

# THE SELLER'S RIGHT TO CURE UNDER THE UNIFORM COMMERCIAL CODE AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Eric C. Schneider\*

## *Resumen*

*La Convención de las Naciones Unidas sobre contratos para la venta internacional de mercaderías ("la Convención") ratificada por el Congreso de los Estados Unidos en Enero 1, 1988, fué la primera convención de ventas internacionales aprobada por las Naciones Unidas y ha llegado a ser la primera fuente del derecho de comprventas para la mayoría de las transacciones de internacionales. La Convención es el resultado de años de negociaciones entre países de el derecho civil, y de derecho consuetudinario, y las naciones socialistas. La Convención rige las transacciones de ventas internacionales en los países que han ratificado la Convención a menos que las par de la transacción estipulen que ellos no aceptan la Convención como fuente obligation y seleccionen otra fuente alternativa de derecho. Este estudio examinará las diferencias entre el Código Uniforme de Comercio y la Convención en cuanto a los derechos del vendedor para reparar una ejecución defectuosa de sus obligaciones. El estudio también enfocará las ventajas de fuentes alternativas de derecho y proporcionará dirección al comerciante internacional para decidir si desea ser regido por la Convención.*

## INTRODUCTION

On January 1, 1988, a United Nations Convention became the first federal sales law in the United States.<sup>1</sup> Disputes arising out of

---

\*Professor, University of Baltimore School of Law. B.A., University of Connecticut, 1959; LL.B., University of California, Hastings School of Law, 1962; LL.M., New York University, 1968.

1. The United Nations Convention On Contracts For the International Sale of Goods was ratified by the Senate on October 9, 1986 and took effect on January 1, 1988. S 15773-74 (daily ed. Oct. 9, 1986) (rollcall vote No. 339-Treaty Doc. No. 98-9). See also Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INTL & COMP. L. 707 nn. 1-2 (1986). For a prior attempt to pass a federal sales act, see the Proposed Federal Sales Act. H.R. No. 8176, 76 Cong., 3rd Sess. (1940), reprinted in 26 VA. L. REV. 668 (1940) and A *Symposium: The Proposed Federal Sales Act*, 26 VA. L. REV. 537 (1940).

international sales contracts, formed after January 1, 1988 between merchants from signatory nations, may be governed by the United Nations Convention On Contracts For the International Sale Of Goods (CISG or Convention)<sup>2</sup> rather than the Uniform Commercial Code (U.C.C.) or foreign sales law,<sup>3</sup> unless the parties specifically state otherwise.<sup>4</sup>

The structure of an international sale of goods differs from a local sale in ways which will affect traders' decisions about which law to choose as the governing law of their contract.<sup>5</sup> In an international sale of goods between merchants, payment is made through a documentary sale or letter of credit transaction.<sup>6</sup> In simplified form, the buyer takes the sales contract to his bank and receives a line of credit. The buyer's bank notifies the seller's bank of the line of credit and the seller, after shipping the goods, presents the bill of lading and other required documents to his bank for payment. The seller's bank presents the documents to the buyer's bank for reimbursement and the buyer's bank turns over the documents to the buyer so that the buyer can obtain the goods from the carrier.

In a documentary transaction, the buyer has paid for the goods before receiving them.<sup>7</sup> He nevertheless has a right to inspect the goods and can reject them if they do not conform to the sales contract and sue for a return of the purchase price.<sup>8</sup>

2. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. A/CONF.97/18 Annex I (1980) [hereinafter CISG], reprinted in UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter Conference].

3. CISG applies only to offers and contracts made after entry into force of the convention. CISG, *supra* note 2, art. 100. See also *Convention on International Sales of Goods Expected to Aid Contract Dispute Resolution*, 4 Int'l Trade Rep. (BNA) 677, 678 (May 20, 1987) [hereinafter *Convention*].

4. Because CISG article 6 reads "[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions," it permits parties to exclude themselves from the Convention or any of its provisions as part of their private contract. International traders might use article 6 to avoid the CISG "until international case law is clear." See *Convention, supra* note 3, at 677.

5. R. FOLSOM, R. GORDON & J. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 32 (1986).

[I]t will involve distance between parties, . . . more than one legal system, . . . could involve different currencies . . . [and] it is more likely that buyer and seller do not know each other and do not wish to trust each other or to rely upon litigation (especially in a foreign legal system) for protection."

*Id.*

6. A. LOWENFELD, INTERNATIONAL PRIVATE TRADE, § 5, at 101-44. (rev. 2d ed. 1988).

7. R. FOLSOM, R. GORDON & J. SPANOGLE, *supra* note 5, at 57.

8. A. LOWENFELD, *supra* note 6, § 2.25, at 15.

Because the buyer must pay for the goods before he can inspect them, the buyer can demand that a third party in the seller's country inspect the goods and that the seller include a certificate of inspection with the documents of sale.<sup>9</sup> Although the letter of credit transaction and documentary sale are a valuable means of payment in international trade, they do expose the parties to certain risks. In a letter of credit transaction, the buyer has paid for goods without personally inspecting them. If the goods do not conform to the sales contract, the buyer's only recourse is a cause of action for damages. In a documentary sale transaction, if the buyer or the buyer's bank does not accept the seller's draft, the seller may incur expenses in reselling the goods in a foreign country.

The seller's right to prevent the buyer from rejecting the goods and the buyer's right to avoid a contract were in the past dependent on domestic law, of either the buyer's or the seller's country, as determined by uncertain conflict of law rules.<sup>10</sup> The CISG is designed to make the outcome of such disputes more certain.<sup>11</sup> One area of the CISG which was vigorously debated and ultimately compromised is the seller's right to cure a late or defective performance. This Article will examine whether international traders will benefit by opting to use the CISG provisions regarding the seller's right to cure rather than the Uniform Commercial Code as the controlling law of their contracts.

### HISTORICAL BACKGROUND OF INTERNATIONAL SALES LAW

The general principles on which the CISG is based are found in the legislative history of international sales law, beginning with two 1964 Hague Conventions: The Convention on Formation of the Contract (ULF)<sup>12</sup> and the Convention on the Sales Contract (ULIS).<sup>13</sup> The ULIS, adopted only by most western European nations,<sup>14</sup> was the

---

9. R. FOLSOM, R. GORDON & J. SPANOGLE, *supra* note 5, at 57.

10. A. LOWENFELD, *supra* note 6, at 81-85.

11. *Id.* at 84.

12. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169 (1972) [hereinafter ULF]

13. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 34 U.N.T.S. 107 (1972) [hereinafter ULIS].

14. P. WINSHIP, THE SCOPE OF THE VIENNA CONVENTION ON INTERNATIONAL SALES CONTRACTS 1-1 to 1-13 (1984) and Miniter, *Buyer's Right of Rejection: A Quarter Century Under the Uniform Commercial Code, and Recent International Developments*, 13 GA. L. REV. 805 (1979).

basis of early work by the United Nations Commission on International Trade Law (UNCITRAL). By 1978 UNCITRAL developed a Draft Convention (Draft Convention) which was used in UNCITRAL's 1980 Diplomatic Conference (Conference) to negotiate and agree on the final provisions of the CISG.<sup>15</sup>

During these conventions, the rules relating to a seller's right to cure were among the most difficult to negotiate.<sup>16</sup> This is not surprising since the rules relating to a seller's right to cure have undergone major changes in the United States and other participating countries over the last thirty years.<sup>17</sup> The changing nature of international sales law has, at times, made international transactions unnecessarily uncertain.<sup>18</sup>

The CISG has not been completely successful in eliminating this uncertainty. Professor John Honnold maintains that the CISG contains, "rules that can save a contract from destruction on technical and trivial grounds" by permitting a breaching party to cure a deficiency in performance under articles 34, 37 and 48 while limiting the right of avoidance of a contract to breaches which are fundamental under articles 25, 49 and 64.<sup>19</sup>

The CISG has been ratified by sixteen nations.<sup>20</sup> Sixty-two nations approved the 1980 draft of the CISG without dissent.<sup>21</sup> Unlike prior attempts to unify the international rules of trade, the CISG represents

---

15. The Draft Convention [hereinafter Draft Convention] is found in Conference, *supra* note 2, at 5.

16. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 65 (1982).

17. Honnold, *Buyer's Right of Rejection- A Study of the Impact of Codification on a Commercial Problem*, 97 U. PA. L. REV. 457 (1949); Minitzer, *supra* note 14; J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 318-324 (2d ed. 1980).

18. Often, buyers become uncertain as to whether they are excused from a contract with a breaching seller and free to pursue alternative means of obtaining the goods they want. If the buyer acts too quickly and the seller's breach is later determined to have been minor, or if the seller is found to have had a right to cure, the buyer, by acting as though the defectively performed contract is at an end, may find himself in breach. The seller must also be certain of his rights in a contract across national borders where their ability to dispose of rejected goods is more limited. J. HONNOLD, *supra* note 16, at 65.

19. *Id.* at 65-66.

20. Up to date information on ratification can be obtained from the Treaty section of the Office of Legal Affairs, United Nations telephone (212) 754-7958/5048. Countries having ratified to date are: United States, China, Italy, Argentina, Australia, Austria, Egypt, Finland, France, Hungary, Lesotho, Mexico, Sweden, Syria, Yugoslavia and Zambia.

21. Honnold, Book Review, 81 AM. J. INT'L L. 540 (1987) (reviewing P. VOLKEN & P. SARCEVIC, INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES (1986)).

a synthesis of the interests of international traders.<sup>22</sup> The countries attending the debates and ultimately agreeing to the terms of the CISG had to resolve differences between common law and civil code concepts.<sup>23</sup> In addition, the Convention addressed the competing concerns of both industrialized and developing nations and economic systems based on a socialist or capitalist model.<sup>24</sup> Because of the shared conviction that international rules for trade were necessary, the countries accepted a compromise formula with certain limitations and reservations.<sup>25</sup> For example, the CISG does not govern sales to consumers or sales of securities, ships, aircraft or electricity.<sup>26</sup> It does not affect the liability of a seller for death or personal injury caused by goods<sup>27</sup> or

22. Prior attempts to unify international trade law did not receive the support of countries of different legal, social and economic systems. Report of the Secretary-General on the International Sale of Goods (1966-1970) 1 UNCITRAL Y.B. 159. See also Honnold, *Uniform Law for International Trade-Progress and Prospects*, 20 INT'L LAW. 635, 637 (1986).

23. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 610 (1988). ("On some points, however, the delegates did not agree. This was true of the Convention's remedial provisions, which reflect an awkward compromise between two distinct approaches to contract damages").

24. Sturley, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?* 21 TEX. INT'L L.J. 540, 552-54 (1986); Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN J. INT'L L. 263 (1986). That the differences will prevent a true consensus, see Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 267-68, 282-83 (1984); See also *Proposed United Nations Convention on Contracts For the International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the Senate Committee on Foreign Relations*, 98th Cong., 2d Sess. 77 at 39 (1984) (statement of Frank A. Orban III).

25. For a detailed historical development of the international law for the sale of goods over the last three decades, see Reinhart, *Development of a Law for the International Sale of Goods*, 14 CUMB. L. REV. 89 (1984).

26. CISG, *supra* note 2, art. 2. Article 2 states:

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

*Id.*

27. CISG, *supra* note 2, art. 5. Article 5 states: "This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person." *Id.*

the obligations of parties to a contract to third parties such as creditors and bona fide purchasers.<sup>28</sup>

The CISG provides that it is to apply to contracts between parties of signatory and non-signatory states.<sup>29</sup> The United States' ratification, however, limits the applicability of the CISG to those cases where both contracting parties are from ratifying states.<sup>30</sup>

The CISG does not clarify which methodology will be used in interpreting CISG provisions.<sup>31</sup> CISG article 7 gives some guidance and states that:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.<sup>32</sup>

---

28. CISG, *supra* note 2 art. 4. Article 4 states:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

*Id.*

29. CISG, *supra* note 2, art. 1. Article 1 states:

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States;

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

*Id.*

30. The United States exercised its right to make a reservation under CISG article 95 so that it would not be bound by Article 1(1)(b). According to the ABA, article 1(1)(b) would lead to more uncertainty about which law applied, national or CISG, and this would create the type of confusion CISG was meant to minimize. *See Report of ABA House of Delegates*, 18 INT'L LAW. 39 (1984). *See also* S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 21-22 (1983).

31. 5 Int'l Trade Rep. (BNA) 638 (Apr. 27, 1988). UNCITRAL will collect and disseminate information on court decisions and arbitral decisions interpreting the convention. *Id.*

32. CISG, *supra* note 2, art. 7(2).

Article 7 of the CISG seems to prescribe a civil code approach, meaning that case law will not have precedential value but will be viewed as highly persuasive in the development of principles.<sup>33</sup>

#### THE SELLER'S RIGHT TO CURE A NON-CONFORMING TENDER PRIOR TO THE DATE SET FOR PERFORMANCE

The seller's right to cure a late or nonconforming tender prior to the date of performance is found in CISG articles 34 and 37 and U.C.C. § 2-508(1). CISG articles 34 and 37 clearly allow the seller to cure any nonconformity in documents of sale or performance if the seller has delivered the documents or non-conforming goods prior to the date set for delivery in the contract of sale.<sup>34</sup> This right is limited in both CISG articles 34 and 37 to a cure that is effected before the date set for delivery in the contract and can only be exercised if it "does not cause the buyer unreasonable inconvenience or unreasonable expense."<sup>35</sup> In any case, the buyer retains the right to claim damages.<sup>36</sup>

---

33. The sources of law used in interpreting the Convention will not be limited to cases.

The Convention takes no position on the major issues of jurisprudential process . . . By its form alone the Convention is a code, in the sense that term is used in continental and socialist systems, rather than a detailed set of decisional rules like the UCC. For this reason, broad interpretation by scholarly treatises, judicial reasoning by analogy, emphasis on conceptual analysis and other continental interpretative techniques are to be expected. The concept also suggests less emphasis on common-law stare decisis, the following of past judicial authority with attention to decisions turning on the factual circumstances of prior cases.

Rosett, *supra* note 24, at 297-98.

34. CISG article 34 provides:

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided in this Convention.

CISG, *supra* note 2, art. 34.

CISG article 37 provides:

If the seller has delivered the goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

CISG, *supra* note 2, art. 37.

35. *Id.*

36. *Id.*

According to U.C.C. § 2-508(1), the seller has the right to cure any nonconformity before the date set for performance in the contract, if he seasonably notifies the buyer of his intention to cure and then, within the contract time, makes a conforming delivery.<sup>37</sup> This unfettered right to cure before the time set for performance is similar to article 37 of the CISG.

United States' courts have tended to favor the seller in setting the time during which this unfettered right to cure exists. In *Traynor v. Walters*,<sup>38</sup> the court extended the contracted for performance date six days (from December 8 to December 14) for the delivery of Christmas trees.<sup>39</sup> The court inferred an agreement to modify the contract from the buyer's statement that his customers did not need the trees until December 16th and the buyer's demand for other trees on December 14th.

In a contract which stated no performance date, a Washington court in *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*,<sup>40</sup> stated that when a sale is on approval, and the seller has given a six month warranty to repair defects and replace parts, the date for performance does not expire before the sixth month. An Oklahoma court, however, came to a different conclusion in a case where the buyer was a consumer. In *Olberg v. Phillips*,<sup>41</sup> the court did not allow a seller the 12,000 mile or 12 month warranty period in which to cure, stating that the right to cure is not controlled by the seller but should closely approximate the expectations of both parties.<sup>42</sup>

Both the CISG and the U.C.C. give the seller an unfettered right to cure any nonconformity prior to the date set for delivery by the contract. The U.C.C. may limit the seller's right to cure if the buyer is a consumer and has accepted goods in which there is a material breach.

---

37. U.C.C. § 2-508(1) (1977) states: "Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." *Id.*

38. 342 F. Supp. 455, 10 U.C.C. Rep. Serv. (Callaghan) 965 (M.D. Pa. 1972).

39. *Id.* at 460, 10 U.C.C. Rep. Serv. (Callaghan) at 974. There was evidence that the original purchase order stated "pickup December 8 and 9," and that this was later extended by the buyer to December 10th. *Id.* at 460, 10 U.C.C. Rep. Serv. (Callaghan) at 974.

40. 17 Wash. App. 761, 565 P.2d 819, 21 U.C.C. Rep. Serv. (Callaghan) 1231 (1977).

41. 615 P.2d 1022, 29 U.C.C. Rep. Serv. (Callaghan) 846 (Okla. Ct. App. 1980).

42. *Id.*



## THE SELLER'S RIGHT TO CURE A NON-CONFORMING TENDER AFTER THE DATE SET FOR PERFORMANCE

### *The Seller's Right to Cure Under the CISG*

A seller's obligation is defined in CISG article 35 which requires delivery of goods which are of the "quantity, quality and description required by the contract . . . which are contained or packaged in the manner required by the contract." A tender of non-conforming goods by a seller constitutes a breach of contract.<sup>43</sup> Goods do not conform to the contract if: (1) they are not fit for ordinary use; or (2) they are not fit for the particular use by the buyer which the seller knew of or should have known of; or (3) they do not possess the quality of samples; or (4) they are not properly packaged in a manner usual for such goods.<sup>44</sup> The seller is not liable for a nonconformity if the buyer knew or should have known of the lack of conformity when he entered into the contract.<sup>45</sup>

---

43. CISG, *supra* note 2, art. 36. Article 36 provides:

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

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including breach of a guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

*Id.*

44. CISG, *supra* note 2, art. 35(2). Article 35(2) provides:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

*Id.*

45. CISG, *supra* note 2, art. 35(3). Article 35(3) states: "The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity." *Id.*

When a seller fails to deliver on time or tenders non-conforming goods, CISG article 48 allows a seller to cure the performance if it does not cause the buyer unreasonable delay, unreasonable inconvenience or unreasonable uncertainty of "reimbursement by the seller of expenses advanced by the buyer."<sup>46</sup> CISG article 48(2) provides:

If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

The seller's right to cure under the CISG is qualified by certain rights and duties allowed the buyer. Many of these rights arise out of civil law concepts that are unfamiliar to common law lawyers.<sup>47</sup>

### The Buyer's Right to Specific Performance

Courts in civil law countries are more willing to apply the remedy of specific performance than are courts in common law countries. Primary relief for failure to deliver under the CISG,<sup>48</sup> at least in theory,<sup>49</sup> is specific performance and a buyer may require performance

46. Article 48(1) states:

Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

CISG, *supra* note 2, art. 48(1).

47. That the civil law bias of prior attempts to unify international trade law has been tempered in CISG, see Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. LAW 79, 81 n. 16 (1984).

48. CISG article 33 provides:

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;  
 (b) if a period of time is fixed or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or  
 (c) in any other case, within a reasonable time after the conclusion of the contract.

CISG, *supra* note 2, art. 33.

49. Gonzales, *supra* note 47, at 96; See also CISG article 28 which provides:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement 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.

CISG, *supra* note 2, art. 28.

by a seller without having to show that damages would be an inadequate remedy.<sup>50</sup> A buyer may also avoid the contract, take a price reduction and seek compensatory damages.<sup>51</sup> These remedies may be cumulated<sup>52</sup> but a buyer can seek specific performance only if he has given timely notice and has not previously chosen an inconsistent remedy such as avoidance or price reduction.<sup>53</sup> Because representatives from common law nations objected to the primacy of specific performance as a remedy,<sup>54</sup> a compromise was struck in CISG article 28 which allows a court to order specific performance only in a situation where the remedy would be appropriate under its domestic law.<sup>55</sup>

### The Buyer's Duty to Give Notice of Non-conforming Tender

After receiving goods, the buyer must examine them "within as short a period as is practicable in the circumstances"<sup>56</sup> and must give notice to the seller specifying the nature of the nonconformity within a reasonable time after the buyer discovered or should have discovered it. If the buyer does not notify the seller within a reasonable time after discovery of the nonconformity, he loses all remedies that might be based on the nonconformity, including the right to damages, specific performance, avoidance and reduction of price.<sup>57</sup> This was an area of contention between developed and developing states at the Convention. European countries argued for a strict notice provision, while developing countries felt more time might be needed to find

---

50. CISG, *supra* note 2, art. 46(1). Article 46(1) states: "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement." *Id.*

51. CISG, *supra* note 2, art. 45(1). Article 45(1) states: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77." *Id.*

52. CISG, *supra* note 2, art. 45(2). Article 45(2) states: "The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." *Id.*

53. CISG article 46(1), *supra* note 50.

54. For a discussion of the various views, see Drobnig, *General Principles of European Contract Law*, in VOLKEN & SARCEVIC, *INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES* 305, 319-22 (1986).

55. CISG article 28, *supra* note 49.

56. CISG, *supra* note 2, art. 38.

57. CISG, *supra* note 2, art. 39(1). Article 39(1) states: "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it." *Id.*

defects in complicated machinery which their nationals purchased.<sup>58</sup> The compromise position taken by the CISG includes an unusual feature: the buyer loses his rights arising out of the seller's breach of contract if he does not notify the seller within two years after he has received the goods, unless the parties have contracted otherwise.<sup>59</sup>

There are two exceptions that may protect a buyer who has not given proper notice: (1) If the nonconformity "relates to facts" about which the seller knew or should have known but did not disclose to the buyer, the buyer is relieved of the notice requirement,<sup>60</sup> and (2) at the insistence of developing countries for a relaxed notice requirement,<sup>61</sup> CISG article 44 allows the buyer to reduce the price or claim compensatory damages if he "has a reasonable excuse for his failure to give the required notice."<sup>62</sup> This excuse provision does not protect a buyer from the two-year cut-off period but only from the requirement of giving notice within a reasonable time. This adds confusion to the CISG since the "reasonable time" requirement of CISG article 39(1) should already include factors relating to a reasonable excuse for not having given notice. It is arguable that this exception "removes the sharpest teeth of article 39."<sup>63</sup>

### The Buyer's Ability to Require Repair or Substitute Delivery

Consistent with civil law concepts regarding a buyer's remedies, the CISG allows a buyer to require a seller to cure a timely but non-conforming tender by repair or additional delivery if the request for cure is not unreasonable in light of all the circumstances.<sup>64</sup> What constitutes a reasonable request for repair is not clear from the CISG.

---

58. J. HONNOLD, *supra* note 16, at 254.

59. CISG, *supra* note 2, art. 39(2). Article 39(2) provides:

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

*Id.*

60. CISG, *supra* note 2, art. 40.

61. J. HONNOLD, *supra* note 16, at 254.

62. CISG, *supra* note 2, art. 44.

63. J. HONNOLD, *supra* note 16, § 261, at 283.

64. CISG, *supra* note 2, art. 46. Article 46 provides:

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Professor Schlechtriem defines "unreasonable" as a repair which would cause disproportionate expense to the seller when compared to the advantage given to the buyer.<sup>65</sup> If the cure request is found to be unreasonable, a buyer is left with only a claim for damages or price reduction.<sup>66</sup>

A buyer's right to demand substitute goods is potentially expensive to a seller since substitution means retrieval or redispensing of the goods first delivered. Prior to the ratification of the CISG, ULIS article 42(1) allowed a buyer to demand substitute goods for a less than fundamental nonconformity.<sup>67</sup>

Pursuant to article 42(2) of the Draft Convention, a buyer could demand substitute goods upon a showing that the seller's tender constituted a fundamental breach.<sup>68</sup> At the Conference, the United States raised the issue of whether, under the Draft Convention, the seller's right to cure by repair prevailed over the buyer's right to demand substitute goods.<sup>69</sup> Professor Farnsworth from the United States asked, "[w]hat would happen if the buyer, claiming his rights under [Draft] article 42 required substitute goods and the seller, basing himself on [Draft] article 44, offered to remedy [by repair]?"<sup>70</sup> It

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

*Id.*

65. P. SCHLECHTRIEM, *UNIFORM SALES LAW: THE U.N. CONVENTION FOR THE INTERNATIONAL SALE OF GOODS* 76 (1986).

66. *Id.*

67. ULIS, *supra* note 13, art. 42. Article 42(1) provides:

The buyer may require the seller to perform the contract:

- (a) if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects;
- (b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;
- (c) if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible.

*Id.*

68. Draft Convention, *supra* note 15, art. 42(2). Article 42(2) provides:

If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

*Id.*

69. Conference, *supra* note 15, at 344.

70. *Id.*

seemed reasonable to the United States delegation that the seller should prevail and they offered an amendment to make this clear.<sup>71</sup> Not all countries favored the United States position, including Bulgaria and the Federal Republic of Germany.<sup>72</sup> The Federal Republic of Germany, basing its position on the German Civil Code § 480,<sup>73</sup> wanted the buyer to have the right to demand substitute goods whether or not the lack of conformity constituted a fundamental breach and contended that the right should “only be excluded if it was not reasonably practical for the seller to deliver substitute goods.”<sup>74</sup>

The Conference adopted article 46(2) which makes the buyer’s right to demand substitute goods dependent on a fundamental non-conformity and rejected an amendment offered by the United States which made the buyer’s right to substitute goods subordinate to the seller’s right to cure.<sup>75</sup>

At the twenty-second meeting, under a joint proposal agreed to by a vote of nineteen to seven,<sup>76</sup> the Conference adopted the final language of CISG article 48(1) which makes the seller’s right to cure a late or nonconforming fundamental breach dependent only on whether he can do so within a reasonable time without causing the buyer unreasonable inconvenience or uncertainty about reimbursement of expenses.<sup>77</sup> The United States proposed amendment that CISG article 49 include language to make clear that the seller’s right to cure was not subordinate to the buyer’s right to demand cure by substitute goods was not added. The question of whether the CISG places a serious limit on the seller’s right to cure by giving the buyer the right to dictate the terms of the cure under article 48 with a demand for substitute goods is still open to debate.

Professor Schlechtriem contends that the seller’s right to cure should yield to the buyer’s right to demand substitute goods when the buyer has, for example, clearly ordered but not received “chips suitable for the tropics.”<sup>78</sup> In this situation, “the breach is fundamental and [the]

---

71. *Id.* at 114. “Revise the first sentence of paragraph (1) of article 44 to read as follows: (1) Unless the buyer has declared the contract avoided in accordance with article 45 and regardless of any right of the buyer under article 42 the seller may, even after the date for delivery, remedy . . .” *Id.*

72. *Id.* at 344.

73. P. SCHLECHTRIEM, *supra* note 65, at 76.

74. Conference, *supra* note 15, at 332-33.

75. *Id.* at 114.

76. *Id.* at 115.

77. CISG article 48(1), *supra* note 46.

78. P. SCHLECHTRIEM, *supra* note 65, at 78.

buyer retains the right to demand substitute goods, even if [the] buyer can otherwise use the nonconforming transistor without great loss."<sup>79</sup>

Often in the case of raw materials or fungible goods, a breach is neither fundamental (it does not give rise to a right to demand substitute goods) nor repairable. In this situation a buyer must keep the goods and take a reduction in price or sue for damages.<sup>80</sup>

### The Buyer's Right to a "Grace Period"

Another civil law right given to the buyer by CISG article 47(1) is the buyer's right to "fix an additional period of time of reasonable length for performance by the seller of his obligation."<sup>81</sup> This right is based on the German concept of *Nachfrist* or "grace period."<sup>82</sup> This device has been welcomed by most commentators because it aids the parties in avoiding lawsuits.<sup>83</sup> When viewed in light of the CISG provisions regarding a seller's right to cure, however, *Nachfrist* may eliminate the certainty in contractual relations which the provisions seek to create.

### The Buyer's Right to Avoid the Contract: The Question of Fundamental Breach

Under article 44(1) of the Draft Convention, a seller may cure a late or nonconforming tender "[u]nless the buyer has declared the contract avoided in accordance with article 45."<sup>84</sup> This provision, which favored a buyer's right to avoid a contract over the seller's right to cure, was of concern to numerous delegates at the Conference who sought to delete these limiting words.<sup>85</sup> After three alternative

79. *Id.*

80. *Id.* at 76.

81. CISG, *supra* note 2, art. 47.

82. Reinhart, *supra* note 25, at 99.

83. J. HONNOLD, *supra* note 16, § 290, at 307.

84. Draft Convention, *supra* note 15, art. 44(1). Article 44(1) provides:

Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing buyer unreasonable inconvenience or uncertainty of reimbursement by seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

*Id.*

85. Conference, *supra* note 15, at 341-44, 351-53.

proposals were considered,<sup>86</sup> the Conference finally adopted CISG article 48(1) which opens with the words, “[s]ubject to article 49, the seller may . . . remedy . . . .”<sup>87</sup> Because CISG article 49 gives the buyer the right to avoid the contract,<sup>88</sup> it is, on its face, no different than the Draft Convention. Professor Honnold argues, however, that the change in words leaves little doubt that the seller’s right to cure prevails over the buyer’s right to avoid.<sup>89</sup> To find otherwise, he maintains, would make meaningless the seller’s right to cure.<sup>90</sup> Professor Honnold’s view is not universally held. Professor Ziegel argues that “there is no requirement in the Convention requiring an injured party to give a breaching party an opportunity to cure before exercising the right of avoidance.”<sup>91</sup>

The Convention also addressed the issue of whether the buyer’s right to avoid the contract is limited only to situations where the seller has failed to deliver on the date set for delivery in the contract. This was a particularly difficult issue because the ULIS granted buyers a broad right of avoidance. Although the ULIS started with the idea that the buyer could avoid a contract only for a fundamental breach,<sup>92</sup> it also allowed the buyer to demand that the seller cure even a minor nonconformity within a reasonable time and, if the seller did not, the buyer could transform the minor breach into a fundamental breach

86. Ziegel, *Buyer’s Remedies*, in INTERNATIONAL SALES § 9.03, 9-22 (Galston and Smith ed. 1984).

87. CISG article 48(1), *supra* note 46.

88. CISG article 49 provides:

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach; or

(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.

CISG, *supra* note 2, art. 49.

89. J. HONNOLD, *supra* note 16, at § 296.

90. *Id.* at 312 n. 16. Honnold argues:

Avoidance under Art. 49(1) is applicable to a wide range of circumstances other than cure, whereas the cure provisions of Art. 48(1). could be frustrated by an unqualified application of Art. 49(1). In such situations, a general provision yields to a specific. The same result follows from the conclusion that an offer to cure prevents a breach from becoming ‘fundamental’.

*Id.*

91. Ziegel, *supra* note 86, § 9.03, at 9-23.

92. ULIS, *supra* note 13, art. 43. Article 43 provides: “The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of contract . . . .” *Id.*



and avoid the contract.<sup>93</sup> This caused one commentator to state that "[the] seller can cure only when [the] buyer has not avoided."<sup>94</sup> Because the Draft Convention took a similar approach in draft article 45, there was a great deal of debate on this issue.<sup>95</sup> Draft article 45 allowed the buyer to declare the contract avoided in two situations:

- a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach; or
- b) if the seller has not delivered the goods within the additional period of time fixed by the buyer . . . or has declared that he will not deliver within the period so fixed.<sup>96</sup>

The debate over draft article 45 centered on whether there was a distinction between nondelivery and nonconformity. The Norwegian representative declared that subparagraph (b) was concerned only with nondelivery and that the buyer, in a case of nonconformity, could not declare the contract avoided if the seller did not cure in the time set by the buyer for cure.<sup>97</sup> The Netherlands' representative took the opposite approach saying that:

It was strange that under [Draft] article 43 the buyer was entitled to give the seller additional time to perform, whereas [Draft] article 45 did not give him any right upon expiry of that time. The buyer should be able to declare the contract avoided because

93. ULIS, *supra* note 13, art. 44(2). Article 44(2) provides:

The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided.

*Id.*

94. Minter, *supra* note 14, at 839.

95. Conference, *supra*, note 15, at 354.

96. Draft Convention, *supra* note 15, art. 45(2). Article 45(2) goes on to state:

In cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

- (a) in respect of late delivery, after he has become aware that delivery has been made; or
- (b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such additional period.

*Id.*

97. Conference, *supra* note 15, at 351.

of the seller's failure to perform a material obligation as well as failure to make delivery.<sup>98</sup>

The Swedish representative argued for a distinction between nondelivery and nonconformity. The Swedish representative, contended that if the buyer could avoid the contract, the buyer could "transform a simple breach into a fundamental breach by the mere fact of allowing the seller additional time."<sup>99</sup> He went on to say:

On the other hand, nondelivery should in all cases amount to a fundamental breach. If the buyer wondered whether enough time had been allowed for the breach to be considered fundamental, he could allow the seller additional time, at the end of which the breach would become fundamental and the buyer could declare the contract avoided.<sup>100</sup>

The Greek representative endorsed the position that if a seller did not cure a nonconformity in the time given by a buyer under draft article 43, he would be in fundamental breach under draft article 45(1)(a) and a buyer could therefore avoid the contract.<sup>101</sup>

The Federal Republic of Germany representative stated that the *Nachfrist* procedure set forth in draft article 43 was not intended to transform an insignificant breach into a fundamental breach.<sup>102</sup> The representative of Finland said that in countries where the *Nachfrist* procedure was unknown any breach could be made a fundamental breach by the buyer under draft article 45.<sup>103</sup> Many countries endorsed Finland's interpretation of draft article 45 which would allow the buyer to set a time in which a breach would become fundamental, but this view did not prevail.

Draft article 45 became CISG article 49 with the important addition of the words, "in case of nondelivery" in subsection (1)(b).<sup>104</sup> Based on this amendment, Professor Honnold argues that the buyer's right to set a time for cure which, if not met, would result in a fundamental breach, applies only to nondelivery and not to nonconformity.<sup>105</sup> Therefore CISG articles 48 and 49 give the seller the right to cure any fundamental breach, either of nonconformity or nondelivery, if it

---

98. *Id.* at 354.

99. *Id.* at 352.

100. *Id.* at 354.

101. *Id.* at 355.

102. *Id.* at 354.

103. *Id.* at 355.

104. CISG article 49(1)(b), *supra* note 88.

105. J. HONNOLD, *supra* note 16, § 288, at 305.

can be done in a reasonable time after the date set for performance in the contract. If such a cure is possible, the breach is not considered fundamental.

As noted above,<sup>106</sup> article 47(1) allows the buyer to fix an additional time beyond the contract date for the seller's conforming performance. This additional time, however, does not convert a minor delay or nonconformity into a fundamental breach.<sup>107</sup> It only limits the buyer's remedies during the additional time to damages caused by the delay.<sup>108</sup> If the seller, however, delays beyond a reasonable time or continues to perform in a fundamentally nonconforming way, the buyer can avoid the contract.<sup>109</sup>

Other CISG rules provide that the buyer's right to avoid a contract is limited to cases in which the seller's breach is fundamental. CISG article 25 defines a fundamental breach as one which "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen the result." Under CISG article 49(1), a buyer is allowed to declare a contract avoided:

- (a) if the failure of the seller to perform any of his obligations under the contract of this Convention amounts to a fundamental breach; or
- (b) in case of nondelivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer ... or declares that he will not deliver within the period so fixed.<sup>110</sup>

---

106. See *supra* note 81 and accompanying text.

107. *Id.*

108. CISG, *supra* note 2, art. 48(2).

109. P. SCHLECHTRIEM, *supra* note 65, at 77-78.

110. CISG, *supra* note 2, art. 49(1). See also CISG article 49(2) which states: [I]n cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- (b) in respect to any breach other than late delivery, within a reasonable time:
  - (i) after he knew or ought to have known of the breach;
  - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after seller has declared that he will not perform his obligations within such additional period; or
  - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

CISG, *supra* note 2, art. 49(2). For a discussion of article 49, see J. HONNOLD, *supra* note 16, at 317.

The buyer may also declare a contract avoided if prior to the date set for performance it becomes clear that the seller will commit a fundamental breach.<sup>111</sup>

A fundamental breach is also determined in accordance with the buyer's expectations as fixed in the contract. Courts will not only look to the buyer's objective damages but to whether the "nonconformity was considered so serious by the parties that its existence would eliminate [the] buyer's interest in performance of the contract concerning these goods."<sup>112</sup>

Summarizing the concept of fundamental breach, Professor Honnold concludes that "the question of whether a breach was 'fundamental' for the purpose of avoidance must be answered in light of the effect of a rightful offer to cure, for otherwise [the] seller's exercise of this right would be futile."<sup>113</sup> Professor Honnold also maintains that if a cure is possible, the breach is not to be considered fundamental and the buyer cannot avoid the contract.<sup>114</sup> Honnold's conclusions do not necessarily follow from the language or history of the CISG and are of little help in determining whether the buyer's right to demand substitute goods prevails over the seller's right to cure by repair. This raises the issue of whether there are actually two types of cure under the CISG rather than the alternative of cure or avoidance. If this is the case, exercising one's rights under the CISG would be futile.

One significant issue to be resolved is whether the term "fundamental breach," as used in the CISG, includes only incurable breaches. Whether a breach is incurable is often a difficult question of fact that takes into account the buyer's reasonable expectations under the terms of the contract. The delegate from the United Kingdom, Mr. Feltham, gave an example which illustrates how difficult this question can be. Mr. Feltham argued that if a machine were delivered that did not work but could be repaired in a few days, there was no fundamental breach. But, he continued, "where the seller had delivered a machine which in no way fulfilled the buyer's expectations, whereupon the latter lost confidence and did not even wish the seller to attempt to repair it, the buyer should be able to declare the contract avoided . . . without having to listen to the seller's arguments."<sup>115</sup>

---

111. CISG, *supra*, note 2, art. 72(1). Article 72(1) states: "If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided." *Id.*

112. P. SCHLECHTRIEM, *supra* note 65, at 77.

113. J. HONNOLD, *supra* note 16, at 214.

114. *Id.*

115. *Conference*, *supra* note 15, at 341-42.

In the final analysis, the buyer's ability to demand substitute goods or to avoid a contract may depend on whether, in the jurisdiction in which the issue is raised, the judge has an understanding of the principles of civil law on which the above CISG principles are based.<sup>116</sup> It is these principles, embedded in the CISG but with no counterpart in the common law, that will cause problems of interpretation of the Convention by common law courts.

### *The Seller's Right to Cure Under the U.C.C.*

If, under the terms of a contract for the international sale of goods, the parties agree to be governed by the Uniform Commercial Code, the seller's right to cure will depend on the court's interpretation of U.C.C. §§ 2-508, 2-601, 2-608, and 2-612.<sup>117</sup>

Under § 2-508(2) of the U.C.C., a seller is allowed to cure after the contract performance date "[w]here the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable, with or without a money allowance," if the seller seasonably notifies the buyer of his intention to cure, and he cures with a substitute conforming tender within a reasonable time.<sup>118</sup>

Unlike the CISG, the U.C.C. treats separately and differently the buyer's right to avoid a contract before and after the acceptance of goods. After delivery but before acceptance of goods, § 2-601 of the

---

116. A. Rosett, *supra* note 24, at 297-98.

The Convention takes no position on the major issues of jurisprudential process . . . . By its form alone the Convention is a code, in the sense that term is used in continental and socialist systems, rather than a detailed set of decisional rules like the UCC. For this reason, broad interpretation by scholarly treatises, judicial reasoning by analogy, emphasis on conceptual analysis and other continental interpretative techniques are to be expected. This concept also suggests less emphasis on common-law *stare decisis*, the following of past judicial authority with attention to decisions turning on the factual circumstances of prior cases.

*Id.*

117. See text of these sections below. For the proposition that the U.C.C. is to be interpreted by courts, see J. WHITE & R. SUMMERS, *supra* note 17, at 9-10.

Courts in the same state will likely follow the footsteps of their predecessors, even where those steps have gone astray. Some theorists believe the code is a 'true Code' and therefore would hold that every case must be resolved in light of the text itself, prior interpretations to the contrary not withstanding.

We find no evidence that courts are generally departing from the notion of *stare decisis* in this way.

*Id.*

118. U.C.C. § 2-508(2) provides in full: "Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender." U.C.C. § 2-508(2) (1977).

U.C.C. allows the buyer to reject when the goods or their tender "fail in any respect to conform to the contract."<sup>119</sup> If the buyer rightfully rejects, he can cancel the contract, recover what he paid on the purchase price and recover damages for total breach.<sup>120</sup> Once the buyer accepts goods by keeping them without complaint after he has had a reasonable time to inspect, or indicating that he is keeping them in spite of their nonconformity,<sup>121</sup> his right to reject the goods has ended.<sup>122</sup> He can now revoke his acceptance only because the nonconformity substantially impairs the value of the goods to him.<sup>123</sup>

119. U.C.C. § 2-601 provides:

Subject to the provisions of this Article on breach in installment contracts [§ 2-612] and unless otherwise agreed under the sections on contractual limitations of remedy [§§ 2-718 and 2-719], if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

U.C.C. § 2-601 (1977).

120. U.C.C. § 2-711(1) (1977). U.C.C. § 2-711(1) states:

Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract [ 2-612], the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

- (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
- (b) recover damages for non-delivery as provided in this Article [§ 2-713].

*Id.*

121. U.C.C. § 2-606:

(1) Acceptance of goods occurs when the buyer

- (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
- (b) fails to make an effective rejection [subsection (1) of § 2-602], but such acceptance does not occur until buyer has had a reasonable opportunity to inspect them; or
- (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

U.C.C. § 2-606 (1977).

122. U.C.C. § 2-607(2) (1977). U.C.C. § 2-607(2) states:

Acceptance of the goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on a reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

*Id.*

123. U.C.C. § 2-608(1) (1977). U.C.C. § 2-608(1) states:

The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

- (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

The U.C.C. does not define what comprises substantial nonconformity and we are therefore left to assume that the drafters intended that the courts use the same factors which are used to determine the common law concept of material breach.<sup>124</sup> These factors include:

- (a) [t]he extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.<sup>125</sup>

The sections of the U.C.C. dealing with rejection, avoidance and cure, like those in the CISG, contain a host of unsettled questions.<sup>126</sup> Unlike the CISG, the U.C.C. has had judicial determinations of most of these issues.

### The Seller's Right to Cure Prior to the Buyer's Acceptance of the Goods

Although U.C.C. § 2-601 is some authority for the buyer's right to reject goods before acceptance for minor nonconformities, other

---

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

*Id.*

124. U.C.C. § 1-103 provides: "Unless displaced by particular provisions of this Act, the principles of law and equity, including the law merchant . . . shall supplement its provisions." U.C.C. § 1-103 (1977).

125. RESTATEMENT (SECOND) OF CONTRACTS § 241 (1979); *See also* Colonial Dodge, Inc. v. Miller, 420 Mich. 452, 362 N.W.2d 704 (1984) (seller delivered a new car without a spare tire under a contract in which the buyer had ordered special tires because he traveled extensively. Over two dissenting opinions, the buyer was allowed to revoke his acceptance on the ground that this was a substantial impairment).

126. J. WHITE & R. SUMMERS, *supra* note 17, at 319.

code sections<sup>127</sup> have led commentators<sup>128</sup> and more than one court to the conclusion that the buyer will be allowed to avoid a contract only for a substantial breach.<sup>129</sup> The most relevant limitation on the buyer's right to reject goods is the seller's right to cure a defective performance.<sup>130</sup>

The seller's right to cure after the date for performance, under U.C.C. § 2-508(2), depends on whether he reasonably believed that a nonconforming tender was acceptable.<sup>131</sup> Professor Nordstrom<sup>132</sup> and one court,<sup>133</sup> in dicta, believe that the language of U.C.C. § 2-508(2) allows the seller to cure after the delivery date only if he actually knew of the nonconformity of tender at the time of performance. Under this view, if, because of prior course of dealing or trade usage, the seller

---

127. U.C.C. § 2-601 (1977), *supra* note 119, makes the perfect tender rule inapplicable to installment contracts. Under U.C.C. § 2-504 late delivery caused by improper shipment contract requires material delay or loss. U.C.C. § 2-504. U.C.C. §§ 2-208 and 1-205 allow that trade usage, course of dealing and course of performance may allow variance from literal terms of a contract. U.C.C. §§ 2-208, 1-205 (1977).

128. J. WHITE & R. SUMMERS, *supra* note 17, at 304-05.

129. *Holland v. Dick Youngberg Chevrolet-Buick, Inc.*, 348 N.W.2d 770 (Minn. Ct. App. 1984); *Moulton Cavity & Mold, Inc. v. Lyn-Flex Indus., Inc.*, 396 A.2d 1024, 25 U.C.C. Rep. Serv. (Callaghan) 1026 (Me. 1979); *Mass v. Scoboda*, 188 Neb. 189, 195 N.W.2d 491 (1972); *Bowen v. Young*, 509 S.W.2d 600 (Tex. Ct. App. 1974). One court has gone so far as to say that some defects do not justify rejection by a buyer. *See Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345, 7 U.C.C. Rep. Serv. (Callaghan) 1257 (1970). The court in *Ramirez v. Autosport*, 88 N.J. 277, 440 A.2d 1345, 33 U.C.C. Rep. Serv. (Callaghan) 134 (1982) disagreed and held that the perfect tender rule was preserved by the U.C.C.

130. *Bonebrake v. Cox*, 499 F.2d 951, 14 U.C.C. Rep. Serv. (Callaghan) 1318 (8th Cir. 1974) (If buyer accepts goods there is no right in seller to cure and seller may have to pay damages). *Boies v. Norton*, 526 S.W.2d 651 (Tex. Ct. App. 1975) (right to cure not available to seller where buyer sued for damages and not for rescission).

131. *See* U.C.C. § 2-508(2), *supra* note 119 and U.C.C. § 2-508 comment 2 which states:

Such reasonable grounds can lie in prior course of performance or usage of trade as well as in particular circumstances surrounding the making of the contract. The seller is charged with commercial knowledge of any factors in a particular sales situation which require him to comply strictly with his obligations under the contract as, for example, strict conformity of documents in an overseas shipment or the sale of precision parts or chemicals for use in manufacture. Further, if buyer gives notice either implicitly, as by a prior course of dealing involving rigorous inspections, or expressly, as by the deliberate inclusion of a 'no replacement' clause in the contract, the seller is to be held to rigid compliance. If the clause appears in a 'form' contract evidence that it is out of line with trade usage or the prior course of dealing and was not called to seller's attention may be sufficient to show that the seller had reasonable grounds to believe that the tender would be acceptable.

U.C.C. § 2-508 comment 2 (1977).

132. R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 105, at 319-21 (1970).

133. *Meads v. Davis*, 22 N.C. App. 479, 481, 206 S.E.2d 868, 869 (1974).



believed the nonconforming tender would be acceptable to the buyer, the seller has a reasonable time to cure beyond the time set in the contract if the buyer unexpectedly rejects the goods.<sup>134</sup> In *T.W. Oil, Inc. v. Consolidated Edison Co.*,<sup>135</sup> the seller was held to have a right to cure when he shipped oil with a .92 % sulfur content under a contract that called for oil with no more than a .52 % sulfur content. The court found that the seller had a right to cure because he knew that the buyer could use oil with a sulfur content of up to 1%.<sup>136</sup> Citing "decisional history" and the "mainstream of scholarly commentary," the court rejected Professor Nordstrom's idea that a seller must have knowledge of the defect at the time of performance to have a right to cure.<sup>137</sup> If a middleman seller, however, redispaches goods without inspecting them and they turn out to be nonconforming, he should not be allowed to cure under a literal reading of the U.C.C. § 2-508(2).

Other commentators, believing that this approach would severely limit the right to cure, argue for a test that would allow the sellers to cure if, had they known of the defect, they would have reasonably believed that the buyer would accept the goods.<sup>138</sup> This latter approach is not supported by the language of the U.C.C. or its comments.<sup>139</sup>

A third approach, suggested by Professors White and Summers and used by courts,<sup>140</sup> concludes:

[A] seller should be found to have had reasonable cause to believe that his tender would have been acceptable any time he can convince the court that:

- (1) he was ignorant of the defect despite his good faith and prudent business behavior; or
- (2) he had some reason such as prior course of dealing or trade usage which reasonably led him to believe that the goods would be acceptable.<sup>141</sup>

---

134. R. NORDSTROM, *supra* note 132, § 105, at 321.

135. 57 N.Y.2d 574, 443 N.E.2d 932, 457 N.Y.S.2d 458, 35 U.C.C. Rep. Serv. (Callaghan) 12 (1982).

136. *Id.*

137. *Id.* at 57, 443 N.E.2d at 939, 457 N.Y.S.2d at 585, 35 U.C.C. Rep. Serv. (Callaghan) at 20.

138. Schmitt & Frisch, *The Perfect Tender Rule-An 'Acceptable' Interpretation*, 13 U. TOL. L. REV. 1375, 1392-95 (1982).

139. Travaglio, *The U.C.C.'s Three 'R's: Rejection, Revocation and (the Seller's) Right to Cure*, 53 CINN. L. REV. 931, 945-46 (1984).

140. See *Wilson v. Scampoli*, 228 A.2d 848, 849 (D.C. 1967) (seller had a right to cure defective television set because "a retail dealer would certainly expect and have reasonable grounds to believe that merchandise like color television sets, new and delivered as crated at the factory, would be acceptable as delivered.").

141. J. WHITE & R. SUMMERS, *supra* note 17, at 322.

A final approach, argued by Professor Wallach, is that courts do not pay attention to the knowledge that the seller has about the nonconformity, but rather to the severity of the breach.<sup>142</sup> The idea that the greater the nonconformity the less reasonable the seller's belief that the goods will be acceptable, seems reasonable, but is not literally stated in the U.C.C. No court has expressly held that a nonconformity must be minor for the seller to have a right to cure.<sup>143</sup> If courts have allowed the seller to cure mostly minor nonconformities, it may be that to have done otherwise would have defeated the buyer's reasonable expectations.

The court in *Bartus v. Riccardi*,<sup>144</sup> held that a seller of a hearing aid who delivered a newer model hearing aid than was described in the contract had a right to cure.<sup>145</sup> The court stressed that the model delivered to the buyer was an improved version of the model ordered and that the seller therefore had reasonable grounds to believe it would be acceptable to the buyer.<sup>146</sup> In *Appleton State Bank v. Lee*,<sup>147</sup> the seller mistakenly delivered a sewing machine of the wrong brand but which was otherwise identical to the one ordered. The seller was allowed to cure the defective delivery even though he had no knowledge at the time of delivery of the nonconformity. The court noted that the buyer received what he had bargained for, a \$200 sewing machine.<sup>148</sup>

If the seller's tender does not meet the buyer's expectations under the contract, the seller will not be allowed to cure the performance. In *McKenzie v. Alla-Ohio Coals, Inc.*,<sup>149</sup> the seller sent coal with an ash content of 13.5 to 16% under a contract that specified that the ash content was not to exceed 7.5%. The court held that no seller could have reasonably believed that such coal was suitable to the buyer's use as metallurgical coal and did not allow cure.<sup>150</sup> The emphasis in these cases is less on the seller's knowledge of the defect or reasonable belief in the acceptability of the nonconforming tender than on the basis of the parties' agreement.

---

142. Wallach, *The Buyer's Right to Return Unsatisfactory Goods—The Uniform Commercial Code Remedies of Rejection and Revocation of Acceptance*, 20 WASHBURN L.J. 20 (1980/1981); see also Note, *Nebraska Uniform Commercial Code, The Seller's Right to Cure*, 16 CREIGHTON L. REV. 155 (1982).

143. Travaglio, *supra* note 139, at 941.

144. 55 Misc. 2d 3, 284 N.Y.S.2d 222, 4 U.C.C. Rep. Serv. (Callaghan) 845 (1967).

145. *Id.*

146. *Id.* at 6-7, 284 N.Y.S.2d at 225, 4 U.C.C. Rep. Serv. (Callaghan) at 848.

147. 33 Wis. 2d 690, 148 N.W.2d 1 (1967).

148. *Id.* at 694, 148 N.W.2d at 3.

149. 29 U.C.C. Rep. Serv. (Callaghan) 852 (D.C. Colo. 1979).

150. *Id.* at 858.

Under U.C.C. § 2-508(2), the seller must give reasonable notice to the buyer of his intention to cure and then cure within a reasonable time. The requirement of reasonable notice favors the parties' expectations under the contract rather than the seller's reasonable belief that the goods will be accepted. In *National Fleet Supply, Inc. v. Fairchild*,<sup>151</sup> the buyer ordered an engine model 270 and received a model 250 which could not be used in the buyer's truck. The court held that the seller's offer to cure with a credit memorandum more than two months after the sale was not reasonable notice.<sup>152</sup>

In *Bevel-Fold, Inc. v. Bose Corp.*,<sup>153</sup> the seller went out of business after delivering stereo speaker cabinets which were "substantially nonconforming." The court held that the buyer was not obligated to wait for reasonable notice of cure before having a right to return the cabinets.<sup>154</sup> The court said that "it would be contrary to the Code's rule of reasonableness to require the buyer to use or retain substantially nonconforming goods which are incapable of adequate repair."<sup>155</sup> In *Marine Mart, Inc. v. Pearce*,<sup>156</sup> the seller tendered a motorboat which needed major repairs. The Arkansas court stated that the "further reasonable time" given to the seller to cure is intended to benefit the buyer and an offer to make only minor repairs during a five month period from the time of the contract was not a reasonable notice of cure.<sup>157</sup>

If defects in tendered goods are relatively minor but the delay in cure is clearly unreasonable, the time extended to the seller to cure is limited to the reasonable expectations of the buyer. In *Ramirez v.*

---

151. 450 N.E.2d 1015, 36 U.C.C. Rep. Serv. (Callaghan) 480 (Ind. Ct. App. 1983).

152. *Id.* at 1018, 36 U.C.C. Rep. Serv. (Callaghan) at 486.

153. 9 Mass. App. Ct. 576, 402 N.E.2d 1104, 28 U.C.C. Rep. Serv. (Callaghan) 1333 (1980).

154. *Id.*; see also *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802, 18 U.C.C. Rep. Serv. (Callaghan) 662 (1975), *cert. denied*, 289 N.C. 613, 223 S.E.2d 391 (seller of mobile home told the buyer he did not know how long it would take to cure. After three months the buyer moved out and the court held that the seller no longer had a right to cure.).

155. *Bevel-Fold, Inc. v. Bose Corp.*, 9 Mass. App. Ct. 576, 584, 402 N.E. 2d 1104, 1108, 28 U.C.C. Rep. Serv. (Callaghan) 1333, 1339 (1980).

156. 252 Ark. 601, 480 S.W.2d 133, 10 U.C.C. Rep. Serv. (Callaghan) 1047 (1972).

157. *Id.* at 607, 480 S.W.2d at 137, 10 U.C.C. Rep. Serv. (Callaghan) at 1052-53; see also *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144, 20 U.C.C. Rep. Serv. (Callaghan) 899 (1976) (seller's right to cure defective automobile does not last for an indefinite time). *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 668 P.2d 65, 35 U.C.C. Rep. Serv. (Callaghan) 804 (1983) (seller has right to cure problems with unlivable mobile home only until the buyer finds the seller's efforts unsatisfactory and revokes acceptance). See also *Transcontinental Refrigeration Co. v. Figgins*, 179 Mont. 12, 585 P.2d 1301, 25 U.C.C. Rep. Serv. (Callaghan) 485 (1978) (buyer is not required to allow a vendor to tinker with a defective article indefinitely in hope that it may ultimately be made to comply with the warranty).

*Autosport*,<sup>158</sup> the buyers of a camper van were told by the seller's agent that the vehicle was not ready on the date set in the contract because of minor defects. The buyer called the seller several times but was given excuses until, two weeks after the contract performance date, the vehicle was said to be ready. In fact, the seller was still working on the minor defects and the buyer had to wait another two weeks while the seller continued to stall. The court rejected a holding that minor defects do not justify rejection by the buyer<sup>159</sup> and a holding that the right to cure is limited to trivial defects.<sup>160</sup> The court stressed the circumstances surrounding the transaction and the inconvenience to the buyer rather than the materiality of the original breach.<sup>161</sup>

Courts have also denied the seller the right to cure a nonconformity after several attempts by the seller to cure have been unsuccessful. These courts hold that the buyer need not remain in a contract when his faith in the seller's performance or product has been shaken.<sup>162</sup> In *Hayes v. Hetinga*,<sup>163</sup> the court denied the seller's right to cure after the seller failed in his numerous attempts to repair two custom molds purchased by the buyer.<sup>164</sup>

If tendered goods require repair or replacement of a major component, cure may not be effective.<sup>165</sup> In *Zabriskie Chevrolet v. Smith*,<sup>166</sup> the seller offered to replace the transmission of a new car. The court allowed the buyer to refuse the seller's offer to cure and stated:

For a majority of people, the purchase of a new car is a major investment, rationalized by the peace of mind that flows from

---

158. 88 N.J. 277, 440 A.2d 1345, 33 U.C.C. Rep. Serv. (Callaghan) 134 (1982).

159. *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345, 7 U.C.C. Rep. Serv. (Callaghan) 1257 (1970).

160. *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954, 23 U.C.C. Rep. Serv. (Callaghan) 929 (1978) (seller had no right to cure paint defects in car which substantially impaired the car's value).

161. *Ramirez v. Autosport*, 88 N.J. 277, 440 A.2d 1345, 33 U.C.C. Rep. Serv. (Callaghan) 134 (1982). Cf. *Erling v. Homera, Inc.*, 298 N.W.2d 478, 30 U.C.C. Rep. Serv. (Callaghan) 181 (N.D. 1980) (1 and 1/2 years was too long for buyer of mobile home to wait for cure of water condensation problem).

162. *Accord Davis v. Colonial Mobile Homes*, 28 N.C.App. 13, 220 S.E.2d 802, 18 U.C.C. Rep. Serv. (Callaghan) 662 (1975) (numerous attempts to cure defects in mobile home ends seller's right to cure). *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. Serv. (Callaghan) 30 (1968) (buyer need not accept replaced transmission in contract for sale of new car because buyer's faith was shaken and vehicle had lost its value as a new car); *Guerdon Industries, Inc. v. Gentry*, 531 So.2d 1202 (Miss. 1988) (court says "enough is enough" after repeated attempts by the seller to cure).

163. 228 N.W.2d 181, 16 U.C.C. Rep. Serv. (Callaghan) 983 (Iowa 1975).

164. *Id.* at 184, 16 U.C.C. Rep. Serv. (Callaghan) at 985-86.

165. See *supra* note 162.

166. 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. Serv. (Callaghan) 30 (1968).

its dependability and safety. Once their faith is shaken, the vehicle loses not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension.<sup>167</sup>

Although U.C.C. § 2-508 does not state the acceptable method of cure, the cases seem to favor a substitute delivery<sup>168</sup> for all but the most trivial breach.<sup>169</sup> Money allowance or price adjustment is not considered a cure under U.C.C. § 2-508.<sup>170</sup> As a practical matter, a buyer will often accept a seller's offer for a price adjustment.<sup>171</sup> When the seller has made a good faith attempt to conform to the contract,<sup>172</sup> or the buyer has tried to avoid a contract for reasons other than the nonconforming performance of the seller, courts uphold the transaction.<sup>173</sup> If the buyer tries to dictate the mode of the seller's cure or uses his right of rejection to welsh on the contract, the buyer may lose the right to reject either on the ground that this is a violation of

---

167. *Id.* at 458, 240 A.2d at 205, 5 U.C.C. Rep. Serv. (Callaghan) at 42.

168. *See* Traynor v. Walters, 342 F.Supp. 455, 10 U.C.C. Rep. Serv. (Callaghan) 965 (M.D. Pa. 1972). *Transcontinental Refrigeration Co. v. Figgens*, 179 Mont. 12, 585 P.2d 1301, 25 U.C.C. Rep. Serv. (Callaghan) 485 (1978). *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195, 5 U.C.C. Rep. Serv. (Callaghan) 30 (1968). *Bayne v. Nall Motters, Inc.*, 12 U.C.C. Rep. Serv. (Callaghan) 1137 (Iowa 1973); *Wright v. Vickaryous*, 611 P.2d 20, 28 U.C.C. Rep. Serv. (Callaghan) 1117 (Alaska 1980).

169. *See* *Carnes Construction Co. v. Richards & Conover Steel & Supply Co.*, 10 U.C.C. Rep. Serv. (Callaghan) 797 (Okla. Ct. App. 1972) (where the non-conforming breach was mislabeling, merely giving the buyer information would have been sufficient cure).

170. Comment 4 to U.C.C. § 2-508 states in part: "[t]rade usages permitting variations without rejection but with price allowance...are not covered by this section." U.C.C. § 2-508 comment 4 (1977). *But see* *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wash. App. 194, 584 P.2d 968, 25 U.C.C. Rep. Serv. (Callaghan) 454 (1978) (where replacement of cinders on playing field without offer of reimbursement to buyer for incidental expenses was held not sufficient cure). In installment contracts, where U.C.C. § 2-612 governs, comment 5 to § 2-612(2) states that "[c]ure ... in the first instance can usually be afforded by an allowance against the price..." U.C.C. § 2-612(2) comment 5 (1977).

171. *But see* *T.W. Oil, Inc. v. Consolidated Edison Co.*, 57 N.Y.2d 574, 443 N.E.2d 932, 457 N.Y.S.2d 458, 35 U.C.C. Rep. Serv. (Callaghan) 12 (1982). (suggesting that appropriate price adjustment would have been adequate cure for delivery of oil with minor non-conformity).

172. *See* *Plateq Corp. of North Haven v. Machlett Laboratories*, 189 Conn. 433, 456 A.2d 786, 35 U.C.C. Rep. Serv. (Callaghan) 1162 (1983) (buyer could not cancel where seller offered in good faith to remedy defects by next day); *Beco, Inc. v. Minnechaug Golf Course, Inc.*, 5 Conn. Cir. Ct. 444, 256 A.2d 522, 6 U.C.C. Rep. Serv. (Callaghan) 910 (1968).

173. *See* *Bartus v. Riccardi*, 55 Misc. 2d 3, 284 N.Y.S.2d 222, 4 U.C.C. Rep. Serv. (Callaghan) 845 (1967).

the seller's rights or on the ground that the buyer is acting in bad faith.<sup>174</sup>

### The Seller's Right to Cure Upon Revocation of Acceptance by the Buyer

Perhaps the most troubling question for courts has been whether the seller may cure a material breach in a situation where the buyer accepts the goods, by holding them beyond the time necessary for inspection, and then gives notice that he is revoking that acceptance. The U.C.C. does not give the seller a right to cure in this situation<sup>175</sup> and most cases have so held.<sup>176</sup> In *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*,<sup>177</sup> however, a buyer of a used car which the seller promised was "in first class condition,"<sup>178</sup> demanded reimbursement of the purchase price after having kept the car almost ten months. During the ten month period the car needed extensive repairs. The *Fitzner* court held that the buyer had accepted the automobile and that this acceptance was reasonably induced by the difficulty of discovering the defects prior to acceptance.<sup>179</sup> Nevertheless, the court ruled that the buyer could not revoke his acceptance without first giving the seller an opportunity to repair. In a footnote the court stated, "[w]e recognize that a strict reading of the cure provisions of [U.C.C. section] 2-508 reveals no explicit application to the revocation situation."<sup>180</sup> The court justified going beyond what is allowed in the U.C.C. on the ground that:

---

174. See *Stephenson v. Frazier*, 399 N.E.2d 794, 28 U.C.C. Rep. Serv. (Callaghan) 12 (Ind. Ct. App. 1980); *Uchitel v. F.R. Tripler & Co.*, 107 Misc.2d 310, 434 N.Y.S. 2d 77, 30 U.C.C. Rep. Serv. (Callaghan) 933 (1980); *Carnes Construction Co. v. Richards & Conover Steel & Supply Co.*, 10 U.C.C. Rep. Serv. (Callaghan) 797 (Okla. Ct. App. 1972); *Wilson v. Scampoli*, 228 A.2d 848 (D.C. 1967).

175. See U.C.C. § 2-508(2), *supra* note 131.

176. *Jensen v. Seigel Mobile Homes Group*, 105 Idaho 189, 668 P. 2065, 35 U.C.C. Rep. Serv. (Callaghan) 804 (1983); *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144, 20 U.C.C. Rep. Serv. (Callaghan) 899 (1976); *Johannsen v. Minnesota Valley Ford Tractor Co.*, 304 N.W.2d 654, 31 U.C.C. Rep. Serv. (Callaghan) 112 (Minn. 1981) (en banc); *Asciolla v. Manter Oldsmobile Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977); *Pavesi v. Ford Motor Co.*, 155 N.J.Super. 373, 382 A.2d 954, 23 U.C.C. Rep. Serv. (Callaghan) 929 (1978); *Erling v. Homera, Inc.* 298 N.W.2d 478, 30 U.C.C. Rep. Serv. (Callaghan) 181 (N.D. 1980); *Olberg v. Phillips*, 615 P.2d 1022, 29 U.C.C. Rep. Serv. (Callaghan) 846 (Okla. Ct. App. 1980); *Jorgensen v. Perssnal*, 545 P.2d 1382 (Or. 1976) (en banc). *But see* *Plateq Corp. of North Haven v. Machlett Laboratories*, 189 Conn. 433, 456 A.2d 786, 35 U.C.C. Rep. Serv. (Callaghan) 1162 (1983).

177. 523 So.2d 324, 6 U.C.C. Rep. Serv. 2d (Callaghan) 396 (1988).

178. *Id.* at 325, 6 U.C.C. Rep. Serv. 2d (Callaghan) at 399.

179. *Id.* at 327, 6 U.C.C. Rep. Serv. 2d (Callaghan) at 401.

180. *Id.* at 328 n.1, 6 U.C.C. Rep. Serv. 2d (Callaghan) at 401, n.1.

[T]he law's policy of minimization of economic waste strongly supports recognition of a reasonable opportunity for cure. Though the express language of [section] 2-508 does not apply here, cure is not excluded by section 2-608. By analogy to section 2-508 and in furtherance of the policy justification undergirding that statute and our common law doctrine of cure in contracts generally, we recognize that, before Smith was entitled to get his money back, Fitzner had a right to a reasonable opportunity to cure the vehicle's deficiencies.<sup>181</sup>

As the above cases indicate, under the U.C.C. as interpreted in United States case law, it is difficult to predict when a seller has a right to cure a late or nonconforming performance. Professors White and Summers despaired of doing more than listing factors which a court might take into account in determining whether the buyer's rejection or revocation is timely.<sup>182</sup> Professor George Priest argues that courts apply code law so as to minimize the costs of sales.<sup>183</sup> Priest claims that courts follow this principle even though it is not called for by the Code.<sup>184</sup> According to Priest, "courts have allowed buyers to reject or revoke acceptance, despite the seller's willingness to repair, in situations in which it is plausible that the cost of the seller's investment outweighs the benefits conferred upon the buyer."<sup>185</sup> But courts have not allowed the buyer to refuse cure where the cost of cure to the seller and the cost to the buyer of waiting are low or when the buyer's refusal to allow cure was motivated by "a change in the market price or his information about the goods."<sup>186</sup>

Most recent commentators accept Priest's premise that the efficient resolution between the buyer's and the seller's rights following a non-conforming tender is one that "minimizes the joint allocative costs of the transaction."<sup>187</sup> To determine the joint allocative cost, the cost to the seller to cure a defective tender, say ten dollars, is added to the buyer's cost for loss of use and any consequential damages, say two dollars. The combined cost, twelve dollars, is then compared to

---

181. *Id.*

182. J. WHITE & R. SUMMERS, *supra* note 17, at 312, list the following factors: (1) difficulty of discovery; (2) contract terms; (3) perishability; and (4) course of dealing between the parties after sale and before rejection.

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

184. *Id.* at 961.

185. *Id.* at 999.

186. *Id.* at 1000.

187. J. WHITE & R. SUMMERS, *supra* note 17, at 313; *but see* Travaglio, *supra* note 139, at 946.

the seller's cost of redispensing of the goods.<sup>188</sup> If the cost to the seller of reselling the goods is more than the cost of allowing the seller to cure, the seller will be permitted to cure the tender. In an international transaction, the cost of resale is magnified since the seller is dealing in a foreign market.

Arguably, the same efficiency could be achieved by allowing the buyer to negotiate with the seller for damages to an amount equaling twelve dollars.<sup>189</sup> However, this would involve additional costs of bargaining and strategic behavior<sup>190</sup> and may be an incentive for buyers to make demands beyond the real value of the nonconformity.

### THE SPECIAL CASE OF INSTALLMENT CONTRACTS

An installment contract is defined as one "which requires or authorizes the delivery of goods in separate lots to be separately accepted . . . ." <sup>191</sup> Under the CISG, either party may declare one installment avoided if the other party commits a fundamental breach with respect to that installment.<sup>192</sup> The entire contract may be avoided if a breach as to one installment gives "the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments."<sup>193</sup>

Under the U.C.C., a buyer cannot reject an installment contract for any nonconformity. A buyer can only reject an installment if the

---

188. Travalio, *supra* note 139, at 946.

189. Schmitt & Frisch, *supra* note 138.

190. Travalio, *supra* note 139, at 949-50.

191. U.C.C. § 2-612(1) (1977).

192. CISG article 73 states:

(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.

(2) If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

CISG, *supra* note 2, art. 73.

193. *Id.*



seller's performance of that installment is substantially non-conforming and the defect in performance cannot be cured.<sup>194</sup> If there is a substantial non-conformity in one installment, the comments to U.C.C. § 2-612 indicate that an allowance against price may cure the tender.<sup>195</sup> Under U.C.C. § 2-612(3), however, if the non-conformity substantially impairs the value of the whole contract, the seller has no right to cure.<sup>196</sup> There is little authority on what would be considered substantial non-conformity in this situation. In *Glennville Elevators, Inc. v. Beard*,<sup>197</sup> the court, in dicta, states "[w]hether the non-conformity in any given installment justifies cancellation as to future installments depends not on whether such non-conformity indicates an intent or likelihood that future deliveries will also be defective, but whether the nonconformity substantially impairs the value of the whole contract."<sup>198</sup>

---

194. U.C.C. § 2-612(2) (1977):

The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

*Id.*

195. U.C.C. § 2-612 comment 5 states: "Cure of non-conformity of an installment in the first instance can usually be afforded by an allowance against the price, or in the case of reasonable discrepancies in quantity either by further delivery or a partial rejection . . ." U.C.C. § 2-612 comment 5. See *Continental Forest Products, Inc. v. White Lumber Sales, Inc.*, 256 Or. 466, 474 P.2d 1, 8 U.C.C. Rep. Serv. (Callaghan) 178 (1970) (the court allowed that price adjustment in an installment contract where parties had agreed to the price reduction as acceptable cure).

196. U.C.C. § 2-612(3) (1977) provides:

Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

U.C.C. § 2-612(3).

*See County Fire Door Corp. v. C. E. Wooding Co.* 222 Conn. 277, 520 A.2d 1028, 3 U.C.C. Rep. Serv. (Callaghan) 2d 1 (1986) (one installment of defective cement pipe not sufficient to relieve buyer where buyer did not show "objective evidence that with respect to its own needs, the value of the goods was substantially impaired."); *Maple Valley Ski Area, Inc. v. Bernard Shannon*, 122 N.H. 576, 448 A.2d 379 (1982) (second installment of monorail track was so defective as to impair value of entire contract). On the issue of reinstatement of the contract see Patterson, *UCC Section 2-612(3): Breach of an Installment Contract and a Hobson's Choice for the Aggrieved Party*, 48 OHIO ST. L. J. 177 (1987).

197. 284 S.C. 335, 326 S.E.2d 185, 40 U.C.C. Rep. Serv. (Callaghan) 1273 (1985).

198. *Id.* at 337, 326 S.E. 2d at 186-87, 40 U.C.C. Rep. Serv. (Callaghan) 1273 at 1274-75, (quoting *Cundy v. International Trencher Service Inc.*, 358 N.W.2d 233, 39 U.C.C. Rep. Serv. 1278 (S.D. 1984).

In installment contracts, the CISG is more favorable to the buyer than is the U.C.C. The CISG allows a buyer to avoid an installment contract if a breach as to one installment gives a buyer good grounds to conclude that a fundamental breach of the contract will occur with respect to future installments. Under United States case law interpreting U.C.C. provisions, the buyer's right to avoid the contract is limited to situations where the breach in the installment is a breach of the whole contract. The conclusion that the CISG favors the buyer in an installment contract, however, hinges on the definition of fundamental breach. If a fundamental breach is an incurable breach, the seller is better off under the CISG, because, under the U.C.C., the seller has no right to cure when a breach in an installment amounts to a material breach of the entire contract.

### CONCLUSION

The U.C.C. favors the buyer's right to avoid a contract by allowing him, prior to acceptance of goods, to reject them for a minor nonconformity. The CISG gives the buyer the right to avoid the contract only for a fundamental breach. Under the U.C.C., once the buyer has accepted the goods, or if the contract is in installments, goods must be materially nonconforming for the buyer to avoid the contract. Under both the CISG and the U.C.C., when goods are not delivered on time or are non-conforming, the buyer's rights are determined by the scope of the seller's right to cure.

Courts in the United States, using common law concepts to define a material breach under the U.C.C., have viewed curability as one of many factors to be taken into account in determining the expectations of the parties under the contract. Courts interpreting the U.C.C. have limited the right to cure to minor breaches and have emphasized the reasonable expectations of the buyer. In part, the impetus for these decisions has been a concern for consumer protection.

It is merchants and not consumers who will most often be the litigants under the CISG. After the date set in the contract for delivery, the CISG gives the seller a broad right to cure, but the extent of the seller's rights is qualified by other parts of the Convention which give the buyer a right of avoidance, a right to set a grace period for performance and a right to demand a specific type of cure. Whether the seller's right to cure prevails over the buyer's rights in these instances will depend on how courts interpret "fundamental breach," and what fact patterns are found to constitute such a breach.

If it is the expectations of the buyer rather than the seller's ability and willingness to cure which define the concept of "fundamental breach," a seller's rights under the CISG and U.C.C. are essentially the same. If, however, "fundamental breach" is defined as an incurable breach or one in which the seller refuses to cure, incorporation of CISG provisions into the terms of the contract may provide the seller with an advantage not available under the U.C.C.

There are uncertainties in both the CISG and the U.C.C. regarding the seller's right to cure. One factor not accounted for by either the CISG or the U.C.C. is the loss of cooperation and accommodation which occurs between parties when their transaction breaks down.<sup>199</sup> This factor adds an additional element of uncertainty to the international transaction. In the United States, when the U.C.C. is not expressly clear on an issue, courts have stressed the good faith and reasonable expectations of the parties as well as the potential economic effect of their decisions. As the above analysis indicates, courts called upon to interpret the Convention are likely to take the same approach.



---

199. J. HONNOLD, *supra* note 16, § 292, at 309.