risk; but he was found to have 'consciously disregarded' facts related to the cause of the malfunction. The tribunal further held that, by failing to provide adequate installation instructions or supervise the installation of the machine, the seller had breached its duty to disclose the non-conformity in question, and that - by virtue of the safety valve in Article 40 - the buyer was not time-barred from presenting its claim for damages.<sup>(33)</sup>

The requirements of Article 40 are met if the seller readily admits that he was aware of the defect. But admissions of this type are rare and it is the buyer who must prove that the seller was aware of the specific flaws claimed to result in non-conformity or, alternatively, that the seller could not have been unaware of those flaws. Even if the buyer fails to prove the seller's awareness of non-conformity, the buyer may still be able to prove facts which, though falling short of establishing actual awareness of non-conformity,<sup>(34)</sup> nevertheless suggest that the seller was aware of facts that relate to the non-conformity. If the buyer succeeds in producing this type of evidence, the burden shifts to the seller, who must then prove that whatever knowledge he or she might have had about the status of the goods such knowledge did not reach the requisite level of awareness as to preclude the seller from relying on the buyer's duty to examine the goods.<sup>(35)</sup>

However, Article 6 of the CISG allows the parties to derogate from or vary the effect of any provision of the Convention and Article 40 is not expressly

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(33) See Joseph Lookofsky, Excerpt from The 1980 United Nations Convention on Contracts for the International Sale of Goods, in J. Herbots ed, *International Encyclopaedia of Laws - Contracts*, Suppl. 29 (The Hague: Kluwer Law International, 2000) 1-192. available online at <http://cisgw3.law.pace.edu/cisg/biblio/loo40.html>

(34) Consequently, provided that Article 40 CISG talks about facts of which the seller "could not have been unaware" the buyer does not need to prove the actual knowledge of the seller. See for this David Ramos Muñoz, *The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player*, (December 2005), available online at <http://cisgw3.law.pace.edu/cisg/biblio/munoz.html#1>

(35) Alejandro M. Garro 'The Buyer's "Safety Valve" Under Article 40: What is the Seller Supposed to Know and When?' 25 *Journal of Law and Commerce* (2005-06), 253-260. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/garro4.html>.

## [The Remedy of Price Reduction Under CISG]

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excepted from this principle of party autonomy. Thus, a buyer may be held to his waiver not to invoke Article 40 against the seller if it is established that the buyer negotiated a reduction in the price of the goods with the seller based on certain defects in the goods. Nevertheless, courts are likely to scrutinize such waivers very closely.<sup>(36)</sup>

### **2.1.2 The Seller did not Remedy (Offer to Remedy) the Defect, before or After the Time of Delivery<sup>(37)</sup>**

The buyer is entitled to the right of invoking price reduction in case of lack of cure by non-performing seller. Part two of Article 50 of CISG states that if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48,<sup>(38)</sup> the buyer may not reduce the price. This part of Article 50 leads to a certain consequence that the right to cure prevails over the right of price-reduction. The provision which gives the seller's right to cure defects in the quality or quantity of the goods before the date of delivery is found in Article 37 of CISG. It states that: "If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered...". However the right to cure before the date set for performance can only be exercised if it "does not cause the buyer unreasonable inconvenience or unreasonable expense".<sup>(39)</sup> In any case, the buyer retains any right to claim damages as provided for in this Convention".<sup>(40)</sup>

The seller also has the right to cure even after the date set for delivery at his own expense, when he fails to deliver on time or tenders non-conforming

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(36) Alejandro M. Garro, *ibid.*

(37) This rule was applied in the case of Audiencia Provincial de Barcelona People Fisheries (Pvt) Ltd v. Pescados Videla SA, Translation by Guillermo Coronado Aguilar, DATE OF DECISION: 20090324 (24 March 2009), JURISDICTION: Spain, TRIBUNAL: Audiencia Provincial de Barcelona, sección 13ª, available online at:

<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/090324s4.html>.

(38) The same applies if the buyer refuses to accept performance by the seller in accordance with those Articles i.e. 37 and 48. See Article 50 of CISG.

(39) Article 37 of CISG.

(40) *ibid.*

**[Dr. Yusuf Obeidat]**

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goods.<sup>(41)</sup> However this right can only be exercised if he can do so “without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer”.<sup>(42)</sup> In any case, the buyer also retains any right to claim damages.<sup>(43)</sup> However, according to CISG Article 82 paragraph 2 If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

Therefore, the buyer will not be able to claim price reduction, if he refuses to accept performance by the seller in accordance with Art 48 CISG.<sup>(44)</sup>

It seems that the application of Article 50 appears to be quite advantageous towards the buyer, since he can elect to pursue the remedy that offers it the highest return. However one must note that the buyer loses the right to rely on reduction price remedy if the seller uses his right to cure any defect under Article 48 as expressly provided in Article 50. This serves to balance the position between buyer and seller so that the seller has an opportunity to acquire some input into the resulting remedy pursued by the buyer. The combination of these two remedies can be viewed in light of the CISG's purpose to preserve the parties' bargain wherever possible.<sup>(45)</sup> Article 50 has a different objective than damages -- to preserve the bargain. If the seller dislikes the reduction of the price he can always cure the delivery.

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(41) Article 48 paragraph 1 of CISG.

(42) *ibid.*

(43) *ibid.*

(44) Germany case, (31 January 1997), TRIBUNAL: OLG Koblenz [OLG = Oberlandesgericht = Provincial Court of Appeal] CASE NUMBER/DOCKET NUMBER: 2 U 31/96. Available online at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/970131g1.html#cx>. see also the case of Audiencia Provincial de Barcelona People Fisheries (Pvt) Ltd v. Pescados Videla SA, Translation: by Guillermo Coronado Aguilar (24 March 2009), JURISDICTION: Spain, TRIBUNAL: Audiencia Provincial de Barcelona, sección 13ª.

(45) Peter A. Piliounis, *Supra*, note 5.



## [The Remedy of Price Reduction Under CISG]

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### 2.1.3 Advance Declaration as a prerequisite for Price Reduction

It should be noted first that a party choosing the avoidance route must issue a declaration of avoidance by providing proper notice to the other contracting party. Declarations of avoidance are governed by Article 26, which simply provides that "[a] declaration of avoidance of the contract is effective only if made by notice to the other party". As a practical matter, the notice should certainly contain the reason for the declaration of avoidance. Specifically, a buyer's declaration of avoidance should clearly indicate to the seller "that the buyer will not accept or keep the goods".<sup>(46)</sup> While analysing the above Article the question that arises is whether it could be applied to price-reduction remedy.

A reading of the plain language of Article 50 demonstrates that the CISG does not require the buyer to give notice of price-reduction. Does that mean a notice is not required before reducing the price?

It is suggested that a separate declaration of price-reduction is to be a prerequisite for claiming price-reduction. The words of the notice should hold the meaning of an invitation to solve the problem outside the area of court, and the meaning of threat of proceeding to litigation. This is supported by many courts' decisions.

In one case the court observed that although Article 50 CISG gives the buyer the right to reduce the price for non-conforming goods, it was held "the buyer could not avail itself of such remedy since it had failed to make a valid declaration thereof".<sup>(47)</sup>

Another instance, in a German case the court decided that: "A reduction in price under Art. 50 CISG cannot be considered in regards with the alleged lack of conformity ... This is because the [buyer] did not make a corresponding

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(46) See for details Christopher M. Jacobs, 'Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability', 64 *University of Pittsburgh Law Review* (Winter 2003) 407-429. Available also online at: <http://cisgw3.law.pace.edu/cisg/biblio/jacobs.html#4>.

(47) Decision of court: Handelsgericht des Kantons Aargau Date: 11.6.1999, Switzerland, No. OR9800010 available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=485&step=Abstract>

**[Dr. Yusuf Obeidat]**

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declaration, which would have been necessary”.<sup>(48)</sup> This also means also that separate declaration of price reduction has been required before reducing the price.

This decision was criticized by those who believed that the court was not explicit about why it considered that the buyer should express his intention to the seller before he reduces the price. The court may have drawn on the requirement of declaration for avoidance of contract and envisioned a similar requirement for reduction of price, since before dealing with the buyer's attempt to reduce the price, the court discussed whether the buyer made a timely declaration for avoidance of contract. In the case of avoiding the contract, however, Articles 49(1) and 26, contrary to Article 50, explicitly state that the buyer will have to declare avoidance of contract before he relies on the avoidance of contract.<sup>(49)</sup> In response to this criticism, it should be noted that this view omits the fact that the provisions of the convention should be dealt with as one entity and therefore all its provisions should be read with each other without taking each Article separate from others, especially when they are regulating the same subject. The subject here is the remedies given to the buyer under the convention. The court may have drawn on the requirement of declaration for avoidance explicitly stated in Articles 49(1) and 26,<sup>(50)</sup> It is submitted that there is no reason to distinguish between remedies in the same convention. Thus Article 50 should not be applied alone, but only in conjunction with other provisions which contemplate a declaration as a prerequisite.

However, it was said that the reasoning behind the requirement of declaration for avoidance of contract is the possibility that without such declaration, the seller might be led to perform in ignorance of the other party's decision to refuse the performance. On the other hand, when the buyer attempts to reduce the price this possibility simply does not exist because the

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(48) (Appellate Court (Oberlandesgericht) München, 2 March 1994, Translation by Ruth M. Janal, available online at: <http://cisgw3.law.pace.edu/cases/940302g1.html#cx>).

(49) Chang-Sop Shin, 'Declaration of Price Reduction under the CISG Article 50 Price Reduction Remedy', 25 *Journal of Law and Commerce* (2005-06) 349-352. Available also online at: <http://cisgw3.law.pace.edu/cisg/biblio/shin2.html>.

(50) It provides that: A declaration of avoidance of the contract is effective only if made by notice to the other party.

## [The Remedy of Price Reduction Under CISG]

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seller would have already been notified of the alleged defects in the goods by the notice provided by the buyer as per Article 39(1).<sup>(51)</sup> Any way this view forgets that Article 39\1 states that: The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity". Therefore, the notice required in this Article aims to inform the seller of lack of conformity in the meaning that it is insufficient to say that the seller has already been warned of buyer intention to seek a certain remedy as price-reduction. Yet, another warning to the seller should be given to seek price-reduction.

It is understood that if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48, the buyer may not reduce the price. By obligating the buyer to express his intention of reduction with a valid declaration, the seller would have the opportunity to cure in accordance with Articles 37 or 48, and therefore the notice will serve as an invitation to the seller to perform in accordance with the contract. In case of refusal, the buyer may proceed with his intention to reduce the price. One must note that Article 50 balances between the seller's right to cure and the buyer's obligation to let the seller cure. This can be achieved by making the intention of the reduction expressed with a valid declaration as a prerequisite for invoking price reduction.

This also gives the seller the opportunity to offer delivery of substitute goods or repair under Article 46(2) and the required notice before resorting to price-reduction could achieve the interest of the buyer himself. The buyer who may have declared price reduction a bit hastily and discovered only after dispatch of his communication that his interests would be better served by a demand for delivery of substitute goods or repair under Article 46(2), a claim that Article 46(1) would bar where there is an effective price reduction.<sup>(52)</sup> Therefore, by upholding the view of the courts mentioned above both parties will have the time and opportunity to exercise their rights under the convention before resorting to price reduction.

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(51) Shin, *supra* note 50.

(52) Peter Schlechtriem, 'Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG', *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995) 95-114. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlecht.html#31>.

**[Dr. Yusuf Obeidat]**

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Moreover, equity requires the seller to be warned instead of making him surprised of the buyer's claiming price reduction.

In the end, although Article 50 does not expressly require a separate declaration for reduction of price, it cannot be inferred from this that there is no need for such declaration. This Article should be applied in conjunction with other provisions of the convention; particularly those related to avoidance since both are remedies available for the buyer.

It is to be noted at the end of analysing the above preconditions that the language of CISG Article 50 indicates that the seller cannot unilaterally exclude the application of Article 50, since it gives the buyer the upper hand. Whenever the prerequisites are met the buyer has the right to reduce the price whether or not the price has already been paid. Therefore, the seller is bound to a price reduction under Article 50 even if he made it clear that he did not intend to be so bound. Thus, the seller cannot ship non-conforming goods accompanied by notice stating that in the case of the buyer's unwillingness to pay full price despite the nonconformity the goods should be returned to the seller<sup>(53)</sup>. If this note is allowed some sellers (particularly those who have influence in the market) will always want or press to insert such note in their contracts.

## **2.2 Price Reduction Remedy under the Two Laws**

### **2.2.1 The Position under English Law**

Price reduction remedy is unknown at English Law. However, the Sale of Goods Act 1979 has some provisions, (section 30 paragraph 1 that relates to defect of quantity of goods and section 53 paragraph 1 (a) which relates to breach of warranty and defects of quality), lead to the same results as with Article 50 of CISG.

#### **2.2.1.1 Defect of Quantity of Goods**

A defect of quantity of goods occurs when contrary to the original obligation established by the contract, the seller delivers to the buyer goods of lesser

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(53) 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 *Journal of Law and Commerce*, (1995), 153-176. available online at: <http://www.cisg.law.pace.edu/cisg/biblio/flechtner.html>.

## [The Remedy of Price Reduction Under CISG]

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than the amount he contracted to sell. This case is dealt with by Section 30 paragraph 1 which provides that: “where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate”.

Accordingly, if the seller delivers to the buyer lesser amount of goods than contracted for, it is clear that English Law gives the buyer the option either to reject the goods delivered or to keep them and reduce the purchase price for the amount not delivered. It seems that this section serves the same purpose of CISG Article 50, since it allows the buyer to reduce the purchase price whenever he decides to keep the goods delivered.

Thus, under English Sale of Goods Law, the buyer has the opportunity to reduce the price, though the method of calculating the reduction is different, i.e. the buyer must pay at the contract price. However two situation should be distinguished: 1-if the parties have determined the contract rate on the basis of each item delivered, then the price reduction will be calculated according to each item not delivered. If, for example the seller contracted to deliver to the buyer 100kg of sugar at a market price of \$10 per Kilo for a total of \$1000, but he only delivered 80KG. The buyer elects to accept the 80kg and reduces the price to \$800 (20kg times \$10=\$200 the amount of reduction). 2- If the parties have specified the contract rate not on the basis of each item delivered, but on the basis of the entire goods delivered as a whole. Then the reduced price can be calculated according to the proportionality standard adopted by Article 50 of CISG. If, the seller agreed to sell 100kg of sugar for \$1000, but instead delivered 80kg, the reduction proportionality calculated would mean  $800/100=8/10$  of \$1000= \$800.

In conclusion: It can be derived from section 30 of SOGA that the price reduction remedy in principle is not completely unknown to English Law. Instead, unless the parties have agreed upon a contract price which does not correspond to the value at all, both provisions (CISG Article 50 and section 30(1) of English Sale of Contract Act) are likely to reach the same amount of reduction of the purchase price.<sup>(54)</sup>

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(54) Piliounis supra note 5, at 1. Also Anette Gärtner. ‘Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law’, Pace Review of the Convention on

**[Dr. Yusuf Obeidat]**

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### **2.2.1.2 Defects of Quality of Goods**

The seller may deliver goods of lower than average quality. Section 53 talks about damages for breach of warranty, and therefore is quite different from the content of CISG Article 50. Under section 53\1 (a) the buyer is not entitled to reduce the price payable as with CISG Article 50 unless set up against the seller suing for the price. Rather the buyer is entitled to deduct his damages from the contract price if it has not yet been paid. One must note that this result does not resemble the price reduction remedy, for the buyer should first resort to court in order to claim damages. If he proved that he has suffered a loss and therefore entitled to damages, he is entitled to deduct the amount of damages from the contract price. After the deduction the buyer should pay to the seller the balance of contract price. In other words, the buyer can exercise the right to set-off if he has actually suffered a loss, which eventually leads to reducing the contract price. This can be noted from the content of Article 53 of English Sale of Goods Act which provides that:

1-Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may- A-set up against the seller the breach of warranty in diminution or extinction of the price, or b-maintain an action against the seller for damages for the breach of warranty. 2-the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from breach of warranty. 3-in the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

In English Law, reduction of price may be even reached in case of delivery of defective goods, by way of negotiation. Practically speaking, if a buyer receives defective goods of a lesser quality than contracted, which he otherwise wishes to accept, he can negotiate with the seller for a reduced price. This negotiation can take place before or after the purchase price has

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Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 59-81.  
Available online at: <http://cisgw3.law.pace.edu/cisg/biblio/gartner.html>

## [The Remedy of Price Reduction Under CISG]

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been paid and might take the form of the buyer paying a lesser amount to the seller. If the seller accepts this price reduction the price under the sales contract can be considered modified to that effect.<sup>(55)</sup>

### 2.2.2 The Position under Jordanian Civil Law

The price-reduction remedy does not have the same role within the provision of Jordanian Civil Law as in the Vienna Convention. Under the Jordanian Law Article 513 if a buyer became aware, after delivery, of certain specified hidden defects<sup>(56)</sup> he has the option to bring an action for rescission and reclaim the purchase price or to accept the goods with paying the total purchase price. However, he has no option to bring an action of price-reduction.<sup>(57)</sup> Therefore, the price reduction remedy is not useful for the buyers who decide not to reject defective goods. This position adopted by Jordanian legislator contravenes with the general rule, included is Article 198 of Jordanian Civil Law, which stipulates that the buyer has the right to accept the defective goods and claim price reduction. The reason behind the non-application of the rule is because Article 513 is related to sale contract, while Article 198 is applied to all contracts such as lease contract. Therefore Article 513 applied to sale contract consist of a special rule.

Nevertheless, the price reduction remedy is still advantageous, and the buyer can bring an action for price reduction in the following situations:

- 1- If the defective goods perished, after delivery, for old hidden defect or consumed before a buyer has knowledge of the defect, he can bring an action of price-reduction.<sup>(58)</sup> While if the goods perished or consumed after the buyer had knowledge of the defect, the buyer would not have the right to resort to price reduction remedy, because his silence or consumption would be regarded as an implicit assent of the goods.

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(55) Peter A. Piliounis, *ibid.*

(56) At this price reduction remedy is limited to defects which were hidden at the time of conclusion of the contract, and evident ones were excluded from this remedy, for the buyer should have rejected the goods at that time or should have taken such defects into consideration when calculating the price he was willing to pay.

(57) Article 513 of Jordanian Civil Law.

(58) Article 516 of Jordanian Civil Law.

**[Dr. Yusuf Obeidat]**

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- 2- If a new defect exists after delivery, a buyer has no right of rescission if he became aware of the existence of old hidden defect in the goods, but could bring an action for price-reduction, unless the seller agrees to take back the defective goods (i.e. with the new defect which existed after delivery of goods).<sup>(59)</sup> This situation is an application to the general rule of avoidance, which stipulates the parties should return to the same situation they were in at the time of contracting. This would not be achieved in this case as there is a new defect hit the goods after delivery.
- 3- In case of existence of any additions or enhancements to the goods, such additions or enhancements prevent the buyer's right of rescission, but gives him the right to bring an action for price-reduction in proportion to the defects therein.<sup>(60)</sup>

In addition where different goods are sold in one bargain and it has proved, after delivery, that some of them have old defect the buyer has the option to return the defective goods and reduce the purchase price if the distinction between the sound part and defective part does not cause any damage to the whole item sold. If, for example, the seller contracted to deliver refrigerator and washing machine in one bargain, and after delivery it was showed that the refrigerator was defective, the buyer has no right to avoid the whole contract, rather he has the right to keep the washing machine and pay only for its price.<sup>(61)</sup>

The Jordanian Civil Law also offers a remedy similar in effect, though not in theory, to reduction of price for delivery of an insufficient quantity of goods. The theory is that since there has been a partial non-execution of the contractual obligation to deliver, then, if the price has not been paid and the buyer is faced with a partial non-delivery, can rely upon the *remedy of price reduction* to withhold that part of the purchase price related to the non-performance.<sup>(62)</sup> Article 492 of Jordanian Law provides that subject to any usage or special agreement between the parties, if the quantity of goods was specified in the contract, and after delivery, it has been proved that the seller

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(59) Article 517 paragraph 1 of Jordanian Civil Law

(60) Article 518 paragraph 1 of Jordanian Civil Law

(61) Article 519/2 of Jordanian Civil Law.

(62) See for this also Bergsten & Miller, *supra* note 7, at 9-57.



## [The Remedy of Price Reduction Under CISG]

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delivered to the buyer a quantity of goods less or larger than he contracted to sell, the following rules should be followed:

1-if the goods sold would not be affected by being delivered partially; the seller has the right to reclaim the excess. However in case of short-delivery the buyer has the right to pay for the goods so delivered at the contract rate irrespective of whether the parties have specified a contract rate for each item delivered or for the whole goods sold.<sup>(63)</sup> According to this Article, as with Articles 35(1) and 50 of the CISG, the buyer has the right to use the price reduction remedy if the supplied goods are not of the quantity required by the contract.

The reference to "contract rate" is comparable to the "proportional" calculations made under Article 50 of the CISG. If the parties have specified a contract rate for each item delivered, that rate would also determine the proportion of value that the goods delivered had to the conforming quantity. Where there is a delivery of a lesser amount, Section 30 of the English Sale Act and Article 492 of Jordanian Law, would likely reach the same result as Article 50<sup>(64)</sup>. For example if the buyer contracted to purchase 100KG of sugar at a market price of 2JD per kilo for a total of 200JD, but instead the seller delivered 95KG. If the parties have specified a contract rate for each item delivered. i.e. 2 JD per kilo, the buyer has the right to reduce 10JD from the purchase price. On the other hand, if the parties have specified a contract price for the whole goods delivered, i.e. 200JD, the result will be calculated by way of proportionality (1/20 of JD200 = JD190)<sup>(65)</sup>. The buyer is not entitled to reject the goods in this case unless the shortfall is material.<sup>(66)</sup>

2-if the goods sold would be affected by being delivered partially,<sup>(67)</sup> and

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(63) Article 492\1 of Jordanian Civil Law.

(64) Piliounis, *supra* note 5, at 1-46.

(65) See for this subject and example Adnan Serhan, *Rules of Sale in Civil Transactions Act*, (Sharjah: Brighter Horizon publisher, 2nd Ed, 2010), 148.

(66) See also section 30 2D (a) of English sale of Goods Act.

(67) If, for example, the seller contracted to deliver a 10 meter carpet at a market price of JD100 a meter for a total of JD1000, but instead the seller delivered 9 meters, the seller is responsible for this short-delivery which gives the buyer the right to reduce the price (1 times 100= JD100). While on the other hand where the carpet supplied was 11 meters, the excess (one meter) would be for the buyer without consideration. This means the seller could not reclaim the excess, for

**[Dr. Yusuf Obeidat]**

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the parties have specified a contract rate for each item supplied, the buyer has the right to reduce the purchase price. While if the price has been agreed upon for the whole bargain (not for each item separately), the excess in the whole items sold is for the buyer and the shortfall does not give him the right to reduce the price. This is because the parties when agreed upon the price did not take into account the price of each item but for the whole bargain.<sup>(68)</sup>

### **2.2.3 Goods Perish before Delivery: (Jordanian Law and English Law)**

Article 500 of Jordanian Law reads that if the goods perished before delivery, without any fault on the part of the seller or the buyer (i.e. for circumstances beyond the parties' control such as force majeure), the contract is avoided and the buyer has the right to reclaim the price if it has been paid. This means that the risk does not pass to the buyer.

However if the goods have partially perished for circumstances beyond the parties' control, the buyer has the option of rescinding the contract or accepting the remaining part and paying for it at the contract rate.<sup>(69)</sup> The legislator gives the option to the buyer, and the seller may not deliver substitute goods unless the buyer accepts such offer.

The same result is suggested to be reached under Section 7 of the English Sale Act which provides that: "where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided". It is generally thought that section 7 of the Act was based on the decision of the CA in *Howell v Coupland*.<sup>(70)</sup> Even though the seller agreed to sell 200 tons of potatoes to be grown in his field, the crop failed due to disease so leading to the delivery of only 80 tons by the defendant. The buyer took delivery of the 80 tons and sued damages for non-delivery of the remainder 120 tons. It was held that the seller was excused of the obligation to deliver the remainder for impossibility of performance. The CA upheld the judge's

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this would damage the carpet, and he has no right to claim the increase in price (i.e. JD100) because the buyer purchased and paid the price for the whole carpet no on the basis of each meter.

(68) Article 492\2 of Jordanian Civil Law.

(69) Article 500 of Jordanian Civil Law.

(70) (1876) 1 QBD 258.

## [The Remedy of Price Reduction Under CISG]

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decision holding that :<sup>(71)</sup>

The true ground ... on which the contract should be interpreted ... is that by the simple and obvious construction of the agreement both parties understood and agreed, that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been in existence, and should still be existing when the time came for performance... It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place.... On the facts the condition did arise and the performance was excused.

Therefore the result of this case is regarded as resembling the same result as the application of CISG Article 50. Despite English Law being unclear about the situation in which the goods have partially perished in section 7, equity and history of this section being a codification of the decision of *Howell v Coupland* would result in giving the buyer the right to accept the goods available and reduce the price in proportion to the perished part of the them. This result would achieve the goal of preserving the bargain and reducing the cases of avoidance.

In addition the Jordanian Civil Law also offers a remedy similar in effect, though not in theory, to reduction of price for partial non-performance if this part of goods perished because of an act of a third party. Article 502 distinguish between two situations: the first: if the goods, before delivery, the buyer has the option of rescinding the contract or approving the contract and claiming substitute for the value of the goods perished from the third party responsible.<sup>(72)</sup>

The second: if part of the goods perished before delivery the buyer has the option of:<sup>(73)</sup>

1. Rescinding the contract. The two parties being brought back to the situation they were in before the conclusion of the contract.
2. Approving the contract, paying the full price and claiming damages for

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(71) Available on line at [www.law.cam.ac.uk/faculty-resources/10009347.doc](http://www.law.cam.ac.uk/faculty-resources/10009347.doc)

(72) Article 502/1 of Jordanian Civil Law.

(73) Article 502/2 of Jordanian Civil Law.

**[Dr. Yusuf Obeidat]**

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the perishable goods.

3. Accepting the imperishable part and reducing the price. If the buyer chose this option he became under obligation to pay only the price of the imperishable part of the goods. The buyer will absolutely resort to this option when the sold items are indivisible and he may benefit from the imperishable part. This result can be also implied from Section 7 of English Sales Law, which applied to all situations that happened without any fault on the part of the seller or buyer, including the fault of third party. On the other hand the section considered the agreement avoided if the whole goods perished, and can be avoided in the perishable part in case of partial non-execution. Even reduction of price may, in this case, be reached under both Jordanian Law and English Law by way of negotiation until getting to the point of agreeing upon the avoidance of the contract for the perishable part, and proportional reduction to this part.

In contrast the importance of the price reduction remedy under CISG is limited since damages under Article 74 of CISG serves the buyer better, unless the price reduction remedy serves as alternative to damages.

## [The Remedy of Price Reduction Under CISG]

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### Conclusion

This study has reached the following outcomes:

1. It has become clear that Article 50 of CISG does serve as a mean to promote international trade since it achieves the purpose of preserving the bargain and decreasing any attempt to reject the goods. This becomes necessary since CISG applies to international contracts, leading therefore the remedy of price reduction being used as one of the means to foster international trade.
2. Though the remedy of price reduction is familiar for the system, Article 50 of CISG contains several differences from the Jordanian legal system. In the Jordanian Civil Law the remedy of price reduction might be accorded, though in certain situations, against hidden defects and perishable goods before delivery, and not limited to non-conformity.
3. The actual remedy of price reduction as per Article 50 of CISG is unknown both to English Law and Jordanian Law, but has some parallels. Though there is no express indication giving the buyer the right to reduce the price, section 30 and 53 of English Sale of Goods Law implicitly allows the buyer to use this right, and therefore have the mechanisms to realize results similar to those effectuated by Article 50 of CISG. When, for example, section 30 provides that if the buyer receives goods less than required by the contract, he must pay “for them at the contract price”, it means that English Law has the remedy of price reduction.

Thereupon, despite some existing differences, this remedy cannot be considered new to the application in the English Law. When considering, therefore, the adoption of the CISG, there should not be any hesitation or reluctance preventing such decision.

4. Separate declaration of price reduction is required before using this remedy otherwise the buyer will be deprived from the use of price reduction remedy. This is why it is to be emphasized, as some courts have decided, that Article 50 cannot be applied alone, but only in conjunction with other provisions related to remedial regime, which contemplate a separate declaration as a prerequisite.

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## [The Remedy of Price Reduction Under CISG]

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[Dr. Yusuf Obeidat]

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القانون الأردني، القانون الإنجليزي.