COMPARISON OF CISG ARTICLE 45/61 REMEDIAL PROVISIONS AND COUNTERPART PECL ARTICLES 8:101 AND 8:102

Liu Chengwei*

Nordic Journal of Commercial Law
issue 2004 #1

a. Remedies available to a party are a key consideration for that party, particularly if the contract is breached. However, issues relating to remedial provisions are difficult and central substantive issues have been the focus of a large part of the discussion and deliberation surrounding application of commercial law.[1] At the same time, no aspect of a system of contract law is more revealing of its underlying assumptions than is the law that prescribes the relief available for breach of contract.[2] It is where a system's solutions to a large proportion of real world disputes in commercial transactions are to be found. In practical terms, it may be said that the remedial scheme is the substantive heart of a particular system of contract law, which will be a powerful support for the harmonization of actual outcomes and improve the reliability of the often unpredictable results of disputes.[3]

b. Generally speaking, the remedies available to an aggrieved party for a breach of contract can in all significant legal systems be classified into three basic categories.

- *Firstly*, an aggrieved party may be able to claim specific performance. As such, specific perfor mance hardly gives the aggrieved party exactly the performance to which he was entitled to, unless it is supplemented with some kind of an additional remedy, such as monetary relief.

- *Secondly*, the aggrieved party may have the right to require substitutionary relief. A relevant relief here is compensation, and almost always a monetary compensation for the loss that the party has suffered for performance not received.

- *Finally*, the aggrieved party may have the right to put an end to the contractual relationship. In such a case, the third remedy can also be seen in that the aggrieved party is put into a position where he would have been had the contract never been made.

The three categories are not exclusive in that monetary compensation will also very often be available together with a claim for specific performance and an act to put an end to the contract. Furthermore, the above mentioned basic categories of remedies also appear in different variations, such as a right to price reduction and suspension of performance.[4]

c. The CISG follows the above mentioned three-category system. The remedies available for a breach of contract are summarized under the Convention in Arts. 45 and 61. These Articles set forth reciprocal remedies for the buyer and seller for breach of contract. According to Art. 45(1) which specifies remedies for breach of contract by the seller, in case of a seller's non-compliance with a contract or CISG obligation, in principal the following five legal remedies (defects rights) are at the buyer's disposal:

Right to performance (Art. 46(1));
Right to cure (Art. 48);
Right to avoid the contract because of a fundamental breach of contract (Art. 49(1)(a));
Right of price reduction (Art. 50, sentence 1);
-Right to damages (Art. 45(1)(b) in connection with Arts. 74-77).[5]

Thus, Art. 45 offers an overview of the remedies available to the buyer in the event of a breach — specific performance, avoidance, compensatory damages, and price reduction. In a parallel manner, the seller's remedies are enumerated at Art. 61(1) when the buyer is in default. Although the remedies available to the seller under Art. 61(1) are comparable to those available to the buyer under Art. 45(1), they are less complicated. This is so because the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. Therefore, the seller has no remedies comparable to the following which are available to the buyer: reduction of the price because of non-conformity of the goods (Art. 50), right to partially exercise his remedies in the case of partial delivery of the goods (Art. 51), and right to refuse to take delivery in

case of delivery before the date fixed or of an excess quantity of goods (Art. 52).[6]

d. Under the Convention the notion "breach of contract" covers all failures of a party to perform any of his obligations.[7] The *notion of breach of contract* under the CISG comprises *any non-fulfilment of contractual obligations*. Those obligations may have their origin not only in the contract between parties, but also in the Convention, established practices and usages (Art. 9). This refers to non-fulfilment of obligations by the seller and to non-performance of obligations by the buyer. The rights of the other party are provided for in parallel: compare Art. 45 et seq. with Art. 61 et seq. There is no distinction between breaches of main obligations or breaches of auxiliary obligations, rather, a *distinction is made between fundamental breaches of contract and other breaches of contract* (Art. 25). A breach of contract constitutes an objective fact; no matter whether the party who commits the breach is at fault or not.[8] In other words, by contrast with the ULIS approach where each individual type of breach was followed by the proper remedy, the CISG uses the uniform term of breach of contract, which under the CISG comprises any non-fulfilment of contractual obligations whether the party who commits the breach is at fault or not.

e. This is true of the PECL, which also uses the unitary concept of non-performance (for the sake of simplicity, the term *non-performance* is used here equally to the CISG term *breach*) both for the excused and the non-excused non-performance. It is noted that non-performance as used in the PECL covers failure to perform an obligation under the contract in any way, whether by a complete failure to do anything, late performance or defective performance. Furthermore, it covers both excused and non-excused non-performance.[9] On the other hand, according to PECL Art. 8:101, the remedies available for non-performance depend upon whether the non-performance is not excused, is excused due to an impediment under Art. 8:108 or results from behavior of the other party. A non-performance which is not excused may give the aggrieved party the right to claim performance — recovery of money due (Art. 9:101) or specific performance (Art. 9:102) — to claim damages and interest (Arts. 9:501 through 9:510), to withhold its own performance (Art. 9:201), to terminate the contract (Arts. 9:301 through 9:309) and to reduce its own performance (Art. 9:401). If a party violates a duty to receive or accept performance, the other party may also make use of the remedies just mentioned.[10] Thus, the PECL also generally corresponds with the major legal systems in providing the above mentioned three-category remedial system.

f. However, under certain conditions the breaching or non-performing party may be exempted from certain consequences of a failure to perform his obligations while the other remedies remain unaffected and are still available to the aggrieved party. Textually, the excuse granted in Art. 79 CISG exempts *only* the breaching party from liability for damages. All the other remedies of the other parties are not affected by this excuse, i.e., demand for performance, reduction of the price or avoidance of the contract.[11] The Secretariat Commentary clearly states: "Even if the impediment is of such a nature as to render impossible any further performance, the other party retains the right to require that performance under article 42 or 58 [*draft counterpart of CISG article 46 or 62*]."[12] In other words, even in case of impossibility, the other party could ask for specific performance — a result that is hardly convincing.[13] By contrast, PECL Art. 8:101(2) specifies that where there is an impediment which fulfils the conditions set by PECL Art. 8:108, the aggrieved party may resort to any of the remedies set out in PECL Chapter 9 *except claiming performance* and damages. Any form of specific performance (Arts. 9:101 and 9:102) is by definition impossible.[14] However, this rigid solution might lead to some unreasonable situations particularly in case of temporary impediments. Although it seems to amount to an obvious contradiction because it is supposed that performance is not possible, it has become clear at least that the right to performance continues to exist in the event of temporary grounds for exemption and that auxiliary claims that are related to it, like interest, continue to accumulate.[15]

g. Despite the exempted remedies difference, there is agreement between the CISG and the PECL that the fact that the non-performance is caused by the creditor's act or omission has an effect to that extent on the remedies open to the obligee. This is expressed by either CISG Art. 80 or PECL Art. 8:101(3). It would be contrary to good faith and fairness for the creditor to have a remedy when it is responsible for the non-performance. In such a case, the most obvious situation is the so-called *mora creditoris,* where the creditor directly prevents performance (e.g., access refused to a building site). But there are other cases where the creditor's behavior has an influence on the breach and its consequences. In other cases where there is also a non-performance by the debtor, the creditor may exercise the remedies for non-performance to a limited extent. When the loss is caused both by the debtor – which has not performed – and the creditor – which has partially caused the breach by its own behavior – the creditor should not have the whole range of remedies. The creditor's contribution to the non-performance has an effect on the remedy "*to the extent that* (*the other party's*) *failure to perform* (*is*) *caused by its own act or omission.*" In other words, this effect may be total, that is to say that the creditor cannot exercise any remedy, or partial. The exact consequence of the creditor's behavior will be examined with each remedy.[16] In any event, a non-performance which is due solely to the other party's wrongful prevention does not give the latter any remedy. In most of the systems, the party who has prevented performance will himself be the non-performing party against whom the remedies may be exercised.[17]

h. Among other things, it is to be noted that CISG Art. 45(2)/61(2) provides that a party who resorts to any remedy available to him under the contract or this Convention is not thereby deprived of the right to claim any damages which he may have incurred. Thus, the cumulation of damage claims with other remedies is explicitly contemplated. In other words, either Art. 45(2) or Art. 61(2) rejects the notion that the buyer/seller is forced to elect between claiming damages and exercising the other remedies conferred on him under the Convention, viz., specific performance and avoidance. The common law position is the same and, in particular, it is basic law that a buyer who rejects non-conforming goods or cancels the contract on some other ground is not thereby deprived of his entitlement to damages.[18] Thus, the right to claim damages exists either as an exclusive right or as a supplementary right besides the right to require performance or payment, to reduce the price or to avoid the contract. The rule in CISG Art. 45(2)/61(2) is followed and furthered in a separate Art. 8:102 under the PECL. As is stated: "Remedies which are not incompatible may be cumulated." A party which is entitled to withhold its performance and to terminate the contract may first withhold and then terminate. A party which pursues a remedy other than damages is not precluded from claiming damages. A party which terminates the contract may, for instance, also claim damages.[19]

i. It is a truism that a party cannot at the same time pursue two or more remedies which are incompatible with each other. Thus a party cannot at the same time claim specific performance of the contract and terminate it. If a party has received a non-conforming tender, it cannot exercise its right to reduce its own performance and at the same time terminate the contract. A non-performance which causes the aggrieved party to suffer a loss may give it a right to be compensated for that loss, but it cannot be awarded more than the "*réparation intégrale*". Thus, if it has accepted a non-conforming tender, the value of which is less than that of a conforming tender, and if it has claimed or obtained a reduction of the price corresponding to the decrease in value, it cannot also claim compensation for that same decrease in value as damages. When two remedies are incompatible with each other, the aggrieved party will often have to choose between them. However, PECL Art. 8:102 does not preclude an aggrieved party which has elected one remedy from shifting to another later, even though the later remedy is incompatible with the first remedy elected. If, after having claimed specific performance, it learns that the defaulting party has not performed or is not likely to do so within a reasonable time, the aggrieved party may terminate the contract. On the other hand, an election of a rem-

edy is often definite and will preclude later elections of incompatible remedies. A party which has terminated the contract cannot later claim specific performance, because by giving notice of termination the aggrieved party may have caused the other party to act in reliance of the termination. If a defaulting party has adapted itself to a claim for specific performance and taken measures to perform within a reasonable time, the aggrieved party cannot change its position and terminate the contract. This applies when the defaulting party has received a notice fixing an additional time for performance. The rule is in accordance with the widely accepted principle that when a party has made a declaration of intention which has caused the other party to act in reliance of the declaration the party making it will not be permitted to act inconsistently with it. This follows from the general principle of fair dealing.[20]

j. However, it should be mentioned here that not only the obligations of the parties but also the remedies may be changed by them in their contract. The provisions in either CISG Art. 45/61 or PECL Arts. 8:101 and 8:102 are premised on the assumption that the parties have not chosen some other remedy or remedies within their contractual relationship. Any such remedies chosen by the parties would always prevail. Contractual freedom is thus the rule, also reflecting the starting point for various legal systems in general. Moreover, it is important to note that the remedies available for a breach of contract will be subject to, not only the express agreement made between the parties, but also any practice or usage which can be regarded as an implied part of the agreement. In case of a breach of contract it is, therefore, necessary to first look into the contract executed between the parties or any practice or usage of relevance.[21] Only if the agreement and any relevant practice or usage is silent, the provisions of the applicable rules – CISG, UNIDROIT Principles or PECL or any other laws — concerning remedies will be at hand. However, it should also be noted that, in cases of such remedies chosen by the parties or implied by relevant practice or usage, potential uncertainty may arise depending on the types of remedies chosen by the parties. This becomes a clearer problem in the context of the CISG, Art. 4 of which sets forth the scope of its application and expressly excludes "the validity of the contract or of any of its provisions or of any usage." Moreover, although the CISG does give the parties the freedom to choose their own remedies, it is not necessarily clear that these remedies will be enforced the same way in every country, if at all.[22]

k. Finally, it is to be noted that, under the Convention, Art. 45(3)/61(3) each provides that if the entitled party resorts to a remedy for breach of contract, no court or arbitral tribunal may delay the exercise of that remedy by granting a period of grace either before, at the same time as, or after the buyer has resorted to the remedy. Such provision seems desirable in international trade.[23] Thus, domestic laws that permit the courts or arbitral tribunals to grant a seller in breach extra time to perform are expressly excluded. This is mainly because the Convention specifically rejects the idea that in a commercial contract for the international sale of goods the party may, as a general rule, avoid the contract merely because the contract date for performance has passed and the obligated party has not as yet performed its obligations. In these circumstances, as a general rule, the other party may do so if, and only if, the failure to perform on the contract date causes him substantial detriment [*results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract*] and the party in default foresaw or had reason to foresee such a result. As a result of this rule in the Convention, there was no reason to allow the buyer/seller to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties.[24] Nonetheless, if the parties have expressly referred to an arbitral procedure that allows such feature, the arbitration rule should prevail over Art. 45 or 61, following the principle of Art. 6. But, the mere fact that the parties are litigating before a court whose procedure allows some "*délai de grace*" should not be regarded as an agreement to have such a rule

apply.[25]

FOOTNOTES

* LL.M. of Renmin University of China; Attorney-at-Law on Global Law Office; 37th Floor, Jing Guang Center, Hu Jia Lou, Chaoyang District; Beijing 100020 China; <Lexway@mail.com>.

1. "Among the provisions in the Draft Convention on Contracts for the International Sale of Goods which were the most difficult to formulate and are among the most likely to generate controversy are those dealing with the remedies of buyer and seller for breach of contract by the other party. Many aspects of the law of sales reflect merchant practice, and to the extent that this practice is standardized in international sales transactions, the problems in formulating the text of the Draft Convention were reduced. However the provisions in respect of breach of contract do not reflect merchant practice. They reflect the efforts of lawyers from many legal systems to reconcile their views on the appropriate actions to be taken by the parties and by a tribunal in case of breach. The result has been a series of provisions which ... are in general harmony with one another but which will often be unfamiliar to lawyers from any given legal system." *See Eric E. Bergsten & Anthony J. Miller* in "The Remedy of Reduction of Price": 27 *American Journal of Comparative Law* (1979) 255-277 at 255. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/bergsten.html>. This is a commentary on the remedy of reduction of price under Art. 46 of the 1978 Draft Convention, from which the basic concept of price reduction under CISG Art. 50 remains unchanged but nevertheless differs from the latter in several respects. For comparison of Art. 46 of the 1978 Draft with CISG Art. 50, see the match-up, available online at <http://cisgw3.law.pace.edu/cisg/text/matchup/matchup-d-50.html>.

2. *See E. A llan Farnsworth* in "Damages and Specific Relief": 27 *American Journal of Comparative Law* (1979)247-253. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/farns.html>.

3. For example, when commenting on Chapter 7 of the UNIDROIT Principles, *Arthur Rosett* states that: "In practical terms, it is the substantive heart of the whole Principles. It is where the Principles' solutions to a large proportion of real world disputes in commercial transactions are to be found. It is here that the remedial consequences of serious failures of performance are defined: orders of performance, damages, contract termination by rescission, and restitution. These are difficult and central substantive issues. Indeed, Chapter 7 is probably the most imaginative synthesis to emerge in this generation of some of the most difficult practical questions of contract law. It will be a powerful support for the harmonization of actual outcomes and improve the reliability of the often unpredictable results of disputes. The substantive content of Chapter 7 is important as an illustration of the creative power of the UNIDROIT Principles." *See Arthur Rosett* in "UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven". Available online at <http://www.unidroit.org/english/publications/review/articles/1997-3.htm>.

4. *See Jussi Koskinen* in "CISG, Specific Performance and Finnish Law": *Publication of the Faculty of Law of the University of Turku, Private law publication series B:47* (1999). Available online at <http://cisgw3.law.pace.edu/cisg/biblio/koskinen1.html>.

5. *See* the decision by the Swiss *Commercial Court (Handelsgericht) Aargau* [OR.2001.00029], 5 November 2002, translated by *Martin F. Koehler*. Available online at <http://cisgw3.law.pace.edu/cases/021105s1.html>.

6. *See* Secretariat Commentary on Art. 57 of the 1978 Draft [*draft counterpart of CISG Art. 61*], Comment 2. Available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-61.html>.

7. *See Fritz Enderlein* in "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods": *Petar Sarcevic & Paul Volken* eds., *International Sale of Goods: Dubrovnik Lectures*, Oceana (1996), p. 188. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/enderlein1.html>.

8. *See Fritz Enderlein, Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods*, Oceana Publication (1992), p. 174. Available online at <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html>.

9. *See* Comment and Notes to the PECL: Art. 8:101. Note 1. Available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp45.html>.

10. *Ibid.*, Comment B.

11. *See* Secretariat Commentary on Art. 65 of the 1978 Draft [*draft counterpart of CISG Art. 79*], Comment 8. Available online at

<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-79.html>.

12. *Ibid.*, Comment 9.

13. It could be argued that paragraph (5) of CISG Art. 79 entails unrealistic results. It would allow an action for specific performance in a case where the goods are destroyed and thus, the performance is physically impossible. *See Denis Tallon*, in *Commentary on the International Sales Law - The 1980 Vienna Sales Convention*, C.M. *Bianca & M.J. Bonnell* eds., Giuffrè: Milan (1987), p. 588.

14. *See* Comment and Notes to the PECL: Art. 8:108. Comment D. Available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp79.html>.

15. In this respect, the UNIDROIT Principles have found a flexible answer to the question of what is to become of the right to performance. Unlike either the CISG or the PECL which specifies the remedies, though differing from each other slightly, which the aggrieved party cannot resort to in case of exemption, the UNIDROIT Principles adhere to the principle that the excuse is general, but in Art. 7.1.7(4) they make important exceptions in determining certain claims which are not affected by *force majeure*, namely the right to terminate the contract or withhold delivery or request interest on money due. The Official Comment makes some of its deliberations clear: "In some cases the impediment will prevent any performance at all but in many others it will simply delay performance and the effect of the article will be to give extra time for performance. It should be noted that in this event the extra time may be greater (or less) than the length of the interruption because the crucial question will be what is the effect of the interruption on the progress of the contract." *See* Comment 2 on Art. 7.1.7 UNIDROIT Principles of International Commercial Contracts.)

16. *Supra.* fn. 10.

17. *Supra.* fn. 9, Note 3.

18. *See Jacob S. Ziegel* in "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods": Comment 2. Available online at <http://cisgw3.law.pace.edu/cisg/text/ziegel45.html>.

19. *See* Comment and Notes to the PECL: Art. 8:102. Comment A. Available online at <http://cisgw3.law.pace.edu/cisg/text/peclcomp45.html>.

20. *Ibid.*, Comments B, C.

21. *Supra.* fn. 4.

22. One such example would be if the parties operating under the CISG specifically agreed that the only available remedy was specific performance. Under English law, e.g., specific performance is a discretionary remedy. While it is unlikely that the parties would agree to such a remedy, there would be no conflict between the agreement for specific performance and Art. 46 of the CISG. On the other hand, an English court applying general legal principles would be unlikely to grant specific performance where the court did not consider that the situation merited the exercise of discretion in favour of specific performance. A more likely issue is the question of the quantum of damages agreed by the parties. Under the CISG, there is no limit on the amount of compensation that may be agreed to be paid upon breach of a contract. In contrast, English common law draws a distinction between genuine pre-estimates of damage (referred to as "liquidated damages") versus clauses viewed as punitive or penal. Penalty clauses are considered invalid and will not be enforced by an English court. So while the parties are generally free to choose their own remedies, English law will not enforce all of the remedies, at least not to the same degree. (*See Peter A. Piliounis* in "The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are these worthwhile changes or additions to English Sales Law?" (1999). Available online at <http://cisgw3.law.pace.edu/cisg/biblio/piliounis.html>.)

23. *See* Secretariat Commentary on Art. 41 of the 1978 Draft [*draft counterpart of CISG Art. 45*], Comment 6. Available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-45.html>; *See* also Secretariat Commentary on Art. 57 of the 1978 Draft [*draft counterpart of CISG Art. 61*], Comment 6. Available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-61.html>.

24. *See* Secretariat Commentary on Art. 43 of the 1978 Draft [*draft counterpart of CISG Art. 47*], Comments 4, 5. Available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-47.html>; *See* also Secretariat Commentary on Art. 59 of the 1978 Draft [*draft counterpart of CISG Art. 63*], Comments 4, 5. Available online at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-63.html>.

[25.] *See Bernard Audit* in "The Vienna Sales Convention and the Lex Mercatoria": *Lex Mercatoria and Arbitration*, rev. ed., *T. Carboneau* ed.; Juris Publishing (1998) p. 285 n.47.