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ARTICLES

**THE REMEDIES OF SPECIFIC
PERFORMANCE, PRICE REDUCTION
AND ADDITIONAL TIME
(*NACHFRIST*) UNDER THE CISG:
ARE THESE WORTHWHILE CHANGES OR
ADDITIONS TO ENGLISH SALES LAW?**

Peter A. Piliounis

INTRODUCTION

“The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are dictates of common sense, drawn from the truth of the case.”¹

“The mercantile law, in this respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.”²

—Lord Mansfield (1705-1793)

¹ Hamilton v. Mendes, 97 Eng. Rep. 787, 795 (K.B. 1761).

² Pelly v. Royal Exchange Assurance Co., 97 Eng. Rep. 342, 346 (K.B. 1757).

It was apparent as long ago as the mid-eighteenth century that lawmakers should strive for a consistent and universal form of international mercantile law, based upon common sense and common legal principles. More recently, this same belief led to the development of the United Nations Conventions on Contracts for the International Sale of Goods³ (CISG or the Convention). The CISG came into force on 1 January 1988⁴ and as of 3 March 2000, fifty-six countries had acceded to the Convention.⁵ The Contracting States include most of the member nations of the European Union (with the exception of the United Kingdom (UK), Ireland and Portugal) and other major British trading partners and common law countries such as the United States, Australia, New Zealand and Canada.⁶

While the United Kingdom Department of Trade and Industry has issued two consultation papers (in 1989 and 1997) on the subject of the UK entering into the Convention,⁷ no further formal steps have been taken to adopt the CISG in the UK. Based on the responses it received, the Department of Trade and Industry issued a position paper in February 1999 stating that the Convention should be brought into national law when there is time available in the legislative programme.⁸ To date, no further steps have been taken to bring the CISG into English law.

In considering the adoption of the CISG, many of the supporting arguments regard the Convention as a good compro-

³ *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. Doc. A/CONF.97/18 (1980), available in S. Treaty Doc. No. 98-9 (1983) and in United Nations: Conference on Contracts for the International Sale of Goods, May 1980, 19 I.L.M. 668 [hereinafter CISG].

⁴ See *UNCITRAL Homepage* (visited May 9, 2000) <<http://www.uncitral.org/english/status>>.

⁵ See *id.*

⁶ See *id.*

⁷ See Department of Trade and Industry (UK), *United Nations Convention on Contracts for the International Sale of Goods: a consultative document* (London: Department of Trade and Industry, 1989) and Department of Trade and Industry (UK), *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): a consultative document* (London: Department of Trade and Industry, 1997).

⁸ See Department of Trade and Industry (UK), *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention)*, position paper (London: Department of Trade and Industry, February 1999) [hereinafter *Vienna Sales Convention*].

mise on sales law, which could lead to a useful uniform international sales law.⁹ Critics of the CISG have tended to focus on the drawbacks of the Convention itself, rather than the stated objective of uniformity or the principles espoused by Lord Mansfield.¹⁰ For example, Mr. Justice Hobhouse damned the CISG and similar conventions as follows:

The utopian ideals which have led to the present situation have a parallel in those which gave rise to the movement for the adoption of Esperanto as a universal language. International commerce is best served not by imposing deficient legal schemes upon it but by encouraging the development of the best schemes in a climate of free competition and choice.¹¹

In light of these criticisms, this article will examine the CISG to determine whether it would be a useful addition to (or in certain circumstances, replacement of) English sale of goods law as it currently exists, emphasising particular remedies available when a sales contract is breached.

The stated purpose in the preamble of the CISG is the “adoption of legal rules which would contribute to the removal of legal barriers in international trade and promote international trade.”¹² This article will examine whether the CISG is a useful addition to English law in light of the stated unification purpose of the CISG, with an emphasis on some potential effects the adoption of it may have on remedies available to English businesses now and in the future. A particularly relevant possible future effect on English law and English businesses is the trend within the European Union (and to a lesser extent, worldwide) toward greater unification of the law. In light of this feature, this article will also discuss the extent to which the CISG reflects generally accepted common European or interna-

⁹ Some of these arguments were included in Department of Trade and Industry, *supra* note 7 and in B. Nicholas, *The Vienna Convention on International Sales Law*, 105 L.Q. Rev. 201 (1989).

¹⁰ According to the Department of Trade and Industry, others were reluctant to adopt the CISG into English law because the Convention would weaken English law as a separate choice of law for foreign parties and possibly lead to fewer parties choosing English law or London as a centre for dispute resolution. See *Vienna Sales Convention*, *supra* note 8.

¹¹ J.S. Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L.Q. Rev. 531, 534-535 (1990).

¹² CISG, *supra* note 3, at pmb1.

tional legal principles as recognised by comparative legal scholars. If the CISG remedies reflect these future legal unification directions, they would be a useful addition to English law, as an intermediate step toward future harmonisation or unification efforts.

The addition of any new legal regime, whether under a convention or otherwise, generally leads to a period of uncertainty while courts and businesspeople adapt to the new rules. From an English party's perspective, the less the deviation from the current regime, the lower the level of uncertainty. While a full analysis of all of the implications of the CISG on English law would require a weighty treatise, this article will take a narrower view, based on certain remedies available for breach of contract. This article will examine some potential areas of uncertainty based on the differences from the remedies available under the known and understood sales law regime represented by the Sales of Goods Act 1979 (SGA).¹³ Of particular import are the new or potentially significant different remedies of specific performance, granting of additional time (often referred to as *Nachfrist*) and price reduction, to illustrate the types of areas where English parties should be aware of the changes represented by the CISG.

Remedies serve as a particularly useful case study of the potential effects of the CISG for several reasons. First, remedies available to a party are a key consideration for that party, particularly if the contract is breached. Second, the CISG was designed to take into account the special characteristics of the international sale of goods, such as long distances involved, costs of transportation and the length of the term of the contracts.¹⁴ As a result of this design, the CISG emphasises remedies that seek to preserve the contract notwithstanding a

¹³ Sale of Goods Act (1979), ch. 54, as amended (Eng.) [hereinafter SGA].

¹⁴ See J.O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 64-65 (2d ed. 1991); New Zealand Law Commission, *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance: Report No. 23* (Wellington: New Zealand Law Commission, 1992), available in CISG W3 database, Pace University School of Law, at ¶¶ 23, 55,113, (May 26, 1998) <<http://www.cisg.law.pace.edu>> [hereinafter Pace CISG Database].

breach,¹⁵ which can have additional implications in light of English law.

Remedies for breach of contract in sales law can be broken into two main categories: one where the contract can be terminated or avoided by the parties, the other where the remedy is granted while the contract remains in force.¹⁶ Because parties will typically expect their contracts to be performed, or at least stay in effect, the primary emphasis should be on the remedies that operate without having to avoid the contract. Additionally, the focus in the CISG on preserving the contract notwithstanding a breach could mean that these new remedies are a potential source of uncertainty, also making them a useful subject for analysis and comparison with the existing rules under the SGA. In such a structure, the main emphasis tends to be on the remedies of the buyer, as the buyer is obtaining goods under the contract, rather than the seller, who is primarily interested in receipt of the purchase price. This article will mirror this focus, emphasising the available buyer's remedies.

OTHER ATTEMPTS AT UNIFICATION

Since the CISG came into force in 1988, there have been two main efforts to develop overall unifying principles covering the field of contract law. While both of these cover a much broader ambit than merely the sale of goods, they can be seen as indicative of the direction contract law and sale of goods law are likely to proceed in the future. In contrast to the governmental negotiation and compromise leading to the CISG, both sets of principles were drafted by an international cross-section of academicians, judges and civil servants acting in their own personal capacities, not as representatives of their own countries.¹⁷

¹⁵ See HONNOLD, *supra* note 14. See also A.H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 342 (1980); M.G. Bridge, *The Bifocal World of International Sales: Vienna and non-Vienna*, in MAKING COMMERCIAL LAW 289 (R. Cranston ed. 1997).

¹⁶ The author notes that this categorisation was adopted by H.M. Flechtner, *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53 (1988), available in Pace CISG Database, *supra* note 14 (March 16, 1998).

¹⁷ The author notes that good descriptions of the working methods and procedures of the commissions can be found in M.J. Bonnell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract*

Their purpose was to find common unifying principles, an equivalent to the American Restatement of Law,¹⁸ which could form the basis of future efforts at harmonisation and unification. This is different from the CISG, where, due to the divergent legal regimes and views, consensus could only be reached on compromise solutions with some ambiguous wording and gaps in coverage.¹⁹ Unlike the CISG, the other efforts at unification were not bound to take the viewpoints of every single country, legal regime or rule into account. The final choice among possibly conflicting rules was made on the persuasiveness or suitability of the rule within the overall regime.²⁰ These other efforts can thus be seen as a more unified and coherent regime than the CISG. These regimes definitely are a step forward in legal thinking and the number of similarities between the two regimes suggests that they represent the main directions being taken by international contract law.

The regime covering the greatest geographical scope is the work of the International Institute for the Unification of Private Law (usually referred to as UNIDROIT) and their Principles of International Commercial Contracts (UNIDROIT Principles).²¹ The scope of the UNIDROIT Principles is international and sets forth "general rules for international commercial contracts."²² While the international nature is similar to the CISG, the UNIDROIT Principles are broader in scope and more detailed in provisions than the CISG.

Of more import for England are the efforts of the Commission of European Contract Law (often referred to in practice as the "Lando Commission", after the Commission's head, Ole Lando). In 1995, the Lando Commission published the first

Law: Similar Rules for the Same Purposes?, 26 UNIFORM L. REV. 229, 229-246 (1996), available in Pace CISG Database, *supra* note 14 (May 12, 1998).

¹⁸ See M.J. Bonnell, *The UNIDROIT Principles of International Commercial Contracts and CISG - Alternatives or Complementary Instruments?*, 26 UNIFORM L. REV. 26, 26-39 (1996), available in Pace CISG Database, *supra* note 14 (May 12, 1998); Bonnell, *supra* note 17; THE PRINCIPLES OF EUROPEAN CONTRACT LAW - PART 1: PERFORMANCE, NON-PERFORMANCE AND REMEDIES xx (O. Lando & H. Beale eds. 1995) [hereinafter Lando & Beale].

¹⁹ See Bonnell, *supra* note 18.

²⁰ See *id.*

²¹ International Institute for the Unification of Private Law ("UNIDROIT"), *Principles of International Commercial Contracts* (Rome: UNIDROIT, 1994).

²² UNIDROIT Principles, *supra* note 21, at pmb1.

part of its Principles of European Contract Law (the PECL).²³ The specific history of the PECL also merits some mention. In 1989, the European Parliament passed a resolution in favour of pursuing a European Code of Private Law.²⁴ In 1994, this intent manifested itself with a resolution in favour of the Lando Commission's efforts at the harmonisation of contract law.²⁵ Therefore, in addition to the express purpose of being applied "as general rules of contract law in the European Communities,"²⁶ the PECL are intended to represent a modern European *lex mercatoria*²⁷ and most importantly for future legal developments, "as a model on which [European] harmonisation work may be based."²⁸ So while the PECL are of a narrower geographic focus than the UNIDROIT Principles, it covers a wider area of law, plus it has been developed with the laws of the European Union (EU) countries (including England) in mind.

The development of the PECL is particularly important for the future development of English law, considering the continued activism of the European Commission in further harmonisation efforts.²⁹ As an example, although neither the PECL nor the CISG are expressly mentioned as an inspiration for the remedies section, a recent draft directive of the European Commission on Guarantees for Consumer Goods³⁰ has remedial provisions which mirror both the PECL and the CISG fairly closely.³¹ Additionally, if the PECL will in fact be used by EU entities in interpreting European contract law or as the ba-

²³ Lando & Beale, *supra* note 18. The author notes that since then, the Lando Commission has developed Part II of the PECL, which has resulted in some renumbering of the provisions of Part I and which is expected to be published shortly. For ease of reference, this article will cite the numbering from both versions for the remedies referred to herein.

²⁴ Resolution of 26 May 1989, OJEC No. C 158/401.

²⁵ See Resolution on the Harmonization of Certain Sectors of the Private Law of the Member States, 6 May 1994, OJEC No. C 205/457.

²⁶ PECL, art. 1.101.

²⁷ See Lando & Beale, *supra* note 18, at xviii.

²⁸ *Id.*

²⁹ The author notes that a recent directive that had a significant effect on private law is the Products Liability Directive, Council Directive 85/374, 1985 O.J. (L 210) 29.

³⁰ OJEC 1998 C148/12, COM (1998) 217, amending COM (1995) 520.

³¹ See M.G. BRIDGE, *THE SALE OF GOODS* x-xi (1998) (suggesting that the CISG is the inspiration for the remedial provisions of the draft directive).

sis for further harmonisation efforts, they are particularly important to consider as indicating future legal developments.

EFFECT OF CHOICE OF REMEDIES BY THE PARTIES

The discussions in this article are premised on the assumption that the parties have not chosen some other remedy or remedies within their contractual relationship. Any such remedies chosen by the parties would obviously fall outside the scope of this article. The CISG generally gives effect to the principle of freedom of contract of the parties, which is typified in Article 6, which reads: "The parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."³²

A literal reading of this article means that the Convention gives the parties the authority to determine in their contract all of the remedies to which they will be subject upon breach. This concept does not in itself lead to uncertainty. A contract could specify, for example, that the parties choose to be governed by the remedial scheme under the SGA rather than under the CISG. While the SGA recognises the same general concept (which is a fundamental aspect of English contract law), the scope of the equivalent provision in the SGA is somewhat narrower.³³

The potential for uncertainty depends on the types of remedies chosen by the parties. One such example in the context of this article would be if the parties operating under the CISG specifically agreed that the only available remedy was specific performance.³⁴ Under English law,³⁵ specific performance is a discretionary remedy.³⁶ While it is unlikely that the parties would agree to such a remedy, there would be no conflict be-

³² CISG, *supra* note 3, art. 6. Article 12 deals with reservations made by the Contracting States to the Convention, which the parties are unable to derogate or vary.

³³ Section 55(1) of the Sale of Goods Act, allows the parties to negate or vary "a right duty or liability," which is arguably narrower than the scope of Article 12 of the CISG. *See* SGA, *supra* note 13, § 55(1).

³⁴ For example, excluding the operation of Article 12 of the CISG.

³⁵ For a more complete discussion regarding the positions of English law and the CISG, *see infra* Part IV.

³⁶ The author notes that a general discussion of the exceptional nature of the remedy can be found in G. JONES & W. GOODHART, SPECIFIC PERFORMANCE 1-23 (1996).

tween the agreement for specific performance and Article 46 of the CISG.³⁷ On the other hand, an English court applying general legal principles would be unlikely to grant specific performance where the court did not consider that the situation merited the exercise of discretion in favour of specific performance.³⁸

An issue more likely to arise is the question of the quantum of damages agreed by the parties. Under the CISG, there is no limit on the amount of compensation that may be agreed to be paid upon breach of a contract. In contrast, English common law draws a distinction between genuine pre-estimates of damage (referred to as "liquidated damages") versus clauses viewed as punitive or penal.³⁹ Penalty clauses are considered invalid and will not be enforced by an English court. So while the parties are generally free to choose their own remedies, English law will not enforce all of the remedies, at least not to the same degree.

This becomes a clearer problem in the context of the CISG. Article 4 of the CISG sets forth the scope of the CISG and expressly excludes "the validity of the contract or of any of its provisions or of any usage."⁴⁰ Although the CISG does give the parties the freedom to choose their own remedies, it is not necessarily clear that these remedies will be enforced the same way in every country, if at all. In the example given above, whether a damages clause was enforced would likely depend on whether penalty clauses were considered a question of validity under the CISG or whether the freedom of choice granted by Article 6 overrode Article 4. Some commentators have suggested that whether a particular predetermined damages clause is unenforceable as a penalty clause is based in public policy and therefore a question of validity of the particular clause.⁴¹ Under such an analysis, the parties' freedom of choice would be overridden

³⁷ Also, if there was no relevant application of Article 28. See *infra* pt. IV.

³⁸ Examples include: want of mutuality, requirement for court supervision and adequacy of damages. See JONES & GOODHART, *supra* note 36, at ch.2.

³⁹ This is discussed in more detail in G.H. TREITEL, *THE LAW OF CONTRACT* 898-906 (1995).

⁴⁰ CISG, *supra* note 3, art. 4(a).

⁴¹ E. A. Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247 (1979), available in Pace CISG Database, *supra* note 14 (Sept. 2, 1998). See also *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat*, U.N. Doc. A/Conf. 97/5, published in Official Records U.N. Doc. 97/9, 14-66, art. 42 cmt. ¶ 10, reprinted in Pace CISG Database,

by the applicable (domestic) law in some jurisdictions, but not others.

This uncertainty regarding the extent to which remedies chosen by the parties are enforceable in any given forum is a drawback to the CISG that does not currently exist under the SGA. This uncertainty, however, exists without the CISG where the parties choose one domestic legal regime and the contract and remedies chosen are litigated in another legal regime. There is no guarantee that each jurisdiction will interpret the remedy chosen by the parties in the same way

SPECIFIC/ENFORCED PERFORMANCE

Specific performance can be viewed as particularly important in the context of international trade.⁴² In international trade, a great deal of time and effort may be incurred by the innocent buyer in finding an alternate supply of the goods contracted for. While an award of damages may compensate the buyer for any tangible additional expense incurred (if it can be calculated), the buyer is more likely to face some loss or detriment unless it can get the seller to perform the contract. This is in contrast with a domestic situation where replacement of goods may be more readily available.

a) *Traditional English Law Approach*

Under English law, granting specific performance of the terms of a contract is an extraordinary remedy, granted in very limited circumstances.⁴³ This position is reflected in Section 52(1) of the SGA, which reads:

In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be

supra note 14 (Sept. 2, 1998) This author notes that this is roughly equivalent to Article 46 of the CISG [hereinafter *Secretariat Commentary*].

⁴² See *Secretariat Commentary, supra* note 41, at 38. See also A.H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 64 WASH. L. REV. 607 (1988).

⁴³ The author notes that a good description of the general English law approach to specific performance and contractual remedies generally can be found in a speech given by Lord Hoffman in *Co-Operative Insurance Society Ltd. v. Argyll Stores* (Q.B. 1997) AC. See also G.H. TRIETEL, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT* 43 (1988).

performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

There are several elements of this provision that are important to note in the context of the CISG. In particular, certain aspects of the English law and SGA approach to specific performance are themselves open to misinterpretation and/or uncertainty.

Section 52(1) limits specific performance to those circumstances involving "specific" or "ascertained" goods. In other words, Section 52(1) only applies to goods "identified and agreed on at the time a contract of sale is made"⁴⁴ or "identified in accordance with the agreement after the time a contract of sale is made."⁴⁵ On its face then, Section 52(1) is only meant to apply in limited circumstances involving limited types of goods. The mere fact that specific or ascertained goods are involved, however, is no guarantee that the court will exercise its discretion and order specific performance, including instances where the buyer was put to significant hardship in obtaining any sort of replacement good, such as custom machinery⁴⁶ or a ship.⁴⁷ This discretionary approach to specific performance is, by its very nature, uncertain. A plaintiff seeking specific performance has no means of knowing whether the remedy will be granted even if successful on the merits of the case where either a unique or semi-unique good is involved.

Further uncertainty arises in connection with Section 52(1) from a lack of consensus regarding the nature of the SGA itself. Some view the SGA as a codification of the common law (and equity) regarding sales law, meaning that the only remedies available to the parties are those expressly set forth in the SGA, while others consider the SGA to operate in addition to any other remedies available at common law or equity.⁴⁸ For the

⁴⁴ SGA, *supra* note 13, at ch. 52(1).

⁴⁵ Re Wait [1927] Ch 606 at 630, per Atkin, L.J.

⁴⁶ See *Societe des Industries Metallurgiques SA c. Bronx Engineering Co. Ltd.*, 1 Lloyd's Rep. 465 (K.B. 1975).

⁴⁷ See *C.N. Marine Inc. v. Stena Line*, 2 Lloyd's Rep. 336 (C.A. 1982). As per Article 2(e), the CISG does not apply to sales of "ships, vessels, hovercraft or aircraft."

⁴⁸ See SGA, *supra* note 13, § 62(2) which states that the *common law* continues to apply where inconsistent with the terms of that Sale of Goods Act. This can be contrasted with other common law jurisdictions whose legislation is based on the SGA, *e.g.*, *New South Wales Sale of Goods Act 1923*, where Section 56 states that all remedies are still available in equity, but does not contain an equivalent to

purpose of specific performance, this is particularly relevant in considering whether the remedy can be granted for unascertained goods. This narrow "codification" view was taken in the leading case of *Re Wait*,⁴⁹ where the majority refused to grant an order of specific performance for what it considered to be unascertained goods. In that case, Atkin L.J. stated that "The sum total of legal relations (meaning by the word 'legal' existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code [the SGA]".⁵⁰ This view of codification has been criticised by some commentators⁵¹ and has not been consistently applied in all cases.

In the case of *Sky Petroleum Ltd. v. VIP Petroleum Ltd.*,⁵² the parties had a long-term contract for the supply of petrol to a filling station. When the seller defaulted, the buyer was unable to locate an alternate supply of petrol due to an interruption of supply as a result of the Yom Kippur War. Given the circumstances, the court exercised its discretion to grant a decree of specific performance. As a precedent for such a remedy, *Sky Petroleum* was weakened by the fact that the court failed to discuss whether in fact it had the power to grant such a remedy under the circumstances or how the remedy fit into Section 52, the decision of *Re Wait* or even the general remedial structure of the SGA. Subsequent cases have questioned the authority of *Sky Petroleum* for the sale of goods.⁵³ Based on these decisions, English case law is unsettled on this point. The precise scope of when a court might have the power or discretion to grant specific performance is therefore unclear. Any new regime to be implemented in the CISG or other sales laws will have the opportunity to clarify English law on this point.

Section 52(1) of the SGA. See BRIDGE, *supra* note 31, at 6-10 for a discussion of the role of equity in modern sales law in England.

⁴⁹ [1927] Ch 606.

⁵⁰ *Id.* at 636.

⁵¹ See, e.g., G.H. Treitel, *Specific Performance in the Sale of Goods J.B.L.* 211, 223-224 (1966).

⁵² 1 W.L.R. 576 (1974).

⁵³ See *In Re London Wine Company (Shippers) Limited*, [1986] PCC 121, at 149 (considering the situation in *Sky Petroleum* to be a long term supply contract rather than a contract for the sale of goods).

The language used in Section 52(1) of the SGA, contrasted with the placement of the section within the SGA, also leads to potential uncertainty in exceptional circumstances. Section 52(1) makes no reference to “buyer” or “seller”, but instead refers to “plaintiff” and “defendant”.⁵⁴ At the same time, Section 52(1) is in the SGA under the heading “Buyer’s remedies”.⁵⁵ Based on this ambiguity, some have argued that in theory a seller can sue for specific performance,⁵⁶ while others state categorically that only the buyer has a right to ask for specific performance.⁵⁷ In practice, this ambiguity is not an issue. Specific performance is usually a remedy sought only by a buyer, since specific performance for the seller is usually receipt of the purchase price, which can almost always be compensated for by damages or by an action for payment of the purchase price under Section 49 of the SGA. The limitation contained in Section 52(1) of the SGA concerning ascertained goods would also be meaningless in connection with an action by the seller for specific performance. Since the seller is usually the responsible party for identifying and ascertaining the goods, the seller could easily avoid this limitation⁵⁸ by ascertaining the goods before seeking a decree of specific performance.

Despite these practical considerations, it is conceivable in some circumstances that a seller would prefer to force the buyer to take delivery of the goods rather than trying to sell the goods elsewhere and trying to recover any losses through an award of damages. Treitel⁵⁹ combined several of the unclear points to illustrate a situation where it would be appropriate for a seller to seek specific performance. A seller could have contracted to supply all of the requirements of the buyer’s manufacturing

⁵⁴ SGA, *supra* note 13, § 52(1).

⁵⁵ For further information on the use of headings to interpret English statutes, see Halsbury’s Laws of England vol. 44(1), ¶ 1411 (4th ed. 1995).

⁵⁶ See, e.g., MICHAEL FURMSTON, SALE AND SUPPLY OF GOODS 173 (2d ed. 1990); Treitel, *supra* note 51, at 229-230; LARSHMAN MARASINGHE, CONTRACT OF SALE IN INTERNATIONAL TRADE LAW 178 (1992). This issue could also turn on whether the SGA exempts all non-enumerated remedies, since before the SGA, in *Buxton v. Lister*, 26 Eng. Rep. 1020, 1021 (1746), the court assumed that a seller could obtain an order for specific performance.

⁵⁷ See, e.g., P.S. ATIYAH & J.N. ADAMS, THE SALE OF GOODS 507 (9th ed. 1995).

⁵⁸ That is, if this limitation does exist. See *supra* this part regarding whether specific performance is an available remedy for unascertained goods.

⁵⁹ See Treitel, *supra* note 51, at 230.

business over an extended period of time (therefore the goods are neither specific nor necessarily ascertained) for a contracted price. The seller may have made a significant initial investment and the market price might vary in such a way as to make any damage award speculative. Under these circumstances, the seller has some justification to seek specific performance. However the actual position under English law is unclear as to whether a court would have the ability to make such a decree.

b) *CISG Provisions*

The equivalent provision to Section 52(1) of the SGA is contained in Article 46 of the CISG which provides that a "buyer may require performance of the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement." Unlike the SGA, the CISG also contains a provision in favour of the seller in Article 62 to require the buyer to "pay the price, take delivery or perform his other obligations." As discussed above, the addition of a provision allowing specific performance in favour of the seller is unlikely to have a significant practical effect except in exceptional circumstances.⁶⁰ Consequently, the main focus below will be on the ability of the buyer to obtain specific performance.

There is no requirement under Articles 46 or 62 of the CISG that the goods be specific, ascertained or otherwise identified under the contract. On this basis, the CISG avoids some of the uncertainty associated with the scope of specific performance under the SGA. The only limitation on the buyer's ability to demand specific performance is resorting to a remedy which is inconsistent with specific performance. As with the SGA, the buyer is not precluded from claiming damages in addition to a claim for specific performance.⁶¹ Some types of remedies that

⁶⁰ In such circumstances, although unclear, English law might grant a remedy. Additionally, an action for the price under Section 49 of the SGA can be characterised under the CISG as essentially specific performance of the buyer's obligation to pay the price. See Kastely, *supra* note 42, at pt. I.C.2.a; J.S. Zeigel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 9-1, 9-30 (N.M. Galston & H. Smit eds. 1984).

⁶¹ See CISG, *supra* note 3, arts. 45(1), 45(2); HONNOLD, *supra* note 14, at 277-278. Treitel, wonders whether the reverse is necessarily true but if the CISG contemplates damages coexisting with specific performance, damages would not nec-

would be considered inconsistent are avoidance of the contract under Articles 26, 49 or 81 or reduction of the contract price under Article 50 (which is discussed below).⁶²

The first obvious difference between Section 52(1) of the SGA and Article 46 of the CISG is the difference in emphasis on who may pursue the remedy. Specific performance under the SGA is a discretionary remedy granted by the court. Yet under the CISG, it is the option of the *buyer* to require specific performance on the part of the seller, without any requirement of resorting to a court. According to the Secretariat Commentary on Article 42 of a previous draft of the CISG (roughly equivalent to Article 46), this style was chosen to reflect "the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal."⁶³

Despite this apparent difference in focus, the practical effect of such different wording is uncertain. In fact, the Secretariat Commentary indicates that this different style of legislative drafting is intended to achieve the same result.⁶⁴ In any event, one would anticipate that the typical buyer would desire and expect the seller to specifically perform its obligations before pursuing any remedies before a court. Likewise, since damages are the primary remedy under English law, a court is unlikely to make an award for specific performance unless requested by the plaintiff/buyer.

Where the difference in wording and emphasis could have its greatest effect is on the court itself in determining whether to grant a remedy of specific performance. Under the SGA, discretion is clearly granted to the court, while the CISG makes no mention of any court discretion. On this basis, it might be expected that specific performance would be granted more frequently under the CISG than is currently the case under the SGA. Once again, this difference is more apparent than real. Article 28 of the CISG contains a substantial limitation on the

essarily be an inconsistent remedy unless they somehow precluded specific performance, such as a typical English law award of damages as a sole remedy in lieu of specific performance. See Treitel, *supra* note 43, at 51.

⁶² See Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 TEXAS INT'L. L. J. 211, 214 (1991).

⁶³ *Secretariat Commentary*, *supra* note 41, at 41.

⁶⁴ See *id.*

ability of a party to obtain specific performance in certain circumstances. It states:

If, in accordance with this Convention, one party is entitled to require performance of any obligation by the other party, a 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 this Convention.⁶⁵

On that basis, any determination by an English court on whether to grant specific performance would require the court to look back at existing English law to decide whether the court would in fact grant the award. In other words, the court would refer to the traditional rules encompassed in Section 52(1) of the SGA discussed above in order to exercise its discretion in accordance with that provision.

While this escape clause is useful from the perspective of an English party (in that its legal position is not changed due to the CISG), it flies in the face of the CISG's stated goal of seeking uniformity.⁶⁶ When Articles 28 and 46 are read together there is clearly a compromise among the primary remedy of damages under common law systems (such as England), the primary remedy of performance in civil law systems⁶⁷ and the remedies in those jurisdictions where a court is prohibited from awarding specific performance. In each case it allows a country's court to determine whether it would grant specific performance based on the parameters of its own domestic law at the expense of commercial certainty or uniformity of remedy to be granted.⁶⁸

While there are no reported cases from other jurisdictions⁶⁹ that grant specific performance, it is highly conceivable that

⁶⁵ CISG, *supra* note 3, art. 28.

⁶⁶ See CISG, *supra* note 3, at pml.

⁶⁷ This compromise is discussed and largely criticised by M. Will, in M.C. BRANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 333-334 (1987). See also Walt, *supra* note 62, at 218-224; Kastely, *supra* note 42, at pt. I.C.; Zeigel, *supra* note 60, at 9-9; Farnsworth, *supra* note 41. An illustration of a civil law approach to specific performance can be found in Article 1184 of the French Code Civile. The civilian approach is generally said to be a reflection of the Roman legal maxim of *pacta sunt servanda*.

⁶⁸ See Kastely, *supra* note 42, at pt. I.C.

⁶⁹ This author notes that there are several internet sites which collate decisions made worldwide relating to the CISG, many of which are translated into English. On a review of the available material in English conducted in April 1999, there were no such reported cases.

specific performance would be granted in another jurisdiction in circumstances where an English court would not do so or vice versa. Apart from the uncertainty created by the inconsistency in remedies available in different jurisdictions, there is also the potential for forum shopping by a plaintiff seeking specific performance or a defendant seeking to avoid specific performance.⁷⁰

c) *Potential Future Legal Directions*

The CISG can be viewed as a missed opportunity to clarify the law relating to specific performance. One aspect that the CISG could have introduced into English law is the possible broadening of the narrow circumstances where specific performance is generally granted. The provision contained in Section 52(1) of the SGA was originally introduced in the mid-nineteenth century in order to encourage more liberal granting of specific performance.⁷¹ Bridge⁷² has stated that this provision has in fact had the opposite effect, since Section 52(1) speaks only of specific or ascertained goods, rather than all goods. Regardless of the reason, there has been a definite paucity of decisions where specific performance has been granted. The rules relating to specific performance in the sale of goods have been criticised as being too strict and resulting in unfair results in certain cases where replacement goods are not readily available.⁷³ Other common law jurisdictions, such as the United States, have already shown a greater willingness to grant specific performance than English courts.⁷⁴

⁷⁰ See Will, *supra* note 67, at 341; Zeigel, *supra* note 60, at 9-11; Walt, *supra* note 62, at 230-232 (suggesting that as a practical matter the chance of forum shopping is curtailed due to the limited reliance of parties on specific performance).

⁷¹ See BRIDGE, *supra* note 31, at 531; Treitel, *supra* note 51, at 217-219; Ontario Law Reform Commission, *Report on Sale of Goods* Vol. II. at 437 (Toronto: Ontario Ministry of the Attorney General 1979).

⁷² See BRIDGE, *supra* note 31 at 532; *But see* Sky Petroleum, 1 W.L.R. 576.

⁷³ See, e.g., R. GOODE, *COMMERCIAL LAW* 387-388 (2d ed. 1995); BRIDGE, *supra* note 31, at 531-536; Ontario Law Reform Commission, *supra* note 71, Vol. II at 437-439; Treitel, *supra* note 51.

⁷⁴ See Treitel, *supra* note 43, at 64; Walt, *supra* note 62; J.M. Catalano, *More Fiction than Fact: The Perceived Differences in the Application of Specific Performance under the United Nations Convention on Contracts for the International Sale of Goods*, 71 TUL. L. REV. 1807 (1997).

Instead of allowing a broader approach to specific performance, the new regime introduced by the CISG allows the English courts to continue to apply the traditional restrictive regime while sacrificing the potential benefits of uniformity of remedies. While this approach was a useful compromise to allow the international delegates to approve the CISG, it is an unsatisfactory solution that is unlikely to be adopted in future legal unification or harmonisation efforts.

There is some scope for English judges to use the CISG to expand the doctrine of specific performance based on the wording of Article 28, which only states that a court “is not *bound* to enter a judgment for specific performance [emphasis added]” unless it would do so under its domestic law. It does not expressly limit specific performance to those circumstances allowed under English law.⁷⁵ Article 28 is therefore framed in a discretionary rather than a mandatory manner.⁷⁶ An English court could choose to apply Article 46(1) to grant specific performance where it might not be clearly available under the SGA. However, given the traditional reluctance of English courts to exercise their discretion under the existing language of Section 52(1) of the SGA or to broaden the ambit of the remedy in those circumstances outlined above, it is highly unlikely that the English courts will use this opportunity to expand the doctrine.

Other approaches to the unification of contract law have been more successful in introducing a more coherent and certain scheme regarding specific performance than in the CISG. The clearest example for specific performance can be found in the UNIDROIT Principles, which follow the civil law approach to make specific performance the primary remedy, subject to certain exceptions. Article 7.2.2 reads:

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(a) performance is impossible in law or in fact;

⁷⁵ An example of mandatory wording is “a court shall not grant specific performance unless it would do so under its domestic law.”

⁷⁶ See Kastely, *supra* note 42, at pt. I.C.2.c (asserting that this view is shared by most commentators on the Convention).

- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;
- (d) performance is of an exclusively personal character; or
- (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.⁷⁷

The PECL takes a similar approach.⁷⁸ Unlike the SGA or the CISG (with the effect of Article 28), the remedy is not discretionary. A court must award specific performance unless one of the enumerated exceptions is met. An analysis of the intricacies of this particular specific performance remedy is beyond the scope of this article, but it is illustrative of a completely different compromise than that reached in the CISG. To adopt such an approach in England at this point would be a complete departure from the traditional approach of English law and is therefore inadvisable without further study. For the time being, the CISG is a useful addition in respect of specific performance only to the extent that it forms part of an international convention. Otherwise, it does not add any uniformity, certainty or a desirable remedy to English law.

GRANTING ADDITIONAL TIME TO DEFAULTING PARTY

A remedy that allows one party to grant additional time to the other party is not really a stand alone remedy in the traditional sense. It fits very closely with other remedies, particularly those that allow the parties to repudiate the contract. While details of the question of repudiation are not expressly dealt with in this article, the interaction between the granting of additional time and other remedies, including repudiation or avoidance of the contract, can differ substantially.

One would expect that any ability to grant additional time to perform would mostly be used where there has been some delay in performance by the defaulting party, such as delay in delivery by the seller or delay in payment by the buyer. The additional time gives the defaulting party time to cure its performance by making delivery or paying the purchase price. The

⁷⁷ CISG, *supra* note 3, art. 7.2.2.

⁷⁸ See PECL, *supra* note 26, arts. 4.102(1), 9.102(1).

opportunity to cure defective performance can be a significant help to the seller where it has delivered the goods but the performance is otherwise tainted, such as by defective goods. In that situation, the seller could use the additional time to cure the defective performance, as in Article 48 of the CISG,⁷⁹ such as by repairing the goods.

a) *CISG Provisions*

English law (discussed below) has no express remedy dealing with the granting of additional time to a defaulting party. By contrast, the CISG has borrowed a concept used in other legal systems⁸⁰ to include a specific remedy tied into the granting of additional time.⁸¹ Article 47 outlines the scope of the remedy as follows:

- (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
- (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.⁸²

The remedy in Article 47 was designed to be a companion to Article 46⁸³ and is often referred to as *Nachfrist*, after the German law remedy of similar effect. It also ties in with Article 33, which fixes the time in which the seller must deliver the goods. A similar remedy in favour of the seller is set forth in Article 63, which is connected with timing obligations of the buyer in such

⁷⁹ Article 48 of the CISG gives the seller the right to “cure” a non-conforming delivery by repairing or replacing non-conforming goods within a reasonable time. While the SGA contains no identical provision, it is a common clause in sales contracts, particularly for manufactured goods. Furthermore, the requirement of the innocent party to mitigate its damages would likely oblige the buyer to accept the seller’s offer to cure where (i) the non-conformity does not amount to breach of an essential term, or (ii) the buyer has elected to keep the goods. See J.S. Zeigel & C. Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (July 1981), excerpt reprinted in *Pace CISG Database*, *supra* note 14 (Feb. 19, 1999); *Payzu Ltd. v. Saunders*, 2 K.B. 581 (1919).

⁸⁰ See Will, *supra* note 67, at 342; KRITZER, *supra* note 15, at 355-356.

⁸¹ See CISG, *supra* note 3, art. 47.

⁸² *Id.*

⁸³ See *Secretariat Commentary*, *supra* note 41, at 39.

provisions as Article 38(1) (examination) and Article 59 (payment of the price).

As discussed above, Article 47 is not really a remedy of its own; it is meant to fit into the CISG concept of fundamental breach.⁸⁴ The primary purpose of Article 47 is to protect the buyer who is waiting for a delayed delivery. While waiting, the buyer might have to determine at what point the delay constitutes such a fundamental breach that the buyer becomes entitled to avoid or repudiate the contract.⁸⁵ Where the buyer is in doubt whether the seller has committed a fundamental breach, the buyer can declare an additional period of time under Article 47 for performance of the contract. This period must be “reasonable” (though there is no definition in the CISG of what would constitute a reasonable time). After the expiry of this period the buyer can consider a fundamental breach to have occurred and avoid the contract. This would apply regardless of whether the breach would otherwise have been considered fundamental. The buyer’s ability to avoid the contract after the delivery of a *Nachfrist* notice is outlined in Article 49(1)(b),⁸⁶ which reads:

The buyer may declare the contract avoided . . .

- (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph 1 of article 47 or declares that he will not deliver within the period so fixed.⁸⁷

The combination of Articles 47 and 49(1)(b) lead to some uncertainty as to the full effect of Article 47 as a remedy. Article 47 states that additional time may be granted to allow the seller to perform its “obligations”, while Article 49(1)(b) speaks only avoidance in regard of the delivery obligation. The opportunity of the buyer to avoid the contract where the seller has breached an obligation other than a delivery obligation is limited to cases where there is in fact a fundamental breach. This

⁸⁴ See *id.* See also Zeigel & Samson, *supra* note 79, at commentary on Article 47.

⁸⁵ See HONNOLD, *supra* note 14, at 386.

⁸⁶ The companion provision in favour of the seller is found in Article 64(1)(a), which applies when the buyer’s obligation to take delivery or pay the price is not met.

⁸⁷ CISG, *supra* note 3, art. 49(1)(b).

means that if a buyer gives a *Nachfrist* notice in such circumstances, the effect of the notice will be that the buyer will be prohibited from resorting to any other remedy for breach of contract during the period of such notice.

During this period, the seller would certainly have the opportunity to cure the breach, but the buyer would be precluded from taking any remedial action. This prohibition is useful protection for the defaulting seller who may be trying to perform or cure the contract, perhaps at significant expense.⁸⁸ From the buyer's perspective, it is unclear what purpose a *Nachfrist* notice would serve in those circumstances. Instead of offering a remedy to the buyer, it instead imposes a burden.⁸⁹ Perhaps fortunately for the buyer, after the expiry of the notice, the buyer would still be entitled to any of the other remedies allowed by the CISG.

b) *Contrasted with Traditional English Law Approach*

English law has no direct counterpart to the delivery of a *Nachfrist* notice. Perhaps the closest corollary can be found in the rules relating to breach of timing obligations by a party and whether such breach allows the other party to avoid the contract. Avoidance of a contract under the SGA does not rely on a "fundamental breach" analysis; instead, the analysis is on the importance to the parties of the obligation being breached under the contract.⁹⁰ Generally speaking, the breach of a major term, referred to as a "condition," allows repudiation, while the breach of a lesser term, referred to as a "warranty," only allows a claim for damages.

This approach has an advantage over the fundamental breach concept used by the CISG as the parties should be able to determine relatively easily whether a particular breach allows for termination of the contract, depending on the precise term that is breached. It adds to the certainty of the situation, although perhaps at the expense of the flexibility inherent in the fundamental breach concept. Despite the apparent clarity of the situation, there is still scope for ambiguity.

⁸⁸ See *Secretariat Commentary*, *supra* note 41, at 39.

⁸⁹ See KRITZER, *supra* note 15, at 356.

⁹⁰ This author notes that discussions of the SGA approach can be found in GOODE, *supra* note 73, at 128-130; BRIDGE, *supra* note 31, at 146-162.

Apart from items specifically designated as conditions and warranties in the SGA,⁹¹ whether a particular provision constitutes a condition or warranty is subject to interpretation. Furthermore, Section 11(3) of the SGA makes it clear that whether a particular provision constitutes a condition or warranty depends on the construction of the contract. It also suggests, by implication, that all terms in the contract are either conditions or warranties.⁹² This, too, is over-simplistic, since the courts have developed a third class of terms, referred to as “innominate,” where breach may or may not lead to a right of repudiation, depending on the seriousness of the breach.⁹³

Considering that the right of repudiation arises under the CISG only where the *Nachfrist* notice expires after a failure of the seller to deliver (or the failure of the buyer to make payment) it is important to consider whether a breach of those particular timing obligations under English law gives rise to a right to repudiate. It can further be considered whether the effect of any notice setting additional time would have any effect on such right.

i) *Breach of timing obligations*

Section 10 of the SGA is the starting point for the analysis of any questions on timing. It states (in part):

- (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale.
- (2) Whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract.⁹⁴

Sections 10(1) and 10(2) make no mention of conditions and warranties, which are the standard methods of determining when a right of repudiation arises. Instead, a different classification is offered, which is whether time is or is not of the es-

⁹¹ These are predominantly set forth in Sections 12-15 of the SGA, particularly after the amendments introduced by the Sale and Supply of Goods Act, 1994, Section 7.

⁹² See BRIDGE, *supra* note 31, at 151.

⁹³ See Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., 2 Q.B. 26 (1962).

⁹⁴ SGA, *supra* note 13, § 10.

sence.⁹⁵ While not always explicitly described as such, where time is considered of the essence, time obligations are viewed as conditions in contracts of sale.⁹⁶ This is illustrated by a situation in which a breach of a time obligation leads to a right of the other party to repudiate the contract.⁹⁷ The results of these provisions are twofold.⁹⁸ First, a breach (by way of delay) by the buyer of payment obligations does not *prima facie* give rise to a right of the seller to repudiate the contract. Second, any other time obligation does not clearly allow for repudiation, since it depends on the construction of the contract.

Pursuant to Section 10(1),⁹⁹ the seller can only make a claim in damages where the buyer has delayed by such a substantial amount that the breach allows the seller to repudiate the contract.¹⁰⁰ Such a situation could arise in one of two ways: (1) a court considered the time stipulation to be of the essence, or (2) where time is not of the essence, the delay in payment ultimately became a failure to pay, allowing for repudiation. The question of what length of delay allows for repudiation is the type of question that the CISG is trying to avoid by allowing a *Nachfrist* notice. Where there is a delay in payment, the seller is left to determine on its own whether the payment delay is of such a length that the breach allows it to avoid the contract. If the seller is incorrect in its assessment, it can become liable in damages to the buyer for breach of contract. In practice this situation would rarely arise because delivery and property in the goods typically have already passed before the delay in payment arises. In those circumstances, the seller is restricted to making a claim in damages for non-payment of the

⁹⁵ See BRIDGE, *supra* note 31, at 213.

⁹⁶ *But see* Bunge Corp. v. Tradax, 2 All E.R. 513, 540 (1981) (expressly discussing a time clause as being a "condition." The reasoning of Lord Lowry expressly admits that to treat time stipulations of the essence means to treat them as conditions. *See id.* at 544-545.).

⁹⁷ *Id.* Examples of the apparent interchangeability of the terms can be seen in Halsbury's Laws of England, *supra* note 55, Vol. 41, ¶ 686. *See also* GOODE, *supra* note 73, at 129.

⁹⁸ The following discussion assumes that the parties have agreed on a date (as is typical in commercial contracts). Without such agreement, the obligations must be carried out in a reasonable time. *See, e.g.*, SGA, *supra* note 13, § 29(3).

⁹⁹ It is not clear whether the courts do in fact follow Section 10(1), since they often do construe time to be of the essence in the contract, which reflects the pre-SGA common law cases. *See* BRIDGE, *supra* note 31, at 213-214.

¹⁰⁰ *See* Halsbury's Laws of England, *supra* note 55, at vol. 9(1) ¶ 931.

price within the terms of the contract.¹⁰¹ As the seller's primary interest is payment of the purchase price, this is usually not a problem.

The situation is somewhat different where the seller breaches a time obligation or the buyer's time breach is not related to its payment of the purchase price. Although Section 10(2) states that whether a time stipulation is of the essence depends on the construction of the contract, courts in most cases have held that time obligations are of the essence (or conditions of the contract).¹⁰² This view is supported by the decision of the House of Lords in *Bunge Corp. v. Tradax SA*,¹⁰³ where the court held that time stipulations in mercantile contracts will typically be considered to be of the essence and conditions.¹⁰⁴ The policy rationale for this reasoning is to promote certainty in commercial relationships. Each party should be able to determine easily whether it is entitled to repudiate the contract where there is a delay. By holding the parties strictly to their time commitments (particularly the seller's delivery obligation), English law has avoided the necessity for a *Nachfrist* notice before a contract can be repudiated. When a time stipulation is breached,¹⁰⁵ the innocent party is not obliged to deliver a notice of any sort before being entitled to repudiate the contract.

ii) *Granting of additional time*

If there has been a breach of a timing obligation where time is considered of the essence, the non-breaching party (usually the buyer) is still free to give the defaulting party (usually the seller) additional time to perform its obligations. This granting of additional time is considered a waiver by the party of its strict rights under the contract, rather than being the equivalent of a *Nachfrist* notice. Instead of the single step rep-

¹⁰¹ See SGA, *supra* note 13, § 49.

¹⁰² See GOODE, *supra* note 73, at 279; BRIDGE, *supra* note 31, at 214-219; M. FURMSTON, CHESHIRE, FIFOOT AND FUMSTON'S LAW OF CONTRACT 567-568 (13th ed. 1996).

¹⁰³ 2 All E.R. 513, 540 (1981).

¹⁰⁴ While this reasoning applies to both the obligations of the seller and the buyer, no mention is made of the buyer's payment obligations in conjunction with Section 10(1) of the SGA.

¹⁰⁵ Except in respect of the buyer's payment obligation discussed above.

resented by the delivery of a *Nachfrist* notice, English law requires two steps: first, a waiver of the time obligation and second, a new notice making time of the essence.¹⁰⁶

Where the innocent party has waived a timing breach, time is no longer considered of the essence. This makes the result the same as if time was never of the essence; the obligation must be performed within a reasonable time. In England, equity has intervened in limited circumstances to assist the innocent party. The case of *Stickney v. Keeble*¹⁰⁷ is often cited for the equitable proposition that, in contracts for the sale of land the purchaser can give a notice to the vendor to complete in a specified period, failing which the contract may be rescinded. The purpose of this notice is regarded as making time (again) of the essence,¹⁰⁸ giving the notifying party the ability to avoid or rescind the contract at the expiration of the notice period.

Stickney v. Keeble is a good illustration of the operation of this principle. In that case, an agreement made on the 8th of June for the sale of land provided for completion to occur on the 11th of October. When completion did not occur as scheduled, and after repeated attempts to secure completion, the purchaser gave notice to the vendors on the 30th of January the following year that required completion to occur on or before the 13th of February. When completion again did not occur, the purchaser rescinded the contract and brought a successful action for return of its deposit. The key finding by the court in that case was that the purchaser's actions and the time limits provided were considered to be reasonable under the circumstances. Lord Parker stated the general basis for the decision as follows:

It would be unjust and inequitable to allow the vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by such a notice as that to which I have referred an unreasonable time.¹⁰⁹

¹⁰⁶ For terms considered conditions, the ability of the buyer to waive breaches or treat them as breaches of warranty only are codified in Section 11(2) of the SGA.

¹⁰⁷ 1915 App. Cas. 386.

¹⁰⁸ See FURMSTON, *supra* note 102, at 596; TREITEL, *supra* note 39, at 743-744.

¹⁰⁹ See *Stickney v. Keeble*, 1915 App. Cas. 386, 419.

Since *Stickney v. Keeble*, this concept has been applied in the sale of goods context. The sale of goods case of *Hartley v. Hymans*¹¹⁰ held that, after the waiver by the buyer of the delivery period, the parties had implied a new agreement to extend the period of delivery to a reasonable time of which notice was to be given by the buyer to the seller. This is a slightly different situation than a *Nachfrist* notice because it appears to make a new implied agreement a prerequisite. More helpful is the case of *Charles Rickards v. Oppenheim*,¹¹¹ where the Court of Appeal accepted the reasoning in both *Stickney v. Keeble* and *Hartley v. Hymans* to hold that, where a buyer of goods has waived the time period for delivery, the buyer is subsequently “entitled to give a notice bringing the matter to a head.”¹¹² As with a *Nachfrist* notice under the CISG, the notice period must be reasonable. While not expressly stated in the judgment, it can be implied that during such a period that the buyer cannot pursue any other remedies. Denning L.J. stated:

If the defendant as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel.¹¹³

If this reasoning is followed in respect to the initial waiver of a time obligation, the waiver would appear to continue until such time as any notice was delivered, thereby making time of the essence.

From the above discussion, it can be seen that although the reasoning and approach differ, a similar result would probably be reached in most cases under the common law or under the CISG.¹¹⁴ Under both regimes, the innocent party can deliver a notice, the validity of which is dependent on the reasonableness of the innocent party’s position and of the time period required.

¹¹⁰ 3 K.B. 475 (1920).

¹¹¹ 1 K.B. 616 (1950).

¹¹² *Id.* at 624 (per Denning L.J.).

¹¹³ *Id.* at 623.

¹¹⁴ See Zeigel & Samson, *supra* note 79 (pointing out that to the extent that the seller has not relied upon the time extension, it is not binding on the buyer).

Both structures give the defaulting party the protection of a reasonable time, at the expense of the innocent party's certainty of when a time period would be considered reasonable.

c) *Potential Future Legal Directions*

Article 3.106 (now 8.106) of the PECL fairly closely mirrors the CISG in effect. It states:

- (1) In any case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.
- (2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages, but it may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under chapter 9.
- (3) If in a case of delay in performance which is not fundamental the aggrieved party has given a notice fixing an additional period of time of reasonable length, it may terminate the contract at the end of the period of notice. The aggrieved party may in its notice provide that if the other party does not perform within the period fixed by the notice the contract shall terminate automatically. If the period stated is too short, the aggrieved party may terminate, or, as the case may be, the contract shall terminate automatically, only after a reasonable period from the time of the notice.¹¹⁵

The provisions in both the CISG and the PECL can be viewed as operating on a similar basis, subject to two main exceptions. First, unlike the CISG, the innocent party under the PECL is not limited to cases of non-delivery before it can rescind the contract. Second, instead of having a separate provision dealing with avoidance (Article 49(1)(b) in the CISG), the PECL includes the avoidance provisions within the *Nachfrist* article.

Likewise, Article 7.1.5 of the UNIDROIT Principles contains a very similar provision to the PECL with some variance. The UNIDROIT Principles include a *de minimus* threshold such that a *Nachfrist* notice does not allow avoidance of the contract

¹¹⁵ PECL, *supra* note 26, art. 8.106.

where the unperformed obligation is minor.¹¹⁶ In this regard, the UNIDROIT Principles more closely mirror the CISG. As with the threshold under the UNIDROIT Principles, the CISG's limitation of avoidance to cases of non-delivery can also be viewed as a *de minimus* threshold because the rest of the seller's obligations can be viewed as less important (or more compensable by damages) than the delivery obligation.

Where a remedial scheme does not have a clear distinction between obligations that allow for repudiation and those that do not (such as conditions and warranties), some remedy is required in the cases where the delay is "borderline." Even within such a scheme, there are instances where an innocent party can be uncertain as to the remedies available to it. In these circumstances, the *Nachfrist* concept introduced from German law seems to be a useful tool. While English law does not explicitly have the same tool, it operates in a similar fashion once the innocent party has waived a time obligation. The adoption of the rules set forth in the CISG would cause minimal additional difficulty or confusion in this area of available remedies.

REDUCTION OF PRICE

A remedy allowing the buyer to pay a reduced price for defective goods delivered by the seller has been recognised since Roman times, under the Roman law remedy of *actio quanti minoris*.¹¹⁷ As originally framed, where there was a latent or hidden defect in the goods purchased which reduced their value, the buyer could sustain an action against the seller to reduce the purchase price payable.¹¹⁸ The purpose of the remedy is to allow the buyer to keep defective goods and pay the price it otherwise would have paid had it been aware of the hidden defects in the goods.¹¹⁹ This remedy has since been carried forward

¹¹⁶ See UNIDROIT Principles, *supra* note 21, art. 7.1.5.

¹¹⁷ See R. ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 318 (1996); TREITEL, *supra* note 43, at 107; E.E. Bergsten & A.J. Miller, *The Remedy of Reduction of Price*, 27 AM. J. COMP. L. 255-277, available in Pace CISG Database, *supra* note 14 (Jan. 15, 1998); Will, *supra* note 67, at 386.

¹¹⁸ See *id.*

¹¹⁹ See A.M. Tunon, *The Actio Quanti Minoris and Sales of Goods Between Mexico and the U.S.: An Analysis of the Remedy of Reduction of the Price in the UN*

into several of the main civil law codes.¹²⁰ Under these codes, the remedy is particularly useful because unlike contractual damages, the buyer can obtain the remedy without having to prove fault on the part of the seller.¹²¹

The right of a buyer to reduce the price payable is generally not calculated on the same basis as contractual damages,¹²² and is different from a right to set-off which is also tied into damages.¹²³ Unlike damages-based remedies, the principle of the price reduction remedy is not dependent on actual loss being suffered by the buyer, but is solely dependent on the abstract relationship between the actual value of the goods delivered and the hypothetical value of conforming goods.¹²⁴

While neither English law nor the CISG have fully adopted the traditional Roman law position, elements of the historical remedy can be found in both systems, although through different approaches. Since the CISG has gone further into incorporating a full price reduction remedy, the discussion below will focus first on the elements of the CISG remedy.

a) *CISG Provisions*

Because the CISG was designed through compromises that included both common law and civil law systems, it incorporates elements from both systems. Like the common law (and unlike civil law systems), no fault is required to show breach of contract for damages.¹²⁵ At the same time, the CISG includes the relatively traditional civil law remedy of reduction of price. The key provision for this remedy can be found in Article 50, which reads:

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered

Sales Convention, CISG Article 50 and its Civil Law Antecedents, available in Pace CISG Database, supra note 14 (Jan. 4, 1999).

¹²⁰ See ZIMMERMANN, *supra* note 117, ch.10, pt. II. See also Article 1644 of the French Code Civile and section 459 of the German BGB.

¹²¹ See HONNOLD, *supra* note 14, at 313.

¹²² Meaning, not on the expectation interest. See TREITEL, *supra* note 43, at 107-109.

¹²³ See Bergsten & Miller, *supra* note 117.

¹²⁴ See TREITEL, *supra* note 43, at 107-109.

¹²⁵ See CISG, *supra* note 3, arts. 45(1)(b), 79.

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.¹²⁶

While the committee drafting the CISG considered removing this remedy as damages will usually serve the buyer better, it was ultimately decided to retain the remedy because it was familiar to civil law systems and could benefit the buyer more in certain circumstances.¹²⁷

i) *General application*

The question of whether the goods conform with the contract can be determined in reference to Article 35, namely: whether the goods are of the quality, quantity and description required by the contract and generally fit for the purpose.¹²⁸ No distinction is drawn in Article 50 between different types of non-conformity. The same remedy applies regardless of the reason of non-conformity. There is no difference between the approach to defects of quantity and defects of quality.

As with specific performance, Article 50 is drafted from the perspective of the buyer. It is the buyer that has the option and the power to reduce the price paid to the seller. While civil legal systems require expert advice or the court to determine the difference in value between the contract price and the actual value, the CISG gives this power of determination solely to the buyer.¹²⁹ On this basis, price reduction can be seen as a self-help remedy that can be implemented by the buyer without any requirement to have the determination upheld by a court, expert or other tribunal. In practice, however, this difference is largely illusory. Any price reduction by the buyer must certainly be reasonable, otherwise it would be disputed by the

¹²⁶ CISG, *supra* note 3, art. 50.

¹²⁷ See COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 438-439 (P. Schlechtriem ed. 1998) [hereinafter COMMENTARY ON THE UN].

¹²⁸ This author notes that there are four specific tests set forth in Article 35(2), which mostly refer to fitness for purpose and packaging.

¹²⁹ CISG, *supra* note 3, art. 50. Buyer may reduce price without any specified determination of a third party. See *id.*

seller and subject to review by a court. During these proceedings, expert evidence would in all likelihood be adduced as to the value of the goods. Additionally, the burden of proof as to the value of the goods (both the value of delivered goods and conforming goods) is squarely on the buyer.¹³⁰

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. This situation illustrates why most parties would prefer to be the defendant in any action rather than the plaintiff. After all, 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.

In a study conducted in 1998 of ten cases from multiple jurisdictions using Article 50,¹³¹ it was found that Article 50 was not used "offensively" by the buyer. Instead, the article was predominately used as a counterclaim or a defence to an action by the seller for the purchase price.¹³² Such a result is in some respects not surprising. Where there is no dispute between the parties as to the amount of the reduction, the matter would not come to court and the remedy would act in its intended manner: as a self-help remedy available to the buyer. This way the remedy avoids the costs and uncertainty of litigation.

The method of calculation of the price reduction is easier in questions of defects in quantity rather than defects in quality. When determining the "proportion as the value that the goods actually delivered had . . . to the value that conforming goods would have had," proportions of quantity can be easily calculated.¹³³ If the parties contract for the delivery of one hundred apples, and the seller delivers ninety apples, the proportion is nine-tenths, so the buyer is only responsible for paying ninety percent of the purchase price. Where the quantity of apples de-

¹³⁰ See COMMENTARY ON THE UN, *supra* note 127, at 443.

¹³¹ See Tunon, *supra* note 119.

¹³² See *id.*

¹³³ CISG, *supra* note 3, art. 50.

livered is accurate but the quality is questionable, the proportion that the value of the non-conforming apples bears to conforming apples can be difficult to calculate and could be the subject of dispute between the buyer and the seller.

Where there is a dispute over the price to be paid, then the matter could proceed to litigation. Once the matter proceeds to litigation, the buyer who has already paid the purchase price would in most cases seek the full level of damages for the breach rather than merely reducing the price. Price reduction would usually only come to light where the seller is making a claim against the buyer for the purchase price and the buyer is seeking to reduce or eliminate the obligation to pay the price.¹³⁴ As with the other remedies discussed in this article, price reduction can be obtained by the buyer under the CISG in conjunction with damages.¹³⁵ In most circumstances before a court, seeking damages alone would give the buyer the largest recovery, since, because damages are calculated on the basis of the loss suffered by the buyer.¹³⁶ Price reduction alone is calculated without reference to the loss suffered by the buyer, and, therefore, would not include common costs incurred by the buyer (e.g., costs of mitigation, lost profit, etc.). On the other hand, a claim in damages would typically include the loss in value suffered by the buyer in receiving non-conforming goods. A buyer would, therefore, be well advised to either seek damages alone or damages in conjunction with price reduction to maximise its remedy.

ii) *Differences with damages*

In some circumstances, the buyer would prefer to rely on the price reduction remedy instead of damages. The most straightforward situation is where the buyer has difficulty in proving its loss, such as where it has purchased the goods for altruistic/non-commercial purposes.¹³⁷ If, for example, the buyer has purchased foodstuffs to donate to charity, it has not necessarily suffered any loss from the diminution in value of the non-conforming goods. Without any loss or necessarily the abil-

¹³⁴ See *infra* Reduction of Price, regarding Section 53(1)(a) of the SGA.

¹³⁵ See CISG, *supra* note 3, arts. 45(1)(b), 45(2).

¹³⁶ See CISG, *supra* note 3, art. 74.

¹³⁷ See COMMENTARY ON THE UN, *supra* note 127, at 438-439.

ity to prove any damage, the buyer's preferred remedy would be a reduction in the price to be paid to the seller.

The more contentious application of Article 50 in lieu of damages is in conjunction with Article 79. Article 79 sets forth various measures whereby a party (in this case, the seller) is not liable for a failure to perform if that party can show that the failure was due to an impediment beyond its control (*i.e.*, force majeure). Article 79(5) makes it clear that this exemption only applies to claims for damages and that it does not prevent either party from exercising any other remedy under the Convention. As Article 50 is separate from any claim for damages, the buyer can still claim a price reduction for defects under those circumstances.¹³⁸ For example, if a shipment of perishable goods at the seller's risk is delayed in transit due to unforeseen hostilities or labour action (so therefore outside of the seller's control) and are reduced in value due to the delay, the buyer has the choice to accept or reject the goods. If the buyer chooses to accept the goods, he would be precluded from claiming damages from the seller pursuant to Article 79. The buyer's only remedy would be to reduce the price payable pursuant to Article 50. Article 50 can thus be seen as an additional form of risk allocation between the buyer and seller in these circumstances. The policy rationale for such a rule is that it would otherwise be unjust for the buyer to be forced to pay full price for non-conforming goods.¹³⁹

Perhaps the most important and frequently occurring situation is where the market price of the (conforming) goods has changed substantially between the time of contracting and the time of delivery. The method of calculating the price reduction under Article 50 differs from the standard method of calculating damages. The calculation method for price reduction has been referred to as "proportionate," rather than "linear" or "absolute" calculations for damages.¹⁴⁰ This difference can be best illustrated by a practical example.¹⁴¹ The seller contracts to sell £100,000 worth of cheese. At the time of delivery, the cheese is

¹³⁸ See HONNOLD, *supra* note 14, at 392-395; COMMENTARY ON THE UN, *supra* note 127, at 438.

¹³⁹ See Zeigel & Samson, *supra* note 79; HONNOLD, *supra* note 14.

¹⁴⁰ See COMMENTARY ON THE UN, *supra* note 127, at 438.

¹⁴¹ See HONNOLD, *supra* note 14, at 391-395 (providing a version of this example).

slightly mouldy, worth approximately one-fifth of the value of the contracted cheese. Under Article 50, the buyer can reduce the price in proportion to the contract price, in this case one-fifth of £100,000, or £20,000. Regardless of whether the price rises or falls, the buyer is still able to purchase the delivered cheese for £20,000 under Article 50. Under an “absolute” calculation for damages (the difference between the value of the goods at delivery versus the value of conforming goods), the difference can vary depending on whether the price rises, falls or stays the same.¹⁴²

If the market price of cheese stays the same as the contract price, there would be no difference in the amount that could be claimed as damages versus a price reduction under Article 50. Where the price increases, the buyer would be best advised to seek damages since the difference in value between what was contracted for versus what was received would likely be greater than the £80,000 difference calculated under Article 50. For example, if the price of cheese doubles, the value of the conforming goods would be £200,000 versus a delivered value of £40,000, a difference of £160,000. Conversely, Article 50 would provide a greater benefit on a fall in market price. If the market price halves, the value of delivered cheese would be £10,000 with a conforming value of £50,000, leading to a damages award of only £40,000.

Of course, if there were a reduction in market price from the time of contracting, the buyer would most likely reject the goods, since it could obtain conforming replacement goods on the open market at less than the contract price. The application of Article 50 appears to give the buyer the upper hand, since it can elect to pursue the remedy that offers it the highest return. One must note that Article 50 is expressly made subject to the seller’s right to cure any defect under Article 48. This serves to balance the position between buyer and seller so that the seller has an opportunity to have some input into the resulting remedy pursued by the buyer. The combination of these two reme-

¹⁴² The following discussion is premised on the assumption that the buyer is not reselling the goods or otherwise suffers recoverable consequential loss, which is not covered by Article 50 and can only be dealt with by a damages claim.

dies can be viewed in light of the CISG's purpose to preserve the parties' bargain wherever possible.¹⁴³

These examples show that Article 50 is of narrow applicability in this "offensive" manner. In most cases, damages would be the preferred remedy. Considering the limited number of cases on this topic, it can be expected that in the future more cases will come to light where the buyer seeks price reduction in lieu of (or in conjunction with) damages where the purchase price has already been paid. Particularly circumstances such as those described above will come to be addressed.

The narrow application of Article 50 does throw some doubt on the necessity for such a provision. Despite these concerns, the worth of a provision should not be determined on the basis of its frequency of use. Apart from its use as a familiar tool to those comfortable with civil law systems, it does protect the buyer from certain inequitable situations that would otherwise not be properly remedied by damages alone.

iii) *Ambiguities in Article 50*

There is some uncertainty arising from the wording of Article 50, as it is unclear whether it also covers other situations, such as defects in title to the goods.¹⁴⁴ For instance, can the buyer claim a reduction in the price where the seller has failed to deliver good title in the goods? While by no means clear, it appears that Article 50 does not apply to defects in title. This interpretation is supported by the wording of Article 50 itself, which refers to goods not conforming to the contract.¹⁴⁵ While arguably a defect in title does not "conform to the contract," it is more properly characterised as an obligation of the seller rather than a particular character of the goods under the contract. The buyer's ability to claim damages for any loss suffered is by far a better remedy in such circumstances. These ambiguities in scope of Article 50 also highlight the limited application of the price reduction remedy under the CISG.

¹⁴³ See Tunon, *supra* note 119, at 4.3. The consequences of the effect of Article 50 in these circumstances are discussed in Bergsten & Miller, *supra* note 117.

¹⁴⁴ See HONNOLD, *supra* note 14, at 397.

¹⁴⁵ See *id.*, at 397-398; COMMENTARY ON THE UN, *supra* note 127, at 440-441.

b) *Contrasted with Traditional English Law Approach*

While the exact remedy of price reduction based on *actio quanti minoris* is unknown at English law, it does have some parallels to existing remedies.

i) *Defects of quantity*

A general remedy of price reduction can be implied from Sections 30 and 53 of the SGA. While Section 30 refers only to delivery of the wrong quantity, it follows the same general principle. For example, if the seller has delivered less than the contracted quantity of goods and the buyer accepts the goods, the buyer must “pay for them at the contract rate.”¹⁴⁶ 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 SGA would likely reach the same result as Article 50, as illustrated by an example given in the CISG Secretariat Commentary.¹⁴⁷ A seller contracts to deliver ten tons of corn at a market price of \$200 a ton for a total of \$2000, but instead delivers nine tons. The buyer accepts the ten tons and reduces the price by ten percent, paying \$1800 instead. Whether the result is characterised by way of contract price (9 tons times \$200 = \$1800) or proportionality (9/10 of \$2000 = \$1800), the buyer is responsible for paying the same amount. Thus each of the methods of calculation/characterisation under the CISG and the SGA for defects in quantity reach the same amount of price reduction.

ii) *Breaches of warranty and defects of quality*

Section 53 also contemplates a similar concept to Article 50, though it applies only to breaches of warranty and is phrased in terms of setting off the breach against the price due. Unlike the CISG, there is no general right on the part of the buyer to reduce the price unless set up as a defence to the seller’s action for

¹⁴⁶ SGA, *supra* note 13, § 30(1).

¹⁴⁷ See *Secretariat Commentary*, *supra* note 41, at 42.

the price.¹⁴⁸ However, as with the CISG, the reduction of price remedy applies at the option of the buyer in lieu of a claim for damages. There is also a specific provision in the SGA dealing with valuation where the breach is in respect of quality obligations. Section 53(3) states that, *prima facie*, the loss is the difference in value of the goods at the time of delivery between the delivered value and the contracted value. This is an implementation of the “linear” or “absolute” calculation of damages, which reflects the standard method of calculating damages rather than the proportional method of Article 50. Where there has been a market price change (either a rise or fall) from the contract price, the difference in value test could reach a different result than the proportionality test. This would not necessarily hold true in all circumstances, since Section 53(3) only states that the loss is “*prima facie*” the difference in value. An English court is allowed to make an award on a different basis. This basis could conceivably include the proportionality test as in Article 50, since proportionality is implicitly recognised in Section 30 of the SGA for defects of quantity.

Even without a specific remedy comparable to Article 50, English law probably reaches the same result as the CISG in most cases where there is a breach of a warranty.¹⁴⁹ Practically speaking, if a buyer receives defective goods of a lesser quality than contracted, which it otherwise wishes to accept, it can negotiate with the seller for a reduced price. This negotiation can take place before or after the purchase price has been paid and might take the form of the buyer paying a lesser amount to the seller. If the seller accepts this price reduction or the lesser amount paid to it, the price under the sales contract can be considered modified to that effect. In the circumstance where the price reduction is not agreed, the buyer or the seller can commence legal action to enforce its rights through a damages claim. Where the seller commences the action, the buyer can seek to set off the amount owing pursuant to Section 53(1)(a), which has also been reflected in the cases decided under Article 50 of the CISG. Where the buyer commences the action, it will in most circumstances seek damages in the same manner as

¹⁴⁸ See BRIDGE, *supra* note 31, at 591.

¹⁴⁹ In particular, where the only remedy concerned is price reduction or damages.

parties have been under the CISG (even though the CISG contains the Article 50 remedy).

Where the remedy would differ would be in the more limited circumstances described above, namely: where the buyer accepts the goods and (1) the buyer is unable to prove damages, (2) *force majeure*, and (3) the market price of conforming goods increases between the time of the contract and the time of delivery. These are the circumstances under the CISG where the price reduction remedy of Article 50 differs from an award of damages, and the same difference would hold true between Article 50 and damage awards under the SGA.

iii) *Partial frustration / force majeure*

Section 7 of the SGA roughly serves the same purpose as Article 79 of the CISG.¹⁵⁰ Where Section 7 does not apply, such as where the contract is not for specific goods, or *force majeure* other than the perishing of goods, the general doctrines of frustration and construction of the contract would apply.¹⁵¹ While the scope of this article does not allow for a full discussion of the implications of Section 7 and the differences between the doctrine of frustration and the damage exclusion provisions of Article 79, both serve to exclude liability of the seller for the perishing or damaging of the goods in circumstances beyond the seller's control. But what about the situation where the goods have partially perished?

On this point, English law is unclear. The orthodox view is that Section 7 would fully discharge both parties from the contract.¹⁵² Where there is a shortfall in quantity resulting from goods perishing, the discharge of all contractual obligations would preclude the buyer from demanding delivery of and accepting part of the goods if that was all that was available. There would be no opportunity for the parties to seek to reduce the price under Section 30(1) for the reduced quantity delivered (as with Article 50 of the CISG).

¹⁵⁰ Section 7 of the SGA reads "[w]here 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." SGA, *supra* note 13, § 7.

¹⁵¹ See, e.g., *Kursell v. Timber Operators and Contractors Ltd.* 1 K.B. 298 (1927).

¹⁵² See BRIDGE, *supra* note 31, at 135.

Little additional clarity can be found from the pre-“codification” cases under the SGA. Section 7 has been described as being a codification of the principle found in *Howell v. Coupland*.¹⁵³ In that case, the parties had contracted for the delivery of 200 tons of potatoes from the seller’s land (which was expected to produce over 400 tons). The crop failed due to disease and the land produced only 80 tons, which were all delivered to the buyer. The buyer sued for damage resulting from the non-delivery of the other 120 tons. The decision of the majority turned upon the construction of the contract and Coleridge C.J. held that the contract was “to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place.”¹⁵⁴ Based on that reasoning, the seller was not held liable for the non-delivery, which is similar to a result that would be reached under the CISG. However, this decision turned largely on the construction of the contract, which was interpreted to contemplate a reduced quantity, so partial frustration was not really an issue. Where there is no issue of partial frustration on questions of quantity, arguably Section 30(1) would apply if the buyer demanded and received delivery of the lesser quantity. Additionally, this case does not even appear to fall within the later-drafted provisions of Section 7 of the SGA, since an ungrown crop of potatoes (a portion of the anticipated crop) would not normally be considered specific goods.

However, in a more recent case outside of Section 7 (where the goods were non-specific), *H.R. & S. Sainsbury Ltd. v. Street*,¹⁵⁵ the court held that the buyer was allowed to call for delivery of a reduced crop. In this case, no goods were actually delivered and the buyer was able to claim damages for non-delivery of the goods actually available. While there was no delivery, the decision that the parties can continue to have a contract for a reduced quantity (not dependent on the construction of the contract) suggests that a similar result as envisaged under Article 50 would be reached in those circumstances. This is sup-

¹⁵³ 1 Q.B.D. 258. The author notes that this position is set forth in A. Diamond, *Force Majeure and Frustration under International Sales Contracts*, reprinted in *FORCE MAJEURE AND FRUSTRATION OF CONTRACT* 166-167 (E. McKendrick ed., 2d ed. 1995).

¹⁵⁴ *Howell*, 1 Q.B.D. 258, 261.

¹⁵⁵ 1 W.L.R. 834 (1972).

ported by Section 1(3) of the Law Reform (Frustrated Contracts) Act 1943, which requires recipients of a “valuable benefit” (such as a buyer receiving goods) to pay a just sum as determined by the court. However, that Act expressly does not apply to contracts considered frustrated under Section 7 of the SGA.¹⁵⁶ It would be odd if in fact the result differs in situations where Section 7 applies, but there is uncertainty in English law on these points. The amount to be awarded under that provision also cannot necessarily be concretely ascertained by the parties, since it would be at the court’s discretion. Finally, each of these cases has dealt with problems arising outside of the seller’s control which affect the quantity of the goods, which are arguably already covered in Section 30(1) of the SGA. There would appear to be even more ambiguity where the supervening event reduced the market price of the delivered goods for another reason, such as defects in quality. Adoption of the CISG would serve to clarify all of these matters.¹⁵⁷

The practical issue to be faced in the tension between *force majeure* frustration and damages in either the CISG or the SGA is the limited effect that ambiguities in the law would have on commercial parties. In most international sales contracts, whether they are a standard form or specifically negotiated, the parties will include some form of *force majeure* clause, often tailored to suit different situations. Since the parties will usually have agreed how to deal with these extraordinary situations, the effect of any uncertainty in the application of the law will be limited. Despite this, any legal regime should try to minimise any ambiguities for such rare circumstances.

c) *Potential Future Legal Directions*

Since the price reduction remedy is such a fundamental concept in civilian legal systems, it seems certain that any future efforts on the unification of contract or sale of goods law will contain some form of this remedy. Whether these efforts

¹⁵⁶ See Law Reform (Frustrated Contracts) Act 1943 § 2(5)(c).

¹⁵⁷ See BRIDGE, *supra* note 31, at 133-134 (discussing the question of partial frustration of quality obligations and arriving at a similar conclusion). Quality obligations are even more unclear, considering the interplay between Sections 7 and 14 of the SGA.

will necessarily reflect the approach of the CISG (without any fault requirement) is still to be determined.

To date, the unification efforts of the PECL for the reduction of price remedy are fairly similar to the CISG in approach. Though the language differs, this can be seen in Article 4.401 (now 9.401) of the PECL:

- (1) A party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time.
- (2) A party who is entitled to reduce the price under the preceding paragraph and who has already paid a sum exceeding the reduced price may recover the excess from the other party.
- (3) A party who reduces the price cannot also recover damages for reduction in the value of the performance but remains entitled to damages for any further loss it has suffered so far as these are recoverable under Section 5 of this Chapter.

As with the CISG, paragraph (1) above adopts the proportionality measure for the price reduction, measured at the time of delivery. Likewise, paragraph (2) is intended to allow a party such as the buyer to recover the amount of the price reduction once it has been paid. Finally, paragraph (3) makes it clear that the claimant cannot demand both the price reduction plus damages for the reduction in value. While there is no express equivalent to paragraph (3) in Article 50 of the CISG, the two provisions would likely have the same effect.¹⁵⁸

Interestingly enough, the UNIDROIT Principles contain no equivalent remedy to Article 50 of the CISG. There is no explanation within the UNIDROIT Principles for the reason for this exclusion, which might be due to the limited role the remedy plays when damages are readily available and not dependent on fault. The fact that the price reduction remedy has not been included can be interpreted to mean that price reduction may not be a remedy in future private law harmonisations. However, given the importance and familiarity of the remedy to ci-

¹⁵⁸ See HONNOLD, *supra* note 14, at 394. This is also consistent with the fact that Article 75 contemplates for loss suffered as a consequence of breach. If the buyer has already been "compensated" by price reduction, it would not be able to claim that amount again, since it had not suffered a loss in that regard.

vilian legal systems, this is not necessarily the case. In contrast to the UNIDROIT Principles, the European context (with its predominance of civil law systems) outside of the PECL gives further support to the *actio quanti minoris* continuing to play a role in future legal developments. In its draft directive on Guarantees for Consumer Goods,¹⁵⁹ the European Commission has included as one of the remedies a price reduction remedy similar to Article 50 of the CISG.

Another possible explanation for the exclusion of a price reduction remedy in the UNIDROIT Principles is the scope of coverage of those Principles. The *actio quanti minoris* is one of the earliest consumer protection remedies and exemptions to the *caveat emptor* principle, originally designed to protect buyers from latent defects in goods (typically slaves). As consumer protection legislation, it would have a place in any Consumer Goods directive and the PECL, which are both intended to cover all contracts, not just commercial ones. Since the UNIDROIT Principles only cover international commercial contracts, it could be argued that there would be a lesser need for such protection. If this were the sole basis, there would likewise be little reason to include such principles in the CISG and/or as an addition to English sales law. However, the price reduction remedy has grown beyond its original scope of consumer protection and an examination of the situations where it is useful to the commercial buyer (such as those discussed above) indicates that there is a role for the remedy to play in modern commercial law.

Whether with or without the potential of future application of the price reduction remedy, from the traditional common law perspective there is a great deal of existing support for similar remedies. While there is some potential for overlap with a claim for damages, price reduction is a useful element in the buyer's arsenal and helps protect the buyer with a remedy that can in principle be exercised by the buyer without having to resort to a court. The uncertainties introduced by Article 50 are not significant and the provision can be assimilated into English sales law without too many conflicts or resulting uncertainty.

¹⁵⁹ See COM (1998) 217, art. 3.4.

CONCLUSION

The basis of English sale of goods law is the SGA, which was originally passed over one hundred years ago. Many of the concepts contained therein are significantly older than that. Since the adoption of the SGA, commercial transactions have increased in volume, complexity and their international character. To expect Nineteenth Century or earlier legislation to deal with Twenty-first Century transactions is perhaps asking too much.¹⁶⁰ At minimum, the SGA should be expanded and amended to deal with modern technical and commercial developments.¹⁶¹

By way of contrast, the CISG is a much more modern document, developed in light of the international character and complexity of current trade practices. The remedies adopted in the CISG reflect more recent developments in practice and law and borrow heavily from a variety of legal systems. This combination of concepts and compromise between the positions of the drafters of the Convention has also led to some ambiguity and uncertainty in application rather than resulting in a consistent legal regime.

Even within such ambiguities, the remedies of specific performance, price reduction and *Nachfrist* which are introduced by the CISG and are different from or new to English law do serve a useful purpose and add to the protection of the contracting parties in certain circumstances. Additionally, these remedies are sometimes even more certain than their existing counterparts under English law. At the very least, the CISG remedies can be seen as consistent with other efforts at harmonising and unifying contract law, as represented by the PECL and the UNIDROIT Principles.

No international commercial legal regime can expect to be perfect, especially when it is developed on the basis of compromise between legal systems. To some extent the CISG does justify the criticisms of Mr. Justice Hobhouse, referred to in the

¹⁶⁰ See GOODE, *supra* note 73, at 1205-1212 (further discussing this position).

¹⁶¹ In the Canadian province of Ontario, the Law Reform Commission reviewed its Sale of Goods Act (modeled on the original SGA) and made arguments and recommendations in favour of changing its Act, which in many cases reflected the policy decisions made in the CISG. See Ontario Law Reform Commission, *supra* note 71 (especially vol. I. ch. 3).

Introduction, and mirrors the somewhat unrealistic efforts to make Esperanto a universal language. But the comparison with Esperanto is misleading. Parties are generally less willing to adopt another's legal regime in their dealings than they are another's language. To avoid the need to adopt each other's legal structure or an unfamiliar third one, the parties can choose¹⁶² to adopt the neutral regime represented by the CISG. So while the remedies provided for by the CISG might not represent part of the "consistent and universal form of international mercantile law" desired by Lord Mansfield¹⁶³ or a modern *lex mercatoria*, they do represent a step forward in that process.

The lack of perfection or total certainty of the CISG as a complete legal regime is not a reason for England to fail to adopt it. As illustrated above, the SGA has as much, if not more, uncertainty in the scope and application of some of its remedies as the CISG. On the question of remedies, the CISG can be seen as a step forward in the development and harmonisation of English law in conjunction with the majority of the United Kingdom's trading partners. While this article has focused on particular remedies, there is certainly scope within the rest of the CISG to consider whether it represents a worthwhile change or addition to English sale of goods law in other areas.

Attempts to analyse the CISG in light of English law and other international unifying regimes can give English parties and English courts some idea of the directions in which English sales law may be heading, not only on the question of available remedies. Given the useful purposes shown in this article for the addition of the CISG remedies to English sales law, such discussions may even serve to reduce any reluctance within the English legal or business communities to implement the CISG.

Neither English law nor English parties exist in isolation, nor can they afford to. Internationalisation is ongoing, both in trade and in legal developments. This internationalisation is particularly relevant when viewed in the context of the European Union and England's role within it. The continuing harmonisation and unification of EU laws on grounds that ap-

¹⁶² The CISG also automatically applies in a large number of international sales contracts pursuant to Article 1.

¹⁶³ See *infra* Introduction.

pear to fit well with the CISG, such as the PECL and the draft directive on Consumer Guarantees, give added support to adopting the CISG as an addition to existing English law. Adoption would also give English courts the opportunity to help develop the international (and European) jurisprudence on the concepts advanced in the CISG, including remedies. It is time for English law to move forward from the SGA and add the considerable expertise and influence of English courts in developing a new European and international *lex mercatoria*, of which the CISG is only a preliminary step.