BRINGING THE CISG HOME: RESTITUTIONARY CONSIDERATIONS FOR THE CISG IN THE DOMESTIC CONTEXT

REBEKAH PLACHECKI*

Introduction

New Zealand became a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG) in 1994.[1] However, the CISG only applies to international sale of goods contracts.[2] Where the CISG does not apply, ordinary conflict of laws rules and domestic law continue to apply. Unlike the CISG, the New Zealand domestic law has been described as outdated. Consequently, New Zealand has reformed its law for consumer transactions[3] and further legislative reform has been debated for commercial ones.[4] In New Zealand, domestic commercial contracts for the sale of goods are currently regulated by the Sale of Goods Act 1908 (SOGA). The Law Commission has hinted that for New Zealand, the application of the CISG as a domestic law may be an advance on the retention of SOGA. Compared to the CISG, the SOGA is an 'older model, less direct, and has a less flexible range of remedies'.[5]

The CISG has an inclusive set of remedies (including restitutionary ones) which are particularly tailored to the sale of goods context. In contrast, the SOGA does not deal with relief following rescission or rejection, or for relief following a frustrating event. Therefore, the

* LLB, Candidate for LLM, Victoria University of Wellington.

[1] New Zealand acceded 22 September 1994: AppHR 1995 A1:81; 1994 UN Status, 384,386 (footnote). Entered into force for New Zealand 7 October 1995 by virtue of section 1 of the Sale of Goods (United Nations Convention) Act 1994.

[2] These contracts are for the international sale of goods in the commercial context unless parties opt for domestic law to apply. Consumer transactions are governed by the Consumer Guarantees Act 1993 (NZ).

[3] Consumer Guarantees Act 1993 (NZ).

[4] New Zealand Law Commission The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance (NZLC Report 23, Wellington, 1992) p. 51.

[5] Ibid.

SOGA which was intended to be a 'code' is not fulfilling that original objective. Restitution under the current domestic law is a matter for the general common law and other statutes.

This paper is therefore based on the premise that the CISG should extend to cover internal sales which remain covered by the SOGA. Remedies are 'critical to the effective operation of law and especially in an area such as the sale of goods'.[6] Hence, the thrust of this paper is to evaluate the advantages and disadvantages of obtaining restitutionary remedies through such reform.[7]

The structure of this paper is as follows: Part A will examine the restitutionary remedies available under the CISG.[8] Part B will examine the restitutionary remedies available under the current New Zealand domestic law. The examination in these Parts will be divided into restitution for failed contracts followed by restitution as a form of damages for a breach of contract (restitutionary damages)[9]. These two situations are quite different from each other. In the first situation, parties may wish to exercise their right to recover goods or money where they have performed the contract up until its failure.[10] The objective of a restitutionary remedy for a failed contract is therefore to restore the parties to their pre-contractual positions. In contrast, restitutionary damages may apply while the contract is in existence. They may become relevant where the obligee wants to bring a damages claim against the obligor but has difficulty in proving that loss is caused by the breach. Therefore, the loss suffered by the obligee might be measured by the benefit the obligor received.

[6] Ibid., p. 40.
[7] The paper does not attempt to provide an exclusive set of considerations relevant to such reform. There are many potential issues that could arise in regard to restitution – for example those surrounding the demand of substitute goods where the goods have been destroyed. However, this paper instead aims to focus on some of the more important considerations particularly in regard to articles 79, 81, 82 and 84 of the CISG.
[8] See appendix.
[9] Also known as a disgorgement of profits.
[10] This paper considers two types of failed contracts. First, a contract may fail because a party is entitled to have the contract discharged for breach by the other party. Second, a contract may fail where it has become impossible for a party to perform the obligations under the contract.

132 The New Zealand Law Students' Journal (2006) 1 NZLSJ

SOGA which was intended to be a 'code' is not fulfilling that original objective. Restitution under the current domestic law is a matter for the general common law and other statutes.

This paper is therefore based on the premise that the CISG should extend to cover internal sales which remain covered by the SOGA. Remedies are 'critical to the effective operation of law and especially in an area such as the sale of goods'.[6] Hence, the thrust of this paper is to evaluate the advantages and disadvantages of obtaining restitutionary remedies through such reform.[7]

The structure of this paper is as follows: Part A will examine the restitutionary remedies available under the CISG.[8] Part B will examine the restitutionary remedies available under the current New Zealand domestic law. The examination in these Parts will be divided into restitution for failed contracts followed by restitution as a form of damages for a breach of contract (restitutionary damages)[9]. These two situations are quite different from each other. In the first situation, parties may wish to exercise their right to recover goods or money where they have performed the contract up until its failure.[10] The objective of a restitutionary remedy for a failed contract is therefore to restore the parties to their pre-contractual positions. In contrast, restitutionary damages may apply while the contract is in existence. They may become relevant where the obligee wants to bring a damages claim against the obligor but has difficulty in proving that loss is caused by the breach. Therefore, the loss suffered by the obligee might be measured by the benefit the obligor received.

[6] Ibid., p. 40.
[7] The paper does not attempt to provide an exclusive set of considerations relevant to such reform. There are many potential issues that could arise in regard to restitution – for example those surrounding the demand of substitute goods where the goods have been destroyed. However, this paper instead aims to focus on some of the more important considerations particularly in regard to articles 79, 81, 82 and 84 of the CISG.
[8] See appendix.
[9] Also known as a disgorgement of profits.
[10] This paper considers two types of failed contracts. First, a contract may fail because a party is entitled to have the contract discharged for breach by the other party. Second, a contract may fail where it has become impossible for a party to perform the obligations under the contract.

Next, Part C will discuss what issues in relation to restitution should be considered were the CISG to apply to domestic sale of goods contracts. Various questions arise. For example: Does the CISG have more advantageous restitutionary provisions than those available under New Zealand domestic law? Would the CISG need to be supplemented by other provisions? If so, how would the legislature proceed to deal with those inadequacies?

Finally, Part D will summarise the findings of this paper, namely that the restitutionary remedies under the *CISG* provide parties with adequate protection.

A: Restitution Under the CISG

1. Breach

The CISG allows restitution for a failed contract under Section V – 'Effects of Avoidance'. Avoidance of contract is expressly allowed under the CISG in Articles 49 and 64. These Articles provide that the buyer or seller may avoid the contract where the other party is in fundamental breach.[11]

However, the right to avoid the contract is conditional. Articles 49(2) and 64(2) prevent a buyer or seller from avoiding the contract where the other party has already performed, unless avoidance is declared within the time specified in the CISG.[12]

Avoidance prima facie releases both parties from further obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

However, despite the parties being free from future obligations, avoidance is not nullifying the contract altogether. The CISG continues to regulate the rights and obligations of the parties to eliminate

[11] A fundamental breach is defined. See, United Nations Convention on Contracts for the International Sale of Goods (CISG) (11 April 1980) 3 UNTS 1489, art. 25 (entered into force 30 September 1981).
[12] Ibid., art. 49(2) and 64(2).

Restitution under the CISG in the Domestic Context 133

Next, Part C will discuss what issues in relation to restitution should be considered were the CISG to apply to domestic sale of goods contracts. Various questions arise. For example: Does the CISG have more advantageous restitutionary provisions than those available under New Zealand domestic law? Would the CISG need to be supplemented by other provisions? If so, how would the legislature proceed to deal with those inadequacies?

Finally, Part D will summarise the findings of this paper, namely that the restitutionary remedies under the *CISG* provide parties with adequate protection.

A: Restitution Under the CISG

1. Breach

The CISG allows restitution for a failed contract under Section V – 'Effects of Avoidance'. Avoidance of contract is expressly allowed under the CISG in Articles 49 and 64. These Articles provide that the buyer or seller may avoid the contract where the other party is in fundamental breach.[11]

However, the right to avoid the contract is conditional. Articles 49(2) and 64(2) prevent a buyer or seller from avoiding the contract where the other party has already performed, unless avoidance is declared within the time specified in the CISG.[12]

Avoidance prima facie releases both parties from further obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

However, despite the parties being free from future obligations, avoidance is not nullifying the contract altogether. The CISG continues to regulate the rights and obligations of the parties to eliminate

[11] A fundamental breach is defined. See, United Nations Convention on Contracts for the International Sale of Goods (CISG) (11 April 1980) 3 UNTS 1489, art. 25 (entered into force 30 September 1981).
[12] Ibid., art. 49(2) and 64(2).

unnecessary detriment as a result of the contract being avoided. Article 81(2) says that:

> [a] party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

This provision allows a party to seek a restitutionary remedy according to the contractual arrangements.

Article 84 then recognises that gains made from the goods also should not be retained by the buyer. And, as for recovery of money by the buyer, the seller is bound to pay interest on it. It is notable that Article 84(2) is unique in regard to the seller's rights. The seller may seek not only the return of the goods but also an account of profits. This additional remedy for an account of profits is a personal remedy against the buyer. In contrast the buyer would not be entitled to excess money supposing the seller has invested it and gained proceeds.[13] Therefore, from an unjust enrichment perspective, the seller may have the more favourable claim. Nevertheless, in practical terms, there may be calculation difficulties in assessing the seller's remedy.

Avoiding the contract has another condition in addition to the 'time' constraint.[14] Being able to make restitution to the other party (where that other party has performed in whole or part) is a pre-requisite. The CISG provides that (subject to the three exceptions listed in Article 82(2)), if a buyer cannot return the goods substantially in the condition in which the buyer received them, the buyer must proceed with the contract and the remedy will be limited to damages.[15]

In conclusion, if a party is in breach of contract, the other party may seek avoidance of contract. However, the approach of the CISG requires restitution of whatever has been received as a condition to

[13] Although the buyer is entitled to interest, that is not an additional personal remedy. The domestic law (which applies because there is no provision in the CISG) merely sets an interest rate as part of the remedy.
[14] Supra n. 12.
[15] CISG (11 April 1980) 3 UNTS 1489, art. 82 (entered into force 30 September 1981).

134 The New Zealand Law Students' Journal (2006) 1 NZLSJ

unnecessary detriment as a result of the contract being avoided. Article 81(2) says that:

> [a] party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

This provision allows a party to seek a restitutionary remedy according to the contractual arrangements.

Article 84 then recognises that gains made from the goods also should not be retained by the buyer. And, as for recovery of money by the buyer, the seller is bound to pay interest on it. It is notable that Article 84(2) is unique in regard to the seller's rights. The seller may seek not only the return of the goods but also an account of profits. This additional remedy for an account of profits is a personal remedy against the buyer. In contrast the buyer would not be entitled to excess money supposing the seller has invested it and gained proceeds.[13] Therefore, from an unjust enrichment perspective, the seller may have the more favourable claim. Nevertheless, in practical terms, there may be calculation difficulties in assessing the seller's remedy.

Avoiding the contract has another condition in addition to the 'time' constraint.[14] Being able to make restitution to the other party (where that other party has performed in whole or part) is a pre-requisite. The CISG provides that (subject to the three exceptions listed in Article 82(2)), if a buyer cannot return the goods substantially in the condition in which the buyer received them, the buyer must proceed with the contract and the remedy will be limited to damages.[15]

In conclusion, if a party is in breach of contract, the other party may seek avoidance of contract. However, the approach of the CISG requires restitution of whatever has been received as a condition to

[13] Although the buyer is entitled to interest, that is not an additional personal remedy. The domestic law (which applies because there is no provision in the CISG) merely sets an interest rate as part of the remedy.
[14] Supra n. 12.
[15] CISG (11 April 1980) 3 UNTS 1489, art. 82 (entered into force 30 September 1981).

avoiding the contract. Furthermore, the restitutionary rights set out in Articles 81 and 84 apply irrespective of which party caused or declared avoidance.[16]

2. Impossibility

Another situation in which restitution may become relevant is where the contract has become frustrated. This is because a contract may fail because it has become impossible for a party to perform. A party in such situation may wish to be put into his or her pre-contractual position. The relevant provision in the CISG to deal with a contract that has become impossible to perform is Article 79. However, it is notable that this Article is not an exception to Articles 49 and 64. Therefore, to avoid a contract and obtain the right to restitution, always requires a breach. So, Article 79 does not deal with a 'failed' contract. The fact that Article 79 is not a gateway to avoidance (and therefore restitution) can be problematic.

Article 79 exempts a party from performing his or her obligations under the contract if an unexpected impediment occurs. The Article does not however bring the contract to an end. Article 79(3) says that 'the exemption provided …has the effect for the period during which the impediment exists.' Further, although Article 79 allows either party to seek other remedies,[17] namely avoidance; it does not provide an exception to the prerequisite of showing a breach to avoid. Hence, the only way for the contract to come to an end permanently, is for there to be a breach.[18]

[16] Peter Schlechtriem and Ingeborg Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed, 2005) p. 888.

[17] Except for damages.

[18] Or for the parties to terminate the contract (both parties must agree to this). See, Article 29(1) of the CISG. This paper is based on the premise that the parties do *not* have mutual wishes to end the contract. Rather one (either the buyer or seller) wishes to proceed but the other party does not. This is the difficulty of the CISG because if an unexpected impediment occurs one party may suffer detriment and wish to be free from his or her obligations under the contract. However, he or she cannot invoke Article 29 (because the other party is not in agreement to end the contract) nor can the contract be avoided for mere frustration.

Restitution under the CISG in the Domestic Context 135

avoiding the contract. Furthermore, the restitutionary rights set out in Articles 81 and 84 apply irrespective of which party caused or declared avoidance.[16]

2. Impossibility

Another situation in which restitution may become relevant is where the contract has become frustrated. This is because a contract may fail because it has become impossible for a party to perform. A party in such situation may wish to be put into his or her pre-contractual position. The relevant provision in the CISG to deal with a contract that has become impossible to perform is Article 79. However, it is notable that this Article is not an exception to Articles 49 and 64. Therefore, to avoid a contract and obtain the right to restitution, always requires a breach. So, Article 79 does not deal with a 'failed' contract. The fact that Article 79 is not a gateway to avoidance (and therefore restitution) can be problematic.

Article 79 exempts a party from performing his or her obligations under the contract if an unexpected impediment occurs. The Article does not however bring the contract to an end. Article 79(3) says that 'the exemption provided …has the effect for the period during which the impediment exists.' Further, although Article 79 allows either party to seek other remedies,[17] namely avoidance; it does not provide an exception to the prerequisite of showing a breach to avoid. Hence, the only way for the contract to come to an end permanently, is for there to be a breach.[18]

[16] Peter Schlechtriem and Ingeborg Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd ed, 2005) p. 888.

[17] Except for damages.

[18] Or for the parties to terminate the contract (both parties must agree to this). See, Article 29(1) of the CISG. This paper is based on the premise that the parties do *not* have mutual wishes to end the contract. Rather one (either the buyer or seller) wishes to proceed but the other party does not. This is the difficulty of the CISG because if an unexpected impediment occurs one party may suffer detriment and wish to be free from his or her obligations under the contract. However, he or she cannot invoke Article 29 (because the other party is not in agreement to end the contract) nor can the contract be avoided for mere frustration.

The operation of Article 79 is therefore problematic. 'Avoidance' cannot be sought for mere frustration because the Article does not permanently exempt a party from performing. Therefore, the way the Article operates may result in economic disadvantages to either the seller or the buyer. The seller may face undue hardship in making alternative arrangements to carry out his or her obligations. Alternatively, the buyer may face inconvenience from the seller's delay.

Suppose for example, a seller is obliged to manufacture and supply goods to the buyer. The seller's factory is destroyed by an 'act of God' making it impossible to deliver the goods to the buyer. To be able to perform the contract, the seller now has to re-locate to a new factory and manufacture new goods (meaning that now the seller will incur enormous cost increase). In this situation, because performance could still be carried out at a later date, the seller is only temporarily exempted from performing[19] and the seller cannot seek avoidance for mere frustration. The seller cannot avoid the contract although he or she can return whatever has been received from the other party.[20] Likewise, if the seller had partly performed prior to the frustrating event, there would be no right to avoid the contract and seek restitution unless the seller can show that the buyer is in breach of contract. Alternatively, the time delay by the seller may be burdensome for the buyer. But, the buyer cannot avoid the contract either unless the seller is in breach.[21] Since Article 79 temporarily exempts the seller from performing, the seller would only be in breach if he or she failed to perform at all.

3. Restitutionary Damages for Unjust Enrichment

Article 74 of the CISG is the damages provision. It provides that '[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.'

[19] Also, there is nothing to prevent the other party from bringing a claim for specific performance. See, Nina M Galston and Hans Smit (eds) *International Sales – The United Nations Convention on Contracts for the International Sale of Goods* (1984) at 5.03.

[20] This is assuming the buyer wishes the contract to be continued of course: supra n. 18.

[21] This is also assuming that the seller would not suffer undue detriment and therefore *does* wish to proceed with the contract once his or her affairs have been sorted out: supra n. 18.

136 The New Zealand Law Students' Journal (2006) 1 NZLSJ

The operation of Article 79 is therefore problematic. 'Avoidance' cannot be sought for mere frustration because the Article does not permanently exempt a party from performing. Therefore, the way the Article operates may result in economic disadvantages to either the seller or the buyer. The seller may face undue hardship in making alternative arrangements to carry out his or her obligations. Alternatively, the buyer may face inconvenience from the seller's delay.

Suppose for example, a seller is obliged to manufacture and supply goods to the buyer. The seller's factory is destroyed by an 'act of God' making it impossible to deliver the goods to the buyer. To be able to perform the contract, the seller now has to re-locate to a new factory and manufacture new goods (meaning that now the seller will incur enormous cost increase). In this situation, because performance could still be carried out at a later date, the seller is only temporarily exempted from performing[19] and the seller cannot seek avoidance for mere frustration. The seller cannot avoid the contract although he or she can return whatever has been received from the other party.[20] Likewise, if the seller had partly performed prior to the frustrating event, there would be no right to avoid the contract and seek restitution unless the seller can show that the buyer is in breach of contract. Alternatively, the time delay by the seller may be burdensome for the buyer. But, the buyer cannot avoid the contract either unless the seller is in breach.[21] Since Article 79 temporarily exempts the seller from performing, the seller would only be in breach if he or she failed to perform at all.

3. Restitutionary Damages for Unjust Enrichment

Article 74 of the CISG is the damages provision. It provides that '[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.'

[19] Also, there is nothing to prevent the other party from bringing a claim for specific performance. See, Nina M Galston and Hans Smit (eds) *International Sales – The United Nations Convention on Contracts for the International Sale of Goods* (1984) at 5.03.

[20] This is assuming the buyer wishes the contract to be continued of course: supra n. 18.

[21] This is also assuming that the seller would not suffer undue detriment and therefore *does* wish to proceed with the contract once his or her affairs have been sorted out: supra n. 18.

The specific reference to loss of profit is necessary because in some legal systems the 'concept of loss standing alone does not include loss of profit.'[22] Therefore loss includes wasted expenditure and compensation for lost profits.

It is clear that the drafters of the CISG had compensatory and not restitutionary damages in mind in relation to this article. The thrust of a restitutionary remedy is for an account of profits and is different from lost profits.

So the question becomes whether a party could ever claim an account of profits under the CISG apart from under Article 74. The answer lies in whether a buyer or seller may assert, in addition to or instead of his rights under Article 45(1) [and 61(1)], further claims he derives under domestic law that is secondarily or complementarily applicable by virtue of the rules of private international law. [23]

The Schlechtriem and Schwenzer's Commentary on the CISG[24] provides some guidance on this issue.

> "[Article] 74 therein provide[s] for "an evaluation of the parties' interests with the intent of protecting the seller from excessive liability." Domestic law should not be permitted to interfere with this carefully considered assessment…A buyer's concurrent remedy based on domestic law is admissible only under three conditions: the grounds upon which the remedy is based cannot fall within the scope proper of Uniform Sales Law; the remedy cannot be in conflict with the regulatory goals of Uniform Sales Law; and the domestic law itself must permit concurrent assertion of the remedy."[25]

Accordingly, it is uncertain whether restitutionary damages would be allowed as a matter of principle. There is no international consensus on allowing restitutionary damages for a breach of contract. As will be

[22] Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989) p. 475.
[23] Schlechtriem; Schwenzer, supra n 16, p. 530.
[24] Ibid.
[25] Ibid., p. 531.

Restitution under the CISG in the Domestic Context 137

The specific reference to loss of profit is necessary because in some legal systems the 'concept of loss standing alone does not include loss of profit.'[22] Therefore loss includes wasted expenditure and compensation for lost profits.

It is clear that the drafters of the CISG had compensatory and not restitutionary damages in mind in relation to this article. The thrust of a restitutionary remedy is for an account of profits and is different from lost profits.

So the question becomes whether a party could ever claim an account of profits under the CISG apart from under Article 74. The answer lies in whether a buyer or seller may assert, in addition to or instead of his rights under Article 45(1) [and 61(1)], further claims he derives under domestic law that is secondarily or complementarily applicable by virtue of the rules of private international law. [23]

The Schlechtriem and Schwenzer's Commentary on the CISG[24] provides some guidance on this issue.

> "[Article] 74 therein provide[s] for "an evaluation of the parties' interests with the intent of protecting the seller from excessive liability." Domestic law should not be permitted to interfere with this carefully considered assessment…A buyer's concurrent remedy based on domestic law is admissible only under three conditions: the grounds upon which the remedy is based cannot fall within the scope proper of Uniform Sales Law; the remedy cannot be in conflict with the regulatory goals of Uniform Sales Law; and the domestic law itself must permit concurrent assertion of the remedy."[25]

Accordingly, it is uncertain whether restitutionary damages would be allowed as a matter of principle. There is no international consensus on allowing restitutionary damages for a breach of contract. As will be

[22] Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989) p. 475.
[23] Schlechtriem; Schwenzer, supra n 16, p. 530.
[24] Ibid.
[25] Ibid., p. 531.

noted later in this paper, even common law commentators are divided on the acceptability of allowing such claim.

However, there remains another possibility – that of excluding the application of Article 45 altogether. Article 6 of the CISG allows the parties to derogate from or vary the effect of any of its provisions. Hence, derogating from Article 45 means that damages will be a matter for the domestic law and not subject to the CISG.[26] Consequently, if the law of the jurisdiction (which is to be applied according to the rules of private international law) allows for restitutionary damages, then a party may be entitled to seek them.

B: Restitution Under New Zealand Domestic Sale of Goods Law

1. Breach

Unlike the CISG, there is no provision regulating the avoidance of a contract under the SOGA. The set-up of the New Zealand Act is quite different. Under the SOGA it is the buyer's obligation to accept and pay for the goods. [27] However, where the seller is in breach the buyer may reject them.[28] Accordingly, it is the duty of the seller to deliver the goods.[29]

However, if the buyer is in breach, the seller may rescind the contract and may also exercise a right to an equitable lien over the goods in the seller's possession. Under the current law it seems that so long as the seller retains possession he or she is adequately protected by rights of retention if there is a breach of contract by the buyer.[30] On the other hand, the rescinding seller who has given up possession is 'confined to rights in personam against the buyer.'[31]

If the seller is in breach and does not deliver any goods at all (therefore the buyer cannot accept or reject them) but the buyer has pre-paid,

[26] Ibid., p. 533.
[27] Sale of Goods Act 1908 (NZ), section 29.
[28] New Zealand Law Commission, *Contract Statutes Review*, (NZLC Report 25, Wellington, 1993) p. 116.
[29] Sale of Goods Act 1908 (NZ) section 29.
[30] New Zealand Law Commission, supra n. 28, p. 121.
[31] Ibid.

138 The New Zealand Law Students' Journal (2006) 1 NZLSJ

noted later in this paper, even common law commentators are divided on the acceptability of allowing such claim.

However, there remains another possibility – that of excluding the application of Article 45 altogether. Article 6 of the CISG allows the parties to derogate from or vary the effect of any of its provisions. Hence, derogating from Article 45 means that damages will be a matter for the domestic law and not subject to the CISG.[26] Consequently, if the law of the jurisdiction (which is to be applied according to the rules of private international law) allows for restitutionary damages, then a party may be entitled to seek them.

B: Restitution Under New Zealand Domestic Sale of Goods Law

1. Breach

Unlike the CISG, there is no provision regulating the avoidance of a contract under the SOGA. The set-up of the New Zealand Act is quite different. Under the SOGA it is the buyer's obligation to accept and pay for the goods. [27] However, where the seller is in breach the buyer may reject them.[28] Accordingly, it is the duty of the seller to deliver the goods.[29]

However, if the buyer is in breach, the seller may rescind the contract and may also exercise a right to an equitable lien over the goods in the seller's possession. Under the current law it seems that so long as the seller retains possession he or she is adequately protected by rights of retention if there is a breach of contract by the buyer.[30] On the other hand, the rescinding seller who has given up possession is 'confined to rights in personam against the buyer.'[31]

If the seller is in breach and does not deliver any goods at all (therefore the buyer cannot accept or reject them) but the buyer has pre-paid,

[26] Ibid., p. 533.
[27] Sale of Goods Act 1908 (NZ), section 29.
[28] New Zealand Law Commission, *Contract Statutes Review*, (NZLC Report 25, Wellington, 1993) p. 116.
[29] Sale of Goods Act 1908 (NZ) section 29.
[30] New Zealand Law Commission, supra n. 28, p. 121.
[31] Ibid.

then under section 55 of the SOGA the buyer can bring an action to recover the money, based on a failure of performance. In contrast, if the seller is in breach of contract but the goods have been delivered, the buyer may reject them. By rejecting them, the buyer is free from the duty to pay. However, if the buyer has pre-paid for them, because the SOGA does not deal with relief following rejection, the buyer must seek restoration of benefits on the ground of a failure of basis. Likewise, as the SOGA does not deal with relief following rescission, restitution for the seller is dealt with on the ground of a failure of basis.

Failure of basis within a contractual context is dealt with at common law. Common law allows a plaintiff to either seek compensation for the loss of performance or recover the value of money or other benefits transferred pursuant to the contract.[32] Common law dealing with 'failure of basis' supplements the SOGA.[33] Nevertheless, although restitutionary remedies where a contract is discharged for breach are available, the common law's practical implications have been criticised. Obtaining restitution through this avenue is therefore often going to be an inefficient or ineffective process. The problems arising under common law will be discussed in greater detail later in this paper.[34]

2. Impossibility

Because the SOGA does not deal with impossibility to perform, other law applies – namely, the Frustrated Contracts Act 1944 (NZ) (FCA).[35]

The FCA allows a party to seek restitution where a contract 'has become impossible of performance or otherwise been frustrated'.[36] Section 3(2) of the FCA provides that:

> [a]ll sums paid or payable to any party in pursuance of the contract before the time when the parties were so

[32] Ross Grantham and Charles Rickett, Unjust Enrichment and Restitution in New Zealand (2000), p. 165.
[33] See, the Sale of Goods Act 1908 (NZ), sections 55 and 60.
[34] See, below Part C(1)(a).
[35] There is a saving provision in the FCA in regard to the Sale of Goods Act 1908 (NZ) section 9. However, this paper will focus on the reasons for impossibility apart from that saving, and which therefore fall within scope of the FCA.
[36] Frustrated Contracts Act 1944 (NZ) section 3(1).

Restitution under the CISG in the Domestic Context 139

then under section 55 of the SOGA the buyer can bring an action to recover the money, based on a failure of performance. In contrast, if the seller is in breach of contract but the goods have been delivered, the buyer may reject them. By rejecting them, the buyer is free from the duty to pay. However, if the buyer has pre-paid for them, because the SOGA does not deal with relief following rejection, the buyer must seek restoration of benefits on the ground of a failure of basis. Likewise, as the SOGA does not deal with relief following rescission, restitution for the seller is dealt with on the ground of a failure of basis.

Failure of basis within a contractual context is dealt with at common law. Common law allows a plaintiff to either seek compensation for the loss of performance or recover the value of money or other benefits transferred pursuant to the contract.[32] Common law dealing with 'failure of basis' supplements the SOGA.[33] Nevertheless, although restitutionary remedies where a contract is discharged for breach are available, the common law's practical implications have been criticised. Obtaining restitution through this avenue is therefore often going to be an inefficient or ineffective process. The problems arising under common law will be discussed in greater detail later in this paper.[34]

2. Impossibility

Because the SOGA does not deal with impossibility to perform, other law applies – namely, the Frustrated Contracts Act 1944 (NZ) (FCA).[35]

The FCA allows a party to seek restitution where a contract 'has become impossible of performance or otherwise been frustrated'.[36] Section 3(2) of the FCA provides that:

> [a]ll sums paid or payable to any party in pursuance of the contract before the time when the parties were so

> discharged…shall, in the case of sums paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.[37]

This remedy is subject to the proviso which is a statutory recognition of the defence of change of position.

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may…allow him to retain or…recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.[38]

Therefore if the defendant has changed position in reliance on the contract then restitution to the plaintiff may be subject to those expenses incurred by the defendant. A restitutionary remedy could be calculated as the amount paid or payable to the plaintiff minus the defendant's wasted expenses.

The FCA then goes on to allow the plaintiff recovery where a benefit is obtained by a defendant other than money. Under section 3(3) the court has the discretion to grant the party conferring the benefit such sum as it thinks just.

3. Restitutionary Damages for Unjust Enrichment

The common law principle of damages for a breach of contract has been that the plaintiff should be put in the position, had the contract been performed.[39] Hence, a general restitutionary claim for profit gained by a defendant for breach of contract has not been recognised in New Zealand.[40] In assessing damages for the breach of contract, the court is concerned with the plaintiff's loss and not with the defendant's gain.[41] However, there has recently been a significant shift in thinking.

[37] Frustrated Contracts Act 1944 (NZ) section 3(2).
[38] Grantham; Rickett, supra n. 32, p. 176.
[39] *Robinson v Harman* (1848) 1 Ex 850, p. 855.
[40] Blanchard (ed), *Civil Remedies in New Zealand* (2003) p. 32.
[41] *Sotiros Shipping Inc v Sameiet Solholt* [1983] 1 Lloyd's Rep 605 (CA).

140 The New Zealand Law Students' Journal (2006) 1 NZLSJ

> discharged…shall, in the case of sums paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.[37]

This remedy is subject to the proviso which is a statutory recognition of the defence of change of position.

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may…allow him to retain or…recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.[38]

Therefore if the defendant has changed position in reliance on the contract then restitution to the plaintiff may be subject to those expenses incurred by the defendant. A restitutionary remedy could be calculated as the amount paid or payable to the plaintiff minus the defendant's wasted expenses.

The FCA then goes on to allow the plaintiff recovery where a benefit is obtained by a defendant other than money. Under section 3(3) the court has the discretion to grant the party conferring the benefit such sum as it thinks just.

3. Restitutionary Damages for Unjust Enrichment

The common law principle of damages for a breach of contract has been that the plaintiff should be put in the position, had the contract been performed.[39] Hence, a general restitutionary claim for profit gained by a defendant for breach of contract has not been recognised in New Zealand.[40] In assessing damages for the breach of contract, the court is concerned with the plaintiff's loss and not with the defendant's gain.[41] However, there has recently been a significant shift in thinking.

[37] Frustrated Contracts Act 1944 (NZ) section 3(2).
[38] Grantham; Rickett, supra n. 32, p. 176.
[39] *Robinson v Harman* (1848) 1 Ex 850, p. 855.
[40] Blanchard (ed), *Civil Remedies in New Zealand* (2003) p. 32.
[41] *Sotiros Shipping Inc v Sameiet Solholt* [1983] 1 Lloyd's Rep 605 (CA).

Attorney-General v Blake[42] became a leading case in 2003 for recognizing the possibility of restitutionary damages for breach of contract. This English case mentions two situations where restitutionary damages could be sought - for skimped performance and/or for doing the very thing you contracted not to do. The latter situation could easily arise in a contract for the sale of goods. Whether the obiter dictum of this case would be accepted in New Zealand has been a matter of academic debate.[43] It is notable that there is no statutory impediment to allowing this remedy for a breach of a sale of goods contract. While the SOGA does not provide any express regulation of applying for restitutionary remedies, section 60 provides that 'rules of common law…save in so far as they are inconsistent with the express provisions of this Act…shall continue to apply to contracts for the sale of goods.' Therefore, development in the common law for allowing restitutionary damages is possible.

C: Restitutionary Considerations for the CISG Applying to Domestic Contracts

The preceding Parts have set out how and when restitution is available under the CISG and the domestic law. As can be seen, the domestic law is substantively different to the CISG in various ways. This paper will now explore those differences and determine whether the restitutionary remedies available under the CISG would be an acceptable alternative to those available under the current domestic law.

This Part will first focus on the weaknesses of the domestic law concerning restitution for failed contracts and determine whether the CISG would eliminate those weaknesses if it were to supersede SOGA. Alternatively, if the CISG has any weakness then those will also be addressed. Then, since restitutionary damages are not available under the CISG or current domestic law, the paper will address whether that is an inadequacy and how it could be dealt with if the CISG were a basis for a new domestic code. Finally, domestic law that would be

[42] *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 (HL). See also, *Experience Hendrix LLC v PPX Enterprises INC Edward Chalpin* [2003] EWCA Civ 323 for application of restitutionary remedies for breach of contract in the commercial context.
[43] Views are currently divided. See Maree C Chetwin and David K Round 'Breach of Contract and the New Remedy of Account of Profits' (2002) 38 ABACUS.

Restitution under the CISG in the Domestic Context 141

Attorney-General v Blake[42] became a leading case in 2003 for recognizing the possibility of restitutionary damages for breach of contract. This English case mentions two situations where restitutionary damages could be sought - for skimped performance and/or for doing the very thing you contracted not to do. The latter situation could easily arise in a contract for the sale of goods. Whether the obiter dictum of this case would be accepted in New Zealand has been a matter of academic debate.[43] It is notable that there is no statutory impediment to allowing this remedy for a breach of a sale of goods contract. While the SOGA does not provide any express regulation of applying for restitutionary remedies, section 60 provides that 'rules of common law…save in so far as they are inconsistent with the express provisions of this Act…shall continue to apply to contracts for the sale of goods.' Therefore, development in the common law for allowing restitutionary damages is possible.

C: Restitutionary Considerations for the CISG Applying to Domestic Contracts

The preceding Parts have set out how and when restitution is available under the CISG and the domestic law. As can be seen, the domestic law is substantively different to the CISG in various ways. This paper will now explore those differences and determine whether the restitutionary remedies available under the CISG would be an acceptable alternative to those available under the current domestic law.

This Part will first focus on the weaknesses of the domestic law concerning restitution for failed contracts and determine whether the CISG would eliminate those weaknesses if it were to supersede SOGA. Alternatively, if the CISG has any weakness then those will also be addressed. Then, since restitutionary damages are not available under the CISG or current domestic law, the paper will address whether that is an inadequacy and how it could be dealt with if the CISG were a basis for a new domestic code. Finally, domestic law that would be

[42] *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 (HL). See also, *Experience Hendrix LLC v PPX Enterprises INC Edward Chalpin* [2003] EWCA Civ 323 for application of restitutionary remedies for breach of contract in the commercial context.
[43] Views are currently divided. See Maree C Chetwin and David K Round 'Breach of Contract and the New Remedy of Account of Profits' (2002) 38 ABACUS.

needed in addition to the CISG to regulate contracts for the sale of goods will be noted.

1. Failed Contracts

(a) Breach

There are two main problems with the domestic law in regard to restitution for a breach of contract. First, the SOGA makes no provision for when a buyer who rejects the goods actually cancels the contract.[44] And second, restitution under the common law for 'failure of basis' is inadequate and dated. The Law Commission has noted these issues and suggested amendments to SOGA. This paper will now determine whether those recommendations by the Law Commission could also be achieved by replacing SOGA with the CISG.

In regard to the cancellation issue, the Law Commission suggested that the buyer should have the choice to either reject the goods or cancel the contract. This would eliminate the current ambiguity of when rejection also amounts to cancellation. The Law Commission noted that to complete the dovetailing, it is necessary to affirm the rule that the effect of rejecting goods after the property has passed or cancellation of the contract is that title re-vests in the seller unless the goods have been accepted.[45] They said that it would be inconvenient, if in the majority of fact situations, the property were to remain in the buyer after cancellation.[46] Accordingly, a proprietary right is transferred back to the seller and this right can be enforced by way of restitution.[47]

If the CISG were to take the place of SOGA, then the inadequacy of the word rejection would not be an issue. Under the CISG rejection and cancellation would be combined into 'avoidance'. Where a party wishes to avoid the contract under the CISG, notice to the other side is

[44] It is unclear what further act is required for the contract to be cancelled. Rejecting is not always going to involve complete cancellation of the contract. The Law Commission also suggested that the word 'rescission' by the seller should be replaced with 'cancellation'. However, unlike the situation for the buyer, that does not substantially change the provision so it will not be discussed.
[45] New Zealand Law Commission, supra n. 28, p. 118.
[46] Ibid.
[47] Ibid.

142 The New Zealand Law Students' Journal (2006) 1 NZLSJ

needed in addition to the CISG to regulate contracts for the sale of goods will be noted.

1. Failed Contracts

(a) Breach

There are two main problems with the domestic law in regard to restitution for a breach of contract. First, the SOGA makes no provision for when a buyer who rejects the goods actually cancels the contract.[44] And second, restitution under the common law for 'failure of basis' is inadequate and dated. The Law Commission has noted these issues and suggested amendments to SOGA. This paper will now determine whether those recommendations by the Law Commission could also be achieved by replacing SOGA with the CISG.

In regard to the cancellation issue, the Law Commission suggested that the buyer should have the choice to either reject the goods or cancel the contract. This would eliminate the current ambiguity of when rejection also amounts to cancellation. The Law Commission noted that to complete the dovetailing, it is necessary to affirm the rule that the effect of rejecting goods after the property has passed or cancellation of the contract is that title re-vests in the seller unless the goods have been accepted.[45] They said that it would be inconvenient, if in the majority of fact situations, the property were to remain in the buyer after cancellation.[46] Accordingly, a proprietary right is transferred back to the seller and this right can be enforced by way of restitution.[47]

If the CISG were to take the place of SOGA, then the inadequacy of the word rejection would not be an issue. Under the CISG rejection and cancellation would be combined into 'avoidance'. Where a party wishes to avoid the contract under the CISG, notice to the other side is

[44] It is unclear what further act is required for the contract to be cancelled. Rejecting is not always going to involve complete cancellation of the contract. The Law Commission also suggested that the word 'rescission' by the seller should be replaced with 'cancellation'. However, unlike the situation for the buyer, that does not substantially change the provision so it will not be discussed.
[45] New Zealand Law Commission, supra n. 28, p. 118.
[46] Ibid.
[47] Ibid.

required.[48] The CISG then has the desirable objective of putting the parties into their pre-contractual positions by allowing restitution of performance to be claimed by either party. Upon avoidance the seller has the right to the re-vesting of his or her property interest. And, the buyer may recover any money pre-paid.

The second issue - failure of basis - is that, as mentioned earlier in this paper, the common law has been criticised. The problems with the current law are as follows. First, the common law requires a total failure of basis.[49] Therefore a plaintiff who has received part of the contractual performance is prevented from seeking restitution. Second, restoration can only be to the party not in breach – thereby barring the party in breach from restitution.[50] Third, restitution as a failure of basis claim allows the party to have returned only what was agreed under the contract. Therefore gains made would not be recoverable.[51] Finally, benefits conferred under the contract are not recoverable if the contract was one constructed as requiring complete performance.[52]

Although the enactment of the Contractual Remedies Act 1979 (NZ) (CRA) was implemented to remove the common law inadequacies, it specifically excluded its application to the sale of goods.[53] Nevertheless, it is notable that the drafters of the CRA intended the saving to be temporary.[54] It seems that the saving was merely to allow time to conduct a thorough overhaul of the SOGA, which was to be the Contracts and Commercial Law Reform Committee's (CCLRC) next project.[55] The CCLRC was, however abolished before it could undertake that review.[56]

[48] CISG (11 April 1980) 5 UNTS 1489, art 26 (entered into force 30 September 1981).
[49] Grantham; Rickett, supra n. 32, p. 168.
[50] Ibid.
[51] Ibid.
[52] *Cutter v Powell* (1795) 6 Term Rep 320.
[53] Contractual Remedies Act 1979 (NZ) section 15(d). But also see sections 4(3) and 6(2) of the CRA for exceptions where the CRA applies despite the SOGA. Those exceptions are however are not discussed in this paper.
[54] Grantham; Rickett, supra n. 32, p. 169.
[55] New Zealand Law Commission, supra n. 28, p. 112.
[56] Grantham; Rickett, supra n. 32, p. 170.

Restitution under the CISG in the Domestic Context 143

required.[48] The CISG then has the desirable objective of putting the parties into their pre-contractual positions by allowing restitution of performance to be claimed by either party. Upon avoidance the seller has the right to the re-vesting of his or her property interest. And, the buyer may recover any money pre-paid.

The second issue - failure of basis - is that, as mentioned earlier in this paper, the common law has been criticised. The problems with the current law are as follows. First, the common law requires a total failure of basis.[49] Therefore a plaintiff who has received part of the contractual performance is prevented from seeking restitution. Second, restoration can only be to the party not in breach – thereby barring the party in breach from restitution.[50] Third, restitution as a failure of basis claim allows the party to have returned only what was agreed under the contract. Therefore gains made would not be recoverable.[51] Finally, benefits conferred under the contract are not recoverable if the contract was one constructed as requiring complete performance.[52]

Although the enactment of the Contractual Remedies Act 1979 (NZ) (CRA) was implemented to remove the common law inadequacies, it specifically excluded its application to the sale of goods.[53] Nevertheless, it is notable that the drafters of the CRA intended the saving to be temporary.[54] It seems that the saving was merely to allow time to conduct a thorough overhaul of the SOGA, which was to be the Contracts and Commercial Law Reform Committee's (CCLRC) next project.[55] The CCLRC was, however abolished before it could undertake that review.[56]

[48] CISG (11 April 1980) 5 UNTS 1489, art 26 (entered into force 30 September 1981).
[49] Grantham; Rickett, supra n. 32, p. 168.
[50] Ibid.
[51] Ibid.
[52] *Cutter v Powell* (1795) 6 Term Rep 320.
[53] Contractual Remedies Act 1979 (NZ) section 15(d). But also see sections 4(3) and 6(2) of the CRA for exceptions where the CRA applies despite the SOGA. Those exceptions are however are not discussed in this paper.
[54] Grantham; Rickett, supra n. 32, p. 169.
[55] New Zealand Law Commission, supra n. 28, p. 112.
[56] Grantham; Rickett, supra n. 32, p. 170.

Therefore the Law Commission has since argued that the CRA and the SOGA should be harmonised. Particularly that section 9 of the CRA should be made available for sale of goods contracts.

Section 9 overcomes the problems of the common law noted above. However, at the time of the Law Commission's proposal, the CISG had not been adopted by New Zealand. Therefore, proceeding with the CCLRC's original plan, the CISG could overtake SOGA. The substantive objectives of the Law Commission would also be achieved but through a different avenue – the CISG instead of the CRA.

The CISG is an advance on the common law by allowing restitution (whether or not there has been part performance) to be sought by either party, not limiting recovery to the contract (Article 84), and by being available whether or not complete performance was stipulated in the contract. The CISG is a mechanism to provide a fairer remedy for restitution than what is available to parties under the current domestic law.

Further, the CISG is arguably even more desirable than the CRA in that it makes restitution a guaranteed right on avoidance. Under the CRA restitutionary relief is entirely at the court's discretion and not the subject of firm rules.[57] Importantly, this point was criticised by Professor D McLauchlan shortly after the CRA was implemented.

> The [CCLRC] has effectually swept away 200 years of case-law dealing with restitution upon rescission…with no reported discussion of the important and complex issues involved. [However] it is not suggested that the common law ought to have been retained…It is for the legislature to make the policy decisions, not simply to uproot the existing rules and dump the problems into the lap of the courts to be solved by the exercise of an almost boundless discretion.[58]

However, restitution under the CISG is not free from criticism. Some academics have argued that Article 82, which bars the buyer from

[57] Contractual Remedies Act 1979 (NZ) sections 9(1)-(4); Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (2005), p. 127.
[58] David McLauchlan 'Contract Law Reform in New Zealand: The CRA 1979' (1981) 1 OJLS 284, pp. 288 and 292.

144 The New Zealand Law Students' Journal (2006) 1 NZLSJ

Therefore the Law Commission has since argued that the CRA and the SOGA should be harmonised. Particularly that section 9 of the CRA should be made available for sale of goods contracts.

Section 9 overcomes the problems of the common law noted above. However, at the time of the Law Commission's proposal, the CISG had not been adopted by New Zealand. Therefore, proceeding with the CCLRC's original plan, the CISG could overtake SOGA. The substantive objectives of the Law Commission would also be achieved but through a different avenue – the CISG instead of the CRA.

The CISG is an advance on the common law by allowing restitution (whether or not there has been part performance) to be sought by either party, not limiting recovery to the contract (Article 84), and by being available whether or not complete performance was stipulated in the contract. The CISG is a mechanism to provide a fairer remedy for restitution than what is available to parties under the current domestic law.

Further, the CISG is arguably even more desirable than the CRA in that it makes restitution a guaranteed right on avoidance. Under the CRA restitutionary relief is entirely at the court's discretion and not the subject of firm rules.[57] Importantly, this point was criticised by Professor D McLauchlan shortly after the CRA was implemented.

> The [CCLRC] has effectually swept away 200 years of case-law dealing with restitution upon rescission…with no reported discussion of the important and complex issues involved. [However] it is not suggested that the common law ought to have been retained…It is for the legislature to make the policy decisions, not simply to uproot the existing rules and dump the problems into the lap of the courts to be solved by the exercise of an almost boundless discretion.[58]

However, restitution under the CISG is not free from criticism. Some academics have argued that Article 82, which bars the buyer from

[57] Contractual Remedies Act 1979 (NZ) sections 9(1)-(4); Cynthia Hawes (ed) *Butterworths Introduction to Commercial Law* (2005), p. 127.
[58] David McLauchlan 'Contract Law Reform in New Zealand: The CRA 1979' (1981) 1 OJLS 284, pp. 288 and 292.

avoiding the contract if the buyer cannot make restitution of the goods, is too restrictive.[59] Perhaps a more liberal provision in place of the current Article 82 would be to grant a party an allowance in money. This is the approach of The International Institute for the Unification of Private Law (UNIDROIT). On the other hand, the criticism that the CISG is too restrictive has also been countered:

Due to the wide range of exceptions to the bar of avoidance under Art. 82(2)(a) to (c) CISG and the objective equalization of benefits according to Art. 84(2) CISG, restitution under [UNIDROIT and CISG] will quite often produce the same or, at least, a similar result. Furthermore, one should give broad application to the exceptions of para. (2) and thereby limit the bar of Art. 82(1) CISG.[60]

Therefore, the exceptions in Article 82(2) mean that the buyer would not often face a dissimilar result to that under the UNIDROIT approach. If the reason the buyer cannot return the goods is not his or her fault, or if the goods have simply been on-sold the goods in the normal course of business, then the buyer can avoid the contract. These exceptions are very wide. The working operation of article 82 arguably strikes a good balance and is fair for both parties.

(b) Impossibility

If the CISG became a code for domestic contracts, then it would trump the FCA where the sales of goods are involved.[61]

The domestic law differs from the CISG in that it deals with restitution for frustrated contracts and restitution where the contract is discharged for breach separately. As pointed out earlier in this paper, there are problems with the operation of Article 79 of the CISG. Under the CISG, discharging the contract is not a guaranteed option for the party faced with the impossibility.[62] The CISG's problem of having a breach

[59] See, Florian Mohs 'Remarks on the manner in which Articles 7.3.5 and 7.3.6 of the *UNIDROIT* Principles compare with Articles 81 and 82 of the CISG' http://www.cisg.law.pace.edu/cisg/biblio/mohs.html at 21 January 2006.
[60] Ibid.
[61] This is because the *CISG* has its own regime for dealing with frustrated contracts in Article 79.
[62] Supra Part A(2).

Restitution under the CISG in the Domestic Context 145

avoiding the contract if the buyer cannot make restitution of the goods, is too restrictive.[59] Perhaps a more liberal provision in place of the current Article 82 would be to grant a party an allowance in money. This is the approach of The International Institute for the Unification of Private Law (UNIDROIT). On the other hand, the criticism that the CISG is too restrictive has also been countered:

Due to the wide range of exceptions to the bar of avoidance under Art. 82(2)(a) to (c) CISG and the objective equalization of benefits according to Art. 84(2) CISG, restitution under [UNIDROIT and CISG] will quite often produce the same or, at least, a similar result. Furthermore, one should give broad application to the exceptions of para. (2) and thereby limit the bar of Art. 82(1) CISG.[60]

Therefore, the exceptions in Article 82(2) mean that the buyer would not often face a dissimilar result to that under the UNIDROIT approach. If the reason the buyer cannot return the goods is not his or her fault, or if the goods have simply been on-sold the goods in the normal course of business, then the buyer can avoid the contract. These exceptions are very wide. The working operation of article 82 arguably strikes a good balance and is fair for both parties.

(b) Impossibility

If the CISG became a code for domestic contracts, then it would trump the FCA where the sales of goods are involved.[61]

The domestic law differs from the CISG in that it deals with restitution for frustrated contracts and restitution where the contract is discharged for breach separately. As pointed out earlier in this paper, there are problems with the operation of Article 79 of the CISG. Under the CISG, discharging the contract is not a guaranteed option for the party faced with the impossibility.[62] The CISG's problem of having a breach

[59] See, Florian Mohs 'Remarks on the manner in which Articles 7.3.5 and 7.3.6 of the *UNIDROIT* Principles compare with Articles 81 and 82 of the CISG' http://www.cisg.law.pace.edu/cisg/biblio/mohs.html at 21 January 2006.
[60] Ibid.
[61] This is because the *CISG* has its own regime for dealing with frustrated contracts in Article 79.
[62] Supra Part A(2).

as a pre-requisite to avoid as opposed to allowing avoidance for a frustrating event, has been criticised:

The system of remedies is ill-adapted to the situation dealt with in Article 79. The remedies, of course, are simply the general remedies for the kind of non-performance which a common lawyer calls breach of contract, whereas in article 79 we are not dealing with breach. We are concerned with adjusting the rights of two innocent parties. The problems are those of balancing benefits received against expenses incurred, problems which are normally thought of in the context of the law of restitution, but call for the exercise of a greater degree of judicial discretion than found in normal restitutionary remedies.[63]

Unlike the CISG, discharging a contract for impossibility under the current domestic law is not dependent on a breach by the other party. So in that respect the domestic law is better. Consequently, the question becomes whether or not the problems of Article 79 could be overcome if the CISG were to apply to domestic contracts. The easiest way to overcome the problem would be to delete Article 79(3). Article 79(3) makes the exemption under Article 79 temporary – during the period that the impediment exists. If a party is permanently exempted from performing, the contract has failed. In that case, either party could declare the contract avoided and seek restitution.[64]

Despite the FCA perhaps being advantageous as to when it applies, its provisions on how it applies are not so attractive for sales of goods.[65] Particularly, perhaps the CISG is more geared to dealing with commercial contracts for the sale of goods in that it provides the option to have the actual goods returned where applicable. The FCA section 3(2) does not allow the restitution of property, other than in a monetary form.[66] This limitation may be problematic at times.

[63] Galston and Smit, supra n. 19, at 5.20.
[64] This however brings inconsistency to the domestic and international approach. However, the author is of the view that Article 79 needs to be amended for international contracts as well. However, reform of the CISG in the international context is a complicated matter requiring consensus by parties. That inquiry is beyond the scope of this paper.
[65] New Zealand Law Commission, supra n. 28, p. 296. Note that there were several criticisms in regard to the subsection.
[66] Ibid., p. 297.

146 The New Zealand Law Students' Journal (2006) 1 NZLSJ

as a pre-requisite to avoid as opposed to allowing avoidance for a frustrating event, has been criticised:

The system of remedies is ill-adapted to the situation dealt with in Article 79. The remedies, of course, are simply the general remedies for the kind of non-performance which a common lawyer calls breach of contract, whereas in article 79 we are not dealing with breach. We are concerned with adjusting the rights of two innocent parties. The problems are those of balancing benefits received against expenses incurred, problems which are normally thought of in the context of the law of restitution, but call for the exercise of a greater degree of judicial discretion than found in normal restitutionary remedies.[63]

Unlike the CISG, discharging a contract for impossibility under the current domestic law is not dependent on a breach by the other party. So in that respect the domestic law is better. Consequently, the question becomes whether or not the problems of Article 79 could be overcome if the CISG were to apply to domestic contracts. The easiest way to overcome the problem would be to delete Article 79(3). Article 79(3) makes the exemption under Article 79 temporary – during the period that the impediment exists. If a party is permanently exempted from performing, the contract has failed. In that case, either party could declare the contract avoided and seek restitution.[64]

Despite the FCA perhaps being advantageous as to when it applies, its provisions on how it applies are not so attractive for sales of goods.[65] Particularly, perhaps the CISG is more geared to dealing with commercial contracts for the sale of goods in that it provides the option to have the actual goods returned where applicable. The FCA section 3(2) does not allow the restitution of property, other than in a monetary form.[66] This limitation may be problematic at times.

[63] Galston and Smit, supra n. 19, at 5.20.
[64] This however brings inconsistency to the domestic and international approach. However, the author is of the view that Article 79 needs to be amended for international contracts as well. However, reform of the CISG in the international context is a complicated matter requiring consensus by parties. That inquiry is beyond the scope of this paper.
[65] New Zealand Law Commission, supra n. 28, p. 296. Note that there were several criticisms in regard to the subsection.
[66] Ibid., p. 297.

Arguably, if the actual goods could be returned, (as allowed in the CISG) the parties could be restored to their pre-contractual positions with minimum hardship.[67] Additionally, in some circumstances it may be very difficult for the court to assess a just sum in relation to a benefit incurred. It may be easier for the courts to order the return of the goods if for instance the goods have increased in value.

Moreover, there is no provision in the FCA equivalent to Article 84 of the CISG allowing the recovery of gains made from the goods or interest to be paid on the refunded money. However, interest would be available by recourse to section 87 of the Judicature Act 1908 (NZ). In regard to gains made from the goods by the buyer, the FCA says that the seller may recover a just sum but such sum cannot exceed the value of the said benefit to the party obtaining it.[68] Therefore, unlike the CISG, the seller has no personal remedy for 'profits' under the FCA.

2. Restitutionary Damages for a Breach of Contract

As a general rule the measure of damages for breach of contract 'is compensatory rather than restitutionary, so that the claimant will have his [or her] damages assessed by reference to the loss sustained, not to the profit made by the defendant as a result of his [or her] wrongful act.'[69]

However, both academic articles and case law have criticized the limitation of damages to compensatory relief. Some writers have favoured the view that 'in some circumstances the innocent party to a breach of contract should be able to disgorge the profits he [the breaching party] obtained from his breach of contract.'[70] An award of damages assessed by loss is not always going to be adequate.[71]

It is quite possible for a defendant to gain from a breach of contract but without causing any loss to the plaintiff. This can be illustrated by the following examples:

[67] Ibid., p. 301.
[68] Frustrated Contracts Act 1944 (NZ), section 3(3) (emphasis added).
[69] *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268, 274 (HL).
[70] Ibid., (Lord Nicholls of Birkenhead); see, Catherine Mitchell 'Remedial Inadequacy in Contract and the Role of Restitutionary Damages' (1999) 15 JCL 133.
[71] See, *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268, 274 (HL).

Restitution under the CISG in the Domestic Context 147

Arguably, if the actual goods could be returned, (as allowed in the CISG) the parties could be restored to their pre-contractual positions with minimum hardship.[67] Additionally, in some circumstances it may be very difficult for the court to assess a just sum in relation to a benefit incurred. It may be easier for the courts to order the return of the goods if for instance the goods have increased in value.

Moreover, there is no provision in the FCA equivalent to Article 84 of the CISG allowing the recovery of gains made from the goods or interest to be paid on the refunded money. However, interest would be available by recourse to section 87 of the Judicature Act 1908 (NZ). In regard to gains made from the goods by the buyer, the FCA says that the seller may recover a just sum but such sum cannot exceed the value of the said benefit to the party obtaining it.[68] Therefore, unlike the CISG, the seller has no personal remedy for 'profits' under the FCA.

2. Restitutionary Damages for a Breach of Contract

As a general rule the measure of damages for breach of contract 'is compensatory rather than restitutionary, so that the claimant will have his [or her] damages assessed by reference to the loss sustained, not to the profit made by the defendant as a result of his [or her] wrongful act.'[69]

However, both academic articles and case law have criticized the limitation of damages to compensatory relief. Some writers have favoured the view that 'in some circumstances the innocent party to a breach of contract should be able to disgorge the profits he [the breaching party] obtained from his breach of contract.'[70] An award of damages assessed by loss is not always going to be adequate.[71]

It is quite possible for a defendant to gain from a breach of contract but without causing any loss to the plaintiff. This can be illustrated by the following examples:

[67] Ibid., p. 301.
[68] Frustrated Contracts Act 1944 (NZ), section 3(3) (emphasis added).
[69] *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268, 274 (HL).
[70] Ibid., (Lord Nicholls of Birkenhead); see, Catherine Mitchell 'Remedial Inadequacy in Contract and the Role of Restitutionary Damages' (1999) 15 JCL 133.
[71] See, *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268, 274 (HL).

Suppose Company A contracts with Company B not to manufacture and sell a particular type of good for one year except to Company B (the buyer) with Company B's name attached. Company A sells the exact same model to Company C inside that same year. Company A gains 10 per cent profit from sales to Company B and Company C. Can Company B sue Company A for the profit obtained from Company C? Has there been a loss to Company B or merely a gain to Company A? There is no doubt that Company A is in breach but what would Company B's remedy be?

Suppose Company A is in breach of contract because it delays transferring goods under the contract entered into with Company B. Company A chooses to delay in transferring the goods to Company B because it is making money by selling them elsewhere. Can the party in breach of contract be sued for the money made by Company A as a result of the delay?

Under the CISG and the current New Zealand domestic law, the plaintiff in both scenarios would be without remedy. Academics have argued that it is not clear why it should be any more permissible to expropriate personal rights than property rights.[72]

Therefore, the legislature may wish to consider whether to allow for restitutionary damages in addition to the CISG. This could be achieved perhaps by drafting a separate remedies provision to apply alongside the CISG. However if a provision allowing for restitutionary damages was accepted, then drafters should take into account that restitutionary damages differ from true restitution. Consequently, a plaintiff should not be able to claim restitutionary damages as well as compensatory damages.[73] Furthermore, such provision would only be able to apply for domestic contracts. This is because parliament cannot unilaterally add to the international convention.[74]

[72] See, Lionel D Smith 'Disgorgement of the Profits of Breach of Contract: Property, Contract and Efficient Breach' (1995) 24 Can BLJ 121.
[73] Blanchard, supra n. 40, p. 32.
[74] This paper is based on the presumption that the new sales code simply uses the CISG as a 'basis' for domestic sale of goods contracts. International contracts would be governed strictly by the Sale of Goods (United Nations Convention) Act 1994 (NZ) where the parties had not chosen ordinary conflict of laws rules to apply.

148 The New Zealand Law Students' Journal (2006) 1 NZLSJ

Suppose Company A contracts with Company B not to manufacture and sell a particular type of good for one year except to Company B (the buyer) with Company B's name attached. Company A sells the exact same model to Company C inside that same year. Company A gains 10 per cent profit from sales to Company B and Company C. Can Company B sue Company A for the profit obtained from Company C? Has there been a loss to Company B or merely a gain to Company A? There is no doubt that Company A is in breach but what would Company B's remedy be?

Suppose Company A is in breach of contract because it delays transferring goods under the contract entered into with Company B. Company A chooses to delay in transferring the goods to Company B because it is making money by selling them elsewhere. Can the party in breach of contract be sued for the money made by Company A as a result of the delay?

Under the CISG and the current New Zealand domestic law, the plaintiff in both scenarios would be without remedy. Academics have argued that it is not clear why it should be any more permissible to expropriate personal rights than property rights.[72]

Therefore, the legislature may wish to consider whether to allow for restitutionary damages in addition to the CISG. This could be achieved perhaps by drafting a separate remedies provision to apply alongside the CISG. However if a provision allowing for restitutionary damages was accepted, then drafters should take into account that restitutionary damages differ from true restitution. Consequently, a plaintiff should not be able to claim restitutionary damages as well as compensatory damages.[73] Furthermore, such provision would only be able to apply for domestic contracts. This is because parliament cannot unilaterally add to the international convention.[74]

[72] See, Lionel D Smith 'Disgorgement of the Profits of Breach of Contract: Property, Contract and Efficient Breach' (1995) 24 Can BLJ 121.
[73] Blanchard, supra n. 40, p. 32.
[74] This paper is based on the presumption that the new sales code simply uses the CISG as a 'basis' for domestic sale of goods contracts. International contracts would be governed strictly by the Sale of Goods (United Nations Convention) Act 1994 (NZ) where the parties had not chosen ordinary conflict of laws rules to apply.

3. Gaps

Although the CISG is set up as a code for international sale of goods contracts,[75] sometimes by virtue of the ordinary rules of private international law, a domestic law may apply (relevant for this paper are those New Zealand domestic laws that apply alongside the CISG).

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[76]

There are some gaps in the CISG in regard to restitution. Two of the major ones are discussed in this chapter. First, the CISG does not deal with the passing of property. Consequently, the SOGA section 19 currently applies even where a contract is governed by the CISG. Accordingly, if the CISG became SOGA's successor, the legislature would need to address this gap. A provision such as the following (equivalent to that of section 19 SOGA) should apply alongside the CISG:

> (1) Where there is a contract for the sale of goods to which this Act[77] applies, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Second, the CISG is silent on the details of transfer in restitution. It is therefore a matter for domestic law to determine which of the parties (or their insurance companies)[78] bears the cost. Restitutionary costs could be very substantial for the buyer. For example, the buyer may

[75] Sale of Goods (United Nations Convention) Act 1994.
[76] *CISG* (11 April 1981) 3 UNTS 1489, art 7(2) (entered into force 30 September 1981).
[77] 'This Act' will be the new domestic code based on the *CISG*.
[78] Insurance law is beyond the scope of this paper and therefore it will not be discussed.

Restitution under the CISG in the Domestic Context 149

3. Gaps

Although the CISG is set up as a code for international sale of goods contracts,[75] sometimes by virtue of the ordinary rules of private international law, a domestic law may apply (relevant for this paper are those New Zealand domestic laws that apply alongside the CISG).

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[76]

There are some gaps in the CISG in regard to restitution. Two of the major ones are discussed in this chapter. First, the CISG does not deal with the passing of property. Consequently, the SOGA section 19 currently applies even where a contract is governed by the CISG. Accordingly, if the CISG became SOGA's successor, the legislature would need to address this gap. A provision such as the following (equivalent to that of section 19 SOGA) should apply alongside the CISG:

> (1) Where there is a contract for the sale of goods to which this Act[77] applies, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Second, the CISG is silent on the details of transfer in restitution. It is therefore a matter for domestic law to determine which of the parties (or their insurance companies)[78] bears the cost. Restitutionary costs could be very substantial for the buyer. For example, the buyer may

[75] Sale of Goods (United Nations Convention) Act 1994.
[76] *CISG* (11 April 1981) 3 UNTS 1489, art 7(2) (entered into force 30 September 1981).
[77] 'This Act' will be the new domestic code based on the *CISG*.
[78] Insurance law is beyond the scope of this paper and therefore it will not be discussed.

incur significant shipment expenses by returning a large quantity of goods back to the seller. Also, if a party is obliged to make restitution in money terms then he or she could incur expenses in accessing the funds. This would occur for example if the party's bank requires a fee to withdraw from the account. Domestic statute law in New Zealand does not expressly deal with this issue where the contract is discharged for breach.[79] Therefore, the availability of restitutionary costs is a matter for the common law. In contrast, if the contract is discharged for impossibility, the FCA seems to exclude the recovery of restitutionary costs incurred by a seller making restitution. The FCA says that where the seller is obliged to make restitution only the 'expenses for which allowance may be made, are those paid incurred before the time of discharge'[80] In other words, the wasted expenditure incurred by the party bound to make restitution, would fall within scope of the provision, but restitutionary costs would not (as those would be incurred by the seller after the contract had been discharged). As for the buyer, the set-up of the FCA pre-empts potential claims for restitutionary expenses in returning goods. This is because, as noted earlier, section 3(3) of the FCA does not allow a party to obtain restitution for the particular goods but only their money equivalent. However, restitutionary costs could still be incurred (like with the seller) in accessing money. Yet, unlike the situation for the seller, the Act does not expressly exclude the recovery of restitutionary costs. The FCA leaves the amount of money the buyer must pay (as restitution) at the discretion of the court.[81] While the Act expresses factors that a judge should particularly take into account, those factors are not exclusive.[82] Accordingly, it is quite possible that restitutionary costs incurred by the buyer could be deducted from seller's restitutionary remedy.

However, if the CISG succeeded the SOGA, the FCA would not apply.[83] Therefore, recovery of restitutionary costs would be a matter

[79] The Sale of Goods Act 1908 (NZ) is silent on the matter.
[80] Frustrated Contracts Act 1944 (NZ) section 3(2), emphasis added.
[81] Frustrated Contracts Act 1944 (NZ) section 3(3).
[82] The Court has 'regard to all the circumstances': Frustrated Contracts Act 1944 (NZ), section 3(3).
[83] This is because this paper assumes that the CISG would be implemented as a domestic code and proposes that a consequential amendment would be to exclude the application of the FCA.

150 The New Zealand Law Students' Journal (2006) 1 NZLSJ

incur significant shipment expenses by returning a large quantity of goods back to the seller. Also, if a party is obliged to make restitution in money terms then he or she could incur expenses in accessing the funds. This would occur for example if the party's bank requires a fee to withdraw from the account. Domestic statute law in New Zealand does not expressly deal with this issue where the contract is discharged for breach.[79] Therefore, the availability of restitutionary costs is a matter for the common law. In contrast, if the contract is discharged for impossibility, the FCA seems to exclude the recovery of restitutionary costs incurred by a seller making restitution. The FCA says that where the seller is obliged to make restitution only the 'expenses for which allowance may be made, are those paid incurred before the time of discharge'[80] In other words, the wasted expenditure incurred by the party bound to make restitution, would fall within scope of the provision, but restitutionary costs would not (as those would be incurred by the seller after the contract had been discharged). As for the buyer, the set-up of the FCA pre-empts potential claims for restitutionary expenses in returning goods. This is because, as noted earlier, section 3(3) of the FCA does not allow a party to obtain restitution for the particular goods but only their money equivalent. However, restitutionary costs could still be incurred (like with the seller) in accessing money. Yet, unlike the situation for the seller, the Act does not expressly exclude the recovery of restitutionary costs. The FCA leaves the amount of money the buyer must pay (as restitution) at the discretion of the court.[81] While the Act expresses factors that a judge should particularly take into account, those factors are not exclusive.[82] Accordingly, it is quite possible that restitutionary costs incurred by the buyer could be deducted from seller's restitutionary remedy.

However, if the CISG succeeded the SOGA, the FCA would not apply.[83] Therefore, recovery of restitutionary costs would be a matter

[79] The Sale of Goods Act 1908 (NZ) is silent on the matter.
[80] Frustrated Contracts Act 1944 (NZ) section 3(2), emphasis added.
[81] Frustrated Contracts Act 1944 (NZ) section 3(3).
[82] The Court has 'regard to all the circumstances': Frustrated Contracts Act 1944 (NZ), section 3(3).
[83] This is because this paper assumes that the CISG would be implemented as a domestic code and proposes that a consequential amendment would be to exclude the application of the FCA.

for common law in all cases for contracts discharged for breach or impossibility. Whether restitutionary costs should be allocated by statute or left to judicial discretion is something the legislature may wish to consider on reform of its sales of goods law. Further, Schlechtriem and Schwenzer's Commentary on the CISG[84] has provided some guidance on restitutionary costs, which should be considered by either a judge (if restitutionary costs are left to the common law), or parliament (if it chose to regulate such costs by statute):

It would seem appropriate for the innocent party to include [restitutionary] costs in his damages calculation, while the other party should bear his own costs. If the other party is exempt from damages by virtue of Article 79, the innocent party must bear his own costs of making restitution.[85]

If the legislature chose to regulate the availability of restitutionary costs by statute then it may consider drafting a provision with a similar effect to the following:

> (1) Subject to subsection (2) a party who is bound to make restitution in accordance with this Act, may include restitutionary costs in a damages claim.
>
> (2) A party cannot include restitutionary costs under subsection (1) if he or she is in breach of contract or if the contract has been avoided because of an impediment under Article 79.

D: Conclusion

The SOGA which was set up as a 'code' is not fulfilling that original objective. This is because over time, inadequacies with the SOGA have arisen. As a consequence, other law supplements the SOGA – for example the general common law and the FCA. This paper concludes that the CISG as a basis for a domestic code in New Zealand is desirable. That way, the SOGA could be replaced with a more inclusive code. Restitutionary remedies would be available under the one code.

[84] Schlechtriem and Schwenzer, supra n. 16.
[85] Ibid., p. 861.

Restitution under the CISG in the Domestic Context 151

for common law in all cases for contracts discharged for breach or impossibility. Whether restitutionary costs should be allocated by statute or left to judicial discretion is something the legislature may wish to consider on reform of its sales of goods law. Further, Schlechtriem and Schwenzer's Commentary on the CISG[84] has provided some guidance on restitutionary costs, which should be considered by either a judge (if restitutionary costs are left to the common law), or parliament (if it chose to regulate such costs by statute):

It would seem appropriate for the innocent party to include [restitutionary] costs in his damages calculation, while the other party should bear his own costs. If the other party is exempt from damages by virtue of Article 79, the innocent party must bear his own costs of making restitution.[85]

If the legislature chose to regulate the availability of restitutionary costs by statute then it may consider drafting a provision with a similar effect to the following:

> (1) Subject to subsection (2) a party who is bound to make restitution in accordance with this Act, may include restitutionary costs in a damages claim.
>
> (2) A party cannot include restitutionary costs under subsection (1) if he or she is in breach of contract or if the contract has been avoided because of an impediment under Article 79.

D: Conclusion

The SOGA which was set up as a 'code' is not fulfilling that original objective. This is because over time, inadequacies with the SOGA have arisen. As a consequence, other law supplements the SOGA – for example the general common law and the FCA. This paper concludes that the CISG as a basis for a domestic code in New Zealand is desirable. That way, the SOGA could be replaced with a more inclusive code. Restitutionary remedies would be available under the one code.

[84] Schlechtriem and Schwenzer, supra n. 16.
[85] Ibid., p. 861.

This paper has discussed the key provisions relating to restitution in the CISG and the current domestic law. It has pointed out various issues in regard to restitution that should be considered if the CISG were to succeed the SOGA in New Zealand. As noted throughout this paper, there are substantial differences between the CISG and SOGA in regard to restitutionary rights and obligations.

The paper finds a number of problems with the current domestic law that could be overcome if the CISG were used as a basis for a domestic sale of goods code. Furthermore, while the CISG has some disadvantages, this paper argues that those too could be overcome through an adjustment to the principles in the CISG or drafting separate provisions to apply alongside the CISG.[86] Finally the paper has addressed the gaps in the CISG and pointed out how they should be dealt with.

This paper concludes that the CISG has a better regime to deal with restitutionary rights and obligations than the current domestic law. It would provide New Zealand with a more inclusive code. Moreover, if the international and domestic law for sale of goods contracts are eventually harmonised, then certainty and consistency in the law is increased.

[86] Note that these would only apply in the domestic context. While there are still some inadequacies at the international level, that issue is beyond the scope of this paper.

152 The New Zealand Law Students' Journal (2006) 1 NZLSJ

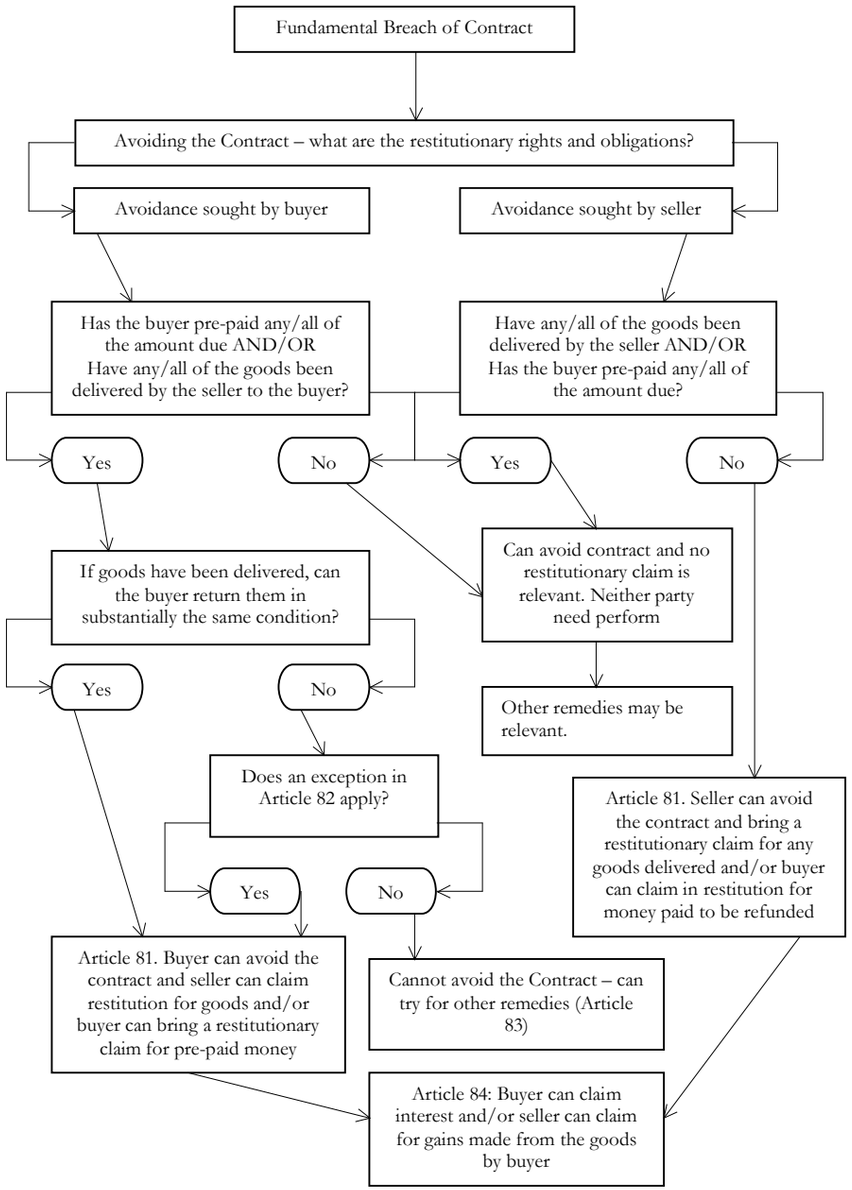
This paper has discussed the key provisions relating to restitution in the CISG and the current domestic law. It has pointed out various issues in regard to restitution that should be considered if the CISG were to succeed the SOGA in New Zealand. As noted throughout this paper, there are substantial differences between the CISG and SOGA in regard to restitutionary rights and obligations.

The paper finds a number of problems with the current domestic law that could be overcome if the CISG were used as a basis for a domestic sale of goods code. Furthermore, while the CISG has some disadvantages, this paper argues that those too could be overcome through an adjustment to the principles in the CISG or drafting separate provisions to apply alongside the CISG.[86] Finally the paper has addressed the gaps in the CISG and pointed out how they should be dealt with.

This paper concludes that the CISG has a better regime to deal with restitutionary rights and obligations than the current domestic law. It would provide New Zealand with a more inclusive code. Moreover, if the international and domestic law for sale of goods contracts are eventually harmonised, then certainty and consistency in the law is increased.

[86] Note that these would only apply in the domestic context. While there are still some inadequacies at the international level, that issue is beyond the scope of this paper.

Appendix: Restitution under the CISG



Restitution under the CISG in the Domestic Context 153

Appendix: Restitution under the CISG