

# **Remedies under the Convention on Contracts for the International Sale of Goods and the United Kingdom's Sale of Goods Act: A Comparative Examination**

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# Remedies under the Convention on Contracts for the International Sale of Goods and the United Kingdom's Sale of Goods Act: A Comparative Examination

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*The United Nations Convention on Contracts for the International Sale of Goods (CISG) has played an increasingly important role in international trade and considering that the law of England and Wales has a long history of being selected as the governing law in sales contracts, there has been much debate over whether the United Kingdom (UK) should ratify the CISG. Due to the different preferences and approaches adopted by the CISG and the UK's Sales of Goods Act 1979 (especially in respect of remedial provisions), this note will make a comparative study of remedies — such as the right to termination, specific performance, the reduction of price and the right to cure — under both of these legal regimes. It will also deal with the argument of vagueness and uncertainty inherent in the concept of fundamental breach, economic inefficiency of specific performance and the necessity of other remedies under the CISG which are unfamiliar to English lawyers. It will be argued that the arrangement of remedies under the CISG is better and worth serious consideration by English law.*

## I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>1</sup> is intended to promote the harmonisation and unification of the law governing the obligations and rights of both the buyer and the seller in international sale contracts.<sup>2</sup> As of now, the CISG has been ratified by 78 countries,<sup>3</sup> including most states of the European Union and a number of major trading partners of the United Kingdom (UK) such as

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entry into force 1 January 1988) UNTS vol 1489, p 3 (CISG).

<sup>2</sup> CISG *ibid*, Preamble. See also B Nicholas, 'The Vienna Convention on International Sales Law' (1989) 105 *Law Quarterly Review* 201, 202.

<sup>3</sup> United Nations Treaty Collection, 'Chapter X: International Trade and Development' <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-10&chapter=10&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en)> accessed 7 March 2012.

the United States, Germany, China, Canada and France.<sup>4</sup> Given such wide adoption, the long-established English law seems no longer the only highly regarded choice of law for international trade.<sup>5</sup> Indeed, the CISG has become an increasingly important instrument in international commercial law, particularly with respect to remedies available to the parties under the contract. Professor Mullis notes: ‘Few other commercial law conventions have attracted as many adherents, the academic literature and case law is extensive, and it has had a considerable impact internationally on the reform of sales and contract laws.’<sup>6</sup>

Nonetheless, some leading academics (like Professor Guest and Professor Treitel) still do not agree with the need for the UK to ratify the CISG; most of their concerns relate to the remedial provisions of the CISG, which are thought to be substantially different from English law.<sup>7</sup> One argument is that whereas many aspects of English sales law reflect merchant practice, the CISG, to a large extent, reflects the efforts of legal drafters from different legal systems to reconcile divergence and bring general harmony, which is usually not the case for any given legal system.<sup>8</sup> Professor Treitel has argued that the CISG would not only lead to significantly different results compared with the present English rules, but also cause a considerable uncertainty where the present governing rules bring about ‘clear and easily predictable’ results because of ‘the lack of precision with which the Convention is drafted’.<sup>9</sup> Some writers even claim that the CISG is unsuccessful and would inevitably be misapplied by courts due to the ambiguous nature and textual inconsistencies.<sup>10</sup> It is also argued that uniformity is merely a utopia because of the ‘wildly differing legal traditions and institutions’ existing in different countries.<sup>11</sup> Lord Hobhouse contends that free competition and choice of law are the best solution.<sup>12</sup> In other words, allowing differing legal systems to compete in the real business world might be a better approach than proposing a uniform legal scheme for international trading.

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<sup>4</sup> See ‘UK Export and Import in 2011: Top Products and Trading Partners’ *Guardian* (London 24 February 2010) <<http://www.guardian.co.uk/news/datablog/2010/feb/24/uk-trade-exports-imports>> accessed 26 March 2012.

<sup>5</sup> A Rogowska, ‘CISG in UK: How Does the CISG Govern the Contractual Relations of English Businessmen?’ (2007) 18 *International Company and Commercial Law Review* 226, 226.

<sup>6</sup> A Mullis, ‘Twenty-Five Years On — The United Kingdom, Damages and the Vienna Sales Convention’ <<http://www.cisg.law.pace.edu/cisg/biblio/mullis2.html>> accessed 5 August 2011.

<sup>7</sup> A Mullis, ‘Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law: Is There a Substantial Difference?’ <<http://www.cisg.law.pace.edu/cisg/biblio/mullis.html>> accessed 29 July 2011.

<sup>8</sup> E Bergsten and A Miller, ‘The Remedy of Reduction of Price’ (1979) 27 *American Journal of Comparative Law* 255, 255.

<sup>9</sup> A Guest et al (eds), *Benjamin’s Sale of Goods* (7th edn Sweet & Maxwell, London 2006) 1122.

<sup>10</sup> For example, in *Italedcor SAS v Yiu’s Industries (HK) Ltd*, the Italian court only looked at the domestic case law and improperly interpreted what constitutes a fundamental breach under the CISG. See C Sheaffer, ‘The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law’ (2007) 15 *Cardozo Journal of International and Comparative Law* 461, 477–478 and 494.

<sup>11</sup> J Hobhouse, ‘International Conventions and Commercial Law: The Pursuit of Uniformity’ (1990) 106 *Law Quarterly Review* 530, 533.

<sup>12</sup> *Ibid* 535.

Admittedly, English law has been extensively preferred as the governing law in international commodity sales;<sup>13</sup> many foreign parties choose English courts to resolve their disputes even though they have little or no connection with the UK,<sup>14</sup> thus excluding the application of the CISG.<sup>15</sup>

At the same time, several writers are of the view that the CISG has been playing a generally positive role in removing legal obstacles to international sales.<sup>16</sup> Professor Bonell points out the parties may not consider the CISG simply because they are afraid of the uncertainties in the application of a new instrument.<sup>17</sup> If this is the case, with the passing of time and more case reports, such fears will necessarily be allayed. In order to provide a clear and comprehensive picture of the essence of this argument, this note will examine whether the CISG is effective in regulating international sales and whether the provisions of the CISG lead to substantially different results or cause a considerable uncertainty as compared to the UK's Sale of Goods Act 1979 (SGA), which is said to lead to the so-called clear and easily predictable outcomes. This comparison will be done with a special focus on exploring the remedial provisions under the CISG which are controversial to English lawyers. However, although the remedy of damages is of great significance, this note will not discuss it as a separate issue since the principles of damages under the CISG are generally similar to those of the SGA.<sup>18</sup>

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<sup>13</sup> For example, see J Feltham, 'CIF and FOB Contracts and the Vienna Convention on Contracts for the International Sale of Goods' [1991] *Journal of Business Law* 413, 425.

<sup>14</sup> It has been estimated that in at least 50 per cent of the cases before the English courts, one party is not British and in 30 per cent of the cases neither is British. Meanwhile, a large volume of arbitration also takes place in London. See A Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom' in *Review of the Convention on Contracts for the International Sale of Goods 2000–2001* (Pace International Law Review, New York 2001) 11.

<sup>15</sup> K Takahashi, 'Right to Terminate (Avoid) International Sales of Commodities' [2003] *Journal of Business Law* 102, 103.

<sup>16</sup> L DiMatteo et al, *International Sales Law A Critical Analysis of CISG Jurisprudence* (Cambridge University Press, Cambridge 2005) 8-9; M Murphy, 'United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law' (1989) 12 *Fordham International Law Journal* 727, 750; M Bonnell, 'The UNIDROIT Principles of International Commercial Contracts and CISG: Alternative or Complementary Instruments?' (1996) 1 *Uniform Law Review* 26, 26; H Flechtner, 'Remedies under the New International Sales Convention: The Perspective from Article 2 of the UCC' (1988) 8 *Journal of Law and Commerce* 53, 107.

<sup>17</sup> Bonnell (n 16) 34.

<sup>18</sup> The damages are not fault-based in the CISG and comprise a sum equal to the 'loss, including loss of profit, suffered by the other party as a consequence of the breach'. As in English law, the purpose is also to place the aggrieved party 'in as good a position as if the other party had properly performed the contract'. See Williams (n 14) 41; J Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (3rd edn Kluwer Law International, Hague 1999) 445; M Bridge, 'A Comment on "Towards a Universal Doctrine of Breach: The Impact of CISG" by Jürgen Basedow' (2005) 25 *International Review of Law and Economics* 501, 506. Even in string sales there is no material difference between the CISG and the SGA when the original buyer could be regarded as a re-seller. See N Tamblyn, 'Damages under String Contracts for Sale of Goods' [2009] *Journal of Business Law* 1, 14; G Treitel, 'Damages for Breach of Warranty of Quality' (1997) 133 *Law Quarterly Review* 188, 190.

Part II of the note will focus on the right to termination and the different approaches under both the SGA and the CISG. It will further explore the definition and function of fundamental breach and examine the criticism of uncertainty under the CISG as compared to English law. Part III will deal with specific performance which is regarded as the primary remedy under the CISG, but significantly restrained under the SGA. The note will then discuss whether it is a better approach to give the injured party the right to select remedies based on previous arguments such as economic efficiency. Part IV analyses the necessity and special role of other remedies including the reduction of price and the right to cure under the CISG.<sup>19</sup> Finally, in Part V, the conclusion of the comparative examination will be drawn together with suggestions of giving serious consideration to the remedial provisions under the CISG.

## II. RIGHT TO TERMINATION

### A. Termination of Contract under the SGA

Under English law, the breach of a condition could give the non-breaching party a right to treat the contract as repudiated.<sup>20</sup> Such a right to termination is regarded as the ‘first and primary’ remedy for a breach,<sup>21</sup> largely due to the requirement of certainty. Apart from those common terms and the statutory conditions like Sections 13 and 14 of the SGA, the usual way to distinguish conditions from warranties depends on examining the intention of the parties at the time of contracting by the court. Once a condition is breached, no matter how slight or insignificant, the buyer can terminate the contract.<sup>22</sup> For example, in *Arco v Ronassen*,<sup>23</sup> the buyer terminated the contract on grounds that the goods did not exactly conform to the description in the contract which specified the thickness of staves to be half an inch. Lord Atkin pointed out that if the written contract specified the condition of measurement, it must be complied with, because ‘a ton does not mean about a ton, or a yard about a yard’.<sup>24</sup>

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<sup>19</sup> In addition to damages, right to termination, specific performance, price reduction and liberty to cure, the CISG also recognises other remedies such as the right to repair and the right to deliver substitute goods. However, these remedies either would not cause material confusion or would relate to a concept which would be covered under the above mentioned remedies (for example, the delivery of substitute goods relates to the concept of fundamental breach and specific performance). Therefore, this note will not discuss the rest of the remedies separately.

<sup>20</sup> This is according to common law and Section 11 of the SGA. It should be noted that this is now subject to Section 15A of the SGA discussed below.

<sup>21</sup> P Atiyah, J Adams and H MacQueen, *The Sale of Goods* (11th edn Pearson/Longman, Harlow 2005) 499.

<sup>22</sup> For an innominate term, the remedy of termination of contract is also available when the seller’s breach goes to the root of contract. *Ibid.* This will be discussed in detail below.

<sup>23</sup> *Arcos, Limited v E A Ronaasen & Son* [1933] AC 470.

<sup>24</sup> *Ibid* 479.

Likewise, in *Re Moore and Landauer*,<sup>25</sup> a contract for the sale of tinned peaches required cases to be packed with 30 tins each, but the seller packed some cases with 24 tins. The court held that the seller had breached Section 13 of the SGA, although there was no difference in the market value of the goods whether the cases were packed with 24 tins or 30 tins. It is clear that if the specified description has not been complied with, the obligation of conformity is breached. As such, the court in *Re Moore* allowed the buyer to terminate the contract notwithstanding that there was no actual loss. Similarly, the court allowed the buyer to terminate the contract in *Arco v Ronassen*, where the staves were not of the required thickness but were nonetheless reasonably fit for the purpose they were bought for.<sup>26</sup>

It would be wrong to say that English law knows no contractual terms other than conditions and warranties.<sup>27</sup> In the *Hong Kong Fir* case,<sup>28</sup> the Court of Appeal reaffirmed that there existed a type of term that was neither a condition nor a warranty, which Lord Wilberforce in a later case described as 'intermediate'.<sup>29</sup> The effect of breaching an innominate or intermediate term is determined by the 'gravity' of the breach. This means whether or not a breach gives the innocent party the right to terminate the contract depends on whether she is thereby substantially deprived of the whole benefit obtainable under the contract. Similarly, the court in *The Hansa Nord* held that the term 'shipment to be made in a good condition' was not a condition but an intermediate or innominate stipulation<sup>30</sup> and therefore, the buyer could not repudiate the contract unless the breach went to 'the root of the contract', which implies a certain degree of harm.

Against the backdrop of the judicial evolution of 'innominate term', Section 15A was added to the SGA by the Sale and Supply of Goods Act 1994. This newly inserted provision provides that unless a contrary intention appears in the contract, the breach of a condition in non-consumer contracts might be merely treated as a breach of warranty if the effect of the breach is very slight. This modifies, at least partially, the classic position of the effect of a 'condition' in English law. In cases such as *Re Moore*, the breach could now be deemed as slight and the difference between the performance promised and the performance tendered as insignificant.<sup>31</sup> Thus, there is a possibility that the breach of a condition might not confer the right to terminate the contract after the 1994 amendment.

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<sup>25</sup> *Re An Arbitration between Moore & Company, Limited and Landauer & Company* [1921] 2 KB 519.

<sup>26</sup> Many doubts have been cast upon these cases resulting in injustice. This is also why innominate terms and reasonable termination are necessary.

<sup>27</sup> But Professor Bridge claims that the binary approach is the implication of Section 11(3) of the SGA. M Bridge, *The Sale of Goods* (2nd edn Oxford University Press, Oxford 2009) 605.

<sup>28</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

<sup>29</sup> *Bremer Handelsgesellschaft m b H v Vanden Avenne-Izegem P V B A* [1978] 2 Lloyd's Rep 109, 113.

<sup>30</sup> *Cehave NV v Bremer Handelsgesellschaft m b H (The Hansa Nord)* [1976] QB 44.

<sup>31</sup> Takahashi (n 15) 119–120.

## B. Avoidance of Contract under the CISG

The CISG aims to encourage the preservation of the contract even when it is breached.<sup>32</sup> Therefore, in comparison to the SGA, under the CISG, a party is not allowed to terminate the contract unless the breach is fundamental, i.e., the party suffers ‘such detriment ... as substantially to deprive him of what he is entitled to expect under the contract unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result’.<sup>33</sup> Obviously, the parties in *Re Moore* would not be allowed to terminate the contract under the CISG since the breach caused no substantial harm to the innocent party, i.e., the breach did not amount to a fundamental breach.

It could be said that although there is hardly any material difference between the CISG and the SGA on the obligation of conformity,<sup>34</sup> the consequences of breach are very different. Under the CISG, the buyer can avoid the contract only when breach of seller is very serious, while under the SGA ‘description’ is usually treated as a condition, which entitles the buyer to terminate the contract whenever the description has not been strictly complied with. In other words, under the CISG, the seller in *Re Moore* and in *Arco* would have been liable for breaching the obligation of conformity but the buyer would not have allowed to terminate the contract simply because of the non-conformity without proving any substantial harm.

The *Cobalt Sulfate* case<sup>35</sup> clearly shows this position of the CISG on the right to termination.<sup>36</sup> The cobalt sulphate sold was agreed to be of British origin together with certificates of origin and quality. But the certificate of origin was wrong as the goods were in fact made in South Africa, so the buyer sought to terminate the contract. Under the SGA, whether or not the buyer is able to obtain certificates or sell goods in other markets

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<sup>32</sup> Williams (n 14) 34.

<sup>33</sup> CISG (n 1) art 25 read with art 49(1)(a).

<sup>34</sup> With respect to Article 35(1) of the CISG, the seller must deliver goods which are of the description required under the contract. Therefore, *Arco v Ronassen* and *Re Moore* are most likely to be held as breaching the obligation of conformity in the same way under the CISG since description is very objective as mentioned above ‘half an inch is not about half an inch’ and ‘24 tins in a case is obviously inconsistent with 30 tins in a case’. In other words, even if the staves with more than half an inch have exactly the same value and fitness for the identical purpose, they are still not corresponding to the description in the contract which could be treated as an explicit or implicit arrangement made by both parties.

<sup>35</sup> Supreme Court of Germany (1996) <<http://cisgw3.law.pace.edu/cases/960403g1.html>> accessed 26 March 2012.

<sup>36</sup> But we should notice that some French cases are decided differently. For instance, in a case dealing with wine, the French Supreme Court held that the non-merchantability of the wine in the French domestic market was enough to constitute a fundamental breach. L Graffi, ‘Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention’ (2003) 3 *International Business Law Journal* 338, 343–344. The divergent judgments by German and French courts may cause certain controversy, but it is largely due to the issue of interpretation. As discussed below, if a more uniform interpretation could be adopted, such inconsistencies might be overcome.

or whether or not the seller knew that the buyer's certificate was false are all irrelevant.<sup>37</sup> All that judges are concerned with is whether a condition has been breached. However, the German Supreme Court, in the *Cobalt Sulphate* case, found that the breach of the contract was not fundamental since the buyer could not show it was impossible to sell the South African cobalt sulphate in Germany or aboard.<sup>38</sup> In other words, the buyer had failed to prove that she was 'substantially deprived of what she was entitled to expect under the contract', as required by Article 25 of the CISG for establishing a fundamental breach. Additionally, the court held that the delivery of wrong certificates of origin and quality did not amount to a fundamental breach on the ground that the buyer could still obtain the correct documents from other sources.<sup>39</sup> Thus, the buyer was not allowed to terminate the contract for fundamental breach under Article 49(1)(a) of the CISG and was bound to pay the purchase price.

### C. Concept of Fundamental Breach

It is thus clear that unlike the position under the SGA, the buyer can terminate a contract under the CISG only when the other party's failure to perform amounts to a fundamental breach, or where the seller does not deliver the goods within the additional time granted by the buyer.<sup>40</sup>

As for the concept of fundamental breach beyond the right to termination, the right to substitute delivery also relies on this concept,<sup>41</sup> so it plays a central role in the remedial system under the CISG. One criticism in relation to fundamental breach is its uncertainty due to its open-textured nature. According to Article 25 of the CISG, the concept of fundamental breach requires the non-breaching party to have been substantially deprived

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<sup>37</sup> For example, see P Todd, *Cases and Materials on International Trade Law* (Sweet & Maxwell, London 2002) 344–345.

<sup>38</sup> *Cobalt Sulphate* (n 35).

<sup>39</sup> *Ibid.*

<sup>40</sup> It is often referred to as a *Nachfrist* period and is mainly designed for overcoming the difficulties associated with late delivery. Granting additional time to the defaulting party provides certainty to the buyer when it is not clear whether the breach is a fundamental one. Under such a situation, the buyer can 'fix an additional period of time of reasonable length for performance by the seller of his obligations' under Article 47(1) of the CISG. Article 49(1)(b) then gives the buyer the right to avoid the contract 'if the seller does not deliver the goods within the additional period of time'. This position has been criticised since it is not easy for the buyer to know exactly how soon she would be entitled to avoid the contract. However, the *Nachfrist* period has played a positive role. Besides overcoming the risk of terminating contracts where the delay does not amount to a fundamental breach, the aggrieved buyer just needs to stipulate a reasonable extra period without giving up the right to termination. Additionally, it is also conducive to the preservation of business relations.

<sup>41</sup> CISG (n 1) art 46. Professor Ferrari has further pointed out that the concept of fundamental breach also involves the issue of who should take the risk according to Article 70 of the CISG. F Ferrari, 'Fundamental Breach of Contract Under the UN Sales Convention: 25 Years Article 25 CISG' (2005) 3 *International Business Law Journal* 389, 389.

of its contractual expectations.<sup>42</sup> Compared with the almost ‘automatic’ right to terminate for a breach of a condition under the SGA, the definition of fundamental breach under the CISG is likely to result in uncertainty.<sup>43</sup> Let us consider if this kind of uncertainty is problematic or not.

### *1. Objectivity in the requirement of fundamental breach*

It is true that Article 25 of the CISG does not provide clear guidelines for distinguishing fundamental breach from non-fundamental ones. No examples of events that could constitute of such breach are provided,<sup>44</sup> despite the remark that ‘a general concept can only be defined exactly if the cases of application can be listed one by one’.<sup>45</sup> In considering whether or not the concept of fundamental breach is truly problematic as claimed by the opponents, it is helpful to analyse the structure of Article 25. Babiak suggests that Article 25 could be divided into two parts, one is the ‘detriment/expectation component’ which makes a breach fundamental, and the other is the ‘foreseeability component’ which operates as a filter.<sup>46</sup>

Accordingly, to judge whether a breach amounts to a fundamental one depends firstly on whether it has caused a serious detriment. This requirement is criticised on the ground that ‘detriment’ cannot be uniformly defined, as there is no explicit definition and judgement would vary with the individual parties’ expectations in different contracts.<sup>47</sup> On the face of it, this seems to be true. However, as Professor Will commented, the ‘threshold of fundamental breach’ or the expectation of the aggrieved party is judged objectively by considering its commercial background, the relevant terms in the contract and other circumstances instead of the personal wishes of the aggrieved party.<sup>48</sup> Moreover, objective factors of a subjective expectation are not that difficult to collect and apply. In the words of Ferrari, ‘it is a matter of contract interpretation’.<sup>49</sup> This introduces the possibility of using earlier judgments as precedents for similar cases in the future.

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<sup>42</sup> Article 25 of CISG provides: ‘A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.’

<sup>43</sup> B Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (2nd edn Oxford University Press, Oxford 2009) 194.

<sup>44</sup> A Babiak, ‘Defining “Fundamental Breach” Under the United Nations Convention on Contracts for the International Sale of Goods’ (1992) 6 *Temple International and Comparative Law Journal* 113, 115.

<sup>45</sup> See Nicholas (n 2) 219; G Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press, Oxford 1988) 350.

<sup>46</sup> Babiak (n 44) 118–119.

<sup>47</sup> See, for example, Zeller (n 43) 194.

<sup>48</sup> For more details, see M Will, ‘Article 25’ [2.1.2.2] <<http://www.cisg.law.pace.edu/cisg/biblio/will-bb25.html>> accessed 26 March 2012.

<sup>49</sup> Ferrari (n 41) 391.

Although many writers disagree that detriment should be considered in light of monetary damage,<sup>50</sup> the Secretariat's Commentary on the Draft Convention (Secretariat's Commentary) specified that:

[The] determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.<sup>51</sup>

Therefore, monetary loss is *prima facie* the most important factor to be taken into account. Case law also shows the preference for this approach.<sup>52</sup> It is argued that monetary loss suffered by the aggrieved party and the overall value of the contract, as well as other interferences caused by the breach are all directly related to the expectations of the party.<sup>53</sup> All these help to add objective criteria to limit the scope of detriment and deprivation.<sup>54</sup>

With respect to the degree of foreseeability of detriment component, it requires both the breaching party and the 'reasonable person of the same kind in the same circumstances' to foresee such a serious result. While there is still debate on issues of burden of proof<sup>55</sup> and the point at which foreseeability should be judged,<sup>56</sup> these variables are not fatal enough to result in uncertainty.<sup>57</sup> The main issue of concern might be the potential vagueness of the expression 'reasonable person of the same kind in the same circumstances'. Some writers ridicule that there are no fewer than 31 instances of using the word 'reasonable'

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<sup>50</sup> J Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspective' in N Galston and H Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Mathew Bender, New York 1984) 9; P Schlechtriem, 'Sale of Goods' in P Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods* (2nd edn Oxford University Press, Oxford 1998) 173, 177.

<sup>51</sup> See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat, UN Doc A/Conf 97/5 (1979) art 25 [34] <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-25.html>> accessed 26 March 2012 (Secretariat's Commentary).

<sup>52</sup> See Graffi (n 36) 340, 342–344.

<sup>53</sup> Babiak (n 44) 120. Meanwhile, other factors such as the parties' special interest should not be ignored, as discussed below.

<sup>54</sup> *Ibid.*

<sup>55</sup> In order to avoid controversies on civil procedure, the CISG makes no mention of which party carries burden of proof on particular matters. But due to the wording 'unless' in Article 25 of the CISG, it is agreed the party who claims to be not able to foresee such detriment has to prove that this is so. In other words, the burden of proof lies on the breaching party. *Ibid* 121.

<sup>56</sup> There are mainly two opinions. One is that foreseeability needs to be determined at the conclusion of the contract; the other viewpoint is that information and circumstances after the conclusion of the contract can also be taken into account to determine the foreseeability of detriment. According to Schlechtriem, 'if knowledge or foreseeability is to be equivalent to express agreement, it must in any event exist at the time when the contract was concluded.' Schlechtriem (n 50) 180.

<sup>57</sup> These issues are mainly procedural. The reason why the CISG does not specifically deal with them is to maintain flexibility.

or ‘unreasonable’ in the Convention.<sup>58</sup> However, Professor Will explains that the person should be a hypothetical reasonable merchant who plays the same role in the same line of trade with the same business practices, and the whole socio-economic background such as religion, language, average professional standard and other relevant conditions should all be taken into account.<sup>59</sup> In other words, the test would be applied on these objective grounds,<sup>60</sup> allowing judges to consider the issue of foreseeability with greater objectivity.

## 2. Predictability

The strongest argument against the approach of fundamental breach under the CISG might be that it is difficult for parties to determine when they have the right to avoid the contract, as opposed to the almost automatic right to terminate the contract for a breach of condition under the SGA. However, on a closer examination, it can be noted that apart from the obvious conditions such as description, it is not always easy to classify a contractual term as a condition, warranty or an innominate term under the SGA. As Takahashi argues, even if a term is labelled as a ‘condition’, a court might still judge whether it should be regarded so as a matter of the construction of the contract.<sup>61</sup> Professor Mullis further argues that it is largely due to a century’s worth of case law that helps parties know what their rights are as soon as the breach occurs and that such certainty is largely due to the gradually accumulated case law rather than the superiority of the approach of classifying the different types of contractual terms.<sup>62</sup> Therefore, it might be premature to criticise the CISG approach of fundamental breach.

If the term concerned is an innominate or intermediate one, then the consideration of the level of harm is also necessary. This mirrors the similarity pointed out by Professor Nicholas between the doctrine of fundamental breach and the test of whether the breach deprives the aggrieved party of ‘substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain’ in the *Hong Kong Fir* case.<sup>63</sup> Especially after the enactment of Section 15A of the SGA, the slightness of the breach and the reasonableness of the termination would require consideration of more

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<sup>58</sup> C Gillette and R Scott, ‘The Political Economy of International Sales Law’ (2005) 25 *International Review of Law and Economics* 446, 474.

<sup>59</sup> Will (n 48) [2.2.2.2.1], [2.2.2.2.2].

<sup>60</sup> Graffi (n 36) 340.

<sup>61</sup> See, for example, *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 WLR 683. See also Takahashi (n 15) 108.

<sup>62</sup> Mullis (n 7).

<sup>63</sup> There is no material difference between the gravity of breach under the SGA and the concept of fundamental breach under the CISG. See Nicholas (n 2) 218.

factors and would make it harder for the parties to predict the outcome as compared to the previous situation of almost automatic termination.

Although courts are suggested to be not too willing to interpret a term as a condition as in *The Hansa Nord* case,<sup>64</sup> the general attitude expressed by the Lords in *Bunge v Tradax*<sup>65</sup> emphasises that certainty is the most important, particularly in the so-called commodity sales.<sup>66</sup> For instance, Lord Wilberforce stated that the 'gravity of the breach' approach under innominate terms would 'fatally' remove the element of certainty which is an essential provision in contracts and gives rise to an increasing number of arbitrations.<sup>67</sup> Lord Lowry also feared the uncertainty and lengthy trials caused by the innominate terms.<sup>68</sup> Professor Bridge opined that such a 'strict approach' could not be criticised for unduly preferring any party, since they could have both capacities to the particular goods,<sup>69</sup> as Lowry described, 'today's buyer may be tomorrow's seller' in those string contracts.<sup>70</sup>

However, some of today's buyers may never become tomorrow's sellers. For those ultimate buyers, their only purpose might be to use the goods but not to resell them, so the reasoning of Bridge and Lowry is not universally applicable, particularly in non-commodity sales. Moreover, beyond legal certainty and predictability, the law should never ignore the importance of maintaining flexibility in order to avoid any potential injustice. For instance, if the harm resulting from the breach is insignificant and the reason for it is merely due to the fluctuation of market price, such termination is unmeritorious and could hardly be justified, so an approach should be adopted to prevent such unfair results.<sup>71</sup>

Therefore, as suggested by Professor Treitel, the single most important principle is to delimit a minimum degree of seriousness which should be achieved by the breach when judging whether the remedy of termination is available.<sup>72</sup> It is also the opinion of the Law Commission, that rejecting the contract simply for trivial discrepancies should not be allowed on account of justice.<sup>73</sup> The demand of justice prevails over certainty at least

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<sup>64</sup> *Cehave* (n 30) 55.

<sup>65</sup> *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711.

<sup>66</sup> As Professor Bridge explained, the market of commodities is highly speculative, and most traders in these string sales are intermediate parties who only deal with documents instead of the goods. As a result, the predictability and certainty of the outcome of breach become most important. M Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 *Pace International Law Review* 55, 58–64.

<sup>67</sup> *Bunge* (n 65) 715.

<sup>68</sup> *Ibid* 720.

<sup>69</sup> Bridge (n 66) 66.

<sup>70</sup> *Bunge* (n 65) 720.

<sup>71</sup> For example, in *Re Moore* (n 25), it is difficult to understand the right to termination when there is no material difference whether the goods were 24 tins packed in a case or 30 tins packed in a case. And as discussed in the next Part, even if the buyer could get out of a bad bargain, the overall social welfare could not be increased since the seller would be worse off, and wastage like long international shipment or significant initial investment cannot support the termination for insignificant reasons either.

<sup>72</sup> Treitel (n 45).

<sup>73</sup> The Law Commission, 'Sale and Supply of Goods' (Law Com No 160, 1987) [4.18].

when there is no contrary intention expressed. The purpose of Section 15A of the SGA is to prevent unmeritorious termination and at least with respect to breaches that are ‘so slight’, one will reach the same result under both the SGA and the CISG. At the same time, the task of defining the words ‘so slight’ is not easier than defining ‘substantially deprive’ under the CISG.<sup>74</sup> Based on the comment of Treitel, the right to termination under Section 15A should be limited to severe breaches, otherwise the sacrificed certainty cannot lead to the purported justice.<sup>75</sup> In other words, for determining the ‘seriousness of the disturbance to performance’,<sup>76</sup> the approach of fundamental breach under the CISG is arguably better than the slightness approach under the SGA.

### 3. *Establishing appropriate presumptions*

As in the SGA, the CISG also recognises the significance of freedom of contract and the parties’ intention can precede the provisions or not.<sup>77</sup> According to Article 6 of the CISG, parties can derogate from or vary the effect of any of the provisions.<sup>78</sup> Accordingly, the contracting parties can also agree that a specified obligation is to be regarded as fundamental,<sup>79</sup> giving it almost the same effect as that of a condition under the SGA. This is also in line with the suggestion of establishing a presumption that if one party fails to perform a certain obligation, it should be regarded as a fundamental breach in spite of the gravity of the harm.<sup>80</sup>

Huber further argues that the criticism of the uncertainty within the approach of fundamental breach cannot be justified, since the CISG can easily accommodate, even in ‘the documentary sales or contracts where the time of performance and quality of the goods are of the essence’, the principle of legal certainty by an implied agreement between the parties or by establishing presumptions of certain breaches to be fundamental.<sup>81</sup> By expressly stating the performance of a certain obligation is of essential significance (e.g.,

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<sup>74</sup> In addition, the burden of proving the ‘slightness’ is on the seller according to Section 15A(3) of the SGA, while under Article 25 of the CISG it is the non-breaching party (i.e., the buyer) who assumes the responsibility to show ‘fundamental breach’. This reflects that the tendency in English law is to not favour the use of such ‘slight breach’ by adding a heavier burden on the breaching party (i.e., the seller).

<sup>75</sup> G Treitel, *The Law of Contract* (Sweet & Maxwell, London 1999) 745.

<sup>76</sup> Schlechtriem (n 50) 174.

<sup>77</sup> During the drafting period, the UK expressed strong opinion on the principle of free negotiation and freedom of contract. See Murphy (n 16) 735–736.

<sup>78</sup> Here it might be noted that one criterion of a successful international sales law is to reduce parties’ contracting cost. Frequently contracting out of the provisions of the CISG by parties would undermine the goal of uniformity of the CISG. See Gillette and Scott (n 58) 453–454, 476–477.

<sup>79</sup> See Ferrari (n 41) 391.

<sup>80</sup> Takahashi (n 15) 122.

<sup>81</sup> P Huber, ‘CISG: The Structure of Remedies’ <<http://cisgw3.law.pace.edu/cisg/biblio/huber1.html#>> accessed 27 March 2012. In other words, if it appears from the commercial background of the contract that time and quality are of the essence, then any breach of these requirements will certainly be fundamental.

goods must be delivered within a fixed period or pay by letter of credit is indicated as essential), it will achieve almost the same effect as the classification of a term as condition, namely, it will be automatically deemed as a fundamental breach when these obligations are not complied with.<sup>82</sup> By the same token, the insertion of standard forms like the CIF (cost, insurance and freight) term could also be established as of the essence. The aggrieved party can avoid the contract as soon as the other party fails to perform these obligations.

In short, considering contracts are made to be performed and not to be avoided for market fluctuation, the fundamental breach approach could prevent injustice in individual cases without causing great uncertainty by increasing the objectiveness and by establishing the appropriate presumptions. This also corresponds with Professor Reynolds' view regarding the 'approach of seriousness of breach' as a general rule and the 'approach of condition' as an exception.<sup>83</sup> Therefore, a new and comprehensive understanding of the fundamental breach approach is necessary.

### III. SPECIFIC PERFORMANCE

#### A. Position under the SGA

Under English law on the sale of goods, specific performance is an extraordinary remedy which is awarded in very limited circumstances.<sup>84</sup> As concluded by Greenberg, the traditional approach in England is that equity has no role to play unless the remedy at common law is inadequate and the general opinion is that monetary damages based on market price would provide an adequate remedy by enabling an aggrieved party to make a substitute purchase or sale.<sup>85</sup> In order to restrict specific performance as a remedy, Section 52 of the SGA makes 'specific' or 'ascertained' goods a precondition. For instance, in *Re Wait*,<sup>86</sup> although the buyer had paid the seller Wait for the 500 tons of wheat, there was no appropriation or identification of these 500 tons from the whole 1,000 tons. Therefore, the Court of Appeal held that 'the 500 tons were not specific or ascertained goods in respect of which specific performance of the contract of sale would be ordered as the remedy of the sub-purchasers under s. 52 of the Sale of Goods Act, 1893.'<sup>87</sup>

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<sup>82</sup> However, a new problem might appear: as the CISG does not contain any provisions similar to Section 15 of the SGA, unmeritorious termination might become a serious problem.

<sup>83</sup> A Guest et al (eds), *Benjamin's Sale of Goods* (7th edn Sweet & Maxwell, London 2006) 530.

<sup>84</sup> As discussed in the previous Part, the right to terminate the contract and claim damages is the primary remedy in common law countries. See Treitel (n 45) 43–44.

<sup>85</sup> H Greenberg, 'Specific Performance under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style"' (1982) 87 *Commercial Law Journal* 583, 584.

<sup>86</sup> *Re Wait* [1927] 1 Ch 606.

<sup>87</sup> *Ibid* 606.

But in the later case of *Sky Petroleum v VIP Petroleum*,<sup>88</sup> where the plaintiffs (buyer) had no prospect of finding an alternative source of supply due to the war, and the defendants (seller) purported to terminate the contract, the court held that ‘in the unusual circumstances in which the defendants were the only source of supply available to the plaintiffs and the sole means by which the plaintiffs could continue their business damages would not be a sufficient remedy and an *injunction* would be granted.’<sup>89</sup>

This decision does not sit well with the judgment in *Re Wait*. The goods in *Sky Petroleum* (i.e., petroleum) were undoubtedly not specific, and in addition since this was a long term contract between the plaintiffs to purchase petroleum from the defendants, the petroleum would not be ascertained before it was filled into the stations. But as Treitel has argued that if a seller contracted to supply goods to the buyer over an extended period, considering a significant initial investment and the difficulty in establishing damages, the seller has some justifications to expect specific relief.<sup>90</sup> This might also be explained by Section 52(1) which does not rule out a mandatory or prohibitory injunction while its effect is exactly the same as specific performance.<sup>91</sup> As Professor Bridge states, injunctive relief serves the same function as specific performance.<sup>92</sup> In other words, although specific or ascertained goods are a precondition, there is still the possibility of granting specific performance even though this criterion has not been met. Thus, the position of English law on the scope of awarding specific performance seems unclear and full of uncertainty.

On top of that, the final decision on this matter is at the discretion of judges. This means that even if the goods are specific or ascertained, the court does not have to order specific performance unless there is ‘tremendous hardship’ in obtaining substitute goods like in the case of purchasing custom machinery or a ship.<sup>93</sup> This unfettered discretion on the part of courts is likely to cause uncertainty and unpredictability thereby throwing the non-breaching party into difficulty in predicting the outcome.

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<sup>88</sup> *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 WLR 576.

<sup>89</sup> *Ibid* 577 (emphasis added).

<sup>90</sup> G Treitel, ‘Specific Performance in the Sale of Goods’ [1966] *Journal of Business Law* 230.

<sup>91</sup> This is supported by Professor McBryde, who points out that an obligation can be framed either in negative or positive terms and still achieve the same effect. For example, the duty of confidentiality could be framed as imposing an obligation of non-disclosure of information or as imposing an obligation to use the information for a specified purpose only. W McBryde, ‘Remedies for Breach of Contract’ (1996) 1 *Edinburgh Law Review* 43, 53.

<sup>92</sup> Bridge (n 27) 532.

<sup>93</sup> P Piliounis, ‘The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?’ (2000) 12 *Pace International Law Review* 1, 11.

## B. Position under the CISG

As opposed to the SGA, specific performance is regarded as the primary remedy under the CISG,<sup>94</sup> which provides that the buyer has a right to require performance of the seller as long as the buyer has not chosen an alternative inconsistent remedy.<sup>95</sup> Likewise, the seller may demand the breaching buyer to 'pay the price, take delivery or perform his other obligations' under the Convention as long as the seller has not chosen an alternative inconsistent remedy.<sup>96</sup>

From the above, we can see that there is one potential limitation of the right to performance, namely, the aggrieved party cannot choose a remedy inconsistent with specific performance, such as resorting to avoidance of the contract. Furthermore, following the Secretariat's Commentary, if the breaching party does not perform as required by the other party, the court has to order such performance and enforce this order, meaning thereby that the aggrieved parties can expect the final result since their 'rights' will play the role of directives to the court.<sup>97</sup> So it is easier for the non-breaching parties to choose between damages and specific performance since the barriers to specific relief are largely removed. When compared with the unfettered discretionary right of the judges to grant a remedy under the SGA, there is more certainty under the CISG.

However, it may be argued that certain provisions of the CISG – such as Articles 77 and 28 – would deter specific performance as the primary remedy. The following section will explore the effect of these two provisions one by one.

### 1. Duty to mitigate under Article 77 of the CISG

The rationale behind the duty to mitigate is to prevent injustice and waste.<sup>98</sup> For example, a failure to prevent waste occurs if the buyer tells the seller that she will not use the goods soon after contracting, but the seller continues manufacturing the goods and then sues the

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<sup>94</sup> Unlike the right to termination and to claim damages in common law, the CISG seems to be more influenced by the civil law jurisdiction, where specific performance is the primary remedy. Guest et al (n 83) 674; A Szakats, 'The influence of Common Law Principles on the Uniform Law on the International Sale of Goods' (1966) 12 *International and Comparative Law Quarterly* 749, 767–768.

<sup>95</sup> CISG (n 1) art 46(1).

<sup>96</sup> Ibid art 62.

<sup>97</sup> That is to say that the court should grant performance relief when the aggrieved party so claims and courts do not have a discretion in this respect. See A Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 *Washington Law Review* 607, 614.

<sup>98</sup> J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, Hague 1982) 457.

buyer for the whole price in the end.<sup>99</sup> In order to avoid waste or injustice, the aggrieved party is required to reduce the loss by reasonable measures. Article 77 provides:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

One inference that may be drawn from this provision is that it implies that the injured party should make a substitute purchase or resell in order to mitigate the loss. But these steps could be regarded as inconsistent with the demand for specific performance and leading to a loss of the right to require performance. Suppose the buyer needs the special goods to complete the manufacture urgently, but the seller refuses to perform the contract and does not supply the goods. If the buyer does not take any measures, for example, to purchase the substitute goods, the losses would accumulate. Pursuant to Article 77, the buyer has to take reasonable measures such as purchasing substitute goods; otherwise the innocent buyer should bear the further loss.

As Professor Herman has observed, the measures of mitigation including ‘seeking comparable goods in the market’, ‘reducing the resale price of goods on hand’ or ‘paying to have the non-conformity corrected’ are all inconsistent with requiring performance.<sup>100</sup> This means that if Article 77 applies to requests made under Articles 46 and 62, the right to specific performance would be precluded as long as the substitute sale is available since the injured party is obliged to mitigate her loss.<sup>101</sup> If this is true, the duty to mitigate losses would become an impediment and the effect of specific relief would be compromised to a large extent.

It should be noted, however, that the proposal to apply the duty to mitigate as a prerequisite for performance was rejected during the drafting process.<sup>102</sup> It has also been argued that the statutory language in Article 77 is ‘a reduction in the damages’; it does not mention other remedies and since this provision is under the section named ‘damages’, the duty to mitigate applies only when seeking damages.<sup>103</sup> In other words, the duty to mitigate losses is not an impediment and a failure to mitigate under Article 77 does not affect the right to require performance under Articles 46 and 62 of the CISG.

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<sup>100</sup> Ibid 457–462.

<sup>100</sup> S Herman, ‘Specific Performance: A Comparative Analysis’ (2003) 7 *Edinburgh Law Review* 194, 200.

<sup>101</sup> Professor Herman further points out that even if the aggrieved party is ultimately awarded specific performance under such a situation, it is in the court’s discretionary power to award this remedy after examining both parties’ contribution to the loss rather than a party’s independent choice of remedy. Ibid.

<sup>102</sup> Schlechtriem (n 50) 587.

<sup>103</sup> See Kastely (n 97) 622.

## 2. Article 28 of the CISG

It is well-known that the CISG is a compromise between civil law and common law countries.<sup>104</sup> It is common to grant specific performance in civil law systems, something that is an extraordinary remedy in common law regimes.<sup>105</sup> Hence, Article 28 of the CISG is regarded as accommodating different legal traditions.<sup>106</sup> It states:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

It has been pointed out by Professor Kastely (and other commentators)<sup>107</sup> that the primary purpose of this provision is to 'preserve domestic law regarding the availability of specific performance'.<sup>108</sup> The phrase 'is not bound to' suggests that a court is free to choose between specific performance and other remedies under the CISG. This means, as Professor Honnold has pointed out, that rules of domestic law can prevail over Articles 46 and 62 of the CISG by virtue of Article 28.<sup>109</sup>

Under certain legal systems, courts cannot grant certain forms of specific performance, as they lack the authority to do so.<sup>110</sup> It is considered inappropriate to demand these countries to 'alter fundamental principles of their judicial procedure' simply for implementing the CISG.<sup>111</sup> But the scope of Article 28 is more than that. If the purpose is only to take care of the situation where a legal system does not have the authority to grant the performance remedy, the provision should have read as 'a court is not bound to enter a judgement for specific performance unless the court *could* do so under its own law'. As the Secretariat's Commentary states:

Therefore, if a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, article 26 [*Draft counterpart of CISG article 28*] does not limit the

<sup>104</sup> Herman (n 100); Nicholas (n 2) 201. This is because, as Professor Szakats observed, there is a wide gulf between the civil law and common law approaches to remedies, especially with regard to specific performance. Szakats (n 94) 762–763.

<sup>105</sup> S Walt, 'For Specific Performance under the United Nations Sales Convention' (1991) 26 *Texas International Law Journal* 211, 218.

<sup>106</sup> O Gonzalez, 'Remedies Under the UN Convention for the International Sale of Goods' (1984) 2 *International Tax and Business Lawyer* 89, 96.

<sup>107</sup> See, for example, Walt (n 105) 217–218; J Catalano, 'More Fiction than Fact: The Perceived Differences in the Application of Specific Performance under the United Nations Convention on Contracts for the International Sale of Goods' (1997) 71 *Tulane Law Review* 1807, 1814.

<sup>108</sup> Kastely (n 97) 625.

<sup>109</sup> Honnold (n 18) 223–224.

<sup>110</sup> Walt (n 105) 218; Kastely (n 97) 624.

<sup>111</sup> Secretariat's Commentary, art 26 [3] <<http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-28.html>> accessed 27 March 2012.

application of articles 42 or 58 [*Draft counterpart of CISG article 46 or 62*]. Article 26 [*Draft counterpart of CISG article 28*] limits their application only if a court could not under any circumstances order such a form of specific performance.<sup>112</sup>

However, the wording in the current text of Article 28 is ‘would’ instead of ‘could’ as in the previous drafts. This implies that even though ‘a court has the authority under any circumstances to order a particular form of specific performance’, it is not bound to do so. The amendment was advanced by the UK and US at the 1980 Vienna Conference.<sup>113</sup> Their concern was that specific performance was still considered to be an exceptional remedy and that the courts in these common law countries would not have wished to be tied down to ordering specific performance.<sup>114</sup>

The result of this one word change is devastating, because an aggrieved party can no longer predict whether a court would award specific performance, thus leading to a situation similar to the one under the SGA. This undermines the effect of Articles 46 and 62 of the CISG. The uncertainty caused by Article 28 might probably lead to the same case having two divergent judgments simply because of different forums. It deviates from the goal of unification pursued by the CISG, because of the availability of such recourse to the domestic legal system. A breaching seller, for instance, could file a suit in a common law forum where the counterclaim of the buyer for specific relief might probably be denied under Article 28. On the grounds of different legal cultures and the reluctance of courts to accept foreign decisions, decisions on this question might differ substantially between different jurisdictions.<sup>115</sup>

On the contrary, Kritzer<sup>116</sup> and some other commentators<sup>117</sup> have argued that the potential problem of forum shopping in practice rarely occurs. It is their opinion that different forums would order the performance remedy for similar contracts. Further, Catalano claims that the injured parties seldom seek specific performance of the contract for the sale of goods.<sup>118</sup> However, this seems to be a misunderstanding of Professor Honnold’s view about the ‘impracticality’ of specific performance. Admittedly, in situations where the breaching seller is unwilling to perform, seeking specific performance is not so speedy and effective, so it might be better for the aggrieved party to choose monetary damages in practice. What needs to be clarified is that the ‘impracticality’ is not due to the problem

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<sup>112</sup> Ibid.

<sup>113</sup> Kastely (n 97) 626.

<sup>114</sup> If the word ‘could’ had been adopted, the common law courts would have had to grant specific performance as long as they had such authority, and it would no longer have been a discretionary right. Ibid 625-626.

<sup>115</sup> M Kilian, ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 *Journal of Transnational Law and Policy* 217, 241.

<sup>116</sup> A Kritzer, *Guide to Practical Application of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law and Taxation Publishers, Deventer 1989) 219.

<sup>117</sup> See, for example, Catalano (n 107) 1832.

<sup>118</sup> Ibid.

of the remedy itself but other 'assistant procedures' for specific performance.<sup>119</sup> In other words, if there are more efficient mechanisms to enforce performance,<sup>120</sup> the so-called problem of impracticality would disappear automatically.

Moreover, in relation to unique and scarce goods in the market, specific relief has its irreplaceable and seminal role owing to the inadequacy of damages. Due to the limited number of reported cases under the CISG in this respect, it might be too early to say that Article 28 would not affect Articles 46 and 62 or the aggrieved parties would not like to seek the performance remedy. Thus, the potential negative effects of Article 28 could not be ignored. As the discussion below shows, the remedy of specific performance should not be restrained and Article 28 should be, as a result, interpreted in a limited way.<sup>121</sup>

### C. Justifications for Specific Performance

#### 1. Contesting the economic efficiency rationale

Professor Farnsworth, an opponent of the availability of specific performance as a remedy, argued that sales law as a branch of contract law should focus on the relief available for breach.<sup>122</sup> He expressed the preference of 'economic efficiency' in a free enterprise economy, i.e., for the good of society, a contracting party should be allowed to reallocate her resources even if this means terminating one's original contract.<sup>123</sup> Likewise, Professor Posner also pointed out that specific performance would prevent a seller from reallocating the goods to a new buyer who could make more efficient use of them.<sup>124</sup>

This logic can be understood with the help of an example. **A** contracts to sell goods to **B** for £1,000, but **C** wants the goods as well and is willing to pay £1,200. If **A** breaches the contract, she would have to pay **B** damages in the amount of £200. Farnsworth or Posner would emphasise that **C** could utilise the goods in a more productive way, because she values the goods at a higher price (i.e., **C** can sell the goods for a higher after creating 'added value'), and that meanwhile **B**'s position would not worsen by claiming damages. However, if specific performance is ordered in favour of **B**, **A** and **C** cannot be better off and the goods may not be used in the most efficient way possible.

If this is true, it is easy to understand why American or English academics prefer substitutional relief (i.e., damage) rather than specific performance on grounds that such compulsion would deter the reallocation of resources. As Judge Holmes commented:

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<sup>119</sup> Honnold (n 18) 312.

<sup>120</sup> For instance, adopting harsher penalties as a deterrence to improve the efficiency of specific relief.

<sup>121</sup> Article 28 could be seen as an interim measure to give common law countries enough time to re-examine the remedy of specific performance.

<sup>122</sup> E Farnsworth, 'Damages and Specific Relief' (1979) 27 *American Journal of Comparative Law* 247, 247.

<sup>123</sup> *Ibid* 247-248.

<sup>124</sup> R Posner, *Economic Analysis of Law* (5th edn Aspen Law & Business, New York 1998) 57.

[The] duty to keep a contract means a prediction that you must pay damages if you do not keep it — and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. ... Such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much as ethics into the law as they can.<sup>125</sup>

This statement reflects the general attitude to breach in the common law system, something that is also testified by case law of more than a century.<sup>126</sup>

Through long debate of the economic efficiency of specific performance,<sup>127</sup> the ‘persuasive conclusion’ is that the remedy of special performance may be more efficient than any other remedy.<sup>128</sup> If getting out of the contract is not easy, parties would have more incentive to efficiently exchange ‘promises’ when contracting and as to those special subjective interests attached to performance, specific relief is more effective in protecting them.<sup>129</sup> Furthermore, the aggrieved seller has to find a new buyer or the non-breaching buyer has to locate alternative goods which would incur additional costs in any event, and they are most likely to be under-compensated.

One primary supporting point for the argument of ‘economic efficiency’ is not making the aggrieved party worse off, while at the same time enabling the breaching party to be better off. But it is worth questioning whether the substitutional relief could fully compensate the non-breaching party. The calculation of damages is never an easy task. Despite incurring massive costs to measure the damages, doubts still exist as to their accuracy. Apart from the direct financial loss, the inconvenience, additional time and energy to find qualified substitute goods (or new buyer for resale) and other invisible losses such as opportunity costs are all difficult to establish. In sum, the costs of under-compensation are great, especially in international trade.<sup>130</sup> Additionally, the costs of litigation cannot be ignored.

Although the CISG does not prevent an aggrieved party from recovering the foreseeable loss such as loss of profit due to the breach pursuant to Article 74, the costs, as mentioned above, often involve the expenditure of time and effort which is difficult to measure in monetary terms.<sup>131</sup> On the contrary, specific performance is more accurate since it gives the injured party exactly what she pursues.

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<sup>125</sup> O Holmes, ‘Path of the Law’ (1897) 10 *Harvard Law Review* 457, 457, 462.

<sup>126</sup> Herman (n 104) 16.

<sup>127</sup> Farnsworth (n 122) 247–248; T Ulen, ‘The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies’ (1984) *Michigan Law Review* 341, 341–344.

<sup>128</sup> Ulen (n 127) 365; Kastely (n 97) 629.

<sup>129</sup> Ulen *ibid*.

<sup>130</sup> According to Ulen and Schwartz, in many cases damages are under-compensatory. Ulen (n 127) 372; A Schwartz, ‘The Case for Specific Performance’ (1979) 89 *Yale Law Journal* 271, 276.

<sup>131</sup> Schwartz *ibid* 276.

At the same time, specific performance does not in any way hinder in the more efficient way of reallocating goods. As with the above example, the second buyer **C** could obtain the goods by directly purchasing them from the original buyer **B**, who takes possession after the performance of contract. Under such a situation, the benefit to the society could also be maximised. Moreover, contrary to Professor Kronman's worry about the increasing negotiation costs during the formation of new contracts,<sup>132</sup> pursuant to the analysis of Professor Schwartz, the transaction costs (including both pre-breach and post-breach negotiation costs) would not be generated on the ground of awarding specific performance even for those fungible goods.<sup>133</sup> Meanwhile, litigation and proof costs would undoubtedly reduce since fewer things have to be proved before courts.

It is also worth mentioning that the aggrieved party always has an economic incentive to choose the remedy of damages if they can compensate the party fully.<sup>134</sup> In situations where the breaching seller is unwilling to perform, it would be speedier and more effective to choose damages. On the other hand, Huber has pointed out that actions for specific performance are rare even in domestic German trading,<sup>135</sup> so making specific relief a routine remedy rather than an exceptional one would achieve justice by delegating the choice to the injured party instead of the breaching party without causing turbulence in common law countries.

Last but not least, an ideal of efficiency should also embrace considerations of fairness. It is obviously unjust, since the purchase of alternative goods and an award of damages would not let the buyer be better off than abiding by the contract that damages would never compensate her more than the prospective profits.<sup>136</sup> Conversely, the usual situation is to put the non-breaching party into a worse position compared with when the contract is fully performed or specific performance is granted.<sup>137</sup> It seems encouraging people to breach the contract simply because they had made a bad bargain. In reality, specific performance is a superior mechanism for achieving the goal of full compensation and is the most satisfactory remedy from the view of aggrieved parties since they could get what they are supposed to get if the contract is performed.<sup>138</sup> More importantly, parties can expect the outcome with greater certainty and reassert the value of the goods and losses from the breach by making the rule of awarding specific performance routine rather than

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<sup>132</sup> A Kronman, 'Specific Performance' (1978) 45 *University of Chicago Law Review* 351, 365–369.

<sup>133</sup> Schwartz (n 130) 279–290.

<sup>134</sup> *Ibid* 277.

<sup>135</sup> Schlechtriem (n 50) 202.

<sup>136</sup> This is because even the injured party is fully compensated for all the losses. The benefit from the damages (i.e., damages minus all the consequent losses) would at most equal the prospective profit but not exceed. In other words, the non-breaching party could not share any more benefit from the profits obtained by the other party through breach.

<sup>137</sup> Kastely (n 97) 631.

<sup>138</sup> Treitel (n 45) 47.

an exception.<sup>139</sup> This in turn eliminates the uncertainty cost of predicting the availability of specific performance.

## 2. *Other moral aspects*

Besides the argument of economic efficiency or under-compensation, there are additional goals and intrinsic values to guide the law such as the importance of respecting the morality of promise, as suggested by Professor Fried.<sup>140</sup> The dictum of Holmes is being criticised for ignoring the nature of legal rules and for not satisfying the current law.<sup>141</sup> Professor Goode questions the rationality of easily allowing the breaching party (usually the seller) to buy herself out of the contract causing the injured party to struggle with the ‘commercial difficulty and added loss and expense’, something that could be effortlessly avoided by granting specific performance.<sup>142</sup> From the perspective of classical civil law, the non-breaching parties should not be forced to seek alternative purchases or substitute sales.<sup>143</sup> A legal regime should also not allow the breaching party to buy itself out of the contract.<sup>144</sup> Thus, in comparison with the SGA, the CISG approach might be better in so far as it allows the aggrieved party rather than the breaching party to choose between specific performance and damages.

Further, the remedy of specific performance would not be unduly harsh, for it is appropriate to compel a defaulting party to complete the performance as promised in the contract. Additionally, the liberty interest is not important to those not involved in personal relationships, so it cannot be the reason for excluding specific performance either.<sup>145</sup> Even if something unexpected occurs, there is still a defence of impossibility for the breaching party.

In summary, the arguments based on economic inefficiency and morality are untenable. The remedy of specific performance is superior to the remedy of damages. Indeed, efficient exchange of mutually beneficial promises encouraged by routinely granting specific performance would not enhance negotiation costs. Moreover, granting specific performance routinely does not mean the injured party has to sue for that remedy; it is to delegate the aggrieved party the right to elect the most suitable remedy.<sup>146</sup> Thus, the better

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<sup>139</sup> Ulen (n 127) 365.

<sup>140</sup> Ibid 345.

<sup>141</sup> Walt (n 105) 239–241.

<sup>142</sup> In view of Professor Goode, the reluctance to award specific performance would give rise to an ‘over-broad view of what constitutes “availability” in the market and as a result put a great financial burden on the innocent plaintiff’. R Goode, *Commercial Law* (3rd edn LexisNexis, London 2004) 363.

<sup>143</sup> Herman (n 104) 12.

<sup>144</sup> Schlechtriem (n 50) 199.

<sup>145</sup> Schwartz (n 130) 296–298.

<sup>146</sup> It should also be borne in mind that even in civil law regimes, specific performance is also limited. For example, in German law, it would not be awarded where the performance is impossible or monetary compensation can be claimed instead of restoration (*Herstellung*). Treitel (n 45) 47–48.

approach to the remedy of specific performance is not to instinctively refuse it, but to utilise it in appropriate circumstances.

## IV. OTHER REMEDIES

### A. Reduction of Price

The remedy of reduction of price originates from the *actio quanti minoris* in Roman law which allows a buyer to claim a reduction in price for defective goods.<sup>147</sup> This remedy plays an essential role in the civil law jurisdiction, but is unfamiliar to most lawyers from common law countries.<sup>148</sup> In the traditional civil law system, damages can only be recovered if the breaching party is at fault or guilty of fraud.<sup>149</sup> Under such a situation, the remedy of price reduction could prevent injustice to the buyer, as the seller will not receive the full price for defective goods. It is also an efficient remedy since the difficult and time-consuming task of proving fault is no longer necessary. Nonetheless, the CISG does not require the showing of fault as a precondition to claiming damages. Opponents might then argue that there is no necessity for retaining this remedy. However, on grounds that it was familiar to civil lawyers and sometimes could benefit the injured buyer more than damages can, the remedy of reduction of price was ultimately written into the CISG.<sup>150</sup>

According to Article 50 of the CISG,<sup>151</sup> the buyer may reduce the price without any requirement, which means this remedy could be effectuated by the unilateral declaration of the buyer. As Bergsten and Miller observe, 'no further action by the seller, such as acquiescing to the reduction of price, or by a tribunal in confirming the reduction, is necessary'.<sup>152</sup> Even the rule of notice to the other party is no longer required.<sup>153</sup>

It is, however, argued by commentators that such a 'self-help' remedy is disappointing in practice because the seller could always disagree with the existence of non-conformity or its corresponding monetary compensation especially when the defect is in quality instead of quantity. Then the involvement of courts becomes inevitable.<sup>154</sup> Furthermore, while Article 50 provides that 'whether or not the price has already been paid, the buyer

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<sup>147</sup> Szakats (n 94) 760; Bergsten and Miller (n 8) 256.

<sup>148</sup> Bergsten and Miller (n 8) 255; Bridge (n 18) 510.

<sup>149</sup> Honnold (n 18) 339.

<sup>150</sup> Schlechtriem (n 50) 438-439.

<sup>151</sup> Article 50 of CISG specifies: 'If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.'

<sup>152</sup> Bergsten and Miller (n 8) 263.

<sup>153</sup> Ibid.

<sup>154</sup> Gonzalez (n 106) 92; Piliounis (n 93) 33-34.

may reduce the price', in situations where the price has been paid, the buyer needs to ask for a refund which is not as simple as a mere unilateral declaration.<sup>155</sup> Thus, when there is a dispute over the price, the above mentioned convenience might disappear.

Nevertheless, this remedy has certain advantages over damages. As Bergsten and Miller have pointed out,<sup>156</sup> there are three rules which restrict the awarding of damages: first, the rule of foreseeability requires 'damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract'.<sup>157</sup> Second, the rule of mitigation states that failure to take measures would allow a party in breach to 'claim a reduction in the damages in the amount by which the loss should have been mitigated'.<sup>158</sup> Third, successful reliance on an impediment beyond control would prevent the aggrieved party from claiming damages.<sup>159</sup> However, these restrictions on damages would not apply to the remedy of price reduction.<sup>160</sup> Therefore, the significance of Article 50 is indisputable especially when a claim of damages is restrained in the above situations.

Another advantage of price reduction appears when there is difficulty in proving or calculating the loss.<sup>161</sup> The remedy of reduction of price would save a lot of trouble in such cases. Moreover, under Article 50, the approach of price reduction depends on the 'proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time', which is opposite of the 'actual loss' approach under the provision of damages. The difference is apparent unless the market price remains unchanged with the contract price. If the market price gets higher (i.e., it is a good bargain for the buyer), the remedy of price reduction would make her worse off. On the other hand, if the market price gets lower, it becomes a bad bargain for the buyer and the remedy of price reduction would make her better off.<sup>162</sup> The

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<sup>155</sup> Piliounis (n 93) 33.

<sup>156</sup> Bergsten and Miller (n 8) 264.

<sup>157</sup> CISG (n 1) art 74.

<sup>158</sup> *Ibid* art 77.

<sup>159</sup> *Ibid* art 79. It might be argued that the remedy of price reduction here has the same effect as partially avoiding the contract. However, when the non-conformity does not amount to a fundamental breach, the only way is to claim a reduction of price.

<sup>160</sup> Bergsten and Miller (n 8) 264–265

<sup>161</sup> Schlechtriem (n 50) 438–439.

<sup>162</sup> Let us consider an example to understand this. The formula is: reduced price/contract price = value of the goods delivered/hypothetical value of conforming goods. Suppose the contract price was £1,000, if the market price doubles, the conforming goods and the actual tended goods would be worth £2,000 and £800 respectively, and the damages equal the difference between the two prices, namely, £2,000 – £800 = £1,200, but the result of price reduction equals  $(£800 \div £2000) \times £1000 = £400$ . If the market price halves, the conforming goods and actual tended goods would be worth £500 and £200 respectively, and damages equal £500 – £200 = £300, which means the buyer now would have to pay £700, but the result of price reduction equals  $(£200 \div £500) \times £1,000 = £400$ . If the market price remains the same, the damages equal £1,000 – £400 = £600, which means the buyer now would have to pay £400, and the result of price reduction equals  $(£400 \div £1,000) \times £1,000 = £400$ . For more examples, see Honnold (n 18) 336–339; Bergsten and Miller (n 8) 260–263.

function of price reduction, in the view of Amaudruz, is to 'preserve the balance of bargain struck'.<sup>163</sup>

One might argue that in regard to those defects in quality it is sometimes hard to establish such a proportion.<sup>164</sup> This is not surprising, as it would be difficult to quantify even damages under some circumstances. But one feature of the CISG, unlike the SGA, is that there are more choices of remedies, for example, to require the substitution of goods or repair. Besides, the aggrieved buyer could also claim damages in addition to price reduction if it is less than damages.<sup>165</sup>

Although there is no exact counterpart in English law, it might not be wholly accurate to say that there is no room for English lawyers to accept the remedy of price reduction. This is because Section 30 of the SGA provides that where 'the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.' The buyer under the SGA could also buy the goods with quantitative defects for a proportionately reduced price.<sup>166</sup> There is no substantial difference between the wording 'reduce the price in the same proportion' under Article 50 of the CISG and 'pay for them at contract rate' under Section 30 of the SGA. As explained by Gärtner, although the SGA only focuses on the abstract value (namely, the contract rate rather than the actual value of goods under the CISG), it is argued that 'both provisions are likely to lead to a more or less identical reduction of purchase price' unless the contract price is totally unconcerned with the real value.<sup>167</sup>

More doubts can be raised by pointing out that defects of quality are different from that of quantity. As Professor Treitel has observed, the principle of price reduction is not recognised by the common law system with regard to the defects in goods.<sup>168</sup> It should be borne in mind that 'set up against the seller' under Section 53(1) of the SGA merely means that the injured party is to set off part of contract price, which is a very typical way of determining damages. Consequently, the amount allowed to be deducted by way of damages is certainly not calculated like the approach of proportionate reduction under the CISG.

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<sup>163</sup> Bergsten and Miller (n 8) 262.

<sup>164</sup> See C Piché, 'Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized under US Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price Fair and Efficient Ones' (2003) 28 *North Carolina Journal of International Law and Commercial Regulation* 519, 554.

<sup>165</sup> Babiak (n 44) 131.

<sup>166</sup> Piliounis points out that, the 'contract rate' is comparable to the 'proportional' calculations of the CISG: 'If the parties have specified a contract rate for each item delivered, that rate would also determine the proportion of value that the goods delivered had to the conforming quantity.' Piliounis (n 93) 37.

<sup>167</sup> A Gärtner, 'Britain and the CISG: The Case for Ratification: A Comparative Analysis with Special Reference to German Law' in *Review of the Convention on Contracts for the International Sale of Goods 2000–2001* (Pace International Law Review, New York 2011) 66.

<sup>168</sup> Treitel (n 45) 108.

However, since the loss according to Section 53(3) of the SGA is ‘prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty’, it is still possible to calculate the loss on a proportionality basis which is implicitly recognised by Section 30 of the SGA.<sup>169</sup> Piliounis thereby concludes that the remedies of defects in quantity or quality under the SGA reach the same result as under the CISG in most cases.<sup>170</sup>

In summary, the view that the right to set off against the price by the injured buyer in English law is inconsistent with the remedy of price reduction seems unsound,<sup>171</sup> because there will possibly be no substantial difference with regard to the results. May be Professor Nicholas is more concerned with the various specific processes through which the result is arrived rather than the ultimate outcome as such.<sup>172</sup> But the same or similar result itself shows these two approaches have certain inherent relevance. More importantly, considering several advantages of price reduction mentioned above, it is worth retaining this remedy.

## B. Right to Cure

Another important aspect of the CISG in encouraging the completion of the contract is to allow the seller to cure her own mistake not only before the date for delivery,<sup>173</sup> but also after that date.<sup>174</sup>

Generally speaking, when there is a breach by the seller, the buyer has the right to decide whether to reject the goods or retain them and to claim damages or price reduction. Therefore, it might be argued that the coexistence of the right of termination and the right to cure would cause friction. For example, if the buyer wants to terminate the contract due to the seller’s breach, the termination might be wrongful if the seller still has a right to cure the breach. As Professor Reynolds argues, the relationship between the right to cure defective performance and right to termination is not clear.<sup>175</sup>

But is the right to cure such controversial? While there is no provision under the SGA that provides any rights for the seller to cure, according to case law, the seller unquestionably has the liberty to cure defective performance before the due date.<sup>176</sup> This

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<sup>169</sup> Piliounis (n 93) 38.

<sup>170</sup> Professor Piliounis suggests that an English court would make an award on a different basis, which means the proportionality approach under the CISG is also possible. He further argues, with respect to the breach of warranty, that the buyer’s right to set off the amount according to Section 53(1)(a) has also been reflected in cases decided under Article 50 of the CISG. *Ibid* 38–39.

<sup>171</sup> Bergsten and Miller (n 8) 255–256.

<sup>172</sup> B Nicholas, ‘Rules and Terms — Civil Law and Common Law’ (1974) 48 *Tulane Law Review* 946, 947–948.

<sup>173</sup> CISG (n 1) art 37.

<sup>174</sup> *Ibid* art 48.

<sup>175</sup> Guest et al (n 83) 674.

<sup>176</sup> Gärtner (n 167) 76.

means that the right to cure also exist in English law, or at least can be exercised 'within the time fixed by the contract for performance'.<sup>177</sup> Then, the major controversy remains in the right to cure after the date for delivery.

It can be noted that Article 48 of the CISG explicitly states such right is subject to Article 49, i.e., to the buyer's right of avoidance. If the buyer is entitled to terminate the contract, then the seller would be prevented from exercising the right to cure. Meanwhile, the right to termination under the CISG depends on the 'fundamental nature of breach' which, in turn, relies on the possibility of the seller to cure the breach without causing the injured buyer 'unreasonable inconvenience or uncertainty' under Articles 37 and 48.<sup>178</sup> The breach might not be determined as 'fundamental' if the seller could still offer to cure the defect.<sup>179</sup> In other words, when the buyer is entitled to terminate the contract, it probably implies that the breach is incurable. Professor Ziegel rightly asserts that there 'is no requirement in the Convention requiring an injured party to give a breaching party an opportunity to cure before exercising the right of avoidance.'<sup>180</sup>

Additional criticisms concern uncertainty in string contracts of sale, i.e., the goods are bought for resale. On a closer look however, it might not be a problem at all. If time is of the essence, such delay would undoubtedly constitute a fundamental breach. Similarly, if the right to cure would cause unreasonable inconvenience or uncertainty, then there is no ground for this remedy. On the other hand, if time is not of essential significance and no inconvenience or uncertainty is caused, the aggrieved buyer could either directly claim damages by making the breaching party liable for the consequent losses without adopting any measures or by making a cover purchase for the sub-sale. In the latter situation, if the sub-buyer accepts the defective or late delivered goods, and at the same time claims damages, the original breaching seller should also be liable for these indemnities. As such, the injured buyer would not become worse off. It is also argued that a typical buyer would prefer giving the seller a second chance instead of rejecting the goods immediately.<sup>181</sup>

In short, to grant the right to cure would keep the economic waste followed by termination to the minimum and would prevent both parties from being worse off than before. The remedy is a tool of cooperation and accommodation rather than a deadly weapon.<sup>182</sup> Compared with the vagueness of English law, the right to repair or replace the goods especially after the delivery date<sup>183</sup> under the CISG provides a sensible and practicable solution for the seller with respect to curing a breach.

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<sup>177</sup> Treitel (n 45) 371–372.

<sup>178</sup> See Williams (n 14) 44–45.

<sup>179</sup> See, for instance, the *Cobalt Sulfate* case (n 35).

<sup>180</sup> Ziegel (n 50) 9–14.

<sup>181</sup> Goode (n 142) 374.

<sup>182</sup> Honnold (n 18) 318.

<sup>183</sup> R Ahdar, 'Seller Cure in the Sale of Goods' (1990) 3 *Lloyd's Maritime and Commercial Law Quarterly* 364, 364–365.

## V. CONCLUSION

The important role that the CISG has played in international trade is self-evident. The long dream of establishing a uniform international mercantile law seems not so far away.<sup>184</sup> With the growing number of signatory nations, businessmen around the world are beginning to speak ‘in the same legal language’. This note has focused only on certain important remedial provisions under the CISG which are considered controversial by English lawyers. There remains various approaches to interpret remedies available under the CISG and a few of them are exactly the same or similar to English law. Admittedly, in order to accommodate a wide range of different legal jurisdictions, to be adaptable to different social and economic systems and to facilitate its ratification, the compromised language of some provisions has given rise to unfamiliarity or even confusion to some extent.<sup>185</sup> However, through appropriate means of interpretation and evolving case law, it is possible to enhance clarity and certainty.

The purpose of this note was to clarify the misunderstanding on the so-called uncertainty and inefficiency of the provisions of the CISG through a comparative examination of its provisions with the SGA. First of all, it was shown that the right to termination under the CISG is not less certain than that under the SGA if the doctrine of fundamental breach is appropriately interpreted. Second, it was pointed out that the remedy of specific performance is indeed more economically efficient than the remedy of damages, so the best design is to entitle the aggrieved party a right to elect the remedy between specific performance and damages. Third, with respect to other remedies like price reduction and the right to cure under the CISG, it was noted that they possess their own special functions and are easily understood, despite being unfamiliar to English lawyers.

On the contrary, as far as remedies under the SGA and common law are concerned, there exists several deficiencies such as difficulty in preventing injustice in individual cases, uncertainty, and under-compensation due to courts’ reluctance in granting the remedy of specific performance. Therefore, the UK government should consider ratifying the CISG, though many English scholars still question the need for taking this course. Beyond the unfamiliarity or worry of the deferring approaches and ‘national pride’, another significant reason might be that a great deal of international commercial litigation occurs in London, which continue to prefer English law to govern their case. This would inevitably bring an enormous wealth into the UK and would thereby at least make English lawyers a formidable interest group in preventing the adoption of an instrument which

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<sup>184</sup> See Piliounis (n 93) 2. Moreover, it is argued that no matter how certain the domestic law is, considering the issue of law selected and the burden of proving foreign law before the court, parties still prefer their international agreements to be governed by international rules. R Lee, ‘The UN Convention on Contracts for the International Sale of Goods: OK for the UK?’ [1993] *Journal of Business Law* 131, 146.

<sup>185</sup> But it should be noted here that many inconsistencies are caused by the reluctance to apply the CISG and only focus on domestic law. For instance, in *Italedcor* (n 10) and *Delchi Carrier SPA v Rotorex Corp or Beijing Metals & Minerals v American Business Center Inc*, the courts only referred to domestic law and this caused the CISG to be misapplied. Sheaffer (n 10) 477–478.

would change the primary role of English law.<sup>186</sup> But no one can compel businessmen from other legal jurisdictions to choose English law and a refusal to ratify the CISG will not automatically preserve the dominant role of English law. In fact, regardless of whether the UK joins the CISG or not, British businessmen might still be governed by the CISG according to the application rule under Article 1 of the CISG. Thus, even if it might still take some time for the UK to ratify the CISG in view of various political and economic reasons, at least certain provisions of the CISG are worth serious studying and bringing into the English law.

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<sup>186</sup> See Mullis (n 6).