

Differences between the civilian and common law approach to remedies for a breach of a contract for the sale of goods.

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1. Introduction

The preamble of the United Nations Convention On Contracts For The International Sale Of Goods, 1980² states that the adoption of uniform rules which govern contracts for the international sale of goods and take into account of the different social, economic and legal system would contribute to the removal of legal barriers in international trade and promote the development of international trade. It is true that the drafters of CISG had struggled to take into account of various legal systems which could be symbolized by two main legal regime, in other words, civil law and common law system. Those who tried to find out common solutions were successful in some areas, but, in some points, they didn't reach to agreement. Especially the remedy system where one party breaches the contract shows this disagreement. Until now the United Kingdom has not yet been ratified because of a perception by some that English contract law is more sophisticated, and fear that uncertainty would result from the broadly formulated provisions of the Convention.³ This essay will be developed by comparing the remedy system between the civil and common law regimes, particularly focusing on the CISG's remedy system.

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² Herein after "CISG"

³ J. Beatson, *Law of Contract* (28th ed., Oxford, Oxford University Press, 2002) at 19

It should be admitted that even under the common law regime, the legal effect and system must be diverse depending on individual states as the civil law has not the same effect on those who are under civilian regime, so it is not easy to use which kinds of standard of both legal regime to compare with.

This paper uses the Sale of Goods Act 1979⁴ of United Kingdom and the Uniform Commercial Code⁵ of United States to be compared with the CISG, which shows some distinctive features of civil law in some remedy areas.

This essay begins from the criteria of breach of contract, which contains the key to remedy system, and ‘the reduction of price’, ‘the right to require specific performance’ and ‘measures of damages’ will be examined.

2. Fundamental Breach

Article 49(1)(a) of CISG provides that if the failure by the seller to perform any of his obligation under the contract or the Convention amounts to a “fundamental breach”, the buyer may declare the contract avoided⁶. And article 64(1) (a) says that if the failure by the buyer to perform any of his obligation under the contract or the Convention amounts to a “fundamental breach” of contract, the seller may declare the contract avoided. One of the main purposes or principles of the Convention is to encourage the parties to keep the contract valid as soon as possible. In international sales, ‘goods may well have been transported over thousands of miles’⁷, so it can be understood that ‘a wide range of remedies have been employed to discourage unnecessary termination of the contract’.⁸ Thus, the criteria for a party to terminate the contract, namely fundamental breach, is ‘the central theme of the CISG to uphold the contract.’⁹ Article 25 of the CISG provides the definition of “fundamental breach”. If a breach of contract results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, it belongs to the category of “fundamental”, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would have foreseen such a result.¹⁰ Therefore, the standards of judge “fundamental breach” are ‘in terms of materiality and foreseeability of its consequences’¹¹.

⁴ Hereinafter “SGA”

⁵ Hereinafter “UCC”

⁶ CISG, article 49 (1) (a)

⁷ Alison E. Williams, Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom, *Kluwer Law International* (2000-2001) 9-57 at part of “IV, C”; this article can be available at the site, <http://cisgw3.law.pace.edu/cisg/biblio/williams.html>

⁸ *ibid*

⁹ *ibid*

¹⁰ CISG, article 25

¹¹ Harry M. Flechtner, Remedies Under the New International Sales Convention: The Perspective from

This means that even if the degree of breaching contract amounts to substantial to the other party, it is not automatically led into the aggrieved party's right to avoid the contract. The requirement of foreseeability appears as the forms of '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'.¹² It is very familiar and 'known throughout the Common law world as "the rule of Hadley v. Baxendale"'.¹³ The standpoint of CISG providing an aggrieved party with single criterion to avoid the contract is its own unique feature in contrast with other legal system. For instance, Article 2 of the U.C.C. may or may not condition avoidance-type remedies on the materiality of a breach, depending on the type of contract, the party in breach, the kind of breach, and whether the goods have been accepted.¹⁴ However, it should not be overlooked that 'the aggrieved party can choose not to avoid, even if a fundamental breach has occurred.'¹⁵ The rights to choose between avoid and non-avoidance allowed under the Convention create differences from those of common law, raising the problems of right to performance and reduction of price especially where an aggrieved party chooses non-avoidance, which will be discussed more detailed. However, there are some differences between CISG and common law in the extent of one can chooses avoidance remedy also. For example, an aggrieved seller has a right to avoid the contract without consideration of whether the goods delivered or not under the CISG, but 'under the U.C.C, the seller's right to avoid is limited where the goods are delivered'¹⁶

The article 6 of CISG declares that the parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. This rule originates from the freedom of contract. According to this principle, the parties can still define certain terms of the contract as 'conditions,' if they so require, by clearly classifying what will be regarded as a fundamental breach¹⁷, which may be led into diverse criteria of avoidance-right similar to common law system.

As stated above, the Convention adopts single criterion to declare the contract avoided, 'if the other party's breach is not fundamental, the only path to avoidance is through the Nachfrist procedure in Articles 47 and 63'.¹⁸ It will be discussed next chapter.

Article 2 of the U.C.C., 8 *Journal of Law and Commerce* (1988) at 56; this article is available at the site <http://cisgw3.law.pace.edu/cisg/biblio/flecht.html>

¹² CISG, article 74

¹³ E. Allan Farnworth, Damages and Specific Relief, 27 *American Journal of Comparative Law* (1979) 247-253, at the part of "Fifth Tenet: Foreseeability"; this article is available at the site

<http://cisgw3.law.pace.edu/cisg/biblio/farns.html>

¹⁴ Harry M. Flechtner, *op. cit.*, at 72

¹⁵ *ibid*, at 56

¹⁶ *ibid*, at 61

¹⁷ Alison E. Williams, *op. cit.*, at part of "IV, C, 1"

¹⁸ Harry M. Flechtner, *op. cit.*, at 69

3. Nachfrist

The article 47 (1) and 63 (1) of CISG provides that the buyer or the seller may fix an additional period of time of reasonable length for performance by the other party. If a party gives additional times to the other, he or she may not resort to any remedy for breach of contract during the period¹⁹ unless receiving refusal notice to perform from the other party. After the period expires, the aggrieved party may declare the contract avoid if the other party did not perform his obligation within the additional time.²⁰ Even an aggrieved party who can avoid the contract immediately due to “fundamental breach” may give additional times to the breach party to keep the contract. This concept is commonly known as a *Nachfrist* because of its similarity to the German remedy of the same name.²¹ It is a subsidiary tool to fit into the CISG concept of fundamental breach rather than a remedy of its own.²² When it be literally interpreted, the aggrieved party may declare the contract avoid after the *Nachfrist* in which the extent of breach did not reach into the ‘fundamental’ if the breach party did not perform within the period. The drafters’ intention to specify this concept might be in that the non-performance within ‘the gracefully added period’ should be considered as equivalent to the ‘fundamental breach’, so avoidance based on *Nachfrist* is allowed without requiring the fulfillment of fundamental standard. However, this interpretation would be contrary to the spirit or purpose of the Convention, which encourage the validity of the international sales contract as soon as possible. Professor Harry criticizes that ‘the drafters of the Convention failed to make distinctions based on the materiality of the performance that is delayed.’²³ He asserts that article 49(1)(b) and 64(1)(b) should be construed to permit avoidance only where there has been a failure to perform a material portion of the specified obligations within the time fixed in a *Nachfrist* notice.²⁴ English law has no direct counterpart to the delivery of a *Nachfrist* notice²⁵ In English law where ‘a time stipulation is breached, the innocent party is not obliged to deliver a notice of any sort before being entitled to repudiate the contract’²⁶. Section 10 (2) of the SGA provides that whether any other stipulation as to time is or is not of the essence of the contract depends on the

¹⁹ Article 47(2) and 63(2) of CISG

²⁰ *ibid*

²¹ Alison E. Williams, *op. cit.*, at part of “IV, C, 4”

²² Peter A. Piliounis, The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are these worthwhile changes or additions to English Sales Law?, 12 *Pace International Law Review* (Spring 2000) 1-46 at the part of “5) a)” ; this article is available at the site <http://cisgw3.law.pace.edu/cisg/biblio/piliounis.html>

²³ Harry M Flechtner, *op. cit.*, at 70

²⁴ *ibid*, at 72 ; Alison E. Williams, *op. cit.*, at part of “IV, C, 4”

²⁵ Peter A. Piliounis, *op. cit.*, at “5) b)”

²⁶ *ibid*

terms of the contract. This can be interpreted that a delay to performance does not automatically trigger the aggrieved right to declare the contract avoid. Thus, only where time is considered of the essence, time obligations are viewed as conditions in contracts of sale²⁷. The doctrine of *Nachfrist* resembles the doctrines of waiver and estoppel in English law.²⁸ The fact that the buyer may not resort to any other remedy during the period of the *nachfrist* is equivalent to the buyer being estopped from relying on his strict contractual rights as the result of a representation made to the Seller.²⁹ Both structures give the defaulting party the protection of a reasonable time, at the expense of the innocent party's certainty of when a time period would be considered reasonable.³⁰ Although there are some ambiguities to interpret the Convention's *nachfrist* clauses in relation to whether it requires the 'fundamental criterion' or not, 'a similar result would probably be reached in most cases by the common law as by the CISG'³¹.

4. Reduction of price

The first sentence of the article 50 of CISG provides that the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time, if the goods do not conform with the contract and whether or not the price has already been paid.³² As stated above, under the CISG, the contract parties are allowed to declare the contract avoid only where the degree of the breach of contract reaches to 'fundamental' or 'quasi-fundamental' resulted from '*nachfrist* rule'. The buyer who cannot declare the contract void due to not satisfying the criterion of (quasi) fundamentality may use this remedy. And if the defect is not substantial and repair is unreasonable, the buyer retains the right under article 50 to reduce the price³³.

The power to reduce the price paid to the seller is given solely to the buyer under CISG.³⁴

In similarity with, the U.C.C articulates that the buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.³⁵ However, both don't have the same legal character.

A remedy allowing the buyer to pay a reduced price for defective goods delivered by the seller

²⁷ *ibid*

²⁸ Alison E. Williams, *op. cit.*, at part of "IV, C, 4"

²⁹ *ibid*

³⁰ Peter A. Piliounis, *op. cit.*, at "(5) b) ii)"

³¹ *ibid*

³² CISG, article 50

³³ Amy H. Kastely, The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention, 63 *Washington Law Review* (1988) at 618

³⁴ Peter A. Piliounis, *op. cit.*, at "(6) a) i)"

³⁵ UCC, section 2-717

has been recognised since Roman times, under the Roman law remedy of *actio quanti minoris*.³⁶ Although the reduction of price under CISG seems to be one of the successful results of compromising between civil and common law legal regime³⁷, ‘price reduction based on *actio quanti minoris* is unknown at English law’³⁸. The reduction of price under CISG is ‘different from a right to set-off which is also tied into damages’³⁹. The principle of the price reduction remedy is not dependent on actual loss being suffered by the buyer, but is solely dependent on the abstract relationship between the actual value of the goods delivered and the hypothetical value of conforming goods.⁴⁰ The calculation method for price reduction has been referred to as “proportionate”, versus “linear” or “absolute” calculations for damages.⁴¹

The section 30 (1) of SGA provides that in the case the seller delivers to the buyer a quantity of goods less than he contracted to sell, where the buyer may accept the goods so delivered, he must pay for them at the contract rate.⁴² There are no substantial differences in between the term “proportion” used under CISG and “contract rate” under SGA, so actually the defects in quantity of the goods delivered reach the same amount of price reduction.⁴³ If the price has already been paid, the buyer may claim repayment on the basis of article 50 and may also be entitled to interest on this sum under article 78⁴⁴ of CISG, but this remedy is not available in English law.⁴⁵ The most straightforward situation for a buyer to resort to this remedy under CISG is where the buyer has difficulty in proving its loss, such as where it has purchased the goods for altruistic/non-commercial purposes.⁴⁶ Where the Buyer could have difficulty in calculating his damages, he may find price reduction a more practical and speedy option.⁴⁷ And this remedy is useful where the buyer cannot claim damages to the seller. A party is not liable for a failure to perform any of his obligations due to an impediment beyond his control and expectancy at the time of the conclusion of the contract.⁴⁸ Even if the seller can claim

³⁶ Peter A. Piliounis, *op. cit.*, at “(6)”

³⁷ Amy H. Kastely, *op. cit.*, at 608-609

³⁸ Peter A. Piliounis, *op. cit.*, at “(6) b) i)”

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ *ibid*, at “(6) a) ii)”

⁴² SGA 1979, section 30(1); according to this article, the buyer has a right to choose between rejection and acceptance where the seller delivers to the buyer a quantity of goods less than having been contracted.

⁴³ Peter A. Piliounis, *op. cit.*, at “(6) b) i)”

⁴⁴ The article 78 of CISG stipulates “if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.”

⁴⁵ Alison E. Williams, *op. cit.*, at part of “IV, C, 5”

⁴⁶ Peter A. Piliounis, *op. cit.*, at “(6) a) ii)”

⁴⁷ Alison E. Williams, *op. cit.*, at part of “IV, C, 5”

⁴⁸ CISG, article 79(1). “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”

exemption from the liability under the provision, the buyer can reduce the price for defects in goods delivered.⁴⁹ Finally, this remedy may ‘benefit the Buyer is where the price of the goods has fallen between the conclusion of the contract and delivery’.⁵⁰

Literally interpreting, the article 50 of CISG can be construed that the buyer’s right to reduce the price is executed only by unilateral notice to the seller. The notice may create the effect of reduction of price. However, in practice it is not so simple. Where the seller disagrees to the notice of reduction of price, on the contrary, the buyer may be liable of delaying payment. Furthermore, if the price has already been paid, the reduction must be reimbursed through the judicial or tribunal procedures unless both parties agree to the amount.⁵¹ In a study conducted in 1998 of ten cases from multiple jurisdictions using article 50, it was found that Article 50 was not used "offensively" by the buyer but used predominantly as a counterclaim or a defence to an action by the seller for the purchase price.⁵² Thus, in practice, it can hardly be said that there are substantial differences between civil and common law for an aggrieved buyer to resort to the remedy of reduction of price.

5. Right to require specific performance

The Convention had struggled to ‘overcome the conceptual barriers of their various national legal backgrounds and to discover common solutions to typical problems’.⁵³ On some points, however, it had failed to reach agreement, especially remedial provisions which specify the aggrieved party’s right to require specific performance.⁵⁴ If the contract is not avoided, the Convention contemplates that the basic exchange of goods and price will be completed despite a breach, with damages or other remedies to compensate for defects in the exchange.⁵⁵

The buyer may require the seller to hand over documents relating goods⁵⁶; transfer property in the goods⁵⁷; deliver substitute goods or in some circumstances repair non-conforming goods⁵⁸.

⁴⁹ Peter A. Piliounis, *op. cit.*, at “(6) a) ii”); Alison E. Williams, *op. cit.*, at part of “IV, C, 5”

⁵⁰ Alison E. Williams, *op. cit.*, at part of “IV, C, 5”

⁵¹ Peter A. Piliounis, *op. cit.*, at “(6) a) i)”

⁵² *ibid*

⁵³ Amy H. Kastely, *op. cit.*, at 607

⁵⁴ *ibid*, at 611-612

⁵⁵ Harry M Flechtner, *op. cit.*, at 55

⁵⁶ The first sentence of the CISG article 34 stipulates ‘if the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.’

⁵⁷ CISG, article 30; The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

⁵⁸ CISG, article 46 provides that the buyer may require performance to the seller unless the buyer has resorted to a remedy which is inconsistent with this requirement, namely in case of non-avoidance option (1), require delivery of substitute goods where it reaches to the fundamental breach by notice within certain time limit (2), and require to remedy the lack of conformity by repair unless it is unreasonable

The seller also may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted a remedy which is inconsistent with this requirement.⁵⁹ However, it is doubtful that the seller's right to claim the price to the buyer is classified as one of specific performance for 'such a suit is not commonly thought of as one for specific performance'⁶⁰.

From the point of view of common law regime, specific performance was too harsh a remedy for breach of an international sales contract. In the common law system, where the specific performance was ordered from the court and breached by the defendant, the sanction would be penalties such as fines or even imprisonment for contempt of court.⁶¹ This would not be suitable to be applied in the international trade. Some of other main reasons for the opponents to the specific performance are that 'domestic rules on specific performance are so diverse'⁶² and are 'economically inefficient'.⁶³ The latter is based on the ground that even if a party is bound by a contract to allocate his resources in a particular way, the good of society requires that he break the contract and reallocate his resources whenever this makes him better off without making someone else worse off.⁶⁴ The severe contention on whether the right to require performance should be allowed or not was led into a compromising tool, namely article 28 under CISG, which will be discussed in more detailed.

5. 1. The grounds and function of the right of requirement to perform

One of the reasons raised by those who had asserted to introduce the right to require specific performance under CISG was that 'a party to a contract is entitled to full performance by virtue of the agreement itself'⁶⁵. Even where the buyer may purchase the substitute goods from the same seller or others, they are not always deemed to give the same satisfaction to the buyer as the original contract would have performed, because the value of goods depends on by whom, when, and where the goods were made. Thus, in the case 'the buyers are unable to obtain alternative sources of supply in the quantities and with the qualities needed'⁶⁶, the right to require specific performance takes an important role as a remedy for an aggrieved party.

If an aggrieved party's primary remedy is damages, then litigation frequently will be required to fix the extent of liability, resulting in cost and delay, and a court may err in its estimate of

having regard to all circumstances (3).

⁵⁹ CISG, article 62

⁶⁰ E. Allan Farnworth, *op. cit.*, at the part of "Third Tenet: Substitutional Relief"

⁶¹ Amy H. Kastely, *op. cit.*, at 626-627

⁶² *ibid*

⁶³ *ibid*

⁶⁴ E. Allan Farnworth, *op. cit.*, at the part of introduction

⁶⁵ Amy H. Kastely, *op. cit.*, at 613-615

⁶⁶ *ibid*

compensatory damages⁶⁷. The buyer can execute this right where the seller claims exemption due to the failure caused the impediment beyond his control under the article 79 of CISG.⁶⁸

However, it should be limited under certain circumstances.

The buyer or seller has resorted to a remedy which is inconsistent with this right cannot require performance.⁶⁹ Thus, if a buyer declared the contract avoid, he cannot require the specific performance but only damages. Similarly, enforcement of the right to performance would be inappropriate if the buyer has "reduced the price" under article 50.⁷⁰

Furthermore, if the defect in goods does not reach to fundamental breach⁷¹, or repairing is unreasonable⁷², the buyer cannot require the seller to perform substitute goods or repair them.

Therefore, if the costs to repair the defects in goods are too enormous in the light of the breach, the right may be rejected.

5. 2. The attitudes of common law regime toward specific performance

Section 52 (1) of the SGA provides that in any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

Under English law, granting specific performance of the terms of a contract is an extraordinary remedy, granted in very limited circumstances.⁷³

The first obvious difference between section 52(1) of the SGA and article 46 under the CISG is a remedy granted by the court, in its discretion; yet under the CISG, it is the option of the buyer to choose⁷⁴. The specific performance would be ordered only if the court thought it suitable under English law. And the goods must be 'specific' or 'ascertained' to get specific performance in English law, while there is no limit to the type of goods in CISG. Professor Peter A Piliounis claims that under the English law regime 'the precise scope of when a court might have the power or discretion to grant specific performance is therefore unclear'.⁷⁵

Given the traditional reluctance of English courts to exercise their discretion under the existing language of section 52(1) or to broaden the ambit of the remedy, it is highly unlikely that the English courts will use this opportunity to expand the scope of the right to require specific

⁶⁷ *ibid.*, at 613-615

⁶⁸ *ibid.*, at 619

⁶⁹ CISG, article 46, 62

⁷⁰ Amy H. Kastely, *op. cit.*, at 616

⁷¹ CISG, article 46 (2)

⁷² CISG, article 46 (3)

⁷³ Peter A. Piliounis, *op. cit.*, at "4) a)"

⁷⁴ *ibid.*, at "4) b)"

⁷⁵ *ibid.*

performance.⁷⁶ Thus, it might be expected that specific performance would be granted more frequently under the CISG than is currently the case under the SGA.⁷⁷

The section 2-716 of UCC provides that specific performance may be decreed where the goods are unique or in other proper circumstances⁷⁸. And it may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.⁷⁹ Under the section 2-709 of UCC, the seller can recover the price of unaccepted goods only if they suffered casualty after risk of loss passed to the buyer or if the seller cannot resell at reasonable price.⁸⁰ Under the UCC, the aggrieved buyer's right to require substitute goods or repair is 'not normally available unless volunteered by the seller- for instance, in an attempt to cure under U.C.C. section 2-508'⁸¹.

Although the UCC does not explicitly make this irreparability criterion a condition of specific performance, the standard is deeply imbedded in judicial practice, so the specific performance is equitable, discretionary, and justified only in rare cases.⁸² However, among those who are under common law regime, the United States have 'already shown a greater willingness to grant specific performance than English courts'.⁸³

5. 3. Article 28 under the CISG: compromises or wall ?

The severe contention on whether the right to require performance should be introduced or not under the CISG resulted in making a provision of article 28 of CISG as a compromise.

It says that a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention.⁸⁴

The article 28 of the CISG gives those who are under common law regime the ability not to order specific performance except when it deems fit. Although 'this approach was a useful compromise'⁸⁵, there are much concerns over the article 28 which 'contains a substantial limitation on the ability of a party to obtain specific performance'⁸⁶, for it 'threatens to

⁷⁶ *ibid.*, at "4) c)"

⁷⁷ *ibid.*, at "4) b)"

⁷⁸ UCC, section 2-716 (1)

⁷⁹ UCC, section 2-716 (2)

⁸⁰ Harry M Flechtner, *op. cit.*, at 61

⁸¹ *ibid.*, at 58

⁸² Shael Herman, Specific Performance: a Comparative Analysis, 7 *Edinburgh Law Review, Issue 1* (January 2003) 5-26 and *Issue 2* (May 2003) at 18-19; this article is available at the site <http://cisgw3.law.pace.edu/cisg/biblio/herman1.html>

⁸³ Peter A. Piliounis, *op. cit.*, at "4) c)"

⁸⁴ CISG, article 28

⁸⁵ Peter A. Piliounis, *op. cit.*, at "4) c)"

⁸⁶ *ibid.*, at "4) b)"

undermine the Convention's remedial scheme and to prevent uniformity⁸⁷.

Contracting parties may avoid the post-breach uncertainty created by article 28 by specifying in the contract that specific performance will or will not be available in the event of a breach.⁸⁸

Those who are seeking specific performance in the case of breach may take a forum shopping not to be governed by common law system.⁸⁹

However, this agreement in advance between the parties is not so easily achieved, especially in choosing the forum, so the problem of uncertainty still remains. It might be said that article 28 of CISG is a wall between the both legal regimes rather than a successful compromise.

6. Measure of damages

The object of an award of damages for breach of contract is to place the claimant, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed.⁹⁰ Under the English law, ‘the general principle for the assessment of damages is compensatory’⁹¹. The principles applicable to damages under the CISG are broadly similar to those of English law⁹², which are revealed in the articles 74 to 77 of CISG⁹³ through setting forth familiar formulae based on market differential⁹⁴, resale price⁹⁵, and the cost of cover⁹⁶, and establishing limitation based on foreseeability⁹⁷ and mitigation⁹⁸. However, both common law and civil law regimes are not exactly same in respect of the rules governing the damages.

Section 2-708 of UCC provides that if the measure of damages calculated on the difference between the market price at the time of tender and the contract price is inadequate, the seller

⁸⁷ Amy H. Kastely, *op. cit.*, at 611

⁸⁸ *ibid*, at 640

⁸⁹ Peter A. Piliounis, *op. cit.*, at “(4) b)”

⁹⁰ J. Beatson, *op.cit.*, at 598; *Robinson v. Harman* (1848) 1 Exch.850, at 855

⁹¹ Roger Halson, *Contract Law* (London, Pearson Education, 2001), at 461; *Johnson v. Agnew* [1980]AC 367 at 400

⁹² Alison E. Williams, *op. cit.*, at part of “IV, C”

⁹³ Amy H. Kastely, *op. cit.*, at 611-612

⁹⁴ The article 76 of CISG provides that the aggrieved party may claim damages upon the difference between the price fixed by the contract and the current price at the time of avoiding as well as any further damages if the contract is avoided.

⁹⁵ The article 75 of CISG states that the buyer or the seller who claims damages may recover the differences between the contract price and the price in the substitute transaction if the contract is avoided and the buyer has bought goods in replacement (in case of breach by the seller) or the seller has resold the goods (in the case of breach by the buyer) as well as any further damages recoverable under article 74.

⁹⁶ The article 75 of CISG

⁹⁷ The second sentence of the article 74 of CISG provides that damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

⁹⁸ The article 77 of CISG provides that the aggrieved party who failed to take reasonable measures to mitigate loss may not recover the damages to the extent by which the loss should have been mitigated.

may claim the profit (including reasonable overhead) which the seller would have made from full performance by the buyer including incidental damages and costs. This enables an aggrieved seller may claim 'lost volume' where he cannot resale the goods for the supply exceeds the demand, but the CISG contains no direct counterpart of the UCC provision.⁹⁹

In related to the mitigation rule, the Convention has no specific provision about whether the seller has discretion "in the exercise of reasonable commercial judgment" to finish goods in process of manufacture after repudiation by the buyer, which is regulated by the section 2-704 (2) of UCC.¹⁰⁰ In addition, while the UCC 2-715(2) (a) has a separate formula for damages allowing recovery for injury "proximately resulting from any breach of warranty", the Convention has no such separate provision about it.¹⁰¹

However, these matters may not be led into different results in practice for the article 74 of CISG is broad enough to be interpreted flexibly to get the similar results as applying the UCC.¹⁰²

Thus, it can be summarized that there are no substantial differences between both legal regimes with respect to how to regulate the measure of damages.

7. Conclusion

Considering the fact that the delegates of United States and United Kingdom who had participated in drafting the CISG tried to 'change the word "could" in the early drafts of article 28 under CISG to "would" to preserve domestic law where specific performance would be granted'¹⁰³ and finally achieved their assertion, the UK's not ratifying the CISG seems to be strikingly. Actually, the problem of the reduction of price and the measures of damages may not cause substantial differences between civil law and common law regime. However, the contentious topic whether the right of requirement to specific performance is allowed remains unsolved. Some people say it is a successful compromise between both regimes, however, it may cause uncertainty and threaten the uniformity of the CISG. Probably this hurdle will be overcome through the contracting parties' business practice by specifying the conditions of contract more detailed and 'forum shopping' to remove the uncertainty and inconvenience. It may be glib that UK must ratify the CISG as soon as possible without considering the differences from civilian regime. However, it should not be overlooked that legal tools must serve the social and economic situation, and promote the business trade, which might give rise

⁹⁹ E. Allan Farnworth, *op. cit.*, at the part of "Fourth Tenet: Avoidability"

¹⁰⁰ *ibid*

¹⁰¹ *ibid*, at the part of "Fifth Tenet: Foreseeability"

¹⁰² *ibid*

¹⁰³ Amy H. Kastely, *op. cit.*, at 625

to common wealth. Thus, it might be desirable that where the English court has the jurisdiction over the case in which the parties have agreed specific performance in advance before the breach of contract, the scope of the right to specific performance should be more flexibly interpreted respecting for the both parties' free will. In such cases, the discretion allowed to the court under the section 52 (1) of SGA, then, should be recognized more narrowly.

Bibliography

Books

J. Beatson, *Law of Contract* (28th ed., Oxford, Oxford University Press, 2002)

Roger Halson, *Contract Law* (London, Pearson Education, 2001)

Articles

Alison E. Williams, Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom, *Kluwer Law International* (2000-2001) <http://cisgw3.law.pace.edu/cisg/biblio/williams.html>

Amy H. Kastely, The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention, 63 *Washington Law Review* (1988) <http://cisgw3.law.pace.edu/cisg/biblio/kastely1.html>

E. Allan Farnworth, Damages and Specific Relief, 27 *American Journal of Comparative Law* (1979) 247-253. <http://cisgw3.law.pace.edu/cisg/biblio/farns.html>

Harry M. Flechtner, Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C., 8 *Journal of Law and Commerce* (1988) <http://cisgw3.law.pace.edu/cisg/biblio/flecht.html>

Peter A. Piliounis, The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these worthwhile changes or additions to English Sales Law?, 12 *Pace International Law Review* (Spring 2000) 1-46 <http://cisgw3.law.pace.edu/cisg/biblio/piliounis.html>