

Article

Rejection, Revocation of Acceptance, and Avoidance: A Comparative Assessment of UCC and CISG Goods Oriented Remedies

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Commercial parties purchase goods for use in their trade or business or for resale. Their primary objective is to obtain conforming goods of the desired quality at a price that generates a profitable return on the resale or use of the purchased goods. Occasionally, the seller delivers non-conforming goods, goods that fail to meet the contractual obligation. This obligation may arise from the seller's description,¹ statements,² promises,³ practices,⁴ the course of

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1. United Nations Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 19 I.L.M. 668, 1489 U.N.T.S. 3 [hereinafter CISG] (“The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract”); U.C.C. § 2–313(1) (2011) (“Express warranties by the seller are created [by a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.”).

2. U.C.C. § 2–313(1)(a) (2011) (“Express warranties by the seller are

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dealings and the course of performance⁵ between the parties, or from trade usage or trade custom.⁶ The Uniform Commercial Code (“Code”) and the United Nations Convention on Contracts for the International Sale of Goods (“Convention”) empower the buyer to thrust the non-conforming or defective goods back onto the seller. Although the Code and the Convention contain similar language regarding the buyer’s ability to return defective goods, the buyer’s rights and the seller’s corresponding duties vary in significant ways. An assessment of these rights and duties is essential for crafting an agreement that minimizes the adverse impact of the Convention on parties who might otherwise be subject to it, while still reaping the benefits available in the Convention but absent from the Code. This article addresses the rights available to buyers pursuant to the domestic sales law of Rejection,⁷ Revocation of Acceptance,⁸ and the comparable right of Avoidance⁹ available

created [by a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.”).

3. *Id.*

4. CISG, *supra* note 1, art. 9(1) (“The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.”) (emphasis added).

5. U.C.C. § 1–201(3) (2011) (“‘Agreement,’ as distinguished from ‘contract,’ means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1–303.”).

6. CISG, *supra* note 1, art. 9(2) (“The parties are considered, unless otherwise agreed, 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.”); U.C.C. § 1–201(3) (2011).

7. U.C.C. § 2–601 (2011) (“[I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.”).

8. *Id.* § 2–608 (“The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances. (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it. (3) A buyer who so revokes has the same rights and duties with regard to the goods

through the Convention. First, this article will assess the rights granted to, and limitations imposed on, buyers by the Code. Second, after establishing these rights and the conditions precedent to the exercise of them, the rights and obligations of the Convention will be assessed through a comparative lens.

Parallelism between the rights and obligations contained in these two sources of law are obvious. Both permit the buyer to return defective goods, but the conditions and standards applicable for determining the right to do so vary. Both permit defaulting sellers to cure or correct their failures in performing if the goods are delivered in advance of the time for performance or after the delivery date. However, the conditions that authorize the exercise of the right to cure and the buyer's obligation to permit cure are distinguishable. For instance, buyers in contracts that require delivery in separate lots, and who are subject to the Code, will face different standards if the buyer seeks to reject a defective installment rather than the whole contract.¹⁰ Yet a similarly situated buyer subject to the Convention will use the same standard for rejecting a defective installment as it would for rejecting future installments.¹¹ Contrary to the pronouncement by some United States courts, the Code does not inform the interpretation and application of the Convention.¹² The Convention is an autonomous body of principles that do not reflect in total any pre-existing legal

involved as if he had rejected them.”).

9. CISG, *supra* note 1, art. 49 (“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. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) In respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) In respect of any breach other than late delivery, within a reasonable time: (i) After he knew or ought to have known of the breach; (ii) After the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) After the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.”).

10. See U.C.C. § 2-612 (2011).

11. See CISG, *supra* note 1, art. 73.

12. *Id.* art. 7(1).

regime.¹³

I. CONTEXTUAL DELINEATION OF THE RELATIVE RIGHTS

A buyer who is confronted with a non-conforming tender or delivery has several choices: keep the goods as delivered and seek damages for the difference between the value of the goods as warranted and the value of those delivered and accepted;¹⁴ permit the seller to repair or cure the delivery or the tendered goods;¹⁵ reject the goods to push the goods back onto the seller and seek substitute goods from third parties¹⁶ or the breaching seller¹⁷ and damages;¹⁸ or seek damages even though substitute goods are not acquired.¹⁹ Indeed, both the Code²⁰ and the Convention²¹ recognize a seller's *right* to cure if the delineated conditions are met and reflect a policy preference for maintaining the contractual relationship and encouraging adjustments between the parties to minimize damages and needless costs.

A. A SELLER'S RIGHT TO CURE – THE CODE'S APPROACH

The Code permits the seller to cure if: 1) the time for the seller's performance has not expired or 2) the seller had reason to believe that the tendered goods would be acceptable to the

13. See *id.*; see also Frank Diedrich, *Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG*, 8 PACE INT'L L. REV. 303 (1996).

14. CISG, *supra* note 1, art. 50; U.C.C. § 2-714 (2011).

15. CISG, *supra* note 1, art. 48(1); U.C.C. § 2-508 (2011).

16. CISG, *supra* note 1, art. 75; U.C.C. § 2-712 (2011).

17. CISG, *supra* note 1, art. 46(2).

18. *Id.* arts. 49, 74; U.C.C. §§ 2-601, 2-712 (2011).

19. CISG, *supra* note 1, arts. 49, 76; U.C.C. §§ 2-601, 2-713 (2011).

20. U.C.C. § 2-508 (2011) (“Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery . . . [w]here the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.”).

21. CISG, *supra* note 1, art. 48 (“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.”).

buyer.²² Domestic law limits the opportunity to cure to sellers who tender early, receive notice of rejection before the time for performance of the contract has expired, and notify the buyer of their intent to cure.²³ This limitation facilitates the buyer's need to identify alternative sources of supply, minimize its risk of non-performance of forward contractual obligations, and permits needed adjustments to its production schedule, if any, in conservation of its resources. The seller has the right to cure, but the limited time frame reduces the number of sellers who will likely qualify for this right.²⁴ Performing in advance of the obligated date of performance is contrary to Just-in-Time ("JIT") manufacturing and lean production, management processes that eliminate waste, maximize efficiency, and increase value for customers.²⁵ The goal for the seller is delivery "just in time," neither early nor late.²⁶ Early delivery generates waste for the buyers by increasing costs for storage, handling, and insurance. Delivering early also creates a course of performance and, potentially, a course of dealings that, over time, may result in an implied term of the contract obligating the seller to perform in advance of the agreed upon delivery

22. U.C.C. § 2-508 (2011).

23. See, e.g., *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972) (finding that the seller's offer to deliver 600 Scotch Pine trees to the buyer on December 14, 1967 was a valid exercise of the seller's right to cure because the seller seasonably notified the buyer of its intent to do so, and due to an extension of the delivery date, the time for performance had not yet expired). *But see* *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 565 P.2d 819 (Wash. Ct. App. 1977) (relying on the repair warranty period rather than delivery date to determine the amount of time the seller had to cure a defect).

24. See Telephone Interview with Dr. Karen Leonard, Chair of Department of Management, University of Arkansas–Little Rock (Aug. 15, 2012) ("Early performance typically does not happen in the manufacturing setting in large part because the manufacturer will have so much of its assets tied up in pre-processed inventory such that early performance, even if it were possible, would be a waste of time.").

25. See Richard E. White et al., *JIT Manufacturing: A Survey of Implementations in Small and Large U.S. Manufacturers*, 45 MGMT. SCI. 1 (1999) (observing that since 1980 U.S. manufacturers have accelerated the rate of "just in time" implementation); Francis Quinn, *The Lion of Lean: An Interview with James Womack*, SUPPLY CHAIN MGMT. REV., July 1, 2005, at 28; see also James P. Womack et al., *LEAN THINKING* (Simon & Schuster (1996)); JAMES P. WOMACK ET AL., *THE MACHINE THAT CHANGED THE WORLD* 153-162 (Rawson Associates et al. 1990).

26. See Telephone Interview with Dr. Joe T. Felan, Associate Professor of Management, University of Arkansas–Little Rock (Aug. 30, 2012) (explaining "just in time performance" as well as supply chain and production management).

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date and hampering the seller's production processes.²⁷ The second category of sellers who qualify for the right to cure are those who are knowledgeable about the quality—range of goods that are acceptable in the buyer's business or industry, or who have a course of dealings with the buyer, and who believe that the goods tendered, which do not strictly conform to the contract, will be acceptable to the buyer with or without a money allowance.²⁸ This latter category of sellers has been interpreted to include those who are unaware of the non-conformity of the goods, if they reasonably believe that the goods are conforming at the time of tender, but are later notified that a breach occurred.²⁹ This interpretation broadens the right to cure a non-conforming delivery and allows a defaulting seller to make conforming tender at "a further reasonable time" rather than the contract date of performance.³⁰ Put another way, a seller that acts in good faith and tenders goods it reasonably believes are acceptable to the buyer will have additional time to cure the defect and avoid a breach of contract. Such an interpretation facilitates the Code's policy goal of maintaining contractual relationships and conforms, an otherwise rigid legal principle, to reasonable commercial behavior.³¹ This interpretation of Section 2–508 of the Code only excludes those sellers who knowingly tender non-conforming goods without a reasonable belief that the buyer would accept the goods with or without a money

27. See U.C.C. § 1–303(a), (b), (f) (2011).

28. See generally WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2–508:3 (Linda J. Rusch updating, Frederick H. Miller ed., 2012) (WL, Hawkland's Uniform Commercial Code Series) [hereinafter HAWKLAND] ("[O]rdinarily the parties to a commercial transaction are willing to depart somewhat from strict compliance with the sales contract, frequently handling any discrepancies in performance by money allowances or cure.").

29. See *T.W. Oil v. Consol. Edison Co.*, 443 N.E.2d 932 (N.Y. 1982); *Bartus v. Riccardi*, 55 Misc.2d 3 (Utica City Ct. 1967); see generally William H. Lawrence, *Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 WM. & MARY L. REV. 1635, 1670–71 (1994) ("The right to cure protects the seller against 'surprise' rejections, and the 'reasonable grounds' limitation protects the buyer from improper allegations of surprise.").

30. U.C.C. § 2–508 (2011).

31. See *T.W. Oil*, 443 N.E.2d at 939 (quoting James J. White & Robert R. Summers, UNIFORM COMMERCIAL CODE §8–4, at 322–324 (2d. ed. 1980)) ("[T]he code intended cure to be a 'remedy which should be carefully cultivated and developed by the courts' because it 'offers the possibility of conforming the law to reasonable expectations and of thwarting the chiseler who seeks to escape from a bad bargain.'").

allowance.³² Despite the more expansive reading of Section 2–508 of the Code, the right to cure granted by the Code does not approximate the right to cure available to sellers via the Convention. The Code grants the seller a right to cure and does not permit the buyer to restrict the seller’s cure if the seller gives reasonable notice of its intention to cure.³³ Absent a contract term to the contrary, under the Code, the buyer must permit the seller to cure if the goods are rejected and the seller satisfies the conditions precedent to the exercise of the right.³⁴ Although recent authority suggests the seller must be afforded an opportunity to cure the defective goods as a condition to revocation of acceptance,³⁵ neither the Code nor prevailing case law recognize the seller’s right to cure after the buyer’s revocation of acceptance of the goods.³⁶ Here, the non-conformity involves a substantial impairment of the value of the goods to the buyer³⁷ and the buyer’s acceptance was

32. See *McKenzie v. Alla–Ohio Coals, Inc.*, 29 UCC Rep.Serv. 852 (1979) (finding that the seller did not have reasonable grounds to believe its coal would be acceptable to the buyer, and therefore, could not rely on U.C.C. § 2–508 to remedy buyer’s rejection of the defective goods).

33. See U.C.C. § 2–508 (2011).

34. See *Wilson v. Scampoli*, 228 A.2d 848 (D.C. 1967) (holding that the buyer could not rescind the contract when the buyer refused to allow the seller to cure the defect); *Beco, Inc. v. Minnechaug Golf Course*, 256 A.2d 522 (Conn. Cir. Ct. 1968) (deciding that buyer’s failure to make an effective rejection of non-conforming goods implicitly constituted acceptance thus limiting the damages buyer could recover). *But see* *Marine Mart, Inc. v. Pearce*, 480 S.W.2d 133 (Ark. 1972) (upholding the lower court’s rescission of a contract for non-conforming goods because determining what equates to effective revocation of acceptance is a fact-sensitive process).

35. See *Mercury Marine v. Clear River Const.*, 839 So.2d 508, 512 (Miss. 2003) (quoting *Fitzner Pontiac–Buick–Cadillac v. Smith*, 523 So.2d 324, 328 (Miss. 1988)) (“*The law’s policy of minimization of economic waste strongly supports recognition of a reasonable opportunity to cure. . . . [C]ure is not excluded by Section 75–2–608.*”) (emphasis added by quoting opinion).

36. U.C.C. § 2–608 (2011) (“The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances.”); see *Bowen v. Foust*, 925 S.W.2d 211 (Mo. Ct. App. 1996) (recognizing that U.C.C. § 2–508 does not apply to revocation of acceptance); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 8–5 at 467 (4th ed. 1995).

37. See *Inn Between, Inc. v. Remanco Metro*, 662 N.Y.S.2d 1011, 1013 (Nassau Co. Dist. Ct. 1997) (stating that the non-conformities were so substantial and required buyer to call for repair so many times that buyer could revoke acceptance); *Wilk Paving, Inc. v. Southworth–Milton, Inc.*, 649

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induced by a reasonable assumption that the non-conformity would be cured, or by the difficulty of discovering the defect before acceptance, or by the seller's assurances.³⁸ Consequently, the seller's right to cure under the Code arises when the buyer rejects the goods, but the Code imposes no duty to cure.

1. Cure – The Convention

In contrast to the limited scope of the right to cure under the Code, the Convention permits *all* sellers to cure *any* failure at their own expense, including a fundamental breach or material breach – a breach equivalent to a substantial impairment of the value of the goods.³⁹ A failure may be cured

A.2d 778, 781–82 (Vt. 1994) (holding that the right to cure “has limits,” and a buyer can revoke acceptance after multiple malfunctions and failed attempts at a repair).

38. See *Gramling v. Baltz*, 485 S.W.2d 183, (Ark. 1972) (holding that buyer did not waive his revocation of acceptance remedy when he continued to use his truck after seller's assurances and attempts at repairs); *Mercedes-Benz of North America Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358 (Del. 1991) (upholding the trial court's finding that buyer's delayed revocation of acceptance was permissible because of seller's repeated assurances that the defect would be cured); *Uganski v. Little Giant Crane & Shovel, Inc.*, 192 N.W.2d 580, 589–90 (Mich. Ct. App. 1971) (finding buyer's revocation of acceptance may not have been timely under normal circumstances, but there is an exception for cases involving complex and expensive machinery, such as the defective crane at issue); *Funk v. Montgomery AMC/JEEP/Renault*, 586 N.E.2d 1113 (Ohio Ct. App. 1990) (finding that the seasonal nature of the vehicle's defect hampered the buyer's ability to discover the defect and revoke acceptance).

39. CISG, *supra* note 1, art. 48(1); see *Cour d'Appel de Grenoble, Chambre Commerciale [CA]* [appeals court] Apr. 26, 1995, RG 93/4879 (Fr.), English abstract available at <http://www.unilex.info/case.cfm?id=109> (holding that the buyer of a used warehouse was entitled to the repair of defects, to the extent that the warehouse would conform to the buyers original purchase, but the buyer was not entitled to a new warehouse); *Oberlandesgericht Koblenz [OLG]* [provincial court of appeals] Jan. 31, 1997, 2 U 31/96 (Ger.), English abstract available at <http://www.unilex.info/case.cfm?id=223> (holding that low quality goods do not constitute a fundamental breach when seller offers to deliver new goods and such a delivery would not cause unreasonable inconvenience to the buyer); *Landgericht Regensburg [LG]* [district courts] Sept. 24, 1998, 6 U 107/98 (Ger.), English abstract available at <http://www.unilex.info/case.cfm?id=507> (finding that buyer could not assert avoidance of the contract because it did not specify the defect of the fabrics and deprived the seller of its right to cure); *Handelsgericht des Kantons Zürich [HG]* [commercial court] Feb. 10, 1999, HG 970238.1 (Switz.), English abstract available at <http://www.unilex.info/case.cfm?id=484> (holding that when a buyer refuses the seller's offer to cure, and a later delivery date would not result in a material breach, the buyer is no longer entitled to price reduction). *But see* United Nations Commission on International Trade Law, *UNCITRAL Digest of case*

“even after the date for delivery,”⁴⁰ if the seller can do so without unreasonable delay⁴¹ and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement.⁴² A solvent seller who provides a record⁴³ or data message⁴⁴ promising to indemnify the buyer for expenses incurred as a result of the breach should remove any uncertainty that the buyer may have regarding reimbursement.⁴⁵ The buyer retains the right to claim damages that resulted from the non-conforming tender, including its expenses.⁴⁶ This right to cure after the date of delivery is in addition to the right to cure if the seller delivers early.⁴⁷ The seller’s broad right to cure under the

law on the United Nations Convention on the International Sale of Goods, 158 (2008) [hereinafter UNCITRAL Digest] (explaining that while a breach is “rarely fundamental” if it can easily be repaired, a buyer’s right to avoidance because of a fundamental breach is not subject to the seller’s right to cure).

40. CISG, *supra* note 1, art. 48(1).

41. See, e.g., Amtsgericht München [AG] [petty district court] June 23, 1995, 271 C 18968/94 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?id=147> (finding that buyer was permitted to recover damages when buyer had to remedy defect on its own in order to prevent further economic injury to its customers from seller’s delay).

42. See Markus Müller–Chen, *Article 48*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 733, 736–37 (Ingeborg Schwenzer ed., 3d ed. 2010) (explaining that a buyer may incur costs for arranging the return of the goods for repair or for having to suspend production while the seller repairs defective goods); see also CISG, *supra* note 1, art. 37 (describing the seller’s right to cure if the seller delivered goods before the delivery date); Ingeborg Schwenzer, *Article 37*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 601, 605 (Ingeborg Schwenzer ed., 3rd ed. 2010).

43. U.C.C. § 1–201(31) (2011) (“‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”).

44. United Nations Convention on the Use of Electronic Communications in International Contracts art. 4(c), UN Doc. A/60/515. Nov. 23 2005 [hereinafter Electronic Communications Convention] (“‘Data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.”).

45. See CISG, *supra* note 1, art. 48(1); Markus Müller–Chen, *supra* note 42, at 737 (explaining that a seller’s right to cure may be dependent on providing security for costs or an assurance of its responsibility if the buyer doubts the seller’s willingness or ability to reimburse the buyer).

46. See Cour d’Appel de Grenoble, Chambre Commerciale ([CA] [appeals court] Apr. 26, 1995, RG 93/4879 (Fr.), English abstract *available at* <http://www.unilex.info/case.cfm?id=109>.

47. CISG, *supra* note 1, art. 37 (“If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of

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Convention is subject to two limitations that may be exercised by the buyer: 1) the buyer's prior notice of avoidance—cancellation of the contract—that only arises if the breach by the seller is a fundamental one,⁴⁸ or 2) the buyer's notice of its refusal to permit the seller to perform in *response* to the seller's prior notice of its intention to remedy its performance.⁴⁹ The Convention grants the seller broader rights to cure than the Code and empowers the buyer to bar the seller from exercising that right. Furthermore, unlike the Code, the Convention also empowers the buyer with a right to demand a cure.⁵⁰

A buyer may require the seller to repair the non-conforming goods or to tender substitute goods,⁵¹ if the demand is made at the same time the buyer gives its notice of the nature of the non-conformity of the tendered goods or a reasonable time thereafter.⁵² This right to require the delivery of substitute goods, or the repair of defect, is unparalleled under the Code as a default provision, and for the right to be effective under the Code it must be extracted as part of the bargain in fact between the parties.⁵³ The right to require a distant seller to repair or to deliver a substitute tender is a valuable one for buyers who have a special need for custom or scarce goods, whose production schedule requires an uninterrupted flow of the goods, or whose contract right to purchase is as a long term contract.

conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.”).

48. *See id.* arts. 25, 49.

49. *See id.* art. 48(2), (3), (4); Case No. 7531 of 1994 (ICC Int'l Ct. Arb.), available at <http://www.unilex.info/case.cfm?id=139> (holding that buyer could avoid the contract because of a fundamental breach and seller's offer to substitute goods after the breach required the buyer's consent).

50. CISG, *supra* note 1, art. 46(3) (“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.”) (emphasis added).

51. *See* Oberlandesgericht Hamm [OLG] [provincial court of appeals] June 9, 1995, 11 U 191/94 (Ger.), English abstract available at <http://www.unilex.info/case.cfm?id=130> (holding that the seller had to bear the costs of substitution or repair of non-conforming windows and the buyer had a right to be reimbursed for the costs of installation expenses).

52. For a discussion on buyer's duty of prompt inspection and notice of the nature of the conformity of the tendered goods, *see infra* notes 172–181 and accompanying text.

53. *See* U.C.C. § 1–201(3) (2011).

The Convention imposes conditions and limitations on buyer's rights. First, the right to require the delivery of substitute goods is only available if the non-conformity is a fundamental breach.⁵⁴ This condition protects the distant seller from incurring shipping or transportation costs for insignificant defects. Second, the right to require the seller to repair the goods only arises if the demand is not unreasonable under the circumstances. For example, the right to compel the seller to repair the goods may be unavailable if the buyer is able to correct the non-conformity.⁵⁵ A buyer asserting either of these remedial rights may receive one of two possible responses from the defaulting seller: a concession by the seller to the demand followed by performance of the request, or a denial of the seller of the obligation to perform. In the latter case, the buyer encounters the limitation imposed by Article 28 of the Convention, regarding enforcement of a buyer's right to compel performance.⁵⁶ Although Article 28 recognizes a party's right to require performance, it does not obligate a court to enforce the right to substitute performance or the right to request repairs unless a court would do so under domestic law. Therefore, the buyer must determine if the right to compel the delivery of substitute goods or to compel repairs is, indeed, recognized by the court that it selects as the forum for enforcing its right. Promulgation of the Code has liberalized the availability of specific performance in U.S. courts; compelling the seller to deliver substitute goods or to make repairs is growing in recognition when appropriate circumstances arise, although it is not a part of the U.S. domestic legal tradition.⁵⁷ Additionally,

54. See, e.g., Sąd Najwyższy [Supreme Court of Poland], May 11, 2007, V CSK 456/06, English abstract *available at* <http://www.unilex.info/case.cfm?id=1374> (holding that buyer cannot demand substitute goods from buyer unless there was a fundamental breach of the contract).

55. UNCITRAL Digest, *supra* note 39, at 153.

56. CISG, *supra* note 1, art. 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 judgment 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.").

57. See *Colorado-Ute Elec. Ass'n, v. Envirotech Corp.*, 524 F. Supp. 1152, 1159 (D. Colo. 1981) (holding specific performance is a proper remedy to compel a seller to repair a unique item such as a precipitator that the buyer purchased to measure state pollution standards); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*, 146 A.D.2d 212 (N.Y. App. Div. 1989) *aff'd*, 550 N.E.2d 919 (N.Y. 1990) (rejecting automobile association's position that state lemon laws granting buyers a remedial right to a replacement vehicle violated its right to trial by jury and finding that such a remedy allows for specific performance in

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Article 28 does not limit a court's discretion to deviate from domestic law in order to facilitate uniform interpretation of the Convention, or to protect the expectations of foreign parties.⁵⁸ The buyer who desires to have an enforceable right to compel performance must consider including a choice of forum clause in its agreement with the seller and should select a forum whose domestic law authorizes specific performance. In selecting a forum additional factors should be considered, such as foreign procedural rules and the availability of discovery tools. Alternatively, the parties might agree to arbitrate their potential disputes and expressly agree that specific relief is available.

The right to cure provisions of the Convention provide greater parity between the parties than the Code. The seller has expansive rights to correct its defective performance and to reduce the damages the buyer may incur, the buyer is not subject to the seller's desire to cure, and the buyer is empowered to demand a cure—a meaningful remedy—from the seller. Allowing the buyer to demand a cure recognizes the costs associated with seeking substitute goods in the open market that could potentially be minimized by requiring the seller to provide them, since the seller is already engaged in producing or acquiring the exact goods the buyer seeks. Put another way, if the breaching seller is required to supply conforming goods—from its inventory, by immediate manufacture, or acquisition from third parties—then the costs associated with locating a substitute provider and negotiating a substitute contract, the impact on the buyer's business and reputation caused by delay in obtaining substitute goods from a third party, and the magnitude of the damages accumulated, although recoverable, are reduced. "Substitute goods may be difficult to locate . . . their price may be substantially above the

the appropriate contexts); *Stoughton Trailers, LLC v. ArcelorMittal Dofasco, Inc.*, 2008 WL 4722398 (W.D. Wis. Apr. 8, 2008) (declining to grant specific performance as a remedy when the defective goods were not determined to be "unique" and awarding damages was not inadequate); U.C.C. § 2-716(1) (2011) ("Specific performance may be decreed where the goods are unique or in other proper circumstances.") (emphasis added).

58. See Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 Wash. L. Rev. 607 (1988); see generally John Fitzgerald, *CISG, Specific Performance, and the Civil Law of Louisiana and Quebec*, 16 J. L. & COM. 291 (1997); Markus Müller-Chen, *Article 28*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS *supra* note 42, at 459.

contract price; or alternative manufacturers may not have comparable reputations for quality;⁵⁹ or may fail to provide desired warranties. Sellers also benefit from the buyer's use of Article 46(2) and (3). Sellers who perform "preserve good will [with customers], reduce damage liability and avoid the drastic remedy of avoidance of the contract."⁶⁰

The remedial rights of cure available through the Convention give international commercial parties the flexibility needed to meet the challenges that they face in rectifying defective performance, despite the limitation imposed by Article 28. Additionally, remedial rights of cure increase the likelihood of resolving the seller's failure without litigation. In comparison to the Code, the Convention provides the better remedy for non-conforming or defective goods.

B. BUYER'S OBLIGATION TOWARDS REJECTED GOODS – UNIFORM COMMERCIAL CODE.

Despite the existence of the right to cure or the right to demand a cure, the non-conforming or defective goods may not be curable. For example, even when the seller attempts to repair or modify goods, the modified goods may not satisfy the seller's obligation under the contract terms. The quality of the goods as repaired may impair the integrity of the buyer's end product, the repaired goods may fail to meet the buyer's resale obligation, or the attempted cure of rejected goods may be unsuccessful. In any of these cases, both legal regimes, the Code and the Convention, establish a standard of care for a buyer who is in control or possession of the goods.⁶¹ The Code requires a buyer who is pushing the goods back on the seller to hold rejected goods in its possession, or within its control, with reasonable care⁶² for the seller's disposition but only for "a time sufficient" for the seller to take custody of the goods.⁶³ This

59. See Kastely, *supra* note 58, at 611.

60. JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 416 (Harry M. Flechtner ed., 4th ed. 2009) (discussing the benefits granted to sellers who deliver substitute goods or who repair non-conforming goods).

61. See CISG, *supra* note 1, arts. 85–88; U.C.C. §§ 2–602, 2–604 (2011).

62. U.C.C. § 2–602(2)(b) (2011); see generally *In re Empire Pacific Industries, Inc.*, 71 B.R. 500 (Bankr. D. Or. 1987); *Yates v. Clifford Motors, Inc.*, 423 A.2d 1262 (Pa. Super Ct. 1980) (stating that U.C.C. § 2–602 only imposes a duty on the buyer to hold rejected goods for the seller and not a duty to return them).

63. *Graybar Elec. Co. v. Shook*, 195 S.E.2d 514 (N.C. 1973) (holding that,

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duty to hold with reasonable care is subject to the buyer's right to sell the goods to satisfy a security interest granted to the buyer under Article 2 of the Code for deposits or other payments made for the goods or expenses incurred in transporting, inspecting, caring for, or holding the goods for seller.⁶⁴ This right to sell the goods to satisfy the buyer's outlay for the goods protects the buyer from: 1) the risk of non-reimbursement from an insolvent seller;⁶⁵ 2) the time and expense of negotiating a reimbursement;⁶⁶ and 3) the cost of litigation to recover the buyer's expenses or payments.

Section 2-603 of the Code imposes a special obligation on merchant buyers,⁶⁷ buyers with specialized knowledge of the

although goods were ultimately stolen, buyer fulfilled duty to care for goods by storing rejected items in a well-lit storage area for three months); *Lykins Oil Co. v. Fekkos*, 507 N.E.2d 795 (Ohio C.P. 1986) (holding that seller was responsible for loss of stolen tractor after permitting buyer to leave it on his lawn until seller could retrieve it).

64. U.C.C. § 2-711(3) (2011) ("On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller."); *see, e.g.*, *T & S Brass & Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098, 1103 (4th Cir. 1986) (holding that buyer could keep non-conforming zinc handles because he had acquired a security interest in the goods for the cost of inspecting them); *Kleiderfabrik v. Peters Sportswear Co.*, 483 F. Supp. 1228, 1234 (E.D. Pa. 1980) (buyer resold non-conforming jackets to recover its handling costs, but it failed to provide the seller with notice of the sale as required by §2-706 and destroyed records regarding the sale; buyer's actions did not constitute conversion but ambiguities would be resolved against the buyer); *Johnsrud v. Lind*, 219 N.W.2d 181, 191 (N.D. 1974) (holding that buyer obtained a security interest in the delivered rejected steers for the buyer's partial payment plus any expenses reasonably incurred to care for the steers); *Askco Engineering Corp. v. Mobil Chemical Corp.*, 535 S.W.2d 893, 896 (Tex. Civ. App. 1976) (holding that buyer obtained a security interest in rejected goods for the inspecting, testing, storing, and attempted resale of the goods).

65. *In re DeNicola*, 92 B.R. 267 (Bankr. S.D. Ohio 1988) (concluding that buyer lost the right to assert security interest in the rejected electric cart when she surrendered possession of it to the seller); *In re Adams Plywood, Inc.*, 48 B.R. 719 (Bankr. W.D. Tenn. 1985) (deciding that buyer should have retained possession of the rejected goods to protect its right to assert a security interest in the goods under U.C.C. §2-711).

66. *See Deaton, Inc. v. Aeroglide Corp.*, 657 P.2d 109 (N.M. 1982) (buyer rejected and held defective pickup truck dump units for two years after seller refuse to reimburse shipping costs incurred in taking delivery; the buyer's subsequent sale of the units was not an acceptance of the goods).

67. U.C.C. § 2-104 (2011) ("Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the

goods⁶⁸ or who have knowledge of the specialized practices of the relevant industry.⁶⁹ The merchant buyer must follow any reasonable instructions received from the seller regarding the goods and, if none are received, make reasonable efforts to sell the goods in its possession or within its control for the *seller's* account if the tendered goods are perishable or threaten to decline speedily in value. Possession and control are “words of wide, rather than narrow, import . . . [T]he measure of the buyer’s ‘control’ is whether he can practicably effect control without undue commercial burden.”⁷⁰ The determining factor of the buyer’s obligation is the extent of the burden on the buyer in taking possession of the goods.⁷¹ Beyond these special obligations imposed on merchant buyers and any contract terms that impose additional duties, the buyer has no further obligations to the rejected goods.⁷² The buyer is entitled to

transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”)

68. U.C.C. § 2-104 cmt. 2 (2011) (“The special provisions as to merchants appear only in this Article and they are of three kinds . . . A third group of sections includes 2-103(1)(b), which provides that in the case of a merchant ‘good faith’ includes observance of reasonable commercial standards of fair dealing in the trade; 2-327(1) (c), 2-603 and 2-605, dealing with responsibilities of merchant buyers to follow seller’s instructions, etc.; 2-509 on risk of loss, and 2-609 on adequate assurance of performance. This group of sections applies to persons who are merchants under either the ‘practices’ or the ‘goods’ aspect of the definition of merchant.”).

69. See *K & M Joint Venture v. Smith Int’l, Inc.*, 669 F.2d 1106, 1115 (6th Cir. 1982) (holding that two sewer contractors were merchants because of their knowledge of the sewage industry even though neither had specialized knowledge of the goods); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985); R.J. Robertson, Jr., *Rights and Obligations of Buyers with Respect to Goods in Their Possession After Rightful Rejection or Justifiable Revocation of Acceptance*, 60 IND. L.J. 663, 675-676 (1985) (explaining that knowledge of specialized practices is the reasonable understanding of who U.C.C. merchant provisions apply to).

70. U.C.C. § 2-603 cmt. 2 (2011). See e.g., *Mitral Corp. v. Vermont Knives, Inc.*, 566 A.2d 406 (Vt. 1989) (holding that buyer had duty to follow seller’s reasonable instructions regarding care of rejected goods).

71. See U.C.C. § 2-603 cmt. 2 (2011).

72. U.C.C. § 2-602(2)(c) (2011); see also *T & S Brass & Bronze Works, Inc. v. Pic-Air, Inc.*, 790 F.2d 1098, 1103 (4th Cir. 1986) (stating that buyer’s refusal to follow seller’s instructions to return defective handles did not constitute acceptance because the seller refused to pay the expenses of returning the goods, making its instructions unreasonable); *Delano Growers’ Co-op. Winery v. Supreme Wine Co.*, 473 N.E.2d 1066, 1073 (Mass. 1985) (holding that buyer fulfilled its obligation after following seller’s instructions to process and resell the goods); *Integrated Circuits Unlimited, Inc. v. E.F.*

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acquire substitute goods and seek damages to compensate it for the resulting loss even if substitute goods are not acquired.⁷³

1. Buyer's Obligation to Preserve Rejected Goods – The Convention

Although similar to the obligations imposed by the Code, those imposed by the Convention are not identical. If the buyer receives the goods and intends to reject them pursuant to a right provided in the Convention or a contractual right, the buyer must take reasonable steps under the circumstances to preserve the rejected goods.⁷⁴ The Convention does not define “rejection” but includes the right to refuse the goods after they have been delivered. Under the Convention, the buyer has the right to refuse seller's goods after delivery if any one of the following five situations occurs: 1) a fundamental breach by the seller giving the buyer the right to avoid the contract;⁷⁵ 2) the buyer requests the delivery of substitute goods because of the seller's fundamental breach;⁷⁶ 3) the seller delivers early and the buyer refuses to take delivery;⁷⁷ 4) the seller delivers a quantity in excess of that ordered and the buyer refuses the delivery;⁷⁸ and 5) the buyer exercises the right to suspend performance *after* the seller dispatches the goods and the seller fails to provide adequate assurances of its performance.⁷⁹ Only

Johnson Co., 691 F. Supp. 630, 635 (E.D.N.Y. 1988), *rev'd on other grounds*, 875 F.2d 1040 (2d Cir. 1989) (holding that a buyer of microprocessors who received no instructions from the seller, whose goods were neither perishable nor subject to rapidly declining value, was not required to resell the goods); Robertson, Jr., *supra* note 69, at 673–673 (discussing inconsistent holdings regarding the effect of buyer's conduct after rejection or revocation of acceptance).

73. U.C.C. §§ 2–712, 2–713 (2011).

74. CISG, *supra* note 1, art. 86.

75. See HONNOLD, *supra* note 60, at 454–57 (explaining the circumstances when a buyer can reject non-conforming parts of a delivery and when a buyer can avoid the contract completely).

76. CISG, *supra* note 1, art. 46(2).

77. See *id.* art. 52(1); Klaus Bacher, *Articles 85–88*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 895, 903 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

78. Bacher, *supra* note 77, at 903; see CISG *supra* note 1, art. 52(2).

79. CISG, *supra* note 1, art. 71(1); see, e.g., Oberlandesgericht Hamm [OLG] [higher regional court] June 23, 1998, 19 U 127/97 (Ger.), English abstract available at <http://cisgw3.law.pace.edu/cases/980623g1.html> (“The buyer was allowed to suspend performance of its obligations according to article 71(1)(a) CISG. . . . [I]t had become apparent that the sellers would not be able to perform the delivery of the furniture, which constituted a substantial part of their obligations.”); Landgericht Berlin [LG] [regional

in these circumstances will the buyer have received the goods or will have had the goods placed at the buyer's disposal. Some commentators suggest that this duty to preserve the goods also arises if the buyer exercises the right of avoidance when authorized by Article 72.⁸⁰ However, Article 72 recognizes a right of avoidance when circumstances, *prior to performance*, clearly indicate that one party will commit a fundamental breach; this is the more analogous to anticipatory repudiation in UCC § 2-610.⁸¹ Conceptually, the authors fail to recognize the limited scope of the right of rejection. A right to reject may be exercised only if the goods have been *received or placed at the buyer's disposal* at the contract destination.⁸² This is the condition precedent to the duty to preserve. Article 72 empowers the buyer to resort to the remedial relief of avoiding the contract because of conduct or statements by the seller that occur prior to the date of performance.⁸³ A buyer will not have goods to reject when it exercises the right of avoidance prior to delivery based on conduct or communications indicating that the seller *will not* perform in the future. There is, however, one exception: an installment contract.⁸⁴ For example, assume that a buyer and a seller have entered into an installment contract with four planned deliveries. Each of the four deliveries is a component of new machinery for the buyer's new manufacturing plant. The buyer receives deliveries one and two, and then the seller disavows its obligation to meet certain standards or the duty to complete performance. These

court] Sept. 15, 1994, 52 S 247/94 (Ger.), English abstract *available at* <http://cisgw3.law.pace.edu/cases/940915g1.html> (holding that the buyer could suspend contract performance under Art. 71(1)(b) CISG because the seller failed to assure the buyer of performance after delivering defective items.).

80. CISG, *supra* note 1, art 72. *See, e.g.*, FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 355 (1992).

81. CISG, *supra* note 1, art 72; U.C.C. § 2-610 (2011); ENDERLEIN & MASKOW, *supra* note 80, at 291.

82. *See supra* notes 75-79 and accompanying text.

83. CISG, *supra* note 1, art. 71(1); *see, e.g.*, Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 925-926 (N.D. Ill. 1999) (finding that if the seller had indicated in a letter "its pre-performance intention not to perform the contract" and had insisted upon an amendment to the bill of lading, then buyer has standing for anticipatory fundamental breach of contract.); Zürich Handelskammer [Zurich Chamber of Commerce] May 31, 1996, ZHK 273/95 (Switz.), English abstract *available at* <http://www.unilex.info/case.cfm?id=396> (declaring an unwillingness to make further deliveries constitutes a fundamental breach, the buyer was within their rights to refuse to pay the bill and try to renegotiate the contract.).

84. The Convention refers to "instalment contracts."

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statements trigger the buyer's right to avoid deliveries three and four pursuant to Article 72 and to avoid the earlier deliveries, one and two, as provided in Article 73(3) because of their interdependence.⁸⁵ In this scenario the buyer has received goods and may reject those goods already received along with the future deliveries.

A buyer who *receives* the goods must take reasonable steps under the circumstances to preserve the goods.⁸⁶ If the seller does not have a representative at the destination the same duty to protect applies to the goods that have been "placed at [the buyer's] disposal"⁸⁷ at the agreed destination⁸⁸ but only if possession of the goods can be obtained without paying the price and without unreasonable inconvenience or unreasonable expense.⁸⁹ Some argue that if possession can be obtained

85. CISG, *supra* note 1, art. 73(3) ("A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."). See, e.g., China Int'l Econ. & Trade Arb. Comm'n [CIETAC] Apr. 7, 2005, Shen G2004100 (China), English translation *available at* <http://cisgw3.law.pace.edu/cases/050407c1.html> (finding that upon taking delivery of the goods and finding the goods defective, the buyer's avoidance of the contract for deliveries already made was acceptable under CISG art. 73); Neth. Arb. Inst. [NAI] Oct. 15, 2002, 2319 (Neth.), English abstract *available at* <http://cisgw3.law.pace.edu/cases/021015n1.html> (finding that the buyer could suspend future deliveries under CISG Article 73(1), because the non-conformities found in the oil and the deliveries, which were in instalments, were not interdependent.); Tribunal Cantonal de Vaud [appellate court] Apr. 11, 2002, 100/2002 (Switz.), English abstract *available at* <http://cisgw3.law.pace.edu/cases/020411s1.html> (finding that under CISG art. 73, even if apparel items formed an "ensemble" with the defective pieces, the buyer would still be able to sell those items separately, and therefore; would not be required to return all the goods on the grounds of interdependency).

86. CISG, *supra* note 1, art. 86(1).

87. *Id.* art. 86(2).

88. See generally, Audiencia Provincial de Navarra [A.P.] [provincial appellate court] Jan. 22, 2003, 3/2003 (Spain), English abstract *available at* <http://www.unilex.info/case.cfm?id=882>; Audiencia Provincial de Barcelona [A.P.] [provincial appellate court] Mar. 11, 2002, 60/2002 (Spain), English abstract *available at* <http://cisgw3.law.pace.edu/cases/020311s4.html>; Rizhao Intermediate People's Ct., Dec. 17, 1998, Ri Jingchuzi No.29 (China), English abstract *available at* <http://cisgw3.law.pace.edu/cases/991217c1.html>; Trib. of Int'l Commercial Arb. at the Russian Federation Chamber of Commerce, Sept. 25, 1995, 142/94 (Russ.), English abstract *available at* <http://www.unilex.info/case.cfm?id=251>.

89. See, *Secretariat Commentary on Article 75 of the 1978 Draft*, GUIDE TO CISG ARTICLE 86, *available at* <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-86.html>.

without unreasonable expense, then the rationale used in Article 86, which places the duty to protect on the party in the best position to protect and care for the goods, justifies the application of the duty to protect even if the goods are delivered to a destination other than that specified in the agreement.⁹⁰

The term “placed at his disposal” is used in Articles 69 and 86 of the Convention, but the term is not defined.⁹¹ Commercial parties in international trade are accustomed to this usage because of the term’s significance in the shipping and delivering of goods. The phrase, “placed at his disposal,” is used in a number of the Incoterms, customary shipping terms promulgated by the International Chamber of Commerce,⁹² and it is employed by parties in international sales agreements to identify the point at which the seller has completed its performance obligation in delivering the goods.⁹³ “EXW” (named place of delivery)⁹⁴ and “DAP” (named place of destination)⁹⁵ are two examples. The seller completes its

90. See Bacher, *supra* note 77, at 904 (arguing that if the buyer can take possession of the goods without any problems, Article 86(2) may be applied by analogy to goods dispatched to a place other than their contractually agreed destination).

91. CISG, *supra* note 1, art. 69 (“(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are *placed at his disposal* and he commits a breach of contract by failing to take delivery. (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when deliver is due and the buyer is aware of the fact that the goods are *placed at his disposal* at that place. (3) If the contract relates to goods not then identified, the goods are considered not to be *placed at the disposal* of the buyer until they are clearly identified to the contract.”) (emphasis added); CISG, *supra* note 1, art. 86(2) (“If goods dispatched to the buyer have been *placed at his disposal* at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense.”) (emphasis added).

92. See INT’L CHAMBER OF COMMERCE, INCOTERMS 2010, 16, 54, 62, 70 (2010) for Incoterms that use the phrase “placing them at the disposal of the buyer.”

93. See *generally id.* at 5–11 for rules on the use of domestic and international trade terms.

94. See *id.* ¶ A4, at 16 (“The seller must deliver the goods by placing them at the disposal of the buyer at the agreed point, if any, at the named place of delivery, not loaded on any collecting vehicle.”).

95. See *id.* at 61 (“[T]he seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place.”).

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performance obligation to deliver the goods EXW (1464 Washington St., Phoenix, Arizona [seller's place of business]) when the goods are placed at the agreed point, seller's place of business, for the buyer⁹⁶ and buyer has been given notice.⁹⁷ Similarly, DAP (named place of destination) imposes on the seller the duty to provide the contract goods on the arriving means of transport ready for unloading at the named place of destination.⁹⁸ Notice must also be given so that the buyer may take delivery of the goods.⁹⁹

In the Code the phrase "put and hold" is the delineation of the seller's duty of tender of delivery.¹⁰⁰ It is analogous to the term "placed at his disposal" used in the Convention. "[T]he seller [must] *put and hold* conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery."¹⁰¹ When the seller has completed its obligation of performance, at the agreed place, in the manner required by the agreed to shipping terms, and provided the buyer with notice, then the goods are "placed at [the buyer's] disposition."¹⁰²

a. Preserving the Goods: The Rights and Obligations

These rights and obligations can be best illustrated through a hypothetical example. Assume that a Georgian winery agrees to sell one hundred cases of its finest wine "FAS (free alongside ship) Port Said (Incoterms)"¹⁰³ to a U.S. importer. Under this shipping term, the goods are delivered when placed alongside

96. *Id.* para. A4, at 16.

97. *Id.* para. A7, at 18.

98. *Id.* para. A4, at 62.

99. *Id.* para. A7, at 64.

100. U.C.C. § 2-503 (2011). ("Tender of delivery requires that the seller *put and hold* conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession but (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.") (emphasis added).

101. *Id.* § 2-503(1) (emphasis added).

102. *Id.*

103. INT'L CHAMBER OF COMMERCE, *supra* note 92, at 79 ("[Delivering occurs] when the goods are placed alongside the vessel . . . The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards.").

the ship designated by the buyer at Port Said in Egypt.¹⁰⁴ Assume further that the winery does not have an office, agent, or representative of its interest in Egypt. However, the buyer engaged a third party to inspect the goods before they commenced the final leg of their journey to the U.S. Based on the condition and temperature of the bottles the inspector concludes that a fundamental breach has occurred, and he advises the importer to reject the shipment. Because the goods arrived, were placed at the buyer's disposal at the contract destination, and the buyer rejected them, the buyer must take possession only if the buyer can accomplish possession without paying for the goods or without unreasonable inconvenience or unreasonable expense.¹⁰⁵ "FAS" does not impose a payment obligation, unlike the shipping term "CIF (Incoterms)," that imposes an obligation on the buyer to pay for the goods upon presentment of the contractually required documents before the arrival and inspection of the goods.¹⁰⁶ No duty to take possession or to preserve the goods arises from a "CIF Port Said (Incoterms)" shipping term, because the shipping term requires payment for the goods before possession can be acquired.¹⁰⁷ With the FAS shipment term, if the goods have been placed at the buyer's disposal, the U.S. importer must take possession of the goods and preserve them consistent with the obligations imposed by Article 86(2).¹⁰⁸

In this example the U.S. importer may store the wine at the seller's expense with a third party,¹⁰⁹ or retain the wine until it is reimbursed its reasonable expenses for preserving

104. For additional obligations imposed upon the seller under FAS, see *Id.* ¶ A2, at 80, ¶ A7, at 82.

105. See CISG, *supra* note 1, art. 86.

106. INT'L CHAMBER OF COMMERCE, *supra* note 92, at 105 ("Cost Insurance and Freight.").

107. See *Secretariat Commentary on Article 75 of the 1978 Draft*, *supra* note 89; see also INT'L CHAMBER OF COMMERCE, *supra* note 92, ¶ A8, at 114 ("The seller must, at its own expense provide the buyer without delay the usual transport document for the agreed port of destination."); *Id.* ¶ B8, at 115 ("The buyer must accept the transport document provided as envisaged in A8 if it is in conformity with the contract.").

108. See CISG, *supra* note 1, art. 86(2).

109. See *id.* art. 87; see, e.g., Audiencia Provincial de Barcelona, *supra* note 88 (recognizing that CISG art. 87 permits a party with the duty to preserve the goods to deposit the goods at the other party's expense as long as the cost is not unreasonable); *Delchi Carrier, SpA v. Rotorex Corp.*, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994) (finding the buyer is entitled to recover costs of handling and storing non-conforming compressors) *aff'd in part, rev'd in part sub nom Delchi Carrier, SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

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the wine.¹¹⁰ Observe that unlike the buyer subject to the Code who is permitted to sell the goods to recover on its security interest in the goods to the extent of its expenses and payments, the buyer subject to the Convention may only retain the goods as security for its expenses. Although, Article 86(2) creates an exception to the duty to preserve the goods if doing so involves an unreasonable expense,¹¹¹ Article 88 *mandates* the sale of goods that rapidly deteriorate or if their preservation “involves unreasonable expense.”¹¹² Our importer must determine if the condition of the goods will rapidly deteriorate, especially given their condition at delivery, and, if so, resell to eliminate the likelihood of being allocated the loss resulting from their continuing deterioration. Consequently, the importer who is excused from preserving the goods if doing so involves unreasonable expense will have a duty to sell the goods if they are perishable and subject to rapid deterioration. Unlike the Code, the Convention does not extend this duty to avoid loss in value of the goods because of shifts in the market.¹¹³

This obligation was a rude awakening for a buyer who purchased shrimp from a breaching Chinese seller. The buyer’s end-user in Mexico took delivery of non-conforming shrimp from a Chinese seller.¹¹⁴ The buyer retained the non-conforming shrimp in storage pending the resolution of the dispute with the seller, without reselling the perishable goods and as a result the buyer sustained a tremendous loss.¹¹⁵ The tribunal found that the buyer permitted the losses to grow until

110. CISG, *supra* note 1, art. 85.

111. *See id.* art. 86(2).

112. *See id.* art. 88.

113. U.C.C. § 2-603(1) (“Subject to any security interest in the buyer (subsection (3) of Section 2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instruction received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller’s account if they are *perishable or threaten to decline in value speedily.*”) (emphasis added).

114. Rizhao Intermediate People’s Ct., Dec. 17, 1998, Ri Jingchuzi No.29 (China), English abstract available at <http://cisgw3.law.pace.edu/cases/991217c1.html> (holding that because the buyer did not take reasonable measures to preserve the shrimp pending litigation, permitting losses to grow, the buyer was not entitled to a full recovery from the sellers for the loss in value between delivery and resale by customs.).

115. *Id.*

the value of the shrimp was “nearly extinguished.”¹¹⁶ The court determined that the sellers must repay the buyer \$110,701.86 for the non-conforming shrimp (\$103,562.86 price of the goods, \$1,052 DDC fee,¹¹⁷ \$5,752 freight, \$300 supervision of loading, and \$35 certification fee¹¹⁸) plus interest starting from May 3, 1996, the date the buyer’s demand for negotiations expired,¹¹⁹ until the actual date of repayment.¹²⁰ This recovery was subject to a set-off of 70% of the loss in value of the stored shrimp, or \$56,941.21, which reduced the buyer’s total recovery by 54.98%.¹²¹

2. The Seller’s Duty to Preserve the Goods – The Convention

Other than the seller’s common law duty to mitigate its damages that supplements the Code,¹²² the Article 85

116. *Id.*

117. “DDC” is the destination delivery charge that “covers crane lifts off the vessel, drayage of the container within the terminal and gate fees at the terminal operation.” AIR 7 SEAS TRANSPORT LOGISTICS, INC., <http://www.air7seas.com/ddc.htm> (last visited Sept. 24, 2012).

118. Interview with Kirina Alonzo, Sales Representative, Air 7 Seas Transport Logistics, Inc., (suggesting that the \$35 certification fee is likely to have been a Shipper Export Declaration fee, a declaration that the value of the shipment exceeded \$2500).

119. Rizhao Intermediate People’s Ct., Ri Jingchuzi No.29 (China) (The buyer delivered the notarized documents of the FDA’s shut out of the shrimp on April 25, 1996, and gave the sellers seven days to negotiate. The court calculated the commencement of interest date for the following day, May 3, 1996).

120. *Id.*

121. *Id.*; *cf.* China Int’l Arb. Comm. [CIETAC] [PRC–Shenzhen], June 6, 1991, English translation *available at* <http://cisgw3.law.pace.edu/cases/910606c1.html> (imposing storage fees on the buyer and denying the buyer’s claim for the vast majority of the purchase price when a Mexican buyer of Cysteine Monohydrate failed to take reasonable measures to preserve the good and disregarded the Chinese seller’s instructions for returning the non-conforming goods, which subsequently decompose, the seller was only required to compensate the buyer \$3,000).

122. *See* K & D Distribs., Ltd. V. Aston Grp., Inc., 354 F. Supp. 2d 761, 768 (N.D. Ohio 2005); *Simeone v. First Bank Nat. Ass’n*, 73 F.3d 184, 188–89 (8th Cir. 1996) (“[A]n aggrieved party has a duty to mitigate damages.”); *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 724–25 (Me. 1983) (“The common law duty to mitigate damages survives Maine’s enactment of the Uniform Commercial Code in 1963. While the U.C.C. does not explicitly require the mitigation of damages, it does provide that ‘principles of law and equity’ not displaced shall supplement the Code’s provisions. 11 M.R.S.A. § 1–103 (1964). The duty to mitigate is also implicit in the Code’s broad requirements of good faith, commercial reasonableness and fair dealing.”); *see also* U.C.C. § 1–103 (2011).

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imposition of the seller's duty to preserve the goods is without direct parallel in the Code. Indeed, in this regard the structure of the Code and its remedial preferences are the diametrical opposite of the Convention. A seller, subject to the Code, who is confronted with a buyer's breach for goods identified to the contract, is expected to resell the goods rather than to hold them for the buyer. Although Section 2-709 imposes an analogous duty of holding goods for the buyer, this duty only arises if the seller seeks to sue for the price of the goods *after* "the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing."¹²³ In contrast, the seller who is subject to the Convention must hold the goods for the buyer until the seller avoids, or cancels, the contract. The Code's remedial structure encourages the seller to act with immediacy in considering other potential customers or uses for the goods. The seller who is subject to the Convention may lack the corresponding incentive to act as expeditiously. The Code's approach is less likely to result in waste by forcing undesired goods on a reluctant buyer. However, a thorough assessment of the Convention's approach is warranted.

If taking delivery or making payment is a concurrent condition of the seller's obligation to deliver, and the buyer fails to take delivery or to pay, the seller's duty to preserve the goods for the buyer is triggered. This obligation, with a right of reimbursement, only arises if the seller has possession of the goods or the seller is able to take control of them. The duty will not arise for a seller who has surrendered the goods to a carrier, putting the goods beyond the seller's control. However, releasing possession of goods to a carrier upon the delivery of a nonnegotiable bill of lading does not place them beyond the control of the seller.¹²⁴ The Convention imposes this duty to preserve on the seller despite the earlier shifting of the risk of loss to the buyer. The party with the risk of loss is accountable for the goods if the goods suffer casualty or are lost or destroyed.¹²⁵ The seller's obligation of preservation parallels that of the buyer and reflects the policy goal of placing the responsibility for the goods on the party in the best position to

123. U.C.C. § 2-709(1)(b) (2011); *see also id.* § 2-709(2).

124. *See, e.g., id.* § 7-504(c), (d).

125. For an argument on how to allocate the risk of loss, see HONNOLD, *supra* 60, at 508.

protect and care for the goods so that loss is minimized.¹²⁶ When the seller's contractual obligation requires the seller to place goods at the buyer's disposal at the seller's place of business; or to deliver the goods to the buyer's facility; or to use the seller's trucks for delivery, the shifting of the risk of loss is governed by Article 69.¹²⁷ The risk of loss shifts to the buyer when the buyer takes possession or fails to take possession when the goods are placed at its disposal. If the goods are lost or destroyed the buyer remains obliged to pay the contract price for the goods. The breaching buyer who fails to take delivery has the risk of loss and the seller who has possession or control over the goods has the duty to preserve them or to sell them for the buyer's account, if they are rapidly deteriorating.¹²⁸

In a transaction subject to the Code, the similarly situated seller has an index of remedies that is triggered when the buyer repudiates its duty of performance, wrongfully rejects goods, wrongfully revokes its acceptance of the goods, or otherwise breaches its obligation. This index includes the right to resell the goods. However, the seller is not accountable to the buyer for any profit made on the resale of the wrongfully rejected goods,¹²⁹ and the resale transaction may be used to measure the seller's damages, if it was conducted in good faith.¹³⁰ Resale is the seller's sale for the seller's benefit. This

126. Bacher, *supra* note 77, at 904; HONNOLD, *supra* note 60, at 677.

127. See CISG, *supra* note 1, art. 69 (“(1) In cases not with articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery. (2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.”).

128. See generally, Bacher, *supra* note 77, at 912.

129. U.C.C. § 2-706 cmt. 11 (2011) (“[T]he seller retains profit, if any, without distinction based on whether or not he had a lien since this Article divorces the question of passage of title to the buyer from the seller's right of resale or the consequences of its exercise.”); see, e.g., *Desbien v. Penokee Farmers Union Co-op. Ass'n*, 552 P.2d 917, 927 (Kan. 1976) (finding that the buyers breach of contract allowed the buyers to retain profits gained from selling their grain at market price, nearly double that of the original contract price); *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900, 908-909 (N.D. 1975) (finding a breach of contract when the buyer refused the grain, allowing the seller to resell the grain at a higher price and retain the profits).

130. U.C.C. § 2-706(1) (2011); see, e.g., *Eades Commodities, Co. v. Hoeper*, 825 S.W.2d 34, 38 (Mo. Ct. App. 1992) (“[T]he seller who resells goods has damages based upon the difference between the contract price and the resale price.”) (emphasis in original); *President Container, Inc. v. Patimco*,

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distinction between the Convention's obligation of preservation and the Code's resale remedy is rooted in the right of the seller, whose contract is subject to the Convention, to require the buyer to pay for and to take the goods.¹³¹ This right is an absolute, remedial alternative that is available until the seller exercises the right to avoid or cancel the contract.¹³² This right to require payment for the goods is not conditioned upon seller's inability to resell the goods as required by Code section 2-709(b).¹³³ Rather, the Code reflects a preference for the seller's resale of the goods as a seller's preferred remedial tool with compensation for incidental damages for transportation, storage and insurance costs.¹³⁴ After the buyer's breach the goods are in the seller's hands. The seller is the party with the better knowledge of the goods, their use, and the relevant markets.¹³⁵ This preference for a resale for the seller's account minimizes loss by forcing the sale or use of the goods on the party best able to promote them. A seller whose contract is subject to the Code may only require the buyer to take and pay for the goods if their resale is unavailable after reasonable effort¹³⁶ or circumstances, such as the custom nature of the

82 A.D.2d 879 (N.Y. App. Div. 1981) (holding that the seller's failure to establish market price was not fatal to their recovery under U.C.C. § 2-706); see generally Roy Ryden Anderson, *A Roadmap for Sellers' Damage Remedies Under the Uniform Commercial Code and Some Thought about Pleading and Proving Special Damages*, 19 RUTGERS L.J. 245, 255-60 (1988) (discussing the complexities of the damage formulae provided for in U.C.C. § 2-706 and § 2-708 when sellers resell the goods in "good faith" and in a "commercially reasonable manner").

131. See CISG, *supra* note 1, art. 62.

132. HONNOLD, *supra* note 60, § 453 at 608.

133. *Id.*

134. U.C.C. § 2-710 (2011) ("Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.").

135. See Anderson, *supra* note 130, at 253, for a critique of § 2-709 "risk of loss" provisions, as well as the efficiency benefits associated with seller's disposition of the goods.

136. U.C.C. § 2-709(1)(b) (2011). *Compare* Data Documents Inc. v. Pottawattamie Cnty., 604 N.W.2d 611, 616 (Iowa 2000) ("[P]laintiff's attempt to sell its overstock did not constitute a reasonable effort."), and *In re* Narragansett Clothing Co., 138 B.R. 354, 365 (Bankr. D.R.I. 1992) (finding that a seller who only made minimal efforts to contact other buyers, failed to make reasonable efforts to resell), *with* W.I. Snyder Corp. v. Caracciolo, 541 A.2d 775, 780 (Pa. Super. Ct. 1988) ("There was sufficient evidence from which the jury could conclude that Appellee was unable to resell the goods at a reasonable price after making a reasonable effort to do so."). See generally

goods, indicate that the efforts in reselling the goods would be unsuccessful.¹³⁷ The seller subject to the Code has an incentive to move the goods as quickly as possible. As a result, buyers are more likely to prefer the Code's remedial scheme and sellers are more likely to be drawn to the Convention. A seller operating at capacity will prefer to sell goods from its inventory to other parties, minimize its proof obligation to establish damages, and require the defaulting buyer to perform.

II. GOODS ORIENTED REMEDIES OF THE CODE – ONE LOT DELIVERIES, NON-INSTALLMENT CONTRACTS

In a contract that requires the delivery of the goods in one lot but the circumstances necessitate the delivery in installments,¹³⁸ the seller has a duty to deliver goods that conform to the contract for sale.¹³⁹ This is commonly known as the perfect tender rule.¹⁴⁰ The goods must conform to the terms of the contract for sale which includes terms implied from course of dealings, trade usage, or course of performance.¹⁴¹ Unless otherwise agreed, the buyer has a *right* to inspect the goods upon identification, tender, or delivery before it pays for or accepts the goods.¹⁴² If the goods or the tender of delivery fails in *any respect* to conform to the contract, the buyer may reject the whole, accept the whole, or accept any commercial

Anderson, *supra* note 130, at 253 (“The problem cases under section 2–709 are those in which the seller seeks the price action solely on the basis that he cannot readily resell the goods at a reasonable price . . . The theory aims to avoid economic waste by preventing a seller who is in the business of selling the goods, and who thus can more readily and efficiently dispose of them, from forcing the goods on a buyer who has no use for them.”).

137. U.C.C. § 2–709(1)(b) (2011); *see, e.g.*, Emanuel Law Outlines, Inc. v. Multi-State Legal Studies, Inc., 899 F. Supp. 1081, 1089 (S.D.N.Y. 1995) (finding that there was no realistic possibility of selling the outlines so the buyer, Multi-State, is responsible for damages); Plateq Corp. of North Haven v. Machlett Labs., Inc., 456 A.2d 786, 791 (Conn. 1983).

138. U.C.C. § 2–307 (2011) (“Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.”).

139. *Id.* § 2–607 (“Subject to the provisions of this Article on breach in installment contracts (Section 2–612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2–718 and 2–719), if the goods or the tender of delivery fail in *any respect* to conform to the contract . . .”) (emphasis added).

140. *Id.* § 2–601; *see also supra* note 138 and accompanying text.

141. U.C.C. § 2–207 (2011).

142. *Id.* § 2–513.

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unit or units, if the price can be apportioned,¹⁴³ and reject the balance.¹⁴⁴ The buyer's rejection must be effective, within a reasonable time after the delivery or the tender of the goods, and the buyer must notify¹⁴⁵ the seller within a reasonable time of the buyer's rejection of the goods.¹⁴⁶ If the rejection is ineffective or untimely, then the goods are accepted by the buyer,¹⁴⁷ and the buyer is liable for the price.¹⁴⁸ The buyer's notice should particularize the defect that the buyer seeks to rely upon to justify its rejection.¹⁴⁹

If a defect is not particularized and it is one that was ascertainable by reasonable inspection, the buyer, whether a merchant or not, is precluded from relying on the unstated defect to justify rejection or to establish breach if the seller could have cured the defect.¹⁵⁰ Likewise a merchant buyer may not rely on a defect to justify its rejection of the goods if the seller requests in a record a full and final written statement of all defects on which the buyer proposes to rely.¹⁵¹ If an unparticularized defect is the sole basis for rejection and it could have been cured, the rejection is wrongful and the buyer has breached its duty; the seller has the right to resort to a remedy.¹⁵²

A. CALCULATING "REASONABLE TIME AFTER TENDER OR DELIVERY FOR REJECTION"

When making an effective rejection the first hurdle for the buyer is to ensure that the goods are rejected within a "reasonable time" after tender or delivery, in order to thrust the goods back on the seller.¹⁵³ Absent contract terms defining the period for rejection or limiting the scope of inspection or limiting buyer's remedial right to reject, the determination of a

143. *Id.* § 2-601.

144. *Id.*

145. *Id.* § 1-202 ("A person 'notifies' or 'gives' notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.").

146. *Id.* § 2-602.

147. *Id.* § 2-606(1)(b).

148. *Id.* § 2-607(3).

149. *See id.* § 2-605.

150. *Id.* § 2-605(1)(a).

151. *Id.* § 2-605(1)(b).

152. *Id.* §§ 2-605, 2-703.

153. *Id.* § 2-602.

“reasonable time after tender or delivery” is a factual one dependent upon the circumstances such as the buyer’s sophistication; the buyer’s knowledge of the goods; the complexity of the goods; the nature of the defect, whether it was patent or latent; the difficulty in discovering the defect; the existence of express warranties regarding the quality of the goods; the nature of the goods, were they perishable or durable; and any course of performance between the parties after the sale and before the buyer’s formal rejection.¹⁵⁴ The course of performance between the parties—such as complaints by the buyer, negotiations between the parties, assurances by the seller that the problem would be corrected, and the seller’s attempted repairs—may enlarge the period constituting a reasonable time.¹⁵⁵ This treatment of the course of performance between the parties reflects the general policy preference of the Code to preserve the deal whenever possible.¹⁵⁶ In most cases it is too late to reject the goods if the buyer uses the goods and has knowledge of a patent defect;¹⁵⁷ processes the goods with or without knowledge of a defect;¹⁵⁸ uses the goods for an unreasonable period of time without rejecting them;¹⁵⁹ or makes a substantial change to the goods.¹⁶⁰

154. See *supra* notes 147–152 and accompanying text.

155. See, e.g., *Latham & Assocs., Inc. v. William Raveis Real Estate, Inc.*, 589 A.2d 337, 342 (Conn. 1991) (finding that the buyer reasonably delayed rejecting the goods while the seller attempted to cure the known defects); *Yates v. Clifford Motors, Inc.*, 423 A.2d 1262, 1269 (Pa. 1980) (finding that the buyer was not untimely in waiting between four and five months to reject a truck because Yates was waiting for repairs to be completed by a Clifford Motors repairman); *Carl Beasley Ford, Inc. v. Burroughs Corp.*, 361 F. Supp. 325, 330–31 (E.D. Pa. 1973) (holding that buyer, who allowed seller eight months to cure defects in a computer, did not fail to reject in a timely manner).

156. U.C.C. § 2 605 cmt. 2. (2011).

157. *IMA North America, Inc. v. Marlyn Nutraceuticals, Inc.* 67 U.C.C. Rep. Serv. 2d 1073, 1094 (Ariz. 2009) (finding it too late for a rejection claim since the buyer accepted and used the tablet machine for ten months knowing that there were defects).

158. See, e.g., *Borges v. Magic Valley Foods, Inc.*, 616 P.2d 273, 275–76 (Idaho 1980) (finding that the buyer knowingly processed the defective potatoes consistent with the buyer’s ordinary course of business and therefore has no grounds for rejection); *A & G Const. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207 (Alaska 1976).

159. See, e.g., *Barton Brands, Ltd. v. O’Brien & Gere Inc. of North America*, 69 U.C.C. Rep. Serv. 2d 1000, 1005 (W.D. Ky. 2009) (finding that the plaintiff accepted the baghouse and may not reject the baghouse regardless of defects because the plaintiff used the baghouse for several months of daily operation during which time the plaintiff had ample opportunity to inspect the goods and reject them).

160. See, e.g., *Intervale Steel Corp. v. Borg & Beck Div., Borg–Warner*

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A buyer's untimely rejection is ineffective and constitutes an acceptance.¹⁶¹ The ease of forcing the goods back on the seller that is afforded by the right of rejection is lost after acceptance.¹⁶² *Borges v. Magic Valley Foods, Inc.*, provides a glimpse of the traps that lie in the path between rejection and acceptance.¹⁶³ Prior to the purchase, the buyer in *Magic Valley Foods* examined potatoes that the seller had available for sale and discovered a hollow heart defect in the potatoes.¹⁶⁴ The buyer and the seller agreed that if further inspection showed that the defect was of a substantial nature and the potatoes were unfit for buyer's purposes, the contract would be null and void.¹⁶⁵ After delivery of the potatoes to the buyer's plant for processing, the state inspectors found substantial defects in 5000 of the 35000 hundredweight of potatoes.¹⁶⁶ Here, rejection after processing would have been timely because a contract term permitted inspection during the stage of processing the goods.¹⁶⁷ Negotiations occurred between the parties; the seller and buyer agreed on a cure.¹⁶⁸ When the cure was unsuccessful, the buyer flaked the potatoes and sold them at a loss.¹⁶⁹ The court correctly determined that the buyer's act was an acceptance of the defective goods because the buyer had an obligation to give the seller notice of the failed cure and await further instructions from the seller.¹⁷⁰ Having previously

Corp., 578 F. Supp. 1081, 1087 (E.D. Mich. 1984) (holding that the buyer may not revoke acceptance of processed goods and was deemed to have accepted the processed steel), *aff'd*, 762 F.2d. 1008 (6th Cir. 1985); *Atlan Indus., Inc. v. O.E.M., Inc.*, 555 F. Supp. 184, 189–91 (W.D. Okla. 1983) (finding that the buyer who received non-conforming reground plastic pellets could still reject the goods because the non-conformity was not discovered until after the plastic had been substantially changed but was restored to pellets by the buyer).

161. U.C.C. § 2–606(1)(b) (2011).

162. *Intervale Steel Corp.*, 578 F. Supp. at 1087 (“A buyer's acceptance of the goods will most likely make the seller's ability to cure the non-conformity or resell the goods much more difficult.”).

163. *Borges v. Magic Valley Foods, Inc.*, 616 P.2d. 273.

164. *Id.* at 274.

165. *Id.* at 274.

166. *Id.* at 274–75.

167. *Id.* at 275 (“It is . . . clear that the 4,838.77 c. w. t. of potatoes, unable to make the fresh pack grade, did not conform to the contract and gave Magic West the right of rejection.”).

168. *Id.* at 275.

169. *Id.* at 275.

170. *Id.* at 275–76 (“Generally, a buyer is deemed to have accepted defective goods when, knowing the defect, he resells the goods without notifying the seller.”); *see*, U.C.C. § 2–606(1)(c) (2011).

rejected the goods, the buyer no longer had title to the potatoes;¹⁷¹ title vested in the seller when the buyer rejected the goods.¹⁷² The buyer had an obligation to give the seller notice of the failed cure and to await the seller's instructions.¹⁷³ The goods, though perishable in nature, did not require the buyer to immediately flake and sell them in order to prevent loss; rather the buyer became obligated to pay the contract price for the goods, by flaking and selling them rather than notifying the seller that the cure had failed.¹⁷⁴ This obligation to pay was subject to the buyer's counterclaim for breach of any implied warranty or express warranty, but the burden of proof on the issue of breach and the existence of any warranty lies with the buyer.¹⁷⁵ Rejection involves a simple call on the part of the buyer, telling the seller to "come and get them!"¹⁷⁶

B. THE CODE GRANTS A BUYER A SECOND RIGHT TO THRUST THE GOODS BACK ON THE SELLER – REVOCATION OF ACCEPTANCE.

Under the Code, the buyer may revoke its acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to the buyer.¹⁷⁷ Unlike the perfect tender rule, which permits good faith rejection of some or all of the goods for any insubstantial defect, revocation of acceptance requires a substantial impairment based on the buyer's subjective assessment of its needs and goals under the contract. The "substantial impairment" standard is analogous to the material breach standard of the common law and Restatement (Second) of the Law of Contracts.¹⁷⁸ Therefore, the substantial impairment standard falls *between* the perfect tender rule of the Code for rejection and the fundamental breach standard imposed for avoidance by the Convention.¹⁷⁹ Revocation of

171. U.C.C. § 2-401(2), (4) (2011).

172. *Id.* § 2-401(4).

173. *Id.* §§ 2-603, ~~to~~ 2-604 (2011).

174. *Id.* §§ 2-606(1)(c), 2-607(1) ("The buyer must pay at the contract rate for any goods accepted.").

175. *Id.* § 2-607(4) ("The burden is on the buyer to establish any breach with respect to the goods accepted.").

176. *Id.* § 2-602(1) (the buyer may reject in a reasonable time by giving the seller reasonable notification of the rejection).

177. *Id.* § 2-608(1) (2011).

178. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 242.

179. For a discussion of the fundamental breach standard *see infra* note 270 and accompanying text.

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acceptance is only available in two limited contexts: 1) the buyer's acceptance of the goods must be induced by a *reasonable* assumption that a non-conformity of which the buyer is aware will be cured but the cure has not been seasonably provided;¹⁸⁰ or 2) the buyer accepts the goods without discovering the defect either because of the difficulty of discovery,¹⁸¹ or because the seller's assurances induced the acceptance without discovery.¹⁸² Revocation of acceptance must occur within a reasonable time after the buyer discovers, or should have discovered the asserted grounds, *and* before any substantial change in condition of the goods which is not caused by the defective condition of the goods.¹⁸³ For example,

180. *E.g.*, Koch Supplies, Inc. v. Farm Fresh Meats, Inc., 630 F.2d 282, 286 (5th Cir. 1980) (holding that for the buyer of a smokehouse who accepted delivery two to three weeks after discovery of a defect, revocation of acceptance six months after receipt of the smokehouse was effective given past dealings between the parties and the seller's continued efforts to repair the smokehouse); Plastic Moldings Corp. v. Park Sherman Co., 606 F.2d 117, 122 (6th Cir. 1979) (noting that an acceptance made on the reasonable assumption that the defects could be cured can be lawfully revoked if the cure is not forthcoming); Contours, Inc. v. Lee, 874 P.2d 1100, 1106 (Haw. Ct. App.1994) (holding that revocation was unavailable for a buyer who accepted furniture in an uncompleted condition, with seller's assurances of completion, because the buyer prevented the completion).

181. *E.g.*, Atlan Indus., Inc. v. O.E.M., Inc., 555 F.Supp.184, 188 (W.D. Okla. 1983) (noting that a buyer may revoke acceptance if the acceptance was reasonably induced by the difficulty of discovery); J.F. Daley Int'l, Ltd. v. Midwest Container & Indus. Supply Co., 849 S.W.2d 260, 264 (Mo. 1993) (finding that latent defects in plastic bottles were not discovered until after buyer processed them for its use).

182. *E.g.*, Alpert v. Thomas, 643 F. Supp. 1406, 1418 (D. Vt. 1986) (holding that a buyer of a breeding stallion was induced to accept the horse without discovery of defects due to seller's assurances that it would conduct breeding soundness tests and that the horse was breeding sound); Hart Honey Co. v. Cudworth, 446 N.W.2d 742, 745-46 (N.D. 1989) (finding a seller of honey storage equipment who was unavailable for the buyer's inspection represented that equipment containing live beehives and shown to the buyer from a distance was of the same type and condition as the equipment being purchased by the buyer; the buyer's acceptance was induced by the difficulty in inspecting the equipment and by seller's assurances).

183. *E.g.* Royal Typewriter Co., a Div. of Litton Bus. Sys., Inc. v. Xerographic Supplies Corp., 719 F.2d 1092, 1106-07 (11th Cir. 1983) (holding that when the buyer attempted to return the goods seventeen months after receiving the goods substantial change existed due to the use, improper maintenance, and modifications to the goods); Intervale Steel Corp. v. Borg & Beck Div., Borg-Warner Corp., 578 F. Supp. 1081, 1087 (E.D. Mich. 1984) (holding that the buyer could not revoke acceptance because the buyer substantially changed the condition of the good by stamping the purchased steel into parts); Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 381 (E.D. Mich. 1977) (holding that the buyer's continued use and

cutting fabric into panels¹⁸⁴ or pressing or molding aluminum sheets into forms for auto parts¹⁸⁵ are the kinds of substantial changes that bar revocation of acceptance. Unlike the return of non-conforming goods that might be resold to another customer at a discounted price, returning substantially modified goods to the seller thrusts upon the seller goods it may have difficulty selling. The seller may lack a ready market for modified goods, or lack the knowledge necessary to market the substantially changed goods. The buyer who cannot revoke its acceptance may, however, use the Code's damage remedy for accepted goods or breach of warranty, provided by Section 2-714.¹⁸⁶ A buyer who revokes its acceptance has the same rights and obligations towards the goods as the buyer who rejects the

depreciation of the purchased machine over a period approaching its life expectancy amounts to a clear substantial change in condition); *Stridiron v. I.C., Inc.*, 578 F. Supp. 997, 1002 (D. Va. 1984) (holding that the use of car for six months and 6,833 miles, relying on seller's assurances of cure, was not a substantial change in the condition of the goods so as to defeat revocation of acceptance).

184. *Trinkle v. Schumacher Co.*, 301 N.W.2d 255, 257-58 (Wis. Ct. App. 1980) (holding that there was a substantial change in the condition of the goods barring the buyer from revoking acceptance when the buyer discovered a defect that was not discoverable until after the buyer cut the fabric into roman shades). *But cf.* *Deere & Co. v. Johnson*, 271 F.3d 613, 620 (5th Cir. 2001) (noting that simple depreciation alone usually does not constitute a substantial change in the condition of the goods); *Lackawanna Leather Co. v. Martin & Stewart, Ltd.*, 730 F.2d 1197, 1202-03 (8th Cir. 1984) (holding that the buyer's revocation of acceptance of purchased hides was a question for the jury because the evidence showed (1) the defects in the hides could not have been discovered without processing (2) that the seller knew from the beginning that the buyer would be processing the goods for use in its business and (3) the buyer's processing of the hides after discovery of the defect enhanced their value); *ARB, Inc. v. E-Systems, Inc.*, 663 F.2d 189, 197-98 (D.C. Cir. 1980) (finding damage naturally flowing from the attempts to make the equipment work was neither inconsistent with the seller's ownership nor a substantial change within the meaning of § 2-608).

185. *Intervale Steel Corp. v. Borg & Beck Div., Borg-Warner Corp.*, 578 F. Supp. 1081, 1087-88 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1008 (6th Cir. 1985).

186. U.C.C. § 2-714 (2011) ("Buyer's Damages for Breach in Regard to Accepted Goods: (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable. (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (3) In a proper case any incidental and consequential damages under the next section may also be recovered.").

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goods.¹⁸⁷

C. THE GOODS ORIENTED REMEDIES OF THE CONVENTION –
ONE LOT DELIVERIES, NON-INSTALMENT CONTRACTS

Unlike the Code, which gives the buyer a reasonable time to reject the goods after their delivery or tender,¹⁸⁸ the Convention *mandates* prompt examination of the goods within as short a period as is practicable in the circumstances.¹⁸⁹ Circumstances used for determining the promptness of the buyer's examination include: the method of delivery including the "kind" of packaging of the goods,¹⁹⁰ the quantity delivered,¹⁹¹ the nature of the goods,¹⁹² the skill of the buyer's employees,¹⁹³ the nature of the defect,¹⁹⁴ the obviousness of the defect,¹⁹⁵ the number or deliveries, and the steps that must be

187. *Id.* § 2-608(3) (2011). For a discussion of the merchant buyer's obligation to care for the goods, see text and note, *supra* note 61.

188. U.C.C. § 2-602(1) (2011). For a discussion of the right to reject pursuant to the Code, see text and notes, *supra* note 139.

189. CISG, *supra* note 1, art. 38 (1).

190. Oberlandesgericht Saarbrücken [OLG] [higher regional court] Jan. 13, 1993, 1 U 69/92 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?id=180>; Obergericht Kanton Luzern [OG] [appellate court] Jan. 8, 1997, 11 95 123/357 (Switz.), English translation *available at* <http://cisgw3.law.pace.edu/cases/970108s1.html>.

191. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 27, 1999, 1 Ob 223/99x (Austria), English translation *available at* <http://cisgw3.law.pace.edu/cases/990827a3.html>.

192. Arrondissementsrechtbank Breda [Rb.] [district court] Jan. 16, 2009, 197586 / KG ZA 08-659 (Neth.), English translation *available at* <http://cisgw3.law.pace.edu/cases/090116n1.html>.

193. Gerechtshof Arnhem [Hof] [ordinary court of appeals] June 17, 1997 96/449, English abstract *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=317&step=Abstract>; Oberlandesgericht München [OLG] [higher regional court] Mar. 11, 1998, 7 U 4427/97 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?id=299> (“[B]uyer was an expert merchant, who usually sold high value clothes, it could have become aware of the lack of conformity by spot check examination and could have given notice of lack of conformity much earlier.”).

194. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 3, 1999, VIII ZR 287/98 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?pid=1&id=447&do=case> (finding that the defect was only discoverable after expert examination); Obergericht Kanton Luzern [OG] [appellate court] Jan. 8, 1997, 11 95 123/357 (Switz.), English translation *available at* <http://cisgw3.law.pace.edu/cases/970108s1.html> (finding that the determination of the time for examination must take into account the nature of the goods, the quantity, the kind of wrapping and all other relevant circumstances).

195. Gerechtshof Arnhem [Hof] [appellate court] Jan. 28, 2010, 87379/

taken to discover the defect.¹⁹⁶ The Convention only obligates the buyer to discover those defects that a normal examination, one consistent with trade custom or the practices between the parties, would reveal.¹⁹⁷ If the buyer later complains of a particular defect that could have been discovered by immediate inspection and testing of the goods upon delivery, the buyer has no recourse because Article 38 of the Convention imposes a duty on the buyer to have examined the goods and to have discovered the defect by random inspection.¹⁹⁸ This prompt inspection of the goods must be followed by notice of the nature of the defect within a reasonable time.¹⁹⁹ A recent case addressed by the Netherlands Appellate Court illustrates the general approach to prompt examination and notice within a reasonable time under Article 38 of the Convention.²⁰⁰ The Spanish seller delivered lemons to a buyer at its place of business in the Netherlands.²⁰¹ The buyer examined the lemons and determined they were not of acceptable quality on the day of delivery.²⁰² However, the buyer gave the seller notice of the non-conformity twelve days after the delivery.²⁰³ The court held that the buyer's notice was untimely; the obvious nature of the defect and the perishable character of the goods required considerably earlier notice.²⁰⁴

The period for examination commences at the time of

HAZA 07-716 (Neth.), English translation *available at* <http://cisgw3.law.pace.edu/cases/100128n1.html> (finding that the obvious nature of the defect and the perishable character of the goods required notice earlier than twelve days after delivery).

196. Landgericht Berlin [LG] [regional court] Mar. 21, 2003, 103 O 213/02 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?pid=1&id=921&do=case> (finding that while the defects in the cloth were only detectable when dyed, the buyer should have dyed a sample shortly after delivery to test for defects).

197. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 27, 1999, 1 Ob 223/99x (Austria), English translation *available at* <http://cisgw3.law.pace.edu/cases/990827a3.html> (noting that the lack of conformity preserves only the right to claim the sufficiently specified defects and that a notification of other defects afterwards is not possible).

198. *Id.*

199. CISG, *supra* note 1, art. 39 (1).

200. Gerechtshof Arnhem [Hof] [appellate court] Jan. 28, 2010, 87379/HAZA 07-716 (Neth.), English translation *available at* <http://cisgw3.law.pace.edu/cases/100128n1.html>.

201. *Id.* ¶ 4.1.

202. *Id.* ¶ 4.3.

203. *Id.* ¶ 4.3.

204. *Id.* ¶ 4.4.

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delivery and transfer of the risk of loss;²⁰⁵ industry usages and practices may dictate the required manner of examination.²⁰⁶ Citing Austrian law, the Austrian Supreme Court affirmed the trial court's determination that the buyer had the burden of proof on the timeliness and sufficiency of its notice.²⁰⁷ It held that the purchase of a large quantity of goods *requires* the use of experts in the field to examine the goods.²⁰⁸ This holding is contrary to calculating the time for and duration of an examination period based on the quantity of the goods or the expertise of the buyer's employees. It does, however, indicate a strong preference for an expeditious means of examination.

The examination of perishables, such as citrus fruit, must take place without delay because the goods may be exposed to damage or decay during their transport.²⁰⁹ In a contract that does not impose on the seller the obligation to hand the goods over at a particular place or to a carrier because the parties use a delivery term, such as EXW (Incoterms),²¹⁰ timely examination by the buyer may only be possible before it commences the transporting of the goods from the seller's place of business or storage facility.²¹¹ However, the seller's delivery to a particular place or to a carrier results in the shifting of the risk of loss at that designated place such as FAS Port Said

205. CISG, *supra* note 1, arts. 67–69.

206. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 27, 1999, 1 Ob 223/99x (Austria), English translation available at <http://cisgw3.law.pace.edu/cases/990827a3.html>.

207. *Id.*; see also CISG, *supra* note 1, at 295–298; JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES, ¶¶ 177–178, at 330, ¶ 70.1, at 86–92 (4th ed. 1989) (stating that unless expressly provided, CISG does not address the allocation of the burden of proof). *But Cf.* Ingeborg Schwenzer & Pascal Hachem, *Articles 3*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 61, 72, ¶ 22 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005). (recognizing the reluctance of the Vienna Convention to address burdens of proof but opining that the Convention and not domestic law implicitly governs the allocation of the burden of proof).

208. [OGH] 1 Ob 223/99x (Austria).

209. See Gerechtshof Arnhem [Hof] [appellate court] Jan. 28, 2010, 87379/HAZA 07–716 (Neth.), English translation available at <http://cisgw3.law.pace.edu/cases/100128n1.html>.

210. INT'L CHAMBER OF COMMERCE, *supra* note 92, at 15 (“Ex Works’ means that the seller delivers when it places the goods at the disposal of the buyer at the seller’s premises or at another named place.”).

211. Gerechtshof Arnhem [Hof] [appellate court] Jan. 28, 2010, 87379/HAZA 07–716 (Neth.), English translation available at <http://cisgw3.law.pace.edu/cases/100128n1.html>.

Egypt,²¹² or upon delivery to the carrier. The wise buyer should examine perishable goods, or engage a third party to examine the goods, upon delivery at the designated place, or before transport by the carrier.²¹³ Prompt examination by the buyer may only be deferred beyond the point of the seller's delivery if all the goods to be delivered by the seller are redirected or re-dispatched by the buyer while the goods are in transit.²¹⁴ If the buyer receives the goods and then immediately resells a small portion, deferral of the examination is inappropriate. Deferral is only available if the buyer does not have a real opportunity to examine or to have the goods examined.²¹⁵

1. The Buyer's Notice of the Non-conforming Goods

Article 39 of the Convention imposes on the buyer an obligation to give notice specifying the nature of the lack of conformity, within a reasonable time after discovery or from the time it ought to have been discovered, but no more than two years from the date on which the goods were handed over to the buyer.²¹⁶ The buyer loses the right to rely on non-conformity as a basis for its claim if notice is untimely. The ease with which discovery may be made is a factor for determining whether the examination was within "as short a period as practicable" and whether the notice of the defect was given within a reasonable time.²¹⁷ The following cases illustrate the promptness required by national courts and arbitration tribunals: sterile wrapped medical devices packed in boxes required ten days for prompt examination and thirty days from delivery for Article 39 notice because the defect could be viewed through the packaging;²¹⁸

212. See *supra* notes 103–105 and accompanying text.

213. See generally 18 RICHARD A. LORD, WILLISTON ON CONTRACTS § 52:19 (4th ed. 2012) (noting that determination under the UCC of whether the buyer should have inspected the goods within a particular time depends upon the difficulty of discovering defects in the goods and their perishability, among other factors).

214. CISG, *supra* note 1, art. 38(3).

215. See *id.*, art. 38(2).

216. See *id.*, art. 39.

217. See Pretura di Locarno–Campagna [district court] Apr. 27, 1992, 6252 (Switz.), English translation available at <http://cisgw3.law.pace.edu/cases/920427s1.html>.

218. Obergericht Kanton Luzern [OG] [appellate court] Jan. 8, 1997, 11 95 123/357 (Switz.), English translation available at <http://cisgw3.law.pace.edu/cases/970108s1.html> (holding that thirty days of notice is appropriate, compared to the short German eight day period and the longer Dutch period of several months).

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trekking shoes delivered to the buyer's end user in partial deliveries required examination of each delivery, and a total of 14 days for both the examination and the Article 39 notice was imposed unless special circumstances are established by the buyer, such as the quantity delivered or the defect required examination by a professional.²¹⁹ These holdings illustrate that a buyer should negotiate for an agreed-to period for examination and notice, given the demands that courts place on buyers. Article 6 of the Convention allows buyers and sellers to negotiate terms that vary from the Convention.²²⁰

Courts have imposed sampling on buyers that have argued that either the packaging or the nature of the goods necessitated the delaying of examination until the goods were resold to its end-users. Courts were unconvinced by that argument in the following types of cases: defects in individually wrapped doors were repetitive and easily recognizable, therefore, the buyer *could* have discovered the defects by examining samples;²²¹ defects in cloth were only detectable once the cloth was dyed, because the buyer *should* have dyed a sample of the cloth shortly after delivery an examination seven weeks after delivery was untimely.²²² This pattern of cases also suggests that if a method of discovery could have been employed by the buyer, buyer should have employed that method.²²³

Defects in prior deliveries may impact the required scope of an examination of subsequently delivered goods. For example, a buyer ordered goods for delivery to its end user and received

219. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 27, 1999, 1 Ob 223/99x (Austria), English translation *available at* <http://cisgw3.law.pace.edu/cases/990827a3.html>.

220. CISG, *supra* note 1, art. 6 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."); *see, e.g.*, Arrondissementsrechtbank Zwolle [Rb.] [district court] Mar. 5, 1997, HA ZA 95-640 (Neth.), English abstract *available at* <http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Keywords> (holding that as a result of the seller's standard terms on notice, trade custom, nature of the goods (fish) and the buyer's expertise, buyer's notice was untimely).

221. Oberlandesgericht Saarbrücken [OLG] [higher regional court] Jan. 13, 1993, 1 U 69/92 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?id=180>.

222. Landgericht Berlin [LG] [regional court] Mar. 21, 2003, 103 O 213/02 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?pid=1&id>.

223. *See, e.g.*, Obergericht Kanton Luzern [OG] [appellate court] Jan. 8, 1997, 11 95 123/357 (Switz.), English translation *available at* <http://cisgw3.law.pace.edu/cases/970108s1.html>.

notice from its end user of defects in the first delivery of forty-eight pairs of shoes after the buyer had placed a second identical order with the same seller. The buyer's random, "sampling," examination of the second delivery without discovering any defects was held an ineffective manner of examination. The buyer's notice of the non-conformity sixteen days after the second delivery was untimely.²²⁴ The buyer that fails to provide timely notice is not, however, without a remedy. Article 44 of the Convention permits the buyer that has a reasonable excuse for failing to give the required notice to use the price reduction remedy,²²⁵ or to recover damages, except its lost profits.²²⁶ In the relatively few cases and arbitration awards that have addressed the question of the buyer's purported "excuse" of its untimely notice, and not its untimely examination, only in those instances when the buyer's untimely notice was not the result of the buyer's neglect or inattentiveness has relief been granted.²²⁷

224. Landgericht Stuttgart [LG] [regional court] Aug. 31, 1989, 3 KfH 0 97/89 (Ger.), English abstract available at <http://www.unilex.info/case.cfm?id=1>.

225. CISG, *supra* note 1, art. 50.

226. *Id.* art. 44 ("Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.").

227. The parties jointly appointed a third party to inspect and certify the quality of coke when the goods were loaded in China, the place of delivery. The buyer in good faith relied on the accuracy of the certificate regarding the conformity of the goods and did not independently inspect the coke until it arrived in Germany. Case No. 9187 of 1999, ICC Int'l Ct. of Arb., English translation available at <http://www.unilex.info/case.cfm?id=466> (finding notice of non-conformity to the seller was untimely, the Tribunal permitted recovery of the cost of storing and reselling the coke, and the loss incurred from blending the coke with a higher grade purchased, but not the buyer's anticipated profit). See Camilla Baasch Andersen, *Exceptions to the Notification Rule - Are They Uniformly Interpreted?*, 9 VINDOBONA J. OF INT'L COMM. L. & ARB. § 3.4 at 39-42 (2005) (arguing that reasonable excuse is directed to the untimeliness of notice rather than the untimeliness of the examination). *But see* Tribunal of Int'l Commercial Arb. at the Russian Federation Chamber of Commerce and Industry, Jan. 24, 2000, 54/1999 (Rus.), English translation available at <http://cisgw3.law.pace.edu/cases/000124r1.html> (finding the buyer's inspection of the goods in the loading port as required by the contract had been economically and technically inadequate; the buyer's postponement of the quality check until the goods arrived at the port of destination was, therefore, considered reasonable by the tribunal and the buyer was entitled to a price reduction).

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2. Technical Requirements for Notice and the Seller's Waiver of the Defense of Untimely Notice

Article 39 of the Convention does not specify the form or method for giving the required notice. Although it ruled that written notice was required, the Serbian Chamber of Commerce Foreign Trade Court of Arbitration found, consistent with the terms of Article 13 of the Convention,²²⁸ that the writing requirement was satisfied by an electronic transmission, which in this case was a fax.²²⁹ Courts have held notice by telephone to be permissible.²³⁰ The buyer's obligation of satisfying the burden of proof may become a challenge if the seller asserts that the call was not received or disputes the asserted contents of the conversation. The German Bundesgerichtshof ruled that a buyer implicitly declared the contract avoided by giving notice that it could not make use of a certain quantity of the goods and by placing those goods at the seller's disposal.²³¹ If the contract can be avoided by conduct, Article 39 notice could likewise arise from implication. The weakness in this argument is that only notice that specifies the nature of the lack of conformity satisfies the notice requirement.²³² Consequently, notice by conduct is likely to be insufficient.

Several courts have held that conduct by a seller can constitute a waiver of the right to raise an untimely notice of the lack of conformity defense. A German seller who declared that it would be liable for present or future justified complaints regarding the conformity of the goods waived the defense of untimely notice.²³³ Likewise, an Austrian seller that made

228. CISG, *supra* note 1, art. 13 ("For the purposes of this Convention 'writing' includes telegram and telex.").

229. Foreign Trade Court of Arbitration [attached to the Serbian Chamber of Commerce] Nov. 06, 2005, T-10/04 (Serb.), English translation *available at* cisgw3.law.pace.edu/cases/051106sb.html (noting that because the time of the transmission couldn't be verified by the buyer the arbitrator could not find that the buyer provided timely notice).

230. *See, e.g.*, Landgericht Stuttgart [LG] [regional court] Aug. 31, 1989, 3 KfH 0 97/89 (Ger.), English abstract *available at* <http://www.unilex.info/case.cfm?id=1>.

231. Bundesgerichtshof [BGH] [Federal Court of Justice] June 25, 1997 VIII ZR 300/96 (Ger.), English translation *available at* <http://cisgw3.law.pace.edu/cases/970625g2.html>.

232. HENRY GABRIEL, *CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF DOMESTIC AND INTERNATIONAL LAW* 154 (2009).

233. Bundesgerichtshof [BGH] [Federal Court of Justice] June 25, 1997 VIII ZR 300/96 (Ger.), English translation *available at* <http://cisgw3.law.pace.edu/cases/970625g2.html>.

repairs waived the right to defend on the grounds of untimely notice.²³⁴ Another seller implicitly waived its right to rely on untimely notice as a defense by retaking the goods and agreeing to exchange them without making its own examination of the goods.²³⁵

Most importantly, however, is the prohibition imposed by Article 40 of the Convention that bars a seller, who knew or could not have been unaware of the defective condition of its goods *and* failed to disclose those facts to the buyer, from relying on the buyer's failure to meet the requirements of prompt examination and reasonable notice if the lack of conformity.²³⁶ Implicit in this requirement is a threaded policy of timely communication and disclosure imposed by several of the provisions.²³⁷ Although the Convention does not impose a general duty of good faith on the parties, many of its provisions reflect general policies that are harmonious with good faith in domestic law such as the duty to communicate reflected in Article 40.²³⁸

3. Avoidance, the Convention's Ultimate Remedy for Returning the Goods

When the seller tenders or delivers non-conforming goods, the buyer whose contract is governed by the Code may find it necessary to use either, or both, of the goods oriented remedies provided by the Code: rejection,²³⁹ available for any non-

234. Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, 8 Ob 125/08b (Austria), English translation *available at* <http://cisgw3.law.pace.edu/cases/090402a3.html> (finding that the buyer failed to raise the question of waiver in the Court of First Instance).

235. Oberster Gerichtshof [OGH] [Supreme Court] July 5, 2001, 6 OB 117/01a (Austria), English translation *available at* <http://cisgw3.law.pace.edu/cases/010705a3.html>

236. CISG, *supra* note 1, art. 40.

237. See HONNOLD, *supra* note 60, § 100 (citing CISG, *supra* note 1, arts. 19 (2), 21 (2), 26, 39 (1), 48 (2), 65, 71 (3), 72 (2), 79 (4), and 88 (1) (interpreting that the CISG as imposing a duty to communicate); Sarah Howard Jenkins, *Construing Laws Governing International and U.S. Domestic Contracts for the Sale of Goods: A Comparative Evaluation of the CISG and UCC Rules of Interpretation*, 26 TEMPLE J. INT'L & COMP. L. (forthcoming 2012).

238. For a comparative assessment of the good faith duty imposed by domestic contract law and the interpretative guideline of good faith in international trade espoused by Article 7 of the Convention, *see* Jenkins, *supra* note 237.

239. For a discussion of the Code remedy of rejection, *see supra* note 63 and accompanying text.

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conformity, and revocation of acceptance,²⁴⁰ which is only available for substantial impairments in value. Similarly, the Convention provides two goods oriented remedies: avoidance²⁴¹ and a request for substitute goods.²⁴² Unlike the Code, the standard applicable for the Convention's two remedies is the same, a fundamental breach of contract.²⁴³ The first of these two remedies, avoidance, is a remedy of last resort and is the functional equivalent of the cancellation of a contract that is subject to the Code.²⁴⁴ Avoidance reflects the policy goals of preserving the contractual relationship and minimizing the waste of resources expended for transporting, delivering, and returning goods. If the buyer has not obtained what it expected from the contract, adjustments must be obtained by permitting repair of the goods, seeking a price reduction, or recovering damages. Upon avoidance, both parties are released from their obligations under the contract, subject to any claim for damages that are due,²⁴⁵ and must make restitution of the

240. For a discussion of the Code remedy of rejection, *see supra* note 63 and accompanying text.

241. CISG, *supra* note 1, art. 49 (“(1) 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. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) In respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) In respect of any breach other than late delivery, within a reasonable time: (i) After he knew or ought to have known of the breach; (ii) After the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) After the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance”).

242. *Id.* art. 46(2) (“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.”).

243. *Id.* art. 25 (“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.”).

244. U.C.C. § 2-106(4) (2011).

245. CISG, *supra* note 1, art. 81(1) (“Avoidance of the contract releases both parties from their obligations under it, subject to any damages which

performance received by the other unless excused.²⁴⁶ Although avoidance is similar in effect to rejection and revocation of acceptance, the conditions precedent to the right to avoid a contract are distinguishable and the conduct of the parties preceding an effective avoidance, course of performance in Code nomenclature, may have a substantially different effect in a contract subject to the Convention compared to one subject to the Code.²⁴⁷ Consequently, course of performance, or conduct after notice of the breach and before notice of avoidance, may pose a substantial trap for domestic parties who are accustomed to attempting repairs and to interacting with their sellers without adversely impacting rights derived from the Code.

4. Avoidance – The Conditions Precedent to an Effective Avoidance

The Convention recognizes two contextual patterns that give the buyer a right to avoid the contract.²⁴⁸ First, there is a fundamental breach by the seller in performing any of its obligations under the contract or the Convention.²⁴⁹ Second, the seller fails to deliver the goods; thereafter, the buyer gives the

may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.”).

246. *Id.* art. 82 (“(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. (2) The preceding paragraph does not apply: (a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course normal use before he discovered or ought to have discovered the lack of conformity.”); *Id.*, art. 84 (“(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid. (2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them: (a) If he must make restitution of the goods or part of them; or (b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.”).

247. For a discussion of the determination of a reasonable time to reject and to revoke acceptance, *see supra* note 50 and accompanying text.

248. HONNOLD, *supra* note 60, § 287.

249. CISG, *supra* note 1, art. 49(1)(a).

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seller an additional period of time for performing but the seller does not deliver the goods within the additional period of time, or the seller declares that it will not deliver within that period.²⁵⁰ In both of these cases, the buyer may exercise the right of avoidance. This latter category, referred to as *Nachfrist notice*, was inspired by the German law *Nachfrist*: one who gives notice extending time for performance to a further definite time.²⁵¹ Here, a seller's non-fundamental breach of delay matures into a basis for avoiding the contract by the seller's failing to perform within the extended period granted for performing.²⁵² The former, the fundamental breach of the seller's obligation to deliver conforming goods, is the focus of this article.

a. The Delivery of Non-conforming Goods and Avoidance

The seller's delivery of non-conforming goods must constitute a fundamental breach before the buyer may declare the contract avoided.²⁵³ One leading commentator suggests that the policy goals of Article 49 of the Convention reflected in the fundamental breach standard support a requirement of postponing the buyer's right to determine the existence of a fundamental breach until after the seller fails to cure the non-conformity within a reasonable time, until that point, he argues, no fundamental breach has occurred.²⁵⁴ This analysis misses the mark and places the buyer at risk in meeting its required notice of the fundamental breach within a *reasonable time after he knew or ought to have known of the breach*.²⁵⁵ The buyer's notice of avoidance is distinguishable from the Article 39 notice of non-conformity of the delivered goods after a prompt examination, unless the examination at delivery

250. *Id.* arts. 47(1), 49(1)(b).

251. HONNOLD, *supra* note 60, § 290.

252. UNCITRAL, *Digest of Article 25 Case Law*, DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS § 6 (2008) available at <http://www.cisg.law.pace.edu/cisg/text/digest-art-25.html>. For a discussion of whether the seller's failure to cure after an extension in time operates as a *Nachfrist* notice resulting in a right of avoidance see *supra* note 251 and accompanying text.

253. CISG, *supra* note 1, art. 49(1).

254. Peter Schlechtriem, *Article 25, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS* 281, 294, ¶ 20(aa) (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

255. CISG, *supra* note 1, art. 49(2)(b)(i).

reveals a fundamental breach. If the breach is fundamental either at delivery or discovered thereafter, the reasonable time for avoidance commences at the point the buyer knew or ought to have known of the fundamental breach.²⁵⁶ Should the buyer fail to provide this notice within the required time frame, it loses the right to avoid the contract.²⁵⁷ A buyer who must wait for the seller to provide seasonable notice of its intent to cure the non-conformity may be subsequently held to have itself acted in an unreasonable manner. How long must the buyer wait? Assume the buyer takes delivery of goods that fail to meet the agreed standard of quality and the buyer determines that the seller should have provided notice of its intent to cure within ten days after receiving the buyer's notice of a lack of conformity. Thereafter, the buyer gives notice of avoidance. The buyer's calculation of seasonable notice by the seller creates a factual issue that may later be resolved against the buyer. The exercise of the right of avoidance as a result of seller's delivery of non-conforming goods arises when the buyer determines that its expectations created by the contract or Convention have not been met. If the breach "results in such a detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract,"²⁵⁸ the breach is fundamental and the buyer should provide notice of avoidance within a reasonable time of that discovery.²⁵⁹

Courts of contracting states are uniform in requiring a serious or severe failure by the seller, such as: the tender of imitations of branded Intel Pentium CPUs where the adverse impact on the buyer's reputation in using such goods would be substantial;²⁶⁰ or superficial cracks hidden by lamination mark

256. *Id.*

257. *Id.*

258. *Id.* art. 25 ("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.").

259. See, e.g., Sąd Najwyższy [Supreme Court of Poland] May 11, 2007, V CSK 456/06 (Pol.), translation available at <http://cisgw3.law.pace.edu/cases/070511p1.html>; see also Cour d'Appel [CA] [regional court of appeal] Versailles, 12e ch, Jan. 29, 1998, R.G. no. 56 (Fr.), English abstract available at <http://www.unilex.info/case.cfm?id=280> (finding that notice of non-conformity was reasonable in a case involving a buyer who could not use the defective machines as expected).

260. Oberster Gerichtshof [OGH] [Supreme Court] Jul. 5, 2001, docket No. 6 Ob 117/01a, ENTSCHEIDUNGS DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] (Austria), translation available at

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on tendered steel rods are unfit for their intended use by the buyer for manufacturing axle spindles that are welded and form an integral part of axles on buses and other vehicles.²⁶¹ If the non-conformity of tendered goods is such that it “cannot be remedied within reasonable time and by reasonable effort to the effect that the goods are practically useless, unmerchantable or cannot be appropriately resold,”²⁶² a fundamental breach has occurred. The buyer’s substantial deprivation may result from an insubstantial or a slight defect or delay if, based on the contract, the defect or timeliness was of basic importance for one of the contracting parties.²⁶³ To determine if a breach substantially deprives the other party of what it was entitled to expect under the contract, analysis commences with an assessment of the parties’ agreement and their evaluation of the importance of the performance.²⁶⁴ In a contract for a particular variety of Christmas trees, the buyer specified the percentage of first and good second class trees and described the quality, height, and price of the trees.²⁶⁵ The seller’s delivery of the proper quality of trees, but not of the requested height, was a fundamental breach.²⁶⁶

A severe deprivation sustained by the buyer’s is only part of the formulation for the fundamental breach standard. The test of the buyer’s deprivation is subject to an exception or excuse for the seller: did the seller foresee, and would a

<http://www.unilex.info/case.cfm?id=905>.

261. S.A.P., Jul 30, 2010 (R.A.J. No. 169/2010) (Spain), English abstract available at <http://cisgw3.law.pace.edu/cases/100730s4.html>.

262. Bundesgerichtshof [BGer] [Federal Supreme Court], May 18, 2009, docket no. A_68/2009 (Switz.), translation available at <http://cisgw3.law.pace.edu/cases/090518s1.html>.

263. See, e.g., Oberster Gerichtshof [OGH] [Supreme Court] May 23, 2005, docket No. 3Ob193/04k, ENTSCHEIDUNGS DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] (Austria), translation available at <http://cisgw3.law.pace.edu/cases/050523a3.html>.

264. See, e.g., Oberster Gerichtshof [OGH] [Supreme Court] June. 21, 2005, docket No. 5 Ob 45/05m ENTSCHEIDUNGS DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] (Austria), translation available at <http://www.unilex.info/case.cfm?id=1047>; see also S.T.S., Jan. 17, 2008 (R.A.J. 81.2001) (Spain) translation available at <http://cisgw3.law.pace.edu/cases/080117s4.html> (explaining that no fundamental breach occurred when the seller tendered 300 used automobiles, as required by the contract, with scratches and dents from ordinary use).

265. Vestre Landsret [Western High Court], Nov. 10, 1999, docket no. B-29-1998 (Den.), translation available at <http://cisgw3.law.pace.edu/cases/991110d1.html>.

266. *Id.*

reasonable person of the same kind in the same circumstances foresee, such a result?²⁶⁷ The applicability of this exception based on objective foreseeability has been characterized by a Spanish court as a “lack of predictability of the outcome would create a situation that could be regarded as a fortuitous event or one of force majeure.”²⁶⁸ Whether from the express terms of the agreements, the negotiations, practices between the parties,²⁶⁹ or seller’s knowledge of the buyer’s intended use or knowledge of industry standards, if the seller or a reasonable person in the seller’s position could foresee the substantial deprivation of the buyer’s expectations, no excuse is available for the seller.²⁷⁰

The presence of an excuse or exemption in the standard raises the question of timing. When must the seller have notice of the essential nature of the buyer’s use or expectation? The alternatives are varied: at the conclusion of the contract, before the seller’s performance, or at the time of the breach? Some authorities argue that the timing of foreseeability is consistent with that provided in the predecessor provision in the Hague Convention on Uniform Law on the International Sale of Goods, Article 10.²⁷¹ Therefore, the seller must foresee the results, the buyer’s severe deprivation from the breach, at the conclusion of the contract.²⁷² There is contrary and persuasive authority, including the legislative history of Article 25, which

267. See CISG, *supra* note 1, art. 25.

268. S.A.P., July 30, 2010 (R.A.J. No. 169/2010) (Spain) (quoting S.T.S., Jan. 17, 2008 (R.A.J. 81.2001) (Spain)), English abstract *available at* <http://cisgw3.law.pace.edu/cases/100730s4.html> (“[Fundamental breach is] a system of contractual liability based on a criterion of objective imputation, attenuated, however, by exceptions—corresponding to the hypotheses of fortuitous events and force majeure under domestic law—and by a parameter of reasonableness.”).

269. See CISG, *supra* note 1, art. 9(1) (“The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.”); *see, e.g.*, Landgericht Ellwangen [LG] [regional court] Aug. 21, 1995, 1 KfH O 32/95 (Ger.), English translation *available at* <http://cisgw3.law.pace.edu/cases/950821g2.html> (holding that based on previous commercial relationships parties impliedly agreed that the goods should comply with German standards for food).

270. Schlechtriem, *supra* note 254, para.12–6 at 288–91.

271. United Nations Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, Aug. 23, 1972, 834 U.N.T.S. 171, art. 10 at 189 (“An acceptance cannot be revoked except by a revocation which is communicated to the offer or before or at the same time as the acceptance.”).

272. Schlechtriem, *supra* note 254, para.15 n.50, at 290.

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rejects the prior uniform law's approach that foreseeability is tested at the conclusion of the contract.²⁷³ If communications between the parties, or other knowledge is received by the seller, that clarifies the importance of an aspect of seller's performance in advance of its performance, or the parties agree to modify the terms of the contract, the test of foreseeability must include the knowledge of the buyer's expectation as influenced by the clarification or modification of the contract.²⁷⁴ "However, information receive[d] too late to affect performance seems outside the scope of Article 25 . . . the foreseeability principle presumably is designed to give [the seller] an opportunity to give special attention to minor details of performance the importance of which he could not otherwise have anticipated."²⁷⁵

5. Timing of the Notice of Avoidance

Avoidance is only accomplished by notice of avoidance. The reasonable time for giving notice of avoidance commences at the point the buyer knew or ought to have known of the fundamental breach.²⁷⁶ Neither complaints nor notification of breach constitute avoidance.²⁷⁷ The following cases illustrate the need for the buyer to expeditiously notify the seller of its avoidance or cancellation of the contract. A buyer received its delivery of Christmas trees on December 2 and notified the seller that the quality of the shipment was "fine," but the height was inconsistent with the specifications.²⁷⁸ The buyer requested a price reduction and the seller refused.²⁷⁹ On December 4, the buyer gave the same notice and request.²⁸⁰ The seller refused.²⁸¹ On December 10, the buyer gave notice of

273. HONNOLD, *supra* note 60, § 183, n.5.

274. *See, e.g.*, App., 20 Marzo 1998, Diritto del commercio internazionale, 1999, 455–59 (It.), English abstract available at <http://www.unilex.info/case.cfm?id=275> (deciding that the seller's failure to deliver the goods on a fixed date held a fundamental breach when clarifications between the parties after contracting affirmed the importance of the date and the buyer expected to receive the goods before end of year sales).

275. HONNOLD, *supra* note 60, § 183, at 277.

276. CISG, *supra* note 1, art. 49(2)(b)(i).

277. *Id.* art. 26.

278. Vestre Landsret [Western High Court], Nov. 10, 1999, docket no. B-29-1998 (Den.), translation available at <http://cisgw3.law.pace.edu/cases/991110d1.html>.

279. *Id.*

280. *Id.*

281. *Id.*

avoidance.²⁸² The Denmark Western High Court held that the buyer's notice of avoidance on December 10 was untimely because the season for Christmas trees ended within fourteen days, thus requiring sale in a short period of time.²⁸³ The court concluded the trees would be without value.²⁸⁴ Observe that the attempts to negotiate a price reduction were not used to enlarge the time for providing reasonable notice of avoidance but rather robbed the buyer of the right of avoidance. Moreover, the nature of the goods and the seller's ability to resell them impacted the court's determination of whether notice was timely. The buyer here is in a difficult position. The seller has committed a fundamental breach and refused to negotiate. The buyer's options were numerous: 1) an effective avoidance, pushing the goods back on the seller; 2) using the goods in its business, suing and recovering the difference in value by using the Article 50 Price Reduction remedy;²⁸⁵ 3) rejecting the goods and retaining them pending reimbursement of its expenses;²⁸⁶ 4) storing the goods with a third party;²⁸⁷ or 5) selling them if they are perishable or if preserving the rejected goods involves unreasonable expense.²⁸⁸ The trees are perishable; observe that unlike the Code, the Convention does not require the sale of goods whose value is subject to rapid devaluation but only those goods that are subject to rapid deterioration.²⁸⁹ Christmas trees fall within the latter category.

Untimely performance may also serve as a basis for avoidance. Such as a case where a seller fails to deliver the goods on the date fixed by the contract.²⁹⁰ An Italian buyer and Hong Kong seller had contracted to sell knitted goods to be delivered on Dec. 3, 1990.²⁹¹ The goods were not delivered on

282. *Id.*

283. *Id.*

284. *Id.*

285. CISG, *supra* note 1, art. 50.

286. *Id.* art. 86.

287. *Id.* art. 87.

288. *Id.* art. 88(2).

289. *Id.* art. 88.

290. *See, e.g.,* App., 20 Marzo 1998, Diritto del commercio internazionale, 1999, 455-459 (It.), English abstract available at <http://www.unilex.info/case.cfm?id=275> (the seller's failure to deliver the goods on a fixed date held a fundamental breach when clarifications between the parties after contracting affirmed the importance of the date and the buyer expected to receive the goods before end of year sales).

291. *Id.*

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the 3rd so the buyer canceled the purchase order.²⁹² In interpreting the delivery clause, the court determined that precise compliance with the delivery term was of fundamental importance to the buyer and the buyer expected to receive the goods in time for the holidays.²⁹³ The court held that the buyer was entitled to declare the contract avoided.²⁹⁴ The cancellation of the purchase order sent by the buyer was equivalent to a notice of avoidance.²⁹⁵

Article 6 of the Convention empowers parties to vary or opt-out of any of the provisions.²⁹⁶ A Yugoslav seller and an Italian buyer concluded a contract for the sale of cow hides.²⁹⁷ Exercising the right granted by Article 6, the parties agreed that the buyer would give the seller notice of the lack of conformity of the goods within one month of their arrival accompanied by a statement from an independent inspector.²⁹⁸ The buyer lost its right to rely on a lack of conformity because it did not give notice of the defects within the contractual period; because the defect was easy to discover, the contractual notice period was reasonable.²⁹⁹

In another matter, a buyer's notice of avoidance was timely when made six days after the seller communicated: 1) that its obligation of performance was completed, even though the goods had not been assembled; 2) that the delay in signing the final acceptance was beyond its control; and 3) that the guarantee period for the goods had expired.³⁰⁰ Notice of avoidance was untimely when the buyer discovered that the goods were non-conforming at delivery, but it did not provide notice until after an "expertise" (third party inspection).³⁰¹

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. CISG, *supra* note 1, art. 6.

297. Case No. 7331 of 1994, 6 ICC Int'l Ct. Arb. Bull. 73, English abstract available at <http://www.unilex.info/case.cfm?id=140>.

298. *Id.*

299. *Id.*

300. Sales of Technical Equipment, (Russ. v. Austria), VAS-11307/09, (High Arb. Ct. of Russ. 2009), English abstract available at <http://cisgw3.law.pace.edu/cases/091015r1.html>.

301. *See, e.g.*, Cour d'Appel [CA] [regional court of appeal] Paris, 5e ch., June 14, 2001, JDI 2002, 483, Obs. Cl. Witz (Fr.), *aff'd*, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] com., Sept. 24, 2003, Bull. civ. 2003, I, 139, obs. Philippe Delebecque (Fr.), available at <http://www.cisg.fr/decision.html?lang=fr>.

Even though origin of the defects could only be ascertained after an expertise, because the defects themselves were apparent the buyer should not have waited for the results of the expertise before asking for avoidance of the contract.³⁰²

Finally, a buyer communicated the complaints of its end user of the non-conformity of coal delivered by the seller five days after receiving notice from its end user.³⁰³ However, the buyer's notice of avoidance four months later was untimely.³⁰⁴ The underlying policy goals of rejection, revocation, and avoidance are similar: preserving the contractual relationship and minimizing waste. A buyer's exercise of the right of avoidance is in effect, substantially similar to a buyer's exercise of the power of rejection and revocation of acceptance in a contract subject to the Code. But, these relative rights are not identical. Rejection, subject to the seller's right to cure, is far more efficient and easily obtainable than either revocation or avoidance. Avoidance places the most significant burden of proof on the buyer. The breach must be severe and foreseeable. Rejection only requires an insubstantial defect and revocation a substantial impairment of the value to the *buyer*! Furthermore, for U.S. domestic parties who are accustomed under the Code to negotiating and repairing from the time the defect is discovered until it is clear that the seller cannot rectify its default, such a course of performance works against the buyer's timely avoidance of the contract. The clock for avoidance commences at the time the buyer knew, or ought to have known, of the defect, and the clock stops at the end of a reasonable time. This time period is not extended, as under the Code, by negotiations between the parties. However, a good faith interpretation of the Convention prohibits avoidance until the seller has completed its proffered cure if the buyer has indicated that it will permit the seller to cure.³⁰⁵ As commercial parties determine which of the two regimes should govern their international transaction these are the considerations.

302. *Id.*

303. Oberlandesgericht München [OLG] [Provincial Court of Appeal] Mar., 02, 1994, 7 U 4419/93 (Ger.), English translation *available at* <http://cisgw3.law.pace.edu/cases/940302g1.html>.

304. *Id.*

305. *See, e.g.*, Trib., 12 Dicembre 2001, Rivista di Diritto Internazionale Privato e Processuale, 2003, 150–155 (It.), English translation *available at* <http://cisgw3.law.pace.edu/cases/011213i3.html> (holding that buyer's giving of notice until seller's attempts at cure failed is not considered as delayed).

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6. Avoidance and Instalment Contracts

An instalment contract is one that requires delivery in several or separate lots³⁰⁶ and includes separate contracts, if the contracts are “considered a unitary transaction from an economic point of view.”³⁰⁷ The Convention empowers the buyer to exercise the right of avoidance with respect to each instalment. Unlike the Code, the standard remains the same for instalment contracts as for unitary (one lot delivery) contracts; the seller’s fundamental breach of any of its obligations for *any* instalment empowers the buyer to avoid the contract as to that instalment.³⁰⁸ As is often the case, the seller’s fundamental breach as to one instalment may create an apprehension regarding the quality of seller’s future performance of the remaining instalments. Article 73 recognizes that possibility and provides that if a party’s “failure to perform any of his obligations” with any instalment “gives the other party *good grounds* to conclude that a fundamental breach of contract will occur with respect to future instalments,”³⁰⁹ future instalments may be avoided as well on reasonable notice. Courts and tribunals have held that the buyer has “good grounds” to conclude that a fundamental breach will occur as to future instalments in a number of cases justified not only on the quality of the goods delivered but also the seller’s conduct as a contracting party. If the buyer’s expectations in the contract are substantially shaken, or its ability to perform its forward obligations is severely hampered,

306. See Handelsgericht Zürich [HG] [Commercial Court], Feb 5, 1997, docket no. HG 95 0347 (Switz.), English translation *available at* <http://cisgw3.law.pace.edu/cases/970205s1.html> (discussing contract for several deliveries of Italian salad oil); see also Landgericht Ellwangen [LG] [regional court] Aug. 21, 1995, 1 KfH O 32/95 (Ger.), English translation *available at* <http://cisgw3.law.pace.edu/cases/950821g2.html> (discussing an installment contract for paprika).

307. Barley Case, (Austria v. Pol.), *Österreichische Zeitschrift für Rechtsvergleichung*, 1998, 211–20 (Schiedsgericht der Börse für Landwirtschaftliche Produkte – Wien 1997), English translation *available at* <http://cisgw3.law.pace.edu/cases/971210a3.html>. Cf. U.C.C. § 2–612(1) (“An ‘installment contract’ is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause ‘each delivery is a separate contract’ or its equivalent.”).

308. CISG, *supra* note 1, art. 73(1) (“In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.”).

309. *Id.* art. 73(2). (emphasis added).

avoidance of future deliveries becomes an option. The relatively few cases addressing Article 73 illustrate the breadth of its application. Avoidance of future deliveries was authorized for the following “good grounds”: the quality of the goods delivered;³¹⁰ the seller’s demand that a price increase for future deliveries mirror an increase in market price;³¹¹ the seller failed to deliver the first instalment after the buyer set an additional time period for delivery;³¹² the pervasiveness of the non-conformity; a party’s bad faith conduct;³¹³ the seller’s untimely deliveries affected the buyer’s own production processes;³¹⁴ the seller’s ability to supply conforming substitute goods within a reasonable time was doubtful;³¹⁵ and a series of non-fundamental breaches, the cumulative effect of which gives the buyer “good grounds” to believe that a fundamental breach will occur in future instalments.³¹⁶

Finally, not only may the buyer avoid any instalment if it is fundamentally flawed without having to establish “good grounds,” the buyer may avoid previous deliveries and future deliveries that are so interdependent that the buyer’s contemplated use of the goods cannot be achieved.³¹⁷

310. See, e.g., Case No. 9887 of 1999, 11 ICC Int’l Ct. Arb. Bull. 109 (2000), English abstract available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=469&step=FullText> (deciding that delivery of non-conforming chemical a fundamental breach but buyer fails to give notice of avoidance).

311. See, e.g., Sour Cherries Case (Austria v. Hung.), Case No: Vb/97142 of 1999 (Hung. Chamber of Commerce and Indus. Ct of Arb.), English abstract available at <http://www.unilex.info/case.cfm?id=425>.

312. See, e.g., Handelsgericht Zürich [HG] [Commercial Court], Feb 5, 1997, docket no. HG 95 0347 (Switz.), English translation available at <http://cisgw3.law.pace.edu/cases/970205s1.html> (deciding that failure to perform their obligations in respect to the first installment gave the buyer good grounds for concluding that a fundamental breach would occur also with respect to future installments).

313. See, e.g., Cour d’Appel [CA] [regional court of appeal] Grenoble, com., Feb. 22, 1995, JDI 1995, 632, note Philippe Kahn, English abstract available at <http://www.unilex.info/case.cfm?id=83> (holding that buyer misrepresents the final destination of goods).

314. See, e.g., S.A.P., Nov. 3, 1997 (Revista Jurídica de Catalunya Jurisprudencia 1998, II, 411 (Sp.), English abstract available at <http://www.unilex.info/case.cfm?id=313>.

315. See, e.g., Landgericht Ellwangen [LG] [regional court] Aug. 21, 1995, 1 KfH O 32/95 (Ger.), English translation available at <http://cisgw3.law.pace.edu/cases/950821g2.html>.

316. See, e.g., Trevor Bennett, *Article 73*, in BIANCA–BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW 531–37, ¶ 2.7 (1987).

317. CISG, *supra* note 1, art. 73(3) (“A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in

7. The Code – Rejection, Revocation of Acceptance & Installment Contracts

Regrettably, unlike the Convention, the domestic law approach to installment contracts is complex and does not mirror in any respect the standard applicable for the exercise of the right of rejection in unitary contracts, contracts with a one lot delivery. In contrast to the perfect tender rule for contracts that envision a one lot delivery, rejection of an installment is only available if the value of the installment is substantially impaired and the non-conformity cannot be cured.³¹⁸ Unless the non-conformity of one installment impairs the value of the whole contract, the buyer must accept a substantially impaired installment if the seller gives adequate assurance of cure.³¹⁹ Revocation of this statutorily imposed acceptance becomes an option for the buyer if the seller fails to seasonably cure the impairment.³²⁰ The foundational policies of the Code, to maintain the contractual relationship and to facilitate performance, are reflected in the elevated standards applicable to installment contracts. These standards protect the seller's reliance interest in a contract that requires multiple performances, unless the value of the whole contract is substantially impaired. The seller may have entered into supply contracts for raw materials to be used for its performances, enlarged its production capacity, purchased new equipment, expanded its labor force, or otherwise changed its position in reliance on the agreement.

a. Substantially Impaired Value of an Installment

A substantial impairment in value has been held to be

respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.”).

318. U.C.C. § 2-612 (1) (2001); *see also* William H. Lawrence, *Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 WM. & MARY L. REV. 1635, 1635-90 (1994) (encouraging the adoption of the perfect tender rule for installment contracts in Amended Article 2).

319. *See* U.C.C. § 2-612(2) (2001).

320. *See* U.C.C. § 2-608(1)(a); *see also* Automated Controls, Inc. v. Mic Enters., Inc., 27 UCC Rep. Serv. 661, 672 (D. Neb. 1978) (finding that the buyer has the right to cancel an installment contract if the value of the entire contract is substantially reduced by the non-conformity), *aff'd*, Automated Controls, Inc. v. MIC Enters., Inc., 599 F.2d 288 (8th Cir. 1979) (holding that MIC has the right to cancel the installments because the defects had “substantially impaired the value of the whole contract”).

analogous to a material breach of contract³²¹ or insubstantial performance.³²² However, the two are distinguishable. Four primary issues govern the determination of whether the breaching party's performance was insubstantial or substantial: 1) the extent to which the buyer receives its expected benefit under the contract; 2) whether the deficiency can be compensated with damages; 3) the extent to which the breaching party will suffer a forfeiture if the breach is determined to be material; and 4) likelihood that the party failing to perform or to offer to perform will cure its failure.³²³ The buyer's receipt of its expected benefit from the seller's performance is a condition precedent to its duty to accept and pay for the goods.³²⁴ If the loss of benefit resulting from seller's failure of performance can be compensated with damages, or the default in performance can be cured, the breach may be treated as partial or insubstantial rather than material. Similarly, if the breaching party has changed position in reliance on the nonbreaching party's performance, by acquiring raw materials or partly performing by manufacturing the goods, forfeiture may result. In this scenario a forfeiture is "the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially" by preparing to perform or performing with an expectation of receiving the agreed compensation.³²⁵ In determining the materiality of the seller's breach, emphasis is placed on the interests of the nonbreaching party but requires a weighing of the relative interests of both the nonbreaching and the

321. See *Midwest Mobile Diagnostic Imaging L.L.C. v. Dynamics Corp. of Am.*, 965 F. Supp. 1003, 1013 (W.D. Mich. 1997) (citing *Durfee v. Rod Baxter Imp., Inc.*, 262 N.W.2d 349 (Minn. 1978)), *aff'd*, 1998 WL 537592, at *1 (6th Cir. 1998).

322. See RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 241 (1979) ("In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.").

323. *Id.* at § 241(d)

324. *Id.* at § 241 cmt. b.

325. *Id.* § 229 cmt. b.

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breaching party.³²⁶ The analysis is designed to reach a reasonable result in view of similarly situated parties in similar circumstances.³²⁷

The language of UCC Article 2 suggests that substantial impairment of value to the buyer carries a slightly different connotation than a determination of a reasonable result based on similarly situated parties.³²⁸ Rather, a substantial impairment in value to the buyer is based on the buyer's specific need, judgment, or perspective even if unknown to the seller at the time of contracting.³²⁹ Substantial impairment may be based not only on the quality of the goods but also the timeliness of the seller's performance, the quantity of the goods delivered, or the desired assortment of the goods.³³⁰ There is, however, balance in the test. Trivial, insignificant needs are not cognizable; the severity of the deprivation of the anticipated benefit is the key consideration. A buyer's subjective need must also be objectively reasonable.³³¹ If the buyer's objectively demonstrated need cannot be cured, the buyer may reject the installment.³³² The likelihood of the seller's forfeiture is not a

326. See 10 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 946 (Interim ed. 2008).

327. *Id.*

328. See U.C.C. § 2-608(1) (2001).

329. See *id.* § 2-608(1) cmt. 2; see also HAWKLAND, *supra* note 28, § 2-612:3 (“[T]he test is not different from that employed in the doctrine of revocation of acceptance”); Clemens Pauly, *The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law*, 19 J.L. & COM. 221, 228 (2000) (stating that under UCC § 2-610 and § 2-612 the two pronged test of “substantiality” is the same).

330. See U.C.C. § 2-612 cmt. 4 (2001).

331. See *Allen v. Rouse Toyota Jeep, Inc.*, 398 S.E.2d 64, 65 (N.C. Ct. App. 1990) (holding that the substantial impairment test of UCC § 2-608 is a two-part test which considers both the buyer's subjective reaction to the alleged defect and the objective reasonableness of this reaction, taking into account the good's market value, reliability, safety, and usefulness for purposes for which similar goods are used); see also *Colonial Dodge, Inc. v. Miller*, 362 N.W.2d 704, 707 (Mich. 1984) (holding that revocation of acceptance appropriate for a car missing a spare tire the buyer's occupation demanded that he travel extensively, sometimes in excess of 150 miles per day on Detroit freeways, and often in the early morning hours and he was afraid of a tire going flat and of being helpless until morning business hours; the buyer's fears were not unreasonable).

332. U.C.C. § 2-612(2) (2001); see, e.g., *Graulich Caterer Inc. v. Hans Holterbosch, Inc.*, 243 A.2d 253, 261 (N.J.Super.Ct.App.Div. 1968) (holding that food vendor's failure to deliver goods that conformed to the accepted sample was a substantial impairment because they were incurable and that the tender of the second non-conforming installment resulted in an impairment of the whole).

factor. If the defect cannot be cured; the seller retakes possession of the rejected goods.³³³ The seller has the opportunity to avoid loss by curing its performance. Although the nature of the breach is substantially similar to that required for a material breach, establishing a substantial impairment in value is more readily attainable because the possibility of the seller's forfeiture is not weighed as part of the test.

Assuming the seller gives adequate assurance of cure and attempts to cure even with an offer of a money allowance,³³⁴ what standard is applicable for testing the buyer's obligation to accept the cure? The Code is silent on this point. If the standard of performance in the first instance is substantial performance, which imposes a duty of acceptance on the buyer despite insubstantial defects, the standard should not shift to the perfect tender rule for determining the effectiveness of the seller's attempt to cure. If the buyer is obligated to accept an installment upon the tender of substantially conforming goods with a right to seek damages for the partial deviation in value, this standard should remain fixed and is the minimum goal of any cure.³³⁵ An effective cure that meets the substantial performance standard is also timely.³³⁶ Consistent with the consideration of the timeliness of the tender for determining if the tendered goods are substantially impaired in value, the timeliness of the cure is a factor in determining if the cure achieves the substantial performance test.³³⁷ If substantial

333. William H. Lawrence, *Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 WM. & MARY L. REV. 1635, 1635-90 (1994).

334. U.C.C. § 2-612 cmt. 5 (2001) ("Cure . . . can usually be afforded by an allowance against the price, or . . . further delivery or a partial rejection.").

335. See *Midwest Mobile Diagnostic Imaging*, 965 F. Supp. at 1013 (W.D. Mich. 1997) (identifying two possible standards for cure without resolving the issue because the tendered cure failed both the perfect tender and the substantial performance standards), *aff'd*, 1998 WL 537592, at *1 (6th Cir. 1998) (holding that tendering a non-conforming product substantially impairs the remaining a value of the whole contract and the damages awarded are commercially reasonable expense to cover the breach).

336. See, e.g., *S. J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 529 (3d Cir. 1978) (holding that additional requirement of timely delivery is governed by U.C.C., and concrete supplier's failure to perform consistent with the contract schedule for delivery breached the whole contract; contractor's choice to continue with the defaulting supplier or use an untested supplemental supplier was not a failure to mitigate its damages).

337. See *Midwest Mobile Diagnostic Imaging*, 965 F. Supp. at 1012 (holding that tender of cure of the first installment was made within

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performance is achieved, the buyer must accept the goods as cured and employ rights available through Section 2-714 for any insubstantial non-conformity to the contract.³³⁸ To impose a perfect tender rule on the seller for determining an effective cure negates the policy goals of Section 2-612 and conforms the installment contract standard of substantial performance to a perfect tender rule any time a seller tenders substantially impaired goods or insubstantially performs. This penalizes the seller for its breach and is inconsistent with the fundamental goal of compensation for breach of contract, rather than punishment.³³⁹ The parties may, however, avoid this effect by an implied term arising through course of dealings, other circumstances, or establishing an express term in their agreement, that mandates strict conformity of the goods tendered or that defines when an installment is substantially impaired and cannot be cured.³⁴⁰ Without such a term, if the seller's cure fails to satisfy the substantial performance standard, the buyer should rightfully reject the cure and revoke its acceptance of the substantially impaired installment—the buyer accepted the substantially impaired installment reasonably assuming that the seller would cure the installment and the non-conformity has not been seasonably cured.³⁴¹

reasonable time from the original agreed upon delivery date).

338. U.C.C. § 2-714 (2001) (“Buyer’s Damages for Breach in Regard to Accepted Goods: (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable. (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (3) In a proper case any incidental and consequential damages under the next section may also be recovered.”).

339. See U.C.C. § 1-305 (2001) (“[T]he remedies provided by the Uniform Commercial Code must be liberally administered to the end that the aggrieved party may be put in as good of a position as if the other party had fully performed”); see also *Hubbard v. UTZ Quality Foods, Inc.*, 903 F. Supp. 444, 450 (W.D.N.Y. 1995) (holding that the purpose of the substantial impairment standard is to preclude a buyer from canceling the contract for trivial defects); E. ALLAN FARNSWORTH, *CONTRACTS*, 730 (4th ed. 2004) (“Our system of contract remedies is not directed at *compulsion of promisors to prevent breach*; it is aimed, instead, *at relief to promisees to redress breach.*”) (emphasis added).

340. U.C.C. § 2-612 cmt. 4 (2011) (stating that strict conformity may apply because of an express term or circumstances).

341. *Id.* § 2-608(1)(a).

b. Substantial Impairment of the Whole Contract

Section 2–612 empowers the buyer to reject any installment or series of installments that substantially impairs the value of the whole contract and to treat the tender as a breach of the whole contract.³⁴² Comment 6 to Section 2–612 cryptically provides that the impact of a non-conforming installment on the impairment of the whole contract depends “not on whether such non-conformity indicates an intent or likelihood that the future deliveries will also be defective, but whether [it] substantially impairs the value of the whole contract.”³⁴³ When does a non-conforming installment substantially impair the whole? *Plotnick v. Pennsylvania Smelting & Refining Co.*, a case interpreting the predecessor provision to Section 2–612, Section 45(2) of the Uniform Sales Acts, provides guidance on identifying that conduct which results in the substantial impairment of the *whole* contract.³⁴⁴ In *Plotnick*, a Canadian seller agreed to sell battery lead in 200 ton lots to a Pennsylvania buyer, who promised to pay 8.1 cents per pound.³⁴⁵ Sixty-three percent of the price was to be paid immediately after delivery and the balance four weeks after delivery.³⁴⁶ The parties contemplated full performance of the agreement no later than December 25, 1947, two months after they entered their agreement.³⁴⁷ In a rising market, the seller delivered only one lot before the end of December, one in January, and, with a balance of 290,000 pounds remaining, a third in March of 1948.³⁴⁸ Thereafter, the buyer demanded full performance within thirty days, withheld the price of the third shipment, and threatened to cover in the open market and sue for damages.³⁴⁹ Later, the seller canceled the contract and sued for breach of the whole contract.³⁵⁰ The trial court held that the buyer’s failure to pay the 63% of the price of the third installment was a breach, but not a breach of the whole contract.³⁵¹ An impairment of the whole contract results, the

342. *Id.* § 2–612(3).

343. *Id.* § 2–612 cmt. 6.

344. *Plotnick v. Pa. Smelting & Ref. Co.*, 194 F.2d 859 (3d Cir. 1952).

345. *Id.* at 861.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 862.

350. *Id.*

351. *Id.*

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court reasoned:

first, if non-payment for a delivered shipment may make it impossible or unreasonably burdensome from a financial point of view for the seller to supply future installments as promised. Second, buyer's breach of his promise to pay for one installment may create such reasonable apprehension in the seller's mind concerning *payment* for future installments that the seller should not be required to take the risk involved in continuing deliveries.³⁵²

Without the buyer's payment, can the seller acquire the raw materials to perform the contract? Is the payment or installment essential for the non-breaching party's performance of the agreement? If yes, a substantial impairment of the whole contract results. Does the buyer's failure to pay create a reasonable apprehension about the buyer's willingness to pay or its ability to pay?³⁵³ If yes, a substantial impairment of the whole contract results. Likewise, for the buyer, does the non-conformity, the quality or timing of the seller's performance, create a reasonable apprehension regarding the seller's willingness or ability to supply goods of the quality, quantity, or within the time frame required to meet the buyer's needs so that it can pay for the contract goods?³⁵⁴ Can the buyer operate its trade or business as envisioned, producing an income stream to perform its contractual obligation?³⁵⁵ In *Plotnick*, the court concluded that the buyer's withholding of the price as a set-off, coupled with its offer to pay 75% rather

352. *Id.*

353. William H. Lawrence, *Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 WM. & MARY L. REV. 1635, 1635-90 (1994) (arguing that the right to cancel the whole arises from an anticipatory repudiation of the seller's obligation not to impair the buyer's expectations of the promised performance).

354. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 8-3, at 444 (4th ed. 1995).

355. *See, e.g.,* Midwest Mobile Diagnostic Imaging, 965 F. Supp. at 1016 (W.D. Mich. 1997) (material inconvenience or injustice results if aggrieved party is forced to wait and receive only partial performance because the seller has repudiated a portion of its obligation). *Cf. Bodine Sewer, Inc. v. E. Ill. Precast, Inc.*, 493 N.E.2d 705, 713 (Ill. App. Ct. 1986) (holding that defective deliveries pursuant to an installment contract were consistently corrected and the purchaser, during the time of the contract's performance, voiced no concerns with respect to delays occasioned by the defective deliveries, the non-conforming deliveries did not substantially impair the value of the entire contract).

than 63% of the price or to pay by sight draft, an instrument that requires immediate payment upon presentment, indicated that the buyer did not lack either the willingness or the ability to perform as agreed, the buyer was not repudiating its executory performance obligation.³⁵⁶ The Official Comment directs that apprehension that additional defaults may occur is an insufficient basis for asserting a breach of the whole.³⁵⁷

Unlike the Convention that mandates one test for avoiding a unitary contract, an installment, or future deliveries, the Code requires three different standards. The clarity and ease of application of one standard on a consistent basis enhances uniformity of interpretation and uniformity in application among the national courts, produces a brighter line for parties seeking to resolve disputes without litigation, and thereby minimizes the loss of time and resources. The dearth of domestic case authority on installment suggests that attorneys hesitate to venture into the complexities of Section 2–612 and that the goal of the drafting committee of making the section “more mercantile”³⁵⁸ has failed.

III. CONCLUSION

Agreements for the sale and purchase of goods between commercial parties with their places of business in different contracting states are subject to the Convention. Article 6 of the Convention empowers these parties to vary or derogate from all its provision but one term. This limitation is only triggered if one party has its place of business in a contracting that made an Article 96 Reservation imposing an obligation that agreements be reduced to a writing.³⁵⁹ Other than this limitation, the parties may agree to opt–out of the Convention or to fine tune their agreement as they desire or to contract with standard terms that vary or derogate from the Convention. This flexibility is not offered by the Code. Coupled

356. Plotnick, 194 F.2d 859.

357. U.C.C. § 2–612 cmt. 6 (2011).

358. *Id.* § 2–612, Official Cmt. (2001).

359. *See* CISG, *supra* note 1, art. 96 (“A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.”).

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with its inherent flexibility, the Convention offers greater parity between the parties on the right and obligation to cure. Buyers are likely to favor the right to compel its seller to make a substitute delivery or to make repairs that the Convention authorizes. Sellers are more likely to be drawn to the Code because only the seller has the right to cure and a buyer cannot insist on a cure absent a contract term to the contrary.

The Code permits its buyers to extricate themselves in good faith from an agreement with a one-lot delivery if tendered or delivered goods have insubstantial defects and the seller fails to seasonably provide notice of cure. On the other hand, the Convention imposes an obligation of performance on the buyer unless a breach is severe and foreseeable. The distance between the parties and the resulting waste from shipping and handling cost alone justify the elevated standard reflected in the Convention. In installment contracts, the complexity of the Code with its varying standards is likely to be unattractive to the parties and their counsel. The Convention provides a straightforward, uncomplicated standard: fundamental breach for an instalment or the whole contract.

Both legal regimes authorize inspection by the buyer and require notice of any non-conformity. The Code offer a more flexible nebulous standard of “a reasonable time” when compared with the staccato rhythms of examination imposed by Article 38 followed by notice of any defect within a reasonable time as dictated by the Convention. Any adverse impact of Article 38, however, can be ameliorated by an agreement between the parties defining the period for examination and/or notice. The choice between the two regimes should be based on the client’s assessment of its business model, its risk tolerance, the custom and usages of its industry, and its contracting goals. A U.S. domestic business, in an effort to establish new markets for its goods in developing nations, might suggest the Convention as the governing law in order to develop trust with parties who might otherwise fear being overreached, yet, include in the agreement a choice of forum that facilitates resolution of disputes through the use of discovery, procedural tools, and processes with which the U.S. domestic party is familiar and fine tune the Convention’s provisions by agreement. The Convention greatly increases opportunities for parties to order their relationship to reflect their business goals and objectives.