THE RIGHT TO REQUIRE PERFORMANCE IN INTERNATIONAL SALES: TOWARDS AN INTERNATIONAL INTERPRETATION OF THE VIENNA CONVENTION

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The United Nations Convention on Contracts for the International Sale of Goods[1] ("Sales Convention" or "Convention") is now law.[2] The Convention was drafted by the United Nations Commission on International Trade Law ("UNCITRAL"), a representative body with delegates from thirty-six states, representing all of the regions of the world.[3] UNCITRAL began its work on a Sales Convention in 1968.

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1. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex I (1980) [hereinafter Sales Convention or Convention], *reprinted in* UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS at 178, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981), *and in* 19 I.L.M. 671 (1980).

Many of the legislative materials cited in this article are reprinted in UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, OFFICIAL RECORDS, U.N. Doc. A/CONF.97/19, U.N. Sales No. E.81.IV.3 (1981) [hereinafter OFFICIAL RECORDS]. Unless otherwise noted, all page references for materials reprinted in the OFFICIAL RECORDS are to the reprinted version, not the original.

2. The Convention entered into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification. Sales Convention, *supra* note 1, art. 99. On December 11, 1986, China, Italy, and the United States deposited instruments of ratification, bringing the number of ratifications to eleven. U.N. Dept. of Public Information, Press Release No. I/T/3849 (Dec. 11, 1986) [hereinafter Press Release]. The Convention therefore came into force as law on January 1, 1988. The first eight nations to ratify or accede were Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia, and Zambia. *Status of Conventions: Note by the Secretariat* at 4, U.N. Doc. A/CN.9/271 (1985). As of June 14, 1988, Australia, Austria, Finland, Sweden, and Mexico had added their assent, bringing to sixteen the number of nations having filed instruments of ratification or accession. Telephone interview with staff member, United Nations Treaty Office (June 14, 1988). To determine whether a nation has ratified or acceded to the Convention, contact the U.N. Treaty Office by telephone—(212) 963-3918.

Article 1(1) defines the scope of the Convention's coverage: "This Convention applies to contracts of sale of goods between parties whose places of business are in different States: *(a)* when the States are Contracting States; or *(b)* when the rules of private international law lead to the application of the law of a Contracting State." Sales Convention, *supra* note 1, art. 1(1).

A Contracting State may declare that it will not be bound by article 1(b). Sales Convention, *supra* note 1, art. 95. The United States has made such a declaration. *Status of the Conventions: Note by the Secretariat* at 5, U.N. Doc. A/CN.9/294 (1987).

3. The membership was originally set at 29 and was enlarged to 36 in 1973. A formula in the Commission's charter specifies the following allocation of delegates: Africa, nine; Asia, seven; Eastern Europe, five; Latin America, six; Western Europe and Others (including Australia,

The full Commission met once a year for two to four weeks until a draft of the Convention was approved by the Commission in 1978.[4] A diplomatic conference of sixty-two states[5] meeting in Vienna in 1980 reviewed this draft, made a number of changes, and gave unanimous approval to the Sales Convention.[6] The United States ratified the Convention on December 11, 1986,[7] and the Convention came into force January 1, 1988.[8]

As law, the Sales Convention is unusual in the relative purity of its origins.[9] Throughout the drafting process, the UNCITRAL delegates struggled to overcome the conceptual barriers of their various national legal backgrounds and to discover common solutions to typical problems. Professor John Honnold, who served as Chief of the United Nations International Trade Law Branch ("Secretariat") and Secretary to the Commission,[10] has described this method of drafting:

Canada and the United States), nine. G.A. Res. 2205 (XXI), 21 U.N. GAOR (1497th plen. mtg.), U.N. Doc. A/6396 (1966), *reprinted in* [1968–70] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 65, U.N. Doc. A/CN.9/SER.A/1970; G.A. Res. 3108 (XXVIII), 28 U.N. GAOR (2197th plen. mtg.), U.N. Doc. A/9408 (1973), *reprinted in* [1974] 5 Y.B.U.N. COMM'N ON INT'L TRADE L. 11, U.N. Doc. A/CN.9/SER.A/1974. *See generally* Honnold, *The United Nations Commission on International Trade Law: Mission and Methods,* 27 AM. J. COMP. L. 201 (1979).

4. *See Report of the United Nations Commission on International Trade Law on the Work of Its Eleventh Session,* 33 U.N. GAOR Supp. (No. 17), U.N. Doc. A/33/17 (1978), *reprinted in* [1978] 9 Y.B.U.N. COMM'N ON INT'L TRADE L. 14, U.N. Doc. A/CN.9/SER.A/1978.

Much of the actual drafting was done by the Working Group on the International Sale of Goods, established after an initial review of the 1964 Uniform Laws on the International Sale of Goods and the Formation of Contracts for the International Sale of Goods. *See* J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 9, at 53–54 (1982). The Working Group originally included representatives from Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, the Union of Soviet Socialist Republics, the United Kingdom, and the United States. Later the membership was expanded to include members from Austria, Czechoslovakia, the Philippines, and Sierra Leone. The Working Group was chaired by Professor Jorge Barrera Graf of Mexico. *Id.*

5. A list of the 62 participating nations is included in *Final Act of the United Nations Conference on Contracts for the International Sale of Goods,* U.N. Doc. A/CONF.97/18 (1980), [hereinafter *Final Act*] *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 176. Several organizations also participated in the 1980 Vienna Conference, including the Bank for International Settlements, Central Office for International Railway Transport, Council of Europe, European Economic Community, Hague Conference on Private International Law, International Chamber of Commerce, International Institute for the Unification of Private Law (UNIDROIT), and the World Bank. *Id.*

6. *Final Act, supra* note 5, at 176. The Convention was approved in six official languages: Arabic, Chinese, English, French, Russian, and Spanish. *Id.*

7. *See* Press Release, *supra* note 2.

8. *See supra* note 2.

9. As one quip goes: Law, like sausage, is best enjoyed in ignorance of what goes into its creation.

10. J. HONNOLD, *supra* note 4, § 8, at 52.

> The Secretariat studies and proposals laid before the legislative body *did not lead off in difficult areas with proposed legislative drafts.* Instead, the delegates were confronted with what the puzzled civil law delegates called the "common-law case method"—concrete hypothetical cases calling for decisions as to *result* rather than legislative *words*. . . .
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> What came next was, for me, even more significant: the relative ease with which delegates, from different backgrounds, reached agreement on *results.* Some will say this shows that there is a universal natural law—others, that there are basic principles of commercial and legal efficiency, just as survival in the sea (beyond the reef) . . . molded the dolphin and the shark into almost identical lines although they entered the sea from wildly different backgrounds.
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> To return to dry land: After agreement was reached on what results should flow from a series of factual cases, it was not too difficult to agree on words to express the result.[11]

When dealing with difficult topics, the UNCITRAL delegates began their discussions with factual situations and sought consensus on the proper outcome in each case. They then articulated the results in words that they hoped would be free from the baggage of any one particular legal system. By using words that refer to events in the world, they sought to escape the limits of any one conceptual scheme.[12]

This method certainly focused the delegates' attention on specific issues raised by each provision, and it also must have provided the group with a context for discussion that avoided the hopelessly irreconcilable conceptual differences among the legal cultures represented in the Commission.[13] The success of this method can be seen espe-

11. J. Honnold, *Beyond the Reef: Uniform Law for International Trade,* Remarks made at the William S. Richardson School of Law, University of Hawaii 7–8 (May 13, 1986) (available at the William S. Richardson Law School Library and *Washington Law Review* offices) [hereinafter *Beyond the Reef*]; *see also* J. HONNOLD, *supra* note 4, § 33, at 69 ("One device used by the Secretariat in presenting issues to UNCITRAL seemed to facilitate agreement and, perhaps, a more direct mode of expression. At points where proposed legal texts might be read differently by delegates from different legal backgrounds, the crucial issues were posed initially in terms of concrete factual examples."). For examples of such factual hypotheticals, see *Working Paper Prepared by the Secretariat* paras. 71, 74, U.N. Doc. A/CN.9/WG.2/WP.1 (1970), *reprinted in* [1968–70] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 197, U.N. Doc. A/CN.9/SER.A/1970.

12. J. Honnold, *Beyond the Reef, supra* note 11, at 4 ("What one needs to do is to cut out legal idioms, and write the rules in terms of commercial *events* that happen around the world. Without knowing the languages of the world you can be sure that there *have to be* words for these commercial events wherever there is commerce."); *see, e.g.,* Sales Convention, *supra* note 1, art. 67 (defining passage of risk of loss as "when the goods are handed over to the first carrier"); *see also* J. HONNOLD, *supra* note 4, §§ 32–33, at 67–69.

13. For a witty and insightful view of this process, see Eörsi, *Unifying the Law (A Play in One Act, With a Song),* 25 AM. J. COMP. L. 658 (1977); Eörsi, *A Propos the 1980 Vienna Convention*

cially in provisions on risk of loss,[14] force majeure,[15] and the like[16] that traditionally have been major conceptual battlegrounds between civil and common law systems.[17]

On some points, however, the delegates did not agree. This was true of the Convention's remedial provisions, which reflect an awkward compromise between two distinct approaches to contract damages.[18] Briefly, most civil law and socialist legal systems conclude that each party to a contract is entitled to performance from the other side.[19] The remedial schemes that flow from this principle generally emphasize an aggrieved party's right to compel performance by the breaching party. For largely historical reasons,[20] most common law systems

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on Contracts for the International Sale of Goods, 31 AM. J. COMP. L. 333 (1983) [hereinafter *A Propos the Convention*].

14. Sales Convention, *supra* note 1, arts. 66–70.

15. *Id.* art. 79.

16. *See, e.g., id.* arts. 50 (buyer's right to reduce the price), 58 (time for payment).

17. *See* Eörsi, *A Propos the Convention, supra* note 13.

18. *See* Date-Bah, *The United Nations Convention on Contracts for the International Sale of Goods, 1980: Overview and Selective Commentary*, 11 REV. GHANA L. 50, 62 (1979); Eörsi, *A Propos the Convention, supra* note 13, at 347; Farnsworth, *Damages and Specific Relief*, 27 AMER. J. COMP. L. 247, 249 (1979); Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. LAW. 79, 97 (1984); Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 9-1, 9-10 to 9-11 (1984).

19. *See generally* I. SZASZ, THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES 167 (2d ed. 1985); Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959); Eörsi, *Contract in the Socialist Economy: General Survey*, in VII-5 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3 (1981); Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1150–51 (1970); Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 233 (1955); Treitel, *Specific Performance in the Sale of Goods*, 1966 J. BUS. L. 211; Comment, *The Convention on Contracts for the International Sale of Goods and the General Conditions for the Sale of Goods*, 12 GA. J. INT'L & COMP. L. 451, 457 (1982).

20. In brief, although early common law courts granted various remedies that operated much like specific relief, the remedy of specific performance became identified with the courts of chancery, which had only a limited impact on contract litigation because of a variety of jurisdictional, political, and ideological factors. *See* Berryman, *The Specific Performance Damages Continuum: An Historical Perspective*, 17 OTTAWA L. REV. 295, 296–306 (1985); Farnsworth, *supra* note 19, at 1152–56. Legal formalists advocated rejection of the discretionary doctrines of equity and the remedy of specific performance at the end of the nineteenth and beginning of the twentieth centuries. Berryman, *supra*, at 305–06. Loosely associated with the formalist critique was a notion that orders of specific performance wrongfully infringe the liberty of the promisor. *Cf.* Farnsworth, *supra* note 19, at 1152–53, 1156 (emphasizing the coercive aspects of specific performance as an important reason for its limited use). *But cf.* Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 296–98 (1979) (arguing that concerns with liberty are significant only where the contract involves personal services or goods to which the promisor has sentimental attachments and noting that the liberty interests involved in the second case are not now recognized by the law and have not yet been shown to be substantial enough to warrant exception to a rule favoring specific performance).

conclude that, although entitled to the monetary equivalent of performance, an aggrieved party normally may not compel actual performance by the breaching party.[21] Although each system recognizes various mitigating rules that lead to similar results in many cases,[22] still the differences between them can be crucial in some circumstances.

A relatively common case, for example, is where a contract provides for specially manufactured goods and the manufacturer repudiates before delivery. Under any legal system, if satisfactory substitute goods are available from another manufacturer, the best course for the aggrieved buyer will be to purchase the substitute goods, regardless of any right to compel performance by the breaching party. Sometimes, however, the purchase of substitute goods will not be a satisfactory solution. Substitute goods may be difficult to locate; their production may entail some delay; their price may be substantially above the contract price; or alternative manufacturers may not have comparable reputations for quality.[23] Similarly, a buyer may doubt that a damage award will be adequate or enforceable. In any of these cases, a buyer may well prefer to insist that the original manufacturer supply the goods, even if that requires some litigation. In such a case, most civil law and socialist systems would require the original manufacturer to perform, while many common law courts would not.[24]

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21. *See generally* E.A. FARNSWORTH, CONTRACTS 818–23 (1982).

22. *See* Treitel, *Remedies for Breach of Contract,* in VII-16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1976).

23. *See, e.g.,* Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975) (substantial increase in market price of cotton); Scholl v. Hartzell, 20 Pa. D. & C.3d 304, 33 U.C.C. Rep. Serv. 951, 954 (Callaghan) (Pa. Ct. C.P. 1981) (1962 Chevrolet Corvette, rare but not "unique").

24. *See generally* Treitel, *supra* note 22, at 16-7 to 16-39. It is difficult to generalize how common law courts approach cases of this kind because the doctrine affords so much discretion to the trial court. *Compare, e.g.,* Scholl v. Hartzell, 20 Pa. D. & C.3d 304, 33 U.C.C. Rep. Serv. 951, 954 (Callaghan) (Pa. Ct. C.P. 1981) (no specific performance of contract for sale of 1962 Corvette) *with* Sedmak v. Charlie's Chevrolet, Inc., 622 S.W.2d 694 (Mo. Ct. App. 1981) (granting specific performance of contract for the sale of a Corvette). In addition, the liberal attitude toward specific performance embodied in section 2-716 of the Uniform Commercial Code has led some courts to grant specific performance in circumstances like those described in the text. *See, e.g.,* Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975) (specific performance available where costs of arranging substitute purchases are uncertain); Copylease Corp. of Am. v. Memorex Corp., 408 F. Supp. 758 (S.D.N.Y. 1976) (specific performance should be available where alternative brands of toner were inferior in quality). In view of these cases, one wonders whether the UNCITRAL members representing the common law nations actually overestimated the degree to which common law courts refuse specific performance. *Cf.* Ziegel, *supra* note 18, at 9-10 ("In any event, the common law is less than consistent in its own position .... [T]here is evidence that the remedy is gaining ground among judges in the sales as well as non-sales areas.").

The Sales Convention does not finally resolve this conflict. Its principal remedial provisions establish a clear right to performance similar to that recognized in most civil law and socialist systems. Article 46 provides that "[t]he buyer may require performance by the seller of [his] obligations."[25] Similarly, article 62 provides that "[t]he seller may require the buyer to pay the price, take delivery or perform his other obligations."[26] Article 28, however, located in a different part of the Convention, provides that even if one party is entitled to performance, "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."[27]

This inconsistency will no doubt prove troublesome for parties seeking to evaluate their rights and obligations under contracts covered by the Convention, for their lawyers, and for courts interpreting this new law. In addition, article 28 threatens to undermine the Convention's remedial scheme and to prevent uniformity in this important aspect of international sales. This Article will explore the remedial provisions of the Convention and some of the issues raised by the uneasy compromise over the right to require performance. Part I will describe the Convention's remedial provisions, illuminated by their drafting history. Part II will evaluate the ability of parties to vary these remedies, and will consider, in particular, the parties' ability to waive or require the remedy of specific performance contractually. A concluding section will offer some general observations regarding interpretation of the Sales Convention.

I. THE CONVENTION AND THE RIGHT TO PERFORMANCE

The remedial provisions of the Sales Convention will at first seem familiar to most American lawyers. A section on damages, articles 74 to 77, sets forth familiar formulae based on market differential,[28] resale price,[29] and the cost of cover,[30] and it establishes limitations based on foreseeability[31] and mitigation.[32] However, further study will reveal a crucial difference between the Convention and the Anglo-

25. Sales Convention, *supra* note 1, art. 46(1).
26. *Id.* art. 62.
27. *Id.* art. 28, quoted in full at text accompanying note 84 *infra.*
28. *Id.* art. 76.
29. *Id.* art. 75.
30. *Id.*
31. *Id.* art. 74.
32. *Id.* art. 77.

American common law: the remedial provisions of the Convention establish a clear right to performance for both buyers and sellers. Under these provisions, an aggrieved party may choose either to require the breaching party fully to perform the contract or to seek substitutional damages.[33]

A. The Right to Performance

The Convention provides that the buyer has a right to require the seller to perform the contract in article 46(1): "The buyer may require performance by the seller of [his] obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."[34] In a typical case, the seller may breach the contract by refusing to deliver the goods. This is the situation most clearly addressed by article 46(1).[35] In addition, however, the seller may breach his obligations regarding documents of sale or delivery. A seller may, for example, fail to present a certificate of ownership or to deliver appropriate bills of lading or warehouse receipts.[36] The right to performance in article 46(1) apparently includes the right to require the seller to perform these documentary obligations as well as the obligation to deliver the goods.[37]

A similar right is given to the seller in article 62: "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement."[38] Under this provision, a seller may

33. Where the goods do not conform with the contract, an aggrieved buyer also may choose to reduce the price to reflect any reduction in value resulting from the defect. *Id.* art. 50.

34. *Id.* art. 46(1).

35. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat,* art. 42, U.N. Doc. A/CONF.97/5 (1979) [hereinafter *1978 Commentary on the Draft Convention*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 14, 38. Although this draft Commentary was never formally adopted, still it is a useful source for interpretation of the Convention. *See* Winship, *Note on the Commentary of the 1980 Vienna Convention,* 18 INT'L LAW. 37 (1984).

36. Article 34 recognizes that many international sales contracts impose documentary obligations on the seller:

> 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. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Sales Convention, *supra* note 1, art. 34.

37. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 3 ("The seller must deliver the goods or any missing part, cure any defects or do any other act necessary for the contract to be performed as originally agreed."); Ziegel, *supra* note 18.

38. Sales Convention, *supra* note 1, art. 62.

require the buyer to pay the price or to perform other obligations, even if the buyer refuses to accept the goods.[39]

Although these provisions are phrased in terms of the "rights" of the parties, the Secretariat's Commentary clearly indicates that they were intended to act as directives to a court in the event of litigation.[40] If the seller refuses to deliver, article 46 directs a court to order specific performance, subject to article 28. Similarly, if the buyer wrongfully rejects the goods, article 62 directs a court to order payment of the price.

The drafting history of the Convention suggests several reasons justifying a broad right to performance. First, several delegates expressed the belief that a party to a contract is entitled to full performance by virtue of the agreement itself, and that the law should not force a nonbreaching party to accept anything less.[41] Second, buyers of goods

39. *See* P. SCHLECHTRIEM, UNIFORM SALES LAW: THE UN- CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 84 (Eng. trans. 1986); Ziegel, *supra* note 18, at 9-30; *see also* Hellner, *The UN Convention on International Sales of Goods—An Outsider's View,* in IUS INTER NATIONES: FESTSCHRIFT FÜR STEFAN RIESENFELD 71, 88–89 (1983) (discussing ambiguities in article 62 and related provisions); *cf.* J. HONNOLD, *supra* note 4, §§ 347–49, at 356–59 (emphasizing limitations on the right of a seller to sue for the price after wrongful rejection imposed by articles 28, 85, and 88).

40. *1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 8:

> The style in which article 42 in particular and Section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief. However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 42(1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

(Footnote omitted.) *See also id.* art. 58, para. 5 (similar discussion of the drafting style of article 62).

41. *See, e.g., Summary Records of the First Committee (18th mtg.),* U.N. Doc. A/CONF.97/C.1/SR.18 (1980) [hereinafter *Summary Records (18th mtg.)*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 328, 331–32:

> 60. Mr. HOSOKAWA (Japan) said that . . . [i]t seemed obvious to him that, once a buyer had concluded a contract which bound the seller to perform his obligation, that buyer should have the right to demand performance.
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> 63. Mr. HJERNER (Sweden) said . . . [that] [e]ven if the buyer was able to purchase substitute commodities elsewhere on the market, he should still have the right to hold to the contract and to expect that the seller's promise would be honoured.
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> 64. Mr. GHESTIN (France) said . . . [that] [t]he result of such an amendment [limiting the right to performance] would be to encourage the seller to dishonour his obligations if the product he was selling was available on the market. Recourse to damage did not seem to him a satisfactory solution; the essential remedy was to secure performance of the contract.

from other countries often are unable to obtain alternative sources of supply in the quantities and with the qualities needed.[42] Finally, 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.[43]

Accordingly, the Convention gives an aggrieved party the right to choose between specific performance and damages. This approach takes on added importance because, in many cases, particularly in international trade, an award of damages will not fully compensate for an aggrieved party's losses. In order to cover, for example, a buyer will incur the costs of finding an alternative supplier and negotiating a new deal. Although the Convention entitles a buyer to recover foreseeable incidental damages,[44] these costs often involve the expenditure of time rather than cash, and it is difficult to establish an accurate monetary value for time and effort.[45] Similarly, resale by a seller may entail costs in time and effort that may not be compensated in a damage award.

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42. *1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 2:

> [I]f the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true if alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.

43. *See id.* ("Legal actions for damages cost money and may take a considerable period of time."). Of course litigation costs and delay also occur in actions for specific performance. The Secretariat's comment must assume that if the law clearly establishes a right to full performance, then a seller is more likely to perform, or at least to negotiate an acceptable settlement with the buyer. The validity of this assumption can be proved only by detailed empirical study. One could speculate, however, that so long as the cost of replacement is the same for both buyer and seller, and assuming that the seller does not save more money from the delay than it costs him to litigate the dispute, then it will be cheaper for the seller to perform than it would be for him to await an eventual suit for specific performance or damages. *See* Schwartz, *supra* note 20, at 285–86.

44. *See* Sales Convention, *supra* note 1, art. 74. Article 74 provides as follows:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he knew or ought to have known, as a possible consequence of the breach of contract.

Id. Although the cost of arranging cover or resale normally would be foreseeable at the time of the contract, costs resulting from sudden shortages or the like may be treated as unforeseeable by some courts. *See generally* J. HONNOLD, *supra* note 4, §§ 406–07, at 410–11; Ziegel, *supra* note 18, at 9-37 to 9-38.

45. *See* Schwartz, *supra* note 20, at 276; *cf.* Brown, *Specific Performance in a Planned Economy,* in PAPERS AND COMMENTS DELIVERED AT THE EIGHTH ANNUAL WORKSHOP ON COMMERCIAL AND CONSUMER LAW 35, 37 (J. Ziegel ed. 1980) (arguing that damage awards are likely to be inadequate for breaches of relational contracts).

In addition, a court may err in its estimate of compensatory damages, that is, the additional cost to the buyer of substitute goods, the difference in value between the contract goods and the available substitutes, and any other losses caused by the breach.[46] The risk of error is particularly acute in cases involving international sales, because identical products are not common in the international market. If a seller has breached, for example, and the buyer is unable to find an exact substitute, then the court must estimate any difference in value to the buyer between the original contract item and the closest substitute. Numerous types of product differentiation are likely. Purchases from alternative suppliers may come with reduced warranties, less brand name recognition, or diminished quality. The diminution in value caused by these differences is difficult to prove with certainty and difficult for a court to evaluate.

The Convention's principal remedial provisions resolve this problem by permitting the aggrieved party to determine whether damages will fully compensate for any loss.[47] If an award of damages would not be sufficient, then the aggrieved party may choose court-ordered performance. Under this remedy, the breaching party will directly bear all losses caused by the breach.[48]

B. Limitations on the Right to Performance

The Convention recognizes several significant limitations on the right to performance. Article 28 will be discussed separately below. The remaining limitations generally define the circumstances in which it would be unfair or unwise to allow the aggrieved party to insist on full performance. Articles 46 and 62 expressly provide that the right to performance cannot be enforced if the aggrieved party has resorted to an inconsistent alternative remedy.[49] The buyer, for example, may

46. *See* Schwartz, *supra* note 20, at 275–77 (discussing reasons why courts' estimates of substitutional damages often may be inaccurate); Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies,* 83 MICH. L. REV. 341, 363 (1984) (emphasizing the difficulty for a court in accurately assessing substitutional damages).

47. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 26, para. 4 (discussing the original draft of article 28):

> It should be noted that articles [46] and [62], where not limited by this article [28], have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy *available at the discretion of the other party.*

(Emphasis added.)

48. The parties may agree to some other allocation, either following the breach or in the original contract. For further discussion of contractual terms regarding specific performance, see *infra* notes 160–90 and accompanying text.

49. Sales Convention, *supra* note 1, arts. 42, 62.

have declared the contract avoided under article 49,[50] in which case the buyer may seek only damages.[51] Similarly, enforcement of the right to performance would be inappropriate if the buyer has "reduced the price" under article 50.[52] Likewise, a seller may lose the right to payment under article 62 by declaring the contract avoided under article 64.[53]

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50. *Id.* art. 49. Article 49 provides as follows:

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Id.

51. *See* Ziegel, *supra* note 18, at 9-9.

52. Article 50 provides as follows:

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

Sales Convention, *supra* note 1, art. 50.

53. Article 64 provides as follows:

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

Subsections (2) and (3) of article 46 also limit the buyer's right to full performance where the seller has delivered goods that do not conform to the contract specifications or are otherwise defective.[54] Under subsection (2), the buyer has a right to substitute goods only if the defect is serious enough to constitute a "fundamental breach," that is, if the defect substantially deprives the buyer of what the buyer is entitled to expect from the contract.[55] Similarly, subsection (3) gives the buyer a right to require the seller to repair the defect only if requiring

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(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Id. art. 64.

54. The Convention recognizes that quality requirements may be either spoken or unspoken. Fortunately, however, the Convention avoids the complexity of Anglo-American warranty law by focusing on the notion of conformity instead of on the notion of implied warranty. Article 35 provides as follows:

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any 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;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Id. art. 35. *See generally* J. HONNOLD, *supra* note 4, § 224, at 251–52.

55. Article 46(2) provides as follows:

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

Sales Convention, *supra* note 1, art. 46(2).

Article 25 defines fundamental breach as follows:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Id. art. 25; *see* Ziegel, *The Vienna International Sales Convention,* in NEW DIMENSIONS IN INTERNATIONAL TRADE LAW: A CANADIAN PERSPECTIVE 38, 43 (1982) (observing that the Convention's test for fundamental breach is more demanding than that for substantial performance in the common law).

repair is not unreasonable under all of the circumstances.[56] Presumably it would be unreasonable to compel the seller to repair if repair is technically infeasible or if the cost of repair exceeds the diminution in value to the buyer[57] caused by the defect.[58] If the defect is not substantial and repair is unreasonable, the buyer retains the right under article 50 to reduce the price to reflect any diminution in value.[59] These limitations on the buyer's right to performance are designed to avoid economic waste where the seller has substantially performed or where the cost of repair exceeds the benefit to be gained.[60]

In addition to the express limitations within articles 46 and 62, article 7 implicitly requires that the right to performance be exercised in good faith. Article 7 requires that in interpreting the Convention, regard should be had to "the observance of good faith in international trade."[61] Although the principle of good faith is not clearly defined and its placement in the Convention is problematic,[62] it is appropriate

56. Article 46(3) provides as follows:

> (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Sales Convention, *supra* note 1, art. 46(3). *See generally* J. HONNOLD, *supra* note 4, § 284, at 301.

57. The loss in value presumably should be based on the buyer's subjective value. *Cf.* Sales Convention, *supra* note 1, art. 74 (damages based on "loss . . . suffered by the other party as a consequence of the breach"); RESTATEMENT (SECOND) OF CONTRACTS § 347 comment b (1981) ("In principle, this requires a determination of the values of those performances to the injured party himself and not their values to some hypothetical reasonable person or on some market.").

58. The reasonableness requirement in article 46(3) might also be read to focus solely on the cost of repair without regard to the buyer's loss: If repairs are very costly, then they are unreasonable. Yet this approach unduly restricts the right to repair. *Cf.* Ziegel, *supra* note 18, at 9-17 n.45 ("Presumably, the severity of the defect, the prejudice to the buyer, and the cost to the seller of repairing goods that may be a long distance from the seller's place of business will all be relevant considerations.").

59. Sales Convention, *supra* note 1, art. 50.

60. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 12; J. HONNOLD, *supra* note 4, § 283, at 301.

61. Article 7 provides as follows:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity [with] the general principles on which it is based or, in the absence of such principles, in conformity [with] the law applicable by virtue of the rules of private international law.

Sales Convention, *supra* note 1, art. 7.

62. Some delegates argued that the obligation of good faith should be treated as a part of the parties' contractual obligations, rather than as a principle for interpretation of the Convention. *See, e.g., Summary Records of the First Committee (5th mtg.),* U.N. Doc. A/CONF.97/C.1/SR.5

to interpret the rights to performance granted in articles 46 and 62 consistently with a general obligation of good faith. The recognition of a right to performance should not permit one party to inflict undue pain or punishment on the breaching party, and article 7 authorizes the court to prohibit such bad faith behavior.[63]

A good faith limitation on the right to performance may be especially important in cases of impossibility or impracticability. Article 79 excuses a party from liability for damages where that party "prove[s] that the failure [to perform] was due to an impediment beyond his control."[64] However, subsection (5) of article 79 expressly limits this excuse to damage claims: "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."[65] As the Secretariat's Commentary explains:

(1980), *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 254, 257–59. As to the obligation of good faith generally, see *1978 Commentary on the Draft Convention, supra* note 35, art. 6, at 17–18; J. HONNOLD, *supra* note 4, § 94, at 123–24; Eörsi, *General Provisions,* in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2-1, 2-6 to 2-8 (1984).

63. This may prove to be a significant limitation where, for example, a party delays an action for performance in order to speculate on the market or until there has been a market collapse, or where a party pursues specific performance for the purpose of harassing the other party or in circumstances where specific performance will be particularly onerous to the breaching party. *See* J. HONNOLD, *supra* note 4, § 95, at 125, § 193, at 222–23, § 285, at 302.

64. Sales Convention, *supra* note 1, art. 79. Article 79 provides as follows:

> (1) A party is not liable for a failure to perform any of his obligations if he proved 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.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
>
> *(a)* he is exempt under the preceding paragraph; and
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> *(b)* the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
>
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
>
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Id. See generally Nicholas, *Force Majeure and Frustration,* 27 AM. J. COMP. L. 231 (1979); Ziegel, *supra* note 55, at 49–50.

65. Sales Convention, *supra* note 1, art. 79(5). *See generally* P. SCHLECHTRIEM, *supra* note 39, at 102–03 (discussing rejection of German and Norwegian proposals to extinguish obligor's obligation to perform in cases of exemption); Hellner, *The Vienna Convention and Standard Form Contracts,* in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 335, 354 (1986).

> The effect of article [79](1) in conjunction with article [79](5) is to exempt the non-performing party only from liability for damages. All of the other remedies are available to the other party, i.e. demand for performance, reduction of the price or avoidance of the contract.
>
> However, if the party who is required to overcome an impediment does so by furnishing a substitute performance, the other party could avoid the contract only if that substitute performance was so deficient in comparison with the performance stipulated in the contract that it constituted a fundamental breach of contract.[66]

If one party is confronted by an impediment, the other party still has a right to performance but may be required to accept a substitute performance.[67] This suggests that the principle of good faith is an essential aspect of the right to performance. Good faith also may require that the breaching party be relieved even of the obligation to make a substitute performance if this is exceptionally burdensome.[68]

Some commentators have argued that article 77, interpreted as a general duty to mitigate damages, imposes an additional limitation on the right to performance.[69] It is doubtful, however, that the duty to mitigate loss recognized in article 77 limits the right of performance granted by articles 46 or 62.[70] Article 77 provides as follows:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures,

66. *1978 Commentary on the Draft Convention, supra* note 35, art. 65, para. 8.

67. *See* Nicholas, *supra* note 64, at 241.

68. *Cf.* P. SCHLECHTRIEM, *supra* note 39, at 102–03 (noting general consensus at the Vienna Convention that it would be wrong to order specific performance of a physically impossible task); Drobnig, *General Principles of European Contract Law,* in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 305, 321 (1986) (noting that Continental and Anglo-American law agree that it is inappropriate to order specific performance where there is factual or legal impossibility).

69. *See, e.g.,* J. HONNOLD, *supra* note 4, § 285, at 302, §§ 418–19, at 418–21. Professor Honnold argues that such a duty to mitigate would be important to prevent injustice and waste in a case, for example, where shortly after placing an order the buyer notifies the seller that he will not be able to use the goods, but the seller nevertheless continues production of the goods and eventually sues the buyer for the price. *Id.* § 418, at 419; *Summary Records of the First Committee (30th mtg.),* U.N. Doc. A/CONF.97/SR.30 (1980) [hereinafter *Summary Records (30th mtg.)*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 393, 396 (discussion by Mr. Honnold (United States), quoted *infra* note 83); *see also id.* at 396–97 (Mr. Alkin (Ireland) argued that the first sentence of article 77 establishes a general duty to mitigate applicable to any remedy and that the second sentence is just one of several possible consequences of a failure to mitigate. Professor Honnold responded that although he hoped such an interpretation would be made, he doubted that the provision would be read in that way.).

70. *Cf.* Ulen, *supra* note 46, at 390–93 (noting that the duty to mitigate does not apply in an action for specific performance under United States law and concluding that a rule favoring specific performance nevertheless would not inefficiently induce promisees to increase their losses).

> the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.[71]

Article 77 imposes a duty on an aggrieved party to take reasonable steps to reduce his or her loss. This presumably includes the purchase of substitute goods by an aggrieved buyer, or the resale of the contract goods by an aggrieved seller.[72] If this provision applies under articles 46 and 62, then article 77 would effectively preclude the buyer from exercising the right to performance whenever substitute goods are reasonably available and it would bar the seller from recovering payment of the price whenever it was reasonably possible to resell the goods. Article 77 would mean, in other words, that the aggrieved party must mitigate loss through the choice of remedy.

This suggestion that article 77 limits the right to performance is refuted, however, by the language of article 77, the structure of the Convention, and the Convention's drafting history.[73] First, the second sentence of article 77 specifies the consequences for failure to mitigate one's losses: The breaching party may claim a reduction in *damages.* Under this wording, the duty to mitigate applies only when the aggrieved party claims damages, not when that party pursues the right to performance.

Moreover, article 77 is placed within a section of the Convention entitled "damages." Article 45, which specifies the remedies available to a buyer, distinguishes between the rights established in articles 46 to 52 and damages as provided in articles 74 to 77.[74] Article 61, dealing with a seller's remedies, makes a similar distinction between the right to performance and a claim for damages.[75] The organization of these remedial provisions creates an important distinction between the right to performance and a claim for damages, including the duty to mitigate damages in article 77.

Finally, the drafting history clearly indicates that article 77 does not limit the right to performance in articles 46 and 62.[76] The Secretariat's Commentary, written in 1977, explicitly states that article 77

71. Sales Convention, *supra* note 1, art. 77.

72. *See generally* J. HONNOLD, *supra* note 4, §§ 418–19, at 418–21; Farnsworth, *supra* note 18, at 251.

73. *See generally* Farnsworth, *supra* note 18, at 249–51 (concluding that article 77 does not apply to an action for specific performance); Hellner, *supra* note 39, at 98–99 (concluding that article 77 does not apply to an action for enforced performance under articles 46 or 62); Ziegel, *supra* note 18, at 9-41 to 9-42 (noting significant "hurdles" to application of article 77 in an action for specific relief).

74. Sales Convention, *supra* note 1, art. 45.

75. *Id.* art. 61.

76. *See* Farnsworth, *supra* note 18, at 250.

does not affect the seller's claim for payment of the price under article 62.[77] Thereafter, several amendments that would have imposed a duty to mitigate under articles 46 and 62 were introduced and rejected at the 1980 Vienna Conference. The United States proposed to amend article 46 so as to deny the buyer a right to performance "if he could purchase substitute goods without [unreasonable] [substantial] additional expense or inconvenience."[78] A similar amendment to article 62 would have denied the seller a right to payment of the price "if the buyer has not taken delivery of the goods and the seller can resell the goods without [unreasonable] [substantial] additional expense or inconvenience."[79] The delegates rejected these amendments by a substantial margin,[80] following debate in which several of the delegates stated that the United States proposal would deprive the buyer of his contractual right to performance and would cause great uncertainty in international contracts.[81]

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77. *1978 Commentary on the Draft Convention, supra* note 35, art. 73, para. 3 (article 62 was then numbered 58).

78. *Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses, Prepared by the Secretary-General,* U.N. Doc. A/CONF.97/9 (1980) [hereinafter *Analysis of Comments and Proposals*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 71, 78; *Report of the First Committee,* U.N. Doc. A/CONF.97/11 (1980) [hereinafter *Report of the First Committee*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 82, 111.

79. *Analysis of Comments and Proposals, supra* note 78, at 71, 79. This second proposal was never formally introduced. *Report of the First Committee, supra* note 78, at 82, 124.

80. *See Report of the First Committee, supra* note 78, at 82, 113 (vote of 34 to 7).

81. *See Summary Records (18th mtg.), supra* note 41, at 330, 331–32:

> 58. Mr. MASKOW (German Democratic Republic) said that . . . the amendment would decisively reduce the buyer's freedom to limit the legal consequences of defects, a freedom which was widespread in commercial life and which should be extended rather than restricted.
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> 59. Mr. HERBER (Federal Republic of Germany) . . . [stated that] [t]he proposed amendment would, in effect, do away with the right of the buyer to require specific performance and thus went further than article 25 of [the Uniform Law on International Sales], which had permitted such a practice only in cases where it was in keeping with established usage. To introduce into the Convention a general rule of that kind covering all types of international sales would mean in practice that no provision was made under any legislation for any right of specific performance.
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> . . . .
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> 61. Mr. SAMI (Iraq) supported that view. The proposal laid down a requirement for a specific course of action to be followed by the buyer in the event that the seller did not meet his obligations, namely that he should himself purchase substitute goods. That principle was a dangerous one which he found unacceptable.
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> . . . .
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> 66. Mr. DABIN (Belgium) said . . . [that] [t]he question at issue was not so much the specific one of enforcing performance, but rather the general principle of honoring obligations under a contract, one of the cornerstones of the Convention. The proposal

Despite this defeat, the United States proposed to amend article 77 to provide that a failure to mitigate would allow the breaching party not only to reduce any damage claim but also to claim "a corresponding modification or adjustment of any other remedy."[82] A large majority of the delegates decisively rejected this attempt to limit the right to performance by imposing a duty to mitigate.[83]

Article 77 therefore does not apply to articles 46 and 62 and does not directly limit the right to performance. Moreover, article 77 should not be applied to limit a monetary component of a right to specific performance. Under article 46, for example, a buyer may require the seller to deliver the contract goods. If the seller refuses, the buyer may seek an order of specific performance requiring the seller to deliver the goods. If the time of eventual delivery is after the contract delivery date, the judgment of specific performance may

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would encourage sellers to evade their obligations on the pretext that the buyer had the option of securing his goods elsewhere.

82. *Report of the First Committee, supra* note 78, at 82, 133; *see Analysis of Comments and Proposals, supra* note 78, at 71, 81. This proposal was offered as an alternative to the United States' proposed amendment to article 62 which would condition the seller's right to recover the price on reasonable attempt to resell. *Analysis of Comments and Proposals, supra,* at 81.

83. *See Report of the First Committee, supra* note 78, at 82, 133. During debate on this amendment, several delegates responded directly to a case posed by Mr. Honnold (United States) that "a buyer might realize, shortly after placing an order, that he would be unable to use the goods; he therefore proposed to the seller that he should pay him damages and asked him not to go ahead with the order; but the seller ignored his request and used materials and labour in producing the goods," *Summary Records (30th mtg.), supra* note 69, at 393, 396:

> 64. Mr. ZIEGEL (Canada) said that . . . [a]rticle [77] only applied to cases where a party relied on a breach of contract; in those cases, and in those cases only, the party concerned was required to take measures to mitigate the loss. However, if the seller or the buyer wished to require performance of the contract, he did not rely on a breach, and the situation was reversed.
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> 65. According to the reasoning of the United States representative, if an innocent party was obliged to accept the repudiation of an obligation, it was not entitled to require specific performance. That point of view might, perhaps, be in line with the practice in common law countries, but it was not in line with the principles underlying the Convention, according to which the buyer and the seller had an absolute right to require specific performance so long as they had not had recourse to inconsistent remedies. In the case cited by the United States representative, the seller had not had recourse to such remedies; he simply wished to exercise his right to performance of the contract, which no provision in the Convention denied him. . . .
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> . . . .
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> 67. Mr. MANTILLA-MOLINA (Mexico) said . . . [that] [i]n the case cited by the United States representative, the fact that the buyer changed his mind did not constitute avoidance of the contract and the seller was entitled to proceed with manufacture since nothing had released him from his obligations. It was reasonable that the seller should seek to recover the price, and it would be unreasonable if, as proposed by the United States, the price could be reduced. He did not see why there should be such a reduction, since the seller had not committed any wrong, or how it would be determined.

Id. at 397.

include an order that the seller pay the buyer an amount of money to compensate for the delay. Yet the monetary order is merely supplementary; it is not a substitute for full performance, and it should not be subject to the mitigation rule of article 77.

C. *Article 28*

The limitations on the right to performance discussed thus far define situations in which the exercise of that right would be unfair or wasteful. They complement the right to performance and establish a principled system of contract remedies. Article 28, in contrast, subverts this system by preserving and privileging domestic law on specific performance. This section creates an irreconcilable conflict in the Convention's remedial provisions. The following discussion focuses first on the rationale for article 28 and then on its application.

1. *Rationale*

Article 28 provides:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.[84]

The primary purpose of article 28 is to preserve domestic law regarding the availability of specific performance. A court is not required to order specific performance under the Convention unless it would do so in a similar case under its own law.[85]

The drafting history of article 28 reveals two separate reasons for its adoption. First, under some legal systems, courts simply do not have the recognized authority or the procedural mechanism to order specific performance.[86] The Convention's drafters thought it would be inappropriate to require such nations to develop an injunction mechanism merely to implement the Sales Convention.[87] Early drafts of

84. Sales Convention, *supra* note 1, art. 28.

85. *See* J. HONNOLD, *supra* note 4, §§ 194–95, at 223–25; *cf.* P. SCHLECHTRIEM, *supra* note 39, at 62–63.

86. *Cf. Report of the United Nations Commission on International Trade Law on the Work of its Second Session,* 24 U.N. GAOR Supp. (No. 18) at 85, U.N. Doc. A/7618 (1969) ("the representative of the United Arab Republic said that the concept of specific performance was unknown in certain countries").

87. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 26, para. 3:

> In some legal systems the courts are authorized to order specific performance of an obligation. In other legal systems courts are not authorized to order certain forms of

article 28 therefore provided that a court would not be bound to order specific performance unless it "could" do so under its own law.[88] Under this formulation, a court would not be obligated to order specific performance if its own legal system did not authorize injunctive orders, but if some such procedure did exist, then the Convention's general remedial provisions would govern.[89]

A different rationale for article 28 was advanced by the United States and the United Kingdom at the 1980 Vienna Conference, in opposition to the proposed draft. Delegates from the United States and the United Kingdom argued that an additional purpose of article 28 should be to allow those legal systems that regard specific performance as an exceptional remedy to continue to do so under the Convention.[90] Citing the 1964 Uniform Law on the International Sale of Goods,[91] these delegates introduced amendments to change the word "could" in the early drafts of article 28 to "would."[92] The effect of this amendment was to preserve domestic law regarding the conditions under which specific performance would be granted. As a result, even if a nation's courts were authorized to order specific performance of a contract, they would not be required to do so under the Convention except in those circumstances indicated by domestic law.

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specific performance and those states could not be expected to alter fundamental principles of their judicial procedure in order to bring this Convention into force.

88. This version of article 28 was drafted by the Working Group on International Sales at its sixth session in 1975. *See Report of the Working Group on the International Sale of Goods on the Work of its Sixth Session,* U.N. Doc. A/CN.9/100 (1975) [hereinafter *Report of the Working Group*], *reprinted in* [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 49, 54, U.N. Doc. A/CN.9/SER.A/1975. The Working Group included representatives from the United Kingdom and the United States. *See supra* note 4. This version was approved by UNCITRAL as its final version. *See Text of Draft Convention on Contracts for the International Sale of Goods Approved by the United Nations Commission on International Trade Law,* art. 26, U.N. Doc. A/CONF.97/5 (1979) [hereinafter *Text of Draft Convention*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 5, 7.

89. *1978 Commentary on the Draft Convention, supra* note 35, art. 26, para. 3:

> Therefore, if a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, article 26 does not limit the application of articles 42 or 58. Article 26 limits their application only if a court could not under any circumstances order such a form of specific performance.

90. *See Summary Records of the First Committee (13th mtg.),* U.N. Doc. A/CONF.97/C.1/SR.13 (1980) [hereinafter *Summary Records (13th mtg.)*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 302, 304–05.

91. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, Annex (Uniform Law on the International Sale of Goods), 834 U.N.T.S. 109, 123.

92. *Report of the First Committee, supra* note 78, at 82, 100.

Although this amendment met with some opposition,[93] it eventually was approved.[94] This is unfortunate. The original proposal, using the word "could," successfully protected those few judicial systems that have no established procedure for specific performance from the burden of having to develop such a mechanism. The cost in uncertainty and lack of uniformity of this solution would have been very small; only a very few nations lack some mechanism for specific performance. The 1980 amendment, in contrast, so broadens the impact of article 28 that it risks all remedial uniformity and threatens extreme uncertainty regarding the right to performance.[95] Because parties at the time of a breach will not know whether the right to performance will eventually be enforced, it will be very difficult for them to evaluate and to settle informally their mutual rights and obligations.[96] Indeed, article 28 may wreak havoc on post-breach negotiations under the Convention; it undermines articles 46 and 62 because an aggrieved party must always fear that a court will not order performance.

The reasons given in support of the 1980 amendment are not persuasive. Surely national pride does not justify the amendment—every provision of the Convention represents a compromise from some national law. The only substantive claims made in support of limiting specific performance are that the remedy is unduly harsh, that domestic rules regarding specific performance are so diverse as to defy consensus, and that specific performance is economically inefficient.[97] None is persuasive.

Professor Farnsworth, as a representative of the United States to the Vienna Conference, argued that specific performance, at least in the common law, was too harsh a remedy for breach of an international sales contract:

93. *See, e.g., Summary Records (13th mtg.), supra* note 90, at 302, 305 ("Mr. WAGNER (German Democractic Republic) said that his delegation preferred the present text of the Convention, which it interpreted as a compromise to prevent common law courts from being compelled to do something which they could not normally do under their law.").

94. *See Report of the First Committee, supra* note 78, at 82, 100 (vote of 26 to 10).

95. *Cf.* Ziegel, *supra* note 18, at 9-11 ("[S]ince the rules of specific performance differ widely even among civil law jurisdictions, the results of such an action will depend on the geographical location of the court before which the action is being brought. This seems regrettable even if it is unavoidable."). Article 28 also presents the very real danger of manipulative forum-shopping. *See* Gonzales, *supra* note 18, at 98.

96. The impact of article 28 on post-breach negotiations is considered in greater detail *infra* notes 104–22 and accompanying text.

97. *See Summary Records (18th mtg.), supra* note 41, at 328, 330 (debate on United States proposal to limit performance remedy in article 46).

> In the common law system, the sanction was both severe and effective, since specific performance was enforced by penalties such as fines (or, in some jurisdictions, even by imprisonment for contempt of court). . . . It was in view of the undue harshness of that remedy (particularly in the context of international sales) that the drafters of the 1964 ULIS had rightly limited the role of specific performance . . . .[98]

Yet this argument hardly justifies abandonment of the Convention's goal of uniformity in the rules regarding the right to performance. If imprisonment is inappropriate, a court may coerce the parties to perform by other means, such as fines. Indeed the Convention itself could have specified appropriate methods of enforcement if the harshness of certain means was found objectionable. But the solution to the problem that some jurisdictions use harsh methods to enforce specific performance orders is hardly to preserve domestic law on specific performance, as article 28 does.

The second argument advanced in favor of article 28 is that domestic rules on specific performance are so diverse as to defy consensus.[99] However, although the conceptual framework of specific relief varies in different jurisdictions, still there is fundamental agreement on many significant points.[100] If UNCITRAL and the Vienna Conference had focused attention on this issue, it is quite possible that some consensus could have been reached on remaining issues of disagreement.

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98. *Id.* at 331.

99. This argument was made mainly in the form of an assertion that there must be some compromise between the common law countries on the one hand and the civil law and socialist nations on the other. *See, e.g., Summary Records (13th mtg.), supra* note 90, at 302, 304 (Statement of Mr. Feltham (United Kingdom)); *see also* Gonzales, *supra* note 18, at 97 (noting that the United Kingdom delegation rejected the compromise reached by UNCITRAL); *cf.* Rabel, *A Draft of an International Law of Sales,* 5 U. CHI. L. REV. 543, 559 (1938) (reporting that a drafting committee of the International Institute for the Unification of Private Law (UNIDROIT) found the contrast between common law and civil law too deep to be eradicated on the issue of specific relief). A related argument is that courts typically have much discretion in ordering specific performance and that this discretion should be preserved. *See, e.g.,* Bergsten, *The Law of Sales in Comparative Law,* in LES VENTES INTERNATIONALES DE MARCHANDISES 3, 13 (Y. Guyon ed. 1981) ("It is also a recognition that in many legal systems the courts will use discretion in enforcing the right and that such discretion is to be preserved by the Convention.").

100. *See, e.g.,* Drobnig, *supra* note 68, at 321; Von Mehren, *A Comparative View of the Remedies Available to a Party Aggrieved by Nonperformance of a Contractual Obligation,* in 2 XENION: FESTSCHRIFT FÜR PAN. J. ZEPOS 28 (1973); *cf.* Ziegel, *supra* note 18, at 9-10 (noting that "the common law is less than consistent in its own position" on specific performance). For studies of specific relief in various legal systems, see, e.g., G. FRIDMAN, SALE OF GOODS IN CANADA 397–99 (1973); W. GLOAG, LAW OF SCOTLAND 129–30 (8th ed. 1980); R. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 265–67 (5th ed. 1953); Amos, *Specific Performance in French Law,* 68 L.Q. REV. 372 (1901); Dawson, *supra* note 19; Gross, *Specific Performance of Contracts in South Africa,* 51 S. AFR. L.J. 347 (1934); Szladits, *supra* note 19; Walton, *Specific Performance in France,* 14 J. COMP. LEGIS. & INT'L L. 130 (1932).

Perhaps the most influential argument made in favor of article 28 was that specific performance is economically inefficient and therefore should be discouraged whenever possible.[101] Professor Farnsworth states this argument in the following terms:

> For the good of society, its resources should be efficiently allocated at every point in time. It is therefore in society's interest that each economic unit reallocate its resources whenever this would lead to greater efficiency. 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. Since reallocation through breach will not make the injured party worse off as long as his expectations are protected . . . , and will, by hypothesis, make the party in breach better off, it is in society's interest that the contract be broken and the resources reallocated. This reasoning supports, for example, substitutional rather than specific relief . . . because such compulsion would discourage reallocation.[102]

The rejection of specific performance as economically inefficient too easily assumes that substitutional damages actually do fully compensate an injured party for all financial loss, inconvenience, and delay caused by a contract breach. Indeed, economic analysts have actively debated the efficiency of specific performance and the most persuasive conclusion is that specific performance may be the most efficient remedy, even where alternative goods are available to the buyer. This analysis recommends permitting the aggrieved party to choose between specific performance and damages.[103]

Briefly, an early analysis concluded that specific performance is frequently inefficient because it prevents a seller from transferring the goods to a third party who values them more highly and who may put the goods to more productive use.[104] This conclusion can be illus-

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101. *See* Date-Bah, *supra* note 18, at 61–62 (offering economic efficiency as the explanation for article 28); *cf.* Farnsworth, *supra* note 18, at 250–51 (arguing in favor of broadening amendment to article 28):

> [Under articles 46 and 62] neither seller nor buyer is free to reallocate its resources even if the other party has a ready market on which it can cover or resell as the case may be and even if that party is fully compensated for any resulting loss. This would not, perhaps, be a significant matter if it offended only the sense of pride of those Common law countries whose history dictates a contrary rule. *Its importance lies in its disregard of fundamental notions of economics.*

(Emphasis added.)

102. Farnsworth, *supra* note 18, at 247–48.

103. *See* Schwartz, *supra* note 20, at 305.

104. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 55–59, 61 (1st ed. 1972); *see also* R. POSNER, ECONOMIC ANALYSIS OF LAW 105–14, 117–19 (3d ed. 1986).

trated with the classic sale of widgets: Helen contracts to sell 100,000 custom-ground widgets to Joe for 10 cents apiece, for use in his stroller factory. On the day before Helen is to deliver the widgets to Joe, Sam calls her and says that he must have 100,000 custom-ground widgets right away or his bakery ovens will break down. Sam is willing to pay 15 cents apiece. Helen will need another two weeks to complete a new batch of 100,000 widgets for Joe and he will lose $2,000 in profits as a result of the delay. It is most efficient that Sam get the widgets because he values them more highly than does Joe, and presumably Sam can put them to a more productive use. If the normal remedy for breach of contract is damages, then Helen must pay Joe $2,000, but she still will have an incentive to breach and sell to Sam. By comparison, it is argued, if Helen were ordered to specifically perform the contract with Joe, then she could not sell to Sam and the widgets would not be allocated to their highest and most productive use.[105]

Several responses to this view noted that specific performance would not necessarily prevent the third party, Sam, from getting the widgets because he could purchase them from Joe, the original buyer, or Helen, the seller, could negotiate with Joe to share some of the profits from a sale to Sam in exchange for a release of Joe's claim.[106] Following this line of thought, at least one influential commentator nevertheless concluded that specific performance is inefficient because of the added transaction cost of negotiation, either between the third party and the original buyer or between the seller and the buyer, either at the time of contract formation or after the breach.[107]

Commentators have made three persuasive responses to the conclusion that specific performance is inefficient. First, the analysis assumes

105. This is a variation on Judge Posner's example. R. POSNER, ECONOMIC ANALYSIS OF LAW 57 (1st ed. 1972). Another variation often discussed involves the manufacture of chairs and tables by Athos and his dealings with the three other Musketeers. *See* Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement,* 81 COLUM. L. REV. 111, 114–15 (1981); Macneil, *Efficient Breach of Contract: Circles in the Sky,* 68 VA. L. REV. 947, 951–52 (1982).

106. *See, e.g.,* Kronman, *Specific Performance,* 45 U. CHI. L. REV. 351, 353 & n.12, 373 (1978); Macneil, *supra* note 105; Schwartz, *supra* note 20, at 284–91; Ulen, *supra* note 46, at 370, 379–96. Judge Posner's original analysis of specific performance recognized the possibility of such transfers, but did not treat it as significant to the analysis. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 57 (1st ed. 1972).

107. *See* Kronman, *supra* note 106, at 365–69 (concluding that a rule favoring specific performance would increase the cost of negotiations during formation of the contract). This article influenced the retention of the traditional preference against specific performance in the *Restatement (Second) of Contracts.* Linzer, *supra* note 105, at 124. *See generally id.* at 120–26 (reviewing debate over the specific performance section of the *Restatement (Second)*).

that an award of damages will fully compensate the original buyer, Joe, and therefore that denial of specific performance would not result in undercompensation. Professor Alan Schwartz has persuasively discredited this assumption.[108] The purchase of substitute items and an award of damages will not always put a buyer in as good a position as he or she would have been in if the contract had been performed or if specific performance were ordered.[109] Moreover, the buyer is in the best position to evaluate whether cover and a damage award will best suit the buyer's needs. Finally, the buyer has an incentive to choose damages whenever that remedy is viable, because an action for specific relief entails costs and delay in delivery of the required goods.[110]

Second, the economic efficiency argument concludes that parties prefer the remedy of specific performance only if the goods are unique.[111] However, several scholars have demonstrated that parties would be likely to agree to specific performance whenever the promisee either values the contract goods more highly than does the market or fears that an accurate damage judgment will be unobtainable or uncollectable.[112]

Third, the argument that specific performance is inefficient fails to consider the enormous expense required to establish a damage award. Professor Ulen has pointed out that overall transaction costs from a rule routinely allowing specific performance surely will be lower than a rule preferring damages because specific performance leaves to the parties and their private negotiations the cost of ascertaining each party's valuation of the goods and losses from the breach.[113] If spe-

108. *See* Schwartz, *supra* note 20, at 275–78. Professor Yorio has responded that substitutionary damage awards could be made more accurate. Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1388–1424 (1982). However, there is no evidence that such a change will happen.

109. *See supra* notes 44–48 and accompanying text. Similarly, there are situations in which the seller will not be fully compensated by a salvage or resale of the goods and a damage award.

110. *See* Schwartz, *supra* note 20, at 277; *see also supra* notes 44–48 and accompanying text.

111. Professor Kronman concludes that, if left to their own negotiations, the parties would prefer specific performance only where the goods are unique. Kronman, *supra* note 106, at 365–69.

112. *See, e.g.*, Linzer, *supra* note 105, at 125 (concluding that a promisee would bargain for specific performance whenever his damages "cannot be ascertained by a market evaluation"); Schwartz, *supra* note 20, at 279–84 (arguing first that it is exceedingly difficult to derive any general rule regarding parties' preferences and second that the promisee is likely to be concerned not only with the nature of the goods, but also with the likelihood of obtaining and enforcing an accurate damage award); Ulen, *supra* note 46, at 375–76 (focusing on the importance of subjective valuations by the promisee).

113. *See* Ulen, *supra* note 46, at 364–403; *cf.* Schwartz, *supra* note 20, at 284–91 (concluding that a rule routinely allowing specific performance will not increase post-breach transaction costs). Professor Yorio has responded that post-breach transaction costs will be higher under a rule favoring specific performance because it is generally cheaper for disappointed buyers to

cific performance is the normal remedy for breach, then a seller desiring to sell to a third party or a buyer wanting to cancel his order will be likely to negotiate with the other side, either before or after a breach, in an effort to get a release from the contract. During these negotiations, each party will set a value on the contract and bargain accordingly. In this way, the parties themselves value the contract and their losses. On the other hand, if the normal remedy is damages, the courts must estimate these values in litigation.[114]

In those cases where buyers do seek specific performance, cover and damages likely will significantly undercompensate them.[115] The question, then, is whether the additional transaction costs caused by specific performance outweigh the costs of undercompensation caused by denying specific relief. Although this question is very difficult to answer,[116] Professor Schwartz concludes that the costs of undercompensation are greater,[117] and this conclusion is strongly supported by Professor Ulen's point that the litigation and negotiation costs of damage awards outweigh those under a specific performance rule.[118] Either way, the efficiency losses involved are very small, probably insignificant. One might then appropriately turn to other considerations, such as the goal of full compensation,[119] the moral convention of promising,[120] a community's sense of justice, relational and cooperational norms,[121] or the goal of unification and certainty in international sales contracts[122] to decide which rule is preferable.

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cover than for breaching sellers. Yorio, *supra* note 108, at 1384–85. Both Schwartz and Ulen have shown, however, that sellers and buyers generally have similar cover costs and that no evidence exists of any systematic difference between them. *See* Schwartz, *supra* note 20, at 286–89; Ulen, *supra* note 46, at 385–89.

114. In some cases the advantages of an alternative sale, for example, may be so great that the seller will willingly pay whatever damages the buyer claims. Yet there is an incentive in this situation for the buyer to inflate his damages and for the seller to contest. In such cases litigation over damages is likely.

115. *See* Schwartz, *supra* note 20, at 276–78.

116. Professor Macneil suggests that the costs of empirical investigations necessary to weigh transaction costs would far outweigh the benefits of such investigations and therefore that it might "be far better to ignore all the sophistication in favor of historical or more intuitive solutions." Macneil, *supra* note 105, at 954 n.28, 957. He then suggests some consideration of relational and cooperative norms relevant to this issue. *Id.* at 961–69. Under the Sales Convention, the goal of uniformity strongly favors the routine use of specific performance in international sales contracts.

117. Schwartz, *supra* note 20, at 278–92.

118. Ulen, *supra* note 46, at 366–96.

119. *See* Schwartz, *supra* note 20, at 305.

120. *See* Linzer, *supra* note 105, at 112–13, 138–39.

121. *Cf.* Macneil, *supra* note 105, at 968–69.

122. *See* Sales Convention, *supra* note 1, art. 7.

This review of the debate over the economic efficiency of specific performance suggests that it is most efficient to allow the non-breaching party to choose between specific performance and damages, or, at least, that this approach will entail only minimal efficiency losses. This indicates in turn that the general approach of the Convention, allowing an aggrieved party to choose between the right to performance and damages, is a wise one and that uniformity and certainty need not be sacrificed merely to preserve a rule favoring substitutional damages. This conclusion in turn suggests that courts should interpret article 28 whenever possible to preserve an aggrieved party's right to require performance. The following section proposes an interpretation of article 28 with this object in mind.

2. *Application of Article 28: Toward an International Interpretation*

As finally adopted, article 28 provides that "a court is not bound to enter a judgment of specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention." Any interpretation of this provision must bear in mind the limited purposes of article 28 discussed in the preceding section. It is also necessary to address three specific questions regarding application of this provision. First, what kinds of orders does the phrase "judgment of specific performance" cover? Second, what does the reference to "its own law" mean? And third, does article 28 require a court to treat international contracts as identical to domestic contracts?

a. *"A Judgment of Specific Performance"*

Under Anglo-American law, specific performance refers to a judicial order requiring the performance of a party's contractual obligations.[123] Since a judgment for specific performance takes the form of a direct order to one party, its violation is punishable by contempt of court.[124]

The content of an order for specific performance under Anglo-American law can be quite broad, since a court can order performance of any act that a party can legally incur an obligation to perform.[125]

123. *Cf.* E.A. FARNSWORTH, *supra* note 21, at 823–24.

124. Penalties for violation of an order of specific performance may include fines or imprisonment for contempt. *See* E. MURPHY & R. SPEIDEL, STUDIES IN CONTRACT LAW 1123 (3d ed. 1984).

125. *See* E.A. FARNSWORTH, *supra* note 21, at 823. Traditional Anglo-American law has refused specific performance of personal service contracts and of contracts that offend public policy. *Id.* at 835–38.

In addition, an order for specific performance can include the payment of money to compensate for delay or other defects in the eventual performance.[126] However, for largely historical reasons, Anglo-American law does not consider a judgment against the buyer for payment of the contract price to be an order for specific performance.[127] A judgment for the price is considered instead to be one form of damages. It is not enforceable by contempt and it does not have any other attributes of an order for specific performance.[128] Similarly, courts in common law countries do not normally order a breaching seller to repair defective goods. This form of specific relief simply has not been recognized as a traditional form of specific performance.[129]

What, then, is the meaning of "specific performance" under article 28 of the Sales Convention? The Convention and the Secretariat's Commentary make it clear that it does include an order requiring the seller to deliver goods pursuant to article 46.[130] Does it include, in addition, an order requiring a buyer to pay the contract price under article 62 or requiring a seller to make repairs under article 46(3)?

First, the term "specific performance" in article 28 need not refer to the definition of "specific performance" in the various national legal systems.[131] One should assume that the words of the Convention themselves have meaning.[132] The Convention is intended to establish

126. *See id.* at 825; *cf.* U.C.C. § 2-716 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 358(3) (1981).

127. *See* J. HONNOLD, *supra* note 4, § 348, at 357; Farnsworth, *supra* note 18, at 249–50.

128. In addition to enforcement by contempt, the most distinguishing aspects of an action for specific performance are that there is no right to a jury trial, *see* D. DOBBS, REMEDIES 796 (1973), and the various equitable defenses, such as unclean hands, public policy, laches, and the like, apply. *See* H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 62, 129, 212 (1948).

129. *See Summary Records of the First Committee (19th mtg.),* U.N. Doc. A/CONF.97/C.1/SR.19 (1980) [hereinafter *Summary Records (19th mtg.)*], *reprinted in* OFFICIAL RECORDS, *supra* note 1, at 334, 335–36 (Statements of Mrs. Kamarul (Australia), Mr. Date-Bah (Ghana), Mr. Farnsworth (United States of America)).

130. Sales Convention, *supra* note 1, art. 46(1), (2). The Commentary to article 46 explicitly refers to article 28. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 9 (article 28 was then numbered 26).

131. The detailed meanings of "specific performance" in English are not necessarily paralleled in each of the six official languages of the Convention. The French version of article 28 refers to "l'exécution en nature"; the Spanish version refers to "cumplimiento especifico." The Russian, Chinese, and Arabic versions reflect similar variety. *See* United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF. 97/18, Annex I (1980) (French, Spanish, Russian, Chinese, and Arabic versions). In each of these languages, the words used may overlap technical terms used in domestic law.

132. *Cf.* J. HONNOLD, *supra* note 4, § 85, at 113 (paragraph (1) of article 7 "emphasizes that this law must be interpreted with sensitive regard for its special character and purpose"). For further discussion of this point, see *infra* note 178 and accompanying text.

uniformity and certainty in the law governing international sales. In order to achieve this goal, the Convention should be interpreted in its own right, in light of its underlying purposes and drafting history.[133]

Does "specific performance" include an order requiring the buyer to pay the price? The drafting history strongly suggests that the term specific performance refers to any order requiring the performance of contractual obligations, whether of the seller or the buyer.[134] The Secretariat's Commentary to article 28 mentions both articles 46, regarding the buyer's right to performance, and 62, regarding the seller's right to payment of the price.[135] In addition, the Commentary to article 62 specifically notes that the seller's right to payment would be subject to article 28.[136] Article 28, then, should be interpreted to include any order requiring full performance by the seller or the buyer under articles 46 and 62.[137]

An order requiring the seller to repair defective goods under article 46(3) is more difficult to evaluate.[138] The Commentary does not suggest any distinction between the various subsections of article 46 in its reference to article 28, and the drafting history nowhere directly addresses the question whether such an order for repairs would be covered by article 28. Considering the purposes of article 28, one could conclude that the objections to an order requiring a seller to deliver contract goods or substitute goods should apply as well to an order requiring the seller to make repairs. In all of these cases the court is coercing performance by the seller.[139]

Yet characterizing an order to repair as an order for specific performance has one troubling consequence. If the right to repair under article 46(3) is enforceable only if "the court would do so under its

133. *See generally* J. HONNOLD, *supra* note 4, §§ 85–93, at 113–23 (discussing the interpretation of the Convention in light of its underlying principles and its legislative history).

134. *See Report of the Secretary-General: Obligations of the Seller in International Sale of Goods; Consolidation of Work Done by the Working Group on the International Sale of Goods and Suggested Solutions for Unresolved Problems,* U.N. Doc. A/CN.9/WG.2/WP.16 (1972) [hereinafter *Report of the Secretary-General*], *reprinted in* [1973] 4 Y.B.U.N. COMM'N ON INT'L TRADE L. 36, 52, U.N. Doc. A/CN.9/SER.A/1973 (noting that the preservation of domestic law in the Uniform Law on International Sales (1964) applied to the right to payment of the price); J. HONNOLD, *supra* note 4, § 348, at 357–58.

135. *1978 Commentary on the Draft Convention, supra* note 35, art. 26. The final article 46 was then article 42; the final article 62 was then article 58.

136. *Id.* art. 58.

137. J. HONNOLD, *supra* note 4, § 348, at 357–58 (concluding that article 28 does apply to an action for the price under article 62); Ziegel, *supra* note 18, at 9-31. *Contra* Farnsworth, *supra* note 18, at 249.

138. Article 46(3) is quoted *supra* note 56.

139. See *supra* notes 84–122 and accompanying text for discussion of the rationale of article 28.

own law in respect of similar contracts of sale not governed by this Convention," then this remedy will be severely limited because many legal systems do not recognize a separate remedy of required repair.[140] The drafters of the Convention adopted the right to repair as an alternative to requiring the delivery of substitute goods where the delivery of substitute goods clearly would be wasteful.[141] If an order to repair is characterized as an order to perform to which article 28 applies, this innovative remedy could rarely be invoked because most courts could disregard it as inconsistent with domestic law. This would significantly limit the effect of article 46(3).[142]

There is no easy solution to this problem. The approach most consistent with the language and purpose both of article 28 and article 46 would be to say that an order of repair is subject to article 28, but that always under article 28 courts have the discretion to vary from domestic law in order to give effect to the international character of the contract and the need for uniformity in the law governing international sales. Under this approach, a court should exercise its discretion

140. *Cf. Summary Records (19th mtg.), supra* note 129, at 334, 335–36 (several delegates commented that the right to repair was unknown in their domestic laws).

141. The Uniform Law on International Sales (1964) included a right to repair with respect to goods produced or manufactured by the seller. *See* Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, Annex (Uniform Law on the International Sale of Goods), 834 U.N.T.S. 109, 141 (art. 42). However, this was not included in the draft of article 46 recommended by UNCITRAL. *See Text of Draft Convention, supra* note 88, art. 42, at 5, 38. An amendment to article 46 incorporating a right to repair was introduced jointly by the Federal Republic of Germany, Finland, Norway, and Sweden. *Report of the First Committee, supra* note 78, at 82, 112–13. During debate on the amendment, some delegates noted that the right to repair was necessary to protect the buyer where delivered goods were defective but the defects did not constitute a fundamental breach. *See Summary Records (19th mtg.), supra* note 129, at 334, 335–36. The range of opinion expressed in the debate was quite broad. Some delegates objected to the fundamental breach limitation on the right to require substitute goods; some thought that even the right to repair should be severely limited. The final version of article 46 emerged as a compromise designed to both preserve the fundamental breach limitation in subsection (2) and to give the buyer a right to require repairs by the seller except where such repairs would be technically unfeasible or economically unreasonable.

For an explanation of the fundamental breach limitation in subsection (2), see *1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 12:

> If the goods which have been delivered do not conform to the contract, the buyer may want the seller to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach . . . ."

142. *Cf.* P. SCHLECHTRIEM, *supra* note 39, at 63, 76 n.293 ("Article 28 does not justify the rejection of a claim for repair merely because it is unknown as a remedy under domestic law."). This observation is consistent with the suggestion that courts should exercise their discretion to treat international sales contracts differently than they would treat domestic contracts.

under article 28 to order specific performance, sometimes in the form of an order to repair, even if it would not do so in a dispute involving a domestic contract.[143]

b. "Its Own Law"

Article 28 does not bind a court to order specific performance unless it would do so under "its own law." This provision was clearly intended to refer to the "lex fori"; however, it is not clear whether a court should also look to the forum's choice of law rules in considering whether to grant specific performance.[144] This question was raised at the Vienna Conference, but no clear answer was given.[145]

The question is significant. In some legal systems, the issue of whether to grant specific performance is considered to be substantive and thus is governed by the proper law of the contract, as determined by the rules of private international law.[146] Other legal systems consider the issue to be procedural and hence governed solely by the law of the forum. If article 28 refers to the forum's choice of law rules as well as to its contract law, then the issue of specific performance may be governed by a law which is inconsistent with the forum's own contract law. At the least, the practical effect of such an interpretation would be to resurrect difficult choice of law issues in many international contract disputes, and to make enforcement of the right to performance recognized by the Convention even more uncertain.

The rationale of article 28 clearly suggests that the issue of specific performance should be governed by the forum's domestic contract law, without reference to the choice of law rules of private international law. The debates over article 28 centered first on the problem of

143. For further discussion of the court's discretion to vary from domestic law under article 28, see *infra* notes 149–59 and accompanying text.

144. References to article 28 throughout the drafting history simply mention the "lex fori" of the court. *See, e.g., Report of the Secretary-General, supra* note 134, at 36, 53 (referring to "the procedural rules of the forum"); *Analysis of Comments and Proposals Relating to Articles 18–55 of the Uniform Law on International Sale of Goods (ULIS): Note by the Secretary-General,* U.N. Doc. A/CN.9/WG.2/WP.10 (1971) ("lex fori"), *reprinted in* [1972] 3 Y.B.U.N. COMM'N ON INT'L TRADE L. 54, 60, U.N. Doc. A/CN.9/SER.A/1972. *But cf. Progress Report of the Working Group on the International Sale of Goods on the Work of Its Fifth Session,* U.N. Doc. A/CN.9/87 (1974) ("One observer held that the phrase 'similar contracts of sale not governed by the Uniform Law' pointed to domestic contracts. He, therefore, suggested that the commentary should contain a clear statement to this effect."), *reprinted in* [1974] 5 Y.B.U.N. COMM'N ON INT'L TRADE L. 29, 33, U.N. Doc. A/CN.9/SER.A/1974.

145. *Summary Records (13th mtg.), supra* note 90, at 302, 305.

146. *See* J. HONNOLD, *supra* note 4, § 195, at 224 n.4; *cf.* DICEY AND MORRIS ON THE CONFLICT OF LAWS 1175–78 (J. Morris 10th ed. 1980) (discussing the characterization of rules as procedural or substantive).

judicial systems that have no mechanism for injunctive orders and second on the desire for deference to those legal systems that consider specific performance as an exceptional remedy.[147] For both of these goals, the focus is on the normal practice of the court applying *domestic* law. It would be anomalous to say that the Convention will not directly require such legal systems to grant specific performance, but that it will require them to apply the law of some other legal system that may require specific performance. Conversely, if a legal system stands ready to order specific performance, it should not be prevented from doing so by choice of law rules which likely do not take into account the policies underlying the article 28 compromise. Article 28, then, should be interpreted as referring to the domestic law of the forum court and not to its choice of law rules.[148]

c. Judicial Discretion Under Article 28

Article 28 provides that a court "is not bound" to order specific performance in a dispute governed by the Convention unless it would do so "under its own law in respect of similar contracts of sale not governed by the Convention." If the domestic law of the forum court would require an order of specific performance in a similar contract of sale, the court must order specific performance if the party otherwise has a right to performance under the Convention.[149] If, on the other hand, the domestic law of the forum court does not require an order of specific performance, does the court nevertheless have discretion under the Convention to enforce the right to performance? The best interpretation of article 28 would hold that it does.[150]

The negative phrasing in article 28 is consistent with its purpose. This provision was adopted in order to avoid forcing national courts to issue orders that either were not authorized or were considered unwise under domestic law. The drafting history does not disclose any reason to require adherence to domestic rules on specific performance. In short, article 28 does not require a court to apply its law to a contract governed by the Convention; it simply allows the court to follow domestic law if it so chooses.

147. *See supra* notes 86–92 and accompanying text.

148. *See* J. HONNOLD, *supra* note 4, § 195, at 224; P. SCHLECHTRIEM, *supra* note 39, at 63.

149. The Convention's various limitations on the right to performance would apply even if the court's domestic law would grant specific performance. J. HONNOLD, *supra* note 4, § 195, at 225.

150. This view is shared by most commentators who have addressed the issue. *See, e.g.*, Date-Bah, *supra* note 18, at 62; Gonzalez, *supra* note 18, at 97; *cf.* Bergsten, *supra* note 99, at 13 (describing article 28 as the general preservation of discretion). *But see* J. HONNOLD, *supra* note 4, § 195, at 225.

Article 7 further supports the interpretation of article 28 as discretionary.[151] Article 7 requires that the Convention be interpreted consistently with its international character and with the need to promote uniformity in its application. An interpretation of article 28 allowing a court to give effect to the right to performance recognized in articles 46 and 62 without regard to domestic law furthers these principles. Most civil law courts will readily enforce the right to performance under the Convention's remedial provisions; certainly courts in common law nations should be encouraged to do the same.

Interpreting article 28 as discretionary is also consistent with the broad discretion given to courts under Anglo-American common law to determine when specific performance of a contract should be ordered.[152] Section 2-716 of the Uniform Commercial Code, for example, allows the court to order specific performance where the goods are unique or "in other proper circumstances."[153] In exercising that discretion, a court appropriately considers all of the circumstances of the case, including its international character.[154] Three factors suggest that even under American law, courts should order specific performance more readily in disputes governed by the Sales Convention than they would in other contexts.

First, the difficulties of cover and resale are often aggravated in international transactions. Even though alternative suppliers exist, for example, it may be difficult for a buyer in one country to locate a new seller in another country and to negotiate a contract with him. Similarly, a seller of goods with an international market often will have added difficulty locating and contracting with a new buyer. This suggests that even under American law, the ability to cover or resell in international contracts should be carefully evaluated. While fungible

151. Sales Convention, *supra* note 1, art. 7, quoted *supra* note 61.

152. *See generally* E.A. FARNSWORTH, *supra* note 21, at 826–38 (analyzing factors which may influence a court in the exercise of its discretion to order specific performance).

153. U.C.C. § 2-716 (1978). This provision effectively gives significant discretion to the courts to determine "appropriate circumstances" for specific relief. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 238 (2d ed. 1980) (noting that "the perimeters of uniqueness *vis a vis* 'other proper circumstances' remain undefined"); *see also* U.C.C. § 2-716 comment 1 (1978) ("without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale."). For an example of an increasingly common broad interpretation of "other proper circumstance," see Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975).

154. *Cf.* Ziegel, *supra* note 18, at 9-11:

> [W]hen article 28 invites a tribunal to consider whether a "similar" contract would be specifically enforceable under its own law, presumably it is not the contract alone but *all* the surrounding circumstances, including the subject matter of the contract and the identity of the parties, that the court is entitled to take into consideration.

goods may be readily covered or resold in a domestic market, this may not be true in international trade.[155]

Second, the expectations of the parties to an international contract may be quite different than those to a domestic contract. The civil law system, which generally recognizes and enforces a right to performance, has influenced much of the world.[156] Although the expectations of the parties are not determinative in American law governing specific performance, still a court may consider them in exercising its discretion to order specific relief.[157] If one of the parties is from a jurisdiction influenced by the civil law, and the other deals regularly within a civil law system or under the Sales Convention, an American court should more readily enforce the Convention's right to performance as consistent with the parties' general, albeit unspoken, expectation.[158]

Finally, an American court may recognize, in the exercise of its discretion to order specific performance, the need to promote uniformity in the application of the Sales Convention. The Convention's general remedial provisions give the aggrieved party the choice whether to enforce a right to performance or to seek damages. This approach appears to be economically efficient, and it accords with notions of fairness and justice shared by most of the world. Courts in most civil law nations and in many other states likely will give effect to this approach and will allow the aggrieved party to choose specific performance so long as this is not unduly burdensome to the other side. If so, American courts will significantly further the goal of uniformity by granting specific performance when the aggrieved party requests it. By thus reducing the uncertainty over the right to performance, the courts will encourage the parties to an international contract to settle their claims informally. Uniformity of result also will help prevent the costs and delay resulting from forum-shopping. Finally, this will encourage development of an international jurisprudence in the application of the Sales Convention.[159]

155. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 42, para. 2, quoted *supra* note 42.

156. *See generally* Treitel, *supra* note 22, at 16-7 to 16-39 (surveying the right to performance in numerous legal systems).

157. *Cf.* E.A. FARNSWORTH, *supra* note 21, at 831–32 (discussing the relevance of parties' agreements regarding specific performance).

158. Deference to the parties' expectations, both spoken and unspoken, is consistent with the Convention's commitment to freedom of contract. *See* Sales Convention, *supra* note 1, art. 6 (parties may waive or vary provisions of the Convention by agreement); *id.* art. 8 (statements, conduct, and "all relevant circumstances of the case" are relevant in determining the parties' intent and understanding). *See generally* J. HONNOLD, *supra* note 4, § 2, at 47–48 (emphasizing the Convention's commitment to the primacy of the parties' agreement).

159. *See infra* notes 193–201 and accompanying text.

II. AGREEMENTS REGARDING SPECIFIC PERFORMANCE

In an international transaction governed by the Sales Convention, article 28 will directly affect the post-breach strategy of an aggrieved buyer or seller who prefers to pursue full performance.[160] Because of article 28, the aggrieved party will be unable to predict with any degree of certainty whether his right to performance will be enforced by court order because the case may be heard in a jurisdiction where the domestic law restricts specific performance. Yet cover may be imperfect, and a damage award may be inadequate or unenforceable.[161] The aggrieved party may nonetheless be compelled to accept a less than satisfactory alternative transaction rather than risk the possibility of greater loss if a court refuses to order specific performance. In this way article 28 is not a balanced compromise; it effectively negates the right to performance.

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. Although such terms have been relatively rare in the past, still under the Convention such a term may be advisable.[162] The difficult question is whether such a term will be effective to assure or preclude an order of specific performance in the event of a breach.

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160. Some commentators have suggested that because the parties will choose resale or cover in many contract disputes, the problems created by article 28 will not be significant in practice. *See, e.g.*, J. HONNOLD, *supra* note 4, § 199, at 228 (suggesting that even if article 28 was unfortunate, still it may have been necessary to allow for unification on matters of greater practical concern); Reinhart, *Development of a Law for the International Sale of Goods*, 14 CUMB. L. REV. 89, 98–99 (1984). This does not deny, however, that article 28 will cause significant uncertainty and unfairness in those cases where an aggrieved party would prefer full performance.

161. *See supra* notes 108–12 and accompanying text.

162. The Section on International Law and Practice of the American Bar Association noted the possibility of an express contract term regarding specific performance in its report to the Association recommending support for ratification of the Sales Convention. *American Bar Association Report to the House of Delegates: Section on International Law and Practice*, 18 INT'L LAW. 39, 46 (1984) [hereinafter *American Bar Association Report*].

An international sales contract may also include a term regarding specific performance by incorporation of a recognized trade usage on the issue. Article 9(1) provides that "[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." Sales Convention, *supra* note 1, art. 9(1). The practice in some trades may require a buyer to cover if a seller gives notice that he will not deliver, or it may require a seller to resell the goods if the buyer refuses to take delivery. Under the Convention, such a usage would be part of a contract between members of the trade, and would operate as the equivalent of an express term.

In general, the Convention embraces the principle of freedom of contract, and article 6 expressly recognizes contractual choice.[163] Three questions arise, however, regarding the effectiveness of a contractual term governing specific performance. First, if the contract provides that specific performance should be granted in the event of a breach, can this term overcome article 28? Second, if the Convention does give effect to such a contract term, will the term nevertheless be subject to domestic rules denying enforcement to contract clauses regarding specific performance? In particular, does article 4 preserve such a domestic rule as a rule of validity? Third, what if a state has no recognized mechanism for specific performance or injunctive relief under its domestic law? Is the court of such a state required to develop a mechanism for injunctive orders if the parties agree to a clause requiring specific performance?

A. Contractual Waiver of Article 28

Article 28 provides 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."[164] Enforcement of a contract term providing for specific performance would require that the court order specific performance even if the court would not normally do so in similar contracts. The contract term, then, attempts to waive, or change, the application of article 28.[165]

Article 6, the "freedom of contract" provision, specifies that contracting parties may "derogate from or vary the effect of any of [the Convention's] provisions."[166] The Secretariat's Commentary to this section describes the Convention as "non-mandatory" and makes clear the goal of giving autonomy to contracting parties to determine their own governing rules.[167] Arguably, however, article 28 differs from most of the Convention's provisions because it deals directly with a court's power and discretion to grant injunctive relief. In this way,

163. Article 6 provides: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Sales Convention, *supra* note 1, art. 6.

164. *Id.* art. 28.

165. Similarly, a clause prohibiting specific performance would waive article 28 in the other direction. Article 28 provides that a court "is not bound to enter a judgment for specific performance *unless* the court would do so under its own law." *Id.* (emphasis added). Under such a contract term the court would not be bound at all. A clause prohibiting specific performance would also have the effect of waiving article 46.

166. Sales Convention, *supra* note 1, art. 6. Article 6 expressly exempts article 12, on domestic statutes of frauds, from the parties' power to waive provisions.

167. *See 1978 Commentary on the Draft Convention, supra* note 35, art. 5, para. 1.

article 28 is more like article 12, regarding domestic statutes of frauds.[168] Article 12 is expressly exempted from the contractual waiver power in article 6. The parties cannot agree to be bound by an oral modification if any party has its principal place of business in a Contracting State that has preserved its own statute of frauds under article 96. Similarly, one may argue, the parties cannot require specific performance when the court would not otherwise grant it under article 28.

On balance, however, article 6 should be interpreted to permit waiver of article 28. First, only article 12, not article 28, is expressly exempted from article 6. Furthermore, the Convention's drafters reasonably might have concluded that the domestic policies supporting a statute of frauds are more significant than those protecting a court's discretion to deny specific performance.[169]

168. Article 12 provides as follows:

> Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Sales Convention, *supra* note 1, art. 12.

169. The representatives of the Union of Soviet Socialist Republics argued in particular that the preservation of domestic law requiring written documentation in international sales contracts was critical to protect established practices within the Soviet government for the approval and completion of foreign trade agreements. *See* J. HONNOLD, *supra* note 4, § 128, at 155. Although a majority of the members of UNCITRAL clearly would have opposed a general writing requirement as contrary to accepted international trade practice and there was significant initial opposition to permitting Contracting States to make a declaration preserving domestic law on this issue, the UNCITRAL delegates finally agreed to allow such declarations. To trace this development, see *Analysis of Comments and Proposals Relating to Articles 1–17 of the Uniform Law on the International Sale of Goods (ULIS): Note by the Secretary-General,* U.N. Doc. A/CN.9/WG.2/WP.11 (1971), *reprinted in* [1972] 3 Y.B.U.N. COMM'N ON INT'L TRADE L. 69, 74–76, U.N. Doc. A/CN.9/SER.A/1972; *Text of Comments and Proposals of Representatives on the Revised Text of a Uniform Law on International Sale of Goods as Approved or Deferred for Further Consideration by the Working Group at Its First Five Sessions,* U.N. Doc. A/CN.9/100, Annex II (1975), *reprinted in* [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 70, 78, U.N. Doc. A/CN.9/SER.A/1975; *Report of the Secretary-General (Addendum): Pending Questions with Respect to the Revised Text of a Uniform Law on the International Sale of Goods,* U.N. Doc. A/CN.9/100, Annex IV (1975), *reprinted in* [1975] 6 Y.B.U.N. COMM'N ON INT'L TRADE L. 110, 111–12, U.N. Doc. A/CN.9/SER.A/1975; *Report of the Secretary-General: Analysis of Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods as Adopted by the Working Group on the International Sale of Goods,* U.N. Doc. A/CN.9/126 (1977), *reprinted in* [1977] 8 Y.B.U.N. COMM'N ON INT'L TRADE L. 142, 149–50, U.N. Doc. A/CN.9/SER.A/1977.

B. Contractual Provision as an Issue of Validity

On a different tack, however, a court may refuse to give effect to a clause requiring specific performance, not under article 28, but rather under its own domestic law, preserved by article 4. Article 4 states that the Convention "is not concerned with . . . the validity of a contract or of any of its provisions."[170] Under this provision, can a court enforce a domestic rule invalidating contract terms mandating specific performance?[171] Normally, if the contract is covered by the Convention,[172] then domestic rules of contract law do not apply; the Convention provisions govern issues of formation, interpretation, excuse, and remedies. Moreover, even if the Convention does not expressly address an issue, the Convention directs courts to look to the general principles underlying the Convention to develop an appropriate analysis.[173] Article 4, however, establishes two exemptions from this general approach.[174] First, the Convention does not cover the effect of a contract on property rights in the goods sold. Second, the Convention does not govern the validity of the contract or any of its provisions.

Is a domestic rule that denies the effectiveness of a contract term regarding specific performance a rule of "validity"? The Convention does not define the term "validity."[175] In the absence of an express

170. Sales Convention, *supra* note 1, art. 4.

171. *See, e.g.,* Kronman, *supra* note 106, at 371 (noting the general rule in United States law that a contract term regarding specific performance need not be enforced by the court); Macneil, *Power of Contract and Agreed Remedies,* 47 CORNELL L.Q. 495, 520–23 (1962); *cf.* D. DOBBS, *supra* note 128, at 825 (reviewing the arguments on both sides).

Although some courts in the United States generally have denied effect to contract terms regarding specific performance, still they have occasionally given weight to the parties' characterization of uniqueness. *See* E.A. FARNSWORTH, *supra* note 21, at 831–32 (noting that courts may take notice of facts recited in the contract in evaluating a claim for specific performance); *compare* Duval & Co. v. Malcom, 233 Ga. 784, 214 S.E.2d 356 (1975) (specific performance of a contract for the sale of cotton denied), *with* R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975) (same court, order of specific performance granted where the parties had stipulated prior to trial that the cotton was "unique").

172. For coverage of the Convention, see article 1(1), quoted *supra* note 2.

173. Sales Convention, *supra* note 1, art. 7(2). It is only in the absence of such principles that the court may look to the domestic law for guidance. *Id.*

174. Article 4 provides as follows:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> *(a)* the validity of the contract or of any of its provisions or of any usage;
>
> *(b)* the effect which the contract may have on the property in the goods sold.

Id. art. 4.

175. The language in article 4 echoes article 8 of the 1964 Uniform Law on the International Sale of Goods. The Uniform Law was similarly silent on the meaning of this term. *See* Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, Annex (Uniform Law on the International Sale of Goods), 834 U.N.T.S. 109, 125 (art. 8).

definition, at least one commentator has argued that the definition of validity should be found in the domestic law of the appropriate jurisdiction under private international law.[176] This conclusion is troubling because it holds that a term of the Convention, a uniform law, must have multiple meanings. This interpretation also would permit each national legal system to overcome the Convention's general preemption of domestic law by defining the term "validity" as broadly as it deemed appropriate. Merely by characterizing an aspect of contract law as a rule of validity, each jurisdiction could subject contracts for the international sale of goods to numerous rules of substantive domestic commercial law. This clearly would undermine the Convention's goal of uniformity.[177]

Defining validity by reference to domestic law too easily dismisses the possibility of a Convention-based definition. First, such a definition is suggested as a basic tenet of statutory construction. The term is used in the Convention and therefore it must have some meaning intrinsic to the Convention. Second, article 7(1) mandates such a definition: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[178]

Applying article 7(1), the term "validity" in article 4 can be defined consistently with the principles of internationalism, uniformity, and good faith. First, the language of article 4 suggests that the term does not include any issue expressly addressed by the Convention. The exemption for rules of validity is phrased as a description of the Convention: "[The Convention] is not concerned with . . . the validity of the contract or any of its provisions."[179] Any issue that is expressly addressed by the Convention, then, should not be characterized as an

176. Note, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods,* 53 FORDHAM L. REV. 863, 874 (1985).

177. There are vast differences in different legal systems' concepts of validity and in their use of the word "validity" and its various translations. In French law, for example, some issues relating to non-conformity of goods are treated as issues of validity. *See* Nicholas, *supra* note 64, at 231–32; *cf.* J. HONNOLD, *supra* note 4, § 234, at 258–59 (arguing that the warranty provisions of the Uniform Commercial Code should not be treated as rules of validity merely because they deny legal effect to, or render "invalid," some contract provisions). *But cf.* Ziegel, *supra* note 18, at 9-38 (observing that courts might interpret article 4 to include national rules on disclaimers of warranties). The official language versions of article 4 refer to "la validez" (Spanish) and "la validite" (French). The Arabic, Chinese, and Russian versions obviously are less closely related.

178. Sales Convention, *supra* note 1, art. 7(1). Article 7(2), which permits limited reference to domestic law, provides that domestic law should apply only "in the absence" of general principles underlying the Convention. *Id.* art. 7(2), quoted *supra* note 61. In this case the general principles of internationalism and uniformity provide guidance for a Convention-based definition of validity.

179. *Id.* art. 4, quoted *supra* note 174.

issue of "validity" under article 4, because that would contradict the quoted language.[180] The Secretariat's Commentary to article 4 supports this conclusion:

> Although there are no provisions in this Convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national legal system. In case of conflict the rule in this Convention would apply.[181]

The Secretariat then suggests the possibility of such a conflict with article 11,[182] which provides that a contract need not be in writing. Even though an oral contract is considered to be "invalid" under some legal systems, this is not a rule of validity within the meaning of article 4.[183]

In addition, the drafting history of article 4 suggests that the UNCITRAL representatives considered issues of validity to include only issues such as fraud, duress, unconscionability, and incapacity.[184] The UNCITRAL delegates may have chosen to defer to domestic law on these matters because they involve very significant issues of public policy and the protection of parties. Regard for the principles of internationalism and uniformity can be achieved by a definition of validity that gives deference to very important public policies in the various contracting states, but at the same time limits the category of validity issues to those matters that involve very significant public policies and does not include the vast array of detailed regulatory provisions that exist throughout the world. Domestic rules against contract terms regarding specific performance do not involve considerations of the same magnitude as those underlying issues such as fraud, duress, and incapacity. In the common law countries, such rules reflect vague notions regarding the traditional jurisdictional limits of common law

180. *But cf.* Gonzalez, *supra* note 18, at 82 (asserting that the text of article 4 itself does not address the question of conflicts between the Convention and national rules of validity).

181. *1978 Commentary on the Draft Convention, supra* note 35, art. 4, para. 2.

182. *Id.* para. 3 (article 11 was then numbered 10).

183. *Cf.* P. SCHLECHTRIEM, *supra* note 39, at 33 & n.83b (arguing that a domestic rule invalidating contract terms limiting damages to foreseeable loss would not be preserved under article 4 because it would conflict with the foreseeability principle underlying articles 74–76).

184. *See, e.g., Report of the Secretary-General: Formation and Validity of Contracts for the International Sale of Goods,* U.N. Doc. A/CN.9/128, Annex II (1977) (referring to the draft of a Law for the Unification of Certain Rules Relating to the Validity of Contracts of International Sale of Goods, prepared by the International Institute for the Unification of Private Law (UNIDROIT), which includes provisions on mistake, fraud, duress, and impossibility of performance at the time of contracting as well as provisions relating to the interpretation of the acts of the parties), *reprinted in* [1977] 8 Y.B.U.N. COMM'N ON INT'L TRADE L. 90, 92, U.N. Doc. A/CN.9/SER.A/1977.

courts and courts of equity.[185] A national rule denying enforcement to such terms should not be treated as a rule of validity within the meaning of article 4.

An express contract term concerning specific performance should be enforceable, then, under the general provisions of articles 30 and 53.[186] These provisions require the parties to comply with their obligations under the contract. If the contract provides that specific performance is not appropriate in the event of a breach, then the court should limit recovery to damages, even if it otherwise would have entered injunctive relief. Similarly, if the contract indicates that specific performance should be granted, then the court should do so, in order to carry out the agreement of the parties.

C. Jurisdictions Lacking Injunctive Mechanisms

But what if the dispute comes to trial in a jurisdiction that does not have some mechanism for injunctive relief? By ratifying the Convention, such a nation adopts the Convention as a part of its national law, but does this obligate it to develop a mechanism for specific relief? If the Convention requires enforcement of a contract term requiring specific performance, can the court refuse to issue such an order merely because injunctive relief is not a traditional part of its law? Difficult as this might appear in practice, the answer should be no. A court cannot refuse to order injunctive relief in this circumstance. Following ratification, the Convention governs disputes coming within its purview. As discussed above, the Convention requires enforcement of a contract term unless it comes within one of the limited exceptions in article 4.[187] Because an agreement regarding specific performance is not within those exceptions, the court is required to enforce it.

This answer of course has practical problems. In some nations, an order of specific performance may lack any enforcement mechanism. This problem clearly is not covered by the Convention, and an aggrieved party would have no recourse beyond the remedies available in domestic law.[188] Yet this situation will be very rare. Only a very

185. *See* E.A. FARNSWORTH, *supra* note 21, at 831–32.

186. Article 30 provides: "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." Sales Convention, *supra* note 1, art. 30.

Article 53 provides: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." *Id.* art. 53.

187. *See supra* notes 173–74 and accompanying text.

188. *Cf. Report of the Working Group, supra* note 88, at 49, 54 ("[The current text of article 28] does not speak of the enforcement of a judgment for specific performance, a subject thought not to be appropriate for a Convention on the law of sales.").

few legal systems lack some form of injunctive mechanism, and these can be easily avoided by the aggrieved party through the choice of forum.[189]

An agreement regarding specific performance, then, should be given effect under the Sales Convention.[190] By including a term either requiring or prohibiting specific performance in the event of a breach, contracting parties should be able to avoid the uncertainty and confusion in post-breach negotiations caused by article 28 and to avoid the costs and delay of forum-shopping.

III. CONCLUSION

The Sales Convention now governs disputes arising from contracts between citizens or organizations of the United States and citizens or organizations of other Contracting States.[191] As of June 14, 1988, the Convention has been ratified by sixteen nations,[192] and many other nations will ratify within the next few years. Courts throughout the world will soon be called upon to interpret and apply the provisions of the Convention. Courts and lawyers must become familiar with the Convention and with the appropriate methods of its interpretation.

Many scholars have already written about the Convention, and an international body of commentary is developing.[193] As this discussion

189. Unlike the problems of forum-shopping that would result from a broad application of article 28, here the choice of forum would be significant only to avoid those few jurisdictions that have no mechanism for enforcement of an order of performance in those cases where the contract specifies specific performance as the agreed remedy. This does not present serious problems of forum-shopping.

190. *Cf. American Bar Association Report, supra* note 162, at 45–46 (recommending consideration of such a contract term); Ulen, *supra* note 46, at 355 (arguing that a contract term favoring specific performance should be enforceable under United States law, so long as the parties have legitimately agreed to it).

191. *See* Sales Convention, *supra* note 1, art. 1, quoted *supra* note 2.

192. *See supra* note 2.

193. Commentary on the Convention available in English now includes two treatises, J. HONNOLD, *supra* note 4; P. SCHLECHTRIEM, *supra* note 39; three major collections of essays, INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1984); INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES (1986); PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW (1980) (formerly in 7 DIGEST OF COMMERCIAL LAWS OF THE WORLD; copy on file in *Washington Law Review* offices); two major law review symposia, *Symposium on International Sale of Goods Convention,* 18 INT'L LAW. 3 (1984); *Unification of International Trade Law: UNCITRAL's First Decade,* 27 AM. J. COMP. L. 201 (1979); and numerous law review articles and student comments. In addition to the articles cited elsewhere in this article, see, e.g., Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective,* 77 AM. J. INT'L L. 521 (1983); Dore & DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code,* 23 HARV. INT'L L.J. 49 (1982); Farnsworth, *Developing International Trade Law,* 9 CAL. W. INT'L L.J. 461

grows, it is crucial that courts and scholars focus on the appropriate methodology for interpreting the Convention and that they seek uniformity and internationalism in its application.[194]

The Convention was drafted with a sense of discovery and compromise: UNCITRAL delegates focused on specific factual situations in an attempt to recognize and articulate common solutions to typical problems, without regard to the conceptual predispositions of various legal systems.[195] In keeping with this approach, courts and commentators should resist the temptation to interpret the Convention in light of their own national laws. Although parts of the Convention will look familiar to lawyers from every legal system, it would be wrong to assume that some familiar aspect carries the same implications within the Convention as it does in domestic law.[196] The damage provisions in articles 74 to 77 provide a good example. An American lawyer looking at those provisions may assume that the remedial provisions of the Convention are generally the same as those in the Uniform Com-

(1979); Lansing & Hauserman, *A Comparison of the Uniform Commercial Code to UNCITRAL's Convention on Contracts for the International Sale of Goods*, 6 N.C.J. INT'L L. & COM. REG. 63 (1980); Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT'L L. 263 (1986); Reczei, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513 (1981); Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984); Comment, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code*, 3 DICK. J. INT'L L. 107 (1984). Bibliographies of commentary in numerous languages are available. *See* J. HONNOLD, *supra* note 4, at 29–34; Honnold, *Bibliography: Unification of Trade Law and UNCITRAL*, 27 AM. J. COMP. L. 212 (1979); Winship, *Bibliography: International Sale of Goods*, 18 INT'L LAW. 53 (1984).

194. The effort to promote international discussion of issues raised by the Convention and to encourage uniform interpretation by courts and arbiters is proceeding in many places by many people. Proposals have been made to have UNCITRAL collect and distribute reports of decisions interpreting the Convention and perhaps to issue interpretative recommendations from time to time. *See Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by the Secretariat*, U.N. Doc. A/CN.9/267 (1985). Individual scholars and international organizations are also addressing these issues and seeking ways to promote international discussion and deliberation. *See, e.g.*, Honnold, *Methodology to Achieve Uniformity in Applying International Agreements, Examined in the Setting of the Uniform Law for International Sales Under the 1980 U.N. Convention* (Report to the Twelfth Congress of the International Academy of Comparative Law, 1986) (summarizing and presenting reports of scholars and government officials throughout the world).

195. *See supra* notes 9–17 and accompanying text.

196. *See* J. HONNOLD, *supra* note 4, § 88, at 114–15; P. SCHLECHTRIEM, *supra* note 39, at 37; Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention* (forthcoming in 8 NW. J. INT'L L. & BUS. (1988)); *cf.* Bonell, *Some Critical Reflections on the New UNCITRAL Draft Convention on International Sale*, 1978 REVUE DE DROIT UNIFORME, pt. 2, at 2 (contrasting one view of the Convention as a limited law to be supplemented by national law with that treating the Convention as an autonomous *ius commune*).

mercial Code or the older Uniform Sale of Goods Act. This assumption would be seriously mistaken, as Part I of this article demonstrates.

Similarly, courts, lawyers, and commentators who are familiar with the 1964 Uniform Law for the International Sale of Goods[197] and the Uniform Law on the Formation of Contracts[198] should resist the temptation to interpret provisions of the Convention in light of cases decided under these Uniform Laws. The Uniform Laws were drafted by the International Institute for the Unification of Private Law (UNIDROIT), through the work of a distinguished group of legal scholars. Although the Uniform Laws represent many years of careful work, they are oriented toward European legal systems and they have been adopted primarily by the European countries.[199]

UNCITRAL began its work on the Sales Convention with a careful examination of the Uniform Laws, including comments by the delegates on specific provisions.[200] Thereafter, many of the provisions of the Uniform Laws were used as starting points for the drafting of parts of the Convention. This use of the Uniform Laws, however, should not be understood to incorporate into the Sales Convention the detailed law developed under the Uniform Laws. To the contrary, the drafting history of the Sales Convention indicates a clear determina-

197. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, Annex (Uniform Law on the International Sale of Goods), 834 U.N.T.S. 109, 123.

198. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, Annex I (Uniform Law on the Formation of Contracts for the International Sale of Goods), 834 U.N.T.S. 171, 185.

199. The Uniform Law on International Sales (1964) was ratified and acceded to by only eight nations: Belgium, the Federal Republic of Germany, the Gambia, Israel, Italy, the Netherlands, San Marino, and the United Kingdom, and the Uniform Law on Formation has been ratified by seven of these, excluding Israel. Honnold, *The Draft Convention on Contracts for the International Sale of Goods: An Overview,* 27 AM. J. COMP. L. 223, 224 n.7 (1979). Of the 28 nations that attended the 1964 Hague Conference, 22 were European. *Id.* at 225 n.12. *See Progressive Development of the Law of International Trade: Report of the Secretary-General,* 21 U.N. GAOR Annex 3 (Agenda Item 88) para. 30, U.N. Doc. A/6396 (1966), *reprinted in* [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 18, U.N. Doc. A/CN.9/SER.A/1970. The European orientation of the 1964 Uniform Laws was a major impetus for formation of UNCITRAL and for the Sales Convention project. *See* Date-Bah, *Problems of the Unification of International Sales Law from the Standpoint of Developing Countries,* in PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW in 7 DIGEST OF COMMERCIAL LAWS OF THE WORLD 39, 43–44 (1980); Patterson, *supra* note 193, at 267–71; Reinhart, *supra* note 160, at 94; Comment, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?,* 2 NW. J. INT'L L. & BUS. 129 (1980).

200. *See Analysis of Replies and Comments by Governments on the Hague Conventions of 1964: Report by the Secretary-General,* U.N. Doc. A/CN.9/31, *reprinted in* [1970] 1 Y.B.U.N. COMM'N ON INT'L TRADE L. 159, U.N. Doc. A/CN.9/SER.A/1970; *Report of the United Nations Commission on International Trade Law on the Work of Its First Session,* 23 U.N. GAOR Supp. (No. 16) at 16–19, U.N. Doc. A/7216 (1968).

tion on the part of UNCITRAL to develop a code with worldwide application and to move beyond the European orientation of the Uniform Laws. The Sales Convention therefore should be interpreted as an autonomous legal system, structured by the general principles upon which it is based, and organized according to the issues and concerns addressed in its drafting history. It would be a serious disservice to the Convention to encumber it with the text and case law of the European-oriented Uniform Laws.

It is very important, then, that the Sales Convention be interpreted according to its own terms, as a new and autonomous international code. Courts and commentators should strive to develop an international jurisprudence of Convention interpretation which gives detailed content to the notion of internationalism in transnational trade law. This can be done by resisting the temptation to interpret the Convention in light of other laws, by paying careful attention to the detailed text of the Convention, by striving to articulate the detailed meanings of the general principles of the Convention, and by wide dissemination and attention to the Convention's drafting history. The general principles of the Convention include those expressly stated in article 7 and those implicitly embodied in other provisions of the Convention, including the values of equal treatment and respect for the different cultural, social, and legal backgrounds of international traders; contractual commitment; forthright communication between parties; good faith and trust; and the forgiveness of human error.[201]

Issues relating to the remedial provisions of the Convention will no doubt be the focus of a large part of the discussion and deliberation surrounding application of the Convention. Courts, arbiters, lawyers, traders, and scholars can significantly advance the goals of uniformity, certainty, and equity in the law governing international trade by interpreting the Convention's remedial provisions with a sophisticated understanding of their drafting history and their underlying rationale. Pursuant to such an approach, article 28 in particular should be interpreted so as to preserve as much as possible a uniform right to performance as recognized in the Convention's general remedial provisions.

201. *See* Kastely, *supra* note 196; *cf.* J. HONNOLD, *supra* note 4, §§ 99–102, at 129–33.