

# CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THE CONVENTION AND THE CODE\*

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*In view of the concentrated nature of this course, Professor Stone also prepared an "Overview" and a detailed "Outline" keyed to the "Overview" to afford an overall perspective of the subject matter.*

*This article and its appendix ("Overview" and "Outline") are submitted in the belief that they will be helpful for others teaching concentrated courses involving the CISG.*

## INTRODUCTION

In April, 1980, a Diplomatic Conference of sixty-two nations, which was held in Vienna, approved the United Nations Convention on Contracts for the International Sale of Goods ("Convention," or "CISG"). The Convention was drafted by the United Nations Commission on International Trade Law ("UNCITRAL") which consisted of members representing countries in each region of the world,<sup>1</sup> and representing the differing legal systems.<sup>2</sup> The Convention came into force on January 1, 1988.<sup>3</sup>

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\* Derived from B. Stone, T. Coleman, *International Sales: The Convention and the Code*, vol. XXII *Cincia Política Comparada y Derecho y Economía en Las Relaciones Internacionales* 7177-7200 (1993).

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1. Africa, Asia, Eastern and Western Europe, Latin America, Australia, Canada and the United States. See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* §§ 4-10 (Harry M. Flechtner, 4th ed. 2009) [hereinafter HONNOLD] (Professor Honnold was United States Representative, United Nations Commission on International Trade Law).

2. E.g., civil law, common law and socialist countries. See HONNOLD, *supra* note 1, § 9.

3. Peter Winship, *An Introduction to the United Nations Sales Convention*, 43 *CONSUMER FIN. L. Q. REP.* 22, 22 (1989), available at

In 1952 in the United States, the National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated the Uniform Commercial Code (“Code” or “UCC”) for adoption by the several States of the United States.<sup>4</sup> UCC Article 2, which deals with sales of goods, was eventually enacted in 49 of the 50 States.<sup>5</sup> Subsequently amendments/revisions to the Code were promulgated, most recently in 2010. Article 2 has been little affected since the 1970s and will be referred to as the pre-2003 version.

This paper will review the principal substantive provisions of the Convention and will comment on the comparable or contrasting UCC rule. Further, certain techniques employed by the drafters of the Convention and the Code will be examined. On occasion, counseling suggestions will be proffered.

## 1. SPHERE OF APPLICATION

### A. *Contracts Subject to Convention*

#### (1) *Basic Rules On Applicability: Internationality.*<sup>6</sup>

This Convention applies to contracts of [*sale of goods*] between sellers and buyers (1) who have their places of business in different

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[http://www.cisg.law.pace.edu/cisg/biblio/winship2.html#pw\\*](http://www.cisg.law.pace.edu/cisg/biblio/winship2.html#pw*). The official United Nations text of the CISG appears in Arabic, Chinese, English, French, Russian and Spanish. See *Texts of the CISG*, CISG.LAW.PACE.EDU, <http://www.cisg.law.pace.edu/cisg/text/text.html> (last visited Feb. 25, 2015). Furthermore, at least 83 countries are “Contracting States.” See *CISG: Table of Contracting States*, CISG.LAW.PACE.EDU, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited Feb. 25, 2015).

4. See James J. White, Robert S. Summers, Robert A. Hillman, *UCC PRACTITIONER’S TREATISE SERIES* (6th Ed. 2014-2015) (Finding Aids Pamphlet).

5. The State of Louisiana has adopted several Articles of the UCC, but not Article 2. Sales.

6. See *U.N. Convention on Contracts for the International Sale of Goods*, 2010 art. 1, 10, 95, U.N. Sales No. E.10.V.14 [hereinafter CISG].

States, and (2) when the States are Contracting States. (A “Contracting State” is a country that has become a party to the Convention.)<sup>7</sup>

(2) *Exclusions from Convention: Based On: (i) Nature of the Transaction, (ii) Nature of the Goods.*<sup>8</sup>

The Convention does not apply to certain transactions, for example, sales of goods bought for personal, family or household use.<sup>9</sup> Thus, The Convention applies to commercial sales between persons in business. The Convention does not “apply to certain goods (or other property), for example, ships, vessels, hovercraft, aircraft, electricity, investment securities, negotiable instruments, or money.”<sup>10</sup>

(3) *Goods To Be Manufactured; Services*

Article 3(1) provides that contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a *substantial part* of the materials necessary for much manufacture.<sup>11</sup>

Article 3(2) governs mixed contracts (goods and services). It provides that the Convention does not apply to contracts in which the *preponderant part* of the obligations of the party who furnishes the goods consists in the supply of labour or other services.<sup>12</sup>

7. *Id.* art. 1 (1)(a). *See id.* art. 1 (1)(b), 10. The Convention also applies when the rules of private international law lead up to application of the law of a Contracting State. *Id.* art. 1(1)(b). The United States has declared that it would not be bound by subparagraph (1)(b) of Article I pursuant to Article 95. For discussion of “place(s) of business.” *See* HONNOLD, *supra* note 1, §§ 39-43.

8. CISG, *supra* note 6, art. 2(a)-(f).

9. *Id.* art. 2(a) (Unless seller did not know the goods were bought for such use, pursuant to Article 2(a)). *See also id.* art. 2(b), (c) (sale by auction and sale by authority of law are excluded). *Compare* UCC § 9-102(a)(23) (“‘Consumer goods’ means goods that are used or bought for use primarily for personal, family, or household purposes.”).

10. CISG, *supra* note 6, art. 2(d)-(f).

11. *Id.* art. 3(1).

12. *Id.* art. 3(2).

See CISG – Advisory Council Opinion No. 4, Contracts for the Sale of Goods To Be Manufactured or Produced and Mixed Contracts (Article 3 CISG).<sup>13</sup>

(4) *Exclusion of Liability for Death or Personal Injury*

Also Article 5 excludes a type of claim, that is, the Convention “does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”<sup>14</sup>

UCC Article 2 Sales applies to “transactions in goods,” but most commonly to sales of goods.<sup>15</sup> A “sale” consists in the passing of title (property) from the seller to the buyer for a price.<sup>16</sup> “Goods” are defined as all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action “intangibles.”<sup>17</sup>

B. *Issues Governed by Convention*

The Convention governs only (1) the formation of the contract of sale<sup>18</sup> and (2) the rights and obligations of the *seller* and the *buyer* arising from such a contract.<sup>19</sup> In particular, the Convention is not concerned with the validity of the contract or any of its provisions or of any usage.<sup>20</sup> “One obvious example is a rule of domestic law that prohibits the sale of

13. International Sales Convention Advisory Council (CISG-AC) is a private initiative which aims at promoting a uniform interpretation of the CISG. *CISG Advisory Council Opinion No. 4*, art. 3(1)-(2), available at <http://www.cisgac.com/UserFiles/File/CISg%20AC%20Opinion%204%20English.pdf> (last visited Feb. 25, 2015). See also HONNOLD, *supra* note 1, §§ 57-60.7.

14. CISG, *supra* note 6, art. 5.

15. U.C.C. § 2-102 (2002). UCC Article 2 does not impair or repeal any statute regulating sales to consumers. *Id.*

16. U.C.C. §§ 2-106(1), 2-401 (2002).

17. U.C.C. § 2-105(1) (2002). See U.C.C. §§ 2-501, 8-101 (2002) (Note that the Convention does not define “sale,” or “goods.”).

18. See *infra* Parts 3-4.

19. See *infra* Parts 5-12. CISG, *supra* note 6, art. 4.

20. CISG, *supra* note 6, art. 4(a).

specified products, such as heroin, and invalidates contracts relating to such illegal sales.”<sup>21</sup>

Also, the Convention is not concerned with the effects which the contract may have on the *property* in the goods sold.<sup>22</sup> For example, whether the sale to the buyer cuts off outstanding property rights of third persons is not dealt with by the Convention.<sup>23</sup> An illustration of domestic law that deals with good faith purchase is UCC § 2-403(1) which provides, “A purchaser of goods acquires all title which his transferor had or had power to transfer. . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value.”<sup>24</sup>

### C. *Exclusion or Variation of Convention by Contract*

With one exception, seller and buyer “may exclude the application of the Convention or derogate from or vary the effect of any of its provisions.”<sup>25</sup> Thus, “like most domestic sales rules applicable to commercial contracts, the Convention’s rules play a supporting role,

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21. See HONNOLD, *supra* note 1, §§ 64-69; Professor Schlechtriem’s definition of “validity” and Professor Hartenell’s test for an issue of “validity;” see also UNIDROIT Principles of International Commercial Contracts (2010) art. 3.2.5 (Fraud), 3.2.6 (Threat), 3.2.7 (Gross disparity). As to “unconsonability” see *infra* note 158 and accompanying text. HONNOLD, *supra* note 1, § 67 (suggesting that leaving “validity” to domestic law, “does not open a large door for escape from the uniform rules of the Convention.”). See CISG, *supra* note 6, art. 7(1).

22. CISG, *supra* note 6, art. 4(b)

23. HONNOLD, *supra* note 1, § 70.

24. U.C.C. § 2-403(1) (2002). See CISG, *supra* note 6, art. 4(b); see also *infra* Part 6.A for further discussion on “property in the goods.”

25. CISG, *supra* note 6, art. 6. The exception involves the privilege of a Contracting State under Articles 12 and 96 to preserve its domestic rules that require contracts of sale to be concluded in or evidenced by a writing. *Id.* art. 12, 96. See *infra* Part 3. An example clause excluding application of the Convention is set forth in 12 West’s Legal Forms, Commercial Transactions § 1:18 (4th ed. 2013): “This contract shall be governed and construed in accordance with the law of the State of [New York] excluding the Convention on Contracts for the International Sale of Goods.” See E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT’L L.J. 439, 442 (1988).

supplying answers to problems that the parties have failed to solve by contract."<sup>26</sup>

Of course, this broad scope of freedom of contract is made possible by the exclusion from the Convention of (1) consumer purchases,<sup>27</sup> and (2) liability for death or personal injury.<sup>28</sup> Also, the Convention is not concerned with the validity of the contract.<sup>29</sup>

If you believe that the freedom of parties to contract will lead to better and more complete drafting of international sales agreements, then consider the observation of Lord Atkin in *Phoenix Insurance Co. of Hartford v. de Monchy*, 141 L.T. 439, 334 (H.L. 1929):

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26. HONNOLD, *supra* note 1, § 2. Illustrative of domestic sales rules that allow variation by agreement is UCC § 1-302 (Variation by Agreement):

(a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of [the Uniform Commercial Code] of the phrase "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

U.C.C. § 1-302 (2001).

Thus, Code rules are commonly gap-fillers, that is, rules that apply when parties have not agreed on a matter.

27. *See* CISG, *supra* note 6, art. 2(a). *See, e.g.,* U.C.C. § 2-719(3) (2002) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods . . . is prima facie unconscionable but limitation of damages were the loss is commercial is not.")

28. CISG, *supra* note 6, art. 5; *see* U.C.C. § 2-719(3) (2002).

29. *See* CISG, *supra* note 6, art. 4(a).

It is a popular belief, especially prevalent amongst lawyers, that the efficient business man requires that obligations incurred in business should be expressed in writing in simple, intelligible and unambiguous language. It is a belief encouraged by the sayings of business men themselves. But in practice nothing appears to be further from the truth. Business men habitually adventure large sums of money on contracts which, for the purpose of defining legal obligations, are a mere jumble of words. They trust to luck or the good faith of the opposite party, with the comfortable assurance that any adverse result of litigation may be attributed to the hairsplitting of lawyers and the uncertainty of the law. Some day the ideal business man will appear, on whose advent the legal advisors of many contracting parties ... will get busy.<sup>30</sup>

## 2. INTERPRETATION OF (I) CONVENTION AND (II) SALES CONTRACT

### A. *Interpretation of the Convention*

In the interpretation of the Convention, regard is to be had (1) to its international character, and (2) to the need to promote uniformity in its application.<sup>31</sup> Questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the *general principles* on which the Convention is based.<sup>32</sup> Thus, the

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30. Phoenix Ins. Co. of Hartford v. de Monchy, 141 L.T. 439, 334 (H.L. 1929).

31. CISG, *supra* note 6, art. 7(1). See HONNOLD, *supra* note 1, § 16 (“The Convention has a very special function – to replace diverse domestic rules with uniform international law.”). Thus, Contracting States make the following commitment to each other: “We will apply these uniform rules in place of our own domestic law on the assumption that you will do the same.” *Id.* at § 103.2. Article 7(1) also provides that in interpreting the Convention there shall be regard for promoting “the observance of good faith in international trade.” CISG, *supra* note 6, at art. 7(1). See also HONNOLD, *supra* note 1, §§ 20, 94, 95. Cf. U.C.C. 1-103(a)(3) (2001) (“The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies which are: . . . (3) to make uniform the law among the various jurisdictions.”). *Id.* at § 1-304 (“Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”). Good faith is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing.” *Id.* at § 1-201(b)(20).

32. CISG, *supra* note 6, art. 7(2)(“[O]r[] in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”)

Convention works from the premise that solutions to legal problems can and must be found within the four corners of the Convention – a premise that compels the extension by analogy of one or another of the Convention provisions.<sup>33</sup>

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(emphasis added). Honnold gives examples of “general principles” on which the Convention is based: (a) Reliance on representations of the other party (estoppel), (b) Communication of “information needed by the other party – a recognition that the consummation of a sales transaction involves interrelated steps that depend on cooperation”, (c) Duty to mitigate loss. HONNOLD, *supra* note 1, §§ 99-101.

In sum, a response to the Convention’s invitation to consider its ‘general principles’ before turning to domestic law can minimize the confusion inherent in conflicts rules and avoid the uncritical and wooden application of scraps of domestic law that were developed without regard for the special needs of international trade. The ‘general principles’ alternative . . . can help the Convention, through international case law and scholarly writing to live as uniform law that responds to changing circumstances.

*Id.* § 102.

*Cf.* U.C.C. § 1-103(a) (2001), which states that the UCC “must be liberally construed and applied to promote its underlying purposes and policies.” Comment 2 explains: “[W]hile principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the [UCC] provides otherwise.” *Id.* at cmt. 2. The Comment concludes: “In the absence of such a provision, the [UCC] preempts principles of common law and equity that are inconsistent with either [i] its provisions or (ii) ITS PURPOSES AND POLICIES.” *Id.* (Emphasis added).

33. HONNOLD, *supra* note 1, § 21 observes:

Many legal systems work from the premise that solutions to legal problems can and must be found within the four corners of the Code - a premise that compels the extension by analogy of one or another of the Code’s provisions. Other legal systems take a more strict view of statutes. For example, statutes like the (U.K.) Sale of Goods Act may be regarded as islands in an ocean of uncodified common law; in this setting if the statute does not readily supply an answer the court may draw on general common-law ideas.

Which approach is more appropriate for the Convention? Under the second, narrow approach, if one looks outside the Convention one does not find a body of “common” law; instead, one faces the vagaries of private international law and a fragment of some

### B. *Interpretation of Statements or Other Conduct of a Party*

[S]tatements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.<sup>34</sup>

In determining the intent of a party (or the understanding a reasonable person would have had), due consideration is to be given to all relevant circumstances of the case including (i) the negotiations, (ii) any practices which the parties have established between themselves, (iii) usages and (iv) any subsequent conduct of the parties.<sup>35</sup>

domestic legal system. Moreover, under this approach the results of individual cases would not contribute to a uniform, growing body of case law under the Convention.

In response to this difficulty, Article 7(2) states that when questions arise concerning matters “governed by this Convention” which “are not expressly settled” in the Convention, the question is to be settled “in conformity with *the general principles*” on which the Convention is based. Only when such a general principle cannot be found [is there to be recourse to] “the law applicable by virtue of private international law.”

34. CISG, *supra* note 6, art. 8(2). *But see id.* at art. 8(1) (expressing subjective intent vs. objective meaning).

35. CISG, *supra* note 6, art. 8(3). This is to be contrasted with UCC § 2-202 (explaining final written expression; parol or extrinsic evidence)—the parol evidence rule—which states that:

[t]erms set forth in a writing intended by the parties as a complete and exclusive statement of their agreement *may not* be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [Its policy is] to prevent the uncertainty in contract enforcement that may occur if evidence is allowed that contradicts the “final writing” [and] to discourage possibly perjured testimony of oral side agreements.

BRADFORD STONE & KRISTEN DAVID ADAMS, *UNIFORM COMMERCIAL CODE IN A NUTSHELL* 35 (8<sup>th</sup> ed. 2012) (emphasis added).

Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause & the CISG, Advisory Opinion, No.3 § 2 (Oct. 23, 2004) (“The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.”). *See* MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostine, S.P.A., 144 F.3d 1384, 1389 (11th Cir. 1998). CISG-AC Opinion 3, § 1.4 states: “The parties may wish to assure themselves that reliance will not be placed on representations made prior to the execution of the writing. The Merger or Entire

### C. *Usages and Practices Applicable to the Contract*

The parties are bound [i] by any *usage* to which they have *agreed* and [ii] by any *practices* which they have *established* between themselves:<sup>36</sup>

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.<sup>37</sup>

### 3. REQUIREMENT AS TO FORM – WRITING

Under the Convention a contract of sale need not be concluded in or evidenced by a writing and is not subject to any other requirement as to form.<sup>38</sup> However, “a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement.”<sup>39</sup>

Agreement Clause . . . has been developed to achieve certainty in this regard.” A typical Merger Clause is set forth at § 1.4 note 26. *See also id.* at §4.

36. CISG, *supra* note 6, art. 9(1). *See, e.g.*, Int’l Chamber of Commerce, INCOTERMS (2010) available at <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/> (noting definitions of FOB, CIF, CFR).

37. CISG, *supra* note 6, art. 9(2); *cf.* U.C.C. § 1-303 (2001) (Course of performance, course of dealing, and usage of trade). HONNOLD, *supra* note 1, § at 112 remarks that in the making of a contract the most basic patterns may not be mentioned because, for experienced parties, they “go without saying.” Honnold observes: “In the course of collaborating with an exporter in writing out the understandings that underlay a standard export transaction we were both amazed at the number and scope of basic assumptions that were not mentioned in the detailed documents.” *Id.*

38. CISG, *supra* note 6, art. 11. *See also* U.C.C. §§ 2-201, 2-203 (2002). Of course an Offeror may require that an acceptance must be in writing. *See* CISG, *supra* note 6, explanatory notes part 2, § 20.

39. CISG, *supra* note 6, art. 29(2) (note that “a party may be precluded by his [or her] conduct from asserting such a provision.”). *Cf.* U.C.C. §§ 2-201, 2-209 (2002). For example, U.C.C. § 2-201(1) (2002) reads in part: “[A] contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.” U.C.C. § 1-201(b)(43) (2002) states: “‘Writing’ includes printing, typewriting or any intentional

Any provision of Article 11 and 29, discussed in the prior paragraph, that allows a contract of sale or its modification, etc., to be made in any form other than in writing does *not* apply where any party has his place of business in a Contracting State which has made a *declaration* under Article 96 of the Convention.<sup>40</sup>

#### 4. FORMATION OF THE CONTRACT

Articles 14-24 concern formation of the contract. Cf. UCC §§ 1-103, 2-204 through 2-207, 2-305.

##### A. *Offer*<sup>41</sup>

###### (1) *Criteria for an Offer.*

“A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the Offeror to be bound in case of acceptance.”<sup>42</sup>

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reduction to tangible form.” Cf. § 1-201(b)(31): “‘Record’ means information [i] that is inscribed on a tangible medium or [ii] that is stored in an electronic or other medium and is retrievable in perceivable form.” Article 13 provides: “For the purposes of this Convention ‘writing’ includes telegram and telex.” CISG, *supra* note 6, at art. 13. Furthermore, Electronic Communications under CISG, Advisory Opinion No.1, art. 11 (Aug. 15, 2003), provides: “A contract may be concluded or evidenced by electronic communications.” Also, “The term ‘writing’ in CISG also includes any electronic communication retrievable in perceivable form.” Electronic Communications under CISG, Advisory Opinion No.1, art. 13. *See also* UNCITRAL Model Law on Electronic Commerce Articles 5 and 6.

40. CISG, *supra* note 6, art. 12. The following States have made declarations under Articles 12 and 96: Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, Russian Federation and Ukraine. HONNOLD, *supra* note 1, § 129.

41. CISG, *supra* note 6, art. 14-17, 24, 55.

42. CISG, *supra* note 6, art. 14(1); *see id.* art. 14(2), 55.

(2) *When Offer Becomes Effective, Prior Withdrawal.*

“It becomes effective when it *reaches* the offeree.”<sup>43</sup>

(3) *Revocability of Offer.*

“Until a contract is concluded, it may be revoked if the revocation *reaches* the offeree before he has *dispatched* an acceptance.”<sup>44</sup>

(4) *Termination of Offer: Rejection of Offer Followed by Acceptance.*

“An offer (even if it is irrevocable) is terminated when a rejection *reaches* the Offeror.”<sup>45</sup>

B. *Acceptance*<sup>46</sup>(1) *Acceptance: (i) Criteria and (ii) Time and Manner for Assent.*

“A statement or other conduct of the offeree indicating assent to an offer is an acceptance.”<sup>47</sup> It “becomes effective at the moment it *reaches* the Offeror.”<sup>48</sup> An acceptance is not effective if it does not reach the Offeror within the time fixed, or within a reasonable time.”<sup>49</sup>

43. CISG, *supra* note 6, art. 15(1). “An offer . . . may be withdrawn if [it] reaches the offeree before or at the same time as the offer.” *Id.* art. 15(2). *See id.* art. 24.

44. CISG, *supra* note 6, art. 16(1); *see id.* art. 23, 24, 15(2). Article 16(2) provides, “[h]owever, [that] an offer cannot be revoked if it indicates . . . by stating a fixed time for acceptance that it is irrevocable. *See also id.* art. 16(2)(b); *cf.* U.C.C. § 2-205 (2002).”

45. CISG, *supra* note 6, art. 17, 24.

46. CISG, *supra* note 6, art. 18-24.

47. *Id.* art. 18(1) (“Silence . . . does not in itself amount to acceptance.”).

48. *Id.* art. 18(2). Thus the hazards of a “delay or loss of a communication” sent by the offeree fall on the offeree, not the addressee – Offeror. This is contrasted with “offeror’s power to revoke its offer.” Recall that “an offer may be revoked if the revocation *reaches* the offeree before [it] has *dispatched* an acceptance.” *Id.* at art 16(1).

If by virtue of the offer, the offeree may indicate assent by performing an *act*, the acceptance is effective at the moment the act is performed.<sup>50</sup>

(2) “Acceptance” With Modifications

One of the most perplexing problems in contract formation involves the “acceptance” with modifications, or “the battle of the forms.” To illustrate: Buyer sent to seller a purchase order for certain production machinery. The back of the form stated that seller would be responsible for all damages –including consequential damages—resulting from defects in the machinery. In response, seller delivered to buyer its sales order (or acknowledgement) form that purported to accept buyer’s offer. On the back of the form, it stated that seller agreed to repair or replace any machinery that proved to be defective, but disclaimed liability for shutdown losses, damage to materials, loss of good will or any other consequential damages. The machinery was then delivered to buyer and shortly thereafter defects caused a shutdown of buyer’s assembly plant causing serious consequential damages. Will consequential damages be included in buyer’s measure of damages?

Seller will maintain that, pursuant to Article 19(1), its purported acceptance of buyer’s order was a rejection of the offer and constituted a counter-offer which buyer accepted when he took delivery of the machinery and put it to use. Therefore, sellers *preclusion* of consequential damages clause governed.<sup>51</sup>

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*Cf.* HONNOLD, *supra* note 1, §162 (“dispatch” or “post-box” theory and the “receipt” theory).

49. CISG, *supra* note 6, art. 18(2).

50. *Id.* art. 18(3); HONNOLD, *supra* note 1, § 163 (For example, the buyer states “[p]lease rush shipment of the following goods . . .” Seller promptly ships the goods; acceptance is effective the moment shipment is performed); *cf.* U.C.C. § 2-206(1)(b) (2002).

51. HONNOLD, *supra* note 1, § 166 (per art. 19, a reply which purports to accept an offer but which contains modifications that materially alter the terms of the offer, “is a rejection of the offer and constitutes a counter-offer.” The “extent of one party’s liability to the other . . . [is] considered to alter the terms of the offer materially.”) *See id.* § 170.3 (explaining “[t]his is often called the ‘Last Shot’ approach, invoking the metaphor that

Buyer asserts that where parties have proceeded to perform a contract for the sale of goods, conflicting standard terms in communications they exchanged are excluded from the contract and the resulting gaps are filled by the Convention's provisions. Thus, buyer's including consequential damages clause and seller's disclaiming liability for consequential damages clause are excluded, and CISG Article 74 is filled in, to wit, damages *include* foreseeable consequential damages.<sup>52</sup>

Resolution of this case and numerous variations are most difficult. A counseling point to avoid the "battle of the forms" problems would be to negotiate in advance an overriding agreement which would prevail over the terms of the exchanged purchase order and acknowledgement forms. An overriding agreement form is set forth below:

This agreement shall replace any provisions other than [*state provisions*], set forth on the face or reverse side of your purchase order, and provisions so replaced shall not be applicable to your purchases from us. Similarly, this agreement shall replace any provisions other than [*state provisions*], set forth either on the face or on the reverse side of our acknowledgement form, and provisions so replaced shall not be applicable to your purchases from us. [*State terms of the overriding agreement.*]<sup>53</sup>

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the parties have engaged in a 'Battle of the Forms' and the aphorism that battles are won by the side that 'fires the last shot'; See note 52 *infra* (explaining the "[l]ast shot theories have been rightly criticized as casuistic and unfair because they do not reflect international consensus that justified importing them into the Convention").

52. This is sometimes called the "knock-out rule" where conflicting terms are deleted and "[l]acunae resulting agreement filled with the gap-filling provision of the Convention." HONNOLD, *supra* note 1, § 170.4 (concluding "[t]he rule of Article 74 (and of many domestic systems) that a party in breach is liable for foreseeable consequential damages is not popular with sellers. Under Article 6 the parties can exclude or modify this and other provisions of the Convention but this must be done by agreement; fictitious theories for finding agreement should not suffice."). Int'l Inst. For the Unification of Private Law, *Unidroit Principles of International Commercial Contracts 2010*, Article 2.1.22 (adopts similar views as a matter of international contract law). See also UCC § 2-207(3).

53. Miller, 12 West's Legal Forms, § 3:93 (2014).

(3) *Interpretation of Offeror's Time Limits for Acceptance*

“Article 18(2) . . . provides that an acceptance is not effective ‘if the indication of assent does not reach the Offeror within the time *he had fixed*....’ The offeror’s statement fixing the time for acceptance may be ambiguous if it states a period of time (e.g., 15 days) for acceptance and does not specify when the period starts to run or does not deal with the effect of holidays.”<sup>54</sup> Article 20 is a guide to interpreting the offeror’s time limits for acceptance.<sup>55</sup>

(4) *Late Acceptances: Response by Offeror*

Article 21 “extends and elaborates the basic rule of Article 18(2) that an acceptance ‘is not effective if the indication of assent does not reach the Offeror within the time he is fixed or, if no time is fixed, within a reasonable time....’ (1) The offeree’s reply indicating assent “does *not* reach the Offeror within the time he has fixed’: When a late reply reaches the Offeror can he make it ‘effective’ by notifying the offeree?<sup>56</sup> (2) A reply that normally would have arrived on time is subject to delays in transmission: Must the Offeror notify the offeree that the offer has lapsed?”<sup>57</sup>

(5) *Withdrawal of Acceptance*

“An acceptance may be withdrawn if the withdrawal *reaches* the Offeror before or at the same time the acceptance would have been *effective*.”<sup>58</sup>

54. HONNOLD, *supra* note 1, §171.

55. *Id.* § 179I; CISG, *supra* note 6, arts. 18(2), 20, 24 (explaining when communication reaches the addressee).

56. *Id.* § 172; *but see id.* art. 21(1).

57. *Id.* § 172.

58. *Id.* §138 (noting that under Article 15(2), an offer may be withdrawn “if the withdrawal *reaches* the offeree before or at then same time as the offer”)(emphasis added); *see also id.* at art. 18(2) (explaining an acceptance becomes effective at the moment the acceptance reaches the offeror); *but see id.* at 18(3); *see also id.* art. 23 & 24.

(6) *Effect of Acceptance; Time of Conclusion on Contract*

“Articles 18(2) . . . in stating when an acceptance becomes ‘effective’ implies that a contract is concluded at that time. This implication is made explicit by [Article 23].”<sup>59</sup>

(7) *When Communication (i) “Dispatched,” (ii) “Reaches” the Addressee*

Articles 14-24 (Formation of the Contract), previously discussed, provide in various settings, that a communication becomes effective when it “reaches” the other party. See Article 15(1) (Offer), Article 15(2) (withdrawal of offer), Article 16(1) (Revocation of offer), Article 17 (rejection), Article 18(2) (Acceptance), Article 20(1) (period for acceptance fixed by telephone, telex or other means of instantaneous communication), Article 22 (withdrawal of acceptance).<sup>60</sup> For the purposes of Articles 14-24, “an offer, declaration of acceptance or any other indication ‘reaches’ the addressee when it is [i] made orally to him or [ii] delivered by any other means to him personally, to his place of business or mailing address or is he does not have a place of business or mailing address, to his habitual residence.”<sup>61</sup>

Article 16(1) states that an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. Article 20(1) states in part that a period of time for acceptance fixed by the Offeror in a telegram or a letter begins to run [i] from the moment the telegram is handed in for dispatch or [ii] from the date shown on the letter or no such date is shown, from the date shown on the envelope.<sup>62</sup> Article 21(1) states that a late acceptance is nevertheless effective as an acceptance if without delay the Offeror orally so informs the offeree or dispatches a notice to that effect.<sup>63</sup> Although Article 24 includes a rule stating when a

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59. HONNOLD, *supra* note 1, § 178 (Article 23 states “[a] contract is concluded at the moment when an acceptance of an offer becomes effective.”)

60. *Id.* § 179.

61. *Id.*; *see also* art. 24.

62. CISG, *supra* note 6, art. 24.

63. HONNOLD, *supra* note 1, § 175-76; *see also* art. 21(2).

communication “reaches” the addressee, no provision directly addresses when a communication is “dispatched.”<sup>64</sup>

CISG Advisory Council (CISG-AC) Opinion No. 1 addresses Electronic Communications under CISG. It states with respect to Article 24: “The term ‘reaches’ corresponds to the point in time when an electronic communication has entered the addressee’s server, provided that the addressee expressly or impliedly has consented to receiving electronic communications of that type, in that format, and to that addressee.”<sup>65</sup> With respect to CISG Article 16(1), it states: “In electronic communications the term ‘dispatch’ corresponds to the point in time when the acceptance has left the offeree’s server.... A prerequisite is that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format and to that address.”<sup>66</sup>

Caution: The above discussion relates to Part II of the Convention (Formation of the Contract, Articles 14-24). Article 27 relates to Part III (Sale of Goods, Articles 25-88). With respect to notices, requests or other communications, Article 27 (Delay or Error in Communications) applies the “dispatch” principle.<sup>67</sup> This general rule making notices effective on dispatch is subject to specific exceptions where the “receipt” principle is used.<sup>68</sup>

## 5. GENERAL OBLIGATIONS OF SELLER AND BUYER

The seller must *deliver* the goods, *hand over* any documents relating to them and *transfer* the *property* in the goods, as required by the contract and the Convention.<sup>69</sup> The buyer must *pay* the price for the goods and *take delivery* of them as required by the contract and the Convention.<sup>70</sup>

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64. *Id.* at 179; *see also* art. 24.

65. CISG-AC Opinion no 1, Electronic Communications under CISG, 15 Aug. 2003. Rapporteur: Professor Christina Ramberg, Gothenburg, Sweden.

66. *Id.*

67. CISG, *supra* note 6, art. 30.

68. HONNOLD, *supra* note 1, § 189.

69. CISG, *supra* note 6, art. 30.

70. *Id.* art. 53.

The UCC uses this language: “The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.”<sup>71</sup> “Accept” as used here means that the buyer takes particular goods as his own.<sup>72</sup> This is not to be confused with “acceptance” of an offer.<sup>73</sup>

## 6. OBLIGATIONS OF SELLER

### A. Obligation of Seller to Transfer the Property in the Goods

Article 30 of the Convention requires the seller to transfer the property in the goods. The Convention, however, is silent as to *when* the property is transferred and its importance.<sup>74</sup>

Historically, much significance was placed on the location of title or property at a certain moment of time. For example, prior to the promulgation of the Uniform Commercial Code, many American States had adopted the Uniform Sales Act (USA), which was patterned after the English Sale of Goods Act of 1893.<sup>75</sup> Several issues under the USA were resolved by determining the time at which the property in the goods passed to the buyer. The following sections of the USA illustrate.<sup>76</sup>

Sec. 1. *Contracts to Sell and Sales.* (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. (2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

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71. U.C.C. § 2-301 (2002).

72. OHIO U.C.C. CODE § 2-606, Official Comment 1 (2006). This appears to be similar to “take delivery” under Articles 53 and 60.

73. CISG, *supra* note 6, art. 23.

74. The Convention “is not concerned with the effect which the contract may have on the property in the goods sold.” CISG, *supra* note 6, art. 4(b); *but see id.* art. 41-44, *infra* Part 6.D.

75. 56 & 57 Victoria, ch. 71.

76. The Act has been widely followed in the common law world. Sale of Goods Act §§ 1, 17, 18, 20, 49 (1893); *cf. id.* § 52.

Sec. 18. *Property in Specific Goods Passes When Parties So Intend.* (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

\* \* \*

Sec. 19. *Rules for Ascertaining Intention.* Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. (Five rules are set forth.)

\* \* \*

Sec. 22. *Risk of Loss.* Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

\* \* \*

Sec. 63. *Action for the Price.* (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

\* \* \*

Sec. 66. *Action for Converting or Detaining Goods.* Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Sec. 67. *Action for Failing to Deliver Goods.* (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods the buyer may maintain an action against the seller for damages for non-delivery.

\* \* \*

We see from the above sections the several issues which were resolved under the USA by determining whether or not the property in the goods passed to the buyer, i.e., risk of loss, seller's action for the price, buyer's right to possess the goods (replevin). Other issues were resolved under the USA by determining the passage of property in or title to the goods, for example: (1) rights of buyer's and seller's creditors to levy on the goods of their respective debtors. (2) rights of seller or buyer to sue third parties for injuries to the goods. (3) rights of seller or buyer to collect insurance on the goods, (4) the power of seller or buyer to defeat the other party's interest in the goods by selling them to an innocent third person, (5) the time and place for measuring damages for breach of contract for sale of the goods, etc.<sup>77</sup>

The UCC virtually eliminates the significance of title or property: "Each provision of this Article [2 Sales] with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies irrespective of title to the goods . . . ." <sup>78</sup> Instead, UCC Article 2 "deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed."<sup>79</sup> More fully, the Official Comment to UCC § 2-101 observes:

The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passes or was to pass being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.

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77. U.C.C. § 2-401(preamble).

78. *Id.*

79. See BRADFORD STONE & KRISTEN ADAMS, UNIFORM COMMERCIAL CODE IN A NUTSHELL 42-50 (8th ed. 2012).

A text on the UCC comments on this change of approach:

Thus, the Code utilizes the “narrow issue” approach to problem-solving. The “lump concept” approach of the USA which solved the various issues by locating “title” has been virtually abandoned.

The principle disadvantage of the lump concept title approach is based upon the wooden notion that title must either pass or not pass from seller to buyer –it cannot be deemed to pass from some purposes but not for others. Thus, for example, consider a hypothetical contract for sale of goods under the Uniform Sales Act. Seller ascertains (identifies) the goods and sets them aside in his warehouse. Per USA § 19 Rule 4 (shipment contract), title will pass upon the goods’ delivery to a carrier. Although this might be a satisfactory point at which to pass the risk of loss from seller to buyer, it probably does not follow from this point that the buyer should also have an action to replevy the goods as *owner*. Instead, whether such a cause of action should exist probably requires that we ask a more specific question: Is buyer after reasonable effort able to purchase substitute goods (effect Cover)? If the answer is yes, let the buyer simply sue seller for damages. If the answer is no, allow the buyer a right of replevin for the goods. One can see that in a buyer’s-right-to-the-goods issue, delivery to a carrier has no particular policy significance. Yet, under the USA, delivery to a carrier must be the moment that (1) risk of loss passes and (2) the buyer becomes entitled to the goods upon the seller’s breach. Cf. §§ 2-509(1)(a) (passage of risk of loss upon delivery to carrier), 2-716(3) (right of replevin).

The UCC “narrow issue” approach frees the problem-solver from the albatross of lump concept thinking and affords a resolution consonant with the relevant policy considerations present in each narrow issue.<sup>80</sup> [As noted, the Code resolves issues in terms of contract for sale and by various steps of its performance. Let us, therefore, trace this “step by step performance” rationale to perceive the methodology employed. The commentary sets forth typical steps: (1) Seller (S) identified the goods, (2) S delivers the goods to a carrier for shipment, (3) the goods reach destination and carrier tenders the goods to buyer (B), (4) B takes receipt (physical possession) of the goods, (5) B, generally after inspection,

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80. U.C.C. § 2-101 Comment.

accepts the goods, (6) B rejects non-conforming goods, (7) S cures the non-conformity, (8) B revokes acceptance of the non-conforming goods, etc.]<sup>81</sup>

In drafting the Convention, the effort was “to avoid legal idioms that have divergent local meanings and, instead, to speak in terms of physical events that occur in international trade.”<sup>82</sup> To illustrate: Risk of Loss rules “are not complicated by concepts such as ‘property’ but are stated in terms of physical events. For example, risk passes when goods “are handed over to the first carrier” (Art. 67); when the contract does not involve carriage, risk passes when the buyer “takes over” the goods (Art. 69).<sup>83</sup>

Thus, both the Convention and the Code utilize a narrow issue approach: The Convention speaks in terms of physical events that occur in international trade; the Code is arranged in terms of contract for sale and the various steps of its performance. “The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by

81. STONE & ADAMS, *supra* note 79, at 45-46.

82. HONNOLD, *supra* note 1, § 17. Further, Honnold comments on international collaboration that:

[t]he most powerful forces towards eliminating ‘awesome relics of the dead past’ were intrinsic to the process of international collaboration. Proposals that embodied the idioms or traditions peculiar to a single system were subject to polite but revealing analysis by puzzled representatives from other systems. Another powerful solvent was the process of translation; formulae that were vague or redolent of domestic legal tradition would set off alarms when they appeared in other languages. Unhappy experience with concepts in the 1964 Sales Convention that defied translation (deliverance; ipso facto avoidance) helped pave the way for UNCITRAL’s use of simpler, clearer language.

*Id.* § 33.

83. HONNOLD, *supra* note 1, § 28. In short, the time of transfer of the property in the goods will not be relevant to deciding issues under the Convention. *See* art. 4(b).

84. U.C.C. § 2-101 (2002).

evidence and to substitute for such abstractions proof of words and actions of a tangible character.<sup>84</sup>

*B. Obligation of Seller to Deliver the Goods and Hand Over Documents*<sup>85</sup>

Article 30 requires the seller to deliver the goods as required by the contract and the Convention,<sup>86</sup> Article 31 deals with *place* for delivery, which, in international sales is usually accomplished by “handing the goods over to the first carrier for transmission to the buyer.”<sup>87</sup> The *time* for delivery—where a date or period of time is not fixed or determinable from the contract—is within a reasonable time after the conclusion of the contract.<sup>88</sup>

Articles 30 and 34 require seller to *hand over* the documents relating to the goods.<sup>89</sup> This involves a transaction where there is an exchange of a negotiable or “order” bill of lading for the goods.<sup>90</sup>

85. CISG, *supra* note 6, art. 30-34; *cf.* U.C.C. §§ 2-307, 2-308, 2-309, 2-319 - 2-324, 2-503 - 2-507 (2002).

86. CISG, *supra* note 6, art. 30; *cf.* U.C.C. §§ 2-301, 2-507(1) (2002); *see* CISG, *supra* note 6, art. 53.

87. CISG, *supra* note 6, art. 31(a). *See* INCOTERMS, *supra* note 36; *cf.* U.C.C. §§ 2-503-2-507, 2-319- 2-324 (2002). As to shipping arrangements, *see* CISG, *supra* note 6, art. 32.

88. CISG, *supra* note 6, art. 33; *cf.* U.C.C. § 2-309(1) (2002).

89. In this instance seller must hand them over at the time and place and in the form required by the contract. (As to the cure of lack of conformity in the documents, see Article 34.) “Document” means, e.g., a draft, document of title, certificate, invoice. U.C.C. § 5-102(a)(6) (1995). “Document of title” means a record (e.g., writing) that in the regular course of business or financing is treated as adequately evidencing that the person in possession of the writing is entitled to receive, hold and dispose of the writing and the goods the writing covers. The term includes a bill of lading. U.C.C. § 1-201(b)(16) (2001). “Bill of lading” is a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting goods. U.C.C. § 1-201(b)(6) (2001).

90. *See* U.C.C. § 2-505 (2002); U.C.C. §§ 2-310(b)-(c), 2-504(b), 2-507(2) (2002). This transaction is addressed in Articles 57(1)(b) and 58(1) and (2). *See also* HONNOLD, *supra* note 1, §§ 335-337, 339.2.; *See infra* Part 7.A.(4).

91. CISG, *supra* note 6, art. 35-40. *See id.* art. 27, 44; *cf.* U.C.C. §§ 2-312-2-317 (2002). *See also* U.C.C. §§ 2-508(1), 2-512, 2-513, 2-607(3)(a) (2002).

C. *Obligation of Seller to Deliver Goods That Conform With the Contract*<sup>91</sup>

(1) *Conformity: Seller's Obligations With Respect to Quality of Goods*

Under Article 35, the delivered goods must be of the quantity, quality and description required by the contract.<sup>92</sup> Except where otherwise agreed, goods do not conform with the contract unless they: (a) are fit for ordinary purposes,<sup>93</sup> (b) are fit for any particular purpose,<sup>94</sup> (c) possess the qualities per a sample or model,<sup>95</sup> (d) are contained or packaged in a manner adequate to preserve and protect the goods.<sup>96</sup> Note the similarity with warranties under the UCC.<sup>97</sup>

*Buyer's Knowledge of Condition of Goods at the Time of Contracting.* In such cases Article 35(3) provides that the seller is not liable under the

92. Further, the goods must be contained or packaged in the manner required by the contract. CISG, *supra* note 6, art. 35(1); *cf.* U.C.C. § 2-313(1) (2002).

93. CISG, *supra* note 6, 35(2)(a); *cf.* U.C.C. §§ 2-314(2)(c), 2-316(3)(b). In a much commented upon case a Swiss seller sold New Zealand mussels to a German buyer. German buyer claimed that the level of cadmium in the mussels violated German goods regulations. The cadmium level was, however, acceptable under Swiss regulations. The issue was whether mussels were fit for ordinary purposes, i.e., fit for human consumption or fit for consumption in Germany. *See* CLOUT case No. 123: Bundgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, 123 (Ger.); HONNOLD, *supra* note 1, § 225 (stating CISG does not place an obligation on the seller to supply goods, which conform to all statutory or other public provisions in force in the import State, unless (i) the same provisions exist in the export State as well, or (ii) the buyer informed the seller about such provisions relying on the seller's expert knowledge, or (iii) the seller had knowledge of the provisions due to special circumstances).

94. "[A]ny particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment." CISG, *supra* note 6, art. 35(2)(b); *cf.* UCC §§ 2-315, 2-316(3)(b) (2002).

95. CISG, *supra* note 6, art. 35(2)(c). *Cf.* U.C.C. § 2-313(1)(c) (2002).

96. CISG, *supra* note 6, art. 35(2)(d). *Cf.* U.C.C. § 2-314(2)(e) (2002).

97. *See* U.C.C. §§ 2-314(2)(c); § 2-314 cmt. 8 (2002). The UCC uses the expressions express and implied warranties with respect to conformity of the goods with the contract. Fitness for the ordinary purposes is a fundamental concept of the implied warrant of merchantability.

98. HONNOLD, *supra* note 1, § 229. CISG, *supra* note 6, art. 35(3).

implied obligations of Article 35(2) for those facts which “the buyer knew or could not have been unaware.”<sup>98</sup>

*Disclaimers.* “The seller’s obligations under Article 35 are subject to the parties’ right specified in Article 6, to derogate from or vary the effect of provisions of the Convention. Article 35(2) emphasizes this by declaring that the (implied) obligations described therein apply ‘[e]xcept where the parties have agreed otherwise.’”<sup>99</sup>

UCC § 2-316 (Exclusion or Modification of Warranties) permits disclaimer of the implied warranty of merchantability (e.g., fit for ordinary purposes), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous. Implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.<sup>100</sup>

Under Article 4(a) the “validity” of a disclaimer is beyond the scope of the Convention. This means that a disclaimer is subject to the rules of applicable domestic law relating to matters such as fraud, duress, unconscionability.<sup>101</sup>

*Effect of Damage to Goods on Conformity.* The seller is liable for any lack of conformity which exists at the time when the risk of loss or damage has passed to buyer.<sup>102</sup> Illustration: A contract called for Seller (of Seller City) to ship certain goods to Buyer, “FOB Seller City per INCOTERMS® (2010).” (The FOB term places risk of loss on Buyer when the goods are loaded on board the vessel at Seller City.)<sup>103</sup> During transit from Seller City to Buyer City the goods are damaged. Assume the goods conformed to the contract as of the time when risk passes.

99. *Id.* § 230. CISG, *supra* note 6, art. 35(2).

100. U.C.C. § 2-316(2) (2002); U.C.C. § 2-316 cmt. 3-4 (2002). *See* U.C.C. §§ 1-201(b)(10) (2001), 2-314(2)(c), 2-315, 2-316 (1), (3), 2-317(2002).

101. *See* HONNOLD, *supra* note 1, §§ 64, 67, 69, 230; U.C.C. §§ 1-103(b) (2001), 2-302 (2002).

102. CISG, *supra* note 6, art. 36(1).

103. HONNOLD, *supra* note 1, § 242. *See* Article 67(1). *But see* CISG, *supra* note 6, art. 35(2)(d).

104. CISG, *supra* note 6, art. 66. *See infra* Part 10 (discussing risk of loss). *Cf.* U.C.C. §§ 2-509, 2-709(1)(a) (2002).

Thus, damage to the goods after the risk has passed to the buyer does not discharge buyer from its obligation to pay the price.<sup>104</sup>

However, Article 36(2) reflects the fact that some quality-obligations (warranties/guarantees) include undertakings that extend after delivery. Examples: a contract to service the goods for a designated period, or a guarantee that the goods will perform for a specified period (two years: 10,000 miles whichever first occurs). Thus, the seller would be liable for any lack of conformity which would occur after the time indicated in Article 36(1).<sup>105</sup>

## (2) Procedures Applicable When Goods are Non-Conforming

### (a) Seller's Privilege to Cure

Destruction of contract rights involves hardship and economic waste.<sup>106</sup> Consequently, Article 37 provides that “[i]f the seller has delivered goods before the date for delivery, ... he may [i] deliver any missing part or make up any deficiency in the quantity of the goods delivered or [ii] deliver goods in replacement of any non-conforming goods or remedy any lack of conformity in the goods delivered.”<sup>107</sup>

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105. See HONNOLD, *supra* note 1, § 243. CISG, *supra* note 6, art. 36.

106. HONNOLD, *supra* note 1, § 244.

107. CISG, *supra* note 6, art. 37. Compare art. 34 (seller has the right to cure “lack of conformity in the documents”), with *id.* art. 37 (“provid[ing] that the exercise of this right does not cause the buyer unreasonable inconvenience or [] expense”). Note that Article 48, in limited circumstances, authorized cure after the date for delivery. *Id.* art. 48. See U.C.C. § 2-508 (2002). Distinguish seller’s right to cure from buyer’s right under Article 46 to require the seller to replace or repair non-conforming goods. See HONNOLD, *supra* note 1, §§ 244-247.

108. Article 38(1). “If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.” See Article 38(2). “If the goods are redirected in transit or redispached... examination may be deferred until after the goods have arrived at the new destination” as provided in Article 38(3). See Article 58(3); HONNOLD, *supra* note 1, §§ 249, 254-256. Cf. U.C.C. §§ 2-310(b), 2-512, 2-513; contrast U.C.C. § 2-316(3)(b) (2002); CISG, *supra* note 6, art. 35(3).

(b) Buyer's Obligation (i) To Examine Goods and (ii) to Notify Seller of Nonconformity.

The Convention requires the Buyer (i) to examine the goods within as short a time as practicable<sup>108</sup> and (ii) to give notice to the seller of a lack of conformity of the goods, specifying the nature of the lack of conformity, within a reasonable time after he has discovered or ought to have discovered it.<sup>109</sup> If the buyer fails to notify the seller within the prescribed period he "loses the right to rely" on the non-conformity. This quoted language bars, e.g., a claim for damages, avoidance of the contract and reduction of the price.<sup>110</sup>

The seller's need for timely notice is set forth in HONNOLD, *supra* note 1 as follows:

Sec. 252 ("Timely notice may be needed to enable the seller to take samples or take other steps to preserve evidence of the condition of the

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109. CISG, *supra* note 6, art. 39(1). *Id.* art. 39(2). "In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless the time-limit is inconsistent with a contractual period of guarantee." *See id.* art. 36(2), 27.

110. HONNOLD, *supra* note 1, §259. *See* CISG, *supra* note 6, art. 45(1)(b), 74-77, 46, 49, 50.

However, this rule is subject to exceptions: (1) *Seller's knowledge of non-conformity*. Article 40 relieves the buyer of these notice requirements when a lack of conformity relates to facts which the seller "knew or could not have been unaware and which he did not disclose to the buyer." (2) *Excuse for Failure to Notify*. *Id.* art. 40. Article 44 relieves the buyer of some of the consequences of failing to give notice within a "reasonable time" under Article 39(1) if the buyer has a "reasonable excuse for his failure to give the required notice." *Id.* art. 44. Here, the buyer may reduce the price per Article 50 or claim damages except for loss of profit.

*See* HONNOLD, *supra* note 1, §§ 260, 261.

*See* CLOUT used shoe's case: LG Frankfurt [District Court] Apr. 11, 2005, 775 (Ger.) CISG (Dec. 10, 2008), *available at* <http://cisgw3.law.pace.edu/cases/050411g1.html> (discussing a 2005 decision involving sale of used shoes from a German seller to a buyer located in Kampala, Uganda demonstrates how not to apply these notice requirements). *See* HONNOLD, *supra* note 1, §§ 252, 261.

goods. In some cases timely notice may enable the seller to cure defects... or make a price allowance or other adjustment to meet the buyer's complaint.")<sup>111</sup>

Sec. 255 ("Let us assume that the buyer received goods and, without objection, retains the goods or resells them, but later declines to pay or claims damages on the grounds that the goods were defective. If the seller learns of the claim after the goods have been used or after a period during which the goods could have deteriorated, it will be difficult to ascertain whether the buyer's claim is just.... If the buyer notifies the seller promptly, the seller can inspect and test the goods to ascertain whether a claim is justified. Moreover, when the inspection shows that the goods are defective, the seller may be able to exercise its right to cure the defect.")

Sec. 256 ("The notice requirement should not operate as a trap for unwary or naïve buyers. Notice is a matter of communication between parties; a seller who wants to know more than is contained in the buyer's initial notice can be expected to inquire.... The consequences if Article 39 [Notice of Lack of Conformity] is deemed unsatisfied...are extreme: the buyer will generally lose all rights with respect to an (alleged) breach by the seller of the crucial obligation to deliver conforming goods.... Tribunals should not be quick to impose this severe sanction absent indications that the seller was substantially prejudiced by inadequacies in the buyer's notice.")<sup>112</sup>

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111. HONNOLD, *supra* note 1, § 252.

112. See HONNOLD, *supra* note 1, § 256. Compare U.C.C. § 2-607(3)(a) (2002): "Where a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy," with proposed U.C.C. § 2-607(3)(a) (2002) states in part: "However, failure to give timely notice bars the buyer from a remedy only to the extent that the seller is prejudiced by the failure." See *id.* § 1-202. See *CISG Advisory Council Opinion No. 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39*, CISG-AC (June 7, 2004), <http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html>. See overview of CISG case law prepared as an annex thereto.

D. *Obligation of Seller to Deliver Goods Free From Third Party Claims*

When the seller supplies goods to the buyer that are subject to a third party claim, what are the rights of the buyer against the seller? Illustration: S steals goods from true owner X and sells them to innocent B.<sup>113</sup> X recovers the goods from B under applicable domestic law.<sup>114</sup> S violated its obligation to deliver goods to B “which are free from any right or claim of a third party.” B recovers damages from S.<sup>115</sup>

Seller is relieved of the obligation to deliver goods free of a third party’s right or claim if “the buyer agreed to take the goods subject to that right or claim.”<sup>116</sup> Illustration: X sells certain goods to S reserving a security interest to secure the unpaid balance of the purchase price. S sells the goods to B who agrees to take subject to the security interest in favor of X.<sup>117</sup>

*Notice of Third-Party Claim.* The buyer loses the right to rely on Article 41 “if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.”<sup>118</sup>

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113. Articles 1 and 4(b) (“[The Convention] is not concerned with the effect which the contract may have on the property in the goods sold.”) See, e.g., UCC § 2-403.

114. *Id.*

115. CISG, *supra* note 6, art. 41. To exclude this obligation, see *id.* art. 6; *cf.* U.C.C. § 2-312(1)-(2).

116. *Id.*; see HONNOLD, *supra* note 1, at § 266.1.

117. *Id.*; see, e.g., U.C.C. §§ 1-201(a), 1-201(b)(35), 9-101, 9-109(a)(1), 9-201(a).

118. CISG, *supra* note 6, art. 43(1). The seller is not entitled to rely on the provisions of Article 43(1) “if he knew of the right or claim of the third party and the nature of it.” CISG, *supra* note 6, art. 43(2). Notwithstanding Article 43(1), “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.” CISG, *supra* note 6, art. 44.

For third-party claims based on a patent or other Intellectual property see, Articles 42 and 43.<sup>119</sup>

## 7. OBLIGATIONS OF BUYER

### A. *Obligation of Buyer to Pay the Price*<sup>120</sup>

#### (1) *Summary of Buyer's Obligations to Pay the Price*

Article 53 requires the buyer to pay the price for the goods as required by the contract and the Convention.<sup>121</sup>

#### (2) *Steps and Formalities Required to Enable Payment to Be Made*

“The buyer’s obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws or regulations to enable payment to be made.”<sup>122</sup>

#### (3) *Determination of Price: Open-Price Contracts*

Article 14(1) (Criteria for an Offer) provides that a proposal for concluding a contract is sufficiently definite if it indicates the goods and “expressly or implicitly” fixes or makes “provision for determining” the quantity and “the price.” Article 55 (Open Price Contracts) states:

Where a contract has been *validly* concluded but does not expressly or implicitly make provision for determining the price, the parties are

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119. For discussion, see HONNOLD, *supra* note 1, at §§ 267-271.

120. Article 53-59; *cf.* U.C.C. §§ 2-301, 2-305, 2-310, 2-507.

121. For buyer’s obligation to take delivery, see *infra* 7.B (discussing Articles 53 and 60); see CISG, *supra* note 6, art. 30 (discussing seller’s obligations); *cf.* U.C.C. § 2-301.

122. CISG, *supra* note 6, art. 54. “[This] reflects the importance of preliminary steps by the buyer that are necessary for timely payment of the price, such as arranging for the issuance of a letter of credit and applying for governmental authorization to transmit funds to the seller.” HONNOLD, *supra* note 1, at § 323.

considered...to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Honnold and Flechtner extensively discuss Articles 14(1) and 55. They conclude: “In any event, formal trade agreements are not likely to fail to provide for the price, and will avoid the question posed by Articles 14 and 55.”<sup>123</sup>

#### (4) *Place of and Time for Payment*

*Place of Payment.* If the buyer is not bound to pay the price at any other place, it must pay it to the seller at the seller’s place of business. Commonly in international trade, payment is to be made against handing over of the goods or documents (e.g., negotiable bills of lading). Consequently, payment is made where the handing over takes place.<sup>124</sup>

*Time for Payment.* If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their possession (e.g., negotiable bills of lading) at the buyer’s disposal.<sup>125</sup> “If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition [e.g., negotiable bills of lading], will not be handed over to the buyer except against payment of the price.”<sup>126</sup>

*Illustration.* S is unwilling to deliver goods to B without receiving payment. S will make a “shipment under reservation.” S delivers the goods to Carrier (C) and procures a negotiable bill of lading to his own order (deliver “to the order of S”). S will forward the bill, along with a

123. HONNOLD asks whether Article 14 denies *validity*, per Article 55, to the parties’ clearly expressed intent to be bound absent an express or implicit provision for determining the price. See HONNOLD, *supra* note 1, §§ 137.4-8, 324, 325, 325.1-4; see also Article 56 (discussing net weight); CISG, *supra* note 6, art. 59 (discussing Payment Due Without Request); HONNOLD, *supra* note 1, § 340; cf. U.C.C. § 2-305.

124. CISG, *supra* note 6, art. 57(1); see also *id.* at 57(2).

125. CISG, *supra* note 6, art. 58(1) (“The seller may make such payment a condition for handing over the goods or documents.”).

126. CISG, *supra* note 6, art. 58(2).

demand for payment (draft) and other documents, through banking channels to a correspondent bank in B's vicinity. Bank will notify B of the arrival of the bill. B makes payment to Bank and receives the bill. (This is the simultaneous exchange of the "document" and "payment of the price.") B takes the negotiable bill of lading properly indorsed, surrenders it to the carrier, and receives the goods.<sup>127</sup>

(5) *Buyer's Opportunity to Examine Goods Before Payment*

"The buyer is not bound to pay the price until he has an opportunity to examine the goods." Buyer has no right to examine the goods before he pays when "the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."<sup>128</sup> Example: "A contract called for Seller to ship goods to Buyer on June 1 on the 'S.S. North Star' which (as the parties knew) was scheduled to dock at Buyer's city on or about July 15. The contract further provided that on June 10 Seller would present a sight draft, with accompanying bill of lading, to Buyer for the full price." These agreed terms are inconsistent with examination before payment.<sup>129</sup>

B. *Obligation of Buyer to Take Delivery*

Article 53 also requires the buyer to "take delivery" of the goods as required by the contract and the Convention.<sup>130</sup> The buyer's obligation to "take delivery" consists of (a) in doing all the acts which could

127. See HONNOLD, *supra* note 1, §§ 333-337. This transaction is addressed in B. STONE & K. ADAMS, UNIFORM COMMERCIAL CODE IN A NUTSHELL 388-90, 595-603 (8th ed. 2012). Note that while the CISG references "documents," it makes no reference to "letters of credit." See also, CISG-AC Opinion No. 11 (Issues Raised by Documents Under the CISG Focusing on the Buyer's Payment Duty).

128. CISG, *supra* note 6, art. 58(3); HONNOLD, *supra* note 1, at §§ 338-339.1.

129. HONNOLD, *supra* note 1, § 339. It should be noted that the U.C.C. uses the word "inspection" in this context. "Examination" is not synonymous with "inspection" under the Code: "[Examination] goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract." U.C.C. §§ 2-316(3)(b) (Exclusion or Modification of Warranties); see also U.C.C. §§ 2-316 cmt. 8, 2-512, 2-513.

130. See CISG, *supra* note 6, art. 53-59, *supra* Part 7.A (discussing buyer's obligation to pay the price).

reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods.<sup>131</sup>

## 8. REMEDIES FOR BREACH OF CONTRACT

### A. Buyer's Remedies for Breach of Contract by Seller<sup>132</sup>

#### (1) Buyer May Exercise Rights Provided in Articles 46-52<sup>133</sup>

(a) Buyer's Right to Require *Performance* by Seller of Its Obligations (e.g., Delivery of the Goods)<sup>134</sup>

(i) Buyer's Right to Require Seller to Perform Its Obligations: (a) Unless Inconsistent Remedy, (b) Concession to Domestic Law<sup>135</sup>

Article 46(1) states that the buyer may "require performance" by the seller of his obligations. This reflects the civil law principle (Roman Law) of *pacta sunt servanda*.<sup>136</sup>

*Inconsistent Remedy.* Article 46(1) goes on to say: "unless the buyer has resorted to a remedy which is inconsistent with this requirement." Illustration: Buyer declares the contract to be "avoided" because seller failed to perform its obligations (e.g., it delivered non-conforming goods) which amounted to a "fundamental breach of contract." Avoidance

131. CISG, *supra* note 6, art. 60. Paragraph (a) of Article 60 "provides yet another instance of the Convention's recognition of the importance in carrying out the interlocking steps of an international sales transaction." HONNOLD, *supra* note 1, §§ 341-343. See U.C.C. § 2-607; *cf.* U.C.C. §§ 2-301 (S to transfer and deliver; B to accept and pay); see also U.C.C. § 2-606.

132. CISG, *supra* note 6, art. 45. *Cf.* U.C.C. §§ 1-305, 2-508, 2-601-2-608, 2-711-2-712, 2-714-2-717.

133. CISG, *supra* note 6, art. 45(1)(a).

134. *Id.* art. 45 (1)(a), 46-48; see also *id.* arts. 28, 50-52.

135. *Id.* art 46(1); see also *id.* arts. 28, 46(2), 46(3), 50-75; *cf.* U.C.C. § 2-716(1).

136. CISG, *supra* note 6, arts. 46(2), 46(3) (showing if goods do not conform with the contract, the buyer requires delivery of "substitute goods" under Article 46(2); if goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by "repair" under Article 46(3)).

“releases both parties from their obligations under the [contract] subject to any *damages* that may be due.”<sup>137</sup>

*Concession to Domestic Law.* Article 28 states that even though the Convention’s general rules provide that a “party is entitled to require performance” under Article 46(1), a court “is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.” Assume the court’s “own law” is in a common law jurisdiction. Here the buyer is entitled to money damages. It is only where money damages are inadequate to make an aggrieved buyer whole, will a court decree that an agreement be specifically performed. UCC §2-716(1) follows this view: “Specific performance may be decreed where the goods are unique or in other proper circumstances.” Inability to cover (purchase of substitute goods) is strong evidence of “other proper circumstances.”<sup>138</sup>

“As a practical matter, if a substitute performance is available from the market, the rational actor will not pursue specific performance regardless of whether the actor is operating in a civil law or common law country.”<sup>139</sup>

#### (ii) Buyer’s Notice Fixing Additional Final Period for Performance (Nachfrist Notice)

Under Article 47(1) “[t]he buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.”<sup>140</sup> Under Article 49(1)(b) in the case of non-delivery, if the seller does not deliver the goods within the time fixed by the buyer, the buyer may declare the contract avoided.<sup>141</sup>

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137. CISG, *supra* note 6, art. 46(1), 49(1)(a), 25, 35, 81(1), 75-75. *See id.* art. 50.

138. U.C.C. § 2-716(1), Cmt 2; *see* Bradford Stone & Santiago Gonzalez Luna, *Aggrieved Buyer’s Right to Performance or Money Damages Under the CISG, U.C.C., and Mexican Commercial Code*, 30 J.L. & COM. 23, 83 (2011).

139. Stone & Luna, *supra* note 138, at 82.

140. CISG, *supra* note 6, art. 47 (stating the buyer may not, during that period, resort to any remedy for breach of contract (unless the buyer has received notice from the seller that he will not perform within the period so fixed.). Note that the buyer may, however, claim damages for delay in performance. CISG, *supra* note 6, art. 63.

141. *See infra* Part 8.A.(1)(b) (discussing avoidance).

(iii) Seller's Right to Cure Defective Performance After Date For Delivery

Assume seller delivers a machine to buyer. Buyer examines it within as short a period as practical under the circumstances (Article 38(1)); discovers defects in the machine and notifies the seller specifying the nature of the lack of conformity within a reasonable time after discovery (Article 39(1)).

Article 48(1) addresses seller's right to remedy defects or deficiencies in performance that has been tendered, e.g., by substituting conforming goods for defective goods or by repairing or replacing defective component part(s). It provides: "[T]he seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so [i] without unreasonable delay and [ii] without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains the right to claim damages. . . ." Thus, as a general matter, a buyer's right to claim damages is subordinate to the seller's right to cure.<sup>142</sup>

But what is the relationship between cure and avoidance for "fundamental breach?" In the above assumed transaction, suppose that when Buyer tested the delivered machine, one of the component parts prevented the machine from operating. (Only Seller had replacement parts.) Buyer notified Seller that the machine had failed to operate. Seller offered immediately to replace the defective part but Buyer refused this offer and declared that the contract was avoided. (The time required for replacing the defective part was not important to Buyer.) Buyer's contention was that the machine had failed to function and that this constituted a fundamental breach of the sales contract (Article 25) empowering him to avoid the contract (Articles 49(1)(a), 81(1)). Enlightened tribunal's response: "[W]here cure is feasible and where an offer of cure can be expected, one cannot conclude that the breach is

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142. CISG, *supra* note 6, art. 45(1)(b), 48(1), 74; see HONNOLD, *supra* note 1, § 296.1; see also CISG, *supra* note 6, art. 34, 37; cf. U.C.C. § 2-508(2).

‘fundamental’ until one knows the answer to this question: Will the seller cure?’<sup>143</sup>

*Requests for Clarification.* “A theme that underlies numerous articles of the Convention is the duty to communicate information needed by the other party – a recognition that the consumation of a sales transaction involves interrelated steps that depend on cooperation.”<sup>144</sup> Under Article 48(2)-(4), a seller may make a proposal to (i) cure by repair, or (ii) make a late delivery. Article 48(2) provides: If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.<sup>145</sup>

(b) Buyer’s Right to Declare the Contract *Avoided*<sup>146</sup>

*Grounds for Avoidance.* “Paragraph (1) of Article 49 states two grounds on which buyers may avoid the contract; (a) when a failure by the seller to perform ‘any of his obligations’ amounts to a ‘fundamental breach of contract’; and (b) ‘in the case of non-delivery, if the seller does not deliver the goods’ within an additional period of time fixed by a *Nachfrist* notice under Article 47.”<sup>147</sup>

143. See HONNOLD, *supra* note 1, § 296; see also *infra* Part 8.A.(1)(b).

144. HONNOLD, *supra* note 1, § 100.

145. CISG, *supra* note 6, art. 48(3) (“A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph [48(2)], that the buyer make known his decision.”); see also CISG, *supra* note 6, art. 48(4); HONNOLD, *supra* note 1, §§ 188-190, 297-300; cf. CISG, *supra* note 6, art. 27.

146. CISG, *supra* note 6, art. 45(1)(a), 49; see e.g., CISG, *supra* note 6, art. 25-28, 81-84; see also *infra* Part 12 (discussing buyer’s duty to preserve goods); cf. U.C.C. §§ 2-601 – 2-608.

147. HONNOLD, *supra* note 1, § 303; see also *id.* §§ 181-86 (stating a breach under Article 25 “is fundamental [i] if it results in such a detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, [ii] unless the party in breach did not foresee and a reasonable person. . . would not have foreseen such a result.”); cf. *supra* Part 8.A.(1)(a)(ii) (discussing *Nachfrist*).

*Loss of Right.* In cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so within a reasonable time(s) set forth in Article 49(2). A declaration of avoidance is effective only if made by notice to the other party.<sup>148</sup>

*Effect of Avoidance.* “Article 81 specifies the effect of avoidance on the parties’ rights and obligations under the contract – [i] that it releases both parties from their obligations (although it does not affect obligations to pay damages or to arbitrate)<sup>149</sup> and [ii] that each party must return what it has received under the contract.”<sup>150</sup>

*Buyer’s Duty to Preserve Goods.* “If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable.”<sup>151</sup>

(2) *Buyer May Claim Damages as Provided in Articles 74-77*<sup>152</sup>

(a) General Rule for Measuring Damages

Damages for breach of contract consist of a sum equal to the loss suffered by the aggrieved party (buyer) as a consequence of the breach (protection of the aggrieved party’s expectation interest). This standard is

148. CISG, *supra* note 6, art. 26; *see id.* art. 27.

149. HONNOLD, *supra* note 1, §§ 438-444.1; *see* CISG, *supra* note 6, art. 81(1), 74-77.

150. *See id.* at Art. 81(2). Article 82 addresses buyer’s inability to return goods in the same condition. Article 83 states that a buyer who has lost the right to declare the contract avoided under Article 82, retains all other remedies. Article 84 (restitution of benefits) supplements Article 81(2). *See* HONNOLD, *supra* note 1, § 445-52.

151. CISG, *supra* note 6, art. 86(1); *see infra* Part 12 (discussing buyer’s duty to preserve goods).

152. *See id.* arts. 45(1)(b), 28, 50, 78.

designed to place the aggrieved party in as good a position as if the other party had properly performed the contract.<sup>153</sup>

*Foreseeability.* These damages, however, may not exceed the loss which the party in breach foresaw (or ought to have foreseen) at the time of the conclusion of the contract (in the light of the facts and matters of which he then knew or ought to have known, as a *possible* [not probable] consequence of the breach of contract).<sup>154</sup>

*Contractual Remedies.* Article 6 permits the parties to “derogate from or vary the effect of any of [the Convention’s] provisions.” Thus, they can agree: (i) to exclude or limit liability for consequential damages; (ii) to limit or alter the measure of damages, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; (iii) to allow for liquidated damages.<sup>155</sup>

But domestic law, e.g., the Uniform Commercial Code, provides:

(i) “Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.”<sup>156</sup>

(ii) “Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the

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153. *Id.* art. 74 (discussing damages include loss of profit); HONNOLD, *supra* note 1, §§ 403, 404; *see also* HONNOLD, *supra* note 1, §§ 421- 422 (discussing the relationship between Article 74 and interest under Article 78); *see also* CISG AC Opinion No. 6: Calculation of Damages under CISG Article 74.

154. CISG, *supra* note 6, art. 74. Cf. U.C.C. § 1-305(a) (“The remedies provided by the [U.C.C.] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may had except as specifically provided in [the U.C.C.] by any other rule of law.”); *see* U.C.C. §§ 2-714, 2-715(1), (2)(a) (discussing Buyer’s Incidental and Consequential Damages). The leading common law case is *Hadley v. Baxendale*, 9 Ex. 341, 156 E.R. 145 (1854). In *Hadley* the claim was for consequential damages. The judgment noted that this included only those damages which were in “the contemplation of both parties at the time they made the contract, as the *probable* result of the breach of it.” *Id.* at 354 (emphasis added).

155. CISG, *supra* note 6, art. 6.

156. U.C.C. §§ 2-719(3), 2-302; *see* U.C.C. § 2-719 (1)-(2).

anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.”<sup>157</sup>

Unconscionable limitation or exclusion of consequential damages clauses and an unreasonably large liquidated damage term – which is void as a penalty – relate to “validity” of the contract. Under Article 4(a), the Convention is not concerned with “the validity of the contract or any of its provisions.” These matters are left to domestic law, e.g., Uniform Commercial Code §§ 2-718, 2-719, 2-302.<sup>158</sup>

#### (b) Measurement of Damages When Contract Avoided

The typical settings for avoidance are: (i) seller fails to deliver goods, or (ii) seller delivers seriously defective goods.<sup>159</sup> In these settings the buyer may free itself from duties under the contract by notifying the seller that the contract is avoided.<sup>160</sup> (Upon avoidance the buyer need not take delivery of the goods and must return the goods it has received.)<sup>161</sup>

Articles 75 and 76 set forth alternative methods for measuring damages upon avoidance. These methods follow:

*Damages Established by Substitute Transaction.* If the contract is avoided and if (in a reasonable manner and within a reasonable time after avoidance), the buyer has bought goods in replacement, the buyer may recover the *difference between the contract price and the price in the substitute transaction* (the goods bought in replacement). Illustration: Contract Price equals \$1000; goods bought in the substitute transaction equals \$1200; damages equals \$200.<sup>162</sup>

157. U.C.C. § 2-718(1).

158. HONNOLD, *supra* note 1, §§ 64-69; see CISG-AC Opinion No. 10 *supra* Part 1.B (discussing Agreed Sums Payable upon Breach of an Obligation in CISG Contracts); see also CISG-AC Opinion No. 13 (Inclusion of Standard Terms under the CISG).

159. CISG, *supra* note 6, art. 25, 49(1).

160. CISG, *supra* note 6, art. Arts. 26, 81.

161. *Id.*

162. CISG, *supra* note 6, art. 75 (stating buyer may recover, as well, any further damages recoverable under Article 74); see *supra* Part 8.A.(2)(a); cf. U.C.C. § 2-712

*Damages Based on Current Price.* If the contract is avoided and there is a current price for the goods, the buyer may (if he has not made a purchase under Article 75), recover the *difference between the price fixed by the contract and the current price at the time of avoidance*.<sup>163</sup> (The current price is the price prevailing at the *place* where delivery of the goods should have been made.<sup>164</sup> Illustration: Contract price equals \$1000; current price at the relevant time and place equals \$1200; damages equals \$200.<sup>165</sup>

### (c) Mitigation of Damages

A buyer who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss resulting from the breach. If buyer fails to take such measures, the seller may claim a reduction in the damages in the amount by which the loss should have been mitigated.<sup>166</sup> “For example, suppose seller fails to deliver raw materials for use in the buyer’s factory and buyer fails to purchase substitute materials that are available on the market, with the result that buyer’s production is interrupted.” Buyer could face the mitigation principle when seller’s breach causes “consequential damages.”<sup>167</sup>

(esp. (2)) (stating buyer may recover from seller as damages the *difference between the cost of cover and the contract price* together with any incidental or consequential damages)(emphasis added).

163. CISG, *supra* note 6, art. 76(1) (stating if buyer has avoided the contract after taking over the goods, the current price at the *time* of such *taking over* shall be applied instead of the current price at the *time of avoidance*)(emphasis added).

164. *Id.* art. 76(2) (discussing what happens if there is no current price at that place).

165. *Id.* art. 76 (stating buyer may recover, as well, any further damages recoverable under Article 74); *see supra* Part 8.A.(2)(a); *cf.* U.C.C. § 2-713 (esp. (1)) (stating buyer’s measure of damages if the *difference between the market price at the time and place* set forth in § 2-713(1) and (2), and the *contract price* together with any incidental and consequential damages) (emphasis added).

166. CISG, *supra* note 6, art. 77.

167. HONNOLD, *supra* note 1, §§ 416-419.2; *cf., e.g.*, U.C.C. § 2.712 (1).

B. Seller's Remedies for Breach of Contract by Buyer<sup>168</sup>(1) Seller's May Exercise Rights Provided in Articles 62-65.<sup>169</sup>

(a) Seller's Right to Require Buyer to *Perform* Its Obligation (e.g., Payment of the Price)<sup>170</sup>

(i) Seller's Right to Require Buyer to Perform Its Obligations: (a) Unless Inconsistent Remedy, (b) Concession to Domestic Law<sup>171</sup>

Article 62 states that the seller "may require the buyer to pay the price, take delivery or perform his other obligations."

*Inconsistent Remedy.* Article 62 goes on to say: "unless the seller has resorted to a requirement which is inconsistent with this requirement." Illustration: Seller declares the contract to be "avoided," resells the goods to x and seeks to recover damages from the buyer.<sup>172</sup>

*Concession to Domestic Law.* Article 28 states that even though the Convention's general rules provide that a "party is entitled to require performance" under Article 62, 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." Assume the court's "own law" is U.C.C. § 2-709(1)(b). Here, when the buyer fails to pay the price – "the seller may recover the price of goods identified to the contract *if* the seller is unable after reasonable effort to resell them at a reasonable price."<sup>173</sup>

168. CISG, *supra* note 6, art. 61; *cf.* U.C.C. §§ 1-305, 2-311, 2-703 (2-706, 2-708, 2-709).

169. *Id.* art. 31(1)(a).

170. *Id.* arts. 61(1)(a), 62, 63; *see also* CISG, *supra* note 6, art. 65; *see cf.* U.C.C. § 2-311.

171. *Id.* art. 62; *see id.* arts. 75, 28; *cf.* U.C.C. § 2-709(1)(b).

172. *Id.* art. 62, 64(1), 81(1), 25, 75.

173. U.C.C. § 2-706(1) (stating that the seller may resell the goods and recover the difference between the resale price and the contract price); *cf.* CISG, *supra* note 6, art. 75.

(ii) Seller's Notice Fixing Additional Final Period for Performance (Nachfrist Notice)

Under Article 63(1) "[t]he seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations."<sup>174</sup> Under Article 64(1)(b), if the buyer does not, within the time fixed by Article 63(1), perform his obligation to pay the price or take delivery, the seller may declare the contract avoided.<sup>175</sup>

(b) Seller's Right to Declare the Contract *Avoided*<sup>176</sup>

*Grounds for Avoidance.* "Paragraph 1 of Article 64 states two alternative grounds for seller's avoidance: (a) Fundamental breach of contract by the buyer; and (b) Failure by the buyer 'to pay the price or take delivery' within an additional final period fixed by the seller under Article 63(1) – the *Nachfrist* Notice."<sup>177</sup>

*Loss of Right.* In cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so within the time(s) set forth in Article 64(2). A declaration of avoidance is effective only if made by notice to the other party.<sup>178</sup>

*Effect of Avoidance.* "Article 81 specifies the effect of avoidance on the parties' and obligations under the contract – [i] that it releases both parties from their obligations (although it does not affect obligations to

174. Under Article 63(2) the seller may not, during that period, resort to any remedy for breach of contract (unless the seller has received notice from the buyer that he will not perform within the period so fixed). Seller may, however, claim damages for delay in performance. *Cf.* Article 47.

175. *See infra* Part 8.B(1)(b) (discussing avoidance).

176. CISG, *supra* note 6, art. 61(1)(a), 64; *see id.* arts. 25-28, 81-84.

177. HONNOLD, *supra* note 1, § 354; CISG, *supra* note 6, art. 25 (discussing "Fundamental breach."); *see also* HONNOLD, *supra* note 1, §§ 181-186. *Nachfrist* notice is discussed at *supra* Part 8.B(1)(a)(ii).

178. CISG, *supra* note 6, art. 26; *see id.* art. 27; HONNOLD, *supra* note 1, §§ 355-356.1.

pay damages or to arbitrate)<sup>179</sup> and [ii] that each party must return what it has received under the contract.”<sup>180</sup>

(2) *Seller May Claim Damages as Provided in Articles 74-77*<sup>181</sup>

(a) General Rule for Measuring Damages<sup>182</sup>

Damages for breach of contract consist of a sum equal to the loss suffered by the aggrieved party (seller) as a consequence of the breach.<sup>183</sup>

*Foreseeability.* These damages, however, may not exceed the loss which the party in breach foresaw (or ought to have foreseen) at the time of the conclusion of the contract (in light of the facts and matters of which he then knew or ought to have known, as a *possible* [not probable] consequence of the breach of contract).<sup>184</sup>

*Contractual Remedies.* Article 6 permits the parties to “derogate from or vary the effect of any of [the Convention’s] provisions.”<sup>185</sup>

(b) Measurement of Damages When Contract Avoided

179. HONNOLD, *supra* note 1, § 438. See Articles 81(1), 74-77.

180. See Article 81(2). HONNOLD, *supra* note 1, § 444 (Example 81E: “A contract called for Seller to deliver goods on June 1; Buyer’s payment was due on July 1. The goods were delivered on schedule but Buyer failed to pay on July 1 or thereafter. Seller avoided the contract based on Buyer’s fundamental breach and brought an action to require Buyer to return the goods. [Article 81(2)] states that a seller who avoids a contract ‘may claim restitution. . . of whatever [the seller] has supplied. . . under the contract.’ The language calls for recovery of goods not merely an action for the price.”) In Example 81E, Seller’s right will probably be defeated by Buyer’s creditors and Trustee in Bankruptcy. Article 4(a), (U.S.A.) Bankruptcy Code § 544, UCC § 9-317.

181. Article 61(1)(b); see Articles 28, 78. (As to seller’s duty to preserve goods in its possession, see Articles 85, 87, 88 at Part 12 *infra*.)

182. *Id.* arts. 74, 78; UCC §§ 1-305, 2-710.

183. *Id.*; *cf.* UCC § 1 305, 2-710. See discussion at Part 8.A.(2).(a). *supra*.

184. See discussion, *supra*, at the text and footnotes accompanying notes 153 and 154.

185. See discussion, *supra*, at text and footnotes accompanying notes 155-158.

The typical settings for avoidance are: (i) fundamental breach of contract by buyer, or (ii) failure by buyer “to pay the price or take delivery” within an additional final period fixed by seller under Article 63(1) – the *Nachfrist* notice.<sup>186</sup> In these settings the seller may free itself from duties under the contract by notifying the buyer that the contract is avoided.<sup>187</sup> (Upon avoidance the seller, e.g., becomes free of the obligation to deliver the goods).<sup>188</sup>

Articles 75 and 76 set forth alternative methods for measuring damages upon avoidance. These methods follow:

*Damages Established by Substitute Transaction.* If the contract is avoided and if (in a reasonable manner and within a reasonable time after avoidance), the seller has resold the goods, the seller may recover the *difference between the contract price and the price in the substitute transaction* (the resale of the goods). Illustration: Contract price equals \$1000; goods resold in the substitute transaction equals \$800; damages equals \$200.<sup>189</sup>

*Damages Based on Current Price.* If the contract is avoided and there is a current price for the goods, the seller may (if he has not made a resale under Article 75), recover the *difference between the price fixed by the contract and the current price at the time of avoidance*.<sup>190</sup> (The current price is the price prevailing at the *place* where delivery of the goods should have been made.)<sup>191</sup> Illustration: Contract price equals \$1000; current price at the relevant time and place equals \$800; damages equals \$200.<sup>192</sup>

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186. *Id.* arts. 25, 64(1).

187. *Id.* arts. 26, 81.

188. *Id.*

189. *Id.* art. 75. Seller may recover, as well, any further damages recoverable under Article 74. *Id.* See Part 8.B.(2).(a) *supra*. Cf. UCC § 2-706 (esp. (1)) (Seller may recover the *difference between the resale price and the contract price* together with any incidental damages).

190. *Id.* art. 76(1).

191. *Id.* art. 76(2). If there is no current price at that place, *see id.*

192. *Id.* art. 76. Seller may recover, as well, any further damages recoverable under Article 74. *Id.* See Part 8.B. (2).(a) *supra*. Cf. UCC § 2-708(1) (Seller may recover

(c) *Mitigation of Damages*

A seller who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss resulting from the breach. If seller fails to take such measures, the buyer may claim a reduction in the damages in the amount by which the loss should have mitigated.<sup>193</sup>

## C. Statute of Limitations

See United Nations Convention on the Limitation Period in the International Sale of Goods (1974, 1980 Protocol of Amendment). The Limitation Convention, Article 8, sets a general limitation period of four years from “the date on which the claim accrues.”<sup>194</sup>

9. ANTICIPATORY BREACH AND INSTALLMENT CONTRACTS<sup>195</sup>

“Articles 71 and 72 afford protection for the party [seller or buyer] who is threatened with a failure of performance by the other party. Article 71 provides that, in some circumstances, a party facing such a threat may *suspend* its own performance. Article 72 provides that, in more extreme circumstances, a party facing such a threat may put a permanent end to it, i.e., *avoid* it.”<sup>196</sup> Examples:

- (1) A seller has agreed to deliver goods on credit but, prior to the time for delivery, the buyer has manifested an inability to pay for the goods.
- (2) A buyer has agreed to pay before receiving the goods but, prior to the time for payment, the seller’s insolvency or some other

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the *difference between the market price at the time and place for tender and the unpaid contract price* together with any incidental damages.).

193. *Id.* art. 77. See HONNOLD, *supra* note 1, §§ 416-419.2. *Cf., e.g.,* UCC § 2-706.

194. U.N. *Convention on the Limitations Period in the International Sale of Goods*, 2008 art. 8 [hereinafter CLPISG].

195. *Id.* arts. 71-73; *see* arts. 25-27, 81-84; *cf.* UCC §§ 2-609 through 2-612.

196. HONNOLD, *supra* note 1, § 385 (emphasis added).

circumstance makes it apparent that the seller will not deliver the goods.<sup>197</sup>

#### A. Suspension of Performance

“A party may *suspend* the performance of his obligations:

If, after the conclusion of the contract, it *becomes apparent* that the other party will not perform a *substantial part* of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.<sup>198</sup>

“A Party suspending performance must [i] immediately give notice of the suspension to the other party and must [ii] continue with performance if the other party provides *adequate assurance* of his *performance*.”<sup>199</sup>

#### B. Avoidance Prior to the Date For Performance

“If prior to the date for performance of the contract<sup>200</sup> it is clear<sup>201</sup> that one of the parties will commit a fundamental breach<sup>202</sup> of contract, the other party may declare the contract avoided.”<sup>203</sup> “If time allows, the

197. *Id.*

198. Article 71(1) [emphasis added]. “Paragraph (1) applies to a threat of non-performance by either party. [Article 71(2)] applies to a specialized situation of concern to sellers – a threat of non-payment by the buyer that becomes apparent while goods are in transit.” HONNOLD, *supra* note 1, § 385, 390. Cf. UCC § 2-705. See HONNOLD, *supra* note 1, §§ 386-389; cf. UCC § 2-609.

199. Article 71(3) (emphasis added). HONNOLD, *supra* note 1, §§ 391-94 (“adequate assurance”).

200. Seller’s obligation is to deliver the goods (Arts. 30-34), buyer’s obligation is to pay the price for the goods and take delivery of them (Arts. 53-60; see Art. 65).

201. For example, seller declares that it will not perform. HONNOLD, *supra* note 1, § 396.

202. CISG, *supra* note 6, art. 25.

203. CISG, *supra* note 6, art. 72(1); see *id.* arts. 26, 49, 63, 81-84.

party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.<sup>204</sup>

### C. Avoidance in Installment Contracts

“A sales contract calls for deliveries in January, February, and March. Article 72, which applies to such installment contracts,<sup>205</sup> in three paragraphs, addresses seriatim the following three questions.

(1) Part of the January delivery is seriously defective. [M]ay the buyer refuse to accept the entire delivery?<sup>206</sup>

(2) As in (1), the January delivery has serious defects. [M]ay the buyer not only refuse that delivery but also the delivery scheduled for February and March?<sup>207</sup>

(3) The buyer receives and accepts [takes delivery of] the January delivery, which conforms to the contract, but the February delivery is seriously defective. [M]ay the buyer not only refuse the February

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204. CISG, *supra* note 6, art. 72(2). Note The requirements of Article 72(2) “do not apply if the other party has declared that he will not perform his obligations.” *Id.* art. 72(3). As to “adequate assurance” of performance, *see* HONNOLD, *supra* note 1, §§ 392, 398; *cf.* U.C.C. §§ 2-609, 2-610, 2-611.

205. HONNOLD, *supra* note 1, § 399 n.1 (“An installment contract is one calling for more than one delivery of goods, irrespective of how payment is to be made.”).

206. CISG, *supra* note 6, art. 73(1) (“[I]f the failure of one party to perform any of his obligations in respect to 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.”) (emphasis added); *see id.* arts. 25, 26, 49, 63, 81-84; *see also* HONNOLD, *supra* note 1, § 400.

207. CISG, *supra* note 6, art. 73(2) (“If one party’s failure to perform *any* of his obligations in respect of *any* instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to *future* instalments, he may declare the contract avoided for the *future*, provided that he does so within a reasonable time.”) (emphasis added); *see* HONNOLD, *supra* note 1, § 401.

delivery but also return the goods that he received in January and refuse the delivery scheduled for March?"<sup>208</sup>

## 10. RISK OF LOSS<sup>209</sup>

Problems in some domestic systems, relating to sales of goods, may be decided by reference to the "property" concept. For example, a common law rule might read, "The goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk."<sup>210</sup>

Article 30 requires the seller to "transfer the property in the goods" to the buyer.<sup>211</sup> However, Article 4(b) relates that the Convention "is not concerned with the effect which the contract may have on the property in the goods sold."<sup>212</sup> Consequently, Articles 66-70 determine when "risk of loss" has passed to the buyer. *When* the property ("title") passes is irrelevant to passing of risk issues.<sup>213</sup>

### A. Loss or Damage After Risk Passes to Buyer

Article 36(1) provides: "The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists *at* the time when the *risk passes* to the buyer."<sup>214</sup>

208. CISG, *supra* note 6, 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.") (emphasis added); see HONNOLD, *supra* note 1, § 402; cf. U.C.C. § 2-612.

209. CISG, *supra* note 6, arts. 66-70; see *id.* arts. 25, 36(1); see also U.C.C. §§ 2-319 – 2-324; cf. U.C.C. §§ 2-303, 2-501, 2-509, 2-510, 2-709(1)(a).

210. See *id.* Part 6.A (discussing Obligation of Seller to Transfer the Property in the Goods).

211. CISG, *supra* note 6, art. 30.

212. *Id.* art. 4(b).

213. *Id.*

214. Article 36(1) (emphasis added). The Article goes on to say, "even though the lack of conformity becomes apparent only after that time." *Id.* See *supra* Part 6.C(1) (discussing obligation of seller to deliver goods that conform with the contract).

Article 66 states: “Loss of or damage to the goods *after* the risk has *passed* to the buyer does not discharge him from his obligation to pay the price.”<sup>215</sup> The question now is: *When* does the risk of loss or damage pass to the buyer? These matters are discussed immediately below at Part 10. B-E.<sup>216</sup>

## B. Risk When the Contract Involves Carriage

Nearly all international sales call for carriage of the goods. “‘Carriage’ refers to arrangements involving use of a third party’s transportation facilities – e.g., a trucking service, railroad or maritime shipping provider – rather than trucks or other transport vehicles of the parties themselves.”<sup>217</sup>

Under the CISG if the contract of sale involves carriage of the goods, “the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.”<sup>218</sup> Nevertheless, the risk does not pass until the goods are clearly identified to the contract.<sup>219</sup>

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215. Article 66 (emphasis added). The Articles goes on to say, “unless the loss or damages is due to an act or omission of the seller.” *Id.* See HONNOLD, *supra* note 1, §§ 360-362; *see also cf.* U.C.C. § 2-709(1)(a).

216. “Casualty to the goods (e.g., theft or fire) may occur in various settings . . . . Allocating the risk of loss between seller and buyer should reflect considerations such as these: Which party is in a better position to evaluate the loss and press a claim against the insurer and to salvage or dispose of damaged goods? Who can insure the good at the least cost? Who is more likely to carry insurance under standard commercial practice? What rules on risk will minimize litigation over negligence in the care and custody of the goods?” HONNOLD, *supra* note 1, § 358.

217. HONNOLD, *supra* note 1, §§ 363, 364.

218. CISG, *supra* note 6, art. 67(1); *but see. id.* art. 31(a) (“If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.”). An illustration is as such: Seller of Lyon, France, contracts to sell goods to Buyer of New York City. The contract states that Seller will deliver the goods to the North Star Line in Marseille. The goods are damaged during transport to Marseille. “Seller is responsible for transit damage between Lyon and Marseille.” HONNOLD, *supra* note 1, § 369.2; *see also* CISG, *supra* note 6, art. 67(1) (“The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.”).

219. CISG, *supra* note 6, art. 67(2) (stating goods are identified: by markings on the goods, by shipping documents, by notice given to the buyer or otherwise).

The UCC relates to the situation where the sales contract requires or authorizes the seller to ship the goods by carrier. Here, UCC § 2-509(1)(a) states that if the contract does not require the seller to deliver the goods at a particular destination, “the risk of loss passes to the buyer when the goods are duly delivered to the carrier” (even though the shipment is under reservation under UCC § 2-505).

These rules operate from the baseline that, unless the parties agree to the contrary, transit risks fall on the buyer.<sup>220</sup> Parties to an international sale commonly *will*, however, provide in their contract for the point at which risk passes.<sup>221</sup> For example, see “Incoterms” (International Commercial Terms). These are pre-defined commercial terms published by the International Chamber of Commerce (ICC) and are widely used in international commercial transactions. Incoterms rules are intended to communicate the tasks, costs, and risks associated with the transportation and delivery of goods.

Seven three-letter trade terms, defined by Incoterms<sup>®</sup> 2010, relate to any mode of transportation: EXW, FCA, CPT, CIP, DAT, DAP, DDP. Four three-letter trade terms for sea and inland waterway transport are: FAS, FOB, CFR, CIF.<sup>222</sup>

To illustrate:

- FOB – Free on Board (named port of shipment)

Here, seller delivers the goods on board the vessel at the port of shipment. The risk passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards. This rule is new.

The former rule was that the seller delivered when the goods passed “the ship’s rail” at the named port of shipment; buyer had to bear all costs and risks of loss of or damage to the goods from that point.<sup>223</sup>

- CFR – Cost and Freight (named port of destination)

Seller must pay the costs and freight to bring the goods to the port of destination. Risk, however, is transferred to buyer once the goods are loaded on the vessel. Again, this rule is new. The former rule was that the seller delivered when the goods “passed the ship’s rail” in the port of

220. HONNOLD, *supra* note 1, § 367. *See* Art. 6; U.C.C. § 2-509(3).

221. CISG, *supra* note 6, arts. 66-70.

222. *Cf.* U.C.C. §§ 2-509(1), 2-509(4), 2-319-2-324.

223. *Id.*

shipment; risk of loss or damage to the goods after the time of delivery, were transferred from the seller to the buyer.

- CIF – Cost, Insurance and Freight (named port of destination)

Same as CFR except that the seller must in addition procure and pay for the insurance.

### C. Sale of Goods During Transit

“Article 68 governs contracts in which goods are sold while in the possession of a ‘carrier.’”<sup>224</sup> It provides as a *general* rule: “The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract.”<sup>225</sup>

*Exceptionally*, Article 68 states: “However, *if the circumstances so indicate*, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage.”<sup>226</sup>

### D. General Residual Rules on Risk

Article 69 governs cases *not* within (i) Article 67 (cases where seller hands goods over to a “carrier” for transmission to the buyer, and (ii)

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224. HONNOLD, *supra* note 1, §§ 372-73.

225. *Id.* art. 68. *See* art. 23.

226. *Id.* art. 68 (emphasis added). An illustration of “circumstances” that “indicate” that the buyer assumed the risk from the time the goods were handed over to the carrier: Seller and Buyer consummated the sale by transferring to Buyer the standard package of documents covering the shipment, including a policy of insurance payable (e.g. “to the order of Seller,” and indorsed by Seller to Buyer). “The [e]ndorsement would make Buyer the only person who could claim under the policy and would clearly evidence an intent to transfer to Buyer the total risk of the voyage.” HONNOLD, *supra* note 1, § 372.2; *See* Art. 6. “Of course, the opportunity to press a claim under an insurance policy is not the equivalent of the receipt of sound goods. If the seller knew (or ought to have known) that the goods had been damaged, he should have communicated this fact to the Buyer so the Buyer could decide whether to buy into such a situation. Under the last sentence of Article 68 if the seller fails to disclose the loss or damage ‘the loss or damage is at the risk of the seller.’” HONNOLD, *supra* note 1, § 372.2.

Article 68 (cases where goods are sold while in possession of a “carrier”).<sup>227</sup>

*When Buyer Is Bound to Take Over the Goods at Seller’s Place of Business.* Here, “the risk passes to the buyer when he takes over the goods.”<sup>228</sup>

*When Buyer Is Bound to Take Over the Goods at a Place OTHER THAN a Place of Business of the Seller.* Here, “the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal.”<sup>229</sup> Illustration: “A sales contract involved goods known by both parties to be held in a warehouse operated by a third party person. When Seller deposited the goods in the warehouse Seller received a warehouse receipt stating that the goods would be released to Seller or any person who held a delivery order executed by Seller. On May 1, at the time of the contract, Seller gave Buyer a delivery order directing the warehouseman to deliver the goods to Buyer. On May 2 a fire in the warehouse destroyed the goods. Under Article 69(2), risk passed to Buyer on May 1, since delivery was then due and the buyer knew the goods were at his disposal.”<sup>230</sup>

227. These matters are discussed, *supra*, at Part 10 B and C.

228. “[O]r, 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 for failing to take delivery.” Art. 69(1). See Article 31(c); HONNOLD, *supra* note 1, §§ 373-76. Cf. U.C.C. § 2-509(3).

229. Art. 69(2). See HONNOLD, *supra* note 1, § 377, comments (“Under [Article 69(1)] risk passes to the buyer when he ‘takes over the goods.’ Under [Article 69(2)] risk passes at an earlier point – ‘when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal’ at the designated place.”). Article 69(3) states that goods are not to be placed at the “disposal of the buyer” until they are clearly identified to the contract. Cf. Article 67(3).

230. HONNOLD, *supra* note 1, § 377 ex. 69C. Art. 69(2) also applies to contracts that call for the seller to deliver the goods (i) to the buyer in seller’s own transport vehicles, or (ii) by carriage for which the seller is responsible, that is, by fulfilling its delivery obligations under a “D” (Delivered) price-delivery term as defined in Incoterms (2010). Cf. U.C.C. § 2-509(1)(b), (2).

## E. Risk When Seller is in Breach

“Article 70 addresses the question whether a breach of contract by the *seller* (e.g., by dispatching non-conforming goods) will prevent the risk from passing to the buyer.”<sup>231</sup> It provides: “If the seller has committed a fundamental breach of contract, Articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.”<sup>232</sup>

Illustration: Seller and Buyer enter into a contract calling for Seller to ship certain goods to Buyer. Under Article 67(1) the risk of loss will pass to Buyer “when the goods are handed over to the first carrier for transmission to the buyer.”<sup>233</sup> The goods handed over to the carrier are seriously defective and constitute a “fundamental breach” of the contract.<sup>234</sup> While in transit the goods are damaged. Upon arrival Buyer promptly examines the goods, rejects them, declares the contract “avoided,” and promptly notifies Seller.<sup>235</sup>

May Buyer reject the goods (avoid the contract) because of the fundamental breach at the time of delivery to the carrier? Answer: Yes, even though the risk of loss passes to Buyer when the goods are handed over to the carrier under Article 67(1). Article 70 relates: “If the seller has committed a fundamental breach of contract, [Article 67(1)] [does] not impair the remedies available to the buyer on account of the breach.” “In short, when a serious breach of contract by the seller gives the buyer the right to reject goods (‘avoid the contract’), this right is not lost because of damage to the goods during transit.”<sup>236</sup>

231. HONNOLD, *supra* note 1, § 379 (“In Article 69(1) we saw that when the *buyer* ‘commits a breach of contract by failing to take delivery’ this breach may transfer risk to the buyer.”).

232. “Fundamental breach” is defined in Art. 25. See HONNOLD, *supra* note 1, § 186. Art. 67-69 are discussed, *supra*, at Part 10. B-D.

233. Thus, risk of loss in transit will be borne by Buyer. Compare Art. 67(1) with Art. 31(a).

234. CISG, *supra* note 6, art. 25, 35, 36(1).

235. *Id.* arts. 38(1)-(2), 39(1), 49(1)(a); See art. 25-26, 81(1).

236. HONNOLD, *supra* note 1, § 381 (“Successful avoidance relieves the buyer of its obligation to pay the price for the damaged goods [Art. 81(1)], and entitles the buyer to recovery of payments already made [Art. 81(2)]. Thus as a result of the buyer’s avoidance, the breaching seller ends up with the damaged goods without a right to collect

11. EXEMPTIONS – EXCUSE FROM LIABILITY<sup>237</sup>

## A. Impediment Excusing a Party From Damages

In Contracts for sale of goods there may be unforeseen events that could delay or prevent performance of the contract, such as, labor disputes, strikes, wars, riots, insurrections, civil commotions, fires, earthquakes, floods, storms, or “Acts of God.” Query, will the party affected by the delay or non-performance be entitled to damages?

Article 79, Impediment Excusing Party From Damages, responds: A party is not liable for a failure to perform any of his obligations if he proves –

- (a) that the failure was due to an impediment beyond his control and
- (b) that he could not reasonably be expected –
  - (i) to have taken the impediment into account at the time of the conclusion of the contract.
  - (ii) to have avoided or overcome it or its consequences.<sup>238</sup>

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the price: *in effect, the seller has the risk for the damage.*” ) (emphasis added). Compare U.C.C. § 2-510 (Effect of Breach on Risk of Loss): “(1) Where a tender or delivery of goods *so fails to conform to the contract so as to give a right of rejection* the risk of their loss remains on the seller until cure or acceptance. . . .” *with/and* U.C.C. §§ 2-601, 2-508, 2-606. As to a breach that is *not* “fundamental,” see CISG, *supra* note 6, art. 49(1)(a) (buyer, though, has a damage remedy).

237. CISG, *supra* note 6, arts. 79-80 and see art. 27. Cf. U.C.C. §§ 2-613 – 2-616.

238. CISG, *supra* note 6, art. 79(1). Article 79(5) states that “[n]othing in this article prevents either party from exercising any right other than to claim damages under this Convention.” “[A] party who may not recover damages for failure of performance may still avoid the contract . . . . Consider these cases: (1) A seller delivers goods to buyer but exchange restrictions prevent the buyer from paying. (2) A buyer pays in advance for goods but export controls prevent the seller from delivering goods. In each case the party who is prevented from performing may be exempt from liability for damages. However, the performing party who has performed without receiving the agreed return is entitled to redress. This is provided by the right of avoidance which carries with it (Art. 81(2)) the right to ‘restitution’ of whatever the party ‘has supplies or paid under the contract.’ See Article 49(1), 25-27, 64(1), 81-84.]” HONNOLD, *supra* note 1, § 435.4. Article 79(2) addresses cases where a party delegates performance to a third party who fails to perform; Article 79(3) addresses temporary and partial impediments; Article 79(4) deals with the requirement that the party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. See

Professor Flechtner illustrates:

Suppose a contract for sale requires specific goods – for example, a particular used piece of heavy industrial machinery, identified in the contract by serial number, which the buyer had inspected and approved before the sale was concluded. After the sale is entered into but before the time for delivery (and before the risk of loss for the goods was passed to the buyer)<sup>239</sup> the goods are struck by a meteorite and destroyed. Because the seller is unable to perform (i.e., it cannot deliver the machinery that the contract specifically required) due to an impediment [i] that was beyond the seller’s control, [ii] that it could not reasonably be expected to have taken into account when the contract was concluded, and [iii] that it could neither have avoided nor overcome, the seller would appear to be exempt under Article 79.<sup>240</sup>

Professor Honnold makes these observations with respect to the drafting of Article 79:<sup>241</sup>

(i) It was not practicable to enumerate the circumstances that would excuse a failure to perform.

(ii) The drafters instead sought to express a dividing point on a continuum between *difficult* and *impossible*. (Honnold noted, parenthetically, that even domestic law cast in terms of *impossibility* concealed questions of degree.)

(iii) In spite of strenuous efforts, CISG Article 79 may be the least successful part of the half-century work towards international uniformity. Consequently, Honnold suggested detailed contract drafting to provide solutions to fit the commercial situation at hand.

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HONNOLD, *supra* note 1, §§ 433-435.6. Of particular importance is Article 50, Reduction of the Price. “This article has a special role in determining how much the buyer owes the seller for non-conforming goods when unusual circumstances relieve the seller of liability for “damages.”” See HONNOLD, *supra* note 1, §§ 309-313.2, 435-435.6. See also CISG, *supra* note 6, at AC Opinion No. 7

239. See, e.g., Article 67(1) (the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.).

240. HONNOLD, *supra* note 1, § 432.4.

241. *Id.* § 432.1.

*Examples of Exemption Clauses.* Honnold illustrates by setting forth, e.g., ECE General Conditions which covers the Supply of Plant and Machinery for Export (No. 188). The contract terms on exemptions (or “reliefs”) are captioned: 10 RELIEFS. See Section 10.1.<sup>242</sup>

Compare UCC § 2-615, Excuse by Failure of Presupposed Conditions, which states that unless a *seller*, has assumed a greater obligation, the seller’s “[d]elay in delivery or non-delivery. . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the *non-occurrence* of which was a basic assumption on which the contract was made or in compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”<sup>243</sup>

## B. Failure of Performance Caused by Other Party

Article 80 provides: “A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.” “For example, where the seller’s failure to

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242. This provides: “The following shall be considered as cases of relief if they intervene after formation of the Contract and impede its performance: industrial disputes and any other circumstances (e.g., fire mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumstances are beyond the control of the parties.” (ECE means United Nations Economic Commission for Europe.) HONNOLD, *supra* note 1, §§ 431, 432. See Articles 6, 9.

Helpful examples of exemption clauses are also referenced in HONNOLD. See *Id.* at, § 431, n. 28. Clauses may be called “Force Majeure Clauses”.

243. U.C.C. § 2-615(a) (emphasis added); see 2-615(b)(past performance), (c) (duty to notify). See also UCC §§ 2-613 (Casualty to Identified Goods), 2-614 (Substituted Performance).

Professor Nordstrom, cited in B. Stone, K. Adams, Uniform Commercial Code in a Nutshell (8th ed. 2012), states: “The Code contains three sections that state the general principles that relieve the *seller* from full performance of its contractual obligations. These principles are embodied in the common law of contracts in the doctrines of impossibility, impracticability, and implied conditions. The most accurate way of describing these principles is to say that they are all intended to deal with the allocation of risks that the parties have not expressly allocated in their agreement.”

designate the port of shipment prevented the buyer from opening a letter of credit as contemplated by the contract, the court properly ruled that Art. 80 prevent[ed] the seller from relying on the buyer's failure to open the letter of credit."<sup>244</sup>

## 12. SELLER'S AND BUYER'S DUTY TO PRESERVE GOODS<sup>245</sup>

[Articles 85-88] are designed to prevent the loss or deterioration of goods when a dispute prevents their acceptance or retention by the buyer. To this end, a party who is in the best position to care for the goods is given the responsibility to do so, regardless of whether this party is in breach of contract. . . . [These Articles], in limited circumstances, prescribes duties to care for goods on grounds that do not turn on legal issues such as fundamental breach and avoidance of the contract. Of course the party in breach is responsible for damages resulting from the breach, including any costs incurred by the other party in preserving the goods.<sup>246</sup>

### A. Seller's Duty to Preserve Goods in Its Possession or Control<sup>247</sup>

Article 85 applies to these situations: (i) if the buyer is in delay in taking delivery of the goods, or (ii) where payment of the price and delivery of the goods are to be made concurrently: if buyer fails to pay the price. Here, if the seller is either in possession of the goods or otherwise able to control their disposition, "the seller must take such steps as are *reasonable* in the circumstances to *preserve* them." (Seller is entitled to retain the goods until he has been reimbursed his reasonable expenses by the buyer.)<sup>248</sup>

244. HONNOLD, *supra* note 1, § 436.5, n. 14. *Cf.* art. 60(a) (duty to cooperate).

245. Arts. 85-88; *see* Article 27; *cf.* UCC §§ 2-602, 2-603, 2-604.

246. HONNOLD, *supra* note 1, § 453; *cf.* CISG, *supra* note 6, Art. 66-70 (Risk of Loss) ("The Convention's provisions on the passing of risk were similarly designed to minimize loss – by placing responsibility for the safety of the goods on the person who was in the best position to prevent casualty or other loss.").

247. *Id.* art. 85, 87, 88; *see id.* at Art. 27.

248. *Id.* art. 85 (emphasis added). For a situation where payment of the price and delivery of the goods are to be made concurrently, *see id.* art. 58(2) ("[I]f the contract

Reasonable steps to preserve the goods might well involve depositing goods in a warehouse under Article 87 or reselling them under Article 88.<sup>249</sup>

### B. Buyer's Duty to Preserve Goods It Has Received<sup>250</sup>

*Duty to Preserve Goods Under Article 86(1).* If the buyer (i) has received the goods (acquired possession of them) and (ii) intends to exercise any right to reject them: "he must take such steps to *preserve* them as are *reasonable* in the circumstances." (Buyer is entitled to retain the goods until he has been reimbursed his reasonable expenses by the seller.)<sup>251</sup>

*Duty to Take Possession of Goods Under Article 86(2).* If goods dispatched to the buyer (i) have been placed at his disposal at their destination and buyer (ii) 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." This provision does *not apply* if the *seller* (or a person authorized to take charge of the goods on his behalf) is *present* at the *destination*.<sup>252</sup> "If Seller has *no* agent in or near Buyer's city, Article 86(2) requires Buyer to take possession of the goods; when it does so, Buyer is subject to the Article 86(1) obligation "to take steps to preserve the goods as are reasonable under the circumstances."<sup>253</sup> "The rationale for this rule is clear: it is difficult for a seller to preserve and dispose of the goods that have been rejected at a remote destination."<sup>254</sup>

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involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods or documents controlling their disposition, will not be handed over to the buyer except against payment of the price"). See HONNOLD, *supra* note 1, § 454.

249. CISG, *supra* note 6, arts. 87-88; *see infra* Part 12.B.

250. CISG, *supra* note 6, art. 86-88; *see id.* Art. 27; *cf.* U.C.C. §§ 2-602, 2-603, 2-604.

251. CISG, *supra* note 6, art. 86(1) (emphasis added).

252. *Id.* art. 82(2) (emphasis added).

253. *Id.* art. 86(2) (emphasis added).

254. *See* HONNOLD, *supra* note 1, § 455.2; *see* §§ 455-455.3. *Cf.* UCC § 2-603 ("when the seller has no agent or place of business at the market of rejection a merchant

Articles 85 (Seller's duty to preserve goods) and 86 (Buyer's duty to preserve goods) both establish a duty "to preserve" the goods. Articles 87 (Deposit in Warehouse) and Articles 88 (Sale of the Goods) authorize two specific type of action that may fulfill this duty. Articles 87 and 88 apply both to seller's and buyer's.

*Deposit in Warehouse.* "A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable."<sup>255</sup>

### Sale of the Goods

*Option to Sell.* "A party who is bound to preserve the goods in accordance with Articles 85 or 86 *may* sell them by any appropriate means if there has been an unreasonable delay by the other party [i] in taking possession of the goods or [ii] in taking them back or [iii] in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party."<sup>256</sup>

*Duty to Sell.* "If the goods [i] are subject to rapid deterioration or [ii] their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with Article 85 or 86 *must* take reasonable measures to sell them. To the *extent possible* he must give notice to the other party of his intention to sell."<sup>257</sup>

*Proceeds of Sale.* A party selling the goods [under Article 88(1) or (2)] has the right to retain out of the proceeds of the sale an amount equal

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buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions 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." See UCC §§ 2-601, 2-602, 2-604 (Buyer's Options as to Salvage of Rightly Rejected Goods).

255. Art. 87. HONNOLD, *supra* note 1, § 456.

256. Art. 88(1) (emphasis added). HONNOLD, *supra* note 1, § 457.

257. Art. 88(2) (emphasis added). HONNOLD, *supra* note 1, § 457. Cf. UCC §§ 2-603, 2-604.

to the reasonable expenses of *preserving* the goods and *selling* them. He must account to the other party for the balance.<sup>258</sup>

### 13. CONCLUSION

The objectives sought to be accomplished by the Convention are set forth in its preamble. It reads:

The states parties to this Convention:

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order. Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States.

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

Have agreed as follows. . . .

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258. Art. 88(3) (emphasis added).

## APPENDIX

*Outline of United Nations Convention on  
Contracts for the International Sale of Goods*<sup>259</sup>

## 1. Sphere of Application

- A. Contracts Subject to Convention. Articles 1-3, 5, 10, 95; cf. UCC §§ 2-102, 2-105(1), 2-106(1), see 9-102(a)(23).

(1) Basic Rules On Applicability: Internationality.  
Articles 1, 10, 95.

(2) Exclusions from Convention: Based On (i) Nature of the Transaction,  
(ii) Nature of the Goods. Article 2(a)-(c) and (d)-(f).

(3) Goods To Be Manufactured; Services. Article 3.

(4) Exclusion of Liability for Death or Personal Injury.  
Article 5.

- B. Issues Governed by Convention. Article 4.

- C. Exclusion or Variation of Convention by Contract.  
Article 6, cf. UCC § 1-302.

2. Interpretation of (i) Convention and (ii) Sales Contract. Articles 7-9 cf. UCC §§ 1-103(a) and Comment 1, 1-304 (1-201(b)(20), 2-103(1)(b)), 1-303, 2-202.

- A. Interpretation of the Convention. Article 7, cf. UCC § 1-103(a).

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259. Keyed to Bradford Stone, *Contracts for the International Sale of Goods: The Convention and the Code* (2015) (“Overview”).

- B. Interpretation of Statements or Other Conduct of a Party. Article 8, cf. UCC § 2-202.
  - C. Usages and Practices Applicable to the Contract. Article 9, cf. UCC § 1-303.
3. Requirement As to Form – Writing. Articles 11-13; see Articles 29, 96; cf. UCC §§ 2-201, 2-209.
4. Formation of the Contract. Articles 14-24. Cf. UCC §§ 1-103, 2-204 through 2-207, 2-305.
- A. Offer. Articles 14-17, 24; see Article 55.
    - (1) Criteria for an Offer. Articles 14, 55.
    - (2) When Offer Becomes Effective; Prior Withdrawal. Articles 15, 24.
    - (3) Revocability of Offer. Articles 16, 23, 24; see Article 15(2); cf. UCC § 2-205.
    - (4) Termination of Offer: Rejection of Offer Followed by Acceptance. Articles 17, 24.
  - B. Acceptance. Articles 18-23, see Article 24.
    - (1) Acceptance: (i) Criteria and the (ii) Time and Manner for Assent. Articles 18, 20, 24; see Article 23.
    - (2) “Acceptance” With Modifications. Article 19, cf. UCC § 2-207.
    - (3) Interpretation of Offeror’s Time Limits for Acceptance. Articles 20, 24, see Article 18(2).

(4) Late Acceptances: Response by Offeror. Article 21, see Article 18(2).

(5) Withdrawal of Acceptance. Article 22; see Articles 15(2), 23, 24.

(6) Effect of Acceptance; Time of Conclusion of Contract. Article 23, see Article 18(2).

(7) When Communication (i) “Dispatched,” (ii) “Reaches” the Addressee.

5. General Obligations of Seller and Buyer. Articles 30, 53; cf. UCC § 2-301.

6. Obligations of Seller.

A. Obligation of Seller to Transfer the Property in the Goods. Article 30; see Article 4(b); cf. UCC §§ 2-101 Comment, 2-401 and Comment 1.

B. Obligation of Seller to Deliver the Goods and Hand Over Documents. Articles 30-34; cf. UCC §§ 2-307, 2-308, 2-309, 2-319 et seq., 2-503 through 2-507.

(1) Summary of Seller’s Obligations to Deliver Goods and Hand Over Documents. Article 30; cf. UCC §§ 2-301, 2-507(1).

(2) Place for Delivery. Article 31, see INCOTERMS® (2010) (e.g., FOB, CIF, CFR), cf. UCC § 2-308.

(3) Shipping Arrangements. Article 32, see Article 31(a); cf. UCC §§ 2-503, 2-504, 2-507(1), see § 2-319 through 2-325.

(4) Time for Delivery. Article 33, cf. UCC § 2-309(1).

(5) Documents Relating to the Goods. Article 34. See UCC §§ 2-310(b) and (c), 2-504(b), 2-505, 2-507(2).

C. Obligation of Seller to Deliver Goods That Conform With the Contract. Articles 35-40; see Articles 27, 44; cf. UCC §§ 2-213, 2-314, 2-315, 2-316, 2-317; see UCC §§ 2-508(1), 2-512, 2-513, 2-607(3)(a).

(1) Conformity: Seller's Obligations With Respect to Quality of Goods Articles 35 and 36; cf. UCC §§ 2-313, 2-314, 2-315, 2-316, 2-317. See, e.g., Articles 66, 67(1); UCC §§ 2-509, 2-709(1)(a).

(2) Procedures Applicable When Goods Are Non-conforming.

(a) Seller's Privilege to Cure. Article 37; see Articles 34, 48; cf. UCC § 2-508(1), (2).

(b) Buyer's Obligation to (i) Examine Goods and (ii) Notify Seller of Nonconformity.

(i) Time for Examining Goods. Article 38, see Article 58(3); cf. UCC §§ 2-310(b), 2-512, 2-513. Contrast UCC § 2-316(3)(b) and Article 35(3).

(ii) Requirement That Buyer Give Notice of Lack of Conformity. Articles 39, 40, 44, see Article 27; cf. UCC §§ 2-607(3)(a), 1-202.

D. Obligation of Seller to Deliver Goods Free From Third Party Claims. Articles 41-43; see Articles 27, 44; cf. UCC § 2-312.

7. Obligations of Buyer. Article 53, cf. UCC 2-301.

A. Obligation of Buyer to Pay the Price. Articles 53-59; cf. UCC §§ 2-301, 2-305, 2-310, 2-507.

(1) Summary of Buyer's Obligations to Pay the Price. Article 53, cf. UCC § 2-301.

(2) Steps and Formalities Required to Enable Payment to Be Made. Article 54.

(3) Determination of Price: Open-Price Contracts. Articles 55, 56, see Article 14; cf. UCC § 2-305.

(4) Place and Time for Payment. Articles 57, 58(1) and (2), 59; cf. UCC §§ 2-310, 2-507.

(5) Buyer's Opportunity to Examine Goods Before Payment. Article 58(3), see Article 38; cf. UCC §§ 2-310(b), 2-512, 2-513.

B. Obligation of Buyer to Take Delivery. Articles 53, 60; cf. UCC §§ 2-301, 2-606; see UCC § 2-607.

## 8. Remedies for Breach of Contract.

A. Buyer's Remedies for Breach of Contract by Seller. Article 45; cf. UCC §§ 1-305, 2-508, 2-601 through 2-608, 2-711 (2-712, 2-715, 2-716), 2-714, 2-717.

(1) Buyer May Exercise Rights Provided in Articles 46-52. Article 45(1)(a).

(a) Buyer's Right to Require *Performance* by Seller of Its Obligations (e.g., Delivery of the Goods). Articles 45(1)(a), 46-48; see Articles 28, 50-52.

(i) Buyer's Right to Require Seller to Perform Its Obligations: (a) Unless Inconsistent Remedy, (b) Concession to Domestic Law. Article 46(1); see Articles 50, 75, 28; see also Article 46(2) and (3). Cf. UCC § 2-716(1).

(ii) Buyer's Notice Fixing Additional Final Period For Performance. Article 47 (Nachfrist Notice); cf. Article 63.

(iii) Seller's Right to Cure Defective Performance After Date For Delivery. Article 48; see Articles 34, 37.

(b) Buyer's Right to Declare the Contract *Avoided*. Articles 45(1)(a), 49; see Articles 25-28, 81-84. (As to buyer's duty to preserve goods, see Articles 86-88 at Part 12 below.)

(2) Buyer May Claim Damages as Provided in Articles 74-77. Article 45(1)(b); see Articles 28, 50, 78.

(a) General Rule for Measuring Damages. Articles 6, 74, 78; cf. UCC §§ 1-305, 2-714, 2-715(1) and (2)(a).

(b) Measurement of Damages When Contract Avoided. Articles 75, 76; cf. UCC §§ 2-711(a) and (b), 2-712, 2-713.

(c) Mitigation of Damages. Article 77; cf., e.g., UCC § 2-712(1).

B. Seller's Remedies for Breach of Contract by Buyer. Article 61; cf. UCC §§ 1-305, 2-311, 2-703(2-706, 2-708, 2-709).

(1) Seller May Exercise Rights Provided in Articles 62-65. Article 61 (1)(a).

(a) Seller's Right to Require Buyer to *Perform* Its Obligations (e.g., Payment of the Price). Articles 61(1)(a), 62, 63, see Article 65; cf. UCC § 2-311.

- (i) Seller's Right to Require Buyer to Perform Its Obligations: (a) Unless Inconsistent Remedy, (b) Concession to Domestic Law. Article 62; see Articles 75, 28. Cf. UCC § 2-709(1)(b)(see § 2-706(1)).
- (ii) Seller's Notice Fixing Additional Final Period for Performance. Article 63 (Nachfrist Notice); cf. Article 47.

(b) Seller's Right to Declare the Contract *Avoided*. Articles 61(1)(a), 64; see Articles 25-28, 81-84.

(2) Seller May Claim Damages as Provided in Articles 74 to 77. Article 61(1)(b); see Articles 28, 78. (As to seller's duty to preserve goods in its possession, see Articles 85, 87, 88 at Part 12 below.)

(a) General Rule for Measuring Damages. Articles 6, 74, 78; cf. UCC §§ 1-305, 2-710.

(b) Measurement of Damages When Contract Avoided. Articles 75, 76; cf. UCC §§ 2-703(d) and (e), 2-706, 2-708.

(c) Mitigation of Damages. Article 77; cf. e.g., UCC § 2-706.

C. Statute of Limitations. Limitations Convention, Article 8.

9. Anticipatory Breach and Instalment Contracts. Articles 71-73; see Articles 25-27, 81-84; cf. UCC §§ 2-609 through 2-612.

A. Suspension of Performance. Article 71, cf. UCC §§ 2-609, 2-610, 2-611.

- B. Avoidance Prior to the Date for Performance. Article 72, cf. UCC §§ 2-609, 2-610, 2-611.
  - C. Avoidance in Instalment Contracts. Article 73, cf. UCC §§ 2-612.
10. Risk of Loss. Articles 66-70; see Articles 25, 36(1); cf. UCC §§ 2-303, 2-501, 2-509, 2-510, 2-709(1)(a); see UCC §§ 2-319 through 2-324.
- A. Loss or Damage After Risk Passed to Buyer. Articles 66, 36(1) UCC § 2-709(1)(a).
  - B. Risk When the Contract Involves Carriage. Article 67, 9(1); see INCOTERMS® (2010) (e.g., FOB, CIF, CFR); cf. UCC §§ 2-509(1), 2-319 – 2-324.
  - C. Sale of Goods During Transit. Article 68.
  - D. General Residual Rules on Risk. Article 69, cf. UCC § 2-509(3).
  - E. Risk When Seller Is In Breach. Articles 70, 25
11. Exemptions – Excuse From Liability. Articles 79-80; see Article 27; cf. UCC §§ 2-613 through 2-616.
- A. Impediment Excusing a Party From Damages. Article 79, see Article 27; cf. UCC §§ 2-613 through 2-616.
  - B. Failure of Performance Caused by Other Party. Article 80.
12. Seller’s and Buyer’s Duty to Preserve Goods. Articles 85-88; see Article 27; cf. UCC §§ 2-602, 2-603, 2-604.
- A. Seller’s Duty to Preserve Goods in Its Possession or Control. Articles 85, 87, 88; see Article 27.

- B. Buyer's Duty to Preserve Goods It Has Received. Articles 86-88, see Article 27; cf. UCC §§ 2-602, 2-603, 2-604.

