Rights, Duties and Remedies under the United Nations Convention on Contracts for the International Sale of Goods

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An Investigation into the CISG's Compatibility with South African Law

A thesis submitted in fulfilment of the
requirements for the degree of

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by

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Declaration

This thesis is my own work and has not been submitted for degree purposes at any other University.

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Abstract

This thesis analyses the compatibility of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the South African law of sale. An initial examination of the historical development of the CISG reveals its ambitions of becoming the primary source of law governing international contracts of sale. The goal of this research is to determine whether South Africa should ratify the CISG. The CISG has been ratified by most of the leading trading States in the world. In order to gain a better understanding of the advantages and disadvantages of ratification, a comparative study has been undertaken. The stance taken toward the CISG by the United Kingdom and Germany has been examined. The United Kingdom has staunchly avoided ratifying the CISG, despite having agreed thereto a number of years ago. Germany however has taken a different approach and has welcomed the CISG. The experiences of these foreign States serve as a useful guide when assessing the specific challenges that exist in South Africa concerning the adoption of the CISG. The most important aspect of this study is the direct comparison between the legal provisions housed in the CISG and their counterparts under South African law. A careful investigation has been conducted into the rights, duties, and remedies under the CISG. This investigation is followed by an examination of the corresponding rights, duties, and remedies under the South African domestic law of sale. It is evident from these explorations that the rights and duties under the CISG strongly resemble those under South African law. The direct comparison revealed however that certain remedies found in the CISG do not have a counterpart under South African law. Despite this discrepancy, there are no legal principles in the CISG that are completely unknown in South African law. While certain remedies housed in the CISG cannot be found in an identical form under South African law, sufficiently similar legal principles can be found, which frequently lead to the same results as those under the CISG. This study is concluded with a recommendation concerning South Africa's adoption of the CISG.

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Uniform Law on International Sale of Goods

Uniform Law on the Formation of Contracts for the International Sale of Goods

United Nations Convention on Contracts for the International Sale of Goods

Abbreviations

Burgerliches Gesetzbuch – BGB

Convention on the Limitation Period in the International Sale of Goods – Limitation Convention

Department of Trade and Industry – DTI

International Institute for the Unification of Private Law in Rome – UNIDROIT

Oberlandesgericht – OLG

Principles of European Contract Law – PECL

Sale of Goods Act 1979 – SOGA

UNIDROIT Principles – PICC

Uniform Commercial Code – UCC

Uniform Law on International Sale of Goods – ULIS

Uniform Law on the Formation of Contracts for the International Sale of Goods – ULF

United Kingdom – UK

United Nations Commission on International Trade Law – UNCITRAL

United Nations Convention on Contracts for the International Sale of Goods – CISG

United States of America – USA

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Chapter One

Introduction

1.1 International Trade and the need for Legal Harmonisation

The twentieth century has witnessed an increase in international trade. This growth is largely due to the development of the market economy, the growth of markets for manufactured goods, the emergence of new markets for raw materials in developing States; advanced methods of communication; and new transport technology. [1] These developments have caused States to turn their attention to international trade as a means of boosting their economies. States can no longer grow effectively in isolation of other States due to the interdependence of trade markets. The increase in trade has brought existing problems between States, caused by different approaches to trade, to the fore. States have different expectations, standards and usages to which trade contracts are subjected. For this reason, the need for harmonised international trade standards and laws has developed.[2]

During the past century two international organisations were founded with the objective of harmonising international trade law. They are the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL).[3] Decades later, the Commission on European Contract Law was established to harmonise contract law within the European Union. These three organisations represent the recognition made by States that a unified system of law is required to facilitate international trade.

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[1] A E. Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom" http://cisgw3.law.pace.edu/cisg/biblio/williams.html (accessed 6 April 2008).

[2] Businessmen have privately established the International Chamber of Commerce (ICC) in the hope of setting universal standards and practices.

[3] The United Kingdom is a member of both organisations and has worked fervently to help achieve their goals. Despite this commitment to the ideals of these organisations, the UK has not ratified the CISG.

1.2 Context of the Research

The unification of international trade law is a growing feature across the globe. The increasing importance of organisations such as the World Trade Organisation (WTO) and the World Customs Organisation (WCO) further prioritises the unification trend.[4] In the 1970s the United Nations (UN) put in place a Code that would govern all international sale contracts. The product of this endeavour was the United Nations Convention on Contracts for the International Sale of Goods (CISG).

This research will not investigate the whole Convention. A brief introduction to the CISG is therefore necessary. In this thesis the term "CISG" will be used interchangeably with the terms "Code" and "Convention". All three terms will denote the same meaning.

This Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980.[5] The objective of the CISG, according to its preamble, is:

> "The adoption of uniform rules which govern contracts for the international sale of goods and take into account different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

The CISG is divided into four parts. Part I establishes the sphere of application and enumerates upon other general provisions. Part II governs the formation of the contract. Part III discusses the sale of goods, the obligations and remedies of the buyer and the seller, and the passing of risk. Part IV encapsulates the administrative provisions regarding the CISG and the declarations or reservations that are available to signatory States. This study will focus on Part III of the Convention. The primary focus will be on the obligations and remedies of the contracting parties.

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[4] S Eiselen "Adopting the Vienna Sales Convention: Reflections Eight Years down the Line" 2007 *SA Merc LJ* 14 at 15.

The CISG does not seek to harmonise the domestic commercial laws of signatory States.[6] Its goal is to separate international sales from the ambit of domestic law and to create unified rules for such transactions. The CISG provides a comprehensive code governing the formation and performance of sale contracts, which fall within its scope of application, as well as the remedies available to parties. The CISG will supersede the domestic law of member States regarding matters covered in its articles. The Convention does not however exclude domestic law entirely, but reserves several issues to be determined under the applicable domestic law.[7]

The CISG aims to safeguard the private autonomy of contracting parties. Under article 6, subject to article 12, parties are permitted to exclude the application of the CISG to their contract, or to derogate from or vary the effect of any of its provisions. The provisions of the CISG bind parties from signatory States, unless they have excluded or varied its provisions in whole or in part. This exclusion may be done explicitly or implicitly.[8] In determining whether implicit exclusion applies, the will of the parties must be discerned. Article 8 of the CISG must be applied to ascertain the will of the parties.

Article 1(1) of the CISG specifies to whom it will be applicable. Article 1(1) provides:

> "This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State."

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[5] C Hugo "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" (1999) 11 *SA Merc LJ* 1.
[6] A Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/biblio/rossett.html (accessed 2 April 2008).
[7] Articles 2-5.
[8] *Parev. Prods. Co. v. 1 Rokeach & Sons, Inc*., 124 F. 2d 147 (2d Cir. 1941). A form of implicit exclusion would be the choice of law from a non-contracting State.

The nationality of the parties is clearly irrelevant. In the instance of one of the parties having a place of business both abroad and in the same State as the other party, the place of business for the purpose of the contract will be that with the closest relation to the contract and its performance.[9] Under article 95 a State may ratify or accede to the Convention on terms that it will not be bound by article l(l)(b).[10]

Nearly every major trading State in the world has ratified the CISG.[11] The United Kingdom is the most important State that has not ratified the CISG.[12] Until 1 July 2008 Japan had also not acceded to the CISG.[13] Its accession has made the UK the last large trading State to have not ratified the Convention. South Africa has also not yet ratified the CISG. The South African law of sale, governing international and domestic sales, has developed from Roman and Roman-Dutch law origins with little influence from developments in international trade law.[14] The importance of South Africa's position regarding the adoption of the CISG became pertinent in 1994, when South Africa held its first authentic democratic election. This event signalled South Africa's re-emergence into international trade.[15] The Department of Trade and Industry promoted the idea of adopting the CISG in the late 1990s, as a method of harmonising international trade law. To date nothing has been completed and the CISG has lost priority to more pressing domestic matters.[16]

The CISG is not only of importance on a global plane, but also in a regional African sense. Since 1994 South Africa has become a leader in the economic cohesion of Southern African States through the development of the South African Development

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[9] Article 10.
[10] The United States has made this reservation on the grounds that the application of article 1(1)(b) would result in the application of the law of the non-contracting State more often than US law.
[11] MP Van Alstine "Dynamic Treaty Interpretation" 146 U. Pa. L. Rev. 687, 689 (1998). The CISG has been ratified by States whose combined economies account for nearly two-thirds of all world trade. These statistics were drawn from statistics published by the International Monetary Fund.
[12] Hugo 1999 *SA Merc LJ* 2. The UK has signalled its intention to ratify the CISG in due course. See Department of Trade and Industry, United Nations Convention on Contracts for the International Sale of Goods (The Vienna Sales Convention) A Consultation Document (Great Britain 1997); A E. Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[13] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html. Japan acceded to the CISG on 1 July 2008. The Convention will enter into force on 1 August 2009.
[14] S Eiselen "A Comparison of the Remedies for Breach of Contract under the CISG and South African Law" http://cisgw3.law.pace.edu/cisg/biblio/eiselen2.html (Accessed 1 March 2008)
[15] Prior to this date South Africa was subjected to international sanctions.
[16] Such as housing, health care, education, HIV/AIDS, poverty, and employment.

Community Convention (SADC).[17] One of the aims of SADC is to harmonise trade law within the member States to promote trade.[18] Certain SADC States have ratified the CISG, which not only helps to harmonise the region, but also brings these States in line with the majority of trading States abroad. South Africa's failure to ratify the Convention may therefore compromise one of the purposes of SADC. There is currently no legal certainty between SADC States because of the various legal systems operating within the region. Legal certainty would be created if all SADC States were to ratify the CISG.

There is a potential *lacuna* in South African law because of the failure to ratify the CISG. This manifests itself in issues such as the formation of contracts, jurisdiction, and dispute resolution. A prominent view exists that the case for ratification of the CISG by South Africa is very strong. There are three main categories of reasons supporting adoption. These are legal, trade, and policy reasons.[19] Conversely, these three categories also provide material against adoption in South Africa. Key factors supporting ratification are:

a) the wide acceptance of the CISG around the world and that States which have adopted the CISG represent South Africa's major trade partners;
b) the growing rate of acceptance of the CISG, both internationally and in Africa;
c) the States which have ratified the CISG represent every continent, every major legal background, and the main political systems in the world; and
d) the CISG may already be applicable to contracts entered into by South African entities by virtue of the principles of private international law.[20]

The last argument is of significance for South Africa. Currently, a South African court may be called upon to apply the CISG when it is discovered that the CISG governs the sale contract.[21] The CISG's influence will therefore be felt in South Africa despite its not having ratified the Convention.

[17] Eiselen 2007 *SA Merc LJ* 14.
[18] Eiselen 2007 *SA Merc LJ* 14.
[19] S Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" http://www.cisg.law.pace.edu/cisg/biblio/eiselen.htnl (accessed 11 February 2008).
[20] Hugo 1999 *SA Merc LJ* 3.

1.3 Structure and Goals of the Research

This thesis will begin with a thorough synopsis of the development of the CISG. This will be followed by a discussion of the legal, trade and political reasons in favour of and against the adoption of the CISG. A comparative analysis of the position in the United Kingdom and Germany concerning the role of the CISG will then be undertaken. The main thrust of this thesis will be to compare the CISG with South African law governing contracts of sale. The comparison will be focused on the rights, duties and remedies available to contracting parties under each system of law. The study will culminate with a recommendation as to whether South Africa should adopt the CISG.

Numerous States have dealt with clashes between the CISG and their domestic laws in the process of deciding whether to ratify the Convention. The experiences of these foreign States serve as a useful guide when assessing the specific challenges that exist in South Africa concerning the adoption of the CISG. From a comparative perspective, two States are useful: the United Kingdom and Germany. It is imperative to consider the position in the United Kingdom both because it has a rich history of international trade litigation and because the United Kingdom has refused steadfastly, until recently, to ratify the CISG. This will provide an overview of the reasons against ratification, which South Africa may also relate to. Conversely, it is important to review Germany's approach to the CISG because it has ratified the Convention and has developed a rich body of case law on the CISG. Looking at Germany may provide a sketch of the reasons in favour of adoption, which may also be applicable in South Africa. Drawing on the differing experiences of these two States will be invaluable in informing South Africa's decision whether to ratify the CISG.

The primary goal of the research is to determine whether the CISG should be ratified in South Africa. As far as ratification is concerned, it will be necessary to consider whether the CISG is compatible with South African law of sale. It is of great importance to create a stable legal climate in South Africa. Conflicting laws regarding sale transactions will jeopardise legal certainty. The rights, duties and remedies

[21] Hugo 1999 *SA Merc LJ* 3.

provided for in the CISG will therefore be compared with their counterparts in South African law. Where the CISG differs from the South African law, critical analysis will be undertaken to determine whether the discrepancy can be overcome and, if so, how. As a point of departure it can be noted that the rights and duties in these two bodies of law bear a resemblance. There are however certain remedies provided for under the CISG that do not exist in South African law. The practical effect of these differences will be discussed.

While not examined in this study, it is important that the issue of international arbitration be noted. The international community has witnessed a growing trend to refer disputes to arbitration as opposed to the lengthy and expensive process of courtroom litigation.[22] South Africa does not have an Arbitration Act in place that specifically deals with international arbitration.[23] South Africa does not therefore present itself as a competitive arbitration forum to foreign entities who are party to an international trade dispute. While the failure to have an International Arbitration Act will not impact the operation of the CISG in South Africa, it will impact the extent to which disputes might be resolved in South Africa. South Africa may therefore have to promulgate an Arbitration Act governing the international sale contracts in the event of ratifying the CISG. South Africa's current arbitration system may also have to be re-considered to determine whether modifications will have to be made to create an optimally stable and efficient system of processing arbitration disputes. At present arbitrators may lack legal expertise in international trade law. Generally, South African legal professionals have not had the exposure to international trade disputes that legal professionals from major trading States have had. Currently the majority of international trade disputes are litigated and presided upon in the United Kingdom because of the UK's rich heritage and vast experience in international trade disputes. South African lawyers do not get sufficient opportunity to participate in international trade disputes because other legal jurisdictions are perceived to be more attractive dispute forums. Should South Africa desire to become an active dispute resolution forum for international arbitrations, suitable laws will have to be promulgated. This

[22] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". More than ninety percent of all international commercial contracts contain an arbitration clause.

[23] South Africa does have an Arbitration Act (Act 42 of 1965), which governs domestic arbitrations. This Act however does not cater for international disputes.

will not only provide political advantage for South Africa in the international trade arena, but will also have economic benefits for the legal profession.

1.4 Conclusion

It is for the above reasons that the proposed research is undertaken. South Africa has become a member of the world community and is eagerly attempting to forge its niche in the international trade market. Although suggestions have been made regarding the ratification of the CISG, it has not been seriously considered by the Government to date. In the present global climate South Africa can no longer afford to tarry in deciding whether to ratify. The failure of the Government to consider the potential positive and negative effects of ratifying the CISG creates the need for research in this field. It must be determined whether South Africa will benefit from ratifying the CISG and whether the potential challenges posed by its ratification can be overcome. South Africa, like many other States, is attempting to boost its national economy through foreign trade and exports. If the CISG would be beneficial to this process by opening up new trade opportunities it should be ratified, provided that no major hurdles exist.

The initial perception is that South Africa should ratify the Convention to create a climate of trust through which trading relations may be built with foreign States. The performance of international trade contracts often spans over long distances and mostly via sea transport. As such there are endless possibilities for a breach of contract to occur. Parties may therefore be more comfortable dealing with a State that is subject to the same law as they are. This study aims to demonstrate that the CISG bears a striking resemblance to South African law and that any incongruity is curable. South Africa may have to sacrifice some of the independence and comfort of domestic law to create legal certainty in respect of international sale transactions.

This thesis reflects the law and opinions held in the sources available to me as at 30 November 2008.

Chapter Two

Development of the CISG: A Historical Perspective

2.1 Introduction

The United Nations Convention on Contracts for the International Sale of Goods (CISG) took fifty-three years to be drafted and brought into force.[24] It therefore understandably has a rich legal history.[25] It is important to investigate and examine this history because it influences the way in which courts interpret the CISG today.[26] The CISG was redrafted on numerous occasions over several decades.[27] Each new step built on the previous step and thus, each stage of contribution affected the final draft. Hence each stage of development must be examined in order to understand how the CISG came to contain its particular articles, which largely govern international trade today.

A historically unproved argument exists that during the Middle Ages the *lex mercatoria* formed a uniform sales code.[28] It is argued that this code was universally applied throughout Europe at the local fairs and markets. Whether accurate or not, this notion contributed towards the interest, which manifested itself in the middle nineteenth century, in creating a uniform commercial law to govern the global markets. At this time numerous European codes were created. During the second half of the nineteenth century the Internationalist Movement was founded in the belief that it could create a unified commercial law based on the existing codes. Initially the

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[24] Numerous abbreviations are in circulation for this Convention. The most popular are the 'Vienna Sales Convention' and the 'CISG'. The former is favoured in the United Kingdom. While the latter is preferred in the United States of America. Germany has also adopted the abbreviation 'CISG'. See C Hugo "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" (1999) 11 *SALJ* 1.

[25] A Rosett "CISG Laid Bare: A Lucid Guide to a Muddy Code" http:www.cisg.law.pace.edu/cisg/biblio/arthurrosett.html (accessed 2 April 2008).

[26] Courts may refer to the legislative history of the CISG in order to ascertain the meaning of an article in dispute from the intention of the drafters.

[27] L Singh "United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An examination of the buyer's right to avoid the contract and its effect on different sectors of the (product) market" http://cisgw3.law.pace.edu/cisg/biblio/singh.html (accessed 1 March 2008).

[28] S Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa".

Movement was convinced that the French Code *de Commerce* would dominate Europe, but soon realised that this was not going to become a reality.[29] The Movement realised that its ambition could not be efficiently achieved and hence abandoned the project.

The Internationalist Movement however laid a path for the creation of the Institut de Droit International and the International Law Association. The Institut was allocated the task of studying international legal problems in the hope of achieving practical results. The Association bore the task of achieving reform and compiling the codification of law. The idea of producing a uniform law of international sales was suggested at numerous conferences of the Association, but these suggestions were never seriously contemplated. This failure was primarily due to the success of the newly created Incoterms. The ambitious notion of creating a unified sales law was however becoming increasingly important due to the steady growth in international trade.[30]

2.2 ULIS and ULF

The aim of creating a unified sales law received its first true opportunity of being achieved in 1926. The League of Nations set up the International Institute for the Unification of Private Law in Rome (UNIDROIT) in 1926.[31] At the first meeting of UNIDROIT Ernst Rabel proposed that a limited project be embarked upon to establish a uniform law of sale, rather than a unified commercial law.[32] Rabel's

[29] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa".
[30] B Zeller "The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law" (2006) 17 *Stell LR* 466 at 468.
[31] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa".
[32] Singh "United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An examination of the buyer's right to avoid the contract and its effect on different sectors of the (product) market". Ernst Rabel was Professor of Law at the Universities of Leipzig, Basel, Kiel, Göttingen, Munich and Berlin until 1937. The political situation forced him to emigrate to the United States of America. He became Professor at the Law Schools of Ann Arbor and Harvard. Rabel's work covered a range of fields such as Roman law, modern civil law, conflict of laws, and comparative law. As the first Director of the Kaiser Wilhelm (now Max Planck) Institute for Foreign and International Private Law in Berlin (1926), Rabel had a significant influence on the development of a systematic comparative law focusing on issues of legal policy. He was also among the first to recognise the importance of comparative law as a foundation for law unification projects. His treatise *Law of the Sale of Goods* (first published 1936) created a model for later endeavours in this field. *The Conflict of Laws: A Comparative Study* (1945) has become a standard work. Rabel founded the *Journal for Foreign and*

proposal was accepted and he was assigned the task of composing the first draft. The CISG is a result of a project effectively begun at the Sixth Session of the Hague Conference on Private International Law in 1928.[33] UNIDROIT accepted the idea that a unified law on international sales should be based on the principles of private law.[34] It was determined that these principles should be determined by comparing national laws rather than comparing commercial practice.[35] Operating under the League of Nations, UNIDROIT established a drafting committee comprised of European scholars to create a uniform law for international sales.[36] At this early stage all of the participating states were industrialised, capitalist, Western European governments. Thus the first true draft, which was put forward in 1935, was tailored for that particular legal heritage. The second draft was accepted in 1939.[37]

The drafting committee's efforts were interrupted by the second Word War, thus putting a halt to the project. However, in 1951 the Dutch government convened a conference at the Hague to recommence the work.[38] The CISG project was hence resumed in the early 1950s, when international trade was flourishing. The second draft, originally tabled at the 1939 UNIDROIT conference, was tabled at the international Hague Conference on the Unification of Sales Law.[39] At this second stage of the development there were twenty-one states participating. In addition to the Western European states, Japan sent representatives to participate in the discussions, while the United States of America (USA) and numerous Latin American states sent observers.[40] The majority of the participating states were however still from Western

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International Private Law (RabelsZ) in 1927 and is currently one of the most respected publications in this field. All modern efforts to unify private law, particularly regarding the sale of goods, are greatly indebted to Rabel. He served as a member of the Institute for the Unification of Private Law in Rome from 1927. His influence on the codification of law governing the international sale of goods is evident in the CISG. See http://www.cisg-online.ch/cisg/rabel.htm (accessed 15 November 2008).

[33] Rosett "CISG Laid Bare: A Lucid Guide to a Muddy Code".

[34] P Winship 'Private International Law and the UN Sales Convention' (1988) 21 *Cornell International LJ* 489; Muna Ndulo "The Vienna Sales Convention 1980 and The Hague Uniform Laws on International Sale of Goods 1964; A Comparative Analysis' (1989) 38 *International and Comparative LQ* 1 at 2-4.

[35] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa".

[36] EA Farnsworth "The Vienna Convention: History and Scope" (1984) 18 *International Lawyer* 17.

[37] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa"

[38] Farnsworth 1984 *International Lawyer* 17.

[39] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa"

[40] Rosett "CISG Laid Bare: A Lucid Guide to a Muddy Code".

Europe. In 1956 a third draft was presented and finally approved by the participating states in 1958.[41]

In 1963 the United States of America joined UNIDROIT. The USA sent a delegation to consider the draft compiled by the European states.[42] The belated entry of the USA meant that it did not have a huge impact on the final product produced by UNIDROIT. This second stage of the development culminated in the creation of two conventions, the Uniform Law on International Sale of Goods (ULIS)[43] and a shorter companion Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).[44] These two conventions, generally known as the Hague Uniform Laws, were approved in 1964 at a diplomatic conference convened at the Hague by the Dutch government.[45] The Hague Uniform Laws were brought into force in 1972.[46] They were adopted by nine states only. These were predominantly Western European states. These included: Belgium, Federal Republic of Germany, Gambia, Israel, Italy, Netherlands, SanMarino, and the United Kingdom.[47] However the adoptions by the United Kingdom and The Gambia were mere gestures rather than true commitment to the ideals of the Hague Uniform Laws.[48] Both of these states made the reservation

[41] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa".
[42] Farnsworth 1984 *International Lawyer* 17.
[43] Convention Relating to a Uniform Law on the International Sale of Goods, opened for signature July 1, 1964, 834 U.N.T.S. 107, with Annex, Uniform Law on the International Sale of Goods, reprinted in 13 Am. J. Comp. L. 453 (1964) and 3 I.L.M. 855 (1964).
[44] Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, opened for signature July 1, 1964, 834 U.N.T.S. 169, with Annex, Uniform Law on the Formation of Contracts for the International Sale of Goods, reprinted in 13 Am. J. Comp. L. 472 (1964) and 3 I.L.M. 864 (1964).
[45] Farnsworth 1984 *International Lawyer* 17. As of 1977, ULIS has been adopted by eight nations, Belgium, the Federal Republic of Germany, the United Kingdom, Gambia, Israel, Italy, the Netherlands, and San Marino, while ULF had been adopted by the same nations, with the exception of Israel.
[46] Ndulo 1989 *International and Comparative LQ* 2-3.
[47] Farnsworth 1984 *International Lawyer* 17-18.
[48] According to article V of ULIS: "Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare, by a notification addressed to the Government of the Netherlands, that it will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article 4 of the Uniform Law, chosen that Law as the law of the contract". The UK exercised this option when it adopted ULIS. Thus, revealing a clear intention to ensure that an escape route existed, which could be utilised to avoid ULIS in practice. I fact, there has been no reported case heard in English or Scottish courts involving the Hague Uniform Laws, which makes it evident that businessmen in the UK did not have recourse to these conventions. The fact that France failed to ratify the conventions despite playing a dominant role in the drafting process, was harrowing. However, the remaining five original members of the EEC did ratify the conventions and subsequently over one hundred and eighty reported decisions were passed down in their courts. This reveals that the Uniform Laws did have an important role to play in certain countries.

that the Hague Uniform Laws would only apply in the limited instances where parties to a contract expressly included the application of these conventions.[49] The proposed reasons for the failure of these two codes will be discussed below, under the next heading.

The limited adoption of ULIS and ULF by the world at large signalled that the project had not achieved its objective of creating a uniform law that would be embraced globally. Therefore, before ULIS had gained sufficient adoptions to take effect, the United Nations had already begun initiatives to create a new version that would be more widely accepted.

2.3 Development of the CISG under UNCITRAL

In 1966, under the initiative of Hungary, the United Nations General Assembly established the United Nations Committee on International Trade Law (UNCITRAL) with the mandate to promote "the progressive harmonisation and unification of the law of international trade".[50] UNCITRAL originally consisted of twenty-nine

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Barry Nicholas "The Vienna Convention on International Sales Law" http:www.cisg.law.pace.edu/cisg/biblio/nicholas2.html (accessed 3 April 2008). Arthur Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" http:www.cisg.law.pace.edu/cisg/biblio/rossett.html (accessed 14 October 2008).

[49] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" http:www.cisg.law.pace.edu/cisg/biblio/eiselen.html.

[50] Nicholas "The Vienna Convention on International Sales Law". World pressures had been mounting and had already produced harmonisation and unification of commercial law in the United States, Scandinavia, and Europe. These included: The Uniform Commercial Code (UCC), the Scandinavian Sale of Goods Act, articles 100 and 220 of the Treaty of Rome. A collection of specialised international legal regimes also developed. For more than half a century the Hague Rules have governed the carriage of goods by sea throughout the world. This convention has been ratified by at least eighty-five nations. World practice on letters of credit has been largely governed by the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce. It has effectively become universal law by its incorporation into most bank letter of credit contracts. The legal relationships between air carriers and passengers or cargo consignors has been governed by the Warsaw Convention, which opened for signature Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. Services performed by individuals other than the contracting air carrier have been governed by the Guadalajara Convention, which opened for signature Sept. 18, 1961, 500 U.N.T.S. 31). The carriage of goods by road carriers throughout Europe has been governed in most nations, including a number of Eastern European socialist states, by the Convention on the Contract for the International Carriage of Goods by Road, which opened for signature May 19, 1956, 399 U.N.T.S. 189). Contracts for particular transactions have been harmonised by model and standard form agreements drafted by national and regional trade associations, industry groups, and the United Nations Economic Commission for Europe. Large international construction contracts have been influenced by Conditions of Contract (International) for Works of Civil Engineering Construction (Fédération Internationale des Ingénieurs-Conseils) (3d ed. 1977), otherwise known as the FIDIC Contract, which has been approved by professional organisations in 73 nations. See generally C. Schmitthoff, Export Trade chs. 3 & 27 (7th ed. 1980); Sand, The International Unification of Air Law, 30 Law & Contemp.

member states and grew to thirty-six.[51] The USA was a member from the inception of this Committee.

In 1968, at UNCITRAL's first session, the world leadership turned its attention back to the idea of an international sales convention. After investigations were made in the form of a survey, it was evident that the Hague Uniform Laws were unlikely to attract world-wide acceptance. The primary reason for the failure of the Hague Uniform Laws was that they had the appearance of having a narrow Western European origin. There were very few representatives from the developing world during the discussions at The Hague. Further, the USA only joined the discussions thirty-four years into the project and thus had little impact on the final document and hence did not ratify it. A third reason for the failure was said to be the existence of serious deficiencies in the material stipulations of the conventions. The conventions failed to pay sufficient attention to overseas shipments, the imbalance between the rights of the buyer and the rights of the seller, the blunt refusal to consider commercial practices, and the scope of the applications of the two conventions. The conventions were criticised for being too complex, overly abstract, artificial, and inappropriately vague due to the drafter's attempts to please all parties.[52] In addition, the conventions gave the appearance of attempting to achieve regional unification rather than global unification. Certain states that may have acceded to the conventions were deterred from doing so by the United Nations itself, when it established UNCITRAL in 1966, before the conventions were even in force. This act on the part of the United Nations created an apprehension that the conventions might be temporary and thus, would become redundant in the near future.

UNCITRAL wanted to remedy these shortcomings as far as possible and therefore, proposed that a more comprehensive group of participants be included in the development process. The third stage therefore saw the number of participants grow from the original twenty-one to sixty-two. The membership was more representative

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Probs. 400 (1965); Yiannopoulos, The Unification of Private Maritime Law by International Conventions, 30 Law & Contemp. Probs. 370 (1965).

[51] Farnsworth 1984 *International Lawyer* 18. The group consisted of: nine countries from Africa, seven from Asia, five from Eastern Europe, six from Latin America, and nine from Western Europe and "Others" (including the United States of America).

of the world and the states included socialist, centrally planned economies; capitalist, free market economies; developing southern hemisphere states; and industrialised northern hemisphere states.[53] Many of the representatives sent by member states were experienced in international trade law.[54] In addition, several of the representatives had been involved in the drafting of ULIS and ULF and thus provided a sphere of continuity and specific experience in the domain of unification processes.[55] These elements combined provided a valuable dimension that was absent in the earlier attempts at creating a unified sales law.

At its second session in 1969, UNCITRAL set up an initial representative Working Group of fourteen states to produce a new convention, which would be "capable of wider acceptance by countries of different legal, social, and economic systems".[56] Although the Hague Uniform Laws were utilised as a starting point, the end result was vastly different from them. The Working Group sat for nine annual sessions in order to complete its task. The text produced was then revised by a full meeting, consisting of the sixty-two participant states, at the tenth session of UNCITRAL in 1977.[57] At first the commission worked on two separate draft conventions; one governing the formation of contracts and the second focussing on the rights and duties flowing from the contract and breach of contract. However in 1978 these two draft conventions were moulded into one document referred to as the New York draft.[58] This single text was commented upon at UNCITRAL's eleventh session in 1978 and additional provisions regarding formation and interpretation were integrated into the text of the CISG. The text produced by these meetings of UNCITRAL was further

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[52] Ndulo 1989 *International and Comparative LQ* 3; M L Zionitz 'A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?' (1980) 2 *Northwest Journal of International Law & Business* 146.
[53] JS Sutton "Measuring Damages Under the United Nations Convention on the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/biblio/sutton.html (accessed 1 March 2008).
[54] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" http:www.cisg.law.pace.edu/cisg/biblio/eiselen.html.
[55] Sarah G Zwart "The New International Law of Sales: A Marriage Between Socialist, Third World, Common Law and Civil Law Principles" (1988) 13 *North Carolina International Law & Commerce Register* 109.
[56] Nicholas "The Vienna Convention on International Sales Law". The Working Group, on which the United Kingdom was represented throughout, was authorised to proceed either by modifying the Hague Uniform Laws or by drafting a new text. The group chose to begin its work by focusing on the Uniform Laws.
[57] Nicholas "The Vienna Convention on International Sales Law".
[58] Ndulo 1989 *International and Comparative LQ* 4.

revised by the Diplomatic Conference in 1980.[59] After five weeks of immense effort by the sixty-two states represented the CISG was finally adopted, at the culmination of a Diplomatic Conference convened in the Neue Hofburg, in Vienna on 11 April 1980 by the Secretary-General of the United Nations.

The CISG was open for signature until 30 September 1981 and has since been open for accession. Despite the CISG having been approved by a majority amounting to forty-two out of the potential sixty-two votes, it was not yet in force.[60] Article 99 of the CISG provided that the Convention would only come into effect on the first day of the month following the expiration of twelve months after the date of the tenth ratification. The CISG thereby entered into force on 1 January 1988, one year after the tenth State had ratified the Convention. By 11 December 1986 the requisite ten states had ratified / acceded to the Convention.[61] The first states were: Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, and Zambia followed by China, Italy, and the United States of America. Many states apparently waited for the United States of America to accede to the conventions before committing themselves.[62] Therefore the CISG came into force on 1 January 1988. One decade after its coming into force the CISG had been acceded to by fifty-one states. This was considered to be a sound reflection on the world's acceptance of the convention.[63] In this respect it achieved where ULIS and ULF had failed.

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[59] Nicholas "The Vienna Convention on International Sales Law".
[60] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa".
[61] UNCITRAL Secretariat *The United Nations Commission on International Trade Law* (1991) para 4.
[62] The House of Delegates of the American Bar Association recommended, at its August 1981 meeting, that the United States sign and ratify the Convention. 1981 Summary of Action Taken by the House of Delegates of the American Bar Association 25.
[63] United Nations, Commission On International Trade Law, Status Of Conventions (1992). The States who have ratified or acceded to the Convention are listed below, together with the date of ratification or accession followed by the date that the CISG has or will enter into force for them are: Argentina 19 July 1983, 1 January 1988; Australia 17 March 1988, 1 April 1989, Austria 29 December 1987, 1 January 1989; Belarus 9 October 1989, 1 November 1990; Belgium 31 October 1996, 1 November 1997; Bosnia and Herzegovina 12 January 1994, 6 March 1992; Bulgaria 9 July 1990, 1 August 1991; Burundi 4 September 1998, 1 October 1999; Canada 23 April 1991, 1 May 1992; Chile 7 February 1990, 1 March 1991; China 11 December 1986, 1 January 1988; Colombia 10 July 200, 1 August 2002 Croatia 8 June 1998, 8 October 1991; Cuba 2 November 1994 , 1 December 1995; Cyprus 7 March 2005, 1 April 2006; Czech Republic 30 September 1993, 1 January 1993; Denmark 14 February 1989, 1 March 1990; Ecuador 27 January 1992, 1 February 1993; Egypt 6 December 1982 (b), 1 January 1988; El Salvador 27 November 2006, 1 December 2007; Estonia 20 September 1993, 1 October 1994; Finland 15 December 1987, 1 January 1989; France 6 August 1982, 1 January 1988; Gabon 15 December 2004, 1 January 2006; Georgia 16 August 1994, 1 September 1995; Germany 21 December 1989, 1 January 1991; Ghana 11 April 1980; Greece 12 January 1998, 1 February 1999; Guinea 23 January 1991, 1 February 1992; Honduras 10 October 2002, 1 November 2003; Hungary 16 June 1983,

The CISG is intended to supersede the Uniform Laws on International Sales as adopted at The Hague in 1964. However, the CISG carries a similar objective to its two predecessors. The primary objective of the CISG is to establish uniform rules governing commercial contracts for the sale of goods between different states.[64] It aims to accomplish this objective by creating legal rules that foster international trade and contribute to the removal of legal barriers. The CISG therefore completes the work of The Hague Conventions by creating substantive uniform rules, which govern international trade contracts.

2.4 Conclusion

In culmination, it is apparent from the historic development of the CISG that the drafters of the Convention were committed to developing a Code that would be of use to the commercial community. Extensive research went into the drafting of the Code regarding contemporary legal systems and current trade customs and usage. In addition, broad participation was encouraged to ensure that a comprehensive piece of law was compiled, which fostered the interests of socialist and capitalist, western and non-western, developed and developing countries alike. The Convention is available in the six official languages of the United Nations, plus certain unofficial translations

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1 January 1988; Iceland 10 May 2001, 1 June 2002; Iraq 5 March 1990, 1 April 1991; Israel 22 January 2002, 1 February 2003; Italy 11 December 1986, 1 January 1988; Japan 1 July 2008, 1 August 2009; Kyrgyzstan 11 May 1999, 1 June 2000; Latvia 31 July 1997, 1 August 1998; Lesotho 18 June 1981, 1 January 1988; Liberia 16 September 2005, 1 October 2006; Lithuania 18 January 1995, 1 February 1996; Luxembourg 30 January 1997, 1 February 1998; Mauritania 20 August 1999, 1 September 2000; Mexico 29 December 1987, 1 January 1989; Moldova 13 October 1994, 1 November 1995; Mongolia 31 December 1997, 1 January 1999; Montenegro 23 October 2006, 3 June 2006; Netherlands 13 December 1990, 1 January 1992; New Zealand 22 September 1994, 1 October 1995; Norway 20 July 1988, 1 August 1989; Paraguay 13 January 2006, 1 February 2007; Peru 25 March 1999, 1 April 2000; Poland 19 May 1995, 1 June 1996; Republic of Korea 17 February 2004, 1 March 2005; Romania 22 May 1991, 1 June 1992; Russian Federation 16 August 1990, 1 September 1991; Saint Vincent and the Grenadines 12 September 2000, 1 October 2001; Serbia 12 March 2001, 27 April 1992; Singapore 16 February 1995, 1 March 1996; Slovakia 28 May 1993, 1 January 1993; Slovenia 7 January 1994, 25 June 1991; Spain 24 July 1990, 1 August 1991; Sweden 15 December 1987, 1 January 1989; Switzerland 21 February 1990, 1 March 1991; Syrian Arab Republic 19 October 1982, 1 January 1988; The former Yugoslav Republic of Macedonia 22 November 2006 17 November 1991; Uganda 12 February 1992, 1 March 1993; Ukraine 3 January 1990, 1 February 1991; United States of America 11 December 1986, 1 January 1988; Uruguay 25 January 1999, 1 February 2000; Uzbekistan 27 November 1996, 1 December 1997; Venezuela (Bolivarian Republic of) 28 September 1981; Zambia 6 June 1986, 1 January 1988. Ghana and Venezuela have each signed, but have yet to officially ratify the CISG. http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (accessed 15 November 2008).

such as German and Italian.[65] Due to these efforts, the CISG stands in an auspicious position to achieving its objective of unification in international trade law.

However, it requires more than a fairly composed Convention to achieve unification. In order for the CISG to succeed it must gain the support of states across the globe. Large numbers of ratifications are required to create a credible state of unification. It is paramount to the success of the CISG that strong trading States ratify the Convention to influence the rest of the world's States. This has been achieved despite the failure of the United Kingdom to ratify the CISG. Due to the fact that dominant trading states have ratified the Convention, it is thus necessary to consider the reasons for and against ratifying this Convention so as to determine whether it would be in the interests of South Africa to join the growing number of signatory states.

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[64] Ahmad Azzouni "The adoption of the 1980 Convention on the International Sale of Goods by the United Kingdom" http:www.cisg.law.pace.edu/cisg/biblio/azzouni.html (accessed 3 April 2008).

[65] The six official languages in which translations of the CISG can be found are: Arabic, English, French, Spanish, Chinese, and Russian. See http://cisgw3.law.pace.edu/cisg/cisgintro.html; Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". Rosett discovered however that it is very difficult to find non-English UN materials, at even the largest law libraries in the USA, when attempting to locate a French translation of the CISG. Several UN depository libraries in the western United States were unable to provide the French text, nor was the Convention text carried on the French Journal Official service of LEXIS, although France has ratified the Convention. The UCLA Research Library attempted to borrow the text from the United Nations Library at headquarters in New York, but that library was unable to locate a French text. A French text was eventually obtained by mail from the UNCITRAL library in Vienna. One wonders what obstacles will be faced when attempting to locate texts in the less spoken languages such as Arabic or Chinese. Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods"

Chapter Three

Reasons For and Against the Adoption of the CISG in South Africa: a Comparative Analysis with the United Kingdom and Germany

3.1 Introduction

Many scholars have written about the CISG since it was formally adopted in 1980. Certain research is critical of the CISG and suggests that it is unsuccessful in achieving its objectives.[66] Other academics have however arrived at a different conclusion and strongly suggest that the CISG is a success in achieving a unified international sales law.[67] Various reasons have been put forward in support of both views. It will be necessary to discuss these opposing conclusions and the research supporting each because before South Africa decides to ratify the CISG it will be necessary first to consider the arguments put forward by other States. A possible hurdle requiring investigation is the compatibility of the CISG with South African domestic law. Numerous States have dealt with clashes between the CISG and their domestic law in the process of deciding whether to ratify the Convention. The experiences of these foreign States serve as a useful guide when trying to assess the specific challenges that exist in South Africa concerning the adoption of the CISG. The United Kingdom is an example of a State that has for a long time steadfastly refused to ratify the CISG.[68] It will be interesting to consider the reasons for this stance. On the other hand, Germany has adopted the CISG and has implemented domestic law reforms using the Convention as a model. South Africa may also benefit from considering the reasons for Germany's favourable position toward the CISG. While foreign authors have explored the advantages and disadvantages of adopting the CISG in foreign States, Eiselen has composed a comprehensive piece of work on the

[66] Rosett "CISG Laid Bare: A Lucid Guide to a Muddy Code".

matter, which is tailored for the South African context. This chapter will highlight the salient points made by Eiselen and provide a comment on his findings. Additional authors will be referred to in relation to the discussion of Eiselen's work. While it is never prudent to rely heavily on a single author, this area has not been addressed by many South African authorities. Eiselen's work presents an objective argument, without which this study would be incomplete.

It is necessary first to consider the suitability of the CISG to the South African climate. Thereafter reference will be made to the position in the United Kingdom and in Germany for comparative purposes.

3.2 South Africa

Eiselen has divided the reasons for and against the adoption of the CISG principally into three categories. These are legal reasons; business or trade related reasons; and policy reasons. These categories of reasons have been utilised by Eiselen in arguing the case for the CISG. The analysis of these categories will provide a comprehensive perspective from which a balanced conclusion can be reached regarding whether or not South Africa should adopt the CISG. Firstly the reasons in favour of adopting the CISG will be explored and thereafter the reasons against adoption will be investigated.

3.3 The Case for Adoption

3.3.1 Legal Reasons

Eiselen has provided seven subheadings under this category. Each of these subheadings will be looked at in turn so as to attain a complete picture of the legal reasons argued in favour of adoption.

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[67] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa"; Angelo Forte "The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom" *University of Baltimore Law Review* (Summer 1997) 51-66.

[68] This position has now changed, but this will be investigated below.

3.3.1.1 The Nature of the Rules and their Consequences

The drafters of any domestic law have an onerous duty to write a law that is simple enough to be understood yet intricate enough to cover a range of circumstances and have fair consequences when applied. International law drafters are faced with the same burden, except the need for simplicity, fairness, and wide application is even greater.

To be truly successful drafters have to create a law that is sufficiently basic to be understood, equitable and fair to all participants, certain in its application, and consistently applied in like cases. [69] However, these principles often lead to uncertain results because they are not as compatible as one would hope.

The only answer is to attempt to reach a balance between these principles. There is a heightened need for such a balance in the international trade arena by virtue of the pre-existing complexity of such a legal environment. In international trade the applicable law to any contract is left to the dictates of private international law or to the individual strength of the parties involved and thus the dominant party can force its domestic law onto the contract. The complexity of this situation would be greatly reduced through the uniform application of a single body of law. The CISG eliminates the problem by presenting a single body of law. In addition, the CISG has been created with international trade in mind and has taken trade usage and commercial practice into consideration.[70] Therefore it provides a compact solution to many of the complexities innate in international trade contracts.[71]

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[69] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" (1999) 116 *SALJ* 323 at 337. Eiselen explains this matter as follows:

> "These three principles, simplicity, fairness, and certainty and consistency, often lead to conflicting results. If rules are very simple, they will often not be fair in all circumstances and may not be certain. If they are flexible, they may be fairer, but there will be a great deal of uncertainty about their application. If they try to provide a fair result for every situation, they are bound to be very complex and difficult to comply with."

[70] KC Sutton "The Draft Convention on International Sale of Goods (Part II)" (1977) 24 *Business LR* 119ff.

[71] K Sono "UNCITRAL and the Vienna Sales Convention" (1984) 18 *International Lawyer* 7 at 13.

As mentioned in the previous chapter, there were many participating States involved in the drafting process of the CISG. This not only provided a balanced socio-economic and political input, it further ensured that a balanced outlook was achieved regarding the structuring of the rights and duties of both the buyer and the seller.[72] The CISG therefore provides a fair distribution of rights, duties, and risks among the contracting parties. In this respect the CISG has avoided the criticisms previously brought against ULIS and ULF of being overly complex and unnecessarily nebulous.[73] Unfortunately, wherever something is subject to negotiations, concessions have to be made. Simple articles were generated, but at the expense of legal certainty.[74]

3.3.1.2 Conformity of Interpretation and Application

The greatest challenge to the success of the CISG is ensuring the consistency of interpretation and application by the courts in the signatory states.[75] The challenge lies in that the style of the CISG is that of a civil-law code.[76] Many signatory States are steeped in the legal tradition of the more specifically formulated Anglo-American style legislation. In addition, the interpretation methodology in civil law and Anglo-American law differs and may lead to incompatible interpretations of the same text.[77] To be successful in achieving its primary objective of creating a unified international sales law, the CISG will have to be interpreted uniformly.

Based on cases emerging from various States, it would appear that courts are striving to apply and interpret the CISG in a consistent manner.[78] While there have been

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[72] Eiselen 1999 *SALJ* 338.
[73] EP Mendes "The UN Sales Convention & Canada Transactions: Enticing the World's Largest Trading Block to Do Business Under a Global Sales Law" (1988) 8 *Journal of Law & Commerce* 114 at 121; P Winship "The New Legal Regime for International Sales Contracts" (1988) 2 *Review of International Business Law* 108.
[74] For example, the remedy of specific performance was a concession between civil law and common law States. The provision is simple and understandable, but lacks legal certainty.
[75] Eiselen 1999 *SALJ* 338.
[76] The CISG contains generalised rules, unlike the precise nature of the Anglo-American style of drafting.
[77] VS Cook "The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods" 1988 *Univ of Pittsburg LR* 217.
[78] LF Del Duca and Patrick Del Duca "Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders Part I (1995) 27 Convention on International Sale of Goods (CISG): A primer for Attorneys and International Traders Part II" (1996) 29 *Uniform Commercial Code LF* 99-158.

inconsistent judgments, they are isolated cases and form an exception to the general harmonious movement.[79] Eiselen reassures readers that:

> "Lack of uniformity in legal decisions is nothing exceptional and in the present context should not be a source of concern unless it becomes too widespread and no pattern emerges that supports the general trend towards unification."[80]

Inconsistent judgments emanate from domestic legal systems throughout the world. They are not inherently an indication of the failure of the legal regime in question, but are generally viewed as isolated cases. Usually higher standing courts overturn these cases and their reign of confusion is short lived. While there is no international hierarchy of courts[81] that can overturn incorrect decisions founded upon the CISG, the weight of opinion found in other cases should override these incorrect decisions.[82] The world will continue to observe isolated divergent decisions based on the CISG, but the majority of cases appear to be in conformity with one another.

Based on the cases heard to date it appears that both the civil-law States and the common-law States are producing conforming decisions, despite their differing legal approaches. The common-law States appear to utilise their interpretation tools, such as interpreting general rules or principles and applying them to facts, adequately in order to obtain sound decisions. While, the failure of civil-law courts to abide by the *stare desisis* doctrine has not prevented such courts from paying adequate attention to the cases already decided.[83] In addition to the excellent initiative taken by courts to reach conformity there are many commentaries on the CISG, which are aimed at

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[79] LM Ryan "The Convention on Contracts for the International Sale of Goods: Divergent Interpretations" (1995) 4 *Tulane Journal of International & Comparative Law* 100. Ryan mentions that varying interpretations are being evidenced in case law. She fails however to draw reference to any such cases.
[80] Eiselen 1999 *SALJ* 341.
[81] There may be a strong argument in favour of States surrendering individual sovereignty and submitting to an International Court of International Trade. Precedent for such a move can be found in the establishment of the European Court of Justice. Parties could then appeal from the domestic courts to an International Court. This court could then overturn or reinforce the decision of the court *a quo*.
[82] This argument will only prove viable if courts have regard to the decisions reached by other States.
[83] EH Patterson "United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination" (1986) 22 *Stanford Journal of International Law* 263 at 282.

producing a unified interpretation.[84] The growing body of case law on the CISG also provides a method whereby courts can appraise themselves of all the relevant information regarding a similar matter before making their decision.[85]

3.3.1.3 The CISG becomes Domestic Law

Upon accession the CISG is incorporated into the domestic law of the acceding State.[86] The benefit of this position is that parties to a dispute, and their legal representation, need not contend with foreign law with which they are not accustomed. This makes it easier for litigating parties to resolve their disputes faster because they are not held back by confusing foreign law. In addition, jurisdiction debates will be negated by the fact that the same law will apply irrespective of where the case is heard; the CISG will be a part of the domestic law of both contracting signatory States.[87]

At present South African courts and legal practitioners are regularly faced with the need to understand and apply foreign law when dealing with international sale contracts. If South Africa were to adopt the CISG the choice of law rules that normally operate within international trade transactions would be excluded for all transactions where the other party is domiciled in a State that has also adopted the CISG. In such instances a court need not squander time considering which law is to be applied to the dispute. This removes the need to prove foreign law in court and means that relevant information on the law can be introduced during argument. The court would also be compelled to take judicial notice of the law and may take into account any relevant material that it chooses.[88] The court is hence not bound by section 1 of the Law of Evidence Amendment Act[89], which only permits courts to take judicial notice under certain circumstances when applying foreign law.

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[84] Patterson 1986 *Stanford Journal of International Law* 278-279.
[85] MJ Bonell and F Liguori "The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law" 2 *Uniform L. Rev*. 359 (1997) at 374-375.
[86] It enjoys the same status as any other municipal or domestic law within that State.
[87] M Kabik "Through the Looking-Glass; International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods" (1992) 9 *International Tax & Business Lawyer* 409.
[88] E von Caemmerer "Intenrationale Vereinheitlichung des Kaufrechts" (1981) 77 *Schweizinsche Juristen Zeitung* 259 at 260.
[89] Act 45 of 1988.

3.3.1.4 The CISG is already applied to South Africa

One of the strongest motivating factors to signing the CISG is that the Convention may already be applicable to many of South Africa's international trade contracts.[90] Article 1(1)(b) of the CISG states that where the rules of private international law lead to the application of the law of a State, which is a signatory of the CISG, the Convention will be applicable to the contract. The CISG will be applicable even if the other party is not a signatory, unless the parties have specifically excluded the application of the Convention under article 6.

It is therefore evident that South African parties already have to consider the presence of the CISG in their negotiations and standard form contracts. The general apprehension is that many traders in South Africa may be unaware of the CISG or its impact on a contract because it is not formally part of South African law. It is hoped that if the CISG is adopted more traders will be forced to educate themselves on its consequences and thus prevent themselves from being caught unprepared in the future.

3.3.1.5 Positive Development to the Law of Sale

The South African law of sale has been developed incrementally to meet the demands of domestic sales. It is not specifically adapted for international sales and embodies many outdated rules, which are not conducive to healthy participation in the contemporary international commercial climate. In contrast, the CISG was specifically formulated with modern international trade transactions in mind. The drafters not only relied on incremental domestic development, but amalgamated various aspects of sales law from across the globe. This resulted in the production of a sales law that is moulded for international sales and that is sensitive to global economic practice and usage. It can be argued that the adoption of the CISG into South African law would result in the additional benefit of updating the domestic law

[90] Eiselen 1999 *SALJ* 341; D Webb "A New Set of Rules for International Sale" (1995) 71 *New Zealand LF* 87. This same principle applies to the United Kingdom and any other State that has not yet ratified the CISG, but who trades with signatory States.

of sale.[91] The CISG contains certain unfamiliar principles that are not found in South African law. These new concepts are not completely unknown however to South African law.[92] This topic will be discussed in Chapter Four.

3.3.1.6 Legal Certainty for International Sales

The main apprehension when engaging in international trade is the fear of disputes. The international arena poses the problem of a multiplicity of foreign laws with which a trader would have to interact in the case of a legal dispute. The CISG presents a solution to this problem. The benefit is in that parties to a dispute are not faced with unfamiliar foreign laws and can focus proceedings on the facts of the case.[93] The CISG is becoming a well-known piece of law and is in everyday use in many States. There is also an ever-growing body of case law and legal commentaries on the articles contained in the Code. The adoption of the CISG would open South African courts to the foreign precedents decided upon by the courts of other signatory States. This would be good material, of persuasive value, for South African courts. Therefore, the adoption of the CISG would result in greater legal certainty in South Africa regarding international trade matters.

The CISG has been criticised for being too uncertain due to containing provisions such as: "a reasonable time after the conclusion of the contract" and "unless the circumstances indicate otherwise".[94] These articles have been phrased in very vague terms to foster flexibility. It is the responsibility of the court in to apply the provisions in a befitting manner, given the circumstances of the dispute. Uncertain terms are often present in laws. The CISG cannot be fair and flexible without such

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[91] Eiselen 1999 *SALJ* 342. South Africa would not be the first country in the world to look to the CISG to modernise their law. Many Scandinavian countries looked to the CISG as a model law when revising their own domestic law.

[92] C Ng'ong'ola "The Vienna Sales Convention of 1980 in the Southern African Legal Environment: Formation of the Contract of Sale" (1992) 4 *African Journal of International & Comparative Law (RADIC)* 853. South African law has its roots in Roman-Dutch law and is strongly influenced by English law. It therefore boasts a rich variety of legal concepts, which can be matched to those in the CISG.

[93] Rosett argues that despite this a great deal of uncertainty persists. His argument has not been born out in practice. Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" (1984) 45 Ohio State LJ 265 at 270.

[94] Article 33 (c) and Article 18 (2). It is interesting to note that the latest draft of the UCP has removed all references to the "reasonable" criterion for conduct etc. This was due to the differing interpretations of what constitutes reasonable conduct.

uncertainties. Having said this, the CISG is composed in such a manner as to foster a fair balance between certainty and flexibility and thus, it cannot be said that the CISG jeopardises legal certainty through the presence of such wording.[95]

South African lawyers have at their disposal commentaries on the CISG, available in various languages spoken in South Africa. In addition, the cases adjudicated upon the CISG are available in English from UNCITRAL and in UNILEX. Another source available to South African lawyers is the Internet page hosted by the Pace University Law School, which houses references to various works published on the CISG.[96] There is thus a great deal of contemporary information that is easily accessible to aid interpretation and application of the CISG. This in turn fosters an environment of legal certainty.[97]

3.3.1.7 Popularity of the CISG

The CISG has proven popular in practice, with some of the world's most influential trading States having ratified it. While it is true that popularity is not synonymous with success, the wide acceptance of the CISG makes it the predominant legal platform for international trade transactions. For this reason more and more States will have to pay attention to the Code to trade efficiently with States that have ratified the CISG. Large organisations such as the American Association of Exporters and Importers, the National Foreign Trade Council, and the American National Association of Manufactures have endorsed the Convention. In Canada the CISG is firmly supported by the Canadian Manufacturers Association. In both of these States the CISG is supported by the leading legal professional bodies; the American Bar Association and the Canadian Bar Association.[98]

In practice the CISG is producing an ever-growing body of case law. This is not a symptom of a poorly drafted convention, but rather indicates the extent to which the

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[95] RM Lavers "To Use, or Not to Use" 1993 *International Business Lawyer* 10 at 10-11.
[96] Found at http://cisgw3.law.pace.edu/. See also the following websites: Law School of the University of Tromsø (International Trade Law Project) http://itl.irv.uit.no/tradelaw/ ; the ICC at http://www.iccwbo.org/; UNCITRAL at http://www.un.or.at/uncitral/; and UNIDROIT at http://www.unidroit.org/.
[97] Eiselen 1999 *SALJ* 343.
[98] Eiselen 1999 *SALJ* 344.

Convention is being used in daily trade. The increasing number of cases benefits future interpretation of the Convention by shedding light on the more obscure articles.[99]

3.3.2 Trade Related Reasons

It is not only from a legal perspective that the adoption of the CISG would be beneficial for South Africa. There are also various business or commercial reasons that support the ratification of the CISG.

3.3.2.1 Post-Apartheid re-emergence into International Trade

During the Apartheid era South Africa was subject to various international trade barriers and boycotts. In 1994 South Africa held its first democratic election. South Africa is now free to trade with any trade partner in the world and is no longer barred from international markets.

The CISG has been adopted by the majority of South Africa's most important trading partners.[100] The failure to ratify the CISG has not necessarily had a negative impact on States such as the United Kingdom, Taiwan, and Korea, which have not ratified the CISG, yet retain an important position in international commerce.[101] The reasons for the United Kingdom's failure to ratify will be elaborated upon below.

3.3.2.2 Legal Efficiency

As previously stated the legal environment surrounding international trade contracts is complex. Parties to contracts of sale have to fully acquaint themselves with the foreign legal system of their co-contractor. This time-consuming task is achieved at great expense.[102] While it is effortlessly accomplished by large entities, it presents an obstacle to smaller entities, or to first time traders who lack resources and experience.

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[99] Eiselen 1999 *SALJ* 344.
[100] Eiselen 1999 *SALJ* 345.
[101] On the 1 July 2008 Japan acceded to the CISG. This is an important step in international commerce, especially for the East-Asian States. The CISG should enter into force in Japan on 1 August 2009.
[102] Kabik 1992 *International Tax & Business Lawyer* 409.

The unknown foreign legal environment causes legal uncertainty. It may further result in a trader taking unnecessary business or legal risks as a consequence of not understanding the legal environment in which he/she is operating.[103]

The adoption of the CISG would decrease the time and costs spent on investigating the intricacies of a foreign legal system.[104] The fact is that the CISG is already applicable to South African traders when trading with entities domiciled in a signatory State whose law is applicable to the contract. South African traders should thus already be partially familiar with the scope and application of the CISG.

A further aspect of legal efficiency that would be fostered through the adoption of the CISG is that access to the law would be made easier. Parties to a contract governed by the Code need only look to it to establish rights, duties, and remedies. The CISG presents itself as an easily accessible single body of law, which is written in the language of traders.[105] It is true that the Code does not cover all aspects of international trade agreements.[106] Certain significant issues were omitted to reach a compromise when drafting the Code. These issues are deliberately left to the nuances of the applicable domestic law in question. Instances of issues that are referred to domestic law include the following:

> "Disputes on mistake, capacity, duress, undue influence, liability for precontractual (*sic*) misstatements and conduct *culpa in contrahendo*, the validity of standard terms and conditions, and specific performance."[107]

From this passage it is clear that the CISG does not totally obliterate the complexities surrounding choice of law rules and proof of foreign law in court regarding the listed issues. Case law has revealed that the majority of disputes arise from the breach of contract, the available remedies, or from interpretation of the contract itself. These

[103] Eiselen 1999 *SALJ* 347.
[104] SG Zwart "The New International Law of Sales: A Marriage Between Socialist, Third World, Common Law and Civil Law Principles" (1988) 13 *North Carolina International Law & Commerce Register* 109 at 114. These two factors potentially inhibit litigation.
[105] Zwart 1988 *North Carolina International Law & Commerce Register* 115. The simple language may however be misleading as to the complexity of the legal principles contained therein.
[106] Eiselen 1999 *SALJ* 348.

issues are amply covered by the CISG and therefore the failure of the Code to cover all legal aspects of a contract is not a hindrance to its ratification.

3.3.2.3 Party Freedom to Contract

The CISG has been drafted in such a manner as to allow the maximum level of party autonomy. As a consequence, most of the CISG's articles may be modified or excluded to fit the given transaction.[108] However, the CISG is not without constraints. The Code specifically enforces particular formalities onto the formation of a contract.[109] Where there is a departure from the CISG's required formalities, the CISG will override the contract. In addition, where the contract is silent on a certain necessary point, the CISG will fill in the *lacuna*.[110]

Of great importance to smaller traders is the CISG's balanced approach to the buyer and to the seller. Neither party is favoured by the Code and therefore weaker parties are in a stronger position than what they would normally be in under domestic law. While it is potentially impossible to protect the weak party entirely from the bargaining power of the strong party, the CISG does attempt to distribute rights and duties evenly to level the legal playing field.

An additional benefit is that parties may remedy any shortfall innate in the CISG by contracting around such problem areas in their private contract.[111] Unfortunately stronger parties have also utilised the freedom given under the Code to completely exclude the application of the CISG.[112] On the whole however parties are benefited by the entrenched principle of party autonomy.

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[107] Eiselen 1999 *SALJ* 348.
[108] Article 6.
[109] Part II of the CISG.
[110] Winship 1984 *Uniform Commercial Code LJ* 64-65.
[111] Eiselen 1999 *SALJ* 349.
[112] RG Lee "The UN Convention on Contracts for the International Sale of Goods: OK for the UK?" 1993 *Journal of Business Law* 132.

3.3.2.4 Language Accessibility

When negotiating international trade contracts parties have to overcome the obstacle that arises when parties do not speak a mutual language. The CISG is of assistance in such situations. The text of the CISG is readily available in six official languages.[113] Each translation of the CISG is comprehensive and covers every article of the Code. When translating the Code into these languages the translators endeavoured to exclude phrases that carried connotations that were too closely intertwined with any domestic legal system. The drafters were careful to ensure that the six official translations did not lean toward different interpretations due to the language in which they were written.[114]

3.3.2.5 Aid in Negotiations

The CISG has been written in such a fashion as to make it easy to read and to understand. It is largely free of technical legal language in order that ordinary traders may utilise it. Further the CISG was composed with international trade transactions as its focus and therefore provides a comprehensive checklist, which inexperienced traders may use during negotiations to ensure that all aspects of the pending contract are addressed.[115]

3.3.2.6 Assimilation of International Trade Usage

The drafters of the CISG were careful to consider the prevailing international trade practices and usages when drafting the Code. This was to ensure that valuable practices, developed through experience, were not lost. The CISG is unique in that it combines the legal principles housed in the Incoterms and the Uniform Customs and Practices of the International Chamber of Commerce (UCP) with general trade practices and usages.[116] This is one of the factors that aided the acceptance of the

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[113] Arabic, English, French, Spanish, Chinese, and Russian. The CISG is however available in numerous unofficial languages. See http://cisgw3.law.pace.edu/cisg/cisgintro.html.
[114] Eiselen 1999 *SALJ* 351.
[115] Eiselen 1999 *SALJ* 351; MJ Bonell "The UNIDROIT Principles in Practice: The Experience of the First Two Years" (1997) *Uniform LR* 34 at 38. It would appear that the CISG is being used increasingly in arbitration matters.
[116] Eiselen 1999 *SALJ* 352.

CISG by many influential trading States. It further explains why various large trade organisations support the CISG.[117]

Much controversy surrounded the insertion of trade customs into the CISG between developing and developed States.[118] The developing states argued that trade usage, while familiar to experienced trading states, were unfamiliar to them. The inclusion of such customs would result in developing States being disadvantaged through lack of knowledge regarding the prevailing trade practices. The developed States retorted that the omission of long-established practices would harm international trade by causing confusion and uncertainty. Trade at this point operated largely on the basis of trade customs and therefore to remove them from the central role they held, by omitting them from the Code, would result in traders becoming uncertain of their legal position in a previously well-charted territory.

3.3.2.7 Facilitating Focused Negotiations

The CISG is a balanced Code that provides equal protection and benefits to both contracting parties. It is a neutral document, which may assist parties during negotiations. It could be applied beneficially in every contract unless the particular circumstances require uneven distribution of rights and duties between the parties. [119] By permitting the CISG to govern the contract it enables the parties to focus negotiations on the commercial aspect of their transaction such as: price, delivery dates and manner, and product size and quality specifications. It further removes the controversy over choice of law and reduces the occurrence of the "battle of forms"; whereby the party who sends the last draft of contractual terms during negotiations succeeds in having his/her terms accepted. This fosters a more congenial trading relationship between the parties because unnecessary friction is avoided by relying on the CISG to manage the legal details of the contract. This will result in a more productive trading contract.

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[117] EH Patterson "United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension between Compromise and Domination" (1986) 22 *Stanford Journal of International Law* 263 at 274. E.g. British Telecom (provided they are able to contract out), British Airways.

[118] Zwart 1988 *North Carolina International Law & Commerce Register* 118.

3.3.2.8 Evening the Playing Fields

Due to the neutral position created by the CISG in respect of the rights and duties of the parties, it offers an even playing field for the parties.[120] The respective bargaining powers of the parties are reduced to a certain extent through the application of the CISG to the contract. Parties may compete with one another on the same legal basis, which strengthens competition by reducing the scope for the stronger party to impose unfair terms on the weaker party.[121] Strong competition in turn strengthens the economy of the States to which the parties belong. There is hence a ripple effect created by levelling the playing fields through the application of the CISG.

3.3.3 Policy Reasons

Regularly overriding policy considerations play a predominant role in decision-making. States can no longer truly live in economic, political, or social isolation of one another. For this reason it is important that the South African government consider the social, political, and economic climate in which South Africa operates. It is necessary to consider the ramifications that the decision whether or not to ratify the CISG would have on other African States and the trading world.

3.3.3.1 The development of the CISG

The discussion in Chapter Two elaborated upon the criticisms levelled against ULIS and ULF. One such criticism was that these two Conventions were drafted under the heavy influence of Western European, developed, civil-law States, to the exclusion of non-western European, developing, common-law States. Therefore these

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[119] Eiselen 1999 *SALJ* 352.
[120] EP Mendes "The UN Sales Convention & Canada Transactions: Enticing the World's Largest Trading Block to Do Business Under a Global Sales Law" (1988) 8 *Journal of Law & Commerce* 114 at 126; P Winship "The New Legal Regime for International Sales Contracts" (1988) 2 *Review of International Business Law* 108.
[121] Eiselen 1999 *SALJ* 353. The question arises as to whether the issue of fairness should in fact be considered in commerce. Each party is entitled to drive a hard bargain and to secure the best deal possible. Courts will have to carefully consider the consequences before basing a decision on fairness.

Conventions did not adequately consider the social, political, and economic positions of non-capitalist developing States.[122]

During the Apartheid era South Africa remained an ostracised member of the United Nations. South Africa did not participate in the drafting process of the CISG due to the political environment within South Africa. Despite South Africa's absence from this process, other developing States as well as African States were represented. The concerns that affect South Africa as a developing, common-law State were therefore adequately addressed through the input of other similar States during the drafting process.[123] This should not therefore be a stumbling block to South Africa ratifying the CISG.

3.3.3.2 International Acceptance

The CISG, unlike its forerunners, has received broad acceptance by the States of the world. South Africa relies on international trade for foreign income and has developed trading relationships with States that have ratified the CISG.[124] It may thus be beneficial for South Africa to ratify the CISG to harbour friendly relations with its trading partners. However it can be argued that South Africa has accumulated these trading partners since 1994, despite not having ratified the Convention. It is hence important to consider the future impact that non-ratification may have.

General acceptance by the world should not be the sole reason for South Africa ratifying the CISG. The wide and diverse acceptance of the CISG by the leading trade nations of the world and by major organisations should indicate that the CISG, for better or for worse, is becoming the dominant source of law governing international trade. South Africa can no longer ignore the Convention in the hope that it will not impact trade. The growing number of cases and academic discussions on the CISG means that the Convention is being used in everyday use and that interest in and knowledge of the Convention is growing. The CISG has taken on life and is now

[122] M Ndulo "The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area" (1987) 3 (2) *Lesotho LJ* 127 at 129.
[123] Eiselen 1999 *SALJ* 349.

not only a recognised part of international commerce, but signals to become the ultimate authority governing international trade.

While certain entities deliberately exclude the application of the CISG to their international trade contracts, this is possibly due to ignorance, prejudice, and habit.[125] As the CISG becomes more commonly used and as knowledge about the Convention spreads, so the pattern of trade practice will change too. While a few entities cling to old practices by excluding the application of the Convention, a fresh new generation of traders is emerging who support the application of the CISG.[126] It can be argued that over time the CISG will become the norm and its exclusion will be unthinkable. This shift in international trade is a strong motivating factor for South Africa to incorporate the CISG into domestic law through ratification.

3.3.3.3 South Africa's role in Southern Africa

South Africa is arguably the leading economic power in Southern Africa and as such plays an important leadership role within the region. Neighbouring States may look to South Africa, either openly or surreptitiously, for guidance in economic affairs. South Africa therefore has an obligation to run its national affairs, and influence its neighbours, in such a manner as to boost the national economies in the region. The majority of national economies in Southern Africa are fragile and impoverished. In addition to the weak national economies, the businesses tasked with improving the economies are undercapitalised and inexperienced in the international trade arena. This facilitates exploitation by stronger traders. The majority of States with which developing States trade are experienced developed nations. The stronger party will dictate what law will be applicable to the trade contract.[127] This may result in the applicable law being that of a foreign State. This entails high legal costs and time consuming operations for the African traders to acquaint themselves with foreign law.

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[124] South Africa's main trading partners (the United Kingdom, Germany, Taiwan and the United States) remain important, international trade has become diversified. South Africa has trading relationships with all of the CISG signatory States. Eiselen 1999 *SALJ* 354.
[125] Eiselen 1999 *SALJ* 354; RM Lavers "To Use, or Not to Use" 1993 *International Business Lawyer* 10.
[126] Lavers 1993 *International Business Lawyer* 10. While many enterprises exclude the applicability of the CISG to their sale contracts, this may be attributed to ignorance, unjustified prejudice, and only in limited instances to justifiable objections to the CISG within a particular transaction.
[127] Eiselen 1999 *SALJ* 355.

It would better serve African States if the CISG were ratified.[128] This would mean that the CISG would be applicable to the contract when the other party is also a signatory of the Convention or when the rules of private international law require it. This would create legal certainty, while saving time and costs. Having a unified law that is applicable in international trade contracts would assist developing traders and would remove the barrier that foreign law poses. It would therefore facilitate trade within the region if Southern African States were signatories of the CISG. In turn this would nurture the national economies of African States.

The drafters of the CISG strove to ensure that the interests of developing States were well represented and protected. It is unfortunate that despite these efforts so few developing African States have ratified the Convention. Economic growth in African States will only result from internal efforts. Sustainable economic growth must be achieved and all efforts must be taken to achieve this. The CISG would be a step in the right direction in this regard. It would ensure that experienced and economically powerful trading partners would not be able to exploit the weaker developing States to the extent that has been possible before the ratification of the CISG.[129] As the economic leader in the region, South Africa's ratification of the CISG may clear the path for acceptance by surrounding States.

From a political stance the weight is in favour of ratifying the CISG. Ratification by South Africa could encourage ratification by other Southern African States. This would ensure more equitable trade practices for South Africa and the Southern Africa region.

[128] When trading with African States that have already ratifies the CISG, South African law is considered foreign law. This may have a negative impact on their eagerness to trade with South Africa. If South Africa ratifies the Convention, it may be the persuasion that the other SADC States need in order to ratify themselves. This would then mean that SADC would have one unifying law under which all members are bound. This would facilitate trade, as evident in the European Union, which ahs a harmonised legal system. By ratifying, SADC would gain a unified legal system and South Africa would align itself with other trading countries abroad that have ratified. Thus, killing two birds with one stone.

[129] The Convention is not tilted in favour of developed States, but is balanced to ensure that parties from all sectors of the economic spectrum are protected and catered for.

3.4 The Case Against Adoption

3.4.1 Legal Reasons

As in the case prepared in favour of ratification, there have also been numerous legal reasons lodged against the adoption of the CISG.

3.4.1.1 The CISG – A "Compromised" Legal Failure

The drafters of the CISG were involved in discussions with sixty-two States. This lead to many debates due to conflicting interests. To achieve harmony the drafters chose compromise solutions. Some academics have argued that such compromised unity is in fact a false allusion of unification.[130] The compromised solutions housed in the Convention superficially cover legal conflicts, which continue to exist in practice. Eiselen indicates articles to which the criticism strongly applies. These are: article 28 on specific performance; article 4 on the validity of a contract; article 5 excluding the liability of the seller for any death or injury caused by goods; article 7 regarding good faith; article 9 on custom and trade usage.[131] These articles may result in different interpretations depending upon the State in question. In addition, the failure of the CISG to set out procedural issues may also result in conflicting interpretations.[132] Despite the above, it is thought that the CISG has successfully achieved harmony regarding the most important aspects of trade contracts, such as breach of contract and the remedies.[133] The majority of disputes concern breach of contract, remedies, and the interpretation of the contract. All of these are well catered for in the CISG and should not cause much conflict. With respect to specific performance, it is infrequently relied upon as a remedy in international trade disputes.[134] Therefore, the potential conflict is contained due to the rare use of this remedy in practice.

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[130] Eiselen 1999 *SALJ* 357; MD Evans "Uniform Law: A Bridge too Far?" (1994) 3 *Tulane Journal of International & Comparative Law* 146 at 147.
[131] Eiselen 1999 *SALJ* 357.
[132] Rosett 1984 *Ohio State LJ* 281.
[133] Zwart 1988 *North Carolina International Law & Commerce Register* 125-126. Bar specific performance where uncertainty remains given that the remedy is dependent upon the domestic law of the State who exercises jurisdiction over the dispute.

These assertions however are largely invalid.[135] Although compromises were reached regarding specific issues, it does not impede the success of the CISG in practice.

3.4.1.2 Absence of Legal Principles

Rosett and Wool have accused the CISG of not possessing underlying legal principles upon which its articles and objectives are based.[136] This argument would suggest that the unification process is being driven without specified principles underlying the proposed outcome.[137]

The contention that no underlying legal principles exist has been disproved through the careful analysis the CISG by academics.[138] Specific principles have been found to exist throughout the Convention. Namely: party autonomy, *pacta sunt servanda*, protection of reliance, freedom from formalities, and *favor contractus*.[139]

3.4.1.3 Novel Language in the CISG

The Convention has been criticised for using terminology, which is unfamiliar in the contractual arena.[140] These novel terms are often wide and imprecise in their meaning, which may lead to legal uncertainty. Uncertainty will not however reign indefinitely because meaning is being given to such terminology in the growing body of CISG precedent.

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[134] Eiselen 1999 *SALJ* 357. This is even true of parties emanating from civil-law States.
[135] Rosett 1984 *Ohio State LJ* 270-271.
[136] Rosett refers to the CISG as a 'cut-and-paste' job where the underlying principles and values are a falsehood. See Rosett 1988 *Cornell International LJ* 589. Wool supports Rosett's views. He argues that there is an unacceptable tension between the diplomatic efforts and the commercial objectives of the CISG. J Wool "Rethinking the Notion of Uniformity in the Drafting of International Commercial Law: A Preliminary Proposal for the Development of a Policy-based Unification Model" (1997) 1 *Uniform LR* 46 at 48. See also Rosett 1984 *Ohio State LJ* 289-292.
[137] Eiselen 1999 *SALJ* 356. Such critics have used the 'good faith' principle as an example. They argue that good faith was omitted as an independent requirement for a valid contract because of the unwillingness of Anglo-American parties to have this principle applying to their contracts. Good faith was therefore inserted into the CISG as an interpretative principle, which still causes conflict.
[138] U Magnus "General Principles of UN-Sales Law" 1997 *International Trade & Business Law Annual* 41.
[139] LF Del Duca and P Del Duca 1996 *Uniform Commercial Code LF* 158.
[140] JC Kelso "The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and Battle of Forms" (1983) 21 *Columbia Journal of Transnational Law* 556. E.g. the concept of 'avoidance' (article 49) and the requirement of an 'additional period' in which to perform (article 47).

By using unfamiliar terminology, the drafters were intending to avoid terms that originated from existing legal systems and that would introduce influential political or theoretical connotations.[141] The drafters were aware that new rhetoric would lead to legal uncertainty, but considered it worth the risk if it would result in a Code that was unencumbered by legal baggage from foreign legal systems.

The uncommon wording utilised in the Convention has not lead to insurmountable obstacles and has been utilised to annex interpretations and legal ideas from various national legal systems.[142] This is contrary to the objective of the Convention, but it also disproves the apprehension regarding the potentially perilous consequences of utilising new legal terminology in the Convention.

3.4.1.4 Synthetic Separation of Domestic and International Transactions

Article 1 of the CISG uses the place of business of the parties to determine the sphere of application of the Convention. Rosett suggests that it is increasingly difficult to differentiate between domestic and international transactions because under the modern economic conditions parties often elect to disregard national boundaries.[143] While it seems synthetic, it does not pose an obstacle to the majority of transactions. It clearly applies in instances where two legal systems come into contact. In addition, there are situations where the CISG may be applicable where conflicts rules would not.[144] In such instances parties would be free to elect the application of their domestic law or prove that their mutual unspoken intention was to apply domestic law.[145] Despite the peculiar formulation the present way of determining the CISG's field of application creates certainty and should be respected.

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[141] Eiselen 1999 *SALJ* 359.
[142] Eiselen 1999 *SALJ* 359.
[143] Rosett 1984 *Ohio State LJ* 268, 270-271. Rosett argues that the: "very interconnectedness of domestic and international economies that motivates the effort to harmonize (*sic*) contract law demonstrates that the international transaction often is neither functionally nor definitionally (*sic*) distinct from other sales".
[144] Rosett 1984 *Ohio State LJ* 277-279.

3.4.1.5 Inability to Grow and to Adapt

A key issue regarding all forms of legal codes, whether domestic or international, is that they tend to become static and hamper the growth of law.[146] The CISG does not contain any provisions for alteration or modification. The drafters of the CISG worked carefully to ensure that the most important aspects of international trade contracts were included in the CISG, with the greatest benefit to all parties and States involved. The CISG like all law was drafted against a specific socio-economic backdrop and in a certain era. While it was drafted to meet the needs of the then international trade market, such needs change with the passing of time. Therefore, certain articles in the Code may become redundant or inappropriate. Acceding to such a code may hinder the incremental development of South African sales law.

Domestic codes are capable of being altered when the Legislature decides that such legislation is no longer satisfying the purpose for which it was originally drafted. The number of States that have ratified the CISG poses a problem when it comes to altering its contents. Before the CISG can be altered every ratifying State would have to agree to the proposed changes.[147] If the States do not unanimously accept the changes, it will lead to the Code remaining static or to multiple versions of the Code being in operation simultaneously. This would ultimately destroy the entire purpose of the CISG, which is to unify the world regarding international trade.

Despite this being a real concern, there are factors related to the CISG that frustrate the "frozen" code concern. The indistinct terminology for which the CISG has formerly been criticised provides for continual development.[148] It is through the interpretation given to the Convention by courts and tribunals that it will be adapted to suit changing circumstances.[149] The drafters of the CISG relied upon the experience of courts to interpret and to apply the Code in the spirit in which it was formulated. The spirit of the Convention necessitates, though it does not dictate, that courts take cognisance of what other courts have done in corresponding circumstances to

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[145] Eiselen 1999 *SALJ* 359.
[146] Lee 1993 *Journal of Business Law* 137; Zwart 1988 *North Carolina International Law & Commerce Register* 126-127.
[147] Rosett 1984 *Ohio State LJ* 272.
[148] Evans 1994 *Tulane Journal of International & Comparative Law* 152.

facilitate uniformity in judgments. Courts do not however always regard the decisions of foreign courts and the CISG does not make any provision for the *stare decisis* doctrine. Common-law proponents argue that in the absence of *stare decisis* courts will not pay any consideration to the decisions of other courts. Investigations into established civil-law systems such as Germany and the Netherlands reveal uniformity in court decisions and legal development.[150] To ensure that the CISG does not become petrified, courts around the world will have to develop the Code in a uniform and consistent manner. The record of cases to date is inadequate to determine whether this has been achieved.[151] The future is therefore still uncertain regarding the possibility of the CISG becoming a living code.[152]

3.4.1.6 Multiplicity of Languages and Interpretation Styles

The CISG is available in six official languages.[153] It further employs the use of novel terminology, which may initially lack clear legal definitions in certain instances. These factors may threaten the unity that the CISG strives to create.[154] This concern comes into play when different courts interpret the CISG. It is thought that it would be arduous for courts with different legal cultures and interpretation styles to interpret and apply the Convention uniformly. This problem is exacerbated in that courts are given the responsibility of developing the CISG. If they are unable to reach uniform interpretations and applications, it would appear impossible for the courts to truly develop the CISG.

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[149] Zwart 1988 *North Carolina International Law & Commerce Register* 127.
[150] There is a growing trend for courts to consider the decisions made by foreign courts, in novel circumstances, concerning domestic matters. Comparative analysis is a growing trend in the modern court system. This means that courts are familiar with the process of considering foreign judgments and can thus adopt the same attitude when applying the CISG.
[151] Eiselen 1999 *SALJ* 359.
[152] In the event of the CISG already being out dated, it would be wise for South Africa to tarry in making the decision to ratify. It would be astute to wait and see what the United Nations does next; perhaps there will be a new Convention in the development process shortly. This is especially so given that the CISG does not specifically cater for electronic transactions in its articles. When drafted, electronic commerce was not a world phenomenon as it is today. Therefore, no provision had to be made for it. This is a real concern that will have to be addressed by courts.
[153] Courts only use the six official language versions when interpreting the CISG.
[154] Evans 1994 *Tulane Journal of International & Comparative Law* 150; Patterson 1986 *Stanford Journal of International Law* 278-279.

The problem primarily exists between the traditional style of the English courts and the more liberal civil-law courts.[155] This problem may be solved in respect of the interpretation of international conventions due to the acceptance of the civil-law approach by Anglo-American courts.[156] This is best illustrated by the words of Lord Denning MR in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd*:

> "This art. 23, para 4, is an agreed clause in all international conventions. As such it should be given the same interpretation in all the countries who were parties to the convention. It would be absurd that the courts of England should interpret it differently from the courts of France, or Holland, or Germany. Compensation for loss should be assessed on the same basis, no matter in which country the claim is brought. We must, therefore, put on one side our traditional rules of interpretation. . . . We ought, in interpreting this convention, to adopt the European method. . . . " [157]

Courts are aware of the need to achieve uniform interpretation of the CISG by utilising similar styles of interpretation. The true issue is not whether courts will correctly interpret the Convention to achieve uniformity, but rather whether courts will resist the urge to create interpretations based on familiar concepts in domestic law when confronted with novel cases.[158]

3.4.1.7 Legal Uncertainty

The features that give the CISG flexibility and adaptability also result in legal uncertainty. The wide terms, novel terminology, and absence of comprehensive

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[155] Eiselen 1999 *SALJ* 359.
[156] Rosett 1988 *Cornell International LJ* 586; Mendes 1988 *Journal of Law & Commerce* 125.
[157] Eiselen 1999 *SALJ* 360.
[158] JO Honnold "The Sales Convention in Action - Uniform International Words: Uniform Application?" (1988) 8 *Journal of Law & Commerce* 207 at 208, 211. It would seem that members of the European Union are interpreting and applying their new laws in a fairly uniform manner. Based on this achievement, it can be argued that signatory States should be able to correctly handle the CISG.

definitions results in the CISG failing to provide clarity regarding its meaning.[159] Parties are therefore left to determine, from the presently scant body of law on the CISG, which direction the court may take.[160]

It is necessary and inevitable that the CISG will have a certain amount of legal uncertainty, due to the civil-law nature in which it was drafted.[161] The existence of legal uncertainty is not in issue. What is in issue is the point at which the extent of the uncertainty negates the positive goal of flexibility.[162] The true issue is therefore whether the legal uncertainty displayed in the CISG is within acceptable boundaries to function effectively.

The ULIS and the ULF failed to achieve uniformity. It is through these two ineffective conventions however that the CISG is saved with respect to legal uncertainty. Due to the CISG's two forerunners many of the principles housed in the CISG had already been put into practice in the States where ULIS and ULF were operational. Several decisions were reported and a number of commentaries were published on the two conventions. Through these cases and writings many golden lessons were learnt, which were utilised during the drafting of the CISG.[163] The extent of the legal uncertainty of the CISG is therefore rendered less severe due to ULIS and ULF. The legal uncertainty in the CISG is hence within acceptable limits and does not create an impassable obstacle to the ratification of the Convention.[164]

3.4.2 Trade Related Reasons

3.4.2.1 Unnecessary due to Effective Trade Practices and Standard Contracts

International trade existed before the CISG, ULIS, or ULF were drafted. The business world operated on well-known standard term contracts, which governed all

[159] M Stonberg "Drafting Considerations Under the Convention on Contracts for the International Sale of Goods" (1988) 3 *Florida International LJ* 262; JS Hobhouse "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 *LQR* 531 at 533.
[160] Eiselen 1999 *SALJ* 362.
[161] Lee 1993 *Journal of Business Law* 137.
[162] Eiselen 1999 *SALJ* 362.
[163] Lavers 1993 *International Business Lawyer* 14.
[164] The fact that the Code has survived since 1988 is substantiation that the level of uncertainty contained in its articles is acceptable.

aspects of international trade practice.[165] These standard terms were established and proven reliable over decades of use. They are therefore trusted, while the new regime heralded by the introduction of the CISG was unknown and consequently not trusted by traders. Sceptics argue that there is no need for the unifying endeavours of the CISG because the international trade arena is already unified through the use of reliable standard term contracts.[166] It is true that standard term contracts have proven successful in achieving stability in the international trade market. This is not disputed and there is further no need for the CISG and standard term contracts to be mutually exclusive. Critics have failed to recognise the usefulness of the CISG in situations where standard terms are not used or where they have shown themselves to be inadequate.[167]

Many traders have rendered the CISG redundant by excluding its application and relying on trade practices in their contract.[168] These traders have chosen to rely solely on standard term contracts. This is unfortunate given that the Convention often covers more aspects of trade than the standard terms and trade practices do. Its inclusion in standard contracts could assist when a dispute arises that is outside the bounds of the standard contract. Many disputes may arise over matters that are not covered by standard terms or by trade practices given that every individual contract is accompanied by arguably unique circumstances.[169] It is in relation to these unique circumstances that the CISG would be useful. When parties however elect to exclude the application of the CISG, the individual circumstances of the contract that are not covered by trade practice or standard terms are referred to domestic law.[170] The CISG, trade practices, and standard term contracts should therefore act together to cover every legal eventuality in international trade agreements.

It is also important to remember that when parties are left to govern the standard terms of their contract the party with the stronger economic capacity will exert superior bargaining power to enforce their interests. This situation is not beneficial for

[165] Eiselen 1999 *SALJ* 363. The contractual playing field was not level and the stronger party imposed its terms on the weaker party more easily than under the CISG.
[166] Eiselen 1999 *SALJ* 363.
[167] Eiselen 1999 *SALJ* 363.
[168] Lavers 1993 *International Business Lawyer* 10-11;
[169] Eiselen 1999 *SALJ* 363.

the development of international trade, which requires competitive bargaining. Bargaining can only be competitive when boundaries are established to place parties on a fairly equal standing. This can be ensured to a greater extent through the use of the CISG.

3.4.2.2 Multiple Conventions or Codes lead to Confusion

It is imperative that unifying attempts should aid the simplification of the international trade arena and not add to its already complicated nature. Generally where there are multiple conventions in place attempting to unify the same area it will undoubtedly lead to confusion.[171] However, this is not necessarily the case with international trade law because ULIS and ULF are no longer in active use. While the UCC is often applied to international sale contracts, this option is dependent upon the parties concerned and is not automatically applicable.[172] Therefore the CISG is the only unifying Convention and thus no confusion on the part of traders could arise.

In fact, the CISG dramatically reduces the number of applicable legal systems in any single international trade transaction.[173] If both parties are from States that have ratified the CISG, then no unfamiliar foreign domestic law will have to be contended with in the instance of a dispute arising. This would be of great benefit to South Africa in the event of the government deciding to ratify the CISG. Therefore the CISG does not further complicate the international trade arena, but in fact simplifies it.

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[170] The CISG would replace the need to refer to parties' individual domestic laws. Instead, parties could refer to the terms of the CISG when trade practices and standard term contracts leave a gap.
[171] Eiselen 1999 *SALJ* 363. This is evident concerning the law of the sea, which is controlled by the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules. Multiple bodies of rule lead to uncertainty concerning which would be applicable in any given situation.
[172] Parties would have to elect to apply the UCC to the sale contract. If the UCC is not applied, the domestic law selected by the parties will apply. The CISG will apply automatically to a contract entered into between parties from signatory States. It will be excluded only if expressly agreed upon. Therefore, the CISG and the UCC are not conflicting conventions. Parties will have to deliberately agree to apply the UCC and to exclude the CISG. No confusion could therefore result because the parties would have had to bring their minds to bear upon the matter before entering into the contract.
[173] AM Garro "Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods" (1989) 23 *International Lawyer* 450 at 450-452.

The only point of concern is the ellipses in the CISG to cover all aspects of the contractual relationship.[174] In such instances parties may have to rely on domestic laws. However, as mentioned above, disputes in these circumstances rarely arise in practice and thus the CISG is largely effective in its attempts to simplify international trade contracts.[175]

3.4.3 Political Reasons

3.4.3.1 Imposing a Foreign Solution

The CISG addresses problems that exist within many States. Prior to ratification, States employed domestic solutions to these pre-existing problems.[176] Many States therefore see the CISG as a foreign solution to internal problems.[177] This situation not only causes debate, but also negatively affects national pride. Strong trading States may be offended by the operation of the CISG, which supersedes the domestic laws that previously governed international trade disputes. The CISG may therefore create a second set of rules governing the same problems. In addition, parties should have autonomy to create their own contractual terms according to familiar domestic law and should not be forced into terms dictated by a convention.

While these arguments seem valid in theory, they are not entirely accurate. The CISG has proudly retained the principle of party autonomy in an endeavour to ensure that parties have freedom to negotiate terms on which to contract. The CISG should not be seen as an imposing foreign law because it has shown great respect and deference to party autonomy and thus to national laws represented by those parties.[178] The CISG should be seen as a safety net or reserve law to cover situations that are not included

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[174] Lavers 1993 *International Business Lawyer* 10-11.
[175] Kabik 1992 *International Tax & Business Lawyer* 409.
[176] Rosett "The International Sales Convention: A Dissenting View" (1984) 18 *International Lawyer* 445 at 447. In the United States of America the Uniform Commercial Code governed trade-related problems. The CISG therefore became a second body of law attempting to control the same problems. The CISG will prove useful in situations where the UCP does not apply due to foreign laws involved.
[177] Rosett 1984 *Ohio State LJ* 286, 303-305.
[178] Under the present climate, an obstacle to ratifying the CISG could be that it threatens the distinct African identity. South African, along with the rest of Africa, is attempting to achieve an African Renaissance, where African identity is not compromised. The Code may be perceived as a largely western solution, which is unwelcome.

in the terms of the contract or that are insufficiently addressed.[179] It must be remembered that under article 6 parties may exclude the application of the CISG or may vary most of its provisions in the contract.

3.4.3.2 Unification is Undesirable and Unachievable

Rosett argues that the CISG is a "cut and paste job".[180] He contends that in the drafters' "anxiety to reach an agreement the delegates often buried problems without resolving them, cut off their messy ends, or adopted a verbal formula which hides persistent disagreement".[181] True unification has therefore not been achieved. However, Rosett agrees that his criticism is levelled at the areas that are currently controversial and that produce disputes.[182] Rosett argues that legal unification should only be attempted once efforts have been made to unify the social and judicial contexts within which the CISG operates.[183] He argues that if the social and judicial environments are not aligned courts will not interpret and apply the provisions in a like fashion, thus jeopardising legal unity.[184] However, this argument does not coincide with the successful unifying laws governing international trade to date. Some of these include: the Incoterms, the Uniform Customs and Practice for Documentary Credits,[185] the Hague-Visby Rules, and the Warsaw Convention.[186] These conventions show that unification is possible without initially co-ordinating the social and judicial contexts of ratifying States.[187] The arguable success of the CISG to date is further evidence that unification is achievable in varying environments.

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[179] Eiselen 1999 *SALJ* 364.
[180] Rosett 1988 *Cornell International Law Journal* 589.
[181] Rosett "The International Sales Convention: A dissenting View" (1984) 18 *International Lawyer* 445 at 447.
[182] Rosett 1984 *International Lawyer* 447.
[183] A Rosett "Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law" (1992) 40 *American Journal of Comparative Law* 683 at 287-288.
[184] Rosett 1988 *Cornell International Law Journal* 575.
[185] The UCP, although drafted by a private commercial body and not by the US Government, has been universally accepted and has resulted in very few problems in practice.
[186] The Warsaw Convention has been criticised for being a Code that is dated and difficult to change. See RM Jarvis and MS Straubel "Litigation with a Foreign Flavour: A Comparison of the Warsaw Convention and the Hamburg Rules" (1994) 59 *Journal of Air Law & Commerce* 907ff.
[187] Eiselen 1999 *SALJ* 365.

Rosett failed to identify that harmonisation generally passes through three separate stages. Bruno Zeller has identified these three stages. [188] Firstly, a document must be compiled in which international disputes and issues are brought together. This provides the possibility for a single solution to be suggested. Seldom will consensus be reached and it is therefore often necessary for the "messy ends" to be cut off. Secondly, litigation will be brought on the practical issues arising from the document. Thirdly, the decisions from various courts can be analysed and compared to attain unity. If harmony is reached after the three stages are complete, the unification attempt has been successful. However if disharmony is the result, then the process has been a failure. In the context of the CISG, stage one has been completed. Stage two and three are currently underway. At no point will litigation cease, due to the complex nature of international trade and the unlimited possibility of circumstances attendant upon sale contracts. After sufficient cases have been brought however, one will be able to reasonably analyse the results to determine whether harmony has been achieved. It is apparent that the majority of courts to date have reached harmonious results, with the exception of a few isolated cases.

Kötz has argued that costly unifying attempts merely create a fragmentary result, which constitutes insufficient progress in comparison with the time and expense involved in drafting the Convention.[189] The following paragraph encapsulates his argument:

> "If one takes a closer view, it appears justified to ask whether legal unification, inasmuch as it has legal simplification as a goal, does not find itself in the same position as Heracles, who cuts off the one snakehead of the Hydra, only to be confronted by three others in its place."[190]

[188] B Zeller " The Significance of the Vienna Convention on the International Sale of Goods for the Harmonisation and Transplantation of International Commercial Law" (2006) 17 *STELL LR* 466 AT 470.
[189] Eiselen referring to H Kötz "Rechtsvereinheitlichung-Nutzen, Kosten, Methode, Ziele" (1986) 50 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1 at 3.
[190] Kötz 1986 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 12.

Unifying attempts may create additional problems, but the nature of the CISG and the practical experience to date would suggest that the Convention is different.[191] One additional burden created is that the CISG was drafted at great financial expense and consumed a great deal of time in order to complete. This argument may be valid, but it is aimed at the past. The CISG has been drafted and the expense has been incurred. It would be astute to utilise this Convention as far as possible to gain the most value out of the time and cost put into its drafting and development.

Another critic, Magnus, has succinctly stated that the nature of legal unification means that it will produce a fragmentary result.[192] This should not be viewed as a negative feature. Unification attempts will only be a useful exercise where harmonisation is needed. Where diversity exists within a specific filed of law it will be useful to create unity, but this will take time. It is expected that fragmentary results will be achieved at first due to the diversity of the field. If there were no diversity, there would be no need for unification attempts. Therefore the world should embrace the CISG as a means to create unity in the diverse environment of international trade and should be patient in achieving total unification.

As explored previously, some have argued that unification is an impossible fairytale and cannot be achieved. Kötz clearly contends that any attempt to achieve unification adds to the confusion of international trade by further complicating an already complex arena.[193] The CISG has succeeded in striking a balance in many areas of international trade where there was no uniformity before.[194] It has thereby assisted to simplify the international trade field. The CISG has failed to cover, and therefore to

[191] The unceasing popularity of the Code is evident through the number of ratifications and the number of cases being heard around the world. The CISG is clearly being used in practice and has become a part of the international trade scene. This is in stark contrast the previous unifying attempts, namely ULIS and ULF. The CISG presents a more appealing unifying document, which has been embraced around the world. Fears of the CISG creating additional problems has faded in the face of the soaring acceptance by States and traders alike.
[192] U Magnus "Die allgemeine Grundsätze im UN-Kaufrecht" (1995) 59 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 470 at 471.
[193] Eiselen 1999 *SALJ* 365.
[194] Zwart 1988 *North Carolina International Law & Commerce Register* 115.

create unity in respect of, certain issues.[195] These issues do not however destroy the unification created by the CISG.[196]

3.5 Conclusion

The CISG is undoubtedly growing in stature and acceptance.[197] It is becoming the customary international trade law due to it being ratified by States that contribute and control two thirds of the world trade.[198] Therefore South Africa should pay careful attention to the positive global movement toward the CISG. The CISG is not flawless. It is worded peculiarly in certain instances, contains new legal terms and concepts, and has omitted certain relevant legal aspects of international trade contracts. However, the Code is gaining popularity and the weak elements are being dealt with incrementally by courts and academics alike. South Africa should encourage other SADC States to ratify the CISG so that a legal framework can be built in which to develop trade relations within the area.[199] While the Incoterms and UCP are recognised in South African law it is necessary to add the CISG to the mixture to complete the unification undertaking.[200] The benefits of ratifying the CISG far outweigh the negatives. In the words of Eiselen: " In short, the case for adopting the CISG in South Africa remains strong". [201]

3.6 Comparative Study: Germany and the United Kingdom

It is important to consider the respective positions in Germany and in the United Kingdom given that the United Kingdom has resisted ratification while Germany has embraced the CSIG. It will be useful to investigate the reasons put forward by these two States for their differing positions. From the outset it must be noted however,

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[195] E.g. pre-contractual formalities, passing of ownership, determination of a price, and use of trade usage and custom.
[196] Rosett disagrees with this statement see: Arthur Rosett "The International Sales Convention: A Dissenting View" (1984) 18 *International Lawyer* 445 at 446-447.
[197] LF Del Duca and P Del Duca 1996 *Uniform Commercial Code LF* 157.
[198] Zeller 2006 *STELL LR* 480.
[199] M Ndulo "The United Nations Convention on Contracts for the International Sale of Goods (1980) and the Eastern and Southern African Preferential Trade Area" (1987) 3 (2) *Lesotho LJ* 127 at 151.
[200] Arthur Rosett "UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven" 1997 *Uniform LR* 441 at 449.
[201] S Eiselen "Adopting the Vienna Sales Convention: Reflections Eight Years down the Line" (2007) *SA Merc LJ* 14 at 25.

that the United Kingdom has decided to ratify the CISG, but has not as yet begun the ratification process. Despite the decision to ratify, a clear attitude of ambivalence and apathy lingers in the United Kingdom. The reasons first held out against ratification are evidently still supported, despite the official decision to ratify.

3.6.1 Germany's Decision to Ratify the CISG

The German Parliament accepted the CISG together with the Statute implementing the Convention on 20 April 1989. The CISG entered into force in Germany on the 1 January 1991.[202] Herewith, the CISG became an integral part of German law. A comparison between German law and the CISG on selected matters will be covered below.

Since ratification, Germany has produced the most case law on the CISG out of any of the ratifying States.[203] While certain German Trade Associations have expressed the desire to exclude the CISG, it has been widely accepted in the business and legal community in Germany.[204] Many businesses are not only aware of the CISG, but have studied its provisions to decide what advantages it can offer. This is in contrast to the Hague Conventions, which parties were often advised to exclude from their contracts.[205] The courts in Germany support the wide application of the CISG. Should a party desire to exclude the CISG, they would have to expressly state that they want domestic law to apply. The German courts have had little difficulty in the application of the CISG.[206] This is arguably due to their experience in interpreting the Hague Conventions.[207] The German courts have made vast strides in maintaining the

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[202] A Romein "The Passing of Risk A comparison between the passing of risk under the CISG and German law" http://cisgw3.law.pace.edu/cisg/biblio/romein.html (accessed 9 October 2008). The CISG had entered into force in the former German Democratic Republic on the 1st of March 1990.
[203] MJ Bonell and F Liguori "The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law" 2 *Uniform L. Rev*. 385 (1997) 386.
[204] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". Schlechtriem believes that the desire to exclude the CISG from contracts of sale will be short lived in Germany due to the acceptance of the Code by the German courts.
[205] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[206] M Karollus "Judicial interpretation and Application of the CISG in Germany 1988-1994" http://www.cisg.law.pace.edu/cisg/biblio/karollus.html (accessed 14 October 2008).
[207] It is considered that the German courts have adjudicated over two hundred cases based on the Hague Conventions. Karollus "Judicial interpretation and Application of the CISG in Germany 1988-1994".

separation between the CISG and domestic law.[208] The initial fears that domestic law would colour the interpretation of the CISG have proven false in the German context. Contrary to such apprehensions, the German government has instituted reforms in the Law of Obligations that would align domestic law with the CISG.[209] It is hence clear that Germany has embraced the CISG with an open mind.

3.6.2 The United Kingdom's Approach and Decision not to Ratify the CISG

The United Kingdom has remained aloof regarding the adoption of the CISG for decades since its drafting.[210] The United Kingdom has however finally made a commitment to ratify the CISG in its entirety.[211] It is necessary to discuss the reasons proposed against the adoption and the reasons in favour thereof.[212]

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[208] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". For instance, the German courts have maintained the separation in relation to acceptance of an offer. German law contains different principles regarding confirmation notices than those housed in article 19 of the CISG. According to German law, a party may deliver to the other party a notice appearing to confirm the content of the contract, but which actually differs from the original offer (*Kaufmannisches Bestätigung*). The burden is placed on the other party to refute this conformation, otherwise the content thereof will be regarded as being part of the final contract. Under article 19(1) of the CISG, such a confirmation will constitute a counter-offer. The burden is then also placed on the other original offeror to objects to the altered terms. The German courts have not attempted to embroider these domestic principles into the interpretation of the CISG. Williams argues that such principles may be introduced into the contract as a usage or practice under article 9 of the CISG. Despite this possibility, the decisions handed down by German courts reveal that the application of the CISG is in line with the needs of contemporary international trade.

[209] W Lorenz "Reform of the German Law of Breach of Contract" 1 *Edinburgh L. Rev*. 317 (1995). These laws, under reform, are contained in the German Civil Code, the *Burgerliches Gesetzbuch* (BGB). In 1995 a paper was presented to the Scottish Law Commission on breach of contract and the proposed German reforms. Parties argued that it is not desirable to have two systems of sales law functioning simultaneously within a State, especially if that State engages in international sales. In addition, the German authorities highlighted certain areas where they believe that the solutions offered in the CISG are superior to those offered by German law.

[210] The United Kingdom has not been persuaded to sign even by the fact that the majority of the other Member States of the European Union are signatories.

[211] Department of Trade and Industry, Report to the House of Commons (House of Commons Library, Great Britain, February 1999). The CISG is yet to be ratified.

[212] It is important to bear in mind that the political unit known as the United Kingdom is not governed by a uniform law. Although legislation is often enacted, which applies to both England and Scotland, non-statutory law is territorial in its application and administered by different courts in each jurisdiction. The Common Law, was developed in the English courts, and has been spread abroad to many countries and has formed the foundation of their jurisprudence. Scottish private law has been influenced by the Common Law and, particularly since the Act of Union in 1707, English case-law is often looked to as offering potential solutions that might be useful in Scotland. Scottish courts will not follow a decision of the House of Lords where the Scottish authorities indicate a different and more desirable conclusion (See *Barclays Bank plc. v. O'Brien, [1993] 4 All E.R. 417* (H.L.) and *Mumford & Smith v. Bank of Scotland 1995 S.C.L.R. 839*). Scottish private law has also been influenced by other legal systems. For instance, the law of obligations and the law of sale have been affected by principles derived from Roman Law and from other European legal systems, which have been influenced by Roman Law. Scots law recognises that legal literature may attain "institutional" status and hence may be treated as a source of law. In support thereof Lord Benholme commented in *Drew v. Drew*, (1870) 9

3.6.2.1 The Reasons against Adoption

A number of reasons were put forward as to why the CISG should not be incorporated into English Law. Firstly, the United Kingdom (UK) is unfamiliar with many of the legal principles and rights introduced by the CISG. The UK is unfamiliar with the right to cure after the time fixed for performance, the right to reduce the purchase price when non-conforming goods are delivered, and the concept of a fundamental breach.[213] Secondly, the established Sale of Goods Act 1979 proved very popular in that many contracts elected English law to be the applicable law despite neither party being connected to the UK.[214] The success of the English Commercial Court is renown abroad. In at least fifty percent of the cases before it, one party is not British and in thirty percent neither party is.[215] Thirdly, concern was expressed regarding uniformity in the application of the CISG due to the fact that different courts may interpret and apply the CISG differently.[216] Fourthly, it was feared that many commercial traders would simply opt out of the application of the Convention thus negating the effectiveness of the CISG. Fifthly, the CISG did not present a

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M 163, 167 that: "When on any point of law I find Stair's opinion uncontradicted, I look upon that opinion as ascertaining the law of Scotland." James Dalrymple, Viscount Stair, wrote The Institutions of the Law Of Scotland in 1681. Scots law, therefore, may be thought of as a mixed system of law; principles have been borrowed from the Common Law of England and others have been extracted from the Civil Law tradition. Mixed legal systems can be found in Louisiana, Quebec, and South Africa. It can be argued that all legal systems may be regarded as mixed. The term is however usually utilised to illustrate a system in which both the Common Law and the Civil Law inform the substantive law of the state. The CISG draws on both of these traditions in its provisions. See A Forte "The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom" *University of Baltimore Law Review* (Summer 1997) 51 at 51-52.

[213] The fundamental breach under the CISG must not be confused with the fundamental breach developed in English law in *Photo Productions v Securicor* [1980] AC 827.

[214] B Nicholas "The United Kingdom and the Vienna Sales Convention: another case of splendid isolation" http://www.cnr.it/CRDCS/nicholas.htm (accessed 27 September 2008). In the event of the UK ratifying the CISG, there will be no advantage to selecting English law as the law of the contract because the CISG will apply. One must not forget the commercial reasons behind maintaining the purity of English law. If the UK ratified, there would be no advantage for contracting parties to specify the UK as the judicial forum or English law as the applicable law, because the CISG can be applied in any member State. The legal profession in the UK may lose much of its commercial gains if the CISG was ratified, thus reducing the attractiveness of English law.

[215] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". An extensive amount of arbitration also takes place in London.

[216] It is true that a problem exists in achieving uniform interpretation and application of the CISG. However it is a problem that the UK judiciary have encountered previously in dealing with the interpretation of other conventions. It is a challenge to which solutions have been discovered and implemented. Interpretation of the CISG would therefore pose no greater difficulty for the legal profession in the UK than it already does for their counterparts in other States.

comprehensive code because it does not cover issues such as contractual validity and the passing of property.[217]

These five arguments comprised the main attack against the adoption of the CISG. However, the reluctance to ratify on the part of the UK has come under severe criticism lately. While the UK may feel disturbed about the CISG and the manner in which it is developing, this should become the main reason for ratifying the Convention. Only once the UK has ratified the Convention can the expertise of English lawyers and the English Commercial Court have any influence over the manner in which the CISG is interpreted and applied.[218]

In addition to the above, certain differences in principle are used to argue against ratification. Two central principles underscore the CISG.[219] Firstly, the CISG aims to preserve the contract in the face of breach whenever possible. Secondly, the CISG attempts to fill in the gaps in the law to facilitate commerce. These two principles must be born in mind when considering the other differences between the CISG and English law. One other difference is found in the drafting technique of the CISG.[220] The CISG does not meet the English standards of precision and drafting. The CISG often provides general rules that are to be adapted to suit the parties' needs, while English law asserts concrete solutions to specific problems. This style of drafting,

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[217] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". It is important to note that the Sale of Goods Act is not a comprehensive code either. For example, the formation of a contract and contractual capacity are both regulated by the general law of contract and not by the SOGA. Neither the CISG nor the SOGA provide a completely comprehensive code. Therefore the question can be posed as to why international bodies strive to create a unified code? Annex 1 to the CISG provides an answer to the question:

> "The adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

One may support the CISG primarily on two counts, namely: it provides a set of neutral rules applicable to international contracts for the sale of goods, and it represents a compromise between Common Law and Civil Law principles of sale. The CISG has not attempted to address certain issues, such as the passing of property, on which the gulf between the two juxtaposing traditions is too wide to be bridged. On these points, signatory states will have to resort to the legal principles that they would have had to prior to ratifying the CISG. It would therefore appear that the reluctance on the part of the UK is somewhat unfounded. However it is necessary to consider the UK's position more closely before reaching this conclusion. See Forte *University of Baltimore Law Review* (Summer 1997) 53.

[218] Nicholas "The United Kingdom and the Vienna Sales Convention: another case of splendid isolation".

[219] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom.

which focuses on general principles, permits a more subjective approach to the interpretation of contracts, while the English courts prefer a more objective interpretation.[221] Article 8(3) provides for subjective interpretation, but only when article 8(1) fails to provide a solution.[222] The written agreement will therefore continue to carry the most weight when interpreting the intention of parties.

A second difference lies in the field of documentary sales. Article 9 deals with three situations. Firstly, parties are bound by any usage to which they have agreed and by any practices that they have established between themselves. Secondly, parties are considered to have impliedly made applicable to their contract, or its formation, a usage of which the parties knew, or ought to have known, and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned. The CISG is argued to be ill-designed for documentary sales because it makes little reference to them and fails to attach the same importance to non-conforming documents as the common law.[223] It is believed that the CISG fails to adequately protect standard forms of documentary sales and that article 9 falls short in protecting standard business terms.[224] It must be conceded that the CISG was not meant to provide for all types of contracts or for every class of goods. One should rather focus on the ability of the CISG to detect the true agreement between the parties, identifiable by the inclusion of common trading terms.

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[220] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".

[221] The CISG emphasises justice in the individual case as opposed to the overriding priority of establishing certainty in contracts.

[222] Article 8(1): "For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."

[223] Although the same criticism could be made of the Sale of Goods Act, 1979. Documentary sales are largely governed by the UCP. The CISG need not deal with documentary sales for this reason. In addition, there is very little litigation based on documentary sales. The UCP and the CISG are complimentary Codes, which should operate together. There is no need to have an overlap between the two regarding documentary sales. The CISG can safely leave the regulation of documentary sales to the UCP. Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".

[224] This is not true of ULIS. Article 9(3) of ULIS states: "Where expressions, provisions, or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned." It is feared that if parties do not have an established trading relationship based on these terms they will not be automatically applied as international usages and without specific reference in the contract to the INCOTERMS, the CISG may be applied instead of the common law. This fear appears unfounded. Documentary sales occur world-wide and article 9(1) refers to any usage to which the parties have agreed. Courts would not apply a contrary provision of the CISG if it is clear that the parties wanted to derogate from such a provision. Such derogation could include the use of common trade terms such as c.i.f. or f.o.b.

A third difference lies in the interpretation of the CISG.[225] Article 7(1) requires regard to be had to the international character of the CISG when interpreting its provisions and the need to promote uniformity in its application. The principle of good faith is to be utilised as a guide to interpret the CISG,[226] but does not extend to the performance of the contract.[227] In instances where the CISG does not provide for the issue at hand, article 7(2) states that such matters are: "to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". Therefore English courts will be required to determine the spirit of the CISG by exploring its provisions and will have to refer to other general principles of international trade law.[228] Courts are further expected to take cognisance of decisions handed down by other foreign courts.[229] There is no reason why the English courts will not be able to adjust to this method of interpretation. The House of Lords concluded in *Fothergill v. Monarch Airlines Ltd* that the traditional "plain meaning" approach adopted in interpretation must yield to the more flexible approach adopted by other States, which are parties to the Convention.[230]

In October 1997 the Department of Trade and Industry (DTI) published a consultation document regarding the acceptance of the CISG. The document recognised the increasing acceptance of the CISG. It commented that:

> "...the UK is becoming increasingly isolated within the international trading community in not having ratified the convention. We judge the time is right therefore too consider again whether our international traders

[225] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[226] Article 7(1).
[227] A number of cases have however applied the concept of good faith to the performance of the contract. Namely, *SARL Bri Production "Bonaventure" v. Société Pan African Export* (Cour d'Appel de Grenoble, Ch. Comm.)(Fr.), No. RG 93/3275, UNILEX (22 February 1995); Arbitral Award of the Hungarian Chamber of Commerce and Industry, Court of Arbitration, No. VB/94124, UNILEX (17 November 1995); Arbitral Award of the International Arbitral tribunal of the Bundeskammer der Gewerblichen Wirtschaft (Vienna, Austr.), No. SCH - 4318, UNILEX (15 June 1994); *Renard Constructions (ME) Ltd. v. Minister for Public Works* (N.S.Wales) UNILEX (C.A. 12 March 1992).
[228] The UNIDROIT Principles and the European Principles of Contract law have proved useful in this context on a number of occasions in other jurisdictions.
[229] HM Flechtner "Another CISG Case in the US courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations" (1995) 15 *J. L. & Com.* 127 at 135.

> are at a disadvantage because the UK is not party to the convention and therefore does not have access to a law which was drafted specifically for international sales in the modern world. Ratification would also enable our courts to contribute towards the interpretation and development of the convention, which is taking place at the moment without our participation."[231]

This document called for views on the adoption of the CISG, but sadly received few responses.[232] This indicated the alarming apathy on the part of interested parties toward the CISG. The Law Reform Committee of the Law Society of England and Wales responded with a very negative view and recommended non-ratification.[233] The

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[230] 3 W.L.R. 209 (H.L. 1980).

[231] DTI "United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention): A Consultation Document", 1997, DTI http://www.dti.gov.uk (accessed 27 September 2008).

[232] S Moss "Why the United Kingdom Has Not Ratified the CISG" (2005-06) 25 *Journal of Law and Commerce* 483. The DTI issued 450 consultation documents, but only received thirty-six responses. Out of the thirty-six, twenty-eight supported adoption, while seven were against it. The remaining three responses were uncommitted. In 1989 one thousand five hundred documents were issued. The Institute received only fifty-five responses; twenty-eight in favour, seventeen against, and ten neutral. These responses were not unexpected given the technical nature of the subject and its relatively uncontroversial nature in the UK. One point of concern was that a number of large influential organisations were against ratification. In 1989 this list included ICI, BP, Shell, the CBI and the Commercial Courts Committee. In 1997, the organisations against ratification included BP, the Law Society of England and Wales, and the Commercial Bar Association. Those in favour in 1989 included British Telecom (provided they were able to contract out of it), British Airways, the Law Commission of England and Wales, and British Gas. Some organisations who were in favour of adoption in 1989 changed sides by 1997. Based on the poor responses and the large corporations against ratification, it is not surprising that the Government has not viewed ratification as a high parliamentary priority.

[233] Generally one can identify two strands in their argument against adoption. Firstly, there are differences between the domestic law of sale and the CISG. The Law Reform Committee compiled a report in response to the DTI's statement commenting that:

> "On the merits of the revised uniform law adopted in the 1980 Convention, we do not wish to exaggerate the differences from the provisions of UK law (the Sale of Goods Act). There are, however, certain differences which are not altogether insignificant and we think they are not such as to make the uniform law more attractive to traders than the existing UK law. Moreover they have the inherent disadvantage that even slight changes of wording from that in the Sale of Goods Act result in losing the benefit of the certainty conferred by long-established case law on the interpretation of the Act." Law Reform Committee Report (LRC Report) para 4.

The second argument against adoption is revealed in the Anglo-centric view that English law is the appropriate law for international sale contracts and English courts are the correct forum for dispute resolution. The Law Reform Committee stated that:

> "If the Convention were ratified by the UK and ... came to be widely applied to international sales, with or without a connection with this country, the role of English law in the settlement of international trading matters would obviously be diminished. A consequential effect might well be a reduction in the number of international arbitrations coming to this country." Law Reform Committee Report para 8.

There is misconception that English law is a world trademark and that the UK should not jeopardise that position. World traders often equate England as being the United Kingdom and vice versa. This

Committee conceded that in the event of the CISG being ratified, the UK should make declarations under articles 94 and 95.[234] In terms of article 94 the UK would not apply the CISG to contracts made between a party having its place of business in the UK and one with its place of business in either another contracting State or non-contracting State, as long as both States have the same, or similar, rules to those found in the Convention. Article 95 prevents the application of the CISG as the proper law of a contract under article 1(1)(b).[235] Despite the poor response and the negative recommendations of the Law Reform Committee, the DTI issued another statement in February 1999 stating that the UK is expected to ratify the CISG when there is time available in the legislative programme.[236] The UK does not consider its national

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age-old misconception is evidenced in paragraph eight of the Report above. This view was further expressed in the decision of the House of Lords in *Miliangos v. George Frank (Textiles) Ltd* [1976] A.C. 443. The court held that judgments by English courts could be given in a foreign currency and not only in sterling. The fear was that if this were not permitted England would cease to be an attractive jurisdiction in which to have disputes resolved. Lord Kerr the following observation:

> "Foreigners have confidence in our legal system. But they no longer have confidence in sterling. They can now continue to contract in stabler currencies, but continue to come here for the resolution of their disputes, without the danger of having to accept payment in sterling at a devalued rate."

[234] LRC Report para 10.

[235] Article 1(1)(b) has been described as trap. It makes provision for the CISG to come into play by virtue of the rules of private international law. The CISG may however be excluded by the contracting parties provided it is done within an appropriate time; article 6 of the CISG. Despite this clear provision a fear persists that an unsuspecting businessman will be made subject to the application of the CISG. This fear may be attached to many provisions under domestic law. Legislation in the United Kingdom is not promulgated with a caution attached indicating that it may contain unexpected provisions. It is the responsibility of the party who is drafting a contract for the sale of goods, to use his/her knowledge of the law governing that contract to avoid what could be perilous to him/her. It can be asserted that the true objection to article 1(1)(b) is that it extends the application of the CISG to non-signatory States and could thereby oust English law in connection with certain trade contracts. After ratification, a dispute between an English party and one located in a non-contracting State would still be governed by the CISG if the rules of private international law pointed to English law as the proper law of the contract. Therefore, article 1(1)(b) may operate in favour of the UK and should not be viewed negatively.

[236] Moss *Journal of Law and Commerce* 484. Due to the lengthy parliamentary programme the DTI explored alternative means of achieving ratification, other than the primary legislation route. The other alternative identified was the use of a Regulatory Reform Order (RRO). In order to utilise the RRO route it must be proved that an existing burden in legislation would be removed or reduced. The changes introduced by implementing the CISG would not qualify as the removal of a reduction of a burden under the tests contained in the Regulatory Reform Act. Further, an RRO would apply only to England and Wales, to the exclusion of Scotland and Northern Ireland. Therefore the DTI aborted the RRO route. The DTI has returned to investigating how it might encourage ratification through legislation. In a renewed effort the DTI conducted an informal consultation to gather evidence. Two meetings were hosted: the first for members of the business community and the second for arbitrators and academics. The first meeting revealed that the business community did not consider it necessary to ratify the CISG because they considered English law to be sufficient. The second meeting produced a positive response in favour of ratifying the CISG for the UK to remain a key player in the international trade arena. Unfortunately, both meetings were poorly attended. Therefore, the reflected opinions of the business community, arbitrators and academics are not adequately accurate. Until the majority of those affected by the potential ratification of the CISG submit their opinions, the DTI will be left in the dark regarding the will of the business and the legal community.

economy to be in harms way by its failure to ratify the CISG and thus the CISG has not been thought a high priority.[237] The UK has nevertheless committed itself to ratifying the Convention, but once again shows apathy regarding the timing of such ratification.[238]

The UK is still to make such time available as to adopt the Convention.[239] In the mean while, the CISG is being applied and interpreted by other trading States. Of importance to the UK is that most of the States belonging to the European Union have ratified the CISG as well as the leading world traders such as the United States of America, China, and Japan. Despite not having ratified the CISG, the English courts may have to apply and interpret the CISG due to the fact that parties have selected the

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[237] The Scottish Law Commission released a statement reflecting its approval of the adoption of the CISG in the face of the reluctance on the part of the English Law Commission. It stated that:

> "The Convention offers a modern, internationally agreed set of rules on the formation of certain contracts. These rules now apply very widely in international trade. Given that Scots law has a tradition of being receptive to the best international legal developments, given the obvious advantages for Scottish traders, lawyers and arbiters in having our internal law the same as the law which is now widely applied throughout the world in relation to contracts for the international sale of goods, and given the sensible tradition in Scotland of not having different rules for the formation of contracts of different types, it seemed to us that it would be worth considering whether the more general rules of contract formation in the Vienna Convention could be adopted as part of the general law of Scotland on the formation of contracts... . We reached the ... conclusion that they would form a very satisfactory basis for the internal law of Scotland in this area." *Report on Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (1993), Scot. Law Com. No. 144, para 17.

Scotland cannot ratify the CISG without the support of England. The desire to ratify the CISG in Scotland is clearly motivated by the fact that Scotland is a small jurisdiction and as such its laws, judicial system, and legal profession are predominantly unknown to most foreign businesses. Should Scotland ratify the CISG, and thereby host a neutral system of law, Scotland may become an attractive forum for litigation or arbitration disputes. This would benefit the legal profession in Scotland. South Africa is largely in the same position as Scotland in that it is an unknown legal entity as far as many commercial markets and traders are concerned. Therefore, it is important that South Africa realise the benefits that would ensue from ratifying the CISG, particularly in the field of arbitration.

[238] The UK has decided to ratify the CISG in its entirety without making a declaration like the USA to limit the application of the CISG to other contracting States. Fifteen out of the thirty-five replies to the DTI Consultation Paper in 1997 suggested that the UK model the USA. However, such an approach would indicate that that the UK is not committed to objectives of the CISG. Legal organisations such as the Law Society and the Commercial Bar Association opposed ratification. They agreed however that if the UK did ratify the Convention that no declaration should be made to limit the application of the CISG to contracts with other States, because the act of ratification would make the CISG a part of English law anyway. DTI "United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention): A Consultation Document", 1997, DTI http://www.dti.gov.uk.

[239] After the 1997 consultation the Ministers gave approval for the UK to proceed towards accession. A draft bill was prepared and was intended to be introduced as a Private Member's Bill, rather than a Government Bill. A Private Member's bill is introduced by a Member of Parliament or Peer who has an interest in a particular subject. Unfortunately, the Peer in question fell seriously ill and subsequently passed away. Progress on the bill was consequently stalled and has remained this way due to a lack of resources in the Department.

application of the Convention, or the implementation of private international law requires the application of the law of a party from a ratifying State.[240]

3.6.2.2 The Reasons in Favour of Adoption

The general opinion held by the UK toward the ratification of the CISG has changed.[241] Instead of the CISG being viewed as a poorly drafted code with few benefits, the UK now recognises that it can use the CISG as a vehicle to exert influence over global international trade law. The CISG has the ability to improve the saleability of English law and the English Courts. The success of the English Commercial Court is renown abroad. In at least fifty percent of the cases before it, one party is not British and in thirty percent neither party is.[242] The court is known for its sensible approach and its effective understanding of business concerns. It further boasts the judicial competence of experienced judges. The adoption of the CISG will enable this court to offer legal services based on the Convention, while contributing toward the development and application of the CISG through interpretation.

The main arguments in favour of adoption can be established as follows. Firstly, it has been suggested that instead of ratification negatively affecting the choice of London as a centre for dispute resolution, it will in fact positively impact the number of parties that elect to have their dispute resolved there.[243] The increasing competition for work in the arbitration sector indicates that it is crucial that London offer the full spectrum of legal services offered elsewhere. Secondly, there are a significant number

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[240] South Africa is in the same position; the CISG is being interpreted and applied without South Africa's input. While English law may provide the UK with a competitive advantage over the CISG, due to its popularity and its experience in international trade affairs over the centuries, South Africa cannot boast the same argument. The CISG would be an advantage over South African law, which is unknown to foreign traders and relatively inexperienced concerning international trade law.

[241] It is evident that the UK has a history of hostility toward multilateral conventions, which have ultimately proved very effective internationally. The CISG is no different. The UK will be one of the last large trading countries to ratify it.

[242] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". An extensive amount of arbitration also takes place in London. This aspect of the UK context is both a reason for and against adoption. By ratifying the Code, English courts will be able to offer broader legal services to parties. Simultaneously, by ratifying the CISG, English law loses its international appeal because parties know that the CISG will apply to their contract and not English law as previously. This would have large-scale commercial ramifications on the English legal profession.

of similarities between English sales law and the CISG.[244] The difficulties that do exist, and which will be mentioned below, will not prove impossible to overcome. After ratification by the UK, it should prove possible for parties to agree to the application of the CISG with the choice of English law and the English courts as the forum for dispute resolution, provided legal costs are not prohibitive.[245] Thirdly, if English law is chosen to fill in the aspects not covered by the CISG and English courts are chosen as the forum for dispute resolution, the English courts will persist in upholding the principle of certainty.[246] In doing so the judges of the commercial court will be able to recognise established trade terms, such as f.o.b.[247] and c.i.f.,[248] as prevailing over conflicting provisions in the CISG. Fourthly, after ratification it will be possible for the English courts to contribute toward the development of the CISG and provide precedent on which other States can rely.[249] Fifthly, traders will benefit from the ratification of the CISG. This will be of particular significance to small traders. Small traders lack the bargaining power to enforce their own choice of law, namely English law. The application of the CISG will avoid the problem and expense of litigating under an unfamiliar legal system. The CISG is a neutral law that will further open many potential markets for UK traders, such as the European Union. This argument is primarily focused at small traders because large traders may not require international trade opportunities as much as small traders because they will often have subsidiaries operating in foreign States.

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[243] The Law Society, 1980 Convention of Contracts for the International Sale of Goods, Comments by the Council's Law Reform Committee (April 1981).

[244] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".

[245] It has suggested that the material danger threatening the amount of arbitration cases coming to the UK is the increasing cost of resolving disputes in London.

[246] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".

[247] The acronym f.o.b. stands for 'free on board'. If a sale in made f.o.b., the seller is obliged to bear all expenses relating to the delivery of the goods until they are on board the ship at the port of loading. See *Anderson and Coltman Ltd v Universal Trading Co* 1948 (1) SA 1277 (W); *Chong Sun Wood Products (Pty) Ltd v K & T Trading Ltd and Another* 2001 (2) SA 651 (D) 656H-J. These terms were catered for under article 9(3) of the ULIS that states: "Where expressions, provisions, or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned." The CISG follows ULIS in declining to define any of the trade terms in frequent commercial use. In a f.o.b. or c.i.f. sale the meaning of these terms will determine the transfer of risk. Article 8 expressly binds the parties to a commercial usage on which they have agreed. PM Roth "The Passing of Risk" http://cisgw3.law.pace.edu/cisg/biblio/roth.html (accessed 1 March 2008).

[248] The c.i.f. contract requires the seller to ship and to insure the goods. The buyer is required to pay a price that covers the goods cost, the freight, and the insurance. See *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) 491H.

In 1989 the Department of Trade and Industry published a *Consultative Document*[250] that identified three advantages that accession might bring. Firstly, uniformity in international sales law may be achieved and the Convention's rules would constitute a neutral foundation on which contracts may be created.[251] Secondly, a uniform law may reduce the time-consuming and costly preliminary litigation often required to determine the proper law of a contract.[252] Thirdly, courts and arbitrators in the United Kingdom could benefit from engaging in the resolution of disputes under the CISG and could participate in the development of its jurisprudence.[253] Some of these advantages have been reiterated from above. It is interesting to note that both Law Societies supported ratification together with the Commercial Law Sub-Committee of the City of London Law Society, a body representing the constituency most likely to be affected by accession.[254]

It is apparent that there are numerous economic and political reasons motivating the UK to ratify the CISG. However, there are a number of discrepancies between the remedies provided under the CISG and those under English law, which have to be considered.

3.6.2.3 Differences in the Remedial Schemes under the CISG and English Law

The CISG presents States with a combination of common law and civil law traditions. While the duties under the CISG are similar to those under English law, the remedies

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[249] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[250] Department of Trade Industry, United Nations Convention on Contracts for the International Sale of Goods: A Consultative Document (1989) Part 1.
[251] Department of Trade Industry, United Nations Convention on Contracts for the International Sale of Goods: A Consultative Document (1989) Part 1 para 31.
[252] Department of Trade Industry, United Nations Convention on Contracts for the International Sale of Goods: A Consultative Document (1989) Part 1 para 32.
[253] Department of Trade Industry, United Nations Convention on Contracts for the International Sale of Goods: A Consultative Document (1989) Part 1 para 33.
[254] A vast change in perception has occurred since the earlier attempts by the DTI. Firstly, English commercial law is no longer viewed as the proper law of international trade. Secondly, the experience and impartiality of English judges and arbitrators would ensure that the City of London would remain a center for the resolution of international commercial disputes. It has been realised to a certain degree that this expertise will be harmed unless the UK ratifies the Code. The Sub-Committee however, recommended that the UK make a declaration under article 95.

are not.[255] It is important to focus on the reasons for the differences and whether they can be overcome.

The differences between the remedies provided under the CISG and those under English law stem from two factors. Firstly, the influence of civil law on the CISG has lead to the introduction of new remedies. Secondly, the CISG has been tailored for international trade and takes into account that goods will often be transported over thousands of miles. Rejection by the buyer or failure to deliver by the seller would cause major loss. For this reason the CISG has provided many remedies to discourage the termination of a contact. [256] The differences between the two legal systems are apparent in respect of certain remedies and therefore the remedies in issue will be outlined below for discussion purposes.

Firstly, the remedy of damages of must examined. The principles applicable to the remedy of damages under the CISG are similar to those under English law. The chief difference involves the circumstance under which the contract is avoided. Namely, avoidance where the innocent seller resells the goods or the innocent buyer purchases substitute goods. The CISG states in article 75 that the innocent party may recover as damages the difference between the contract price and the resale, or repurchase, price. Where no substitute transaction occurred the party is entitled to damages as calculated on the market price. In juxtaposition to this concrete method of calculating damages, the provisions of the British Sales of Goods Act (SOGA) 1979 appear rather abstract.

Secondly, it is important to consider the remedy specific performance. Specific performance is catered for in article 28 of the CISG, but may only be granted if the court would have granted the remedy under its domestic law.[257] Therefore it is

[255] For instance, the Seller's obligations under the CISG, regarding the conformity of the goods, are remarkably similar to those under the Sale of Goods Act 1979 (SOGA). A number of established English legal concepts have been discarded, including the distinction between conditions and warranties, and the traditional reliance on damages as the primary remedy.

[256] Parties are only given limited access to the right to avoid the contract for a fundamental breach. In cases where the breach is not fundamental, the parties are offered the possibility of claiming damages, reducing the price for the goods, requiring repair, setting an extra time for performance, or curing any defects.

[257] Article 28. "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."

unlikely that an English court would be compelled under the CISG to grant an order for specific performance. Despite this, an English court will not exclude an order for specific performance merely because the innocent party could have entered a substitute contract.

Thirdly, as an extension of the remedy of specific performance, the right to cure must be considered. The CISG encourages parties to sustain the contract by allowing the breaching party an opportunity to cure his/her breach. This right may even be exercised after the time for performance has passed, provided that it would not cause the innocent buyer unreasonable inconvenience or uncertainty of reimbursement of expenses advanced by the buyer.[258] This is in contrast with the English law, which will be discussed below. The right to cure also applies to defective documents, which the CISG permits to be cured even after the time of performance has expired.[259] Despite this there is no real fear that established trade practices developed in documentary sales will not be upheld in a contract governed by the CISG. In addition, it is arguable that the right to re-tender defective documents exists under English law, up until the time for delivery has passed.[260]

Fourthly, it is necessary to consider the right to grant an extra period of time in which to perform.[261] This concept is known as a *Nachfrist*.[262] The buyer often resorts to such a remedy if he/she is uncertain whether the breach was fundamental. The buyer may still avoid the contract if the seller fails to perform after this extended period with the advantage that he/she will not have to prove that the breach was fundamental.[263] The seller benefits in that he/she has extra time in which to perform with the assurance that the buyer is barred from exercising other rights except for a claim of damages. The seller has a similar right, which he/she may exercise in respect of a

[258] Article 48.
[259] Article 34. If the time stated in the contract for the hand over of documents is after the date of delivery, then it is arguable that the seller may cure any defects in such documents even after the time of delivery.
[260] *Borrowman Phillips & Co v. Free & Hollis* 4 Q.B. 500 (C.A. 1878). This matter has not however been settled in English law.
[261] Article 47.
[262] Literally translated as a 'prolonged deadline'. Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom"
[263] Only in the instance of non-delivery will the lapse of the *nachfrist* give rise to the right to avoid. In other contexts it will not. Namely, in the case of defective goods, the decision to avoid is always based upon whether the breach is fundamental, irrespective of the lapse of the *nachfrist*.

non-performing buyer.[264] This doctrine, housed in articles 47 and 63, resembles the doctrines of waiver and *estoppel* in English law. The buyer being banned from exercising other remedies during the *nachfrist* is equivalent to the buyer being estopped from relying on his/her strict contractual rights as a result of a representation made to the seller.[265] Both the remedy of *nachfrist* and promissory *estoppel* have the effect of suspending enforcement as opposed to cancelling the contract.[266] The main difference between the two is that promissory *estoppel* may only be used as part of an action and not as a cause of action.[267] Therefore it may only be used as a defence. In the case of non-delivery under the CISG, the lapse of the *nachfrist* upgrades the right of the buyer in that he/she may avoid the contract irrespective of whether the breach is fundamental.[268] The *nachfrist* also upgrades the seller's right in the instance of the buyer failing to pay the price or take delivery of goods.[269]

Fifthly, the remedy of price reduction must be considered.[270] Under article 50 of the CISG the buyer may reduce the price payable, or may reclaim the price already paid, together with interest[271] in the event of a breach. This remedy is not available under English law.[272] The advantage of price reduction is that it is a "self-help" remedy.[273] This is also one of the reasons why some States do not approve of it.[274] In many international sale contracts the price will already have been paid and the parties will have to go to court anyway to reclaim a part thereof. Therefore, the chief advantage of this remedy is negated in practice. Most common-law States saw little use for this article at the time of drafting. In the rare case where *force majure* excused the seller from performance, the amount that the buyer had to pay was determinable by

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[264] Article 63.
[265] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[266] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[267] *Coombe v. Coombe* 2 K.B. 215, 219-20 (C.A. 1951).
[268] Article 49 (1)(b).
[269] Article 64(1)(b).
[270] Article 50.
[271] Article 78 permits a party to claim interest on the unpaid price or on any other amount that is in arrears.
[272] This remedy does not appear in the UNIDROIT Principles (PICC) although the remedy of price reduction is available in The Principles of European Contract Law (PECL), article 9.401.
[273] Parties need not go to court, but may solve their dispute privately. This description is not my own, but is borrowed from Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[274] Certain States do not approve of the fact that parties may enforce their own remedies. The fear exists that unjust dealings will triumph.

reference to domestic rules for restitution to avoid unjust enrichment. [275] However, in light of the fact that the CISG is moulded for international contracts it may be prudent to include an article governing this aspect so as to avoid unnecessary recourse to conflicting domestic laws.

3.6.2.4 Other Points on Ratification

It has been noticed that most legal writings that are against ratification in the UK do not consider the development of the CISG in other States.[276] Rather they have focused on the superiority of English law by discussing differences in principle rather than the actual legal provisions of the two legal systems.

In 1990 Lord Hobhouse commented that the sole aim of international conventions, such as the CISG, was to produce "stark uniformity". [277] He argued that such harmony is unachievable due to different approaches in different States. What Lord Hobhouse failed to take cognisance of is that uniformity is an aspiration towards which courts have to strive. The CISG is merely one component of the harmonisation process.[278] It serves its role by providing universally recognised rules, which have to be applied in the international market.[279]

The CISG has had an increasing impact on the international market. No large trading State can afford to ignore it any longer. Lord Steyn stated in the House of Lords that:

> " The international marketplace for the sale of goods has changed. For every transaction in respect of which an English trader is able to insist on English law as the applicable law, there will be one or more where the English trader has to concede the applicability of a

[275] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[276] JS Hobhouse "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 *L. Q. R.* 530.
[277] *Trendtex Trading Corp v. Central Bank of Nigeria* 1 Q.B. 529 at 532 (C.A. 1977).
His comments were undoubtedly mainly aimed at the CISG, which was at that time being considered for ratification following the 1989 Department of Trade and Industry report.
[278] CM Schmitthoff "The Codification of the Law of International Trade" 1985 *J. Bus. L.* 34.
[279] HM Flechtner "Another CISG Case in the US courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations" (1995) 15 *J. L. & Com*. 127 - 138.

> foreign legal system. That is particularly the case with the great many foreign state trading corporations."[280]

In this speech it was further stated that as early as 1995 UNCITRAL had confirmed that over half of the world trade was conducted under the CISG.[281] Since then the number of ratifying states has increased. With the recent ratification by Japan the CISG has been accepted by States who represent the largest trading blocks in the world. Based on this information, the UK's isolationist attitude is of political danger in light of the increasing interdependence of world markets. Isolation during a period when international trade plays such a significant role, not only for economic development but also for political alliance, is unwise.[282]

3.6.2.5 Summary

It appears that at present interest in the CISG is very low across all sectors in the UK. It is proving difficult to convince the English communities that the CISG will be beneficial to trade, despite the obvious benefit displayed in European States. However, should the CISG be ratified it is possible that it will influence principles of domestic sales law, as is evident in other States who have ratified. The effect of this is not to be underestimated as it could influence fundamental principles such as good faith.

3.6.3 Specific Provisions of the CISG Compared with Germany and the UK

3.6.3.1 Price Reduction

Article 35 of the CISG requires the seller to deliver goods that are of the quantity, quality and description of the contract. If he/she does not fulfil this obligation, Article 50 of the CISG permits the buyer to "reduce the price in the same proportion as the

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[280] Lord Steyn, Address to the House of Lords during discussion of the Sale Of Goods (Amendment) Bill (3 May 1995) H.L. Jour. 1457-59.

[281] Lord Steyn, Address to the House of Lords during discussion of the Sale Of Goods (Amendment) Bill (3 May 1995) H.L. Jour. 1457-59. Statistics obtained from the International Monetary Fund indicate that the CISG has been ratified by States who then accounted for two-thirds of world trade. See MP Van Alstine "Dynamic Treaty Interpretation" 146 *U. Pa. L. Rev*. 687 at 689 (1998).

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".[283] This article has a civil law background. The civil law codes of France and Germany contain versions of the *actio quanti minoris* of Roman law,[284] however the right to reduce the price of defective goods is unknown in the common-law tradition.[285] Article 50 has the same *ratio legis* as the provisions of the German Civil Code, upon which it was modelled.[286] In terms of this article the buyer may retain non-conforming goods while bringing the contract in line with the altered circumstances by reducing the purchase price in proportion to the non-conformity.

Price reduction may be used as an alternative to damages. In the case of *force majeure* a party may excuse the failure to perform under article 79(1) of the CISG.[287] The buyer may elect to reject the goods and avoid the contract, despite the *force majeure*, if the breach is fundamental. However in the event of the buyer selecting to retain the goods, he/she is barred from claiming damages under article 45(1)(b). Price reduction will be the buyer's only remedy.

Secondly, in the case where goods delivered are defective, but the market price of conforming goods has substantially decreased between the time of contracting and the time of delivery, the buyer should elect to reduce the price as opposed to claiming damages. Should the buyer elect to retain the defective goods, he/she has two remedial options. Firstly, the buyer may claim damages under article 45(1)(b) of the CISG, which will be calculated in terms of article 74 and will be a sum equal to the loss suffered as a consequence of the breach. This would be the difference between the value of the defective goods and the market price. Secondly, the buyer may also

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[282] One need only consider the European Union to realise the political and the economic significance of international trade alliances.
[283] Article 50 stems from a civil law tradition.
[284] 4 THE DIGEST OF JUSTINIAN bk. 44, tit. 2, fragment 25, para. 1, at 626.
[285] Some of the common law States have confused this remedy with the right to deduct damages from the price as seen in section 2-717 of the Uniform Commercial Code (UCC) or section 53(1)(a) of the SOGA. However, the right to reduce the price is a separate remedy to that of damages and the right to set-off because it does not have anything to do with compensation for an actual loss suffered by the buyer.
[286] Paragraphs 462 and 472 of the Bürgerliches Gesetzbuch (BGB).
[287] For example, if in a sale of perishable goods the seller cannot perform due to an impediment beyond his/her control, which prevented him/her from performing in due time, the goods may at the time of delivery no longer have the quality required by the contract. In situations like this, the seller is protected under article 79(1) of the CISG.

reduce the price according to article 50. Usually the buyer will receive more under price reduction than under damages.

3.6.3.1.1 Comparison with German Law

Although article 50 of the CISG stems from German law, the corresponding provision under German law does not serve the same function as price reduction under the CISG. Under German law the buyer may choose from a number of remedies. He/she may retain the goods and reduce the price or discharge the contract and reclaim the purchase price paid. However under paragraphs 463 and 480(2) of the BGB the buyer may only claim damages if the seller has given an express warranty or is guilty of fraudulent concealment of a defect. Thus, it is difficult to claim damages under German sales law and hence the price reduction remedy is valuable for those buyers who elect not to reject the defective goods. Even if such buyers cannot claim damages, they may obtain relief through reducing the price. Under the CISG the price reduction remedy is of limited importance because damages are available for every breach on a no-fault basis.[288] In addition, buyers often prefer damages to price reduction because they usually recover a higher amount under damages. However, in certain instances the remedy of price reduction is necessary and more appropriate than damages.

3.6.3.1.2 Comparison with English Law

English law does not recognise the remedy of price reduction. However, SOGA contains two provisions that are utilised to reach a similar result to article 50 of the CISG. These are quantitative defective performance and qualitative defective performance.

Firstly, under articles 35(1) and 50 of the CISG the buyer may reduce the price if defective goods are delivered or in the event of short-delivery. In comparison article 30(1) of SOGA states that if the buyer accepts delivery of a quantity of goods less that what was contracted for, he/she must pay for them at the contract rate. Thus the buyer

[288] Article 45(1)(b).

may also elect whether he/she wants to reject the goods or purchase them at a proportionately reduced price. The manner of calculating the reduction differs under the CISG and the SOGA. The SOGA fails to refer to the actual value of the goods, but rather refers to the contract rate. Despite this, both provisions will lead to the same result, unless parties set a contract price that did not correspond with the actual market value of the goods.

Secondly, the buyer will be permitted to deduct damages from the price for a defect in the quality of the goods in terms of section 53(1)(a) of SOGA. Despite the similarity between this remedy and price reduction, there are numerous differences. SOGA does not confer a right on the buyer whereby he/she may reduce the price payable, but simply permits him/her to set up a warranty entitlement against a seller who is suing for the price. The buyer may thus not bring the contract in line with the altered circumstances on his/her own, but must resort to a court. The method of calculation under section 53(1)(a) of SOGA also differs from that under article 50 of the CISG. SOGA does not allow proportionate reduction of the price, but rather allows damages to be deducted from the price. Further, the buyer may only resort to set-off if he/she has suffered loss and is thereby entitled to damages.[289] Soga further states that the buyer's loss equals the difference between the value of the goods delivered and the market price. Therefore setting up a warranty entitlement against the seller's action for the price may lead to the same result as claiming damages and does not match the price reduction remedy under the CISG. As evidenced above, this will be to the buyer's disadvantage should the market price fall.

3.6.3.1.3 Summary

The price reduction remedy in the CISG is a valid alternative to claiming damages in the event of *force majeure* or a falling market price. However, upon examination of German case law on article 50 of the CISG, it is apparent that neither of the above two circumstances has encouraged buyers to utilise this remedy.[290] The buyers often

[289] Section 53(1)(a).
[290] LG Aachen (F.R.G), No. 41 O 198/89, UNILEX (3 April 1990), available at http://www.jura.uni-freiburg/de/ipr1/cisg/urteile.text/12.htm; AG Nordhorn (F.R.G), No. 3 C 75/94, UNILEX (14 June 1994), available at http://www.jura.uni-freiburg/de/ipr1/cisg/urteile.text/259.htm; LG Oldenburg

elected to reduce the price under circumstances where damages could have resulted in greater monetary relief. One may infer from this that merchants mostly use the price reduction remedy because it immediately restores the parity of performance without the need to go to court. For this reason many international contracts for generic goods require this remedy in the instance of non-conformity of goods. It would appear that article 50 of the CISG better reflects commercial practice than section 53(1)(A) of the SOGA. It is also important to note that a price reduction remedy, arguably modelled on article 50, has been inserted in article 9:401 of the Principles of European Contract Law (PECL).

3.6.3.2 Granting of an Additional Period of Time

In terms of articles 47(1) and 63(1) the buyer or the seller may fix an additional period of time in which the other may perform, in the event of late performance. After granting notice to this effect the party who is granting the additional time is barred from resorting to any remedy for breach, other than damages.[291] Should the offending party not perform within the additional period, the innocent party is entitled to declare the contract avoided.[292]

3.6.3.2.1 Comparison with German Law

It is argued that articles 47 and 63 of the CISG stem from the German law concept of a *Nachfrist*.[293] Both provisions appear to be identical however, as in the case of price reduction, the granting of an additional period under German law serves a different function than that under the CISG. The *Bürgerliches Gesetzbuch* does not

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(F.R.G), No. 12 O 2028/93, UNILEX (15 February 1995), available at http://www.jura.uni-freiburg/de/ipr1/cisg/urteile.text/197.htm.

[291] Articles 47(2), 63(2). For example, if the seller delivers seriously defective goods, but the buyer urgently needs what he/she contracted for, he/she has the right to require delivery of substitute goods. However, the seller might not comply with the buyer's request and while he waits for the delivery of substitute goods the period for avoidance may expire under article 49(2)(b)(i) of the CISG. Consequently, the buyer loses the right to terminate the contract under article 49(1)(a). Therefore it would be prudent for the buyer to fix an additional period for the delivery of substitute goods so as to be able to declare the contract avoided, should the seller eventually not comply.

[292] Articles 49(1)(b), 64(1)(b).

[293] Paragraph 326 of the BGB. The paragraph states that in the case of delayed performance as defined in paragraph 284 (*Schuldnerverzug)*, the creditor may set a period of reasonable length for performance and declare that, outside this period, he will not accept delivery. After the expiration of the fixed

differentiate between simple and fundamental breaches of contract. In fact, under German law the right to terminate a contract only arises under limited circumstances.[294] Paragraph 326 does not attempt to secure the injured party's right to avoid the contract, as is found with articles 47 and 63 of the CISG. Therefore, the German law may have prompted the drafters of the CISG to consider an additional time clause, but it certainly was not the model on which articles 47 and 63 were based.

3.6.3.2.2 Comparison with English Law

Unlike under the CISG and German law, the SOGA does not contain a 'time extension' clause. Under English law breaches of time obligations are generally only assessed in accordance with the doctrine of conditions and warranties.[295] If time is of the essence in a contract and there is a delay in performance, the innocent party may discharge the contract because timely performance will be considered to be a condition of the contract.[296] In the event of the contract being silent as to the date of performance, it is unlikely that timely performance will be considered to be the essence of the contract. The parties will simply be required to perform within a reasonable time.[297] If the parties have set a date or period for performance, it must be determined whether this time stipulation is a condition or simply a warranty. The SOGA provides for two elementary interpretation rules. Firstly, the time of payment is presumptively not of the essence.[298] Secondly, whether any other term is of the essence is dependant upon the construction of the contract.[299]

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period, the creditor is entitled to claim damages for non-delivery or to terminate the contract, unless the debtor has fulfilled his obligations in time.

[294] The CISG allows the innocent party to avoid the contract for any fundamental breach. The BGB states in paragraph 346 that a contract may only be unilaterally terminated if the agreement provides for a contractual right to avoidance. As one of the exceptions to this general rule paragraph 326 of the BGB does not have anything to do with reducing the risk of wrongful termination or securing the right to avoidance. Instead, this paragraph enables the innocent party to declare the contract avoided.

[295] *Bunge Corporation, New York v. Tradax Export S.A., Panama*, 1 W.L.R. 711 (H.L. 1981).

[296] SOGA section 11(3).

[297] SOGA section 29(3). See also *Hick v. Raymond & Reid*, 1 App. Cas. 22 (1892) (Eng.); *Monkland v. Jack Barclay Ltd.*, 2 K.B. 252 (C.A. 1951).

[298] Section 10(1).

[299] Section 10(2).

Should a party desire to declare the contract avoided, the second rule laid out above proves to lead to similar problems as Article 25 of the CISG. It may be difficult to determine whether delay in performance equals a fundamental breach. If the contract remains silent as to whether time is of the essence, it would be doubtful as to whether a time clause is a condition.[300] Due to the need for certainty in commercial relationships, courts tend to interpret time stipulations as conditions.[301] Under English law, if a contract contains a stipulation as to time, the parties may safely assume that it will give rise to a right to cancel. Under English law the risk of unjustified cancellation is virtually non-existent and there is hence no need to provide the innocent party with an option of setting a *Nachfrist*.[302]

3.6.3.2.3 Summary

Under international sales contracts the granting of an additional period can be advantageous because it enables the innocent party to avoid the risk of unjustified termination.[303] In contrast, English law is less complicated and more precise. Hence it can be submitted that articles 47 and 63 of the CISG should not be erected as models for the future amendments to the SOGA.

3.6.3.3 The Right to Cure

In several instances of defective performance, the defect may be rectified by supplying the missing part or by fixing the damaged parts. For this reason, articles 37 and 48 the CISG permit parties to remedy defects both before and after the date for delivery. Under article 37 a party may cure a defect prior to the date of performance;

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[300] Should the innocent party elect to terminate the contract, he/she will be taking a risk because the term may later be held to be a warranty.

[301] *Hartley v. Hyman*, 3 K.B. 475 (1920); *Compagnie Commerciale Sucres et Denrees v. C. Czarnikow, Ltd*. 1 W.L.R. 1337 (H.L. 1990); *Bunge Corporation, New York v. Tradax Export S.A., Panama*, N.Y., 1 W.L.R. at 716.

[302] A Gärtner "Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law" http://cisgw3.law.pace.edu/cisg/biblio/gartner.html (accessed 6 April 2008). Under the CISG, an innocent party often sets a grace period when uncertain whether the breach concerned is fundamental. After the expiration of the additional period, if the breaching party has still failed to perform, the innocent party may avoid the contract irrespective of whether the breach is fundamental.

[303] This same problem may arise concerning contracts that are governed by the PECL because the definition of a fundamental non-performance under article 8:103 (b) of the PECL is virtually identical

this right is recognised in most legal systems.[304] However, article 48 of the CISG is unfamiliar to most European legal systems, which do not permit a party to remedy a defect after the stipulated date of delivery has passed.

Article 48 of the CISG, as its predecessor article 44(1) of ULIS, follows the American rule of section 2-508(2) of the UCC. Under American law the seller is given the liberty to cure a non-conforming tender outside the contract period. The drafters of the CISG were however careful to insert limitations to the right to cure. The seller may only rely on the right to cure if this may be done without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement of expenses.[305] Article 49 further restricts the sellers right by stating that in the event of a fundamental breach, the seller may not deprive the buyer of his/her right to avoid the contract by curing the defect. Therefore, although the CISG accommodates the seller's interests by allowing cure beyond the contract period, the seller may not rely on this right to the detriment of the buyer.

3.6.3.3.1 Comparison with German Law

One need not say much concerning the position under German law. This is because under German law the seller is entitled to cure a defective tender by substituting it with conforming goods within the time limit fixed by the contract.[306] No provision is made for the right to cure after the contract period.

The members of the committee that drafted the BGB thought that there was no need for a right to cure. Therefore no such provision was included in the sales law.[307] Despite this, the courts and academics soon took the view that under certain circumstances sellers should be entitled to remedy minor defects.[308] Thus, on the basis of the principle of good faith, sellers are now entitled to cure after the due date for

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to article 25 of the CISG. Thus, article 8:106 of the PECL provides for the fixing of an additional period for performance.

[304] Despite its existence very few codes expressly provide for it. See: the UCC § 2-508(1) (1977).

[305] Article 48(1).

[306] Gärtner "Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law".

[307] RGZ 61, 92 (93-4).

[308] RGZ 61, 92 (92); RGZ 87, 337 (337)

performance in limited circumstances.[309] The experts who are working on the *Schuldrechtsreform*, a reform of the German law on the breach of contract, have recommended that the seller be given an opportunity to remedy a lack of conformity before damages can be claimed, under certain circumstances.[310] Although this rule is not entirely akin to article 48 of the CISG, which allows the buyer to claim incidental damages, it can be deduced that it was stimulated by article 48 because one of the aims of the reform project is to bring the BGB into line with the CISG.[311] Hence, it can be presumed that the writers of the *Schuldrechtsreform* regard article 48 as being a law that inspires sensible results.[312]

3.6.3.3.2 Comparison with English Law

Under the SOGA no right is given to the seller to cure a defective performance. However, according to English case law the seller has the right to cure defective performance before the date for performance lapses.[313]

The English position regarding the right to cure after the specified time of performance is nebulous. In a *dictum* it has been suggested that English sales law possibly grants the right to cure outside of the contract period.[314] This decision was primarily based on the loss of the right to reject through the retention of the goods and how long a "reasonable time" can be said to be.[315] It is thus unlikely that the judge intended to assert the seller's right to cure. Hence it would appear to be accurate to state that: "There is great uncertainty, at least in English law, as to the existence and extent of the seller's right to repair or replace defective goods."[316]

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[309] Paragraph 242 BGB.
[310] Gärtner "Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law".
[311] Werner Lorenz "Reform of the German Law of Breach of Contract" 1 (1997) *EDINBURGH L. REV*. 317 at 326, 339.
[312] In a similar gesture the Lando Commission inserted article 8:104 into the PECL, which summarises articles 37 and 48 of the CISG.
[313] *Borrowman, Phillips & Co. v. Free & Hollis*, 4 Q.B. 500 (1878*); E.E. & Brian Smith (1928) Ltd. V. Wheatsheaf Mills Ltd*., 2 K.B. 302, 315 (1939); *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp. Of India, (The Kanchenjunga)*, 1 Lloyd's Rep. 391, 399 (H.L. 1990).
[314] *Bernstein v. Pamson Motors (Golders Green) Ltd*., 2 All E.R. 220 (Q.B. 1986).
[315] The SOGA section 35.

3.6.3.3.3 Summary

Usually parties who have to face the problem of non-conforming goods or short-delivery may elect to reject the goods and terminate the contract, or retain the goods and reduce the price or claim damages, after the time set for delivery. Thus, a right to cure after the date of delivery may create confusion. The buyer may be left wondering as to when the seller will exercise this right, seen as he/she may do so even after the time set for delivery. This becomes problematic when the buyer purchased the goods for resale.

Despite these problems, article 48 and 49 provides certain safeguards. In addition to these, the buyer may take the initiative by requesting that the seller cure the defects within an additional period of time, under article 46. If the seller does not perform within the additional period or declares that he/she will not do so, the buyer may declare the contract avoided. Thus the element of uncertainty created by the seller's right to cure after the time for delivery has passed, is counterbalanced by giving the buyer the opportunity to force the seller to perform or to terminate the contract.

The right to cure after the time for delivery is substantially more in sync with commercial practice than the solutions provided for in English sales law. The average buyer will not want to choose between the two courses of action set out in English law, but would rather reject the defective goods and request the seller to repair or replace them. Buyers generally prefer the convenience of permitting sellers to remedy the defective goods rather than having to locate replacement goods themselves. It is furthermore economically sensible to set an additional period for repair or replacement in the case where the seller's breach is not fundamental. Should the seller perform, the economic waste of an avoided contract is minimised; the buyer receives the goods and the seller receives payment.

Therefore, the CISG clearly permits a seller to cure defects after the expiration of the time of delivery, unlike many European legal systems. It is regrettable that English law has not been modernised by including an express provision dealing with this issue

[316] Sale and Supply of Goods, Law Com. 85, Scot. Law Com. 58 (1983) para 2.38

into the SOGA. Thus, uncertainty persists. However, Germany must be commended for its attempt to provide for this situation in its legal reformation efforts.

3.6.4 Conclusion

From the above discussion it is clear that the CISG provides useful and modern solutions to international sales disputes. As is evident from the price reduction remedy and the right to cure, the CISG often provides solutions that accord closely with current commercial practices. Contemporary attitudes regarding the ratification by the UK vary from staunch disapproval, to nonchalant acceptance, to enthusiastic approval.[317] It would appear that the UK will only seriously entertain ratification when the legal profession places pressure on it to do so. The UK could incorporate into domestic law those provisions of the CISG that have proven highly successful in commercial practice. Scotland is eager to ratify and it can be concluded that regarding the CISG "… the United Kingdom is a disunited kingdom".[318] The comparison between the CISG and English law reveals sufficient similarity to advance the argument in favour of ratification in the UK. South Africa need not therefore hold back on account of reasons put forward by the UK. One can only commend the German government for acknowledging the effective contributions made by the CISG to international and domestic sales law. The comparison between the CISG and German law reveals how two legal systems can be brought in line. After ratification, South Africa may elect to follow this domestic reform model.

Many of the arguments put forward concerning the United Kingdom and Germany can be aligned with the South African position. Therefore, one may infer from the preceding discussion that South Africa should also begin to consider the ramifications of not ratifying the CISG. South Africa should further consider whether domestic law should be amended to reflect the CISG, as Germany is doing. In the next chapter South African law will be compared with the articles in the CISG to discern the level of harmony between the two legal systems.

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[317] The Department of Trade and Industry and the Scottish Law Commission are two of the strongest supporters of the UK ratifying the CISG.

Chapter Four

A Comparison between South African Law of Sale and the CISG

4.1 Introduction

The first step in deciding whether to ratify the Convention is to consider whether the CISG is compatible with South Africa's common law regarding sale contracts. The rights, duties, and remedies provided for in the CISG will be compared with those housed in South Africa's common law. Where the CISG differs from the common law, critical analysis will be undertaken to determine whether such a discrepancy can be overcome and, if so, how. While the rights and duties contained in these two bodies of law bear a resemblance, there are certain remedies provided for in the CISG that do not have a counterpart under South African law. These will be considered to ensure that they do not pose a threat to legal stability in South Africa.

Firstly, the obligations imposed upon the seller will be considered, followed by the obligations imposed upon the buyer.[319] Thereafter, the rights and remedies of the parties will be examined.[320] The CISG will be examined first and the position under

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[318] Forte *University of Baltimore Law Review* (Summer 1997) 66.

[319] It is not uncommon for sales laws to deliberately fail to define the rights and obligations of both parties because the rights of the buyer are the obligations of the seller and *vice versa*. Under a usual sales contract the seller has the obligation to deliver the goods and to transfer the property in the goods. These then become the rights of the buyer in that the buyer may demand delivery and the transfer of property. The buyer is obliged to take delivery and pay the contract price, while the seller has the right to demand that the buyer take delivery and that the price be paid. For the above reason, sales laws usually restrict their ambit to defining the obligations of the parties, which is the case in the CISG. The CISG discusses the obligations of both parties, but does not comment on their rights. The rights of the buyer are derived from the obligations of the seller, as found in articles 30 to 44, and the rights of the seller are implied from the obligations of the buyer, found in articles 53-60. F Enderlein "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/biblio/enderlein1.html (accessed 1 March 2008).

[320] In case of a breach of contract, additional secondary rights and obligations arise. In the CISG the secondary rights and obligations appear under the remedies for breach of contract. The buyer's remedies contained in articles 45 to 52 reflect the secondary rights of the buyer and the secondary obligations of the seller. The seller's remedies for breach of contract by the buyer are found in articles 61 to 65 and state the buyer's secondary obligations and the secondary rights of the seller.

South African law will be looked at thereafter to reach a conclusion on the compatibility between the two legal systems.

As a point of departure it is necessary to reiterate the flexible nature of the CISG. This flexibility is displayed in article 6, which states that parties may exclude the application of the Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.[321] Parties may therefore alter or exclude any or all of the duties, rights, and remedies discussed below.

4.2 Obligations Imposed on Contracting Parties

Under this section the specific obligations of the seller and the buyer will be contemplated. The CISG sets out the obligations of the seller and the buyer in Chapter II and III respectively.

4.2.1 Obligations of the Seller

Article 30 summarises the obligations of the seller by stating:

> "The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."[322]

These obligations are laid out in more detail under separate articles of the CISG. These need to be considered for the purpose of this research.

[321] Article 12 states that if a State has made a declaration under article 96 that the creation, modification or termination of a contract of sale; an offer; an acceptance; or any indication of intention must be evidenced in writing, it will override all provisions in the CISG, which permit such agreements to be in any form other than writing. This provision may not be altered. An agreement between the parties altering article 12 will be of no effect.

4.2.1.1 Delivery of the Goods and Handing over of Documents

The seller has the primary duty of delivering the goods and any documents relating to them and transferring ownership in the goods.[323] The seller is required to transfer ownership in the property to the buyer.[324] The Convention is however silent on the manner in which ownership is to be transferred; parties are to consult the domestic law of the State who has jurisdiction over the matter.[325] After passing ownership, the seller is required to make the goods available to the buyer; often referred to as delivery.

The seller is obliged to deliver the goods at the correct place. The place of delivery is determined by the application of article 31.[326] It is evident from article 31 that the place of delivery differs between sales involving carriage and sales not requiring carriage. Article 31(a) specifies that in a sale requiring carriage of goods, the goods are delivered when they are handed over to the first carrier for transmission to the buyer.[327] Where carriage is not required, and in the absence of another agreement, delivery is usually affected upon the seller placing the goods at the buyer's disposal.[328] Placing the goods at the buyer's disposal means to make the goods

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[322] It is important to note that this article places emphasis on the terms of the contract as being the primary requirements that must be fulfilled, while the requirements of the CISG are merely supplementary.
[323] Article 30.
[324] Article 30.
[325] Article 4 states that the CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer. It further states that, except where otherwise expressly provided, it is not concerned with: the validity of the contract or any of its provisions or of any usage; or the effect that the contract may have on the property in the goods sold. The domestic law of the individual state will therefore regulate the excluded matters. The passing of property was excluded from the Convention because of the difficulty of reconciling national differences. In addition, the transfer of ownership impacts other areas beyond the boundaries of the law of contract. The CISG provides for several related matters, such as the seller's obligation to deliver goods free of third party claims (Articles 41-43) and the passing of risk (Articles 66-70).
[326] It is unusual for parties not to specify an exact place of delivery because this place is important for other issues, such as the passing of risk.
[327] Article 67(1) is the corresponding provision for the transfer of risk in such sales. Risk is transferred as soon as the goods are handed over to the first carrier for transmission to the buyer. Delivery is effected when goods are transferred to an independent organisation for transport to the buyer. Should the seller own a trucking company, which transports the goods, this will not constitute delivery to the first carrier because he/she is not an independent carrier.
[328] Article 69 is the corresponding provision on the passing of risk. In terms of article 69(1) risk will be passed to the buyer when he/she takes delivery of the goods. If he/she does not take over the goods in due time risk will pass at the time when the goods are placed at the buyer's disposal and he/she commits a breach of contract by failing to take delivery. However under article 69(2), where the buyer is required to take delivery at a place other than the place of business of the seller, the risk will pass when delivery is due and the buyer is aware that the goods are at his/her disposal at that place. If the

available so that the buyer need only take possession thereof. [329] Where goods are kept in a warehouse and the claim for delivery is not embodied in documents, a special order of release may be required from the seller. Concerning specific goods, or those drawn from a specific stock, delivery is effected by placing the goods at the buyer's disposal at the place where the goods were located when the contract was formed. In the sale of manufactured goods, delivery is effected when the seller makes goods available to the buyer at the known place of manufacture or production.[330] Alternatively, the duty to deliver is discharged when the goods are placed at the buyer's disposal where the seller had his/her place of business at the conclusion of the contract.[331] In addition, goods afloat are generally governed by article 31(b).[332] The CISG states that the seller is not bound to deliver goods at any place other than the abovementioned.[333]

The seller is required to hand the goods over to a carrier where the contract or the CISG demands it.[334] If the goods are not clearly marked, or do not have shipping documents, the seller is required to give notice to the buyer of the consignment

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contract relates to goods not then identified, article 69(3) states that the goods will only be placed at the buyer's disposal once they have been clearly identified to the contract.

[329] P Schlechtriem "Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-26.html (accessed 1 March 2008). This includes specification, or precise identification of the goods. Under certain circumstances preparation of the goods may be required, such as packaging and notification to the buyer.

[330] Article 31 (b).

[331] Article 31 (c). If the seller has more than one place of business, reference must be had to article 10. Article 10 states that the relevant place of business will be that which has the closest relationship to the contract and its performance, having regard to the circumstances known or contemplated by the parties at any time prior to, or at, the conclusion of the contract.

[332] Alternative provisions governing the place of performance are found in Incoterms and similar standard clauses. Proposals made to provide directives for the interpretation of these 'delivery' articles were insufficiently supported because the unification of these clauses, which would have required a special UNCITRAL project, was perceived in Vienna to be too difficult a mission. Any issues based on interpretation may therefore be settled with reference to article 8.

[333] Professor Dietrich Maskow and Monika Stargardt compared the CISG to German national law and discovered a number of similarities and even certain identical provisions. The authors attributed this to the fact that whereas most countries only operate one civil law, or one legal regulation governing commercial contracts of sale, Germany operates three laws of sale. Namely, one for internal relations between socialist enterprises called the *Vertragsgesetz* or Contract Act, one for contracts between citizens found in the Civil Code, and one for international relations known as the Code on International Commercial Contracts of 5 February 1976 (GIW). Article 31 is extremely similar to article 43 of the GIW, but in reverse order. The GIW further requires the seller to do everything that is necessary in order to give the buyer the right of disposition of the goods so as to discharge his/her duty to deliver. Article 31 of the CISG differs significantly from article 19(1) of ULIS. In terms of ULIS delivery requires the "handing over of goods which conform with the contract." Therefore, defective goods cannot be delivered. The delivery of non-conforming goods, under the CISG, is considered to be a delivery. The buyer however has recourse to several remedies. Enderlein "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods".

specifying the goods. When the seller is responsible for arranging carriage of the goods, he/she must enter whatever contracts are necessary for transport to the place agreed upon. The method of transport must be appropriate in the circumstances and must be according to the usual terms for such transport.[335] In certain instances the seller will be required to obtain insurance cover for the carriage of the goods. Should the seller not be responsible for effecting such insurance, he/she must upon request provide the buyer with all available information necessary to enable him/her to effect insurance.[336]

Once the place of delivery is determined, it is necessary to perform at the agreed time of delivery. Article 33 of the Convention enumerates upon the various possibilities available to the seller. Firstly, the seller is required to deliver goods on the date fixed or determinable from the contract.[337] Secondly, in the event of a period of time being fixed, or determinable from the contract, the seller may make delivery at any time within that period, unless circumstances indicate that the buyer may select a specific date within the available period.[338] Thirdly, should the contract not fix a date, and a date is not determinable therefrom, the seller may make delivery within a reasonable time after the conclusion of the contract.[339]

It is not only expected for the seller to deliver the goods, but he/she is also expected to hand over any documents relating to the goods.[340] The seller must hand over such documents at the time and place and in the form required by the buyer. In the event of the seller having handed over the relevant documents before such time, he/she may cure any lack of conformity in the documents up until the time originally specified. The right to cure such non-conformity may only be exercised when it will not cause the buyer unreasonable inconvenience or unreasonable expense. Despite the seller having cured the defect, the buyer retains the right to claim damages in respect of such loss.

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[334] Article 32 (1).
[335] Article 32 (2).
[336] Article 32 (3).
[337] Article 33 (a).
[338] Article 33 (b). If the seller makes delivery before the date or period set, the buyer may either take or reject delivery according to article 52.
[339] Article 33 (c).

Under South African law the seller is required to make the goods available to the buyer.[341] This duty contains several elements. Firstly, the seller must deliver goods at the place and time stipulated in the contract.[342] In the event of no place being mentioned in the contract, the seller must make the goods available at the place where they were at the time of the sale, if they are specified goods.[343] If the goods are unascertained, the seller must make them available at the place where they became ascertained by appropriating them to the contract.[344] If the seller has no place of business, he/she must make the goods available at his/her residence. If the goods are manufactured they must be made available at the place of manufacture[345], unless agreed otherwise.[346] Delivery may be made to a carrier at the place of handing over. When the carrier is the agent of the seller, the passing of the goods to such a carrier will not constitute delivery.[347] When the carrier is the agent of the buyer, delivery will be effected when the goods are handed over.[348] In the case of no time having been mentioned, the seller must deliver the goods immediately if performance is possible at the time of the sale[349] or within a reasonable time.[350] The seller who fails to make the goods available at the correct time will be in *mora debitoris*.[351] Further the seller may not deliver goods by instalment unless the contract permits.[352]

Secondly, the goods must be made available with all their accessories, appurtenances, and fruits.[353] Accessories include anything that loses its separate conception and forms an integral part of the principal thing e.g. buildings on land. Appurtenances are

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[340] Article 34.
[341] AJ Kerr *The Law of Sale and Lease* 3 ed (2004) 161. Authority for this principle is hardly necessary, but can be located in Ulpian's statement in D 19.1.11.2: "The primary obligation on the seller is to make the thing itself available, that is, to deliver it" (Mackintosh's translation).
[342] RH Zulman and G Kairinos *Norman's Purchase and Sale in South Africa* 5 ed (2005) 98, 101.
[343] *Gibson v Payn* (1899) 16 SC 286 at 289. Compare with article 31 (b) of the CISG.
[344] *Greenshields v Chisholm* (1884) 3 SC 220.
[345] *Richards, Slater and Co v Fuller and Co* (1880) 1 EDC 1 at 4; *Goldblatt v Merwe* (1902) 19 SC 373 at 375. Compare with article 31(b) of the CISG.
[346] *Goldblatt v Merwe* (1902) 19 SC 373. The court held that the seller merely has the duty to make the goods available to the buyer and need not physically deliver them.
[347] *Stephen Fraser and Co v Clydesdale Transvaal Collieries Ltd* 1903 TH 121 at 125.
[348] Voet 41.1.35. The seller must intend that *dominium* should pass to the purchaser on delivery of the goods to the carrier. There must further be a corresponding intention on the part of the purchaser to accept such delivery as passing ownership. See *Greenshields v Chisholm* (1884) 3 SC 220.
[349] D 50.17.14; Grotius 3.3.51. Compare with article 33 of the CISG.
[350] Kerr *Sale* 166.
[351] AJ Kerr *The Principles of the Law of Contract* 5 ed (1998) 616-617; Kerr *Sale* 166.
[352] Grotius 3.39.9; Voet 46.3.11; *Horwitz v Hayne and Co* 1920 CPD 457; *Cedarmont Store v Webster and Co* 1922 TPD 106 at 109-110; *Moosa v Robert Shaw and Co Ltd* 1948 (4) SA 914 (T) 917.

those things that share legal conditions with the principal thing and are adapted to serve and augment the utility of the principal thing on a permanent basis e.g. keys to a cupboard. Fruits include anything that has accrued to the principal thing from the date of sale, such as natural and civil fruits.[354]

Thirdly, the seller must do whatever is necessary to make the goods available to the buyer, at his/her own expense. This includes ensuring that: goods meet the requirements of the contract;[355] goods are placed in a deliverable state;[356] the buyer has a reasonable opportunity to examine the goods prior to acceptance;[357] the buyer receives notice that the goods are available for collection if he/she cannot reasonably be expected to know without such notice.[358] The seller is liable for extra costs of transporting goods if he/she moves them from their original position after the sale[359].

From the above it is evident that the seller's duty to deliver goods under the CISG corresponds with South African law. No unknown concepts arise and thus there is parity concerning the duty to deliver.

4.2.1.2 Conformity of Goods

For the seller to discharge his/her duty to deliver, the delivery of the goods must conform with the requirements laid down in the contract or the Convention.[360] The requirements extend beyond mere time and place, and include the nature of the goods.

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[353] Kerr *Sale* 163; Voet 19.1.4-9; *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd (In Voluntary Liquidation)* 1948 (1) SA 91 (W) 100.

[354] *De Kock and Another v Fincham* (1902) 19 SC 136. The court established that rent is a civil fruit that accrues to the buyer after the date of sale. See further, *American Cotton Products Corporation v Felt and Tweeds Ltd* 1953 (2) SA 753 (N) 756C-H.

[355] Kerr *Sale* 211. Compare with article 35(1) of the CISG.

[356] *Stephen Fraser and Co v Clydesdale Collieries* 1903 TH 121. Compare with article 35(1) and (2)(d) of the CISG.

[357] *Kahn v Robert* 1921 CPD 654. Compare with article 38 of the CISG.

[358] *Levinson v Nel* 1921 NPD 79.

[359] Kerr *Sale* 161. Compare article 57(2).

[360] Article 35 of the CISG discusses the duty of delivery. Article 36(1) requires the duty of delivering conforming goods to be satisfied at the time that the risk passes to the buyer, even though the lack of conformity may become apparent later. The question of how long the conformity must last, known as durability, is dealt with under article 36(2) as a lack of conformity that occurs after the passing of the risk. The seller will be held liable if this lack of conformity is due to a breach of any of his/her obligations, including a breach of any guarantee that for a period of time the goods will remain fit. At the Vienna meeting the drafter queried whether the "guarantee" could be implied and whether the "period of time" must be fixed by the guarantee. Regarding the former, the UNCITRAL draft Convention required the guarantee to be express. However it was finally agreed upon to delete the

Article 35(1) states that the seller must deliver goods that are of the quantity, quality, and description required by the contract. Firstly, the goods will not be in conformity unless they are fit for the purposes for which goods of the same description would ordinarily be used.[361] Secondly, the goods must be fit for the purposes expressly or impliedly made known to the seller at the time of the conclusion of the contract. This will not apply however where the circumstances reveal that the buyer did not rely, or that it was unreasonable for him/her to rely, on the seller's skill and judgment.[362] Thirdly, goods must possess the qualities of goods that the seller displayed to the buyer as a sample or model.[363] Fourthly, goods must be contained or packaged in the manner usual for such goods. Where there is no such manner, the goods must be contained or packaged in a manner adequate to preserve and protect them.[364] Where the above four requirements are not met, the goods will not be in conformity with the contract, except where parties have agreed otherwise.[365]

The drafters of the CISG acknowledged that the seller should not be held liable for the unreasonable behaviour of the buyer. Article 35(3) states that the seller will not be liable under the above requirements for any lack of conformity in the goods if the buyer knew, or could not have been unaware, of such non-conformity at the time of

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word 'express'. Simultaneously a proposal to specify that the guarantee could be implied was also rejected. Regarding the setting of the time period, it was pointed out that the French text has *une certain période*, which the French delegate distinguished from *une période certaine*, as not referring to a specific period. The Drafting Committee was thereafter requested to align the English text on the French. Despite the above uncertainties it should be possible, in the ordinary case, to attribute a failure of durability to a breach of the seller's obligation to deliver goods that are "fit" as defined in article 35. B Nicholas "The Vienna Convention on International Sales Law" (1989) *Law Quarterly Review* 201 at 221-222.

[361] Article 35 (2) (a). This is similar to the definition of merchantable quality in section 14(6) of the Sale of Goods Act 1979, which requires goods to be "fit for the purpose or purposes for which goods of that kind are commonly bought". However, the latter Act does not set out the criterion of fitness. The formula used in article 35(2)(a) of the CISG is almost identical to that in U.C.C. § 2-314(2)(c). It would seem that goods of widely differing qualities may satisfy this formula, hence the buyer can presumably insist only on the minimum.

[362] Article 35 (2)(b).

[363] Article 35 (2)(c). This provision is bears a resemblance to section 15(2)(a) of the SOGA 1979.

[364] Article 35 (2)(d). This provision is equivalent to section 15(2)(d) of the SOGA 1979.

[365] Article 19(1) of ULIS requires that for "delivery" to be complete, the "handing over of goods which conform with the contract" must occur. Should the goods be at variance from the contract because they are inferior or different they will be deemed to be cured if the buyer fails to notify the seller of the defects. This principle applies to CISG as well. The Secretariat's Commentary concerning article 31 (Article 29 of the 1978 Draft Convention) distinguishes between the delivery of inferior and the delivery of different goods. This interpretation would result in unwelcome consequences for the passing of risk and the failure to notify the seller of defects. Therefore it should be rejected. Thus,

the conclusion of the contract. Under normal circumstances where the buyer did not know, and could not have known, of the non-conformity the seller will be liable for any lack of conformity existing at the time when risk is passed to the buyer.[366] The seller will remain liable for such lack of conformity even though it only becomes apparent after the passing of risk. The seller is further liable for any lack of conformity that occurs after the passing of risk to the buyer, which is due to the breach of his/her obligations under the contract or the Convention.[367] This includes a breach of a guarantee stating that for a certain period of time the goods will remain fit for their ordinary purposes, for the particular purpose for which they were purchased, or that they will retain certain qualities and characteristics.

If the seller has delivered goods before the date of delivery, he/she may up until that date deliver any missing part or deficiency in the quantity of the goods delivered.[368] The seller may also deliver goods in replacement of any non-conforming goods delivered early or remedy such lack of conformity. The seller may only replace or remedy such non-conforming goods provided that it does not cause the buyer unreasonable inconvenience or unreasonable expense. Despite the seller replacing or remedying the defective goods, the buyer retains the right to claim damages flowing from the non-conformity.

In order to establish the existence of any non-conformity as promptly as possible, the buyer is required to examine the goods delivered. Article 38(1) requires the buyer to examine the goods within as short a period as possible under the circumstances after delivery. The buyer may send a representative to examine the goods on his/her behalf. When the contract involves the carriage of goods, the buyer's examination may be postponed until the goods have arrived at their final destination.[369] Where goods have been redirected during transit, or redispatched by the buyer after arrival without a reasonable opportunity for examining them, the examination may be deferred until after the goods have arrived at the new destination.[370] This is only

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under article 31 any non-conformity in the goods purchased will be negated unless the buyer gives timely notice to the seller of such defects.

[366] Article 36 (1).
[367] Article 36 (2).
[368] Article 37.
[369] Article 38 (2).
[370] Article 38 (3).

permissible when the seller knew or ought to have known of the possibility of such redirection or redispatch at the time that the contract was concluded.

Before the buyer may avail himself/herself of the right to rely on non-conformity, he/she must give notice to the seller.[371] Such notice must explain the nature of the non-conformity. The buyer must give notice within a reasonable time after he/she has become aware, or ought to have become aware, of the lack of conformity. What is considered to be a reasonable period depends upon the circumstances of the case. The CISG however places a two-year cap on what will be considered reasonable.[372] Therefore, the buyer must give notice to the seller within two years from the date upon which the goods were handed over to the buyer. The only means of escaping this limitation is if the two-year limitation is inconsistent with a contractual period of guarantee.[373]

The buyer is thus entitled to claim for any lack of conformity in the goods delivered, provided he/she gives notice thereof to the seller within two years.[374] A seller could escape liability for non-conforming goods if the buyer fails to meet the requirements of adequate inspection and notice. Article 40 presents itself as a safeguard against injustices based on such technicalities. It states that articles 38 and 39 are not available to a seller who knew, or could not have been unaware, of the non-conformity and failed to inform the buyer thereof. In such an instance the buyer may rely on the non-conforming goods despite not having met the requirements of inspection and notice.

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[371] Article 39 (1).
[372] Article 39(2).
[373] Article 39(2).
[374] The time at which a buyer will loose his/her right to rely on non-conformity was one of the most contentious questions at the Vienna meeting. Numerous civil law systems remove the buyer's right to rely on a lack of conformity by the lapse of time, whether a fixed period or a reasonable time. This time period is calculated from either delivery or from the moment when the buyer discovered or should have discovered the lack of conformity. Under English law the right to reject the goods and to treat the contract as repudiated is lost; section 11(4) of the Sale of Goods Act 1979. However under civil law systems all remedies arising out of the lack of conformity are removed. The result thereof can produce unfair results for the buyer, particularly when a short period is set for discovery, which begins at the time of delivery. Alternatively, the longer the period, the more unstable the position of the seller becomes, especially when re-sale may be necessary to mitigate harm. During the drafting stage the majority of the developing countries saw themselves as filling the role of the buyer in respect of manufactured goods and the seller of primary products. The need to examine goods is of particular

South African domestic law also places an obligation on the seller to deliver goods in accordance with the specifications regarding size, quantity, quality, or any other aspect agreed upon in the contract.[375] A buyer cannot be compelled to accept a partial performance of a contract.[376] Furthermore, there is no duty on the buyer to separate the non-conforming goods from the conforming goods; if there are an unreasonable number of defective goods the buyer may reject the entire consignment.[377] The seller bears the onus of proving that he/she delivered goods, which conform to the requirements of the contract.[378] The buyer is entitled to test[379] and to inspect the goods delivered.[380] Where the goods are displayed to the buyer they must be delivered in the condition that they were in at the time of sale.[381] Where a sample was displayed to the buyer it will constitute a warranty of quality.[382] Therefore, the goods cannot be in a state that is materially different from that in which they were at the date of the contract.

The seller must further deliver goods that do not suffer from a defect; whether patent or latent. Where goods suffer from a patent defect the buyer may sue the seller for breach of contract by defective performance.[383] Should a buyer inspect the goods and

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significance when it comes to manufactured goods and thus the developing states would be most affected by this article in practice. Nicholas 1989 *Law Quarterly Review* 222-223.

[375] Kerr *Sale* 164. *Hersman v Shapiro and Co* 1926 TPD 367 at 377; *Mannix and Co v Osborn* 1921 OPD 138; Voet 46.3.8. Compare with article 35 of the CISG.

[376] Where the difference in quantity is so material that the buyer would not have bought had he/she known of it, he/she is entitled to rescission. See *Glass v Hyde* 1932 WLD 19.

[377] *Cedarmount Store v Webster & Co* 1922 TPD 106 at 109.

[378] *Cedarmont Store v Webster and Co* 1922 TPD 106 at 108 the court held that before a seller may claim the purchase price, he must show that he has performed his part of the contract. He may not deliver goods and then place the burden of proving any non-conformity onto the buyer. See also *Hall and Co v Kearns* (1893) 10 SC 152.

[379] Where the buyer cannot test the goods without using part of them, he/she is entitled to use that part (*Hoben v Capetown Stevedoring Co Ltd* 24 SC 40). If the buyer subsequently rejects the goods and repudiates the contract based on non-conformity, he/she is required to pay the price of the portion used in the test, if he/she received any benefit from that use (*Theron v Africa* 10 SC 246). If the buyer did not receive any benefit from the portion used, he/she need not restore that portion nor remunerate the seller for any deterioration caused by the testing (*African Organic Fertilizers and Associated Industries v Sieling* 1949 (2) SA 131 (W)).

[380] Delivery and acceptance are not concurrent conditions; the buyer may therefore inspect the goods delivered before accepting them. The buyer must accept or reject the goods within a reasonable time after receipt. Otherwise the seller may infer from the delay that the buyer has accepted the goods. Such inspection need not occur at the place of delivery. Where goods are delivered to a carrier in order to be forwarded to the buyer at a distant place, the right of inspection continues to exist until the goods arrive and are accepted at their final destination. See *Fine and Gluckmann v Heynecke* 1915 TPD 211 at 214, 217.

[381] *Frumer v Maitland* 1954 (3) SA 840 (A) 846; *Van Wijk v Curry NO* 1907 TS 1109 . Compare with article 35(c).

[382] *Bouwer v Ferguson* (1884) 4 EDC 90 at 96.

[383] *Kroomer v Hess Co* 1919 AD 204.

accept them, having failed to detect a defect that the inspection should have revealed, he/she is considered to have waived his/her remedies for the breach.[384] The buyer may however sue for breach if the seller provided a warranty against defects or if the seller fraudulently concealed the defect during the inspection. In the case of a latent defect the seller will be liable in four circumstances. Firstly, the seller will be liable for breach if he/she acted fraudulently.[385] Secondly, liability will arise if the seller expressly or impliedly warranted against the existence of latent defects[386] or warranted the fitness of the goods for the purpose for which they were bought.[387] Thirdly, the seller will be held liable where he/she is a manufacturer[388] or a dealer professing attributes of skill and expert knowledge in relation to the goods sold.[389] A merchant seller who publicly professes to have skill and expert knowledge concerning the goods will be held liable even though he/she was not aware of the latent defect.[390] Fourthly, the seller will be liable in instances where the two aedilitian actions are available. The *actio redhibitoria* provides for the cancellation of the contract coupled with restitution and a claim for interest, in addition to useful and necessary improvements made to the *res*.[391] The action is available if at the time of the sale the goods suffer from a disease or a defect and the seller failed to disclose the disease or the defect to the buyer, in contravention with what was promised concerning the quality of the goods.[392] The defect must however be material in that it renders the goods unfit for the purpose for which they were bought and a reasonable buyer would not have purchased them had he/she known of the defect. The *actio quanti minoris* is

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[384] *Muller v Hobbs* (1904) 21 SC 669.
[385] *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A).
[386] It is uncertain as to the period for which the goods are warranted to be fit for the purposes for which they were purchased. In *Lexmead (Basingstoke) Ltd v Lewis and Others* [1981] 2 WLR 713 (HL) 720C-G the court referred to the position under English law. Lord Diplock stated that the warranty of fitness for a particular purpose relates to the goods at the time of delivery and continues for a reasonable time thereafter. What will be held to be reasonable depends upon the nature of the goods and allowance must be made for normal wear and tear.
[387] *Minister van Landbou-Techniese Dienste v Scholtz* 1971 (3) SA 188 (A). Courts have favoured the recovery of consequential damages for such breach: *Holden and Co v Morton and Co* 1917 EDL 210 at 216; *Bouwer v Ferguson* (1884) 4 EDC 90 at 96. See further for patent defects: *Kroomer v Hess and Co* 1919 AD 204; *Heslop v Cotts and Co* (1909) 30 NLR 244 at 246-247.
[388] Voet 21.2.10; *Hall and Co v Kearns* (1893) 10 SC 152 at 155.
[389] *Kroonstad Westelike Boere Ko-operatiewe Vereeninging v Botha and Another* 1964 (3) SA 561 (A).
[390] Kerr *Sale* 218. If the purchaser uses the goods for a purpose other than what it was intended for, the merchant seller is not liable for damages caused by the defect exceeding the amount that the buyer would have suffered had he/she been using the thing for its true purpose.
[391] *Hugo v Henwood* 1905 TS 578.
[392] *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) 407. A promise made by the seller is considered to be any material statement on which the buyer was intended to rely concerning the quality of the goods,

an action for the return of a portion of the purchase price.[393] The buyer may elect to pursue this action when the conditions for an *actio redhibitoria* are present. Alternatively, the buyer may elect this remedy when the defect is not sufficiently material to qualify for the *actio redhibitoria* action, but does enable the buyer to claim a reduction in the purchase price.[394] The amount claimed is usually calculated as the difference between the actual price paid and the price of the defective goods.[395] The value of the defective goods is ascertained by reference to the market price. If there is no market price, the best evidence available must be employed to determine the actual value of the defective goods.[396] One may also have regard to the reasonable cost of repairing the defective goods.[397]

Therefore it is evident that under both the CISG and the South African law of sale, the seller is required to deliver conforming goods. A failure to do so will result in the buyer being free to exercise various remedies against the seller. Namely: the termination of the contract , restitution, and the award of damages and interest.

4.2.1.3 Third Party Claims

In order to meet the requirements of delivery, a seller is required to do more than deliver conforming goods to the buyer in a manner and place consistent with the contract. It is further necessary that the goods delivered be free from third party claims.[398] The only exception is if the buyer knowingly took the goods subject to a third party right or claim.

If the third party claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42 of the Convention. Article 42(1) states that a seller must deliver goods free from any right or claim based on industrial

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which goes beyond mere praise and commendation. On the basis of this promise the buyer would have agreed to purchase the goods and agreed to the price in question.
[393] *Davenport Corner Tearoom (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) 714B-D.
[394] *Douglas v Dersley* 1917 EDL 221. In the event of the buyer having already used some of the defective goods delivered, this remedy may be the most suitable. See *Holden and Co v Morton and Co* 1917 EDL 210. This remedy serves as compensation for loss suffered as a result of the breach of warranty.
[395] *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 at 413.
[396] *Labuschagen Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T).
[397] *Maennel v Garage Continental Ltd* 1910 AD 137 at 149.
[398] Article 41.

property or intellectual property of which he/she knew, or could not have been unaware, at the time that the contract was concluded. This general rule is applicable in two instances. Firstly, when the goods are considered to be industrial property or intellectual property under the law of the State where they will be resold or used, provided that the parties contemplated it at the time of the conclusion of the contract.[399] Secondly, if the goods are considered to be industrial or intellectual property in the State where the buyer has his/her place of business.[400] The seller will not be bound to this obligation if at the time of the conclusion of the contract the buyer knew, or could not have been unaware, of the right or claim.[401] Neither will the seller be bound if the right or claim is a consequence of the seller's compliance with technical drawings, designs, formulae, or other specifications furnished by the buyer.[402]

Should the buyer elect to rely on the existence of a third party right he/she must give notice to the seller.[403] This notice must specify the nature of the right or claim held by the third party. As in the instance of non-conforming goods, the buyer is required to give notice within a reasonable time after he/she has become, or ought to have become, aware of the right or claim.[404] The seller may not rely on the buyer's failure to give notice, or valid notice, if he/she knew of the right or the claim and the nature thereof.[405] Further, article 44 states that the buyer may reduce the price in accordance with article 50 or claim damages, bar loss of profit, if he/she has a reasonable excuse for having failed to give the required notice.[406] These safeguards prevent a seller from escaping liability based on technicalities.

Under South African law the buyer must be placed in a position whereby he/she receives ownership or undisturbed possession of the goods.[407] South African law places an obligation upon the seller to transfer ownership in the property if he/she has

[399] Article 42 (1)(a).
[400] Article 42 (1)(b).
[401] Article 42 (1)(c).
[402] Article 42 (1)(d).
[403] Article 43 (1).
[404] Article 43 (1).
[405] Article 43 (2).
[406] Article 44.
[407] Kerr *Sale* 177, 187.

it, or to obtain it if possible to transfer it to the buyer.[408] If the seller fails to transfer ownership, the buyer may institute an action for specific performance; the transfer of ownership.[409] The seller who does not acquire ownership is required to warrant the buyer against eviction.[410] The seller is therefore required to make the thing available free from all third party claims involving an immediate or a future right of possession. The buyer must acquire free and undisturbed possession; *vacua possessio*.[411] Should a party with a stronger title threaten the buyer with eviction, the buyer may sue the seller for performance on the warrantee; which usually manifests itself as the payment of compensation.[412] An exception to this rule is if the buyer purchases goods knowing that the seller is not the true owner.[413] There is thus a kinship between the CISG and South African law in respect of third party claims.

4.2.2 Obligations of the Buyer

The Convention imposes two primary obligations onto the buyer. Article 53 succinctly explains that the buyer is required to pay the purchase price and take delivery of the goods in terms of the contract and the CISG. It is necessary to consider the components of these duties.

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[408] Kerr *Sale* 179, 177. The rule originated in Roman law as the seller's obligation to warrant against eviction, rather than to transfer ownership. There appeared to be no desire to leave ownership in the sellers hand though. See Ulpian D 19.1.11.2 and D18.1.80.3; 19.1.46: "The primary obligation on the seller is to make the thing itself available, that is, to deliver it; the result of which is to make the purchaser owner if the seller was owner." The CISG requires the transfer of property but relies upon domestic law to govern the process.

[409] Kerr *Sale* 198. The failure to discharge the duty to transfer ownership gives rise to the remedy of specific performance, while the breach of the warrantee against eviction only entitles the evicted buyer to compensation for the loss suffered.

[410] For a complete synopsis of the history of the warrantee against eviction, arising from Roman law see J Jamneck "Die ontstaan van die waarborge teen uitwinning en teen verborge gebreke" 1999 *TSAR* 138.

[411] A buyer may then acquire ownership by prescription, if no one with a better title evicts him/her. The seller therefore has done everything that would usually make the buyer the owner. See *ABSA Bank Ltd v Myburgh* 2001 (2) SA 462 (W) 469C-E; Voet 19.1.14. Compare with article 41 of the CISG.

[412] Kerr *Contract* 458-459. In *Vrystaat Motors v Henry Blignaut (Edms) Bpk* 1996 (2) SA 448 (A) 457H-464A the court held that when the police seized stolen vehicles, the buyer had been evicted and could thus institute an action on the warrantee.

[413] Pothier believed that a buyer who purchases goods with the knowledge that the seller is not the owner, is still entitled to recover the purchase price. Kerr argues against this position. Kerr *Sale* 197.

4.2.2.1 Payment of the Price

The buyer is obliged to pay the price for the goods that he/she purchased from the seller. This obligation includes the duty to take such steps and to comply with such formalities that may be required in terms of the contract, or any law or regulation, to enable payment to be made.[414]

The CISG does not require the parties to fix a price in order for the contract to be valid.[415] Two criteria are enumerated upon in article 14(1), which results in an offer giving rise to a valid contract: intention to be bound and definiteness. The latter part of article 14(1) provides that the proposal is "sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." Upon careful reading, article 14(1) would appear to render open-price contracts unenforceable. Article 55 negates this conclusion by stating that where a contract has been validly concluded, but does not expressly or implicitly fix or provide for a price, the parties are considered to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the same trade.[416] This general rule will not however apply if there is evidence that the parties did not intend to adopt the usual price. The wording of article 55 appears to relate directly to article 14(1). These potentially conflicting articles may give rise to disputes regarding the price of goods and as such constitutes a threat to contractual stability under the CISG.[417]

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[414] Article 54.

[415] In the USA and other industrialised countries sales contracts for long-term supplies leave the price and quantity of goods open to be adjusted in terms of the will of the parties. The UCC explicitly permits contracts with open-price terms (U.C.C. §§ 2-305 and 2-306 (1978)). Open price contracts are generally not accepted under common law. In terms of French law there is a certain degree of hostility toward such contracts, particularly when they resemble a franchise or exclusive dealing contract and greatly disadvantage the weaker party. Other European systems are more accepting of these contracts, which are often referred to as "shell" contracts. In certain socialist legal systems these contracts are invalid and thought a threat to the security of the contract.

[416] Article 56 further states that if the price for the goods in question is usually determined according to weight, in cases of doubt the price is to be determined by the net weight.

[417] At the 1983 Parker School Conference, Professor Allan Farnsworth suggested that article 55 is an empty set because it applies, according to its opening clause, only in cases "where a contract has been validly concluded". An agreement with an open price is not based on a valid offer. Under this interpretation the ambit of article 55 would be limited to those signatory nations that choose, under article 92, not to adopt the formation provisions of the Convention. Professor Denis Tallon took a less restrictive approach to article 55, however it is clear that the compromise reached has been obscured by the inclusion of two incompatible articles in the CISG. See International Conference on the United Nations Convention on Contracts for the International Sale of Goods 6-7 (Parker School of Foreign and

When discharging the duty to pay the purchase price, it is important that the buyer do so at the appropriate place. The buyer is required to pay the seller in one of two places, unless the parties have agreed otherwise. Firstly, payment may be made at the seller's place of business.[418] Should the seller change his/her place of business after the conclusion of the contract, he/she is responsible for any increase in the expenses incidental to payment that arise therefrom.[419] Secondly, payment may be made at the place where the goods or documents are handed over, if payment is to be made simultaneously with handing over.[420]

The buyer is further required to make payment at the appropriate time. Parties frequently include the time of payment in the contract. In such a case, the buyer is to pay at that time. Where the contract fails to specify a time of payment the buyer must make payment when the seller places the goods, or the documents that control their disposition, at his/her disposal. It is permissible for the seller to make payment a condition for the handing over of the goods or their documents.[421] When the sale involves carriage of goods, the seller may dispatch the goods on condition that the carrier retains the goods or their documents until the buyer transfers payment.[422] The buyer may refrain from making payment until he/she has made a proper inspection of the goods delivered, unless the procedures for delivery or payment prevent the opportunity to examine the goods.[423] Ultimately the buyer is required to make payment on the date specified in or determinable from the contract, or the CISG, without the need for any request, or compliance with any formalities, on the part of the seller.[424]

Under South African law the buyer bears the duty to make proper payment according to the terms of the contract.[425] While the CISG does not require an exact price to be

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Comparative Law, Columbia University, Oct. 21, 1983). Hereinafter cited as 1983 Parker School Conference.

[418] Article 57 (1)(a).
[419] Article 57 (2).
[420] Article 57 (1)(b).
[421] Article 58 (1).
[422] Article 58 (2).
[423] Article 58 (3).
[424] Article 59.
[425] D 19.1.11.2; 19.1.13.20; Grotius 3.14.1; Voet 19.1.18. A buyer who makes payment, is entitles to a receipt for the amount paid, see *Liebenberg v Loubser* 1938 TPD 414 at 415.

contained in the contract, South African law has long held that for a valid contract to be formed the price must be determinable from the contract.[426] For a contract to be valid it must contain a price that is serious,[427] fixed or capable of ascertainment,[428] and that sounds in current money.[429] To be serious the price: must be real, in that the buyer intends to pay and the seller intends to exact the price from the buyer; and must bear a relationship to the actual value of the goods.[430] To sound in current money, the price must be paid in valid legal currency and must not be the exchange of goods.[431] The parties need not have specified an exact amount in the contract, provided that they come to an agreement regarding the method by which the price can be determined without additional reference to them.[432] Four methods of determining a price have been recognised in South African law. Firstly, reference can be made to

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[426] *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 574B-C. The validity of a contract depends upon the existence of a contract price, agreed to expressly or impliedly by the parties to the contract. Voet 18.1.23 clearly states the rule: no price, no sale contract. See *Treasurer-General v Ormond* 2 SC 127.

[427] Voet 18.1.22.

[428] Voet 18.1.23; *Colonial Government v De Beers Consolidated Mines Ltd* 22 SC 452 at 460; *Burman v Steenkamp* 1917 EDL 419.

[429] Voet 18.1.22. The requirement of 'current money' can be equated to any legal tender: Kerr *Sale* 221. See section 17 of the South African Reserve Bank Act 90 of 1989. Current money includes payment in a foreign currency and the value of the price is to be converted on the date that when payment is due: see *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C) 673 ; *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) 672F-674H. This rule may be varied by mutual agreement between the parties: see *Voest Alpine Inter-Trading GmbH v Burwill and Co (SA) (Pty) Ltd* 1985 (2) SA 149 (W).

[430] Zulman and Kairinos *Norman's Purchase* 46. However, the price need not be fair or exactly equivalent to the value of the goods; the buyer may make the best bargain possible by using his/her superior shrewdness as long as such shrewdness does not constitute fraud. See *Kingsley v African Land Corporation Ltd* 1927 TPD 162 at 172-173.

[431] Where the price is paid partly in goods and partly in money, the intention of the parties will determine whether it is a contract of sale or of exchange: see Voet 18.1.22. Where the intention of the parties is unascertainable, but the greater portion of the price was paid in money, it will be deemed to be a contract of sale. Should the value of the goods however exceed the value of the money paid, it will be a contract of exchange: see *Antonie v The Price Controller and Another* 1946 TPD 190 at 193. Under English law, if a contract is to be paid partly in money and partly in goods that have a fixed value, the contract will be deemed to be one of sale. In *Vizirgianakis v Karp* 1965 (2) SA 145 (W) 150A-B Colman J stated *obiter* that under South African law a trade transaction is one of exchange and not one of sale, however Bristowe J in *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D) 177I-J disagreed with this opinion. Should payment be made entirely in goods, the parties would have entered a contract of exchange and not of sale.

[432] This principle is summarised in the maxim *id certum est quod certum reddi potest* (D 12 1 6; 45 1 74). *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) 670. Colman J said that no valid contract would exist unless the parties had agreed, expressly or by implication, to a purchase price. This could be achieved by fixing an amount in the contract or by agreeing upon an external standard by the application whereof it would be possible to determine the price without further reference to the parties. See also *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) 574B-C; *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A) 576I-577A; *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 (4) SA 141 (A) 158F-159A.

independent circumstances.[433] Secondly, reference may be had to a third party.[434] Thirdly, reference can be made to the usual or current market price.[435] Fourthly, amidst much debate, it has been recognised to a limited degree that parties may state that the sale will be at a 'reasonable price'.[436] The above principles found in South African law correspond with articles 14(1) and 55 of the CISG, which requires parties to fix a price or to make provision for how the price is to be determined.[437] If no price is set, it will be implied that the parties desired the purchase price to be the current market price.[438] Therefore, the CISG corresponds with the South African law position and the uncertainty surrounding the calculation of a reasonable price does not come into play.

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[433] The price could be set as being the cost price plus 40%.

[434] The price may be set by a named third party who was selected by mutual agreement between the parties. See Voet 18.1.23; *Murray and Roberts Construction Ltd v Finat Properties (Pty)* Ltd 1991 SA 508 (A) 515B. *Odendaalsrus Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) 663-665 and *Mufamadi and Others v Dorbyl Finance (Pty) Ltd* 1996 (1) SA 799 (A). The sale is hereby subject to a suspensive condition that the third party actually sets the price. If the third party declines to set the price, or is unable to do so, there is no sale: see *South African Land and Exploration Co Ltd v Union Government* 1936 TPD 174; *CM Asbestos Co (Pty) Ltd v King Chrysotyle Asbestos Mines (Pty) Ltd and Others* 1953 (3) SA 431 (W). No valid sale will come about where parties agree that the price will be set by an unnamed party: see Voet 18.1.23. However, should the agreement be that one of the parties or their nominee will set the price, the contract will be invalid according to *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 574C-D and *Patel v Adam* 1977 (2) SA 653 (A). This latter rule has however been criticised in an *obiter dictum* in *NBS Boland Bank v One Berg River Drive; Deeb v ABSA Bank; Friedman v Standard Bank* 1999 (4) SA 928 (SCA) para 9 and 16, for being illogical and out of step with modern legal systems.

[435] The market price may be set as the purchase price either by express agreement or impliedly via conduct. This case often arises in the event of goods being ordered at a shop without the buyer first enquiring after the price or where the buyer orders a meal at a restaurant without first enquiring what the cost will be. In such cases a tacit agreement has been reached that the usual or market price will be charged. See *Machanick v Simon* 1920 CPD 333 at 338; *R v Pearson 1942 EDL 117 at 121-122; R v Soller* 1945 TPD 75; *Rustenburg Platinum Mines Ltd v Breedt* 1997 (2) SA 337 (A). In *Stead v Conradie en Andere* 1995 (2) SA 111 (A) the court however held that reference to the market value of land was not sufficiently clear and that the contract was invalid.

[436] This method has been the source of contention in South African law. In *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) 419G-420B the court found that a contract of sale at a reasonable price is invalid. It was however commented in an *obiter dictum* in *Genac Properties Johannesburg (Pty) Ltd v NBC Administration CC* 1992 (1) SA 566 (A) 577F-G that it is difficult to see on what principle a sale for a reasonable price should be regarded as invalid. It pointed out that there is authority for the payment of a reasonable price as remuneration for work done: see *Middleton v Carr* 1949 (2) SA 374 (A) as cited in *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) 649C-D. In *Adcorp Spares PR Ltd v Hydromulch Ltd* 1972 (3) SA 663 (T) 668F-G the court held that an agreement to pay a fair and reasonable price was too uncertain to give rise to a valid contract. This view is contrasted with that of Zeffertt who has argued that a reasonable price may be capable of being reduced to certainty should the courts be able to determine what is reasonable in the circumstances; D Zeffertt "Sale at a Reasonable Price" (1973) *SALJ* 113. In *Genac Properties* 578B-D the court admitted that there was support of Zeffertt's view in both the English and the American legal systems. Therefore, a basis for law reform exists on this point.

[437] Article 14(1).

[438] Article 55.

Where the contract requires payment to be made at a specific time and place, the tender will not be valid unless the buyer complies with such requirements.[439] In cash sales, payment is typically due immediately,[440] while under credit sales payment is due on the date specified in the contract.[441] Where the contract does not set a time for payment, the buyer is expected to make payment within a reasonable time.[442] What constitutes a reasonable time may be determined by reference to the previous course of dealings between the parties or to relevant trade usage.[443] A buyer who fails to pay at the time specified in the contract will be placed in *mora*. Certain requirement must be met prior to a buyer being placed in *mora*. Namely: the obligation must be enforceable against him/her and he/she must not have a valid defence against the action brought; performance must be due[444]; the party must be, or be must be deemed to be, aware of the nature of the performance required and that such performance is due.[445] Should a party be placed in *mora* the aggrieved party has the right to terminate the contract, if time was of the essence. Where time is not of the essence, but a time for performance was stated in the contract, an aggrieved party may only resile if an essential term was breached and the failure to perform amounts to a repudiation of the contract.[446] This principle will be discussed further under remedies and therefore need not be repeated here.

Where a place of payment is contained in the contract, payment must be made at that place.[447] When no place of payment is specified, the buyer must make payment at the

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[439] *Aubrey Feinberg Investments (Pty) Ltd v Runge* 1981 (2) SA 598 (T). One exception to this principle is that if a creditor states that he/she will not accept tender of payment, even if it is valid, he/she is barred from later rejecting the tender for invalidity. In *Major's Estate v De Jager* 1944 TPD 96 at 103 the court held that should the creditor refuse to accept valid payment, the debtor need not perform at all, provided that it is clear that payment will be rejected and that he/she displays his/her willingness and ability to pay.

[440] Grotius 3.14.24.

[441] Kerr *Sale* 222. The parties need not stipulate a day, but may agree for payment to be made when the buyer is in a position to do so, see *Sadie v Annandale* 1992 (2) SA 240 (O) 244G-245F; *Williams and Taylor v Hitchcock* 1915 WLD 51.

[442] Kerr *Contract* 371.

[443] Zulman and Kairinos *Norman's Purchase* 104.

[444] Performance can be due in three circumstances. Firstly, by operation of law (*mora ex lege*). Secondly, in terms of the contract (*mora ex re*). Thirdly, by demand duly made by the creditor (*mora ex persona*).

[445] *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* 1970 (1) SA 584 (T) 587F. The court held that it is not necessary for the innocent party to prove that the breaching party's conduct deliberate or negligent. They stated further that the breaching party's ignorance of what is expected or that performance is due would only be a defence if the ignorance were both *bona fide* and reasonable.

[446] *Kangisser v Rieton (Pty) Ltd* 1952 (4) SA 424 (T) 428.

[447] *Coloured Development Corporation Ltd v Sahabodien* 1981 (1) SA 868 (C) 872-873.

place where the obligation was contracted[448] or the place of delivery.[449] Where no place of payment is mentioned, but a time of payment is, the buyer must seek out the seller to make payment in order to avoid the consequences of *mora*.[450] In *Venter v Venter*[451] the court held that if the debtor undertakes to make payment on a certain date, he/she must do so at any convenient place where he/she may lawfully perform. This need not be at the residence of the seller. If the buyer attempts to make payment but the seller, intentionally or unintentionally, places obstacles in his/her path to prevent payment by the specified time at the specified place, the buyer will be deemed to have made a valid tender.[452] The place of performance may be impliedly specified in the contract. Should the contract state that payment is due immediately, it is implied that payment is to be made at the place where the services were rendered.[453]

South African law further requires payment to be made by a person competent to make payment, to a person competent to receive payment.[454] The party to the contract on whom the obligation is placed is competent to pay. Alternatively, the contract may specify that a third party will tender payment.[455] Should this third party do so, it will be considered to be valid performance. Should the third party however fail to perform, the contracting party who promised that the third party would pay will be held liable.[456] Further, payment is to be made to a person who is recognised in law to be competent to receive that payment; this will usually be the other party to the contract.[457] The seller may authorise an agent to accept payment.[458] Payment to a third party who is not an agent will usually not discharge the duty to make payment,

[448] Voet 46.3.12; *Walker v Taylor* 1934 WLD 101.
[449] *Home v Williams and Co* 1940 TPD 106.
[450] Kerr *Contract* 528-533.
[451] 1949 (1) SA 768 (A) 778-779. The debtor must seek out the creditor to make payment before the time of payment lapses. This is in line with previous cases: *Segal v Mazzur* 1920 CPD 634 at 641; *Collet v Eva* 1926 CPD 187 at 190; *Northmore v Scala Cinemas(Pty) Ltd* 1936 TPD 280 at 285; *Schietekat v Naumov* 1936 CPD 493 at 496; *Gordon v Tarnow* 1947 (3) SA 525 (A) 530-534.
[452] *Hanekom v Amod* 1959 (4) SA 412 (C).
[453] *Horne v Williams & Co* 1940 TPD 106 at 112.
[454] Zulman and Kairinos *Norman's Purchase* 101. The CISG does not expressly require the parties to be legally competent to make payment or to receive payment. Given that legal competency is a generally accepted principle, it can be assumed that the CISG would also require legal competency.
[455] Voet 46.3.1; *Bousfield v Divisional Council of Stutterheim* 19 SC 64 at 70.
[456] *Hanomag SA (Pty) Ltd v Otto* 1940 CPD 437.
[457] Christie *The Law of Contract* 5 ed (2006) 407.
[458] Voet 46.3.2; Zulman and Kairinos *Norman's Purchase* 101. Power to sell does not equate with authorisation to receive payment: see *R v Visagie* 1954 (4) SA 50(O) 51G-H.

unless the creditor is *estopped* from denying the authority of the person to receive payment and ratifies the actions with retrospective effect.[459]

Where a buyer fails to make payment in accordance with the terms of the contract or the above general principles, the seller may claim the purchase price, any expenses incurred after the sale, and interest arising from the default.[460] If the seller elects to cancel the contract and claim damages, the rules on mitigation of loss, as discussed above, come into operation.[461]

Therefore it is evident that the CISG strongly resembles South African law in regard to the duty to make payment. Both require the buyer to make payment in accordance with the terms of the contract. In addition, both sets of law permit a contract to be formed without a contract price, provided the contract sets out a clear manner in which a price can be determined.

4.2.2.2 Taking Delivery

The CISG requires that the buyer take delivery of the goods when the seller puts them at his/her disposal. This duty consists of two parts. Firstly, the buyer is required to do everything that could reasonably be expected to enable the seller to make delivery. Secondly, the buyer is required to take possession of the goods when the seller makes delivery. Should the buyer fail to do so, the seller is required to care for the goods until the buyer takes delivery.[462] The buyer is thereafter liable to reimburse the seller for all reasonable expenses relating to the upkeep of the goods.[463]

Under South African law a buyer is under an obligation to remove or to receive the goods purchased.[464] Where no time is set for the buyer to remove the goods, he/she

[459] *Resnik v Lekhethoa* 1950 (3) SA 263 (T). The payment will also be made valid in the event of the seller receiving the benefit thereof from the unauthorised third party.
[460] Voet 19.1.18; D 19.1.13.19-30; Grotius 3.15.1.
[461] Kerr *Sale* 226.
[462] Article 85. This obligation is not found in Chapter Three with the other obligations of the buyer. It is in Chapter Five, which governs the obligations common to both parties.
[463] Articles 85 and 87.
[464] A buyer is under an obligation to remove the goods when they are made available to him/her by the seller or to receive the goods if they are brought to him/her by the seller. See *Gilson v Payne* (1899) 16 SC 286. Pomponius explains this duty as follows: "If a man buys the stone on an estate and refuses to remove it, an action on sale may be brought to enforce removal". D 19. 1. 9.

must do so within a reasonable time.[465] If the buyer fails to fulfil this obligation he/she will be in *mora creditoris*. This entitles the seller to claim a reimbursement for necessary expenses incurred to maintain and to store the *res vendita* between the date of the sale and the making of the goods available, in addition to certain useful expenses.[466] This provision corresponds with articles 85 and 87 of the CISG. Once again South African law corresponds with the provisions of the CISG.

4.3 Rights and Remedies Available to Contracting Parties

The most important rights and remedies available to the buyer and the seller under the CISG will be examined below. Thereafter the position under South African law will be investigated. Under the CISG the buyer may enforce any of his/her rights contained in articles 46 to 52 in the instance of the seller breaching the contract. In addition, the buyer may claim damages as provided for in articles 74 to 77. Article 45 clearly stipulates that the buyer is not deprived of his right to claim damages by exercising his/her right to other remedies. This general principle parallels with the position under South African law where the innocent buyer is entitled to claim damages in addition to any other remedy at his/her disposal.[467] Articles 61 to 65 provide remedies for seller in the instance of the buyer having breached the contract. The seller, like the buyer, is further entitled to claim damages under articles 74 to 77.

It is important to touch on the concept of good faith provided for in article 7 of the CISG.[468] The CISG is to be interpreted in a manner that observes good faith. The meaning of good faith under the CISG is ambiguous. While good faith was intended to be an interpretative tool, courts are extending its application to the performance of

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[465] *James Hall v Hutchinson and Koe* 12 NLR 175; Zulman and Kairinos *Norman's Purchase* 109. What constitutes a reasonable time is a question of fact.
[466] Voet 19.1.18; Grotius 3.15.1.
[467] Eiselen "A Comparison of the Remedies for Breach of Contract under the CISG and South African Law" http://cisgw3.law.pace.edu/cisg/biblio/eiselen2.html (accessed 1 June 2008).
[468] The inclusion of article 7, creating an obligation of good faith and fair dealing, caused many disputes between common law, continental, and socialist representatives. All the representatives acknowledged the multiple meanings of good faith and the various connotations related thereto in different legal systems. The president of the diplomatic conferences noted that: "It was widely thought that the rule was vague, or at least would remain vague for a long time and, because of the laconic language of [the Convention], would never become unambiguous". The obligation of good faith is well known in industrialised States and has been operational under section 1-203 of the UCC, which states that: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-203 (1978).

the contract.[469] Good faith may prevent a party from terminating a contract based on a minor breach.[470] It may further create obligations requiring the parties to communicate during performance and to co-operate in curing defects or modifying obligations in unforeseen circumstances.[471] The drafters of the CISG refrained from relying heavily upon the concept of good faith and therefore did not expressly mention it in respect of party conduct. The principle of good faith enjoys limited scope in the CISG and is uncertain in its contents, but should be borne in mind whenever parties interact with one another. Under South African law the principle of good faith is applied to the performance and the interpretation of contracts. In practice, it appears that the same may be said of the CISG.

4.3.1 The Right to Specific Performance

4.3.1.1 Performance, Repair, and Substitute goods

Article 46(1) of the CISG states that:

> "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."

It is imperative to read article 46 in conjunction with article 28, which states that a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of a similar contract of sale not governed by the

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[469] The inclusion of the good faith principle as an interpretation tool is a concession that arose out of heated debates. No compromise could be reached during negotiations and thus its meaning was left open. Article 7 has been used by courts to introduce the principle of good faith into the other provisions of the CISG. U Magnus "Editorial Remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement CISG Article 7" http://cisgw3.law.pace.edu/cisg/principles/uni7.html#um (accessed 1 January 2008).

[470] Parev. Prods. Co. v. 1 Rokeach & Sons, Inc., 124 F. 2d 147 (2d Cir. 1941).

[471] A Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods" http:www.cisg.law.pace.edu/cisg/biblio/rossett.html (accessed 14 October 2008). In continental and socialist legal systems the principle of good faith is not limited to the performance of completed agreements, but extends to the initial formation process. It serves to limit the right of a party to terminate the formation process by withdrawing after an offer is made. It is not possible to say whether this potentially impish concept is part of the final principle incorporated into the Convention. Professors Honnold and Eörsi think it is, while Professor Farnsworth disagrees. Professor Eörsi commented upon the final compromise by stating that: "Almost everybody thought it a strange

CISG. The Convention provides a compromise remedy between States where specific performance is the primary remedy and States where it is a secondary remedy. The majority of common-law States adhere to the latter view and consider specific performance to be a radical remedy reserved for exceptional circumstances. England is of such a view. In comparison, most civil-law States consider specific performance to be the primary remedy for breach of contract. The consequence of article 28 is that the place at which the action is lodged, and not the merits of the case, may determine whether the buyer will succeed in his/her claim for specific performance. Article 28 therefore creates significant legal uncertainty for parties wishing to claim specific performance.[472] The nebulous wording utilised creates further uncertainty. On a literal reading it would appear that article 28 is only applicable to courts. It may be argued that international arbitral tribunals need not heed this provision. Arguments have been tendered on both sides of this issue.[473] It may be contended that the rationale of article 28 is that a court should not be bound to do something that would contravene the legal tradition of its own *lex fori* and thus it does not apply to an arbitral tribunal because an arbitral tribunal does not have a *lex fori*. Alternatively, it could be argued that the ratio of article 28 calls for an extension of its ambit to include arbitral tribunals. Various factors have been mentioned in support of the latter view. Firstly, arbitral tribunals derive their jurisdiction from the domestic judiciary and therefore the ratio of article 28 applies to them as well. Secondly, more than ninety percent of all international commercial contracts contain an arbitration clause and hence article 28 would serve little purpose if it were not applicable to arbitral

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compromise, in fact burying the principle of good faith and thus covering up the lack of compromise." The result was strange but gained for the principle of good faith a foothold in the CISG.

[472] Nicholas 1989 *Law Quarterly Review* 220. The observation has been made that in practise the gulf between civil law and common law countries, regarding the principle of specific performance being a primary or a secondary remedy, is reduced. It has become evident that even non-common law countries are opting for damages as a primary remedy when litigating. Thus the conflict concerning article 28 is less extensive than feared. It is further of importance to note that the remedy of specific performance cannot be excluded merely because the aggrieved party could reasonably have been expected to make a substitute contract. A proposal to rectify it was made at the Vienna conference (O.R. 330f; cf. U.L.I.S. Art. 25), but was rejected. The proposal, from a German stance, according to Wills would have removed the remedy of specific performance for all practical purposes and would have persuaded sellers to view their contractual obligations too lightly.

[473] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".

tribunals.[474] This issue has not appeared before a court to date and remains to be resolved.[475]

Under article 62 the seller may:

> "require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."

The seller is entitled to claim specific performance under the contract. The same principles, which apply to the buyer claiming specific performance, apply to the seller.

With respect to South Africa the buyer is always entitled to specific performance as a primary remedy and such an order will be granted unless there are exceptional circumstances for not granting the remedy.[476] *Prima facie* every party to a contract who is ready to carry out his/her obligations under the contract has a right to demand that the other party, as far as possible, perform his/her obligations.[477] In *Farmers' Co-op Society (Reg) v Berry* the court held that while in many cases an award of damages would resolve the breach of contract, the offending party does not possess the right to decide whether he/she will perform or pay damages. This right of election lies in the hands of the injured party, subject to the discretion of the court. Specific performance will therefore be granted in every case where the injured party makes out a case in favour of the order. The court will only exercise its discretion to refuse an order of specific performance in exceptional circumstances.[478] These circumstances include impossibility, undue hardship, contracts for personal services, and imprecise

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[474] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom".
[475] This problem is not found in the UNIDROIT Principles. It is solved by article 1:10 that states that: "In these Principles - "court" includes arbitral tribunal".
[476] Zulman and Kairinos *Norman's Purchase* 223.
[477] Voet 19.1.1; *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350.
[478] The court has refused to grant an order for specific performance when: it is impossible for the defendant to comply with the order (*Esterhuizen v East Rand Crushers Ltd* 1968 (4) SA 281 (T)); damages would adequately compensate the plaintiff (*Swarts and Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T)); the order involves services of a personal nature (*Mohr v Kriek* 1953 (3) SA 600 (SR)); the goods are readily available elsewhere (*R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) 873); it would be unreasonably harsh on the defendant (*Haynes v King William's Town Municipality* 1951 (2) SA 371 (A)); the agreement itself is unreasonable or ambiguous (*Bardopoulos and Macrides v*

obligations.[479] Whether exceptional circumstances exist or not is within the discretion of the court to decide.[480] In *Benson v SA Mutual Life Assurance Society*[481] the court confirmed that there are no rules governing the court's discretion except the principle that it be exercised judicially upon a consideration of all the relevant facts. The Appeal Court in *Ex Parte Neethling*[482] held that it would only interfere in the event that the court *a quo* exercised its discretion capriciously, acted upon a wrong principle, did not bring its unbiased mind to bear upon the question, or did not act for substantial reasons. It must only be used to prevent the commission of an injustice through the granting of a specific performance order. An example of an unjust result would be where specific performance would be unduly harsh on the defendant.[483] In executing judicial discretion the court may further take into cognisance legal and public policy and impossibility. In *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*[484] the court held that it is not the duty of the party requesting the order to prove that there are no impediments to the granting of it. Rather, the burden falls on the defendant to prove that he/she is unable to perform the obligations under the contract. Therefore there is no guarantee under South African domestic law either that the party seeking an order of specific performance will be successful in every instance.

Article 46(1) of the CISG states that specific performance may only be claimed if other remedies utilised by the buyer are not inconsistent with performance. An order for specific performance would be rendered impossible should the buyer simultaneously claim avoidance of the contract. This will be examined fully below.

Specific performance under the CISG is augmented in article 46(2)-(3). These provisions make allowance for the substitution or repair of non-conforming goods. The right to demand performance includes the delivery of the goods or any missing

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Miltiadous 1947 (4) SA 860 (W)); it would result in injustice and be inequitable under the circumstances (*Fluxman v Brittain* 1941 AD 273).

[479] Christie *Contract* 524.

[480] In *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378 the court held that it would as far as possible give effect to the plaintiff's claim for specific performance, but possesses a discretion in 'fitting' cases to refuse to make such an order. The court however, refrained from establishing rules to govern the exercise of this discretion.

[481] 1986 (1) SA 776 (A) 782F-783C.

[482] 1951 (4) SA 331 (A) 335.

[483] Christie *Contract* 524. Further instances would be: where compliance with the order is impossible, unduly onerous, difficult to enforce, or insufficiently clear in that opinions may vary as to whether there was performance.

part thereof, the handing over of documents, the curing of defects, and the performance of all other acts necessary to fulfil the contract.
Article 46 (2) reads as follows:

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

Under this provision performance must have been tendered and found to be defective. Article 35 comprehensively sets out the meaning of conforming goods. Goods delivered have to be of the quantity, quality, and description required by the contract, which are packaged or contained in the manner prescribed by the contract.[485] Goods would be in conformity with this requirement if they are: fit for the purpose for which goods of the same description would ordinarily be used; are fit for any purpose expressly or impliedly made known to the seller at the time of concluding the contract, except where the circumstances show that the buyer did not rely, or it was unreasonable for him/her to rely, on the seller's skill and judgment; posses the same qualities as the goods held out to the buyer as a sample; are packaged or contained in the manner typical for the nature of the goods, or where there is no such set packaging, in a manner that will preserve and protect them.[486] Article 35(3) however frees the seller from liability for any such non-conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware or such lack of conformity.[487]

The buyer may request substitute goods in place of the non-conforming ones when two requirements are satisfied. Firstly, the non-conformity must constitute a

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[484] 1982 (1) SA 398 (A) 442B-443F.
[485] Article 35(1).
[486] Article 35(2)(a)-(d).
[487] Article 35 of the CISG fails to provide for who can assert the breach of these obligations by the seller. Goods often pass along a chain of distribution. It is hence not certain what position the CISG takes on product liability to remote vendees and third parties who suffer losses due to non-conforming goods. This article has been the subject of little commentary, which may indicate that domestic rules of product liability are left intact for third-party claims, although presumably buyers and sellers would be limited to their rights under the Convention. This issue is best left to be determined in the context of specific cases.

fundamental breach. Secondly, notice must be given under article 39 or within a reasonable time. Article 39(1) requires the buyer to give notice to the seller of the nature of the non-conformity of the tendered performance within a reasonable time after the buyer has discovered, or ought to have become aware of, the lack of conformity. If this requirement is not met, the buyer loses his/her right to rely on non-conformity. Article 39(2) states that the buyer will further lose his/her right to rely on the non-conformity of the goods if he/she does not give the seller notice thereof within two years from the date on which the goods were actually delivered. The only exception to this requirement is if the two-year period is inconsistent with a contractual period of guarantee.

In terms of article 82, the buyer may only claim substitute goods if he/she is able to make restitution of the defective goods substantially in the condition in which they were received. Article 82(2) lists exceptions to this rule. The buyer may require delivery of substitute goods despite the impossibility to make restitution, if the impossibility is not due to his/her act or omission.[488] Substitution may further be claimed if deterioration of goods is a result of the examination provided for in article 38.[489] The right to request substitute goods is also preserved in the event of the goods having been sold, in part or in whole, during the ordinary course of business, or having been consumed or transformed by the buyer in the course of normal use before the non-conformity was discovered.[490] It is important to note that a buyer, despite having lost the right to claim the delivery of substitute goods, retains all the other remedies available under the contract and this Convention.

Article 46(3) states that:

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

[488] Article 82(2)(a).
[489] Article 82(2)(b). E.g. If the goods perish due to the examination.
[490] Article 82(2)(c).

Under this provision it is also essential that performance must have been tendered, but defectively. The buyer can elect to ask the seller to repair the non-conforming goods at his/her own expense and then once again deliver them. Similarly to a request for substitute goods, the buyer must given notice to the seller when requesting repair of goods. The notice must specify the nature of the deformity and must be given to the seller within two years of the buyer having received the defective goods. Repair must be a reasonable request in the circumstances. The buyer may require repair of goods only in the case of a fundamental breach of contract. [491] The CISG fails to specify what would constitute a fundamental breach in respect of non-conformity of goods. One important element may be the ability of the seller to repair the non-conforming goods within a reasonable time period. Whether the repair is unreasonable in the circumstances may depend upon technical difficulties, the amount of expense involved, or technical reasons indicating impossibility. Disencumbering goods from third party rights is included under the concept of repair. The seller may thus repair such goods by taking a license or buying a patent.

It is doubtful whether the requirement of a fundamental breach is justified. The choice between delivery of substitute goods and repair of the defective goods should rather depend upon the kind of goods in question, the nature of the defect, and the possibilities of the seller. Under certain circumstances it is possible for a buyer to request both substitution and repair of non-conforming goods. This is mostly found in the instance where the seller is only able to supply a portion of replacement goods, but offers to repair the remaining portion of the defective goods.

The inclusion of this remedy in the CISG was criticised because the right to repair is not available in many domestic legal systems. In practice however it has proven itself to be the most common remedy in international trade disputes regarding technical goods.[492]

[491] Enderlein "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods".
[492] Enderlein "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods".

In South African sales law the duty to deliver substitute goods or to repair non-conforming goods is covered by the umbrella right to claim specific performance.[493] The order for specific performance can assume various shapes. Namely: an order for the delivery of goods when no delivery has been made or for the delivery of the balance of the goods when only part delivery has been made;[494] an order for delivery of substituted goods when the goods delivered do not conform to the requirements of the contract and cannot be repaired; an order requiring the repair of non-conforming goods to place them in the state required by the contract. Based on the above it is apparent that the CISG and South African law do not differ regarding the content of the remedy of specific performance.

4.3.1.2 Additional Period of Time

Where the buyer elects to claim specific performance as a remedy against the seller, he/she may affix an additional period of time in which the seller is required to perform. This additional period is often referred to as a *Nachfrist* due to its partial similarity to a German concept of that name.[495] This additional element of the right to claim specific performance is housed in article 47.

Article 47 sates that:

> "(1) The buyer may affix an additional period of time of reasonable length for performance by the seller of his obligations.
> (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not

[493] Under the CISG the right to demand repair or substitute goods is spelt out as separate rights to specific performance. These rights are thereby brought to the buyer's attention. Under South African law, these rights are held under the umbrella right of 'specific performance'. As such they are not made obvious to the buyer.
[494] Failure to deliver includes: a refusal to deliver (*Landau v City Auction Mart* 1940 AD 284); the delivery of non-conforming goods (*Glick v Gerber* 1926 OPD 84; *Anderson and Coltman Ltd v Universal Trading Co* 1948 (1) SA 1277 (W)); the failure to deliver specific goods ordered (*Jordaan v Treunich* 1931 OPD 22); the delivery of the incorrect quantity of goods (*Cedarmont Store v Webster and Co* 1922 TPD 106); delivery at the wrong time and place (*Sher v Frenkel and Co* 1927 TPD 375).
[495] Nicholas 1989 *Law Quarterly Review* 225.

deprived thereby of any right he may have to claim damages for delay in performance."

This period should be of reasonable length. The exact length should be made known to the seller to enable him/her to make timely performance. After the expiry of the grace period, the buyer may require specific performance by the seller. The setting of an additional period is not mandatory. Should the buyer elect to avoid the contract it is not necessary to fix an additional period where a fundamental breach has occurred.

The fixing of an additional period will only have a direct legal effect in three instances. These being a failure: by the seller to deliver, by the buyer to take delivery, or by the buyer to pay the contract price. If the failure is not remedied upon the expiry of the additional time set, the innocent party is entitled to avoid the contract in these three cases regardless of whether the breach is fundamental. The additional period of time relieves the innocent party of the burden of proving that the breach was fundamental. The only concern remaining is whether the court will consider the length of the period to have been reasonable. It is accordingly advisable for parties to be generous in the length of time fixed. A party may choose to set a grace period in other instances to allow themselves time to consider which legal route to pursue. A party may in fact fix numerous consecutive grace periods in which the offending party is encouraged to perform.

The seller may also claim the right to set an additional period for performance. This right is housed in article 63 of the CISG. Unless the buyer notifies the seller of his/her intention not to perform during the additional period set, the seller is deprived of exercising other remedies that are inconsistent with performance. The seller may claim damages for delay in performance, despite the grace period. The principles discussed above in relation to the buyer are equally applicable to the seller.

In South Africa the domestic sales law does not directly address the right of a party to offer a period of grace in which the breaching party may perform. There is nothing however preventing a party from setting an additional period for performance. In *Land*

Values Ltd v Highlands North Investment Etc Co (Pty) Ltd[496] an extension of time was granted in which the buyer could perform his obligation to pay the purchase price to the seller. The CISG has established boundaries for the operation of articles 47 and 63 by removing the right of the innocent party to rely on other remedies during the additional period. South African law may also provide a safe environment in which this principle may operate. In terms of a forfeiture clause, a party may set an additional period of time for performance by the party in *mora*.[497] In the event of the party not performing within this additional period, the innocent party may automatically cancel the contract. The doctrine of *estoppel* supports the principle found in articles 47(2) and 63(2) that the innocent party may not utilise remedies that are inconsistent with performance during this additional period. A potential problem is that *estoppel* need not be limited to instances of misrepresentation, but may also be utilised when one party delays in enforcing their contractual rights.[498] The failure immediately to enforce one's rights is not necessarily a waiver of such rights. In *North Eastern Districts Association (Pty) Ltd v Surkhey Ltd*[499] the court held that it is not by delay that a person loses his/her rights where he/she is aware that another has infringed them. Delay may be taken into consideration by the court when deciding whether the party has lost his/her rights, but it is not the decisive factor. *Estoppel* comes into operation when an innocent party unreasonably delays in enforcing his/her rights. In the instance of such a delay the breaching party is left to assume that the right has been abandoned and may act to his/her determent based on this assumption. Under these circumstances the innocent party will be *estopped* from claiming his/her remedy, especially if it will cause undue hardship to the breaching party. The granting of an extended period in which to perform does not amount to an ordinary delay in claiming one's remedy. It serves a specific purpose and is not unreasonable.[500] In this situation the court will understand the reason behind the delay and should not declare the innocent party's right to be waived. During this grace period the innocent party will however be *estopped* from utilising other remedies available to him/her under the contract. Therefore, although not specifically catered for in South African law, there is

[496] 1931 WLD 174. The buyer was given an extension until 'tomorrow' and it was held to mean that payment could be made at any point before midnight of the following day.
[497] *Kabinet van die Oorgangsregering vir die Gebied van Suidwes-Afrika v Supervision Food Services (Pty) Ltd* 1989 (1) SA 967 (SWA). *Rautenbach v Venner* 1928 TPD 26.
[498] Christie *Contract* 444.
[499] 1932 WLD 181 at 186.

nothing preventing a party from extending an additional period in which the breaching party may perform. The innocent party will be *estopped* from using other remedies until the period of grace has lapsed. Articles 47 and 63 do not therefore introduce a foreign concept into South African law.

4.3.1.3 The Seller's Right to Cure

The specific performance remedy is further extended under article 48 of the CISG. This remedy is often referred to as "the seller's right to cure".[501] Article 48(1) states that:

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

This article enables the seller to remedy any failure to perform prior to the buyer claiming specific performance. This provision in isolation may confuse the buyer, who would not know whether to claim performance or to wait for the seller to remedy his/her failure. Therefore the CISG supplemented this provision. Under article 48(2) the seller is bound to submit a request to the buyer. The seller thereby requests permission to make performance and enquires as to whether the buyer will accept such performance. The buyer is required to give an answer within a reasonable period of receiving the request. A failure to respond within a reasonable time would entitle the seller to presume that performance will be accepted and to perform within the time set under the request. In such circumstances the buyer is prevented, by his/her failure to respond, from exercising any right that is inconsistent with the seller's performance. A request to perform is not effective unless received by the buyer.[502] Any notice by the seller to perform within a specified period is presumed to include a request that the

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[500] The delay is in aid of the offending party and he/she should not be able to claim *estoppel* against the innocent party.
[501] Nicholas 1989 *Law Quarterly Review* 224.

buyer inform the seller as to whether he/she will accept performance.[503] This right is subject to its not causing the buyer unreasonable inconvenience, unreasonable expense, unreasonable delay,[504] and its not having been rejected by the buyer.[505] The buyer may also retain his/her right to claim damages and to avoid the contract.[506]

The exercise of the right to avoid the contract removes the seller's right to cure his/her failure. The right to avoid may only be utilised if the breach is fundamental. Whether or not the breach is fundamental may depend on whether the breach can be 'cured' under article 48. Therefore it is clear that confusion may arise due to these two potentially conflicting rights. It is for this reason that a formal request is to be received and replied to by the buyer. In this manner the seller clarifies the position as to whether performance will be accepted by the buyer and whether to cure his/her failure to perform. The buyer should therefore reply to the request as soon as reasonably possible by either accepting performance or rejecting the request to cure.

The right to cure a failure to perform is also available to the seller before the date fixed for performance. Under article 37, if a seller performs before the date of performance he/she may deliver any missing part or cure any deficiency in the quantity of goods delivered up until the date of performance. The seller may deliver replacement goods in respect of non-conforming goods or remedy the lack in conformity. The exercise of this right is subject to its not causing the buyer unreasonable inconvenience or unreasonable expense. In addition, the buyer reserves his/her right to claim damages.

In South African law there is no specific right enabling the seller to cure defective performance. The only window of opportunity available to a seller is to cure the breach before the buyer cancels the contract. If the seller's cure amounts to full performance, the court will be disinclined to allow cancellation of the contract despite the initial deficient performance.[507] The buyer would however be entitled to claim damages in respect to the initial imperfect performance.

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[502] Article 48 (3).
[503] Article 48 (2).
[504] Article 48 (1).
[505] Article 48 (2).
[506] Avoidance will only be permitted after the period has expired in which the buyer agreed to accept the seller's performance.
[507] Voet 21.1.11; *Townsend v Campbell* (1805) 26 NLR 356.

4.3.1.4 Exceptions

Article 79 of the Convention provides for exceptions that release a party from liability for breach.[508] In terms of article 79(1), neither party is liable for a failure to perform his/her obligations if he/she can prove that the failure was due to an impediment beyond his/her control.[509] In addition, the party will have to prove that he/she could not reasonably have been expected to take the impediment into account at the time of concluding the contract or to have avoided or overcome the consequences of the impediment.[510] If the failure is due to the oversight of a third party who was engaged to perform the whole or a part of the contract, the contracting party will be exempt if two requirements are met.[511] Firstly, the contracting party must be exempt under article 79(1). Secondly, the third party engaged to perform must meet the requirements of article 79(1). The exemption provided for in these two provisions only exists for the duration of the impediment.[512] Thereafter the party is liable to perform under the contract.

In the event of an impediment hindering either the buyer or the seller's ability to perform, the hindered party must give notice to the other party.[513] The notice must contain information regarding the impediment and its effect on the party's ability to perform. The notice must reach the other party within a reasonable time after the hindered party knew or ought to have known of the impediment. Should the hindered party fail to notify the other party within a reasonable time, he/she will be liable for damages resulting from the non-receipt.

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[508] In numerous areas that are ripe for reform, the CISG sweeps disagreement among legal systems under the proverbial rug with provisions that are ambiguously drafted, and which do not provide guidance on substance. Article 79 is such an example and provides excuses to evade contract performance because of supervening events that interfere with the contract. Professor Gyula Eörsi, of the University of Budapest and president of the 1980 diplomatic conference that adopted the CISG, described article 79 as an instance in which "both 'parties' agreed in the hope that their doctrinal interpretation would be reflected in the practice of the Convention." He commented that this "does not bridge the gap, only covers it up. The piquancy of the (compromise on article 79) is that in practice there is no gap, only in theory." Eörsi, A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods, 31 Am. J. Comp. L. 333, 355 (1983). However, the same principles are found in South African law and therefore this provision does not present a problem to ratification.
[509] Article 79(1).
[510] Although different wording is used, the test amounts to foreseeability. Therefore, it is the same as South African law.
[511] Article 79(2).
[512] Article 79(3).

Neither the above exemption, nor the provision for the claim of damages in article 79(4), limits either party from exercising any other right under the CISG. The only limitation to a party exercising alternative remedies is that he/she may not rely on the failure of the other party to perform in so far as the hindrance was due to his/her own conduct or omission.[514]

Under South African law parties are also entitled to claim impossibility as a defence for non-performance. This entitles them to terminate the contract and to escape liability through the interruption by *vis maior*, *force majeur* or *casus fortuitus*.[515] The first two terms refer to non-performance caused by an unforeseen force or agency over which the party has no control.[516] The third term refers to something unforeseen that human foresight cannot be expected to have anticipated.[517] In *Nuclear Fuels Corpn of SA (Pty) Ltd v Orda AG* [518] the court held that actual foresight, or reasonable foreseeability, of the event that causes the impossibility might have the effect of negating the impossibility, despite the actual consequences of the event not having been foreseen. Howie JA stated that:

> "if the cause of impossibility is not foreseen or is not such that it ought to have been foreseen, then the usual consequences of *vis major* will follow even if the cause was within the bounds of human foresight."

As with article 80, under the South African law impossibility created by one of the parties will not discharge the contract. Rather the party whose conduct or omission resulted in the impossibility will be liable for the consequences thereof.[519] The party causing the impossibility will be bound by the contract irrespective of whether the impossibility is partial or complete[520], or whether or

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[513] Article 79(4).
[514] Article 80.
[515] Christie *Contract* 472. One may also spell '*vis maior'* as '*vis major'*.
[516] *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427.
[517] *Bayley v Harwood* 1954 (3) SA 498 (A) 505F-G.
[518] 1996 (4) SA 1190 (A) 1206H-1207I.
[519] Christie *Contract* 475; *Wireohms SA (Pty) Ltd v Greenblatt* 1959 (3) SA 909 (C) 912.
[520] *Wireohms SA (Pty) Ltd v Greenblatt* 1959 (3) SA 909 (C) 912.

not the act causing the impossibility is wrongful.[521] The position under South African law is therefore the same as that under the CISG.

4.3.2 The Right to Avoid the Contract

The right to specific performance is aimed at maintaining the breached contract, while the right to avoid is claimed when the innocent party elects to terminate the contract. Specific performance may be claimed in all instances of breach, but the right to avoid may only be claimed in limited circumstances of fundamental breach. Avoidance is a powerful remedy, which releases both parties from their obligations under the contract, subject to any damages that may be due.[522] Article 81(1) protects certain aspects of the avoided contract from being terminated. It states that all contractual provisions governing the dispute settlement or the rights and obligations of parties subsequent to avoidance will be fully enforceable against the parties. Article 49 of the CISG stipulates the circumstances under which avoidance may be claimed.

Article 49(1) states:

> " The buyer may declare the contract avoided:
> a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
> b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed."

A breach of contract means the failure of a party to perform any of his/her obligations.[523] There are different causes for breach of contract, namely: non-

[521] *The Entertainers and The Record Box v Santam Insurance Co Ltd* 1984 (3) SA 735 (W) 747C-H. *National Union of Textile Workers v Jaguar Shoes (Pty) Ltd* 1987 (1) SA 39 (N) 46A.
[522] Article 81 (1).
[523] Enderlein "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods".

performance; delayed performance; and delivery of non-conforming merchandise.[524] Various remedies for breach of contract are housed in articles 46-52, in addition to the claim for damages in articles 74-77. Under certain circumstances a breach of contract is considered to be a fundamental breach, which makes additional remedies available to the aggrieved party. [525]

Under South African law when a party breaches the terms of a contract the innocent party may elect to cancel the contract in the instance of a major breach. The burden of proving that the breach is major rests on the party asserting it.[526] However, when the breach in question is a minor breach, the innocent party is usually only entitled to claim specific performance and damages.[527]

4.3.2.1 Fundamental Breach

The CISG provides for the concept of a 'fundamental breach'. In terms of article 49(1) a contract can be avoided in the case of a fundamental breach. It is necessary to consider the nature of a fundamental breach more closely because it can have dramatic effect on contracts. This concept does not exist in South African law. There may however be a risk of confusion in South Africa because courts are used to the concept of a material breach, which is similar to a fundamental breach.

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[524] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?".

[525] "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom". Many argue against the concept of a fundamental breach because it appears to be unspecific. Lord Lowry's asserted this point in *Bunge Corporation v. Tradax SA*. 2 All E.R. 513 (H.L. 7 May 1981). In assessing the necessity for certainty as an essential characteristic of commercial contracts, he commented that "…decisions would be too difficult if the term were innominate, litigation would be rife and years might elapse before the results were known."(2 All E.R. 513 at 545.) The definition of a fundamental breach in article 25, although exceptionally broad, is not final. The parties to an agreement may move away from the requirements of article 25. This is sanctioned by article 6, which states that parties may exclude the application of the Convention or derogate from or vary any of its provisions. Therefore parties may set their own requirements as to what will constitute a fundamental breach under the contract. Parties may still define certain terms of the contract as conditions by classifying what will be regarded as a fundamental breach. Should parties fail to define their terms in this manner article 25 will prevent avoidance in the event of a minor breach.

[526] Kerr *Contract* 530.

[527] Damages may be claimed together with a claim for specific performance or the party may elect to only claim damages.

The definition of a fundamental breach under the CISG has two components. Firstly, the detriment or expectations component and secondly, the forseeability component. Article 25 describes the nature of a fundamental breach in the following manner:

> "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"[528]

The only way that a party can escape the consequences of breach is if he/she did not foresee the particular result and a reasonable person of the same kind and in identical circumstances would not have foreseen such a result either.[529] The seriousness of the breach is not determined by the extent of the damage incurred, but rather by the importance of the interest that the contract and its individual obligations create for the buyer.[530] The injured party's expectation interests therefore determine the degree of harm suffered. It is necessary to consider separately the two components of fundamental breach.

Firstly, the 'detriment' concept was developed as a consequence of the perceived weakness in the ULIS. Article 10 of the ULIS provided the following definition for fundamental breach:

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[528] The original wording, of the then article 23, agreed upon by UNCITRAL in 1978 was: "A breach by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result." The change of wording was the consequence of a lengthy debate at Vienna. The purpose of the change was to replace a broad definition in terms of unfocussed detriment with one that looked to the injured party's expectations under the particular contract. It resembles the German test of whether the injured party can be said to have no further interest in the performance of the contract. It may further resemble the English test propounded by Diplock L.J. in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 66 as to whether the breach deprives the injured party of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain". Ultimately, under article 25 a court has to decide whether the breach is sufficiently serious to justify avoidance and such court will probably reach this conclusion according to the methods to which it is accustomed.

[529] Article 25. It is the detriment / expectation component that ultimately determines whether a fundamental breach has occurred. The second component of forseeability is then used to reduce liability.

[530] CISG Advisory Council Opinion No. 5 "The buyer's right to avoid the contract in case of non-conforming goods or documents" http://cisgw3.law.pace.edu/cisg/CISG-AC-op5.html (accessed 30 March 2007).

> "For purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects."

The drafters of the CISG developed the substantial detriment test to improve on the innate weakness of basing detriment entirely on forseeability.[531] The CISG does not provide a definition for the term 'detriment', nor does it provide examples of what would constitute a fundamental breach. The early Commentary on the Draft Convention on the International Sale of Goods (Drafters' Commentary) states that the determination of whether the detriment is substantial must be made in light of the circumstances of the case at hand.[532] Circumstances requiring attention include: the monetary value of the contract; the monetary harm caused by the breach; the extent to which the breach has interfered with the activities and operations of the injured party; the terms of the contract; the purpose for which the goods are bought; and whether it is possible to remedy the defect.[533] The assumption may be made that the drafters intended that "detriment" would include monetary or consequential harm, which is to be assessed on a case-by-case basis to determine whether a fundamental breach has occurred.[534] While these factors were determined prior to the inclusion of the

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[531] Article 10 of ULIS was thought to be unsatisfactory because it relies on a test that requires the breaching party to anticipate whether the aggrieved party would have entered into the contract had he/she foreseen the breach. Article 10 was then replaced by draft article 9 of the Draft Convention on the International Sale of Goods. Draft article 9 states that: "A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result." During the drafting process on fundamental breach, the foreseeability element of article 9 was taking shape, but the substantial detriment test remained present. In 1976 Draft Article 9 stated: "A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result." Draft Article 9 was finally renumbered as draft Article 8. The draft retained the substantial detriment test, but revised the foreseeability component. Commentary on the Draft Convention on the International Sale of Goods, U.N. GAOR, 31st Sess., Supp. No.17, at 5, U.N. Doc. A/CN.9/116, annex I (1976), reprinted in [1976] 7 Y.B. Int'l Trade L.Comm'n 90, U.N. Doc. A/CN.9/SER.A/1976.

[532] Commentary on the Draft Convention on the International Sale of Goods, U.N. GAOR, 31st Sess., Supp. No.17, at 6, U.N. Doc. A/CN.9/116, annex II (1976), reprinted in [1976] 7 Y.B. Int'l Trade L.Comm'n 96, U.N. Doc. A/CN.9/SER.A/1976.

[533] CISG Advisory Council Opinion No. 5 "The buyer's right to avoid the contract in case of non-conforming goods or documents" http://cisgw3.law.pace.edu/cisg/CISG-AC-op5.html (accessed 30 March 2007).

[534] The test under article 25 may be compared with the German law test of whether the injured party can be said to have no further interest in the performance of the contract. Under English law one may discover similarities with the test propounded in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen*

expectation interest in article 25, they are still directly related to what the party is entitled to expect under the contract and remain relevant today. Ultimately, the purpose for which the injured party engaged the contract must be thwarted and hence, result in his/her losing interest in the execution of the contract.[535] This would constitute a breach of the detriment or expectation interest.

This principle is easily applied in practice. Contemporary international sale contracts usually specify the nature, quality, quantity, and price of the goods being traded. The parties to the contract will therefore have an expectation as to the nature, quality, quantity, and price of the goods. Any breach of such expectations will be easy to determine. Merchants involved in the contract will also be able to establish whether their business interests or activities have suffered due to the breach.[536]

The second component of the fundamental breach concept is foreseeability. This component developed out of article 10 of ULIS, which based fundamental breach solely on the foreseeability of the events that occurred. Article 25 brings an element of objectivity into the test by proposing two questions. Firstly, did the breaching party foresee the substantial detriment that the breach caused to the other party?[537] Secondly, would a reasonable person of the same kind and in the same circumstances have foreseen the substantial detriment caused by the breach? These questions require the court to consider the circumstances from the subjective point of view of the party in breach. They further require the court to consider the circumstances from the objective perspective of a reasonable merchant in the same situation.[538] This will

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Kaisha Ltd [1962] 2 Q.B. 26 at 66;one must determine whether the breach deprives the injured party of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain". Eörsi has commented that "a general concept can only be defined exactly if the cases of application can be listed one by one. A court ultimately has to decide whether the breach is of such a serious nature as to justify avoidance. The courts will probably reach this decision according to the methods to which it is accustomed under domestic law. Nicholas 1989 *Law Quarterly Review* 218-219.

[535] Singh "United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An examination of the buyer's right to avoid the contract and its effect on different sectors of the (product) market".

[536] A Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/biblio/babiak.html (accessed 5 July 2008).

[537] Detriment here means loss of 'expectation interest', in whatever form that interest manifests itself.

[538] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods". The 'reasonableness' standard poses a potential problem in this test. As society changes, people conduct themselves in a manner that would previously have been considered unreasonable. Traditional unreasonable conduct is now being accepted as reasonable. It is important

enable the court to determine whether the innocent party's interests were substantially injured by the breach.

According to the Drafters Commentary the burden of proof, regarding the foreseeability of substantial harm, rests on the breaching party.[539] The only word in article 25 that indicates a shift in the burden of proof is "unless".[540] The burden was placed on the breaching party due to the ease at which he/she can access the information required. It would be nearly impossible for the innocent party to prove that the party in breach foresaw the harm.[541] The innocent party is required to establish that he/she has suffered substantial loss, where after the breaching party responds by proving that he/she did not foresee the breach. The foreseeability of the detriment will depend upon the breaching party's knowledge of the circumstances surrounding the contract. Factors to be considered include the breaching party's: experience or inexperience; level of sophistication; and organisational abilities.[542] These factors point to the breaching party's ability to anticipate possible problems in the contract, which may lead to harm. Another factor requiring attention is whether the innocent party failed to disclose vital information, which prevented the breaching party from properly fulfilling his/her obligations.[543] After the breaching party has established that he/she did not foresee the substantial loss caused, he/she must show

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that the courts determine what is currently considered to be reasonable conduct in trade relations, and do not rely on traditional standards of reasonable conduct.

[539] In the comments to the Draft Convention on the International Sale of Goods, the drafters noted their dissatisfaction with the idea that the non-breaching party had to foresee what was going to happen and sought to shift the burden of proof to the breaching party by including the phrase, "unless the party in breach did not foresee and had no reason to foresee such a result." Report of the United Nations Commission on International Trade Law on the work of its tenth session, U.N. GAOR, 32d Sess., Supp. No.17, at 31, U.N. Doc. A/32/17, annex II (1977), reprinted in [1977] 8 Y.B. Int'l Trade L. Comm'n 16, U.N. Doc. A/CN.9/SER.A/1977. The Philippine delegation argued that the breaching party would always claim that they had not foreseen the loss of expectation that the breach had caused and thus, sought to exclude the above phrase. Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods, U.N. GAOR, 32d Sess., Supp. No. 17, U.N. Doc. A/CN.9/125, A/CN.9/125/Add.1-3 (1977), reprinted in [1977] 8 Y.B. Int'l Trade L. Comm'n 127, U.N Doc. A/CN.9/SER.A/1977.

[540] The Egyptian delegation initially attempted to have draft article 23 amended to require the breaching party to "prove" that he/she did not foresee the substantial loss and that a reasonable person in the same circumstances would not have either. United Nations Conference on Contracts for the International Sale of Goods: Report of the First Committee, U.N. GAOR, 1st Comm., at 99, U.N. Doc. A/CONF.97/11 (1981).

[541] United Nations Conference on Contracts for the International Sale of Goods, U.N. GAOR, 12th mtg, at 295 - 301, U.N.Doc. A/CONF.97/C.1/SR.12 (1981).

[542] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".

[543] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".

objectively that a reasonable person in identical circumstances would not have foreseen the harm either.[544] It can be assumed that a "reasonable person" is a reasonable merchant participating in international sale transactions.[545] A reasonable merchant would meet the standards of their trade. A merchant "of the same kind" denotes a merchant in the same business who is employed in the same operations as the breaching party.[546] A reasonable merchant must be in the "same circumstances" as the party in breach, including identical regional and world market conditions. Article 8(3) of the CISG states that when determining the intent of a party, or the understanding of a reasonable person, due consideration must be given to all relevant circumstances. All the relevant circumstances must be considered to determine the intent of the reasonable merchant. These circumstances include: negotiations; practices that the parties have established between themselves; usages; and subsequent conduct of the parties.[547] In the event of the breaching party having successfully proved both legs of the foreseeability test, the innocent party will not be permitted to avoid the contract because no fundamental breach would have occurred.[548]

A point of confusion revolves around the fact that article 25 fails to specify whether foreseeability should be tested on the circumstances existing before, or arising after,

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[544] Article 25.

[545] Article 2(a) of the CISG states that it does not automatically apply to private sales. It can be deduced therefrom that the CISG applies to commercial traders or merchants.

[546] It has been argued that the reasonable merchant's business practices, socio-economic background, religion, and language should also be taken into consideration. This is based on the French version of Article 25. United Nations Conference on Contracts for the International Sale of Goods, U.N. GAOR, 12th mtg, at 261, U.N.Doc. A/CONF.97/C.1/SR.12 (1981).

[547] It is also thought necessary to consider the legal climate in which parties operate. This includes any pending legislation, which could have influenced the breaching party's conduct. All such legal circumstances are to be attributed to the reasonable person in determining what his conduct would have been. Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".

[548] Swedish representatives provided two examples of situations which he believed did not constitute fundamental breach: 1) There could be no fundamental breach if the party in breach was unaware of certain circumstances of which the buyer had not informed him. For example, if the contract contained a specific delivery date such as 1 December, because it was important for the buyer to have the goods available for Christmas, the seller should be informed of the fact. If not, in the event of late delivery, he could not know that substantial detriment had resulted for the buyer and could not be considered to have committed a fundamental breach of the contract. 2) The same applied to the quality of the goods. The contract might specify the dimensions of the goods to which the seller might not attach importance, whereas those specifications were essential to the buyer. In such a case it was incumbent upon the buyer to inform the seller of this fact. United Nations Conference on Contracts for the International Sale of Goods, U.N. GAOR, 12th mtg, at 297, U.N.Doc. A/CONF.97/C.1/SR.12 (1981).

the contract has been entered.[549] The drafters left the timing open to maintain the flexibility of the CISG given the variety of circumstances that may arise.[550] Parties may find it advantageous to expressly specify at which point information pertaining to the performance of the contract will be considered to prevent leaving it to the discretion of the court.[551]

4.3.2.2 Fundamental Breach in Case Law

Due to the uncertain nature of a fundamental breach much can be learnt by exploring court decisions surrounding the issue. The three cases briefly touched on below indicate different aspects of this remedy.

In Germany the *Oberlandesgericht* (OLG) had to decide on a matter between an Italian seller and a German buyer.[552] The Italian seller contracted to manufacture and to deliver shoes to a German buyer.[553] The seller delivered the shoes in March 1989 however, the buyer refused to pay the purchase price. The court first had to determine whether Italian or German law applied to the case. It was decided that Italian law would apply because the plaintiff's (seller) principal place of business was in Italy and performance was due in Italy. Secondly, the court had to decide whether the Hague Sales Convention or the CISG applied to the transaction. The court held that the CISG was applicable to the matter because it had been operational in Italy since 1 January

[549] Two views on foreseeability emerged when the former Article 9 on fundamental breach was being drafted. One view relied on Article10 of ULIS which referred to "the time of the conclusion of the contract". The second view believed that foreseeability should be determined based on the time when the breach was actually committed. Report of the United Nations Commission on International Trade Law on the work of its tenth session, U.N. GAOR, 32d Sess., Supp. No.17, at 31,U.N. Doc. A/32/17, annex II (1977), reprinted in [1977] 8 Y.B. Int'l Trade L. Comm'n 16, U.N. Doc. A/CN.9/SER.A/1977.
[550] At the 1980 Vienna Drafting Conference, the Czechoslovakian and the United Kingdom delegates both sought to introduce amendments, which would expressly state when foreseeability is measured. The Czechoslovak amendment allowed "information disclosed [to the party in breach] at any time before or at the conclusion of the contract" to be considered. United Nations Conference on Contracts for the International Sale of Goods: Report of the First Committee, U.N. GAOR, 1st Comm., at 99, U.N. Doc. A/CONF.97/11 (1981). The U.K. amendment also measured foreseeability at the time of the conclusion of the contract. When the U.K. amendment was proposed, it was opposed by Norway, Finland, and Hungary. The opposition retaliated that the "information provided after the conclusion of the contract could modify the situation as regards both substantial detriment and foresight.". Neither amendment was adopted. United Nations Conference on Contracts for the International Sale of Goods, U.N. GAOR, 12th mtg, at 302, U.N.Doc. A/CONF.97/C.1/SR.12 (1981).
[551] It has been contended that information received after formation, but prior to performance, can be relevant and can be within the scope of article 25.
[552] The *Oberlandesgericht* ("OLG") is a German court of civil appeals.

1988. The operation of the CISG rendered ULIS inapplicable. Article 1(b) of the CISG allows the rules of private international law to determine that the CISG will be applicable to the contract. [554] Therefore, the German court concurred that the CISG would be applicable to the contract despite it having only become operational in Germany on 1 January 1991. Thirdly, the court had to decide whether a fundamental breach had occurred and whether the buyer had given adequate notice of avoidance under article 49(2)(b). The court made its decision without adequately explaining its reasoning. The court held that the seller had not properly performed a contractual duty. This failure was held to be a fundamental breach. For a fundamental breach to have occurred a contract of sale must have existed. The court distinguished between a *Werklieferungsvertrag* and a *Kaufvertrag*. The former is a contract that requires the seller to procure the components, manufacture them, and deliver the completed goods. The latter is a simple contract for the sale of goods. The German civil court of appeals concluded that the contract in question was a *Werklieferungsvertrag*. A *Werklieferungsvertrag,* despite entailing a service component, falls within the scope of the CISG in terms of article 3. Article 3(1) states that contracts involving the manufacture of goods are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture. The present contract was a contract of sale. While the decision of this court is not necessarily in question, it is disappointing that the court failed to explain the reasoning process that lead to its decision. Courts should fully explain the reasoning behind the decision reached to provide guidance for future litigants and other courts. The court set out useful guidelines regarding the nature of the notice of avoidance. The buyer had utilised a telefax to transmit the notice of avoidance to the seller.[555] The court impliedly recognised this method of delivering the declaration to the seller. The court declared that a party need not expressly state that the contract is being avoided. It is adequate for the innocent party to use language that clearly signals that he/she will not perform. The buyer's declaration in the present case was held to be effective; the buyer indicated that another Italian company would be manufacturing the remaining shoes and that their business relationship had ended. The court

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[553] Oberlandesgericht, Frankfurt a.M., Urteil vom 7.9.1991 -- 5 U 164/90. The Italian seller won at the trial level. However the German buyer succeeded on appeal.

[554] Italy had not made a reservation under Article 95 of the CISG to the choice of law rules under Article 1(b).

provided guidance as to the timing of a notice of avoidance in the situation where the breach occurred after the goods had been delivered. The buyer had the goods in his possession for five days before making a declaration of avoidance. This was held to be a reasonable time period because the notice was made one day after the shoes had been displayed and the buyer had become aware of the defect.[556] It can be inferred that a buyer who is injured by a fundamental breach, for reasons other than delivery, may retain goods for several days without becoming aware of the defect and thereafter still be permitted to declare the contract avoided the day following the discovery of the defect.

Delivery at the correct place is an integral component of any sale contract. In the *Raw Salmon* case the court held however that the deviation of the delivery address was not a fundamental breach of contract.[557] This deviation was not serious in light of the circumstances of the contract. This principle was reiterated in the *Ink Jet Printers* case. The court held that one can only determine if the conditions for applying articles 25 and 49(1)(a) of the CISG are present by taking into account all the details and circumstances of the case.[558] From the above cases it is clear that there is no absolute formula for identifying a fundamental breach, it is dependent on the facts of the case.

4.3.2.3 Anticipatory Fundamental Breach

Circumstances may require a party to avoid a contract before the fundamental breach has occurred. Article 72(1) of the CISG requires that it be "clear" prior to the date of performance that the other party will commit a breach and that the anticipated breach will constitute a fundamental breach. If the anticipated breach is fundamental the innocent party may declare the contract avoided. To meet the requirement of a "clear" finding of breach it is necessary that there be a certainty of occurrence. Should the innocent party intend to declare the contract avoided, article 72(2) requires him/her to give reasonable notice to the other party to enable that party to provide assurance of

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[555] The court of appeals referred to the buyer's transmission as having been made by "*Fernschreiben*", which is a form of electronic communication.
[556] Delivery was made on 2 March 1989 and the buyer gave notice to the seller of a breach on 7 March 1989.
[557] http://cisgw3.law.pace.edu/cases/980922g1.html. The purpose was to process the salmon and the altered delivery address did not frustrate this purpose.
[558] http://cisgw3.law.pace.edu/cases/040915g1.html.

performance. Article 72(2) provides that such notice need only be given if time allows. It is uncertain what this article means, but it is suggested that notice can be served prior to or after performance is due. Article 72(3) further provides that notice need not be given in circumstances where the breaching party has declared that he/she will not perform his/her obligations.

Under South African law it is recognised that anticipatory breach may manifest itself in various forms prior to performance being due. Firstly, the defaulting party may state that he/she refuses to perform.[559] Secondly, the party may unequivocally offer to perform less than is contractually due.[560] Thirdly, any conduct that is inconsistent with the intention to perform suggests anticipatory breach.[561] Fourthly, if performance is rendered impossible through the breaching party's own conduct it amounts to anticipatory breach.[562] The test to determine the intention of the breaching party is not based on his/her subjective intention, but on whether his/her conduct would result in a reasonable person believing that he/she did not intend on fulfilling his/her contractual obligations.[563] Should the breaching party be found to have committed anticipatory breach, the innocent party may either cancel the contract and claim damages, or maintain the contract and hold the breaching party to its terms.[564] The topic of cancellation will be explored below under the heading of "Avoidance". The innocent party is not only entitled to cancel the contract, but need not perform his/her own part of the contract if he/she requires the co-operation of the breaching party to perform.[565] This only applies where the innocent party remains willing and able to perform.[566] Both the CISG and South African law therefore recognises the principle of anticipatory breach, which allows innocent party to cancel the contract.

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[559] *Dickinson and Fisher v Arndt and Cohn* (1909) 30 NLR 172 at 181.
[560] *Janowsky v Payne* 1989 (2) SA 562 (C) 564I-J.
[561] *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1956 (1) SA 34 (SR).
[562] *Tuckers Land and Development Corporation (Pty) Ltd v Aleco Investments* 1981 (1) SA 852 (T) 859E-F.
[563] *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) 684I-685G. *Highveld 7 Properties (Pty) Ltd v Bailes* 1999 (4) SA 1307 (A) 1315F-G. It is possible for a breaching party to subjectively think that he/she has complied with the terms of the contract. However, he/she may have misinterpreted the terms and thus it is vital to determine anticipatory breach on an objective basis.
[564] *De Wet v Kuhn* 1910 CPD 263 at 267; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA); *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A); *Culverwell v Brown* 1990 (1) SA 7 (A); *Machanick v Bernstein* 1920 CPD 380.
[565] Christie *Contract* 518.

4.3.2.4 Notice of Avoidance

Article 26 provides that a declaration of partial or complete avoidance will only be effective if made by notice to the other party. This declaration of avoidance must be sent within a reasonable time. The declaration need not conform to any formal preconditions,[567] but must be unconditional.[568] It can be written, oral, or inferred from the avoiding party's conduct, provided that such conduct is unambiguous.[569] It is argued that oral notification is permissible in light of article 11. Article 11 states that a contract of sale need not be evidenced in writing, but may be proved by any means including witnesses.[570] Because oral contracts are permissible it has been presumed that oral notification will also be permissible under the CISG. Article 27 states that a declaration may be made by any means "appropriate" in the circumstances. The declaration must be made in a manner that a reasonable person in the breaching party's position would know that the contract is avoided and that the innocent party will not accept or keep the goods.[571] It is advisable that the notice contain the reason for avoidance; either a fundamental breach or a failure to perform within the additional period set after the initial breach.[572] It is considered to be sufficient for the buyer to return the goods upon their late arrival, simply stating that they were delivered late. The CISG eliminated *ipso facto* avoidance to minimise uncertainty

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[566] *De Wet v Kuhn* 1910 CPD 263 at 267.
[567] CM Jacobs "Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability" http://cisgw3.law.pace.edu/cisg/biblio/jacobs.html (accessed 30 March 2007).
[568] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?".
[569] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?".
[570] It is interesting to note the difference between the CISG and the UCC on this point. See *GPL Treatment, Ltd v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Or. Ct. App. 1995), rev granted, 898 P.2d 770 (Or. 1995). The court had to determine the enforceability of a contract concluded over the telephone. Under article 11 of the CISG, a contract of sale need not be concluded or evidenced in writing. However, under U.C.C. section 2-201, the enforcement of a contract for the sale of goods at a price of over $500 is not possible unless the contract is evidenced by a writing, signed by the party against whom enforcement is sought. The plaintiff attempted to prove that the contract had been in writing in order to satisfy the U.C.C. requirement and only later was reference made to the CISG.
[571] Jacobs "Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability". Therefore, the wording of the declaration is immaterial, provided the legal consequences thereof are sufficiently clear.
[572] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".

relating to the parties' rights and obligations in the event of a breach of contract.[573] Therefore, the declaration must comply with a high standard of clarity. Article 27 provides that if notice is made in a manner that is appropriate in the circumstances, a delay, error in transmission, or failure to arrive does not deprive the maker of the right to rely on the notice. [574] For this reason it is recommended that notice be sent in writing in addition to any other electronic or verbal form of communication.

4.3.2.5 The Buyer's Process of Avoidance

Irrespective of which party is in breach it is necessary to determine whether a breach of contract occurred and whether the breach was fundamental. The first enquiry requires parties to consider their respective obligations, both under the contract and under the CISG.

General remedies are set out in article 45 for the buyer in the instance of the seller having failed to perform his/her obligations.[575] The buyer is entitled to certain remedies for harm caused due to a fundamental breach. Firstly, the buyer can require that the seller perform his/her obligations. In so doing, the buyer may set an additional period of reasonable length in which the seller is to perform.[576] Secondly, the buyer may require the seller to either deliver substitute goods to

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[573] Jacobs "Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability". This stems from the concept of fairness.

[574] For this reason, it is in the best interests of both parties to provide, in the contract, for a safe manner of notification. This would reduce the risk of such notification not arriving and hence causing detrimental loss to the other party. However, the CISG is attempting to protect the innocent party from any loss due to the defaulting party's conduct. Thus, the innocent party will not be held liable should the defaulting party not receive the declaration of avoidance. This provision is primarily aimed at assisting the party who has been defaulted on and hence does not protect the defaulting party.

[575] "(1) if the seller fails to perform any of his obligations under the contract of this Convention, the buyer may:
(a) exercise the rights provided in articles 46 to 52;
(b) claim damages as provided in articles 74 to 77.
(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract."

[576] Despite having extended the time period in which the seller is entitled to perform, the buyer may still declare the contract avoided should the seller not make performance within that period. Article 47(2) clearly prohibits the buyer from resorting to other remedies for breach of contract during the grace period fixed for the seller's performance, unless the seller gives notice that he/she will not perform within such period.

replace non-conforming goods or to repair such goods.[577] Thirdly, the buyer may declare the contract avoided if the seller fails to perform any of his/her obligations, which amount to a fundamental breach. Fourthly, the buyer may avoid the contract if goods have been partially delivered or if non-conforming goods are delivered and:

(i) the buyer does avoid within a reasonable time after the buyer knew or should have known of the breach,[578] or

(ii) the seller fails to perform after the buyer fixes an additional reasonable time for the seller to perform,[579] or

(iii) the seller offers and fails to cure by the time indicated in the buyer's reply.[580]

Fifthly, the buyer may declare the contract avoided if goods have been delivered late and the declaration has been made within a reasonable time after the buyer has become aware that delivery was made.[581] Sixthly, the buyer may accept delivery and reduce the purchase price to compensate for the non-conforming goods. The amount by which the buyer may reduce the purchase price is limited to the relation between the value of the non-conforming goods and the value of conforming goods.

The seller's right to cure is not superior to the buyer's right to avoid the contract.[582] While uncertainty remains as to which right trumps the other, it has been argued that the buyer's right to avoid a contract based on a fundamental breach should prevail. However, until a court produces a judgment on the matter, it remains open to academic speculation. The buyer must be certain that sufficient evidence exists to prove a fundamental breach, otherwise the seller may sue for the enforcement of rights under the contract and the CISG. Once the buyer declares the contract avoided, both parties will be relieved of their obligations. The buyer's only remaining remedy will be to claim damages.[583]

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[577] Article 46(2) requires the buyer to give notice to the seller in such circumstances. Article 82(1) states that the buyer loses his/her right to require the delivery of substitute goods if he/she is unable to make restitution of the non-conforming goods in substantially the same condition in which they were delivered.

[578] Article 49(2)(b)(i).

[579] Article 49(2)(b)(ii).

[580] Article 49(2)(b)(iii).

[581] Article 49(2)(a).

[582] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".

[583] The buyer must be aware that as a result of declaring the contract avoided he/she may destroy the possibility of future business relationships with the seller. Thus it may be advisable to first give the

Should the buyer want the seller to perform, he/she must send notice to the seller in terms of article 26. Article 27 allows any form of communication that is appropriate in the circumstances.[584] The period in which performance must be made must be reasonable in terms of article 47(1). What is reasonable will largely depend on the circumstances of the contract. The buyer may weigh up certain factors when determining a time period. These factors include: the onerous consequences of an extended delay, the seller's ability to deliver, or the buyer's special needs. Ultimately, whatever period is established by the buyer, it is imperative that the seller is unequivocally made aware of that period. Thus, the period should be identifiable by stating a specific date for performance or a specific duration of time in which performance must be made.[585]

In respect of Article 49(1)(b), where the seller has failed to deliver goods by the date specified in the contract, but performance is still possible and the seller has not refused to perform, delivery is merely delayed. This failure does not automatically constitute a fundamental breach.[586] Late delivery will only entitle the innocent party to cancel the contract under three circumstances. Firstly, where the contract contains a clause entitling the buyer to cancel the contract immediately upon non-delivery on the performance date stipulated in the contract.[587] Secondly, where the buyer has informed the seller that he/she intends to cancel the contract should the seller not perform by a certain date in the future and the seller fails to do so. The buyer has to give the seller notice to this effect. The extended period must be of reasonable length given the circumstances. Thirdly, delayed delivery may ultimately constitute a

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seller an extended period in which to make performance. This will avoid the aggressive consequences of avoidance and create a feeling tolerance and trust between the parties. The

[584] This may cause an obstacle for South Africa because under South African law certain contracts are required to be evidenced in writing. E.g. credit sales and sales of land. The problem can easily be overcome by South Africa making a declaration under article 96.

[585] It is imperative that clarity be achieved in regard to the date of performance. Thus, it is not advisable to use terminology as "hope to receive goods" or "if you have an opportunity, it would be appreciated if you could send goods". Such phrases are open to misinterpretation of the serious nature of the situation. The seller may hence not be aware that the communication is in fact notification in terms of article 26.

[586] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?". However, it is contended that non-performance by virtue of failing to deliver, with no prospect of complying, is a fundamental breach.

[587] Eiselen "A Comparison of the Remedies for Breach of Contract under the CISG and South African Law".

fundamental breach if time is of the essence in the particular contract.[588] If the contract stresses a specific date for delivery, which is of importance to the buyer, the seller should have foreseen that failure to meet such deadline would constitute a fundamental breach.[589] The particular circumstances accompanying the contract will determine whether time will be regarded to be of the essence. This will only be done in exceptional circumstances and the buyer under such circumstances has a difficult *onus* to acquit.[590]

The buyer must determine whether he/she is able to accept late delivery. If so, he/she should fix an additional period of time in which the seller may perform.[591] This is an astute option because it will protect the buyer from a possible claim by the seller for having declared the contract avoided without offering the seller a grace period. In the event of the seller failing to perform within the grace period, it will remove the need for the buyer to prove a fundamental breach.[592] The buyer may then declare the contract avoided.

The right to avoid a contract upon fundamental breach is restricted further in article 49(2). According to article 49(2)(a) if the seller makes a delayed delivery the buyer will lose his/her right to declare the contract avoided, unless he/she does so within a reasonable time after becoming aware that late delivery has been made. This principle was confirmed in the *Bottles* case.[593] The buyer however, does not forfeit his/her right to avoid the contract immediately upon the delivery of the goods but, must avoid the contract as quickly as is reasonably expected in the circumstances, if the avoidance is to be founded on delay.[594] What will constitute a reasonable time depends on the facts of each case.[595]

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[588] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?".
[589] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?".
[590] Eiselen "A Comparison of the Remedies for Breach of Contract under the CISG and South African Law".
[591] Articles 47(1) and 49(1)(b).
[592] Article 49(1)(b).
[593] http://cisgw3.law.pace.edu/cases/061214g1.html.
[594] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?"

Article 49(2)(b) states that avoidance for any breach other than late delivery must be made within a 'reasonable time'. This requirement is complemented by three further stipulations. Firstly, the buyer should avoid the contract within a reasonable time after he/she knew or ought to have known of the breach.[596] Secondly, the reasonable time should be after the expiration of any additional period of time fixed by the buyer in accordance with article 47(1) or after the seller has declared that he/she will not perform the obligations within the additional period.[597] Thirdly, avoidance must be declared after the expiration of any additional period of time requested by the seller in terms of an article 48(2) notice, or after the buyer has declared that he/she will not accept such performance.

4.3.2.6 The Seller's Process of Avoidance

The CISG provides remedies in article 61 for the seller in the case of the buyer having failed to perform any of his/her contractual obligations.[598] In the case of a fundamental breach the seller is entitled to do one of five things. Firstly, the seller may require the buyer to pay the purchase price, to take delivery, or to perform his/her obligations under the contract or the CISG. Secondly, in terms of article 63(1) the seller may set an additional period of time in which the buyer can perform. Thirdly, the seller may declare the contract avoided within a reasonable time period if the buyer has paid the contract price and the fundamental breach is caused by something other than late performance after:

i) the seller knew or ought to have known of the breach, [599] or

(ii) the buyer failed to perform within an additional period of reasonable time allowed by the seller, or

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[595] Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?"

[596] Article 49(2)(a)(i).

[597] Article 49(2)(a)(ii).

[598] Article 61 states that:

> "(1) If the buyer fails to perform any of his obligations under the contract or this convention, the seller may:
> (a) exercise the rights provided in articles 62 to 65;
> (b) claim damages as provided in articles 74 to 77.
> (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
> (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract."

[599] Article 64(2)(b)(i).

(iii) the buyer declared that he/she would not perform during the additional period so set.[600]

Fourthly, the seller may declare the contract avoided if the buyer has paid the purchase price, but performed late and the seller's notice of avoidance was issued prior to his/her becoming aware of the buyer's late performance.[601] Lastly, the seller may declare the contract avoided without accommodation of the buyer in the case of the buyer having failed to pay the contract price.[602]

After determining whether a fundamental breach occurred, the injured party has to select a remedy. The first remedy available to the injured seller is that of specific performance under article 62.[603] The remedy of specific performance has been discussed extensively above. The seller may only elect to pursue specific performance if such a remedy is permissible according to the law of the State that exercises jurisdiction over the contract.[604] It is always advisable for the seller to fix an additional reasonable period of time in which the buyer may perform. This enables the buyer to perform, but the seller retains the right to avoid the contract should the buyer fail to perform within the time specified or declare that he/she will not perform.[605]

Secondly, the seller may elect the direct route of avoidance. In circumstances where the buyer has not paid and a fundamental breach has clearly occurred, the seller may avoid the contract without granting a grace period.[606] Where the buyer has already paid it is vital for the seller to act promptly upon the fundamental breach coming to his/her attention. Where the fundamental breach has occurred due to late performance, the seller may declare the contract avoided before becoming aware of

[600] Article 64(2)(b)(ii).
[601] Article 64(2)(a).
[602] Article 64(l)(a).
[603] Article 62 states that: "The seller may require the buyer to pay the price, take delivery or perform his obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement".
[604] Article 28. If specific performance is not permissible, the seller will have to select another suitable remedy.
[605] Article 63(1)-(2), 64(1)(b). Article 64(1)(b) does not require a fundamental breach to be proved but merely requires the granting of an additional period of time and the buyer's non-compliance therewith.
[606] Article 64(1)(a). This is an excellent opportunity for a seller who no longer wishes to perform him/herself after the breach and who is not concerned about future business relations with the buyer.

the buyer's late performance.[607] Should the fundamental breach occur for reasons other than late performance, the seller is restricted as to when he/she may declare the contract avoided.[608] The general principle states that the seller should declare the contract avoided within a reasonable time after he/she knew or ought to have known of the breach.[609] The seller may set an additional period of reasonable length in which the buyer may perform. Should the buyer fail to perform, the seller may avoid the contract or set a second grace period.[610] Alternately, where the seller has granted a grace period and the uncooperative buyer declares that he/she will not perform within that period, the seller may automatically avoid the contract.[611] Therefore, the CISG provides multiple opportunities for the aggrieved seller to avoid the contract.

The seller is bound by the requirement of giving notice under article 26 and 27, as is the buyer. This subject has already been discussed above.

4.3.2.7 Partial Avoidance

One point of contention regarding fundamental breach is whether the seller is entitled to partial avoidance. The two main arguments against allowing the seller to have the remedy of partial performance are as follows. Firstly, no express provision or language to that effect appears in the CISG. Secondly, the seller is in a stronger position to prevent losses than the buyer because he/she retains control over the goods and can resell them should the contract be breached by the buyer. Buyers on the other hand have no control over undelivered goods and are forced to decide whether they can negate the loss caused by the breach. Alternatively, there are two counter arguments that support the seller's remedy of partial avoidance. Firstly, the general principle of legal fairness dictates that the buyer should not be entitled to a remedy to which the seller is not. Secondly, it may be practical to claim partial avoidance in situations where the seller has partially performed by the time that the buyer breaches the contract. The seller could claim partial avoidance in respect of the part of the contract that he/she has not yet performed and claim specific performance in regard to

[607] Article 64(2)(a). If the seller is not swift in declaring the contract avoided, the buyer may argue that the seller knew of the late performance.
[608] Article 64(2)(b)
[609] Article 64(2)(b)(i).
[610] Article 64(2)(b)(ii).

that part that he/she has already performed. The issue is unresolved and awaits judicial attention to resolve the deadlock.

4.3.2.8 Restitution

Both the buyer and the seller are entitled to claim restitution when declaring a contract avoided.[612] There is nothing in the CISG preventing the aggrieved party from claiming damages in addition to restitution.[613] Restitution is not equivalent to damages. Restitution is linked to the amount of goods that the seller supplied or to the amount of money that the buyer has already paid in respect of goods ordered. Each party is to return anything received under the contract.

Restitution is an important pillar in structure of avoidance. Parties who cannot make restitution at all, or who cannot make restitution of the goods in substantially the same condition in which he/she received them, will lose the right to declare the contract avoided.[614] As in the case of specific performance, there are three instances under article 82(2) when the buyer will not lose his/her right to avoid the contract despite not being able to make restitution. Firstly, the buyer will not be prevented from avoiding the contract when the impossibility of making restitution of the goods, or restitution of the goods in substantially the same condition in which they were received, is not the fault of the buyer.[615] Secondly, the buyer may avoid the contract if the goods, or part thereof, have perished or deteriorated as a result of the examination provided for in article 38.[616] Thirdly, the buyer may avoid the contract if the goods, or part thereof, have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he/she

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[611] Article 64(2)(b)(ii).
[612] Restitution is traditionally an equitable remedy at common law. Article 81 discusses the effects of avoidance, but does not state the manner in which restitution must be pleaded. Article 28 addresses restitution from a specific performance point of view, but also fails to specify the manner in which it is to be pleaded.
[613] Articles 74, 75, 76, 81(2), 84.
[614] Article 82 (1). A similar approach is seen in the instance of specific performance where a party is denied the right to claim substitute goods in certain instances where they can no longer make restitution.
[615] Article 82(2)(a). The impossibility is thus not due to the buyer's negligence or deliberate action.
[616] Article 82(2)(b). Article 38 requires the buyer to examine, or have examined of his/her behalf, the goods as soon as is practicable after the time of delivery.

discovered, or ought to have discovered, the lack of conformity.[617] Avoidance can occur where the breach caused by the defect is fundamental or non-fundamental. This can cause confusion in cases where the buyer cannot make restitution of the goods, but has set a reasonable period of time in which the seller can perform his/her obligations. In such circumstances the buyer may possibly still lose his right to declare the contract avoided despite having set a reasonable time for performance with which the seller fails to comply.

After the contract has been declared avoided the buyer may request that his/her purchase price be refunded as restitution.[618] The buyer may further request that interest be paid commencing from the date when the purchase price was paid. The CISG does govern the rate of interest or how interest is to be calculated. Article 84 further fails to enumerate upon how interest is to be calculated in partial payment situations. It can be argued that interest is accrued from the first partial payment tendered or from the date on which the full payment is made. Parties should consider the matter of interest during negotiations and insert a contractual provision governing this point. Should the contract be avoided after goods have been delivered to the buyer, he/she may have to make restitution for the benefits he/she derived from the goods while they were in his/her possession.[619] The buyer must make restitution of such benefits only where he/she is required to make restitution of the goods or part thereof. [620] Secondly, the buyer must make such restitution where he/she elected to declare the contract avoided or requested substitute goods, despite it being impossible for him/her to make proper restitution of the goods in whole, or part, or in substantially the same condition in which he/she received them.[621]

Under South African law, restitution must be made upon the cancellation of a contract.[622] The parties may expressly provide in the contract for the type of restitution that is to occur in given circumstances. An innocent party may claim the return of any money or performance made in terms of the contract.[623] The aim is to

[617] Article 82(2)(c).
[618] Article 84(1).
[619] Article 84 (2).
[620] Article 84 (2)(a).
[621] Article 84 (2)(b).
[622] Voet 18.3.2; *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 (C) 329A-330B.
[623] Christie *Contract* 447.

return the parties to the position they were in before the contract.[624] When parties reach an agreement to discharge the contract, there are two general principles that apply to the restitution, irrespective of whether the topic of restitution was included in the contract. Firstly, an agreement to discharge the contract is presumed to include a tacit agreement to restore what has been delivered in part performance. [625] The buyer is hereby entitled to claim any purchase price that he/she has already paid,[626] while the seller is entitled to the return of any goods delivered in terms of the contract.[627] Where ownership has passed to the buyer, and the goods are in his/her possession, the seller cannot recover ownership by virtue of the cancellation alone without actual delivery.[628] Where ownership has passed to the buyer, he/she may validly sell[629] or pledge[630] the property to an innocent third party, despite the agreement to cancel. It is therefore necessary that actual delivery of the property be made back to the seller to prevent the alienation of the goods to a third party by the buyer. The second principle is that both parties are permitted to recover the parts of the contract already performed.[631] In the instance of a lease contract having been terminated, the tenant is liable to pay rent for the period that he/she occupied the premises[632] even if this continues after the lease is terminated.[633]

The rule requiring parties to make restitution is flexible, and may be departed from when justice requires it.[634] An inability to make restitution will not be fatal to a claim for rescission where: the goods perished due to the defect;[635] the goods were disposed of as contemplated but the proceeds are offered;[636] the goods were partly destroyed in testing their quality;[637] the goods lost value while being used as contemplated.[638] The South African position is therefore in line with the CISG.

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[624] *Feinstein v Niggli* 1981 (2) SA 684 (A) 700F.
[625] *Geldenhuys v Maree* 1962 (2) SA 511 (O) 513E.
[626] *Combrink v Maritz* 1952 (3) SA 98 (T), *Ace Motors v Barnard* 1958 (2) SA 534 (T).
[627] *Harper v Webster* 1956 (2) SA 495 (FC) 499-500.
[628] RH Christie *The Law of Contract* 4 ed (2001) 518.
[629] *Clarke v Bradfield* 1892 (6) EDC 238.
[630] *Van Gelderen v Schaff* 1912 CPD 76.
[631] *Maw v Grant* 1966 (4) SA 83 (C) 87C.
[632] *Parry Leon and Hayhoe Ltd v Yorkshire Insurance Co Ltd* 1940 CPD 397.
[633] *Tooth v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N).
[634] *Harper v Webster* 1956 (2) SA 495 (FC) 499-500.
[635] *Marks Ltd v Laughton* 1920 AD 12.
[636] *Rau v Venter's Executors* 1918 AD 482.
[637] *Theron v Africa* (1893) 10 SC 246.

4.3.2.9 Time Limitations on Declaring Fundamental Breach

When a party declares a contract avoided due to a fundamental breach, other than non-conformity of goods, it must be done within a "reasonable time".[639] Article 39 specifies that notice of non-conformity must be given within a reasonable time, but no later than two years from the date on which the goods were delivered, or within the contractual period of guarantee. The flexible "reasonable time" criterion allows courts to consider what would have been reasonable in the given circumstances.

While certain States have applauded the flexible "reasonable time" criterion, UNCITRAL set about creating the Convention on the Limitation Period in the International Sale of Goods (Limitation Convention).[640] This Convention was not well received and few States became signatories. It is primarily the duty of parties to determine contractually what law will govern the limitation period of declaring fundamental or non-fundamental breaches.

The Limitations Convention is not connected to the CISG. Should signatories of the CISG desire to be bound by the Limitations Convention they will have to become signatories of that Convention as a separate step from signing and ratifying the CISG.[641] There is no obligation on member States of the CISG to ratify the Limitations Convention.

According to the Limitations Convention all breaches have to be declared within four years.[642] Three triggers are identified that begin the four-year period. Firstly, the period begins to run from the date on which the breach occurred.[643] Secondly, if goods are defective, or the buyer refuses to accept the tender of the seller, the period will commence running on the date on which the goods are handed over to the

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[638] *African Organic Fertilizers and Associated Industries Ltd v Sieling* 1949 (2) SA 131 (W).
[639] Article 49.
[640] U.N. Sales No. E.74.V.8 (1974), reprinted in [1974] 5 UNCITRAL Y.B. 210, U.N. Sales No. E.75.V.2 (1975).
[641] Very few States have ratified the Limitations Convention. They are: Argentina, Czechoslovakia, Dominican Republic, Egypt, Ghana, Guinea, Hungary, Mexico, Norway, Uganda, Yugoslavia, and Zambia. The United States of America has not ratified the Limitation Convention nor is it a signatory thereto.
[642] Article 8 U.N. Sales No. E.74.V.8 (1974).
[643] Article 10 (1) U.N. Sales No. E.74.V.8 (1974).

buyer.[644] Thirdly, in fraud cases the period starts running from the date on which the fraud was or could reasonably have been discovered.[645]

While the Limitations Convention does not utilise the term "avoidance", it does deal with circumstances where the contract is "terminated". These two terms bear the same meaning.[646] Both indicate that performance will not be made. Where a party declares a contact terminated before performance is due, the four-year period will commence on the date that the declaration of termination is made.[647] Should a party declare the contract terminated after performance was due, the period will run from the date that performance was due; from before the declaration of termination having been made.[648] The Limitation Convention expounds upon instalment contracts by stating that the period commences in respect of individual instalments from the date that each was breached.[649]

4.3.2.10 General Points in respect of South Africa

Fundamental breach is a very significant aspect of the CISG. It contributes greatly toward determining the nature of relief open to the innocent party. It also opens the door to a declaration of avoidance. Neither the concept of a fundamental breach or a declaration of avoidance is recognised in South African law under that terminology. South Africa provides for cancellation and notice of cancellation. It is important to compare these principles.

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[644] Article 10 (2) U.N. Sales No. E.74.V.8 (1974).
[645] Article 10 (3) U.N. Sales No. E.74.V.8 (1974).
[646] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".
[647] Article 12 (1) U.N. Sales No. E.74.V.8 (1974).
[648] Article 12 (2) U.N. Sales No. E.74.V.8 (1974).
[649] Article 12 (1) U.N. Sales No. E.74.V.8 (1974). Should an instalment contract be avoided, the period for all of the instalments will commence on the date that the contract was declared avoided. The drafters of the Limitations Convention failed to provide for the eventuality of only one instalment being avoided. Article 73(1) of the CISG does however cater for such a situation. There are three possible commencement dates for the termination of an instalment, which may be inferred from other articles of the Limitations Convention. Firstly, the date on which the declaration of avoidance/termination was made; secondly, the date upon which performance was due; thirdly, the date upon which the specific breach occurred. Given the above option, the most sensible option would be the date upon which the declaration of avoidance was made, which coincides with the general article 12 principle on termination.

Under South African law the concept of a contact being discharged due to breach has never been absolutely accepted.[650] Contractual obligations are to be discharged by the parties. In *Ally v Courtesy Wholesalers (Pty) Ltd*[651] the court held that where a party fails to perform, or performs late, he/she has committed a breach and is in *mora*, and where the party has performed in the wrong manner he/she is guilty of positive malperformance. South African law shows a strong inclination toward maintaining the contract in the face of a breach.[652] Courts have even interpreted forfeiture clauses, which entitle either party to cancel the contract upon a specific breach, to mean that the innocent party may elect to cancel or to enforce the contract. This has been done to prevent the wrongdoer from committing the specified breach with the intention of destroying the contract. [653]

While fundamental breach does not exist in South African law, a party will be placed in *mora* for breaching contractual obligations. Three requirements must be satisfied prior to a party being declared to be in *mora*. Namely: the obligation must be enforceable against him/her and he/she must not have a valid defence against the action brought;[654] performance must be due;[655] the party must be, or be must be deemed to be, aware of the nature of the performance required of him/her and that such performance is due.[656] The legal consequences brought to bear upon the contract, due to a party being in *mora,* depend upon the nature of the contract. In the instance of a contract containing a forfeiture clause, the contract will be cancelled upon the occurrence of the named breach.[657] A court has no authority to release a party from the automatic forfeiture resulting from the breach given that forfeiture

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[650] This is the same as the position under the CISG. A breach of contract does not automatically discharge the contract. Parties may only avoid the contract under given circumstances and upon the innocent party's election to do so.
[651] 1996 (3) SA 134 (N) 149F-150H.
[652] The same can be argued of the CISG.
[653] *Holder v Epstein* 1905 TH 158; *Union and Rhodesia Wholesale Ltd v Becker* 1926 EDL 314.
[654] D 12.1.40; D 45.1.127; D 50.17.53; D 50.17.88. If a party has a valid defence to any action that might be brought against him/her, he/she is not in *mora.*
[655] Performance can be due in three circumstances. Firstly, by operation of law (*mora ex lege*). Secondly, in terms of the contract (*mora ex re*). Thirdly, by demand duly made by the creditor (*mora ex persona*).
[656] *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* 1970 (1) SA 584 (T) 587F. The court held that it is not necessary for the innocent party to prove that the breaching party's conduct deliberate or negligent. They stated further that the breaching party's ignorance of what is expected or that performance is due would only be a defence if the ignorance were both *bona fide* and reasonable.
[657] Christie *Contract* 513.

clauses are valid and enforceable.[658] The court will however interpret forfeiture clauses very strictly to prevent injustice.[659]

Where the contract specifies the time for performance and expressly states that time is of the essence,[660] the clause is considered to be a forfeiture clause.[661] This is of importance given that authorities have identified a material breach, justifying cancellation, to exist in circumstances involving a failure to perform when time is known to be of the essence.[662] A parallel therefore exists between South African law and the CISG on this aspect of breach. Where a date of performance has been specified, but not complied with, and the innocent party sets an additional prescribed period of time in which the breaching party is to perform, but once again he/she fails to do so, it is a tacit forfeiture clause.[663] This provision under South African law can be compared to the right under article 47(1) of the CISG where the buyer may set an additional period of time of reasonable length in which the seller may perform his/her contractual obligations. The same remedy is allocated to the seller under article 63 of the CISG. The concept of declaring a contract cancelled on the grounds of a forfeiture clause regarding time of performance is hence not foreign under South African law.

Where the time for performance of a vital term has been specified, but time is not generally of the essence, the injured party may make time of the essence by giving the breaching party notice.[664] This notice instructs the breaching party to perform by a certain date, within a reasonable time, or the contract will be terminated.[665] In the event of the contract not specifying a time for performance, the innocent party may also give such notice to the breaching party, provided that the breached term is essential and goes to the root of the contract.[666]

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[658] *Meyer v Hessling* 1992 (3) SA 851 (Nm) 863A-868B.
[659] The CISG does not expressly provide for the creation of forfeiture clauses. There is however nothing preventing parties from inserting such clauses into their contracts.
[660] Stipulations as to time will not be regarded as being of the essence, unless they were made so in express terms, or it appeared from the nature of the contract or the surrounding circumstances that it was the intention of the parties: see *Bernard v Sanderson* 1916 TPD 673 at 674-675.
[661] *Louw v Trust-Administrateurs Bpk* 1971 (1) SA 896 (W) 903D-H.
[662] *Hayter's Radio Exchange v Hidge* 1949 (3) SA 715 (A) 729.
[663] *Kabinet van die Oorgangsregering vir die Gebied van Suidwes-Afrika v Supervision Food Services (Pty) Ltd* 1989 (1) SA 967 (SWA); *Rautenbach v Venner* 1928 TPD 26.
[664] *Microutsicos and Another v Swart* 1949 (3) SA 715 (A) 730.
[665] *Microutsicos and Another v Swart* 1949 (3) SA 715 (A) 729.

In summary, contracts of sale may be divided into two primary classes. Firstly, where time is of the essence.[667] In such circumstances parties may only terminate the contract if the failure to perform strikes the very heart of the contract and amounts to repudiation. Where the failure to perform consists of delayed performance, the innocent party must give the breaching party notice requesting performance by a given date and stating that failure to perform will be deemed to be repudiation.
Secondly, where time is not of the essence. This category can be further divided into two sub-divisions. Namely, where time for performance is stipulated in the contract, and where time of performance is not stipulated.[668] Where the time for performance is stipulated and the time has passed the innocent party may sue for performance without prior demand.[669] Where the time has not been stipulated, but a reasonable period has elapsed, the innocent party is advised to give notice to the breaching party requesting him/her to perform.[670] Such notice is a method of placing the breaching party in *mora*.[671]

Under South African law the concept of a material breach was developed to be utilised where a contract did not contain a forfeiture clause. In such instances the need arose to distinguish between cases where the breach was of such a nature as to necessitate the cancellation of the contract and instances where an award of damages would suffice. In *Brown v Sessell* [672] Bristowe J made the following distinction:

> "And I think that the rule, that the breach by one party of an essential term of a contract justifies the other party in putting an end to it, depends upon

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[666] *Breytenbach v Van Wyk* 1923 AD 541 at 549; *Sweet v Ragerguhara* 1978 (1) SA 131 (D) 136-137.
[667] Time is of the essence due to surrounding circumstances affecting the business of the parties, the nature of the goods, or on account of an express term in the contract making time of the essence.
[668] *Kangisser v Rieton (Pty) Ltd* 1952 (4) SA 424 (T) 428.
[669] *Kangisser v Rieton (Pty) Ltd* 1952 (4) SA 424 (T) 428.
[670] To determine whether a reasonable period has lapsed, the court will have reference to the intention of the parties expressed in the contract or inferred from the language of the contract or the surrounding circumstances. Regard should also be had to the nature of the performance that was due, and the attendant obstacles and delays, which were in the contemplation of the parties at the time of contracting. See *Young v Land Values Ltd* 1924 WLD 216 at 224-225. If no notice was given, but the breaching party makes payment upon receiving a summons, the innocent party may not be awarded his/her costs.
[671] In *Breytenbach v Van Wijk* 1923 AD 541 the court held that the purchaser should have placed the seller in *mora* by demanding transfer of the property within a reasonable time. The buyer was not permitted to cancel the contract because of the failure to place the seller in *mora*.
[672] 1908 TS 1137 at 1142.

> the consideration that the breach of an essential term is equivalent to a refusal to carry out the contract."

Unfortunately the court failed to differentiate between the breach of an essential term evidencing the desire to no longer be bound by the contract and repudiation; two distinct principles.[673] This is problematic given that repudiation may occur without the breach of any contractual term. The court sought to establish whether the importance of the term breached was sufficient for cancellation. The first attempt at creating such a rule was not entirely successful. In *Yodaiken v Angehrn & Piel* [674] Ward J recognised the distinction between breach and repudiation when stating:

> "… and unless there were an intention to repudiate, or the breach goes to the root of the contract, I do not think the other party is entitled to rescind."

This formulation of the standard is more accurate. Since this judgment it has been accepted in South African law that a sufficiently serious breach of a sufficiently important term will justify cancellation without the necessity of proving an intention to repudiate. The term may be express or implied, but the breach must be fundamental in that it strikes the foundation of the contract.[675] South African law does not permit cancellation due to a minor breach of a serious term. In the instance of a forfeiture clause permitting cancellation upon the happening of a specified breach, the court will not however investigate the materiality of the term breached, but will give effect to the clause.[676] In *Sibanyoni v University of Fort Hare* [677] the court held that by permitting cancellation the court is not imposing the rule of law onto a private contract, but is attempting to ascertain the unexpressed common intention of the parties. The true test is whether the breach of the term is so vital that, based on the unexpressed intention of the parties, it destroys the foundation of the contract in that it would be purposeless to carry out the contract.[678] In *Singh v McCarthy Retail Ltd* [679] the court emphasised

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[673] *Strachan v Prinsloo* 1925 TPD 709 at 716-717.
[674] 1914 TPD 254 at 262.
[675] *Tvl Cold Storage Co v SA Meat Export Co Ltd* 1917 TPD 416 at 416.
[676] *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) 785C.
[677] 1985 (1) SA 19 (Ck) 33A-D.
[678] *O'Connell v Flischman* 1948 (4) SA 191 (T) 194.
[679] 2000 (4) SA 795 (A) para 15.

fairness as an element of the test. The court held that the decision whether the innocent party may cancel the contract due to malperformance entails a value judgment by the court. It is essentially the balancing of competing interests; those of the innocent party and the breaching party. The ultimate criterion was held to be fairness to both parties, having regard to the fact that rescission is a more radical remedy than specific performance or damages. The pertinent question is whether it is fair to permit the innocent party to cancel the contract and erase all of its consequences.[680]

The primary difference between material breach and a fundamental breach can be interpreted as follows. Under a material breach a party may cancel the contract due to a serious breach of a serious term, or the breach of a forfeiture clause, despite the impact of the breach being minimal.[681] The CISG focuses on the impact of the breach and therefore a party may be prevented from avoiding the contract, despite a serious breach of a serious term, if the impact of the breach is minor. The opposite is also true; the breach of a minor term may give rise to the right to avoid if the breach has a major impact on the interests of the injured party. It is clear that different elements of breach are focused on under material breach and fundamental breach. Material breach focuses on the conduct, while fundamental breach concentrates on the effect of the conduct. While a fundamental breach is not recognised in South African law, a material breach of fundamental importance is recognised. Both concepts result in a party being given the right to elect to cancel the contract in appropriate circumstances. Sufficient parity exists between the CISG and South African law to prevent the remedy of avoidance being a hurdle to ratification.

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[680] While fairness is can be a valid consideration under domestic sales law, it is doubted whether it would be a suitable criterion for international sale contracts. The concept of fairness is open to different interpretations. One State may consider certain conduct to be fair, while another State would not. The CISG does not place large importance on the concept of fairness, and wisely so.

[681] Zulman and Kairinos *Norman's Purchase* 227. Under South African law certain conduct will be deemed a breach of contract entitling the innocent party to claim rescission. Namely: where the innocent party elects to rescind the contract and claim damages instead of specific performance; where the breaching party fails to perform where time is of the essence; where the parties have agreed that any breach will entitle the other party to cancel; where one party repudiates the contract, the other may claim rescission and damages. Repudiation may manifest itself in: an express statement (*Continental Bakery (Pty) Ltd v Giannakakis and Another* 1956 (4) SA 62 (W) 73); an unequivocal act (*Aucamp v Morton* 1949 (3) SA 611 (A)); a failure to perform an essential term of the contract (*Strachan v Prinsloo* 1925 TPD 709 at 717); an act whereby one party puts it beyond his/her power to perform (*Boyd v Nel* 1922 AD 414); a party's inability to perform the contract in the precise manner agreed upon (*Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A) 579). Repudiation does not in itself terminate the contract. The innocent party must accept the repudiation in order for the contract to be terminated. See *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 (C) 328-329.

4.3.3 The right to Price Reduction

The Buyer has the right to claim the remedy of price reduction when delivered non-conforming goods. Article 50 of the CISG provides that should the goods not conform to the contract, the buyer may reduce the price by the difference in value between the value of the non-conforming goods delivered and the value that conforming goods would have had at that time. This may be implemented irrespective of whether the buyer had already paid the original purchase price. The buyer may not however reduce the price if the seller has remedied any failure to perform in terms of articles 37 and 48. In addition, the buyer may not reduce the price in the event of his/her refusing to accept the performance tendered by the seller in terms of the latter articles.

The basis upon which article 50 is founded is that through the buyer keeping the non-conforming goods, the contract is adjusted to the new circumstances.[682] Price reduction does not negate the right to claim damages, but in certain instances it enables the buyer to evade having to claim damages.[683] If the value of the price reduction is less than what could ordinarily be claimed as damages, the buyer should first reduce the price and claim the remainder as damages. In the event of the price reduction being equal to the ordinary claim for damages, it is advisable for the buyer to reduce the price. This will enable the buyer to obtain an extra remedy for the purpose of financial relief without having to litigate for an award of damages.[684]

It would appear that the remedy of price reduction is incompatible with avoidance. The buyer cannot reasonably be entitled to accept the goods, reduce the price, and still give notice of avoidance.[685]

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[682] Eiselen "A Comparison of the Remedies for Breach of Contract under the CISG and South African Law".
[683] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods". It is advisable to reduce the price in instances where the value of the non-conforming goods has risen since the sale, hence resulting in them being of a similar or equal value as the conforming goods at the date of sale.
[684] The buyer is entitled to make the election between a price reduction and damages, or both.
[685] Article 50 of the CISG does not address this concern. Therefore it is suggested that the parties provide for this potential problem in the contract itself.

The concept of price reduction is best reflected in the South African remedy of *actio quanti minoris*. In terms of this Roman doctrine the buyer is entitled to the return of a portion of the purchase price where the seller has delivered defective goods.[686] This remedy may be utilised in two circumstances. Firstly, in the instance where the requirements for an *actio redhibitoria* are met.[687] Secondly, in the instance where the defect is not sufficiently material to qualify for redhibition.[688] In the instance of the former, a party may elect which of the two actions he/she will pursue. He/she may therefore: restore the goods to the seller and reclaim the purchase price paid; or retain the goods and reclaim a portion of the purchase price.[689] In the instance of the second option, a party may only reclaim a portion of the purchase price. The party will lose his/her right to the reduction of the purchase price where he/she, knowing of the defect, accepts the thing as satisfactory in terms of the contract.[690]

Various methods may be employed to determine the precise amount of the price reduction.[691] The amount by which the price is reduced may be calculated according to the cost involved in placing the goods in the condition that they should have been

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[686] *Davenport Corner Tearoom (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) 714B-D.

[687] Zulman and Kairinos *Norman's Purchase* 163. The *actio redhibitoria* is an action that allows for the cancellation of the contract and restitution. The parties are accordingly restored to their original positions: see Voet 12.1.4; *Muller v Steenkamp* 1937 TPD 248 at 251. A party may claim this remedy where: at the time of the sale the thing suffers from a material disease or defect; there has been no disclosure of the defect or disease; or the thing is sold in contravention of what was stated and promised. See *Dibley v Furter* 1951 (4) SA 76 (C) 81; *Knight v Trollip* 1948 (3) SA 1009 (D) 1012-1013; *Curtaincrafts (Pty) Ltd v Wilson* 1969 (4) SA 221 (E) 223A-B. Once proved the successful party is entitled to a refund of the purchase price, interest, and reimbursement for useful or necessary improvements made. See *Kirsten v Niland* 1920 EDL 87; *Seggie v Philips Bros* 1915 CPD 292 at 304. The defect must therefore be of such a nature as to force the seller to take the goods back and to annul the sale.

[688] The buyer will be limited to a claim for a price reduction if a reasonable buyer in his/her position would have entered the contract despite the defect. See *Douglas v Dersley* 1917 EDL 221; *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 at 413. An innocent misrepresentation, which amounts to a material statement made during negotiations bearing on the quality of goods and going beyond mere praise and commendation, will give rise to the *action quanti minoris* for a reduction in the purchase price. See *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A); *Hall v Milner* 1959 (2) SA 304 (O).

[689] Where both actions are available, the buyer may claim rescission under the *actio redhibitoria* and, in the alternative, claim a reduction of the purchase price under the *action quanti minoris* in the same action. See *Clarke Brothers and Brown (1913) Ltd v Truck and Car Co Ltd* 1952 (3) SA 479 (W); *Le Roux v Autovend (Pty) Ltd* 1981 (4) SA 890 (N) 893E-H.

[690] If the buyer becomes aware of the defect at the time of inspection, or at any point prior to the sale, yet elects to proceed with the sale, he/she will not later be permitted to rely on this action. See: Voet 21.1.9; *Knight v Trollip* 1948 (3) SA 1009 (D) 1013; *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) SA 344 (A); *Van Der Merwe v Meads* 1991 (2) SA 1 (A).

[691] *SA Oil and Fat Industries v Park Rynie Whaling Co Ltd* 1916 AD 400 at 413.

in to conform to the contract.[692] In the instance of non-conforming goods, the buyer may have regard to the cost of having the goods repaired by a third party. [693] The court will only take into account reasonable costs of repair. If the seller delivers less than contracted for the buyer may base the reduction upon the cost of purchasing additional goods. Further, the reduction may be determined by calculating the difference between the purchase price and the actual market value of the defective thing sold.[694] The value of the defective thing should be calculated with reference to the market price where available. In *Labuschagne Broers v Spring Farm (Pty) Ltd* [695] the court held that the reduction is calculated as the difference between the price and the value objectively ascertained on the best evidence available. Where no market price can be established reference must be had to the best evidence available. The date to be used when calculating the value of the thing is the date of the sale.[696] A buyer may bring an *actio quanti minoris* as often as he/she discovers new and distinct defects in the goods purchased, provided he/she is not prevented from doing so by prescription and provided that he/she does not make a profit.[697]

It is evident that the CISG and the South African law resemble one another with regard to the remedy of price reduction. Both provide for the reduction of the purchase price in the event of defective goods. In addition, the same formula for calculating the *quantum* of the price reduction is used under both systems; the difference between the value of the defective goods and the value that conforming goods would have had on the date of the sale. The remedy of price reduction does not pose a problem to the adoption of the CISG.

4.3.4 The Right to Damages

The CISG provides for the right to damages under four different articles. Under these four articles the right to damages is discussed in a manner familiar to common-law legal systems. Articles 74 to 77 set out the criteria for claiming damages both when a

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[692] The reduction must be proportionate to the reduction of the value of the goods owing to the defect. See *Scheepers v Handley* 1960 (3) SA 54 (A) 59.
[693] *Maennel v Garage Continental Ltd* 1910 AD 137 at 149.
[694] *Ranger v Wykerd and Another* 1977 (2) SA 976 (A); Voet 21.1.5.
[695] 1976 (2) SA 824 (T).
[696] *Wilson v Simon and Lazarus* 1921 OPD 32 at 37; *Grosvenor Motors (Border) Ltd v Visser* 1971 (3) SA 213 (E).

contract has been avoided and when it has not. Article 74 allows for damages for breach of contract, while article 75 houses a specific application of article 74 in regard to resale or repurchase. Article 76 provides for the measurement of damages according to a current market price and only comes into operation when article 75 is not applicable. Article 77 places a duty upon the aggrieved party to mitigate damages where possible. It is now necessary to examine each article separately.

4.3.4.1 Article 74

Article 74 provides for where damages are claimed in respect of a breach of contract. It is important to consider the interpretation of the provision as well as its purpose and meaning.

4.3.4.1.1 Interpretation

Article 74 states that:

> "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such 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, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

Article 74 governs the rules for claiming damages with regard to articles 45(1)(b) and 61(1)(b). It must be interpreted against the backdrop of these two articles in addition to articles 75 to 80.[698] Article 74 is a general provision that is to be applied in every instance where loss has been suffered as a result of a breach, both where avoidance has

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[697] Voet 21.1.6.

[698] Article 74 coincides with article 82 of ULIS, which reads as follows: "Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract."

occurred and where the contract remains in tact.[699] A strong relationship exists between articles 75 and 76 and article 74 in that article 74 provides a general rule for the calculation of damages when articles 75 and 76 do not apply. Where articles 75 and 76 are applicable however, article 74 may still be utilised as a subsidiary rule. The application of articles 75 and 76 versus article 74 depends upon whether avoidance has actually occurred and not on whether the contract is technically avoidable.[700]

4.3.4.1.2 Meaning and Purpose

The right to claim damages under article 74 is available to both the buyer and the seller. A third party is prohibited from claiming damages under this article despite having suffered damages as a result of the conduct of the buyer or the seller.[701] A third party would have to rely on his/her domestic law for compensation. This provision serves two purposes. Firstly, it houses the general rule in regard to the calculation of damages. Secondly, it stipulates the conditions under which a breaching party will be liable for damages and the manner for compensating such loss. It is evident from this provision that the CISG recognises monetary payment as the sole form of compensation for loss suffered.[702]

Article 74 enumerates three conditions for liability in respect of damages. Firstly, either the buyer or the seller must have breached the contract. Secondly, the non-breaching party must have suffered loss. Thirdly, a causal link must exist between the loss and the conduct that resulted in the breach.[703] The CISG does not state whether the breaching party is only liable for loss directly linked to the breach or whether liability extends to loss that is indirectly caused by the breach. In light of the wording of article 74 it may be implied that the foreseeability test could provide a solution to

[699] Damages under the CISG are similar to damages under ULIS. However, ULIS strictly distinguished between damages claimed when the contract was not avoided, in sub-section A, and damages in the event of avoidance, in sub-section B. The CISG has separated these two instances, but to a lesser degree.
[700] V Knapp "Article 74" http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb74.html (accessed 14 August 2008).
[701] Knapp "Article 74".
[702] While, article 37 does provide the seller the opportunity to make up any deficiency in the goods purchased by the buyer, it does not exclude the buyer's right to claim damages. Thus, financial compensation is always permitted.
[703] The breaching party is thus only liable for the other party's loss resulting from the breach in question.

this problem. In terms of this test a party would be held liable, even for loss indirectly linked to the breach, provided the breaching party foresaw the loss at the time of the conclusion of the contract.[704] Liability under article 74 is strict liability. Accordingly, fault or fraud on the part of the party in breach will not influence his/her liability.[705] While strict liability appears impenetrable, liability under the CISG is softened through the foreseeability test housed in article 74 and through the exemptions provided for in articles 79 and 80.

The drafters of the CISG specified in article 74 how to determine whether a party would have foreseen loss. Firstly, the party must have actually foreseen or ought to have foreseen the loss. Secondly, reference must be had to the facts and to matters of which the party knew or ought to have known. Thirdly, foreseeability is gauged at the time of the conclusion of the contract. The foreseeability test further opens the party in breach to liability in that the injured party need not prove that the breaching party actually foresaw the harm. It is sufficient for the injured party to prove that the breaching party ought to have foreseen the loss in that he/she was objectively in a position to foresee it. From this it is evident that the breaching party is only liable for loss resulting from the breach, which he/she foresaw or ought to have foreseen.[706]

An integral question to the foreseeability test is what must be foreseen by the breaching party to render him/her liable for the consequent loss? Article 74 states that damages for breach consists of a sum equal to the loss, but may not exceed the loss foreseeable by the party in breach. It would appear that the breaching party is required to have foreseen the possibility that the breaching conduct would cause loss to the other party and the potential extent of the loss suffered as a result of the breach. The

[704] In the UK the test was laid out in *Hadley v. Baxendale*, and refined by the House of Lords in *The Heron II* (1969) 1 A.C. 350. In the latter case Lord Reid rejected the test of "possible" damages, since adopted in article 74. Article 74 thus contains a much broader test than that under English law. The foreseeability test could lead to the admissibility of damage claims that have to present been rejected. No opposition was mounted against the foreseeability test during the final conference in Vienna and article 74 was adopted without amendment. In practice sales contracts commonly exclude or limit the seller's liability for consequential damages, whether or not they were foreseeable. JS Ziegel "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/wais/db/articles/english2.html (accessed 5 September 2008).
[705] Knapp "Article 74".
[706] The party in breach is not therefore liable for all loss arising from the breach, if such loss was not objectively foreseeable. This theory is known as adequate causality.

knowledge that the party in breach has of the potential loss is presumed knowledge.[707] If objectively viewed the party ought to have foreseen the loss that would result from the breach he/she will be deemed to have had such knowledge and foresight. This will remain true even if the breaching party was not aware of the facts and circumstances that would enable him/her to have such foresight, but was in a position to know them.[708] The breaching party will be presumed to have knowledge of the facts and circumstances if such knowledge is generally known to merchants, and as such is expected to be known by him/her due to his/her experience as a merchant in that field.[709] The breaching party will further be presumed to possess knowledge enabling him/her to foresee loss if the injured party had, at the time of contract, drawn his/her attention to the serious loss that would result from a breach of contract.[710]

The relevant time at which foreseeability is determined is at the conclusion of the contract.[711] If the specific loss was not foreseeable at the conclusion of the contract the breaching party will not be liable. This principle will be applicable even in the event of the non-performance being due to the fraud of the breaching party.[712]

Under article 74 one is entitled to claim for loss of profit. The drafters specifically mentioned the right to claim loss of profit relating to the breach because in certain legal systems the term "loss" does not include loss of profit. Unfortunately the Convention remains silent on how to calculate the amount of lost profit to be paid as damages. The argument revolves around whether an injured party may claim the loss of profit actually suffered, that which he/she could expect to suffer in the future, or the average profit that is expected at that time and place or for the period of time during which the injured party is entitled to claim damages from the breaching party. The most reliable route forward would be to allow the injured party to recover the lost

[707] Knapp "Article 74".
[708] Knapp "Article 74".
[709] Knapp "Article 74".
[710] If a party at the time of concluding a contract knows that a breach by the other party would result in severe or unusual loss, he/she may inform the other party of this fact. Thereafter, should such loss occur following a breach, the injured party is entitled to claim that the breaching party knew of the possible loss and hence foresaw it.
[711] Article 74.
[712] Knapp "Article 74". A party who commits fraud will only be liable for the loss he/she could foresee at the conclusion of the contract. This principle is often reversed in legal systems in that a party who is found guilty of fraud will be held liable for any loss arising from that fraud irrespective of whether he/she actually foresaw it at the conclusion of the contract.

profits actually suffered or which could be expected. In addition, the period of time for which loss of profit may be claimed should not be limited, but should be open to cover all loss attributable to the breach that was foreseen by the breaching party.[713]

Article 78 states that a party is entitled to claim interest on any price or monies in arrears, without losing the right to claim damages. The loss of interest due to the breach is linked to the loss of profit under article 74. Article 74 does not however cater for the award of punitive damages.

The amount and nature of the damages that may be claimed will depend upon the facts of each case. Certain general principles can however be extracted from the CISG.[714] Firstly, in the event of a breach by the buyer occurring prior to the seller having manufactured or procured the goods, article 74 permits the seller to recover the profit that would have been made on the contract. In addition, the seller may claim all expenses that have been incurred in the performance of the contract.[715] Secondly, in the event of defective goods being delivered by the seller and in the event of the buyer retaining such goods, the loss may be determined in a variety of methods. The buyer

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[713] Knapp "Article 74".

[714] The following general calculation can be drawn: damages = market price or cover price - contract price + incidental damages + lost profit + consequential damages - expenses saved. Knapp "Article 74".

[715] Three examples are displayed in relation to this set of circumstances in the Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, U.N. GAOR, at 59, U.N. Doc. A/CONF.97/19 (1981). "Example A: The contract provided for the sale for 50,000 U.S. Dollars F.O.B. of one hundred tools which were to be manufactured by Seller. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller's total costs would have been 45,000, of which 40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy and labour hired for the contract or paid by the unit of production) and 5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated the contract, Seller did not [page 545] expend the 40,000 in costs which would have been incurred by reason of the existence of this contract. However, the 5,000 of overhead which was allocated to this contract was for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of Buyer's breach Seller has lost the allocation of 5,000 to overhead which he would have received if the contract had been performed. Thus, the loss Buyer was able to foresee at the time of the conclusion of the contract and for which he is therefore liable in this example amounts to 10,000. Contract price: 50,000.Expenses of performance which could be saved: 40,000. Loss arising out of breach: 10,000 .
Example B: If, prior to Buyer's repudiation of the contract in Example A, Seller had already incurred 15,000 in non-recoverable expenses in part-performance of the contract, the total foreseeable damages would equal 25,000.
Example C: If the product of the part-performance in example B could be sold as salvage to a third party for 5,000, Seller's loss would be reduced to 20,000."

may claim damages equal to the difference between the value of conforming goods and the value of the non-conforming goods. Otherwise the buyer may claim loss of profit. Should the buyer be in a position to cure the defect in the goods, the claim for damages would often equal the cost of such repair. In the event of the buyer having received defective machinery or tools, he/she may institute a claim for loss in respect of lowered production for the duration that the defect prevented the equipment from being utilised. Thirdly, when the buyer elects to avoid the contract based on defective goods delivered, damages will be determined with reference to articles 75 and 76. Fourthly, should the seller deliver defective goods that have a fluctuating value, the buyer will be entitled to claim damages amounting to the difference between the actual value of the non-conforming goods delivered and the value that conforming goods would have had. The buyer is hereby restored to the economic position that he/she would have been in had the goods conformed to the specification of the contract.[716] The buyer may also claim additional damages to cover any expense or loss resulting from the breach itself.

Article 74 does not specify the time or the place where the loss is to be measured. It is presumed that the appropriate place would be the place of delivery. The appropriate time would be the time of delivery when the injured party became aware, or ought to have been aware, of the non-conformity or when it is apparent that the breaching party will not remedy the non-conformity in terms of articles 37, 46, 47, or 48.

4.3.4.2 Article 75 and 76: Damages in the case of Avoidance

Article 75 and 76 provide for the claim of damages for direct loss when the injured party elects to avoid the contract on the grounds of fundamental breach. In cases of

[716] This scenario is illustrated by the following example from the Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat, U.N. GAOR, at 59, U.N. Doc. A/CONF.97/19 (1981). The contract provided for the sale of one hundred tons of grain at a total price of 50,000 F.O.B. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to Buyer of drying the grain was 1,500. If the grain had been as contracted, its value would have been 55,000, but because of the deterioration caused by the moisture, after it was dried the grain was worth only 51,000.
Contract price: 50,000
Value the grain would have had if as contracted: 55,000
Value of grain delivered: 51,000
Extra expenses of drying the grain: 1,500

avoidance for a fundamental breach three formulas exist for calculating damages. Firstly, a party may claim damages for procuring substitute goods. Secondly, the party may claim market-based damages. Thirdly, the party may claim unique goods damages. These three options will be explored bellow.

4.3.4.2.1 Substitute Transactions

Firstly, in the case of a fundamental breach, an injured buyer may elect to avoid the contract and to arrange for replacement goods, while an injured seller may arrange for the resale of the goods.[717]

Article 75 states that:

> "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74."

In the event of a fundamental breach due to the seller providing delayed or defective delivery, the buyer may avoid the contract and may arrange for reasonable replacement goods. To recover damages the injured party must show that the procurement of replacement goods occurred in a reasonable manner and within a reasonable time of avoidance. The circumstances of the case determine whether the time and manner of procuring the replacement goods is reasonable.[718] To be reasonable, the buyer must have obtained the lowest price reasonably possible for

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Loss arising out of breach: 5,500

[717] Article 75 has its origins in article 85 of ULIS. Article 75 has its established counterparts in the Uniform Commercial Code (UCC 2-706, 2-712). There is no such counterpart under the Sale of Goods Act. Section 48(3) of the SOGA allows the unpaid seller to resell the goods and to recover damages from the original buyer for any loss caused by the breach of contract. This section does not indicate whether such damages may be calculated on the resale price or whether they are determined from the market price test in section 50(3). The accepted argument is in favour of the market price test. Ontario Law Reform Commission, Report on Sale of Goods, vol. 2, p 402.

[718] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".

goods of a comparable nature.[719] The damages will be calculated to be the difference between the contract price and the cost of procuring substitute goods. The innocent party may also claim incidental damages stemming from the breach in terms of article 74. It is known as "covering" when the innocent buyer arranges for replacement goods.[720] There is no express duty to cover. Article 77 however places a duty on the injured party to mitigate the loss caused by the breach. Reasonable efforts have to be made to reduce the extent of the loss suffered. Should the injured party fail to take reasonable measures the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. In light of article 77, a buyer who fails to procure substitute goods by reasonable means may be deemed to have failed in discharging the duty to mitigate loss. The buyer's claim for damages is limited by the principle of substitution and by the duty to mitigate loss.

In the event of the seller electing to avoid the contract as a consequence of the buyer's failure to pay the purchase price, he/she may resell the goods to mitigate loss. The injured party must show that the resale occurred in a reasonable manner and within a reasonable time of avoidance. The seller in required to ensure that the goods fetch the highest price possible in the circumstances when resold. The seller may recover the difference between the contract price and the lower price at which the goods had to be resold. This is known as recovering the contract-cover price differential.[721] The seller will further be entitled to claim damages in accordance with article 74.[722] Article 77 prevents a seller from claiming damages for avoidable loss that could have been mitigated by cover.

The important feature of article 75 is that resale by an aggrieved seller or repurchase by an aggrieved buyer is sufficient to establish damages.[723] The aggrieved party "may recover the difference between the contract price and the price in the substitute

[719] L Chengwei "Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL" http://cisgw3.law.pace.edu/cisg/biblio/chengwei-75.html (accessed 14 August 2008).
[720] J Lookofsky "The 1980 United Nations Convention on Contracts for the International Sale of Goods" http://cisgw3.law.pace.edu/cisg/biblio/loo75.html (accessed 14 August 2008).
[721] Lookofsky "The 1980 United Nations Convention on Contracts for the International Sale of Goods".
[722] A German court held that such additional damages include incidental damages, such as the administrative costs of mitigating loss by obtaining replacement goods or reselling goods. LG Berlin (Germany), No. 99 O 123/92, reported at http://cisgw3.law.pace.edu/cases/920930g1.html.
[723] JO Honnold "Articles 75 and 76: Measurement of Damages When Contract is Avoided" http://cisgw3.law.pace.edu/cisg/biblio/ho76.html (accessed 14 August 2008).

transaction" and need not prove the current market price of the goods.[724] The calculation for damages for substitute goods can be summarised as follows: the damages will be equal to the difference between the contract price and the price of the replacement goods purchased, plus incidental and consequential damages, including lost profit, minus any expenses saved.[725]

4.3.4.2.2 Current Market Price

Secondly, article 76 makes allowance for the recovery of damages calculated in relation to the current market price of the goods. Article 76 of the CISG states that:

> "1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.
> (2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 76 presents an alternate means of recovering damages to article 75 and may be applied in various situations. The golden rule is that the injured party must not have made a substitute purchase or a resale after avoidance. It will also come into operation in circumstances where the substitute purchase or the resale is not made in a reasonable manner or within a reasonable time.[726] A party may further invoke article

[724] Honnold "Articles 75 and 76: Measurement of Damages When Contract is Avoided".
[725] The substitute transactions damages formula is based on the notion that an injured buyer had to buy goods at a price higher than those under the contract and that an injured seller had to sell the goods for a price less than the contract price.
[726] Knapp "Article 76".

76 where it is impossible to determine whether a substitute transaction has occurred or where multiple transactions occurred preventing one from being able to determine which transaction was the substitute transaction for the breach. The latter situation may present itself where the injured party is consistently trading in such goods and it becomes impossible to say with certainty which of multiple contracts of purchase or sale was intended to substitute the breached contract. In such instances article 75 may not be available and, provided that the contract has been avoided, article 76(1) will be applicable.

The current price is equated with the price for goods, which match the description of those in the contract. It is unnecessary that an official or an unofficial market price exist for such goods.[727] Although the absence of a market price may raise the question of whether there a current price for the goods exists. The court will have to determine whether a current price exists, and what it amounts to, in light of the circumstances of the case.

The time at which the current price is to be determined depends upon whether possession was taken of the goods. In the instance of the injured party not having engaged in a substitute transaction after avoiding the contract and not having taken possession of the goods, he/she may recover the difference between the contact price and the current market price of the goods at the time of avoidance, in addition to incidental and consequential damages.[728] Article 76 allows claims for additional damages; damages claimed even when the current price is equal to the contract price. This includes the claim for lost profit, less saved expenses, and any other loss not compensated for under article 76(1). Additional damages may be compensated for under article 74. Should the buyer have taken possession of the goods and thereafter avoided the contract, he/she may claim the difference between the contract price and the current price at the time that he/she took possession of the goods prior to

[727] Knapp "Article 76".
[728] The general principle behind claiming damages can be summarised as follows. In the event of the seller having avoided the contract due to a breach by the buyer and the current price is lower that that agreed to in the contract, the seller will suffer a loss when reselling the items at the new current price. Therefore the seller may recover damages for having to sell goods at a price lower than what he/she legitimately expected under the contract. In the event of the buyer avoiding the contract due to the breach of the seller and the current price is higher than that contained in the contract, the buyer will suffer loss by having to purchase replacement goods at the higher market price than what he/she was obliged to pay under the breached contract.

avoidance. Damages claimed may include incidental and consequential damages, plus lost profit, minus expenses saved.[729] This test was established to prevent injured parties from retaining goods to speculate with the market price.[730]

Article 72 of the UNCITRAL Draft Convention, now article 76 of the CISG, was amended to contain the above two tests. It originally stated that the current price was established at the time when the injured party first acquired the right to avoid the contract. This provision was contested at the Vienna Conference for being too vague and elastic.[731] It was further contended that there would be a risk of injured parties postponing avoidance to benefit from fluctuating market prices.[732] The actual time of avoidance would have been especially difficult to establish in cases of anticipatory breach. An alternate suggestion was made that the appropriate time should be the time of delivery. This however faced severe opposition because delivery does not occur in every contract; cases of anticipatory repudiation do not involve delivery.[733] Finally the two tests set out above were adopted as the most appropriate means available.[734]

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[729] Knapp "Article 76". The two examples bellow demonstrate how damages are calculated under article 76.
Example A: The contract price was 20,000. Seller avoided the contract because of Buyer's fundamental breach and did not resell the goods. The relevant current price of comparable goods was 18,500.
Seller's damages under Article 76 were: 1,500
His loss of profit amounted to: 1,000
Seller's total damages under Articles 74 and 76 were: 2,500
Example B: The contract price was 50,000. Buyer avoided the contract because of Seller's failure of due delivery and did not purchase any goods in replacement. The relevant current price of comparable goods was 53,000.
Buyer's damages under Article 76 were: 3,000
Buyer's extra expenses caused by Seller's breach were: 2,500
His loss of profit amounted to: 1,500
Buyer's total damages under Article 74 and 76 were: 7,000

[730] Honnold "Articles 75 and 76: Measurement of Damages When Contract is Avoided". A drop in the market might entice a buyer to avoid the contract in order to re-purchase goods for less than the contract price. The buyer would recover little or no damages under article 76 due to the subsequent low price. A rise in the market would increase a buyer's claim for damages, but avoidance would deprive the buyer of goods purchased at a lower price. An unreasonable delay may invalidate avoidance under the time limits set by article 49(2)(b)(i).

[731] A/Conf. 97/C.1/SR.30 at 4; Official Records, II, 222-223; 394-396; 415. It was argued that this test would give too much discretion to the courts.

[732] If parties had the right to determine the time when the current price would be calculated they would be free to wait until the market prices suited their needs before avoiding the breached contract. This would leave room for manipulation and injustice.

[733] Ziegel "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods".

[734] Whereas the First Committee had rejected a motion by Norway to amend the article (A/Conf. 97/C.1/L.194 O.R. 132), a corresponding motion brought by Australia, Greece, Mexico, Norway, and Turkey (A/Conf. 97/L.11 O.R. 172) was passed by the required two-thirds majority. See A/Conf. 97/C.1/SR.10 at 6. The new reference to the 'time of avoidance' corresponds with article 84(1) of ULIS. Under ULIS however, the contract is voided by operation of law in necessary cases, to prevent

It is also important to determine the place at which the current price is to be calculated. Article 76 specifies that the current price of goods is the market price that exists at the place where delivery of the goods should have been made. The place of delivery is determined by the application of article 31. Article 31(a) specifies that in the instance of a sale concerning the carriage of goods, the goods are delivered when they are handed over to the first carrier for transmission to the buyer. In the case of the seller manufacturing goods, delivery is effected when the seller makes goods available to the buyer at the known place of manufacture.[735] Alternatively, the duty to deliver is discharged when the goods are placed at the buyer's disposal where the seller had his/her place of business at the conclusion of the contract.[736] The seller is not bound to deliver goods at any place other than the abovementioned. If no current price prevails at the place of delivery, the current price will be equated to the market price at a reasonable substitute place.[737] Due allowance must be made in such circumstances for any difference in the cost of transporting the goods.[738] The reasonableness of the substitution will primarily depend upon the circumstances of the case and the interests of both parties.[739] This test may be too rigid because the place of delivery and the place of receipt often differ. It is suggested that when goods delivered are rejected or acceptance is revoked the place of tender or the place of arrival should be used instead.[740] There is an extent of flexibility in article 76(2) and therefore the court may, in appropriate circumstances, substitute the price at the place of arrival when that presents a more reasonable market price. A substitute price may only be used when there is no current price at the place of delivery under the contract. Accordingly, neither party may request that a current price of a different place be utilised, simply because it is more advantageous to their plight, when a current price exists at the place of delivery.

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the other party from speculating with the market. Schlechtriem "Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods".

[735] Article 31(b).

[736] Article 31(c).

[737] Article 76(2).

[738] Article 76(2). The difference in cost of transporting goods to the place of delivery under the contract or the CISG and the cost of transporting them to the delivery place of the substitute current price must be taken into consideration in reaching the amount of damages awarded.

[739] Knapp "Article 76".

[740] Knapp "Article 76".

Article 76 does not require the breaching party to have foreseeability or knowledge of the current price. The breaching party may not therefore mount a defence based on lack of foresight or knowledge. This is of importance in instances where a substitute current price is used.

Article 76 resembles article 84 of ULIS. Two material differences exist however.[741] Firstly, article 84 of ULIS did not include the last section of article 76(1) of the CISG, which governs the regulation of damages in the case of avoidance. Secondly, ULIS permitted a substitute current price to be used when the current price of the place of the transaction was unreasonable. The CISG only permits substitution of a current price if there is no current price at the place of delivery. Thirdly, article 84 of ULIS did not grant the right for the injured party to claim further damages. Article 76 of the CISG does permit additional damages. This difference is not material because additional damages could be recovered under article 85 of ULIS.

4.3.4.2.3 Unique Goods

Thirdly, damages may be recovered where a contract is avoided that involves the purchase of unique or specially manufactured items. The complication is that no current price exists for such items. In addition, article 76 does not address damages of this nature. It is necessary that a party in such a situation proceed under article 74. The problem is circumvented when the injured buyer or seller claims the remedy of specific performance. The injured party may however desire to declare the contract avoided and to claim damages. The problem lies in determining how to calculate damages where there is no market for the goods and thus no means of procuring substitute goods. One potential solution to this issue is housed in article 74, which allows for damages equal to the difference between the contract price and the current price, in addition to incidental and consequential damages. Lost profit is included in this formula minus saved expenses. In the instance of unique items the market price may be equivalent to the contract price. The buyer would thus be limited to claiming incidental and consequential damages. Further, there will be no saved expenses because the buyer cannot enter a substitute transaction to mitigate loss. Under article

[741] V Knapp "Article 76" http://cisgw3.law.pace.edu/cisg/biblio/knapp-bb76.html (accessed 8 September 2008).

74 a seller who has not yet manufactured the item may recover incidental and consequential damages. If the seller has manufactured the items lost profits, incidental and consequential damages may be claimed. In addition, the seller will be entitled to claim the purchase price because time and money would have been expended during manufacture.[742] This is the only method to place the seller in the position that he/she would have been in if the contract was performed.

4.3.4.3 South African Law of Damages

A claim of damages is available to a party when a breach of contract has occurred. The reason for awarding damages to an injured party is to place that party in the position he/she would have occupied had the contract been properly performed, as far as this can be achieved by the payment of money and without undue hardship to the defaulting party.[743] To compare the remedy of damages under the CISG with that under South African law it is necessary to consider each aspect of damages in South African domestic law. The aspects requiring consideration are: the causation of damages, the nature of damages, general and special damages, and the time of calculating damages.

4.3.4.3.1 Causation

The initial step for a claim of damages arising out of a contractual breach is to determine whether the damages suffered resulted from the breach. This entails a two-stage inquiry.[744] Firstly, factual causation must be established and secondly, legal causation must be proved.

To establish factual causation it must be shown that the breach was the *causa sine qua non* of the loss; would the plaintiff have suffered the loss but for the defendant's breach of contract? If the plaintiff fails to establish that the loss suffered was factually caused by the defendant's breach, the claim for damages will fail and there

[742] Babiak "Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods".
[743] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687; *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 25F, 30H; Voet 19.1.14 approved in *Celliers v Papenfus and Rooth* 1904 TS 73 at 83; Kerr *Contract* 799.

will be no need to consider the second stage of the inquiry.[745] If the plaintiff succeeds in showing a probability that the loss was caused by the breach, he/she may move to the second stage of the inquiry unless the defendant can discharge the onus of proving that the probability does not exist.[746] In the event of the plaintiff proving the factual causation he/she will have to satisfy the legal causation test. In *International Shipping Co (Pty) Ltd v Bentley*[747] Corbett CJ explains the second tier of the causation test as follows:

> "The second inquiry then arises, *viz* whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy play a part. This is sometimes called 'legal causation'".[748]

The wrongful act in question is the breach of contract by the defendant. The closer the loss to the wrongful act of breach, the stronger the plaintiff's case will be. The purpose behind this stage is to place boundaries to the claim. A line must be drawn between the damages for which the defendant should be held liable and those that, although caused by the breach, are so remote that it would prove unfair to hold the defendant liable. It is important that liability for a breach come to an end; not only in respect of time, but also in respect of potential plaintiffs. It is necessary that the courts be able to determine who the plaintiffs will be. It is not permissible to stretch the consequences of a breach so far that the number of plaintiffs is unknown or potentially limitless. The ripples of any breach must therefore be limited in a reasonable and a fair manner.

To be fair to the defendant his/her liability is curtailed according to two general norms: causation and remoteness.[749] For general damages, liability depends firstly upon the causation and remoteness of the breach to the damages that flow naturally

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[744] Christie *Contract* 543.
[745] *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (A) 1191I-J.
[746] *Primesite Outdoor Advertising (Pty) Ltd v Salviati and Santori (Pty) Ltd* 1999 (1) SA 868 (W) 881F-882B.
[747] 1990 (1) SA 680 (A). Although this is a delict case, the stages of the enquiry are the same and thus serves as a useful text to reiterate the salient features of the causation enquiry.
[748] 1990 (1) SA 680 (A) 700I.

from the breach. Secondly, general damages can be claimed for harm caused by the breach that the law ordinarily considers to be too remote to result in liability, provided that the parties contemplated that such loss would result from the breach.[750] General damages need not be specially pleaded and the court need only determine whether they flow naturally and generally as a consequence of the breach.[751] In the instance of the plaintiff claiming special damages the court will have to consider the general principles more carefully. Firstly, to claim damages that the law tends to dismiss for remoteness, the party will have to establish that such damages were foreseeable or foreseen at the conclusion of the contract; they were in the contemplation of the parties.[752] The court may have regard to the subject matter and terms of the contract, or to the special circumstances known to both parties at the conclusion of the contract, to determine what was contemplated.[753] In addition to contemplating such damages the parties must have agreed to pay the damages contemplated; this is known as the convention principle.[754] This poses a problem given that the normal test for the existence of tacit terms must be applied and the officious bystander test would result in special damages not being applied in every case where it should be. In *Thoroughbred Breeders Association of South Africa v Price Waterhouse*[755] the court stretched the principle of the formation of the contract to comply with the convention principle when stating that "Price Waterhouse virtually or tacitly assumed liability for such damages".[756] While this principle proves problematic parties have to meet its requirements when claiming special damages. It is important to note that "causation" is also an integral part of claiming damages under the CISG.

A situation often arising in contracts of sale is harm caused to the buyer by the seller's misrepresentation. A claim for damages due to a fraudulent misrepresentation that induces a contract is based in delict and not in contract law.[757] The innocent party may

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[749] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687.
[750] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) 550.
[751] Christie *Contract* 550.
[752] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) 552B.
[753] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) 552B.
[754] *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) 552F.
[755] 1999 (4) SA 968 (W) 1030G.
[756] Although no express agreement was contained in the contract regarding contemplated damages, the court implied what the parties would have agreed upon.
[757] *Trotman v Edwick* 1951 (1) SA 443 (A) 449B; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T) 310F.

claim damages together with rescission of the contract.[758] Alternatively, he/she may claim for damages based on fraud while maintaining the contract.[759] The innocent party may combine a claim for damages for fraud and a claim for damages for breach of contract in the same action.[760] The innocent party must prove that the fraudulent misrepresentation was related to the loss suffered in that the fraud was the cause of the loss.[761] This relation must be sufficiently direct to pass the legal causation test.[762] Under article 74 of the CISG a breaching party is under strict liability; fault or fraud does not impact liability.[763] Another situation of interest is where a party suffers loss due to the negligent misrepresentation of the other party. In *Bayer South Africa (Pty) Ltd v Frost*[764] the court held that a claim for delictual damages may arise from a negligent misrepresentation, depending upon the circumstances.[765] The circumstances of the case will determine whether there is sufficient factual and legal causation between the misrepresentation and the loss.[766] In the absence of causation, contributory negligence will not affect the innocent party's right to claim damages.[767] A party who causes the other party to enter a contract due to an innocent misrepresentation, will not be liable for damages.[768]

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[758] *Claassens v Pretorius* 1950 (1) SA 37 (O) 42. The innocent party may not be able to rescind the contract because the fraudulent misrepresentation had not induced him/her to enter into the contract (*Ranger v Wykerd* 1977 (2) SA 976 (A) 990H); or that he/she is unable to make restitution or believes that the fraudulent party is unable to do so (*Coomers Motor Spares (Pvt) Ltd v Albanis* 1979 (2) SA 623 (R) 625C); or that he/she has committed himself/herself to other contracts based on the contract (*Trotman v Edwick* 1951 (1) SA 443 (A) 448H). The innocent party's reasons for maintaining the contract does not affect his/her right to claim damages.

[759] *Claassens v Pretorius* 1950 (1) SA 37(O) 42.

[760] *Pocket's Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R).

[761] *Ranger v Wykerd* 1977 (2) SA 976 (A) 991F.

[762] This will entail proving that the innocent party acted to his/her detriment based on the fraudulent misrepresentation. The aim of the damages is to place the innocent party in the position that he/she would have been in had the representation not been made. See *Pocket's Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R) 247C; *Davidson v Bonafede* 1981 (2) SA 501 (C) 505H-506D.

[763] Knapp "Article 74".

[764] 1991 (4) SA 559 (A).

[765] 1991 (4) SA 559 (A) 570D-F.

[766] 1991 (4) SA 559 (A) 570D-F.

[767] *Suid-Afrikaanse Nasionale Lewensassuransiemaatschappy Bpk v Louw and Collins Afslaers (Edms) Bpk* 1997 (1) SA 592 (A).

[768] Christie *Contract* 300. In *Brink v Robinson* 1916 OPD 88 at 90 Maasdorp CJ stated that a party should be held liable for damages for an innocent misrepresentation made by them. This *dictum* would impose strict liability on parties for any representation made. This is contrary to the South African law of delict, which generally only attaches liability to *dolus* and *culpa*. This *dictum* has not received support in South Africa.

4.3.4.3.2 Nature of Damages

Under South African law the purpose of the remedy of damages is not to recompense the injured party, but is to put him/her in the position he/she would have been in had the contract been correctly performed. The nature of damages for a breach of contract were described as follows by Innes CJ:

> "The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party".[769]

Damages may cover the plaintiff's expectation interest, reliance interest, or restitution interest. The expectation interest is protected by placing the plaintiff in the position he/she would have been in had the contract been performed.[770] The reliance interest is protected by putting the plaintiff in the position he/she would have been in had the contract not been entered.[771] The restitution interest is protected when the plaintiff cancels the contract, offers restitution[772], and claims damages; this may overlap with reliance interest.[773] These classifications merely serve as a means of ensuring that a party does not receive double compensation.[774] The chief difference between the former two classifications and the latter is that the latter requires both cancellation and full restitution, while the former two do not require cancellation or restitution. Whichever form of damages the plaintiff is claiming, it is vital that he/she proves the damages claimed. The court will not presume any damages.[775] The court held in *Esso Standard SA (Pty) Ltd v Katz*[776] that absolution will be granted when the plaintiff fails

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[769] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Versfeld v SA Citrus Farms Ltd* 1930 AD 452.
[770] Christie *Contract* 544.
[771] Christie *Contract* 544.
[772] *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 (C) 329A-330B. The ability to make restitution is a prerequisite to the right to rescind. The plaintiff must plead his/her willingness and ability to make restitution in order to set out a good cause of action.
[773] Christie *Contract* 544.
[774] Christie *Contract* 544.
[775] In *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) the court held that because the plaintiff had not provided evidence of financial loss it would not award damages.
[776] 1981 (1) SA 964 (A) 969H-970H. See *Minister of Community Development v Koch* 1991 (3) SA 751 (A) 764D-765A; *N Goodwin Design (Pty) Ltd v Moscak* 1992 (1) SA 154 (C) 166C-167D.

to place before the court evidence that he/she is in a position to lead, but if he/she has brought all the evidence reasonably available to him/her the court must then assess the damages to the best of its ability. For this principle to operate it is necessary that the plaintiff prove that he/she has suffered some form of damages and that only the *quantum* remains to be established.[777] The requirement that damages be proved is not however inflexible.[778] If evidence exists that damages have been sustained, but it is difficult or nearly impossible to calculate the exact estimate thereof, the court must attempt to reach an amount that will result in justice being done in the circumstances.[779] In attempting to reach an amount, the court may reject the claim,[780] adopt the lowest measure of damages displayed by the evidence,[781] or award what appears to be fair and reasonable.[782] Despite the discretion given to the courts in difficult circumstances, this flexible approach must not be misused. In *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*[783] the court warned that it is not competent to award an arbitrary approximation of damages when the plaintiff has failed to provide sufficient evidence and that it will not take part in conjecture when assessing damages where there is no factual basis in evidence for an assessment. Under the CISG the innocent party claiming damages must also show what loss has been suffered.

The burden of proving damages rests upon the plaintiff.[784] The plaintiff is not permitted to demand an inquiry into damages with the object of forcing the defendant to produce evidence that the plaintiff believes could prove the damages.[785] Where a plaintiff finds it difficult to prove the *quantum* of his/her damages, the court may award nominal damages to establish the plaintiff's right.[786] This is the case where the plaintiff has sustained damage, but he/she is unable to calculate the exact extent thereof.[787]

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[777] *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) 164E.
[778] *Bowman v Stanford* 1950 (2) SA 210 (D) 222-223.
[779] *Stolte v Tietze* 1928 SWA 51 at 52.
[780] *Trichardt v Van der Linde* 1916 TPD 148.
[781] *Emslie v African Merchants Ltd* 1908 EDC 82 at 95.
[782] *Cape v Thompson* 1912 EDL 234 at 240-241; *Fouche v Olivier* 1929 GWL 27 at 31-32.
[783] 1976 (2) SA 111 (C) 118E.
[784] Christie *Contract* 548.
[785] *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W).
[786] *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 352. In *Cato v Alison and Helps* 1923 NPD 113 116 the court awarded more than a nominal sum.
[787] *Wheeldon v Moldenhauer* 1910 EDL 97 at 101.

4.3.4.3.3 Time and Value of Calculation

Under South African law the aim of damages is to place the plaintiff in the position he/she would have occupied had the contract been performed. Therefore the most astute time at which to calculate damages is at the time that performance was due. The reasoning behind this was succinctly expressed in *Sasfin (Pty) Ltd v Jessop*[788] where the court stated that unless the time when performance became due was utilised parties may exploit fluctuating markets to gain an unfair advantage. If a breach occurs at the time that performance was due, the time of breach will be the time for calculating the damages. The CISG does not specify the time of calculating damages, but it is presumed to be the time that delivery was due; the time of performance.[789] When repudiation has occurred and no time had been set for performance, the appropriate time will be the time when the plaintiff quantifies his/her loss by entering a resale or a repurchase.[790] Under the CISG the plaintiff will be awarded the difference between the contract price and cost of a resale or repurchase, calculated at the time of resale or repurchase, provided that the new transaction occurred within a reasonable time and in a reasonable manner. When the actual measure of damages is the cost of having goods repaired, the damages should be determined at the date when it was reasonable for the work to be put in hand.[791] The CISG does not expressly provide for the calculation of damages in lieu of repair, but it will be subsumed under articles 74 and 77.

In the event of a plaintiff having suffered loss due to a breach, which manifests itself over a staggered period of time, he/she must bring one claim for both actual and prospective loss. Alternately, the plaintiff may wait until he/she reasonably expects that the full extent of the breach has become patent and then claim in a single action for actual loss suffered. The plaintiff may only claim once in respect of a single breach to prevent exposing the defendant to the harassment of multiple

[788] 1997 (1) SA 675 (W) 699G-H.
[789] Knapp "Article 74".
[790] *Culverwell v Brown* 1990 (1) SA 7 (A) 30G-31H.
[791] *Rens v Coltman* 1996 (1) SA 452 (A).

claims.[792] The CISG does not expressly address the number of times that a party may bring a claim based on the same cause action.

4.3.4.4 Article 77: Mitigation of Damages

Article 77 requires the innocent party to mitigate loss in given circumstances. It is necessary to consider the general principles pertaining to this article and thereafter focus will be placed on the circumstances under which it may operate.

4.3.4.4.1 Article 77

The CISG carefully balances the injured party's right to claim damages with the breaching party's right not to be exploited under the breach.[793] This is achieved by placing a burden upon the injured party to mitigate the damages caused by the breaching party. As discussed above briefly, article 77 states that any party who elects to rely on a breach of contract must take measures that are reasonable in the circumstances to mitigate the loss. This includes loss of profits resulting from the breach and prospective loss. If the injured party fails to mitigate loss, through reasonable measures available to him/her, the party in the breach may claim a reduction in the damages in the amount by which the loss should reasonably have been mitigated. This article therefore modifies the remedy of damages.

Article 77 does not create a formal duty to mitigate loss, but rather imposes a heavy consequence for failing to take reasonable steps to mitigate loss. The moment that a party becomes aware that the other party will not perform his/her obligations under the contract, the former party is expected to take reasonable steps to avoid the imminent loss.[794] A party may embark upon a resale or a purchase of substitute goods to mitigate loss.

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[792] *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) 330F.
[793] Article 77 states that "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."
[794] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien (Vienna), Austria, arbitral award 15 June 1994, No. SCH-4366, http://cisgw3.law.pace.edu/cases/940615a4.html.

Article 77 is applicable to recoverable losses under article 74. An example is a buyer who fails to make reasonable efforts to obtain substitute goods, needed for production purposes, and who will consequently be barred from claiming loss of profits connected therewith. The degree of effort that the innocent party will be held to will largely depend upon that party's experience and financial resources.[795] The courts will then decide what constitutes reasonable mitigation in light of the facts of the case. The decision of Amtsgericht München (Germany)[796] revolved around the reasonableness of the buyer's conduct. The German buyer sold chemicals intended for the production of pharmaceuticals to his customers, who then complained of non-conformity. The Italian seller agreed to cure the defect in Italy. The seller however delayed in curing the non-conformity resulting in the buyer securing a more expensive cure in Germany. Although the buyer had not informed the seller of the customer's urgent need for the goods, the court held that the buyer had acted reasonably in mitigating damages. Under the CISG a buyer's substitute purchase at a higher price will fulfil his/her obligation under article 77.[797] In another case the German Supreme Court held that a buyer who adapted equipment at great expense to process defective metal had acted unreasonably in light of the purchase price in question.[798] The circumstances of the case will therefore dictate what is reasonable to mitigate loss.

A party's loss may appear to be caused by his/her own negligent conduct, in whole or in part. In such instances a party's failure to take reasonable precautions before the breach occurred may bar the recovery of compensation for such avoidable loss. This is often the case where a reasonable person in the injured party's position or trade would have had specific safeguards in place aimed at countering possible loss or contractual breaches and the injured party failed to take such preliminary measures.[799]

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[795] J Lookofsky "The 1980 United Nations Convention on Contracts for the International Sale of Goods - Article 77 Mitigation: No Recovery for Avoidable Loss" http://cisgw3.law.pace.edu/cisg/biblio/loo77.html (accessed 11 September 2008).
[796] Amtsgericht München (Germany) 23 June 1995 http://cisgw3.law.pace.edu/cases/950623g1.html.
[797] OLG Hamburg (Germany), 28 February 1997, reported http://cisgw3.law.pace.edu/cases/970228g1.html.
[798] German Supreme Court (BGH) of 25 June 1997, NJW 1997, 3311-3313, http://cisgw3.law.pace.edu/cases/970625g2.html.
[799] Lookofsky "The 1980 United Nations Convention on Contracts for the International Sale of Goods - Article 77 Mitigation: No Recovery for Avoidable Loss".

4.3.4.4.2 Article 77 following Failure to Perform

In the event of one party failing to perform his/her obligations under the contract and the innocent party electing to avoid the contract, articles 75 and 76 will govern the time when damages must be calculated. Resale or repurchase by the aggrieved party must occur within a reasonable time after avoidance,[800] while the current price will be determined at the time of avoidance or at the time of taking over the goods in specific circumstances.[801] These precautions prevent the innocent party from delaying a claim for damages to profit from the economic climate.[802] Articles 75 and 76 seldomly raise mitigation issues under article 77.

Article 74 contains the general principle that damages cover loss caused by the breach. The causation principle is clearly embraced in article 74. In the event of the seller failing to perform and the buyer failing to mitigate the loss, the courts may utilise either article 74 or article 77 to reach the same conclusion.[803] Under article 74 the buyer may be partially responsible for his/her own loss because he/she helped "cause" the harm. Under article 77 the buyer will be held liable for the loss he/she did not take reasonable steps to mitigate – he/she is partially responsible for causing the harm. The buyer may thus be prevented from claiming damages in respect of all loss suffered under article 74 or under article 77.

4.3.4.4.3 Mitigation before Performance Date

It is not unknown for a party to repudiate the contract prior to the date of performance under the contract. Two fundamental questions arise in this regard. Firstly, must the injured party accept the repudiation, avoid the contract and claim damages? Secondly, do circumstances exist within the context of repudiation that requires the injured party to mitigate loss prior to the actual date of performance?

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[800] Article 75.
[801] Article 76.
[802] A seller who avoids the contract is prevented from shifting to the buyer the loss resulting from a subsequent drop in the market price and similarly a buyer who elects to avoid a contract may not shift a subsequent rise in price to the seller.
[803] JO Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* 3rd ed (1999) 456.

In the event of a buyer repudiating the contract prior to the date of delivery and requesting that the seller resell the goods at a time when the current price is decreasing rapidly, the question stands as to whether the seller is forced to accept the repudiation.[804] Article 72(1) of the CISG states that:

> "If prior to the date of performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party may declare the contract avoided."

The word "may" indicates that the injured party has an election. The party need not declare the contract avoided and need not accept the repudiation. It is important to determine whether article 77 creates an exception to this right of election. In the scenario above, there is nothing unreasonable in the seller refusing to accept the repudiation by the buyer. The seller cannot be expected to know whether the market would continue to fall after the repudiation or whether it would begin to rise and therefore, he/she cannot be held liable for not having resold the goods prior to the market falling.[805] In summary, there is no general obligation in terms of article 77 for the injured party to mitigate damages by accepting the repudiation and reselling or repurchasing goods.

Another scenario worth contemplating is the situation where goods are purchased for the purpose of manufacturing other items. In the event of the seller advising the buyer

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[804] Honnold *Uniform Law for International Sales* 458. An example may be drawn from the context of a repudiation requiring a resale to mitigate loss.. On June 1 A and X made a contract for A to sell and deliver to X on August 1 1,000 bales of cotton at $50 per bale. Both A and X were merchants engaged in the purchase and resale of cotton. Shortly after June 1 cotton prices fell and on July 1, when the market price was $40 per bale, buyer X repudiated the contract and requested A to resell the cotton before the market could decline further. A replied that A expected X to receive and pay for the cotton in accordance with the contract; X thereupon repeated its repudiation. By August 1, the agreed delivery date, the price had fallen to $30; X again refused to receive and pay for the goods. A thereupon declared the contract avoided, resold the goods for $30 per bale ($30,000) and claimed damages from X of $20,000 ($50,000–$30,000). X contended that on July 1, when X repudiated, A should have mitigated loss by selling the cotton at $40, a step that would have reduced damages from $20,000 to $10,000.

[805] In the United States there is conflict in the case law and academic writings regarding the existence of the aggrieved party's duty to accept repudiation and to resell or repurchase the goods. English case law seems to reject this duty. The English doctrine is in favour of the party's right to "require performance" under CISG 46 and 62. An aggrieved party who does avoid the contract after repudiation is placed in an uncertain position since the repudiating party may still perform. This discourages the aggrieved party from delaying a decision to avoid in order to speculate on possible changes in the market price.

to procure goods elsewhere due to his/her being unable to supply the goods because of technical difficulties and the buyer ignores such advise, the question arises as to mitigation of loss.[806] The election under article 72(1) is of no consequence given that the seller has made it clear that he/she cannot perform. There can be no fear of the seller attempting to remedy his/her non-performance by delivering goods at a later stage, to the prejudice of the buyer who has already procured substitute goods. To prevent loss it is both necessary and reasonable for the buyer to repurchase goods after the seller has given notice of his/her inability to supply the goods. The buyer has the right to require late delivery by giving the seller notice of suspension under article 71(3). Article 71(3) states that a party who elects to suspend performance before or after dispatch of the goods must immediately give notice of the suspension to the other party. The party electing to suspend performance must continue with performance if the other party provides adequate assurance of his/her performance. Upon the request of the buyer to suspend performance, the seller could have assured the buyer that he/she would tender late performance and by so doing keep the contract in tact. Although the buyer has the right under article 46 to claim specific performance, it would be to no avail because the seller is facing production difficulties, which cannot be overcome by a court order. The legal process of obtaining a specific performance order may stretch beyond the performance date and thereby defeat the purpose of the application. There is nothing under South African law preventing an innocent party from suspending performance until the other party is in a position to perform.

[806] Honnold *Uniform Law for International Sales* 459. An example may be drawn from the context of a repudiation requiring a repurchase to mitigate loss. On June 1 A and X made a contract for X to produce and deliver to A 10,000 sheets of steel on August 1 at $50 per sheet. Buyer A needed the steel for use in manufacturing. On July 1 Seller X notified A that production difficulties in X's steel mill would prevent delivery of the steel by August 1; X also stated that the production difficulties might persist for an unknown period after August 1 and urged A to obtain the steel elsewhere. Comparable steel was available in A's area; the price at all times remained at $50. For unexplained reasons A did not seek or obtain the steel elsewhere; as a consequence A's production facilities were shut down for the month of August. Buyer A sued X for damages based on shut-down losses, according to article 74 "loss of profit", of $10,000 per day, or $300,000. Seller X argued that, under Article 77, A failed to "take such measures as are reasonable in the circumstances to mitigate the loss" so that there should be a corresponding reduction in the damages.

4.3.4.4.4 The Conflict between Mitigation and the Right to Performance

Under the CISG two contrasting principles fight for dominance. Firstly, article 77 requires the innocent party to mitigate loss arising from a breach by the other party. Secondly, articles 46(1) and 62 contain the right of the aggrieved party to specific performance.[807]

In the event of a buyer requesting a seller not to continue in the preparation of specific goods initially requested, but the seller completes the preparation and resells the goods at a reduced price, the question arises whether the seller should have mitigated his/her loss or whether he/she should have requested performance.[808] In this instances it may be presumed that the buyer's domestic law does not support the remedy of specific performance. The seller will therefore not be successful in a claim for performance of the contract and will have to face article 77. In terms of article 77 one must ask whether it would have been reasonable for the seller to mitigate loss by complying with the buyer's request to stop preparation. When determining what would constitute reasonable conduct one must consider what other sellers would have done when it became apparent that the buyer was not going to perform and that completing the preparation of the goods would reduce their value. It can be strongly argued that the normal businessman would have stopped preparation. The seller's

[807] It must be born in mind that article 28 limits the right to specific performance by stating that such a remedy will only be given if the court hearing the application would do so under its domestic law in respect to similar contracts.

[808] Honnold *Uniform Law for International Sales* 460. An example may be drawn from the context of a repudiation in the presence of the conflicting principles of having to mitigate loss or of requiring performance. A sales contract made on June 1 called for A, a producer of steel, to produce and deliver steel girders to X, a building contractor. The contract called for A to cut the girders to special dimensions provided by X for X's use in erecting a building for Owner. The contract price for the girders was $50,000. On July 1, before A had started work on the contract, Owner repudiated its contract with X; X immediately informed A of this and requested A not to cut the girders. Nevertheless, A cut the girders to the specifications stated in the contract. X refused to accept the girders. A sued X in a court in X's State to require X to accept the goods and pay the agreed price. X's State is one of the many common-law jurisdictions that, in cases like the present, does not "require performance" by compelling acceptance and payment of the price, as contrasted with damages. See Art. 28, §§191-199, supra. The court dismissed A's action for the price and permitted A to prove damages. A thereupon resold the girders but they brought only $10,000 because they had been cut in unusual lengths. A claimed damages of $40,000 (the contract price of $50,000 less $10,000). In response, X requested that damages be reduced by the amount that the value of the girders had been impaired by cutting them to unusual lengths. Th seller should not have cut the girders in order to mitigate the loss. The seller A's attempt to force X to receive and pay for the girders was doomed to failure by the fact that the legal rules in X's State, the jurisdiction where A would normally need to sue for effective enforcement of a decree requiring performance, rejected this type of action even apart from the mitigation requirement of Article 77.

failure to do so is hence inconsistent with the principle of mitigation in article 77. The amount of damages that may be recovered by the seller will be reduced.

It is now necessary to consider the outcome of the above scenario if it were instituted in a State where specific performance is available. Despite the ability to obtain an order for performance, the court will still have regard to whether the seller took reasonable measures to mitigate the loss suffered. Should an order for performance be granted together with damages, the court will reduce the damages claim to the extent that the seller failed to mitigate his/her loss.

Ultimately courts are tasked with the duty to adopt the solution that results in the least harm to either principle. Generally it seems that giving effect to article 77 when permitting specific performance, does little harm to the performance remedy. However, failing to give effect to article 77 would completely nullify the mitigation principle. It is important to strike a balance having regard to the effect, on the two juxtaposing principles, of ignoring or implementing article 77. A party's need for performance may outweigh the importance of the mitigation principle. For instance where unique goods are required, which cannot be procured elsewhere. The seller's need however to compel the buyer to accept goods will usually be less severe and his/her loss may be compensated for with an award for damages.

Article 77 was only decided upon in the final stages of the drafting process and faced opposition due to the vague wording used.[809] Nevertheless, it was included in the final draft of the CISG after failed attempts at amending it. It thus remains for courts to give meaning to this rather broad article.

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[809] The first drafting committee decided upon article 77, draft article 73, during the final week of negotiations. It was argued that the first sentence of article 77 established the general rule requiring reasonable steps to be taken to mitigate loss, while the second sentence contained the sanction of reduction of damages as a penalty for failure to take reasonable steps. The drafters were concerned that article 77 may be misinterpreted as to only be applicable to damages claims and excluded from claims for other remedies. Thus, a proposal was drafted in terms of which the words "or a corresponding modification or adjustment of any other remedy" were added at the end. Thirteen delegates discussed this issue. Five of which supported the amendment. Three opposed the change, while the remaining five were concerned that the words "any other remedy" may be too broad and nebulous. Ultimately, it was concluded that the amendment would not be implemented. The drafters discussed a broad range of reasons when deciding to reject the suggested amendment and it was not merely swept under the carpet. The general principle of mitigation was vehemently supported and therefore, the spirit of taking reasonable steps to mitigate loss must be upheld in all cases irrespective of which remedy is sought.

4.3.4.4.5 South African law of Mitigation

The underlying principle of article 77 that a party must mitigate loss by taking reasonable measures is generally accepted in many legal systems. Many systems do not specifically mention a duty or obligation to mitigate loss, but rather state that the party is liable for the damages it causes.[810]

In most common-law legal systems the party who breaches a contract is liable for the damage caused thereby without regard to fault or negligence. The innocent party is expected to take steps to limit the harm caused. Similarly, the CISG holds a party responsible for non-performance of obligations regardless of fault, as demonstrated in articles 30, 45(1)(b), 53, 61(1)(b).

Under South African law a court must consider the rule on mitigation of loss when determining damages.[811] An injured party may not allow damages to multiply if he/she is capable of mitigating the loss. While the CISG does not place a strict duty on the aggrieved party, South African law does.[812] Under this duty if similar goods are available from another source on the relevant date, the buyer must avail himself/herself of the opportunity to mitigate his/her loss by buying the goods.[813] When determining the value of substitute goods, the court must take cognisance of the market value at that time and place.[814] In *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd*[815] the court held that the aggrieved party is generally granted damages in the

[810]Honnold *Uniform Law for International Sales* 457.
[811] AJ Kerr "Damages in Contract and in Delict" (1994) 111 *SALJ* 127 at 134-137.
[812] The buyer will be entitle to damages amounting to the difference between the purchase price and the price of the substitute goods. In order to claim such damages the buyer must keep the seller informed of the repurchase. The reason for this is that by repurchasing against the seller, the buyer is exercising his/her right to rescind the contract (*Central Produce Co v Hirschowitz* 1938 TPD 350). The buyer must act in good faith and mitigate damages to the best of his/her ability by purchasing substitute goods at the lowest price possible after the breach (*Kaplan v Kroomer* 1920 CPD 418). See also: *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) 381E-382G; *Versfeld v SA Citrus Farms Ltd* 1930 AD 452 at 454.
[813] The goods so obtained must be as similar as possible to the original non-conforming goods. In the sale of unascertained goods, the buyer need only locate goods of that kind and class. In the sale of a specified article, it is impossible to locate an identical item and thus, the buyer should accept a similar item; see *Desmon Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) 288B-C.
[814] In *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) 819F-820B, the court said that generally the aggrieved party is granted damages in the amount of the difference between the contract price and the market or current value at the place and time of delivery.
[815] 1959 (1) SA 816 (W) 819F-820B. In *Novick v Benjamin* 1972 (2) SA 842 (A) 859D-F Trollip JA agreed with the above rule, however added that the rule must yield, in appropriate circumstances, to other evidence of damage.

amount of the difference between the contract price and the market or current value[816] at the place and time of delivery. The meaning of "market" is not an actual market or stock fair, but signifies any source to which the purchaser might reasonably have gone to replace the undelivered or non-conforming goods.[817] The relevant place where the market value is determined is usually the place of delivery.[818] Should a party obtain substitute goods at a place other than the place of delivery, the onus is upon him/her to prove that the goods were not available at the place of delivery.[819] The relevant date upon which the market value is to be determined is ordinarily the time of delivery.[820] The market value may however also be determined on the date that substitute goods are purchased or the goods are resold.[821] A party may not postpone a decision concerning the repurchase or resale of goods to benefit from a fluctuation in the market price.[822] These principles are essentially identical to those under article 75 and 76 of the CISG.

The courts have expressed this duty as a claim based on negligence; the injured party failed to do what a reasonable man would have done if placed in the position of the injured party.[823] The injured party need not plead or prove that his/her conduct met that of a reasonable person because the onus of proof rests on the defendant to show

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[816] The market or current value is taken to be the true value of the goods. In the event of non-delivery, it is presumed that the buyer would consider the value of the goods to be that which he/she could get for them in the open market. The buyer should therefore be entitled to enough damages to enable him/her to purchase similar goods in the open market. *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) 819F-820B.

[817] *Katzenellenbogen Ltd v Mullin* 1977 (a) SA 855 (A) 878E-F. Therefore, the price in a shop may be considered to be the market price as was held in *Durr v Buxton White Line Co* 1909 TS 876 at 883, followed in *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) 820C. Further, the market price could be the cost of importing goods, if the contract referred to imported goods as held in *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) 288A-B. In *Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd* 1994 (4) SA 26 (W) 86E, quoting the *Desmond Isaacs* case, the court held that the term market means "a general current sale of goods available for the purposes in a trade."

[818] *Goolam v Comrie* 1925 NPD 103; *Mills v Schmahmann Bros* 1909 TS 738 at 739, followed in both the *Durr* and the *Garavelli's* cases above.

[819] *Durr v Buxton White Lime Co* 1909 TS 876 at 883-884.

[820] *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) 819F.

[821] *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 31E-F. Parties must however repurchase or resell goods without undue delay in order to prevent parties from delaying as to benefit from a rise or fall in the market price. To determine whether there has been an undue delay, the court is required to consider the date when the goods could reasonably have been repurchased or resold (30C-D, 31F-G). See *Inhambane Oil and Mineral Development Syndicate v Mears and Ford* (1906) 23 SC 250 at 259-260 for the application of the reasonableness standard concerning the time of repurchase or resale.

[822] *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 26H-I: "He cannot lie by indefinitely, and then, after the lapse of a long period of time, go back to the high-water mark of the fluctuations in value of property in the interim". See also *Stephens v Liepner* (1) 1938 WLD 30.

[823] *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388.

that the plaintiff did not meet the standard.[824] The plaintiff should not avoid an opportunity to mitigate loss merely because the opportunity arises from the defendant.[825] The plaintiff may only ignore such an opportunity if he /she has reasonable grounds for suspecting it to be a trap to lure him/her into an unwanted waiver of rights.[826] Should the plaintiff embark upon measures that result in him/her being better off than he/she would have been had the contract been performed, the courts must take this into consideration. While there is authority that such profit cannot be set off against the loss accrued from the breach,[827] it is unwise to separate the consequences of the breach. Instead the net outcome of the breach should be taken into account and the amount of the award determined from that, as is the case when the plaintiff has incurred expense in mitigating the loss.[828]

In the event of a third party acting to reduce or eliminate the plaintiff's loss, the defendant's liability is not removed because such assistance is not equated with mitigation. Third party assistance must be ignored because it is a collateral benefit or *res inter alios acta*.[829]

There is no duty to mitigate when the plaintiff elects to enforce the contract instead of accepting the repudiation and claiming damages. This principle will not be applied to a claim for specific performance that would cause undue hardship to the other party.[830] A claim for specific performance would give rise to undue hardship:

> "…where it would operate unreasonably hardly on the defendant or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances".[831]

Some confusion may exist when determining whether conduct of the plaintiff mitigated or quantified the damages. This distinction is of significance because if the plaintiff quantified the damages the onus would be on him/her to prove that

[824] *North & Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A) 216-217.
[825] *Freedman v Raywid* 1930 CPD 161; *Brown v Webster* 1946 WLD 254.
[826] *Kinemas Ltd v Berman* 1932 AD 246 at 253.
[827] *Sam Lewis and Son v Stone* 1942 SR 101 104.
[828] *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C).
[829] Christie *Contract* 554.
[830] *Smith v Weeks* 1922 TPD 235.

the conduct taken was reasonable, but if his/her conduct mitigated the loss the onus would be placed on the defendant to prove that the plaintiff acted unreasonably.[832] This approach has not found favour because before any question of mitigation can be raised, the plaintiff is required to produce *prima facie* proof of his/her damages. If he/she decides to do so by proving the cost of taking steps to perform the breached contract, he/she will have to prove that such action was reasonable.[833]

From the above discussion it is evident that the principle of mitigation of loss under the CISG and South African law is essentially the same.

4.4 Conclusion

From the above comparison it is evident that a remarkable similarity exists between the duties, rights and remedies contained in the CISG and those in the South African law of sale. A careful examination of the rights and duties of the parties revealed that the CISG matches South African law. There is parity in the seller's duty to deliver goods that conform in nature to the requirements of the contract; to deliver goods free from third party rights; the buyer's duty to make payment and to take delivery of the goods. Two potential weakness are: the CISG's failure to govern the process of transferring ownership in goods, and the fact that the CISG does not require a contract to contain a price to be valid. With regard to the former, the method of transferring ownership may be set out as a term of the contract or may be referred to the applicable domestic law. With respect to the latter weakness, South African law recognises that a valid contract is concluded when parties indicate a method by which a price may be determined. It does not however recognise a contract that does not fix a price or indicate the manner of determining a price. Article 55 of the CISG provides that in the absence of a price or a method of determining a price, it will be presumed that the parties impliedly made reference to the usual price charged for such goods. South African law also recognises that parties may refer implicitly or explicitly to the

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[831] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378H-379A.
[832] Christie *Contract* 554.
[833] *Reid v LS Hepker & Sons (Pvt) Ltd* 1971 (2) SA 138 (RA); *Nedfin Bank Ltd v Muller* 1981 (4) SA 229 (D) 233E-F; *Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A) 235D.

market price as being the contract price. Therefore, no major discrepancy exists concerning the buyer's duty to make payment. The CISG largely mirrors South African law with respect to the duties, and the corresponding rights, of the buyer and the seller.

The CISG caters for a banquet of remedies. A number of remedies contained in the CISG are not strictly catered for in South African law. Firstly, setting an additional period in which to perform is not specifically provided for in South African law, but is also not forbidden. The doctrine of *estoppel* can be utilised to prevent the innocent party from having recourse to other remedies during the set period. Secondly, the CISG specifically permits a breaching party to cure defective performance. Under South African law a party does not have a right to cure, but may attempt to do so before the innocent party cancels the contract. Where defective performance is cured, a South African court is disinclined to permit cancellation and an award of damages may be granted to make up for the initial defective performance. The ability to cure defective performance is therefore not unknown in South African law.

Other remedies under the CISG however match those under South African law. Under both systems a party is exempted from liability for a failure that is caused by a force or agency beyond his/her control, provided that it was not foreseen, or reasonably foreseeable, at the time of contracting. The remedy of anticipatory breach, enabling the innocent party to cancel the contract, is also accepted under both legal systems. Both systems provide for the cancellation of a breached contract; the only difference being that avoidance under the CISG focuses on the effects of the breach, while cancellation under South African law looks to the seriousness of the breached term. Both concepts only permit parties to terminate the contract in suitable circumstances and generally produce similar results in practice. The remedy of price reduction under the CISG also matches that under South African law, as does the remedy of damages.

The duties, rights and remedies under the CISG largely resemble those catered for under South African law. Where discrepancies exist, they can be overcome by utilising sufficiently similar principles that are well known under South African law to produce the equivalent results. The duties, rights and remedies contained in the CISG do not therefore pose a barrier to ratification.

Chapter Five

Conclusion

5.1 The Road Ahead

The aim of this research was to determine the level of compatibility between the CISG and the South African law of sale. The historical development of the CISG demonstrates that the drafters intended it to become a unified code that would harmonise international trade law. It is clear that many States have recognised the potential of this Code to achieve its objectives.

Germany is a prime example of a ratifying State which has embraced the CISG. In addition to ratifying the CISG, domestic law reforms have been undertaken to align German law with the Convention. This will have great future benefits for harmonised sales law in Germany regarding domestic and international sales. While the UK has not ratified the Convention, it has promised to do so. From the comparison between the provisions of the CISG and those of English law it is apparent that no major legal barrier exists to ratification. The fear that the CISG will impact on domestic law is unwarranted because English law would remain applicable to domestic matters and the CISG would only be applicable to international sales. The chief reason behind the failure to ratify is the general attitude of apathy toward the CISG. The UK also has economic reasons for not ratifying the Code. It is currently the primary forum for dispute resolution in international trade matters. A fear exists that the economic benefits from its prominent position would dissipate after ratification. The UK may however continue to benefit after ratifying the CISG given that parties seek the experience of English courts. The CISG will not mitigate the experience of the English courts in international trade matters. English judges will bring experienced minds to bear upon the interpretation of this Convention. South Africa is not in a comparable position. South Africa is not a highly sought after dispute resolution forum and South African law is largely unknown to the world. While the UK may

arguably have an economic advantage to be gained from retaining domestic law for international matters, South Africa cannot boast the same.

In the event of South Africa ratifying the CISG, the decision will have to be made whether domestic law reforms will be embarked upon to align domestic law with the CISG. From the investigation into the compatibility of the CISG with South African law it is evident that the two legal systems are largely similar. Where they differ, sufficiently similar South African principles can be found to breach the gap. South Africa will not therefore have to sacrifice portions of domestic law if it ratified the CISG. South Africa need not follow the German model, but can retain domestic law for domestic sales and apply the CISG to international sales.

The legal, business, and political reasons in support of ratification appear to outweigh the reasons against ratification. This study has focused on substantive legal provisions, which show overwhelming parity between the CISG and South African law. The rights and duties held in the CISG largely match those in South African law. Certain remedies under the CISG do not have an exact counterpart under South African law. The setting of an additional period of time when seeking specific performance or the right to avoid a contract are not found in South African law in the same form as under the CISG. Despite this, neither of these are foreign concepts and sufficiently similar provisions can be located within South African law.

As one commentator noted "in this age of global commerce seemingly routine transactions are subject to the CISG. The general practitioner must be aware of the CISG and the significant changes it brings to sales law."[834] South Africa cannot simply ignore the CISG. The argument that the CISG may lead to uncertainty is overshadowed by the greater uncertainty that accompanies the application of foreign law, given that the CISG is strikingly similar to South African law. The fear that certain terms do not yet have solid definitions is not a reason to fear ratification. Definitions are constantly being developed and South Africa could contribute to this process. The provisions in the CISG mostly mirror South African law and therefore there should be no reason to believe that unworkable definitions will be developed.

[834] Flechtner 1995 *J. L. & Com.* 138.

The CISG has been accepted across the globe because it appeals to both developed and developing States. More importantly it has been well received by the commercial entities, which are making their trade contracts subject to its provisions. It appears that member States of the European Union have set the CISG to work in their trade disputes. Most of the CISG cases stem from disputes between entities domiciled in different European States.[835] This is largely due to the efforts undertaken in the European Union to encourage trade between member States. South Africa could fulfil this role in the SADC region. By ratifying the CISG, South Africa would be aligning itself with the international community as well as with the SADC States that have already ratified the Convention. This may encourage the remaining SADC States to ratify, which will create a unified body of law that would facilitate trade among the SADC States.

The only concern is that since the drafting of the CISG the nature of trade has changed. Trade customs have become largely harmonised as international trade has increased. The need for a unified law has been reduced due to the harmony found in trade usages and customs. Sufficient disparity remains however to maintain the need for the CISG. Of concern is that certain provisions in the CISG have become outdated. This is inevitable when dealing with a Code, but is not an impediment to trade. For instance, the intricate explanation of the mailbox rules appears unnecessary given the nature of current e-commerce. It is unfortunate that the CISG does not touch on the issues of electronic transactions, email correspondence, and Internet sites. The CISG has been ratified by many States who are participating daily in e-commerce. This indicates that the CISG's failure to cover this aspect of commerce does not hamper trade in practice.

The CISG presents few perils to traders and may ease international transactions by providing a single body of law, which may be applied to the contract or altered according to the wishes of the parties. Hereby party autonomy is maintained and parties have freedom to formulate their contract to meet their legal needs.

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[835] Williams "Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom"

It is a pity that few South African academics have undertaken a careful study of the CISG. This concern is not expressed out of fear that incurable discrepancies will be found, but rather that the South African public would benefit from reading material on this Convention. It is imperative that businesses, legal professionals, academics, and private individuals educate themselves on the contents and application of the CISG. It is becoming an unavoidable presence in the international market and South Africa will encounter it increasingly in international sale transactions.

The CISG is not striving to displace domestic law or provide an exclusive set of legal principles. It recognises the need to refer certain aspects of sales contracts to domestic law and supports the use of recognised trade usages and customs. It rather provides a framework within which international trade law may grow in unity irrespective of the political, social, or developmental levels of the States involved. The hope is to foster unified rules through common experience with the application of the CISG.[836] This international project will benefit every signatory State, but requires the input and support of all participants to succeed. The CISG has the potential of becoming a law for the trading nations made by the trading nations. South Africa has to decide whether it is going to join this international project, which is gaining unstoppable momentum.

5.2 Recommendation

It is the recommendation of this study that South Africa become a signatory of the CISG and work toward completing the ratification process.

[836] Rosett "Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods".