

## Does the CISG, compared to English law, put too much emphasis on promoting performance of the contract despite a breach by the seller?

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### Abstract

*Specific performance and the right to cure are often two main concepts in question when there is a breach in an international sale contract. This article, in a different approach, compares the differences between provisions of English law and the United Nations Convention on Contracts for the International Sale of Goods (CISG), in order to analytically examine whether CISG overemphasises the performance of contract by the defaulting seller. Moreover, it explains the relationship between specific performance and the right to cure, using a new approach. While a considerable amount of existing studies mostly concern restriction imposed by English law rules, this essay, illustratively indicates that there are advantages in adopting English law provisions rather than following the permissive attitude of CISG.*

*The article reveals the ambiguity made by some provisions of CISG in regards to application of its rules. While the main remedy granted by English courts is confined to damages, as they recognize specific performance as a discretionary order, the courts consider the test of inadequacy of damages and the uniqueness to avoid the unfair results. This essay is an attempt to change the picture shaped by existing literature by introducing a different perspective on the alleged restrictions of English law.*

### Introduction

Naturally, when a contract is made it is expected to be performed. Thus, parties to the contract are bound by its terms to do what they have promised to do. It may happen sometimes that one party breaches the contract either by refusing to perform his obligations, or by a defective performance. In such circumstances, one of the options available to the parties in order to remedy the breach by the other party is to enforce the performance of the terms of the contract. This is called 'specific performance' and it is

defined as a 'decree of the court which compels the contracting party to do what he promised to do.'<sup>1</sup> This is also true in the context of international sale of goods contracts.

Although the United Nations Convention on Contracts for the International Sale of Goods<sup>2</sup> was developed to establish a harmonisation among different systems of law in international sales,<sup>3</sup> in some aspects, its drafting process were influenced by civil law principles of contract law.<sup>4</sup>

It is submitted that, one of these aspects is the concept of specific performance. It is widely believed that specific performance is the primary remedy preferred by civil law jurisdictions. Thus CISG provisions on this class of remedy are likely to be interpreted in favour of civil law countries.

On one hand, English law tends not to follow this approach, since the principles of English law are based on common law rules. Moreover, English law rules on specific performance are more restrictive than CISG provisions. In other words, specific performance is limited to specified circumstances and it is suggested that the reluctance to make this remedy available in more situations, has its own advantages. Conversely, the Convention has established the remedy of specific performance as a right for the injured buyer, thus the scope of its application is broader than that – under English law.

Hence, it seems that there is a considerable difference between these two systems. This essay focuses on

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<sup>1</sup> Gareth Jones and William Goodhart, *Specific Performance* (2nd edn, Butterworths 1996) 1; Michael P Furmston, Geoffrey C Cheshire and Cecil H S Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (15th edn, Oxford University Press 2007), 797.

<sup>2</sup> The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980 (hereinafter referred to as CISG or the Convention or the Vienna Convention).

<sup>3</sup> cf Troy Keily, 'Harmonisation and the UN Convention on Contracts for the International Sale of Goods' (2003) 1. *Nordic Journal of Commercial Law of the University of Turku* 18 <[http://www.njcl.fi/1\\_2003/article3.pdf](http://www.njcl.fi/1_2003/article3.pdf)> accessed 22 February 2011: He concludes 'The real challenge for harmonisation and the ultimate success or failure of the CISG is dependent on its uniform application.'

<sup>4</sup> Max Wesiack, 'Is the CISG too much influenced by civil law principles of contract law rather than common law principles of contract law?' (2004) <<http://www.cisg.law.pace.edu/cisg/biblio/wesiack.html>> accessed 20 February 2011.

comparison between English law rules and the provisions of CISG, with respect to remedy of specific performance as well as the seller's right to cure. It should be noted that the seller's right to cure and specific performance have the same root but take different forms. Both rules are based on the buyer's demand of performance of the contract.

As far as specific performance is concerned, most of the existing studies on one hand, have concentrated on the limitations imposed by English law; and on the other hand, on the permissive attitude of CISG. However, the purpose of this essay is to indicate that this is not the whole picture. By means of comparison this research essay contends that CISG seems to place too much emphasis on promoting performance of the contract by the seller.

This essay is divided into two chapters. The first chapter (which is generally allotted to discussing English law rules) begins with a historical background for the term 'specific performance'. It then goes on to examine decided cases as well as statutory provisions which are required for the purpose of assessing remedy of specific performance. After that, the requirements provided by the provisions of English law are discussed.

In a similar way, the right to cure is also examined. Furthermore, the uncertainty concerning existence of right to cure is discussed by assessing the opponent and proponent views. In the end, the relationship between these two remedies is analysed.

Chapter two describes the contentious aspects under CISG rules. Like in chapter one specific performance and the right to cure is examined in regards to relevant articles of the Convention. The ambiguity surrounding some of its provisions is subsequently argued.

Finally, the essay concludes by comparing specific performance with the right to cure, as well as differences between the two legal systems.

## Chapter 1: English Law

### I. Specific Performance

#### A. Brief History

In his well-known treatise on specific performance<sup>5</sup> Edward Fry emphasised the fact that the only available remedy for a default in performance of a contract in Roman law, was a title to damages.<sup>6</sup> It seems that Roman law, by giving such a right, neither enforced specific performance directly nor indirectly. Likewise, the courts of common law did not enforce the remedy specifically, and the general rule was limited to granting damages; particularly to pay money. However, by virtue of the Mercantile Law Amendment Act 1866, the courts were given the power to order specific performance in actions concerning breach of delivery in the case of specific goods.<sup>7</sup>

In contrast, the Courts of Equity have been enforcing specific performance for some centuries.<sup>8</sup> These jurisdictions had a root in the past time. As indicated in Year Book 8 Edward IV, it was well-recognised and established since the time of Richard II.<sup>9</sup> Therefore, it would be appropriate to conclude that specific performance was an equitable remedy under English law - before the Sale of Goods Act 1979.<sup>10</sup>

#### B. Specific Performance under Sale of Goods Act<sup>11</sup>

Traditionally, the main application of the rules of specific performance was in land disputes.<sup>12</sup> And by virtue of section

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<sup>5</sup> Edward Fry, *A Treatise on the Specific Performance of Contracts* (William Donaldson Rawlins ed, 5th edn, Stevens and Sons 1911).

<sup>6</sup> *Ibid.*, 4.

<sup>7</sup> Henry Storer Bowen, *Outlines of Specific Performance* (William Clowes 1886) 1.

<sup>8</sup> *Ibid.*, 2.

<sup>9</sup> Jones and Goodhart (n 1), 6.

<sup>10</sup> A G Guest (ed), *Benjamin's Sale of Goods* (8th edn, Sweet & Maxwell 2011) para 17 - 096.

<sup>11</sup> The Sale of Goods Act 1979 c 54 as amended by the Sale of Goods Act (Amendment) Act 1995 (hereinafter referred to as the Act).

<sup>12</sup> *Ibid.*

34 of the Judicature Act 1873, specific performance of contracts between vendors and purchasers of real estate was specifically assigned to the Chancery Division. However, English courts have extended the remedy to cases of sale of goods<sup>13</sup> and it is currently enshrined in section 52 of the Sale of Goods Act 1979. The basis for section 52 was an earlier legislation<sup>14</sup> which was enacted to extend the sphere of this remedy. There is an argument which considers the fact that the sphere of statutory jurisdiction is still open to question.<sup>15</sup>

Generally, section 52(1) of the Act<sup>16</sup> empowers courts to issue the decree of specific performance in circumstances where the promisor in the event of breach of contract of sale, will be ordered to do what he has promised to do. The relief is limited to actions brought with respect to delivery of 'specific' or 'ascertained goods'. The discretion provided for the courts, to award specific enforcement of the contract, would be available as a remedy to the aggrieved buyer only if the court thinks it is appropriate. Thus, the court is not simply bound to grant such an order - per se. For this reason, the remedy is generally granted based on the requirements, discussed below.

#### *i. Conditions Provided by the Act*

According to section 52, there are requirements to be fulfilled for an order to be issued against the vendor - to perform his obligations. The first condition is that the goods must be specific or ascertained. It means that under English

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<sup>12</sup> By virtue of section 34 of the Judicature Act 1873, specific performance of contracts between vendors and purchasers of real estate was specially assigned to the Chancery Division.

<sup>13</sup> Mirghasem Jafarzadeh, 'Buyer's Right to Specific Performance: A Comparative Study under English Law, the Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law' (2001) 20 <

<http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh.html>> accessed 5 February 2011

<sup>14</sup> Section 2, Mercantile Law Amendment Act 1856.

<sup>15</sup> Jones and Goodhart (n 1) 146. This view is in terms of classifications of goods (specified in the provision) which will be discussed later in this .

<sup>16</sup> 'In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.'

law, specific performance is only applied in ‘limited circumstances involving limited classes of goods.’<sup>17</sup> The mere fact that the goods consist of one of the required types, would not result in availability of the remedy. Additionally, there is a second condition as required by the provision and that is, that the court may order a seller to carry out his duties ‘if it so deems fit’. Thus, under this discretionary approach, there is no guarantee for a plaintiff who is seeking specific performance of a contract to obtain the order sought, simply because the subject matter of the contract concerns specific or ascertained goods. It is clear that each of the factors mentioned above is needed to be explained in further details.

### *ii. Specific or Ascertained Goods*

For the purpose of granting an order to compel a defaulting seller to perform his undertaking to deliver the goods, the very first requirement mandated by section 52(1) is that the subject matter of the contract of sale must be specific or ascertained. The question to be posed here would be: what is meant by the terms specific or ascertained goods? The definitions are explained below.

Section 61(1) of the Act defines specific goods as ‘goods identified and agreed on at the time of contract of sale is made’ which means that it is not acceptable for goods (for the purpose of this section) to be identified at a later stage. By the agreement of the parties, specific goods are allocated as the unique<sup>18</sup> goods which have to be delivered by the seller in discharging his obligations under the contract of sale. Therefore, their individuality is established and there is no room for further selection or substitution.<sup>19</sup> The goods are likely to become specific by means of express descriptions in the contract of sale.

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<sup>17</sup> Peter A Piliounis, ‘The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?’ (2000) 12(1) *Pace International Law Review*, 36.

<sup>18</sup> Uniqueness of the goods will be discussed later in this paper.

<sup>19</sup> AG Guest (ed) (n 10), para 1-114.

Moreover, a question may arise regarding the future or non-existent goods<sup>20</sup>, as to whether these types of goods are presumed as specific goods, for the purpose of application of section 52. In other words, is it possible to suggest a wider meaning for specific goods? Some commentators have stated that the position is more or less unclear.<sup>21</sup> However, it is suggested that the wording of the definition of specific goods, as provided by section 61(1), does not necessarily stipulate that the goods in question must be in existence – at the time of the contract.

As far as ascertained goods are concerned, no statutory definition is provided. However, the expression ‘ascertained goods’ is defined by case law. In *In Re Wait*<sup>22</sup>, Atkin LJ stated that ‘ascertained probably means identified in accordance with the agreement after the time a contract of sale is made, and I shall assume that to be the meaning.’<sup>23</sup> Likewise, in some other cases such as *Wait and James v Midland Bank*<sup>24</sup> it was observed that ascertainment might be done in any way which is agreed upon as a satisfactory method by the parties to a contract. As a result, the expression of ‘ascertainment’ speaks of some process used by the seller, taken place after conclusion of the contract,<sup>25</sup> by which the goods are sufficiently identified or earmarked as contract goods.<sup>26</sup> In the case of goods forming part of a bulk, the ascertainment would not be done unless that part is actually separated from the bulk.

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<sup>20</sup> For instance: to be supplied by a manufacturer or procured by a seller after the contract has been made.

<sup>21</sup> cf *Howell v Coupland* [1876] 1 QBD 258 where there was a contract to sell potatoes from a specified crop to be grown by the seller. In that case, the contract was considered to be a sale of specific goods.

<sup>22</sup> [1927] 1 Ch 606.

<sup>23</sup> *ibid* 630; cf *Thames Sack and Bag Co Ltd v Knowles and Co Ltd* [1918] 119 LT 287 at 290 per Sankey J stated that ascertained goods are goods the individuality of which has in some way been found out at the time of contract.

<sup>24</sup> [1926] 31 Com Cas 172, 179.

<sup>25</sup> Michael Bridge, *The Sale of Goods* (1st edn, Oxford University Press 1998) 532. Alternatively, it is possible that ascertainment occurs at the same time as unconditional appropriation for the purpose of passing of property.

<sup>26</sup> Jafarzadeh (n 13) section 2.1.2.

By the clarification made by the Amendment Act<sup>27</sup> section 61(1) stipulates that goods 'includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid.'<sup>28</sup> Treitel provided a classification while describing the situation where goods form an undifferentiated part of an identified bulk.<sup>29</sup> He divided the cases into two types. Firstly, in cases where the part sold is expressed as a fraction or percentage of the bulk and the second one involves cases where the part sold is expressed as a specified quantity of unascertained goods to be taken from an identified bulk. He later discussed that in the first type of cases, by explaining that the court has discretion to order specific performance, provided that the bulk was identified and agreed upon in the conclusion of the contract. Moreover, in terms of the second type of cases, Treitel stated that the purchaser becomes co - owner of the goods, and in the case of vendor's insolvency, he would unlikely choose to seek specific performance. Finally, he concludes that cases concerning the first type are not covered in the wordings of section 52, and therefore the court may be unable to exercise the discretion to issue an order of specific performance.<sup>30</sup>

Furthermore, in the Law Commission report<sup>31</sup> after admitting the fact that there is an element of doubt as to whether an undivided share in goods counts as goods for the purposes of the Sale of Goods Act 1979, it has been suggested that the doubt should be removed and the definition in the Act should consist of an undivided share in goods.<sup>32</sup> Finally, for the purpose of applying section 52, it seems more logical that, the remedy of specific performance is likely to be available to some fraction or percentage of a

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<sup>27</sup> The Sale of Goods (Amendment) Act 1995 section 2(d).

<sup>28</sup> In regard to the effect of adding to the wording of this provision, by s.2(d) of the Sale of Goods (Amendment) Act 1995, on the availability of specific performance, See Hugh Beale (ed), *Chitty on Contracts*, vol 2 (30th edn, Sweet & Maxwell 2008) para 27-016; AG Guest (ed) (n 10) paras 5-109 to 5-127.

<sup>29</sup> Guenter H Treitel, *The Law of Contract* (11th edn, Sweet & Maxwell 2003), 1024.

<sup>30</sup> Treitel (n 29), 1024.

<sup>31</sup> Law Commission, *Sale of Goods Forming Part of a Bulk* (Law Com No 215, 1993).

<sup>32</sup> *ibid* 30 para 5.3

bulk as identified and agreed upon in the conclusion of the contract.<sup>33</sup>

*iii. Position of Unascertained Goods*

The term ‘unascertained goods’ is not defined in the Act, however it can be described as goods which are not identified and agreed upon when the contract is made.<sup>34</sup> Since section 52 is only applied in the case of specific or ascertained goods, the buyer of unascertained goods, which are subject matter of most commercial contracts, cannot resort to the remedy to compel the seller to perform his obligations.

Some authors<sup>35</sup> have argued that the Act cannot be treated as a comprehensive code since section 52 does not cover cases of unascertained goods. Therefore, the remedy of specific performance is not available for a seller or a buyer of goods which are not yet ascertained. It is argued that<sup>36</sup> section 52 may be applied to the case of unascertained goods because the language of the section itself does not seem to exclude expressly its application to such cases. But an examination of related case<sup>37</sup> shows that the remedy is not available regarding unascertained goods. It is submitted that granting the remedy of specific performance should be considered with respect to circumstances of each case, and in questions concerning unascertained goods; particularly when the order of specific performance is the only appropriate and effective remedy.<sup>38</sup> In support of this view also, McKendrick<sup>39</sup> points out that ‘a court should not be too ready to conclude

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<sup>33</sup> Guest (ed) (n 10) para 17-097.

<sup>34</sup> *ibid* para 1-117.

<sup>35</sup> Bridge (n 25), 532.

<sup>36</sup> Jafarzadeh (n 13) section 2.1.3; Treitel (n 29), 1024.

<sup>37</sup> *Re London Wine Co (Shippers)* [1986] PCC 121. In this case, the judge stated that the order of specific performance was not granted in a contract for unascertained goods.

<sup>38</sup> *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, where damages were found to be inadequate because of the oil crisis happening at that time, so the buyer could not obtain supplies of petrol from another vendor, and there was a serious danger that he would be forced out of business if the seller did not deliver.

<sup>39</sup> Ewan McKendrick, *Sale of Goods* (LLP 2000) para 10 - 042.

that it has no jurisdiction to make an order in circumstances falling outside the scope of section 52.’

*iv. Discretionary Order*

Another important aspect of specific performance under English law is the discretionary nature of the order. In addition to the equitable remedy of specific performance<sup>40</sup> this element is also provided in section 52 of the Act which uses the following formulation: if the court thinks fit. As indicated by commentators<sup>41</sup> and case law<sup>42</sup>, the remedy of specific performance is not a right<sup>43</sup> for the aggrieved party to seek. In fact, it is an equitable discretion vested in courts when they enforce performance of a contract. It may be argued that the court has a wide<sup>44</sup> or broad<sup>45</sup> power, by virtue of the provisions of section 52, to grant such an order. It is submitted that, alternatively, this power is limited by the fact that the decision of the court is not ‘left to the uncontrolled caprice of the individual judge.’<sup>46</sup> Indeed, specific performance will only be granted if it is just and equitable to do so.<sup>47</sup>

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<sup>40</sup> Edward Fry, *A Treatise on the Specific Performance of Contracts* in George Russell Northcote (ed) 6th edn, Stevens and Sons 1921, 36.

<sup>41</sup> Furmston, Cheshire and Fifoot (n 1), 798.

<sup>42</sup> Per Lord Watson in *Stewart v Kennedy* [1980] LR 15 App Cas 75, 102: [S]pecific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it; Per Lord Chelmsford in *Caesar Lamare v Thomas Dixon* [1873] LR 6 (HL) 414, 423: [T]he exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court.

<sup>43</sup> While in civil law jurisdictions it is an absolute right arising from the contract. For an analytic comparison between the approaches of Anglo-American law and Civil law regarding specific performance, See Charles Szladits, ‘The concept of Specific Performance in Civil Law’ (1955) 4 *American Journal of Comparative Law* 208.

<sup>44</sup> Guest (ed) (n 10) para 17-100 and 43-473.

<sup>45</sup> Jafarzadeh (n 13) section 2.2.

<sup>46</sup> Furmston, Cheshire and Fifoot (n 1), 798.

<sup>47</sup> Per Lord Parker in *Stickney v Keeble* [1915] AC 386, 419.

### **C. Inadequacy of Damages and Uniqueness**

Basically, it is established that damages are the most adequate remedy when there is a contract for sale of goods which are readily available in the market.<sup>48</sup> This precedence is based on a historical fact that the Courts of Equity would issue an order of specific performance only where the remedy available at common law was inadequate.<sup>49</sup> Similarly, review of cases suggests that the equitable discretion to order specific performance of a contract for sale of goods is exercised only if an award of damage would be an inadequate remedy.

Generally, there is no specific rule to identify what damages would be an adequate remedy.<sup>50</sup> However, some commentators<sup>51</sup> as well as the courts may have identified circumstances under which damages are inadequate. The case often cited as example is the case of the contract for sale of unique goods.<sup>52</sup>

Section 52 of the Act does not express the condition that the goods should be unique, but review of case law indicates that the courts have exercised the test of uniqueness for years. In this respect, as Swinfen Eady MR stated in *Whiteley Ltd v Hill*,<sup>53</sup> the power granted to the courts to order the delivery of a particular chattel is discretionary, and should not be exercised 'when the chattel is an ordinary article of commerce and of no special value or interest.'

Another example is *Cohen v Roche*<sup>54</sup> where the court refused to enforce the seller to deliver a set of Hepplewhite chairs, since they were ordinary commercial articles with no special value. As in *Falcke v Gray*<sup>55</sup> which involved contract

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<sup>48</sup> Treitel (n 29), 1020.

<sup>49</sup> Laurence Kaffman and Elizabeth Macdonald, *The Law of Contract* (7th edn, Oxford University Press 2010), 21-110.

<sup>50</sup> Jones and Goodhart (n 1), 144.

<sup>51</sup> Treitel (n 29) 1020.

<sup>52</sup> Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2010) 932.

<sup>53</sup> [1918] 2 KB 808, 819.

<sup>54</sup> [1927] 1 KB, 169.

<sup>55</sup> [1859] 4 Drew 651. Although, the Vice Chancellor said that the jars had 'unusual beauty, rarity and distinction, so that damages would not be an adequate compensation for non-delivery'.

for sale of two china jars, the court refused to order specific performance on the merits of the case. Thus, in terms of contract for sale of goods, the remedy would not be awarded where the goods are not unique. It means that the goods must be irreplaceable and not to be available on the market.<sup>56</sup> In this way, the chattels such as an Adam door,<sup>57</sup> a stone from Westminster Bridge<sup>58</sup>, or a particular painting or an article are deemed to be unique. Additionally, in this case, Professor Kronman<sup>59</sup> classifies those objects which courts would have great difficulty identifying substitutes as unique.

Occasionally, there are cases in which the chattel is not an ordinary article of commerce, but the court refuses to order specific performance on the basis that the chattel can be obtained from another manufacturer, therefore it is not unique. As in *Societe des Industries Metallurgiques SA v The Bronx Engineering Co Ltd*,<sup>60</sup> the Court of Appeal held ‘the fact that claimants have to wait between nine and twelve months for a replacement delivery did not itself establish that the goods were unique.’

To summarize, it should be stated that the availability of specific performance must depend on the appropriateness of that remedy in relation to circumstances of each case. As Treitel<sup>61</sup> has pointed out, ‘the question is not whether damages are an adequate remedy, but whether specific performance will do more perfect and complete justice than an award of damage.’ On one hand, the aggrieved party has to exercise his right to mitigate the loss, and on the other

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<sup>56</sup> Bridge (n 25) 534; Also, a dictum of Lord Westbury in *Holroyd v Marshall* [1862] 10 HL Cas 209, 210 is an old-fashioned illustration to explain the uniqueness of the goods. He pointed out that a contract for sale of 500 chests of tea is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular, but a contract for sale of 500 chests of the particular tea in my warehouse in Gloucester would be specifically performed.

<sup>57</sup> *Philips v Lambdin* [1949] 2 KB 33, 41.

<sup>58</sup> *Thorn v The Commissioners of Her Majesty's Works and Public Buildings* [1863] 32 Beav 490.

<sup>59</sup> Anthony Kronman, ‘Specific Performance’ (1978) 45 University of Chicago Law Review 351. He also gave an economic analysis of the law of specific performance beginning with a workable concept of uniqueness.

<sup>60</sup> [1975] 1 Lloyd's Rep 465.

<sup>61</sup> Treitel (n 29), 1026.

hand, he should be reasonably compensated by the most appropriate remedy, to be in the position in which he would be if the breaching party had performed his obligations.

#### **D. Grounds for Refusing to Order Specific Performance**

It may seem that once the requirements implied by section 52 are met, and damages would not be an adequate remedy, the courts will readily exercise discretion and order specific performance of a contract. However, this is not the whole story. There is a range of factors which a court will have to consider, in order to grant such a relief. And it should be noted that, its discretion to refuse the order on these grounds cannot be excluded by prior agreement of the parties.<sup>62</sup>

Generally the courts, in exercise of their discretion, consider several factors such as: circumstances of the case<sup>63</sup>, conduct of the parties<sup>64</sup>, the undue hardship that may be inflicted on the defendant<sup>65</sup>, impossibility, unfairness, inadequacy of consideration and other elements.<sup>66</sup> English courts seem to be reluctant to grant the specific enforcement of a contract in cases where any of the mentioned factors are involved.

As Treitel<sup>67</sup> has stated, there are certain contracts which are not specifically enforceable, such as personal services

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<sup>62</sup> *Quadrant Visual Communications Ltd v Hutchison Telephone* [1993] BCLC 442 (CA).

<sup>63</sup> *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954. In this case the court applied the adequacy test and consequently, an interlocutory injunction was ordered. The test was applied as the circumstances of the case were such that an injunction would be equivalent to specific performance.

<sup>64</sup> The plaintiff in equity must approach the court with clean hands. The absence of clean hands is explained by presence of fraud, misrepresentations or illegality. See also I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (7th edn, Sweet & Maxwell 2007), 245.

<sup>65</sup> *Denne v Light* [1857] 44 ER 588. Here the court refused to order specific performance on the ground of severe hardship to the defendant. The case is related to sale of land. However, the rule can be used in terms of contract for sale of goods.

<sup>66</sup> All mentioned factors are discussed in details by Treitel (n 29) 1026-29.

Considering the fact that this essay has focused on specific performance in terms of sale of goods, discussing the factors which are more related to the contracts for sale of land is outside the scope of the essay.

<sup>67</sup> Treitel (n 29), 1029-37.

contracts, contracts requiring constant supervision of the court, contracts which are too vague and promises made without consideration.

As far as contracts for sale of goods are concerned, the foremost element to be considered by judges is the inadequacy of damages, although, as already discussed, there is neither clear measure nor established rule to examine in regards to the fact about; what is exactly considered as adequacy of damages. The general rule is that the courts will refuse to grant specific performance when the claimant can, by any means, obtain the equivalent value of the remedy of damages. In all these cases, the remedy available to the claimant is subject to the duty of 'mitigation of loss'. This duty requires the buyer to substitute purchase in order to mitigate his loss<sup>68</sup>, provided that the satisfactory equivalent of what he contracted for is available in the market.

## II. Right to Cure

Generally, the right to cure can be formulated in different ways. When there is a breach of contract in the context of sale of goods, the main methods of cure can be categorized into two forms; firstly it can be performed by repairing the defective goods. The second way is to substitute the defective part of the goods, or the whole cargo.

As far as English law is concerned, the question of 'cure' creates considerable amount of uncertainty. While some authors<sup>69</sup> are of the view that common law may to some degree, offer applicants a right to cure defects; there are other differing views<sup>70</sup> which advocate a different opinion. For instance, Goode believes that if the buyer lawfully rejects the non-conforming goods, the seller has a general right to cure.<sup>71</sup> However, this is not the whole picture. In contrast, there are

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<sup>68</sup> Treitel (n 29), 1020.

<sup>69</sup> Guest (ed) (n 10) para 12 - 032.

<sup>70</sup> Royston Miles Goode, *Commercial Law* (4th edn, Butterworths 2009) 370-73.

<sup>71</sup> *ibid.*

some other commentators<sup>72</sup> who believe that a defective delivery of the goods is regarded as a breach of condition of contract, and would definitely entitle the aggrieved buyer to reject the non-conforming goods. Thus, if the buyer does so, the contract will be terminated and the seller would not enjoy the right to cure his breach.

Additionally, in the Report of 1987,<sup>73</sup> the Law Commission provided a recommendation for consultation purposes stating that in the case of non-consumer sales,<sup>74</sup> cure should not be introduced because ‘the circumstances of such sales were complex and cure would in many cases be impracticable.’<sup>75</sup> Nevertheless, the consequence of the decision was that it was taken to ‘introduce some measure of control over abusive contractual termination.’<sup>76</sup>

With reference to the Sale of Goods Act it is indicated that there is no statutory recognition of the right to cure, neither can it be demanded by the buyer, nor may it be offered to the seller.<sup>77</sup>

Furthermore, a review of case law has also demonstrated the point that there is no general rule allowing cure of a defective delivery of goods or tender of documents. Though, the leading case which is cited by most of the authors, who support the existence of right to cure, is *Borrowman Philips & Co v Free & Hollis*<sup>78</sup> in which the offered cargo of maize were rejected by the buyer on the basis that complying

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<sup>72</sup> Robert Bradgate and Fidelma White, *Commercial Law* (11th edn, Oxford 2004) 128; Bridge (n 25), 201.

<sup>73</sup> Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987), para 4.16.

<sup>74</sup> As indicated in the report, the Law Commission stated that the reasons behind their decision as to entitling the seller, in the contract with a consumer buyer, to have the right to cure were particular positions of consumer buyers.

<sup>75</sup> Bridge (n 25), 197.

<sup>76</sup> Michael Bridge, ‘A Law for International Sales’ (2007) 37 *Hong Kong Law Journal* 17; This is provided by section 15a of the Act which prevents rejection of the goods and termination where a breach is so slight that it would be unreasonable to reject the goods.

<sup>77</sup> cf Goode (n 70) 372. He states that ‘it is regrettable that opportunity has not been taken to modernise the Sale of Goods Act by including express provisions as to the right of cure, a right which mitigates the impact of an improperly motivated rejection by the buyer while at the same time tending to avoid economic waste.’

<sup>78</sup> [1878] 4 QBD, 500.

documents were not tendered. Although the seller offered another cargo coupled with proper shipping document, the buyer refused to accept seller's retender. It was held that the buyer was bound to take it.

This case is cited as authority by many cases, such as *The Kanchenjunga*,<sup>79</sup> in which the presence of right to cure is defended. The problem which arises here is that the authors who disagree with the existence of such a right, have stated that the *Borrowman*<sup>80</sup> cannot establish a general right to cure.<sup>81</sup> They argue that this can only become the case where the sellers have not effectively appropriated goods to the contract.<sup>82</sup> Thus, according to this approach the authorities on which the existence of right to cure is based are now undermined.

Due to this factor, it is indicated that the position of right to cure is relatively obscure under English law. On one hand, the Law Commission has stated<sup>83</sup> 'there is great uncertainty...as to the existence or extent of the seller's right to repair or replace defective goods'. On the other hand, there are leading academic writers<sup>84</sup> who argue in favour of the existence of right to cure. At least there seems to be a consensus among all commentators on the time limitation to the right to cure. In other words, the seller's right to cure, if it exists, is to be limited to the delivery period. The seller's offer to cure his breach would not be allowed after the time for delivery has passed.

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<sup>79</sup> *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corp'n of India* [1990] 1 Lloyd's Rep 391.

<sup>80</sup> *Borrowman Philips v Free & Hollis* (n 78).

<sup>81</sup> Bridge (n 25), 199.

<sup>82</sup> Mirghasem Jafarzadeh, 'Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law' (2001) <<http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh1.html>> accessed 5 March 2011

<sup>83</sup> Law Commission, *Sale and Supply of Goods* (Law Com No 85, 1983) para 2.38.

<sup>84</sup> Goode (n 70) 372; AG Guest (ed) (n 10) para 12-032.

### III. Specific Performance and Right to Cure

The concepts of specific performance and right to cure are in fact two sides of the same coin, in the sense that English courts are likely to give priority to the remedy of damages. It often seems more practicable, in the case of non-delivery, that an aggrieved buyer be compensated by means of damages rather than requiring his seller to deliver the goods despite all the difficulties. Provided that the existence of right to cure is recognized, damages would be practically more helpful where the buyer demands that the seller substitutes or repairs the defective goods.

To clarify the matter, suppose that there is a contract for sale of certain brand of bread. The seller is a manufacturer of Bread-X and the buyer has a chain of supermarkets. One of the core ingredients of this type of bread is a spice called Corn-Y. This type of spice is produced by a third supplier in a foreign country. The time of delivery passed and the seller has not delivered the required Bread-X to the buyer's distribution centres. The buyer manages to obtain a claim against the seller by resorting to remedy of specific performance. The seller explains that his supplier of Corn-X has not performed his obligations due to a malfunction in the machinery. The machines are quite old, and it is impossible to repair the defecting part. It takes a while to replace them with new substitutes. Subsequently the seller could not procure Corn-X, since that supplier was the only supplier of Corn-X.

In the above case, the buyer may theoretically, demand that the seller performs his obligations under the contract. The reality is that, at this time, it is absolutely impossible for the seller to produce and deliver that type of bread. Thus, award of damages could be a better substitution than nothing. The seller has reasonable excuses, and the only immediate compensation to which he is bound, is to pay damages.

Accordingly, it is submitted that the reluctant attitude of English law as to either compel a seller to perform his duties, or entitle the seller to a right to cure, is more favourable to the injured party, rather than leaving him in an uncertain

situation of whether the breaching party will some day in the future perform his obligations, by delivering the goods, or not. By following this approach, he does not have to wait for the other party, and in our modern world of commerce it would save a substantial amount of money as well as time. Therefore, not only the aggrieved party will be fairly satisfied by the remedy of damages, but also he will have a chance to find alternative sources to supply himself with more suitable and conforming goods he requires in his own business.

Moreover, the seller who may have some justified excuses and convincing reasons for his failure to deliver the goods will not be forced to perform his duty under compelling circumstances in which the delivery of goods is very likely to be defective, since he has to supply the goods from the very first available sources as soon as possible in a very short time. However, he will be justly punished by paying damages. Finally, it is worthwhile to note that when there is a contract for sale of commercially unique goods<sup>85</sup>, it seems reasonable for a buyer to demand the court to use its discretionary power<sup>86</sup> to order the seller to cure the defective delivery, since he may be the only supplier of those goods.

Nevertheless, as it is discussed in this chapter, the existence of right to cure is based on *uncertain* controversial authorities. It is submitted that, a prudent approach offered by English law in which it avoids to expressly recognize or exclude the right to cure, appears to be befitting and objective.

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<sup>85</sup> The term 'unique goods' has been discussed earlier in this essay under section 1.3.

<sup>86</sup> Their power is granted by section 52 of the Act to issue an order of specific performance.

## Chapter 2: The United Nation Convention on Contracts for the International Sale of Goods 1980

### I. Specific Performance

Initially, it is useful to state that the primary remedy for non - delivery, and in general non - performance, under CISG is not damages.<sup>87</sup> Of course, the Convention recognises the remedy of specific performance.<sup>88</sup> This is provided in article 46 of the Convention<sup>89</sup> where the buyer is allowed to 'require performance by the seller of his obligations.' Therefore, the buyer has a right to require the seller to perform his obligations regarding delivery of the goods or documents if the seller has not yet delivered them.

Unlike the Sale of Goods Act,<sup>90</sup> the Convention also provides a right in favour of the seller. Under article 62, the seller 'may require the buyer to pay the price, take delivery or perform his other obligations.' However, the practical aspect of presenting this provision is insignificant, since it is usually applied in exceptional circumstances.

Furthermore, specific performance under the Convention is an option available to the buyer to require a defaulting seller to perform his obligations. It is not, like under the

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<sup>87</sup> As Michael Bridge in James E.S Fawcett, Michael Bridge and Jonathan Harris, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2004) para 16 - 142, stated 'this departs from the common law philosophy of damages as the primary remedy and specific performance as exceptional.' On another note, Barry Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 *Law Quarterly* 201,219 has said that 'In systems outside the common law, specific performance is the logically prior remedy. Performance is what has been promised and it is performance therefore which the promisee is entitled to require. On this view damages are in principle only a substitute for actual performance. This way of looking at the matter is adopted by the Convention.'

<sup>88</sup> Shael Herman, 'Specific Performance: A Comparative Analysis' (2003) 7(2) *Edinburg Law Review* 194, 196. He has asserted that certain provisions of the CISG could militate against specific performance as primary remedy.

<sup>89</sup> Article 46 (1) '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.'

<sup>90</sup> Patrick S Atiyah, John N Adams and Hector MacQueen, *Atiyah's Sale of Goods* (12th edn Longman 2010) 537.

provisions of English law, a discretionary remedy granted by the courts. An aggrieved buyer thus, is not required to resort to a court to enforce performance of the contract by the other party.

The broad language of the provision seems to involve a wide range of circumstances in which the buyer is allowed to invoke such remedy. Article 46(1) refers to seller's non-performance of 'all obligations' which perhaps include delivery to wrong destination, wrong date, or even refusing to tender the proper documents.

In addition to the buyer's general right to specific performance of the seller's obligations, article 46 has two other subparts. Beforehand, it has to be noted that the nature of remedy in all these parts requires the defaulting seller to deliver complying goods. In other words, all the three subparts can be categorized as the buyer's rights to specific performance.<sup>91</sup>

In the case of non-conforming goods, article 46(2) gives the buyer the right to require delivery of substitute goods provided that 'the lack of conformity constitutes a fundamental breach of contract.'<sup>92</sup> And when there is no serious breach of contract, article 46(3) provides that the buyer may require the seller to remedy the lack of conformity by repair.<sup>93</sup>

Having considered remedies granted by the Convention to an injured buyer in the case of non-conformity or non-performance by the seller, it should be stated that there are some restrictions or requirements for resorting to such remedies. One may assert that this article entitles the buyer

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<sup>91</sup> However, there is a suggestion to recognize two last subparagraphs as separate remedies from specific performance. Jafarzadeh (n 13) at section 3 has submitted that these two remedies should be regarded as the buyer's rights to demand cure. Nonetheless, it is suggested that both specific performance and right to demand cure are remedies available for an aggrieved buyer to require his seller to perform his obligations. In fact, this seems to be a matter of language.

<sup>92</sup> And he made 'a request for substitute goods either in conjunction with notice given under article 39 or within a reasonable time thereafter.'

<sup>93</sup> 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.

to ‘an apparently broad right to require performance.’<sup>94</sup> Therefore to clarify the subject these limitations need to be discussed.

#### **A. Conditions Required by Article 46**

As stated before, the text of article 46 may seem so broad that it hardly covers any remedy requested by the buyer. However, this is not true. There are express conditions required by the article in each subpart.

Firstly, article 46(1) makes the remedy available to the buyer unless he has resorted to a remedy which is inconsistent with this requirement. Clarifying the matter, there are several types of remedies which would be presumed as inconsistent with requiring specific performance, such as avoidance of the contract<sup>95</sup> or reduction of the price.<sup>96</sup> Under English law<sup>97</sup> however, the buyer is not prohibited from claiming damages<sup>98</sup> when he has already resorted to specific performance.<sup>99</sup>

Secondly, under article 46(2), there is an obvious limitation on the buyer’s right to require re-delivery of substitute goods. There it is stated that the non-conformity must amount to a fundamental breach. For this purpose, article 25 defines the term ‘fundamental breach’ as a breach that ‘results in such detriment to the other party as

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<sup>94</sup> John Fitzgerald, ‘CISG, Specific Performance, and the Civil Law of Louisiana and Quebec’ (1997) 16 *Journal of Law and Commerce* 291, 294.

<sup>95</sup> See article 26, 49 or 81 of CISG.

<sup>96</sup> Article 50 of CISG.

<sup>97</sup> Treitel (n 29) 1048.

<sup>98</sup> Article 45(2) of CISG.

<sup>99</sup> cf Jussi Koskinen, ‘CISG, Specific Performance and Finnish Law’ (1999) Publication of the Faculty of Law of the University of Turku, Private Law Publication Series B:47 <<http://www.cisg.law.pace.edu/cisg/biblio/koskinen1.html>> accessed 6 March 2011. He argued that ‘the buyer may lose his right to require performance if he has – without avoiding the contract, claimed damages for failure to perform or defective performance of some other obligation. Of the essence is the point of time when the buyer becomes bound by his claims for damages. Such point in time must be decided in conformity with general principles of good faith.’

substantially to deprive him of what he is entitled to expect under the contract.<sup>100</sup>

The definition above consists of the term ‘detriment’ which is called a newcomer<sup>101</sup> word in the field of international sale. The Convention has not given an explanation of what this word means. But according to the statement of the Secretariat Commentary on article 23 of the 1978 Draft Convention, the word ‘detriment’ has an implicit meaning – synonymous with injury and harm. It can be so construed, depending on the circumstances of each case: such as the monetary value of the contract or the monetary harm caused by the breach.

Thirdly, the right to require repair under article 46(3) is limited to a request which would not be unreasonable, having regard to all the circumstances. In other words, it should not be unreasonable to the seller. Moreover, this does not depend on the character of the breach, but rather on the nature of the goods delivered and all the other circumstances.<sup>102</sup>

Finally, both provisions, for the purpose of repair or substitute goods, require that a notice of non-conformity must be made either in conjunction with notice required by article 39 or within a reasonable time thereafter.<sup>103</sup>

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<sup>100</sup> Unless the party in breach did not foresee the result and a reasonable person in the same circumstances would not have foreseen such a result.

<sup>101</sup> Michael Will, ‘Article 25’ in Cesare Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Fred B Rothman & Co 1987) 205, 210.

<sup>102</sup> Michael Will, ‘Article 46’ in Cesare Massimo Bianca and Michael Joachim Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Fred B Rothman & Co 1987) 333, 338; Koskinen (n 99) section 2.2.2.3: ‘Of particular importance are the extra costs that the seller would have to suffer as a result of the repair. If such cost would be unreasonably high especially compared to a delivery of substitute goods, the precondition for article 46(3) is likely to be fulfilled.’

<sup>103</sup> Reasonable time is not defined in the Convention, however article 39(2) reads that ‘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.’

### **B. Compromise Made by Article 28**

The restrictions imposed by article 46 on its rules as to the buyer's right to require specific performance has been set forth. Additionally, a further limitation is provided under article 28 of CISG. According to this provision, a court is not bound to enter a judgement for specific performance unless it would do so under its own law.

In civil law jurisdictions, the most natural remedy in the event of breach is the right to require performance by the defaulting party. This situation is different under the Common law system. As stated before, the primary remedy in the common law countries is presumed to be a claim for damages. Thus, specific performance is an exceptional remedy which may be solely granted in special circumstances.<sup>104</sup> For this reason, there is a compromise reflected in the context of article 28, in the sense that the courts under both civil and common law systems would nevertheless be able to carry on their routine proceedings. In fact, according to Gonzalez<sup>105</sup> article 28 provides 'an exception for countries whose legal systems differ from the specific performance bias of the Convention.'

In addition to the ambiguity<sup>106</sup> that concerns article 28, it has to be considered that while it seems as a useful approach to be applied by a common law party and to some extent, make the specific performance flexible. It also prepares the grounds for application of different rules depending on the law of the forum court, and may subsequently interfere with the aim of CISG to achieving unification.

All things considered, it seems reasonable to conclude that as Fitzgerald has asserted, 'CISG's specific performance provisions seem to raise more questions than they answer.'<sup>107</sup>

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<sup>104</sup> Steven Walt, 'For Specific Performance under the United Nations Sales Convention' (1991) 26 *Texas International Law Journal* 211, 218.

<sup>105</sup> Olga Gonzalez, 'Remedies Under the U.N. Convention for the International Sale of Goods' (1984) 2 *International Tax & Business Law* 79, 96.

<sup>106</sup> As Walt (n 104) 218 pointed out "The meaning of the statement 'its own law' is far from apparent. This phrase could refer to the substantive domestic law of the forum or to the forum's entire law, including its conflict of law rules."

<sup>107</sup> Fitzgerald (n 94), 300.

There is still the shadow of a non-uniform and national interpretation of CISG due to ambiguous nature of article 28.<sup>108</sup>

### **C. The Relevance of other Factors**

As a matter of comparison, several issues such as availability of substitute goods, types of goods and duty of mitigation have to be examined in this section. While these factors were, to some extent, considered under English law, it may be asked what the answers would be if these questions arise in the case of specific performance under the CISG.

As far as the text of Convention is concerned, there are no imposed conditions, as such, to be met in the case of resorting to the remedy of specific performance. In other words, the Convention does not expressly provide such requirements. For the purpose of examining the presence of 'availability of substitute goods' test, a review of drafting history indicates that although article 25 of ULIS<sup>109</sup> precluded the buyer from requiring performance by the seller in cases where it was reasonably possible for the buyer to purchase goods as a replacement, this provision is not invoked anymore.<sup>110</sup> Thus, it can be concluded that there is no prerequisite for availability of substitute goods in the market in order to claim the remedy under CISG.

Sometimes, it may seem necessary to examine whether the goods must fall into certain category in order for a party to

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<sup>108</sup> However, with respect to English law, Bridge has suggested that specific performance in article 28 should have the meaning assigned to it in English law. It should therefore be invoked only in respect of discretionary equitable remedies. Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, Oxford University Press 2007) 3.47.

<sup>109</sup> Uniform Law on the International Sale of Goods (1964)

<sup>110</sup> Report of the Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods (1977) YB VIII, paras 239-240. The UNCITRAL Committee considered a proposal that the buyer- has no right to require performance if 'it is reasonably possible for the buyer to purchase goods to replace those to which the contract relates'. The Committee rejected the proposal justifying the reason that 'the proposal, if accepted, would unjustifiably restrict the rights of the buyer to require performance of the contract... there was also the danger that the proposal, if adopted, might be abused by a seller anxious to avoid his contractual obligations.'

successfully resort to the remedy.<sup>111</sup> This question, as mentioned before, may arise when it comes to the application of CISG rules. The answer, as it is manifestly clear, would be that such an examination is not required by the provisions of the Convention. Thus, the CISG is silent about the types of goods which may meet legal requirements, for the purpose of granting specific performance.

From a practical perspective, it is suggested that the buyer should not be entitled to require delivery of replacement goods in cases involving specific goods, while this remedy should only be available in the case of contracts for the sale of unascertained goods.

As it is explained before, under English law, the remedy of specific performance is subject to the rule of mitigation.<sup>112</sup> It means that the injured party has to make reasonable efforts to mitigate his losses, example by making substitute purchase.<sup>113</sup> Similarly, by virtue of article 77 of CISG which concerns the case of breach of contract, an injured buyer 'must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit.'<sup>114</sup>

There are different views about the effect of this article. Some argue that<sup>115</sup> this cannot be regarded as a restriction on the buyer's right to specific performance, while others<sup>116</sup> are of the opinion that this provision limits the scope of the remedy.<sup>117</sup>

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<sup>111</sup> As it is considered under English law, the express provision of section 52 of the Sale of Goods Act requires that the goods must be specific or ascertained in order to be the subject of the remedy of specific performance.

<sup>112</sup> Treitel (n 29) 1020.

<sup>113</sup> Or the resale of the goods (in the case of an injured seller).

<sup>114</sup> Article 77 continues that 'If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.'

<sup>115</sup> Jafarzadeh (n 13) section 4.6.; Amy H Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 *Washington Law Review* 607, 624.

<sup>116</sup> Guenter H Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon 1988) 73.

<sup>117</sup> Herman (n 88) 196 pointed out that article 77 could constitute a brake on specific performance.

Finally, to make a balance between these arguments, a better suggestion was given by Koskinen. That is, that<sup>118</sup> article 77 ‘should not automatically restrict the right to require performance.’ He submitted that ‘in some situations such restricting effect should be allowed.’<sup>119</sup>

## II. The Right to Cure

In a contract of sale, when a breach occurs, the buyer may demand the seller to remedy that breach.<sup>120</sup> In this manner, if the breach is fundamental then it is obvious that the seller may cure such a breach. This situation is made possible by the principle of right to cure.

In general there is an obvious difference between CISG and English law in recognition of right to cure. Unlike English law the Convention clearly allows the seller to cure any nonconformity in his performance related to the documents and goods.

It is argued that the purpose of giving such a right is to minimise the hardship that may be caused by the termination of the contract, and to save the contract from avoidance for fundamental breach.<sup>121</sup> It would also prevent economic loss and waste of time involved in international trade.

### A. General Provisions

The principle of cure is laid down in article 34, 37 and 48. The right to cure any lack of conformity in the documents is conferred to the seller by article 34. Similarly, article 37 provides the possibility for the seller to cure his non-conforming performance<sup>122</sup> in relation to delivery of the

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<sup>118</sup> Koskinen (n 99) section 2.3.3.

<sup>119</sup> For this purpose, Koskinen gives examples such as ‘where a party requires performance only to speculate on the market and where the party is acting against the good faith principle provided by article 7, some degree of an obligation to mitigate damages should be expected from the party requiring performance.’

<sup>120</sup> By means of specific performance, as discussed earlier.

<sup>121</sup> Bridge (n 108) para 12.35.

<sup>122</sup> Article 37 provides that: ‘He may...deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of

goods. Both of these provisions permit 'cure' up to the time of delivery.

The time for right to cure is extended by article 48(1) under which it is provided that the seller may even after the date for delivery remedy (at his own expense) any failure to perform his obligations. Thus, the seller is entitled to cure a non-conforming tender and delivery even after the date set for performance. The application of these rules is stated subject to some limitations which are provided by the Convention.

It is necessary to state that in addition to the right to cure (like specific performance) the buyer 'retains any right to claim damages as provided for in the Convention.'<sup>123</sup>

### **B. Qualifications of Right to Cure**

Although it may be asserted that under CISG the seller is granted a broad right to cure,<sup>124</sup> the fact is that the availability of such a right is qualified by some provisions of the Convention. As for the right to cure up to the delivery time,<sup>125</sup> it can be exercised only if its application does not 'cause the buyer unreasonable inconvenience or unreasonable expense.'<sup>126</sup> For the purpose of this condition, the unreasonableness must be decided with regards to all circumstances of the contracts.

One of the significant features of the right to cure under CISG is that the determination of relationship between the buyer's right to avoid the contract on the basis of fundamental breach with the seller's right to cure as regulated in articles 34 and 37, is not provided under its rules. The extension of right to cure under article 48(1) is manifestly

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any non-conforming goods delivered or remedy any lack of conformity in the goods delivered.'

<sup>123</sup> Articles 34, 37 and 48(1).

<sup>124</sup> Eric C. Schneider, 'The Seller's Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods' (1989-1990) 7 *Arizona Journal of International and Comparative Law* 69, 102.

<sup>125</sup> Granted by article 43 and 37.

<sup>126</sup> However, in the case of documents, Bridge (n 76) at 31 has stated that '[t]he real problem with this rule is the effect it might have on the clean documents rule.'

made subject to the buyer's right to avoidance.<sup>127</sup> This topic needs to be discussed in further details, thus it is examined under a separate heading below.

### **C. Right to Cure and Avoidance**

It is quite obvious that the language used in article 48(1) makes its application subject to article 49; which deals with the buyer's right to avoid the contract. Article 49(1) states that the buyer may declare the contract avoided in one of these two situations. Firstly, if the failure by the seller to perform any of his contractual obligations amounts to a fundamental breach, or secondly 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 article 47(1).

In relation to the first subpart, it is meant that the exercise of seller's right to cure is subject to the buyer's right to avoid fundamental breach.<sup>128</sup> Perhaps, a question may arise here as to which one of the above rights takes precedence over the other. The answer to this question with respect to the buyer's claim for specific performance is almost clear, as both parties are looking for same result which is performing their respective contractual obligations.

The situation is entirely different in regards to the buyer's right of avoidance. In fact, it draws some controversial arguments. The main difficulty in resolving this controversy is: what is the position when the buyer exercises his right to avoid the contract before the seller has had a reasonable opportunity to attempt to cure?<sup>9</sup> The probabilities are examined as follows.

One of the possibilities for response to the above difficulty, as Bridge has pointed out,<sup>129</sup> is to interpret the provisions of the Convention according to the good faith canon. He made another proposition in which the occurrence of fundamental breach is to be considered in relation to the seller's declared/possible willingness to cure, which would prevent

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<sup>127</sup> Article 49 of CISG.

<sup>128</sup> The concept of fundamental breach was examined earlier in this essay.

<sup>129</sup> Bridge (n 108) para 12.39.

unexpected action by the buyer. In the case where fundamental breach has not yet been committed, he believes the second approach 'has much to commend it.'<sup>130</sup>

There are other views which by some other authors; such as Professor Honnold. He maintained that the breach is not to be considered fundamental if a cure is possible, so that the buyer cannot avoid the contract.<sup>131</sup> Conversely, Ziegel<sup>132</sup> reached a different approach. In order to clarify his conclusion, he gave an example in which it was supposed that the delivered machine by the seller did not work at all, so this amounted to a fundamental breach. The buyer in such circumstances is entitled to avoidance of contract. However, he then presumed that the non-conformity could be fixed by some adjustments or the replacement of a minor part. Despite the ambiguity of the scope of CISG provisions, he finally concluded that to avoid economic waste, the seller 'should have an opportunity to cure.'<sup>133</sup>

Having considered these arguments, it is worthwhile to state that, the present view is that the consequences of the breach from the perspective of the buyer, the conduct of the seller and his willingness to exercise his right, and the possibility of cure must be taken into account in order to decide the fundamental nature of a breach.<sup>134</sup>

### Conclusion

This essay has examined the remedy of specific performance as well as the right to cure, under both English law and CISG. The present research was designed to assess

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<sup>130</sup> *ibid.*

<sup>131</sup> John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer 1982) 214 as cited in Eric C Schneider (n 124) 88.

<sup>132</sup> Jacob S Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Bender 1984) 9 - 19.

<sup>133</sup> *ibid* 19-21; also M Bridge (n 76) 29 stated that the primary justification for the right to cure is that 'it reflects what merchants do in the real world of commerce.'

<sup>134</sup> Alison E Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom' (2000-2001) 9 *Kluwer Law International* 57.

overemphasis by CISG on compelling the breaching seller to perform the obligations he has promised to do in accordance with the contract. The positions in each of the concepts above, under both legal sources were examined. Moreover, cases and provisions related to each topic were also explained. It is indicated that the order of specific performance under English law is not an available routine remedy which the courts readily grant. While it is an established conduct under English law to recognise specific performance as a discretionary remedy, the provisions of CISG do not present such an approach. In this way, it was discussed that unlike English law, the rules of the Convention provide this remedy as a right for the buyer.

Furthermore, it was discussed that although the Sale of Goods Act lay down certain provisions regarding specific performance English courts are generally reluctant to grant such an order, especially in the light of rules which establish the fact that the primary remedy to compensate an injured party is: damages.<sup>135</sup> Subsequently, it was mentioned that there are several conditions required by the Sale of Goods Act in order to limit the scope of this remedy. Besides, in the case that these requirements are fulfilled by the claimant, there is a wide range of additional factors which English courts will consider.<sup>136</sup>

While under CISG, there is an uncertainty about exercising some measures for availability of goods in the market, it can be regarded as similar to the test of uniqueness in English law. The tests of adequacy of damages and the uniqueness of goods have been proved to be exclusively applied by English courts.<sup>137</sup> Subsequently, it is usually the case that this would likely result in refusing to order the specific performance.<sup>138</sup>

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<sup>135</sup> Walt (n 104) 218.

<sup>136</sup> As enumerated before, such as circumstances of the case , conduct of the parties , the undue hardship that may be inflicted on the defendant , impossibility, unfairness, inadequacy of consideration and other elements.

<sup>137</sup> Treitel (n 29) 1020.

<sup>138</sup> *Cohen v Roche* [1927] 1 KB 169.

In contrast, despite the ambiguity regarding the application of compromise made within article 28,<sup>139</sup> not only do the provisions of CISG present a broad chain of remedies available to the buyer to require specific performance of the seller's obligations,<sup>140</sup> there are also not enough restrictions imposed on the application of this remedy. The defaulting seller is not given a fair opportunity to explain his excuses for non-performance of his duties. Under English law, there are several reasonable escape routes for the seller to justify his breach, such as considerable undue hardship he might suffer.<sup>141</sup> Similarly, this is the case when the performance of the contract needs constant court supervision.<sup>142</sup>

At first sight CISG provisions seem more favourable by enabling the buyer to perform the contract in almost all circumstances. However, it is submitted that this is more likely to be counted as imperfection in the Convention rules governing specific performance, in the sense that there are circumstances in which the performance of the contract is practically impossible and where the seller is by no means able to deliver the contract goods.<sup>143</sup>

Given the explanations about the right to cure, although it is considered as a right for the seller to cure his breach, it is submitted that the approach of CISG is more favourable to buyers rather than sellers. In other words, the buyer (by avoiding the contract in the case of fundamental breach)<sup>144</sup> is enabled to deprive the seller of his right to cure. This could be regarded as another attempt by CISG to compel the seller to perform his obligations within the contract period.

According to article 47 of CISG, a buyer can claim damages in addition to requiring specific performance or

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<sup>139</sup> Walt (n 104) 218.

<sup>140</sup> See article 46.

<sup>141</sup> *Patel v Ali* [1984] 1 All ER 978.

<sup>142</sup> *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116.

<sup>143</sup> For example, in a case where the goods have been lost because the ship carrying them sank. The seller has to procure the goods from another supplier even though this maybe sometimes impossible. For instance, the producer has ceased to produce such goods.

<sup>144</sup> See article 49(1)(a) of CISG.

demanding seller's cure. Although there are limitations provided by the Convention on this matter, this permission can result in an unfair situation in which the seller would be obliged to expend unreasonable costs to cure his breach, or to perform delivery as well as paying a considerable amount of money for damages in addition to unexpected costs which might arise. In practice however, this is rarely the case. This is because the injured buyer usually can demand the goods he needs as soon as possible. For this reason, he is unlikely to wait for the seller to exercise his right and offer a cure. Thus, more often the buyer attempts to avoid the contract and consequently, he will try to resort to the remedy of damages instead of enforcing the contract on the first breaching seller.

Returning to the question posed at the beginning of this essay, it is now possible to state that *CISG* provisions overemphasise an approach towards compelling the defaulting seller to perform his contractual duties.

In short, it is true that a contract is made to be performed, it seems wrong to make this truth real regardless of whatever circumstance that is presented in such cases.

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