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OPEN PRICE CONTRACTS AND SPECIFIC PERFORMANCE UNDER THE UN SALES CONVENTION AND THE U.C.C.

KENNETH SCHWARTZ*

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I. INTRODUCTION

On January 1, 1988, The United Nations Convention on Contracts for the International Sale of Goods (The Convention) became law in the United States. The Convention governs the formation of, and rights and duties under, international sale of goods contracts between contracting parties located in nations which have adopted the Convention. The parties to such contracts, however, may exclude or vary the application of the Convention's provisions.¹

After briefly surveying the obligations of the buyer and the remedies of the seller under the Convention and the Uniform Commercial Code (U.C.C.), this paper analyzes two uncertainties resulting from these provisions. The first

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¹ Under Art. 6, the parties may exclude the application of the Convention or vary the effect of any of its provisions. The United States has declared such a reservation under the authority of Article 95. See Kathrein & Magreaw, *The U.N. Convention on Contracts for the International Sale of Goods: An Update*, 23 INT'L LAW. 797, 798 (1989). Article 95 allows the Nations to abrogate the provisions of Article 1 (1)(b). The resulting effect of such an reservation by the United States is: the Convention will not necessarily apply when the rules of private international law lead to application of the law of a Contracting State. However, this paper addresses only the buyer's obligations and the seller's remedies. For more general commentary on the Convention, see JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* (1982) [hereinafter, HONNOLD COMMENTARY], PETER SCHLECHTRIEM, *UNIFORM SALES LAW—THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* (1986) [hereinafter, SCHLECHTRIEM].

is whether an "open-price" contract may be validly concluded under the Convention in light of the apparent conflict between Articles 14 and 55. The second is whether, and to what extent, the remedy of specific performance is available to the seller in the United States under the UN Sales Convention.

II. SURVEY OF THE RELEVANT PROVISIONS

The obligations of the buyer and the remedies of the seller are set forth in Articles 53 to 65 of the Convention. While these sections of the Convention parallel the U.C.C. concerning such issues as acceptance, payment, and cooperation, the duties of each party under the convention differ in several respects. The Convention's provisions at this point are divided respectively into those addressing the buyer's obligation to pay and to take delivery.

A. Obligations of the Buyer

Article 53 of the Convention states the two basic obligations of the buyer: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." This is stated in essentially the same language as U.C.C. § 2-301: "The obligation of . . . the buyer is to accept and pay in accordance with the contract." In this respect, some divergence exists between the U.C.C. and the Convention: the Convention specifically increases the obligations of the buyer. For example, under Article 60 the buyer is required to do "all the acts which could reasonably be expected of him in order to enable the seller to make delivery." The duties of the buyer are also increased by Article 54, which deals with issues of payment. Under Article 54 the buyer must "[take] such steps and [comply] with such formalities as may be required under the contract or any laws and regulations to enable payment to be made." Because the Convention, unlike the U.C.C., includes these preliminary steps in the obligation to pay, the buyer's "non-performance [of such steps] is [viewed, under the Convention, as] an actual rather than an anticipatory breach."² Furthermore, Article 54 exemplifies one of the principles of the Convention, namely, an obligation of "cooperation"³ and "communication"⁴

² Tallon, *Obligations Under the Convention on Contracts for the International Sale of Goods*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* § 7.02, at 7-6 n.6 (N. Galston & H. Smit eds. 1984). [hereinafter TALLON]. Note also that "[p]erformance of such acts in some cases depends only on the buyer's diligence; in others, it needs an administrative authorization, and here, the buyer cannot be held liable for a refusal of such authorization as long as he has taken all reasonable steps to obtain it." *Id.* at 7-6.

³ See HONNOLD COMMENTARY, *supra* note 1, § 323 at 335: "The Convention at many points responds to the fact that consummating an international sale calls for cooperation; each party must take steps that are related to corresponding steps by the other." See also, *id.*, § 323 at 335 n.1: "E.g., Arts. 19(2), 21(2), 32(2)&(3), 48(2), 58(3), 60(a), 65, 71, 73(2), 79(4), and 85-88. It may add a bit of romance to commercial law to suggest an analogy to old-fashioned ballroom dancing."

⁴ *Id.* § 100 at 131: "These provisions may well evidence a general principle calling for communication of information that is obviously needed by a trading partner. . . ."

respecting performance. A similar obligation is also implied in the heading of U.C.C. §2-311 ("Options and Cooperation Respecting Performance").⁵

Articles 55-59 of the Convention cover other matters related to the obligations of the buyer. The significance of Article 55, which deals with open-price contracts, is discussed in greater depth below. Articles 56-58 are default rules governing issues of payment, which in practice would be resolved by most agreements. Where the price is fixed according to weight, it is to be determined by the net weight, unless otherwise agreed (Article 56). The place and time for payment are set by Articles 57 through 59. Article 57 directs payment to be made at the seller's place of business. The exception to this is when there is a simultaneous exchange of goods for money (immediate payment). In such a case, payment is to be made at the place where the buyer receives the goods.⁶ The U.C.C. approach differs in this respect. Under the U.C.C., a simultaneous exchange of goods for money is the rule rather than the exception. In fact, under U.C.C. § 2-310(a) the buyer pays at the time and place he receives the goods - it is irrelevant whether the place of shipment is the place of delivery. Unlike the general rule of the Convention (Art.57(1)(a)), this place will not necessarily be the seller's place of business. In this respect, the Convention is friendlier than the U.C.C. to sellers wary of the risk of having to receive payment in a foreign country.⁷ But under U.C.C. §2-310(c), if delivery is to be made by documents of title, payment is due at the time and place at which

⁵ See also, Tallon, *supra* note 2, § 7.02, at 7-6 n.6 (citing French Civil Code art. 1134, para. 3 and U.C.C. 1-203).

Article 7 imposes the observation of good faith in international trade. Even if the text seems limited to interpretation [of the Convention], this principle has a much wider scope, in agreement with many national systems. It permeates the buyer's obligations in a general way. But two specific applications may also be detected; articles 54 and 60(a) both deal with the preliminary acts required of the buyer for the exact performance of his obligation to pay the price and to take delivery. *Id.* at 7-6.

⁶ SCHLECHTRIEM, *supra* note 1, at 81.

⁷ Such risk would result in loss, if for instance, the seller shipped the goods to a foreign country and the buyer refused to pay, the seller as a practical matter might be forced to sell his goods at a price below the contract price rather than incur the added expense of either storing his goods or shipping them back to his place of business at a loss. Again, the parties may vary the effect of the Convention by agreement. Because "[P]rocedures for payment are of concern to parties and usually are dealt within the contract; Article 58 provides answers to the above questions only when the contract is silent (Art. 6)." HONNOLD COMMENTARY, *supra* note 1, §333 at 344. In addition, there is a concern that,

[u]nder domestic rules of procedure, jurisdiction and venue for an action for the purchase price are often at the place of payment, with the result . . . that the place of business or habitual residence of the seller, being the place of payment [under CISG], automatically fixes the forum for an action for payment of the purchase price Buyers are thus well advised to seek a more favorable choice-of-forum clause in the contract. SCHLECHTRIEM, *supra* note 1, at 82.

Honnold suggests a further problem: "[i]f the plaintiff does not obtain a judgment at the place where the defendant has assets, the plaintiff may face the problem of obtaining recognition of the judgment in a second State." HONNOLD COMMENTARY, *supra* note 1, § 332, at 343 n.5.

the buyer is to receive the documents, regardless of where the goods are to be received.⁸

On matters of payment, Article 58(1) provides that unless otherwise agreed, payment is due at the time when the seller places either the goods or the documents controlling their disposition at the buyer's disposal: "[I]n short, goods are to be exchanged for the price."⁹ In this respect, the Convention coincides more closely with U.C.C. § 2-310 and § 2-507(1).¹⁰ Article 58(3), like U.C.C. § 2-513 and § 2-310(b), allows the buyer to inspect the goods before payment, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with the buyer's opportunity to inspect.

With regard to price, Article 59 provides that the price is due on the date fixed by the contract or the Convention "without the need for any request or compliance with any formality on the part of the seller." This is meant to do away with legal requirements such as the French *mise en demeure* or the German *Mahnung*.¹¹ In line with the Convention's non-mandatory character, however, "a formal notice of default could be agreed upon despite its exclusion by article 59."¹² Article 60, mentioned above, restates the buyer's obligation to take delivery, adding that the buyer must do all the acts which could reasonably be expected of him in order to enable the seller to make delivery.

B. Remedies of the Seller

The remedies of the seller are found in Articles 61-65. These provisions parallel the remedies available to the buyer under Articles 45-52 for breach of

⁸ "U.C.C. § 2-310(a)...seem[s] to respond to domestic conditions by calling for dispatch of the goods with payment for the goods at the point of receipt (destination)." HONNOLD COMMENTARY, *supra* note 1, § 331, at 342 n.4.

⁹ *Id.* § 335, at 345.

¹⁰ However, from the point of view of semantics, the Convention places greater emphasis on payment while the U.C.C. places greater emphasis on tender of delivery. Article 58(1) says the buyer's payment (seller may even make it a condition) is due when the seller tenders the goods or documents, whereas 2-507 says the seller's tender of delivery is a condition (unless otherwise agreed) to the buyer's duty to pay. Both essentially contemplate a simultaneous exchange, the opposed phraseology may offer some insight into the attitudes of the different systems.

¹¹ HONNOLD COMMENTARY, *supra* note.1, §340 at 350-351 :

This provision was inherited from ULIS 60, which was designed to overturn the rule of some Continental legal systems that a party may not recover damages for delay unless he has given an advance warning or protest directed at delay In any event, in connection with the delivery the seller will normally send the buyer an invoice that would be understood as a request for payment In documentary exchanges...the seller does not place the goods 'at the buyer's disposal' (Art.58(1)) until he informs the buyer that the goods are ready At this point Article 59 makes it clear that the buyer must pay without any 'request or . . . formality'.

¹² Tallon, *supra* note 2, §7.02, at 7-5, 7-6.

the seller's obligations.¹³ Article 61 allows the aggrieved seller several remedies, including the right to claim damages as provided for in Articles 74-77. Articles 74-77 constitute a comprehensive section on damages which "sets forth familiar formulae based on market differential [Art. 76], resale price [Art 75], and the cost of cover [Art. 75], and it establishes limitations based on foreseeability [Art.74] and mitigation [Art.77]."¹⁴ The exercise of any other remedy, however, will not deprive the seller of the right to claim damages (Art. 61(2)).

The primary remedies of the Convention are "uncharacteristic of the common law" and are likely to be "strange to the common lawyer."¹⁵ Unlike the common law, the Convention allows both parties to the contract to extend the time for performance. Specifically, Article 63 allows the *seller* to fix an additional period of time for performance by the buyer as long as the time extension is reasonable. During this additional period, "often referred to in the literature as *Nachfrist*, from its partial similarity to a German institution of that name . . . the party fixing the period cannot resort to any remedy for breach of contract,"¹⁶ unless the other party has indicated that he will not perform. If, for instance, the buyer fails to perform within the additional time fixed, the seller may avoid regardless of whether the breach is fundamental (Art.64(1)(b)). This avoids the risk involved for the seller in determining whether breach was fundamental, since in any other situation the seller may only avoid a fundamental breach (Art. 64(1)(a)).¹⁷ If the seller has avoided the contract for fundamental breach, or failure of the buyer to perform within the *Nachfrist* period, "the seller is relieved of responsibility to perform under the contract [Art.81(1)] [and has] a right to restitution of whatever it has 'supplied'[Art.81(2)][;][the seller, however, must] return whatever the buyer has 'paid under the contract' [Art.81(2)]."¹⁸

¹³ Discussed in 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 §9.04 at 9-29 (N. Galston & H. Smit. ed.1984) [hereinafter Ziegel]; HONNOLD COMMENTARY, *supra* note 1, §344, at 354; and Fletcher, *Remedies Under the New International Sales Convention: The Perspective From Article 2 of the U.C.C.*, 8 J.L.& COM. 53, 65 (1988) [hereinafter Fletcher].

¹⁴ Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 WASH. L. REV. 607, 612 (1988) [hereinafter Kastely].

¹⁵ Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L. LAW. 443, 458 (1989) [hereinafter Garro], and Nicholas, *The Vienna Convention on International Sales Law*, 105 LAW Q.REV. 201, 225 (1989) [hereinafter Nicholas].

¹⁶ Nicholas, *supra* note 15, at 225.

¹⁷ Fundamental breach is defined in Art. 25 as a breach which 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.

¹⁸ Flechtner, *supra* note 13, at 65.

The remedies of the seller in the U.C.C. are found in sections 2-702 to 2-710. Section 2-703 is analogous to Article 61 of the Convention in that it is "an index section which gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer."¹⁹ Article 61 is unfortunately not as comprehensive as U.C.C. § 2-703. While including a reference to Articles 81, 85, and 88 would effect a more comprehensive section, no such reference is made in the Convention. "An Article 2 seller has similar [to those of a seller under the Convention] rights and obligations as long as the buyer breaches without continuing to accept the goods,"²⁰ but, unlike the Convention seller's right to avoid (which is not limited to non-acceptance situations), "[an Art.2] seller has extremely limited rights to 'undo' an exchange after the goods have been accepted by a breaching buyer."²¹

In short, under Article 2 of the U.C.C. the seller's normal remedy if the buyer accepts the goods is an action for the price. The seller's right under the Convention to avoid the contract, claim restitution of goods that have been accepted, and recover resale or market-price damages represents a significant departure from the U.C.C. Article 2 scheme of remedies.²²

Under Article 62 of the Convention "the seller may require the buyer to pay the price, take over delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement." As Professor Garro notes, "[t]he Convention's provisions more startling to the common law lawyer's traditional perception of remedies are those concerning

¹⁹ U.C.C. § 2-703 comment 1 (1990). Like the Convention, "[t]his Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." *Id.*

²⁰ Flechtner, *supra* note 13, at 65. For instance, in a credit sale, "an Article 2 seller can reclaim goods that have been accepted only if the buyer received them while insolvent and either the seller made demand within ten days after receipt or the buyer misrepresented solvency in writing within three months before delivery [U.C.C. § 2-702(2)]." Furthermore, "successful reclamation in a credit sale . . . precludes 'all other remedies' including the right to resale or market-price damages [2-702(3)]." *Id.* at 66.

²¹ *Id.* at 66.

²² *Id.* at 66-67. See also Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods*, 2 INT'L TAX & BUS. L. 79, 87 (1984) [hereinafter Gonzalez]:

Under the Convention, the fundamental nature of the breach is the test for immediate cancellation in all cases, whether the breach is effected by the buyer or the seller and whether it occurs before or after the acceptance of the goods. In contrast, under the U.C.C., fundamental breach applies only after goods are accepted [U.C.C. § 2-601]. Prior to acceptance, perfect tender is the rule; the innocent party may avoid a contract if the goods delivered, but not accepted, deviate in any way from the goods contracted for. The U.C.C. perfect tender rule is less appropriate in the international context, however, where there is no guarantee of efficient communication facilities, storage facilities, or a market for the goods at the destination point. In addition, the U.C.C. perfect tender rule is somewhat oriented toward consumer protection, an area completely beyond the scope of the Convention.

specific performance."²³ Under Article 28, however, "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law." This provision "would not, of course, protect a party from a common law country against the granting of specific performance by a court in a civil law country."²⁴ The end result of these conflicting provisions is discussed below.

II. ARE OPEN PRICE CONTRACTS ALLOWED BY THE SALES CONVENTION?

A. Open-Price Contracts Under the U.C.C

Section 2-305 abrogates the rule under pre-Code law that "sales contracts were expected to be definite, at least on the essential points [I]f an agreement was reached but no price set, the contract was treated as an 'agreement to agree.'²⁵ Under § 2-305, such a contract may be enforceable.²⁶ The key to enforceability is "the dominant intention of the parties to have the deal continue to be binding upon both."²⁷ As Professor Quinn puts it, "the critical question is not whether the price has been left open, but whether the parties agreed to close a deal with finality and leave the price term open or flexible."²⁸ Under such a contract, "the price is a reasonable price at the time for delivery."²⁹ Where there is no intent to be bound, there is no contract. "In

²³ Garro, *supra* note 15, at 458.

²⁴ *Id.* at 459.

²⁵ T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST 2-110 (1978) [hereinafter Quinn].

²⁶ U.C.C. § 2-305 (1990):

Open Price Term.

- (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
 - (a) nothing is said as to price; or
 - (b) the price is left to be agreed by the parties and they fail to agree; or
 - (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
- (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
- (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
- (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account."

²⁷ U.C.C. § 2-305 comment 1 (1990).

²⁸ QUINN, *supra* note 25, at 2-110.

²⁹ U.C.C. § 2-305(1) (1990). U.C.C. § 2-305(2) requires that where the seller is to fix the price he must fix a price in good faith. Both the "reasonable" and "good faith" limitations are absent from the price-setting rule in the Convention, Art.55: "the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable

such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account."³⁰ Therefore, the U.C.C. allows the formation of open-price contracts.

B. Open-Price Contracts Under the Convention

While there are practical uncertainties about when an open-price contract will be enforced under the Code,³¹ substantially more confusion exists under the Convention as to whether parties, even those who intend to be bound, can validly conclude an enforceable open-price contract. The confusion starts with Article 14(1), which states:

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.³²

As in the U.C.C., "[T]he basic criterion for an offer, under prevailing law and the Convention, is whether one party has indicated to another the intention . . . to be bound in case of acceptance."³³ Honnold is of the opinion that, "[S]tanding alone, this language [Art. 14] would suggest that if an offer does not expressly or implicitly fix (or make provision for determining) the price, the offer is not sufficiently definite for acceptance and the formation of the contract."³⁴ Although he argues that this reading must be refuted because of contradictory language in Art. 55, one can reject it before even resorting to textual reconciliation.³⁵ As he notes elsewhere, Article 14 might be read as simply giving an illustrative case in which the parties can be sure of satisfying the requirements of definiteness. It does not say that anything less will fail for indefiniteness. Those who insist on reading the illustrative statement in Article 14(1) as a minimum threshold are simply erecting a false conflict with Article 55 of the Convention. In fact, when read in conjunction with that article, it

circumstances in the trade concerned."

³⁰ U.C.C. § 2-305(4) (1990).

³¹ *Id.*

³² Unchanged from 1978 Draft Convention Art. 12. ULF Art. 4 (1) requires an offer to be "sufficiently definite" and to indicate the "intention of the offeror to be bound," but does not mention price or minimum requirements for definiteness.

³³ HONNOLD COMMENTARY, *supra* note 1, § 133, at 160.

³⁴ *Id.* § 325 at 337.

³⁵ *Id.* § 137 at 163 & n.8.

becomes clear that Article 14(1) was not meant to bar open-price contracts. Article 55 contains the price-setting mechanism for open-price contracts:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provisions for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.³⁶

The language "[W]here a contract has been *validly concluded*" assumes that such a contract may be validly concluded.³⁷ When the drafters of the Draft Convention added the word "validly" to the ULIS language (which simply said, "when a contract has been concluded..."), did they intend to refer to validity under the Convention (ie, back to Article 14), to validity in respects other than definiteness, or to national laws on validity?³⁸ Honnold, we have already noted, favors a reading referring to validity in other respects than indefiniteness.³⁹ Farnsworth disagrees, so that "article 55 could not have effect....[O]thers, myself included, are less sanguine that bootstrapping will carry the day if a controversy under the Convention arises in a period of rapid price fluctuation in the courts of a country that is not as receptive to open price terms as the United States is under the Code."⁴⁰ But Professor Garro argues that "in a codified set of rules such as the Convention, every effort should be made to construe seemingly incompatible provisions in order to make sense out of them."⁴¹

³⁶ The Draft Convention of 1978 referred to "'the price generally charged by the seller at the time of the conclusion of the contract.' The Diplomatic Conference, responding to objections that this formula might give effect to excessive or unfair prices charged by the seller, changed this formula to 'the price generally charged... for such goods sold under comparable circumstances in the trade concerned.'" *Id.* § 327 at 339. In ULIS Article 57 the word "validly" is not included: "Where a contract has been concluded but does not state a price . . ." ULF also refers to "the price generally charged by the seller."

³⁷ *Id.* § 325 at 337-338.

³⁸ Art. 4(a) states that the Convention does not govern issues of validity.

³⁹ Honnold interprets validity to refer to "substantive" validity. Even if "validly" referred to *valid under Art. 14 (1)*, Honnold would read 14(1) broadly to allow open-price contracts. HONNOLD COMMENTARY, *supra* note 1, § 325, at 337-338.

⁴⁰ Farnsworth, *Formation of Contract*, in INTERNATIONAL SALES : THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 3.04, at 3-9 (N. Gaston & H. Smit ed. 1984) [hereinafter FARNSWORTH FORMATION].

⁴¹ Garro, *supra* note 15, at 464. But he notes that, Professor Date-Bah recalls that several delegations sought unsuccessfully to delete the second sentence of art. 14(1), so that an offer could be held sufficiently definite even if it did not expressly or impliedly fix the price or make provision for determining the price. Date-Bah concludes that the implication to be drawn by the interpreter from the motion's defeat is that there can be no valid 'open price' contract under the text of art. 14(1), as it now stands. *Id.* at 464 n.94.

Tallon raises an issue which should be of greater concern than the false conflict between Articles 14(1) and 55. The problem arises if "validly concluded" refers to validity under national legal systems, including indefiniteness. While the contract is then free of any imaginable constraints to be found in Article 14(1), "in legal systems such as the French, an agreement on price is necessary for the validity of a sale (French Civil Code arts. 1589, 1591 and 1592)."⁴² Of course, as discussed above, the U.C.C. represents a more flexible approach broader even than Article 55, so this should not be a concern if American law is used to determine a contract's validity under the Convention.

C. Open-Price Contracts: Conclusion

The stronger arguments seem to lie with those who would read the Convention to allow open-price contracts, but as Farnsworth has noted, these arguments may fall on deaf ears if presented in a tribunal where the laws are inhospitable to open-price contracts. The textual arguments on either side are sufficiently complicated such that a tribunal could adopt one or the other depending on its preference. In view of this uncertainty, it would be advisable for parties engaged in open-price contracts to have a choice-of-law clause falling back on the U.C.C. as a gap-filler by selecting the law of a U.S. state with a reasonable relationship to the transaction or the parties, and a choice of forum clause selecting a forum friendly to open-price contracts (ie, any U.S. state).⁴³

Perhaps the most contorted attempt of reconciliation is recounted by Tallon:

The UNCITRAL commentary on the text of the 1978 Draft Convention (under article 51) saw the difficulty and came to the conclusion that article 51 is effective only if one of the parties has his place of business in a Contracting State which has ratified or accepted the Convention as to Part III (Sales of Goods) but not as to Part II (Formation of the Contract) and if the law of that State provides that a contract can be validly concluded without a price. Such an interpretation could almost annihilate CISG article 55 since the conditions for its application would seldom be met. Tallon, *supra* note 2, at 7-10, 7-11.

But if article 14 is read as Honnold suggests, article 14 is not rendered meaningless, as Tallon fears.

⁴² Tallon, *supra* note 2, at 7-11, 7-12. ("Two recent series of French cases have drawn attention to this requirement These cases have been widely discussed and sometimes criticized . . . for their dogmatic approach and for flowing from 'uncommercial ideas'.")

⁴³ See Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L. L.J. 439, 447 (1988) [hereinafter Farnsworth Review] :

Articles six and four of the Convention create a tripartite hierarchy in which the Convention lies at the bottom, the agreement of the parties is in the middle, and the domestic law on validity rests on top. Prudent drafters ought to re-examine language for the international sale of goods, even when such language is dispositive, to protect the special needs of their clients in light of this new tripartite hierarchy. See also B. Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L.& COM. 187 (1988).

III. IS ARTICLE SIXTY-TWO AVAILABLE AS A REMEDY IN UNITED STATES COURTS?

A. *The Convention: Article 62*

Article 62 allows the seller to "require the buyer to pay the price, take delivery or perform his other obligations."⁴⁴ As noted above by Garro, "[t]he disparity between civil law and common law traditional perceptions to the law of sales was particularly evident in the field of remedies."⁴⁵ Nowhere is this more evident than in the remedy of specific performance. In jurisdictions where the remedy is available, Article 62 only limits the seller's right to compel performance by requiring that the seller not have resorted to an inconsistent remedy.⁴⁶

The right to demand specific performance is not conditional on the inadequacy of damages. Thus, in theory, the Convention assumes that specific performance will be more readily available than substitutional relief. This is consistent with the traditional preference of civil law systems for specific relief and with the

⁴⁴ The Convention eliminated the following exception found in Art. 61 of ULIS:
The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected.

HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES : THE STUDIES, DELIBERATIONS AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 156, 178 (1989) [hereinafter, HONNOLD DOCUMENTARY HISTORY]. Thus, the Convention rejected a proposal by the United States that "the seller not have the right to require 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." *Id.* at 400. Another proposal amended the article to read: "The seller, *after he has duly complied with his obligation under the contract*, may require the buyer to pay the price, take delivery or perform any of his other obligations..." *Id.* at 344. This proposal, "based on the proposition that the seller should be able to require the buyer to perform his obligations (in practice, usually to pay the price) only if the seller had already performed his own obligations under the contract" was rejected.

[I]t was noted that the contract may call for payment of the price before the goods were delivered or the contract may require the opening of a letter of credit prior to delivery. It was also pointed out that the proposal would upset the balance of rights and obligations between the seller and the buyer.*Id.*

⁴⁵ Garro, *supra* note 15, at 458.

⁴⁶ For example, "a seller may lose the right to payment under article 62 by declaring the contract avoided under article 64." Kastely, *supra* note 14, at 617. At the Plenary Conference, the delegate of Spain stated :

that his delegation had voted in favor of [article 62] but was not satisfied with the wording of the concluding proviso 'unless the seller has resorted to a remedy which is inconsistent with this requirement.' That passage was not at all clear. As far as he could see, it could only refer to the case in which the seller avoided the contract. If the seller had not avoided the contract the obligations of both parties subsisted unchanged. HONNOLD DOCUMENTARY HISTORY, *supra* note 44, at 747.

economic needs of countries with planned economies that lack markets for substitute transactions.⁴⁷

B. Article 28 Compromise

While the possibility of specific performance in courts which normally grant such remedies will not be eliminated,⁴⁸ in theory, Article 28 eliminates the possibility of an order for specific performance in a common-law court.⁴⁹ But to the extent a common-law jurisdiction *would* grant such a remedy under its own law, that possibility is not eliminated.⁵⁰ Article 28 was "a clear

⁴⁷ Garro, *supra* note 15, at 458-459.

⁴⁸ Where the remedy of specific performance seems desirable, however, the 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 breach. Although such terms have been relatively rare in the past, still under the Convention such a term may be advisable. Kastely, *supra* note 14, at 641.

Whether such a clause would be effective is questionable, although Kastely argues that it should be enforceable.

⁴⁹ Article 28 provides that:

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.

ULIS Article 16 and Article VII are essentially the same as CISG Article 28. As noted by Honnold: "[t]he current text... 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." HONNOLD DOCUMENTARY HISTORY, *supra* note 44, at 245. The 1978 Draft Convention was somewhat narrower, but the following pre-conference proposal by the United States and the United Kingdom was accepted modifying "the article so that a court would be bound to order specific performance of a contract under the Convention only if the court 'would' do so in relation to similar contracts under its own law, rather than whether it 'could' do so as is provided in [the Draft Convention]." HONNOLD DOCUMENTARY HISTORY, *supra* note 44, at 397, 672. Furthermore, "Mr. FELTHAM (United Kingdom) . . . reminded the Committee . . . [t]hat [the ULIS] formulation had been an attempt to ease the position of those States whose courts regarded specific performance as an exceptional rather than a usual remedy...[under the change to 'could'] [t]he effect was to reduce vastly the protection afforded by the earlier provision to those States whose courts did not readily grant the remedy of specific performance . . . Mr. Wagner (German Democratic Republic) said that his delegation preferred the present ['could'] 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." *Id.* at 525-526.

⁵⁰ It is important to bear in mind that,

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 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 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 [CISG Art.28] does not limit the application of articles 42 [CISG 46] or 58 [62]. HONNOLD DOCUMENTARY HISTORY, *supra* note 44, at 417 (Secretariat Commentary).

compromise impairing the unification of law."⁵¹ "Because the draftsmen of the Convention were unable to agree on a uniform substantive rule, an action for specific performance will depend on the vagaries of the forum's law."⁵² In order to determine to what extent Article 62 is available in American courts, we must probe the vagaries of specific performance of the buyer in American law.

C. When is Specific Performance Under the Convention Available in the U.S.?

When Article 28 refers to a "judgment of specific performance," does it limit its availability to the narrow sense of a decree in equity,⁵³ or is Article 62 specific performance available whenever a court has power to compel performance? Honnold's view is that "one cannot be tied to local terminology in construing the Convention,"⁵⁴ even where the Article refers to the local rule, and even though "this provision was designed primarily as a concession to the common law."⁵⁵ Since "[l]imiting this phrase to an equity decree in actions by the buyer would exclude actions such as *detinue* and *replevin*, and in *common law settings* would have little meaning in actions by the seller."⁵⁶ Kastely agrees: "the term 'specific performance' in article 28 need not refer to the definition of 'specific performance' in the various national legal systems,

⁵¹ Garro, *supra* note 15, at 459-460. "[T]he Convention's remedial provisions 'reflect an awkward compromise between two distinct approaches to contract damages.'" Kastely, *supra* note 14, at 610. "[A]rticle 28 threatens to undermine the Convention's remedial scheme and to prevent uniformity in this important aspect of international sales. *Id.* at 612. "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." *Id.* at 627. Professor Kastely's article provides the best summary of the reasons for including a broad right to specific performance: "the law should not force a non-breaching party to accept anything less [than the full performance of the agreement]" *Id.* at 614., Kastely's article also includes a thorough discussion of the Article 28 exception which allows countries that view specific performance as unduly harsh and inefficient to continue in their own legal traditions. Kastely concludes that none of the reasons advanced for the Article 28 exception are persuasive, rather they are more reflective of "national pride." *Id.* at 627. In addition, Article 28 "poses a significant risk of forum shopping by contracting parties, a practice disruptive to the Convention's underlying goal of uniformity." Gonzalez, *supra* note 22, at 98. For an analysis of the pros and cons of specific performance See Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 296-298 (1979).

⁵² Garro, *supra* note 15, at 459-460.

⁵³ "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....and the various equitable defenses, such as *unclean hands*, *public policy*, *laches* and the like, apply." Kastely, *supra* note 14, at 634 n.128. See also, Farnsworth, *Damages and Specific Relief*, 27 AM. J. COMP. L. 247, at 249-50: To begin with, the words 'judgment for specific performance' suggest that the provision does not apply to a suit in which the seller tenders the goods to the recalcitrant buyer and claims the price. Such a suit traditionally one at law rather than in equity, is not commonly thought of as one for 'specific performance,' even though it gives the seller relief that might accurately be described as 'specific'." See also, TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT, 47-71, 73-74.

⁵⁴ HONNOLD COMMENTARY, *supra* note 1, § 348, at 357.

⁵⁵ HONNOLD COMMENTARY, *supra* note 1, at 358 n.6. See also, Ziegel, *supra* note 13, at 9-31.

⁵⁶ *Id.* (emphasis added).

[particularly considering that] the detailed meanings of 'specific performance' in English are not necessarily paralleled in each of the six official languages of the Convention."⁵⁷

Under the prevailing view, then, there would be no need to determine whether the analogous U.C.C. provision, Section 2-709, is in fact "specific performance."⁵⁸ But Honnold believes that the remedy would be restricted to its availability under § 2-709. That section is obviously more restricted than the broad right given in the Convention.⁵⁹ In contrast, Flechtner considers that "it

⁵⁷ Kastely, *supra* note 14, at 634 & n.131.

⁵⁸ SCHLECHTRIEM, *supra* note 1, at 84 n.333a: "Whether an action for the price is a form of specific performance is controversial. In the end, it is merely a problem of denomination, because no one doubts that the action is enforceable against the buyer."; See Anderson, *The Code's Action For the Price: A Survey*, 1 GEORGIA STATE U.L.REV. 27, 28-29. :

The price action remains the most attractive of damage remedies to sellers and their attorneys because it forces the buyer to honor his promise specifically Indeed, the price action under section 2-709 has been described as a specific performance remedy [See *Schumann v. Levi*, 728 F.2d 1141, 1143, 38 U.C.C. Rep. Serv. (Callaghan) 131, 133 (1984); *Central Ill. Pub. Serv. Co. v. Consolidated Coal Co.*, 527 F. Supp. 58, 65, 33 U.C.C. Rep. Serv. 278, 278 (C.D. Ill. 1981)]. This is an apt description as long as it is kept well in mind that the price action is an action at law, whereas specific performance is a remedy in equity. Equitable remedies are, generally, discretionary with the court and are not a matter of right for the plaintiff. Remedies at law are a matter of right. If the aggrieved seller carries his burden of proof that his case falls within one of the three exceptions of section 2-709, he is entitled to the action for the price as a matter of right.

In this sense § 2-709 would seem more similar to Article 62 than to the narrow equitable "specific performance". See also, HILLMAN, McDONNEL, AND NICKLES, *COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE*, 9-28 (1985): "A seller's action for the price is similar to an action for specific performance, since, when awarded, a seller recovers the price and, under Section 2-709(2), must hold the unsalable goods for the buyer"; and YORIO, *CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS*, § 11.4.1, at 306 & n.1 (1989): "For the seller of goods, an action to recover the price is the analogue of specific performance and replevin on behalf of the buyer. See U.C.C. § 2-716 comment 4 (1990): (Code section on specific performance and replevin 'intended to give the buyer rights to the goods comparable to the seller's rights to the price'.)"

⁵⁹ U.C.C. § 2-709 (1990):

Action for the Price:

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

- (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
- (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale become possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make payment due or has repudiated (Section 2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

is less clear [than for the buyer's right to specific performance] whether a U.S. court could restrict the seller's right to the price under Article 62 . . . to situations where that remedy would be available under U.C.C. § 2-709(1)."⁶⁰

Kastely raises an additional thorny question about the interaction of Article 28 and forum law: Does the phrase "unless the court would do so under its own law" include its own law regarding the 'choice-of-law', or only its local substantive law?

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.⁶¹

For Kastely, "[t]he 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"⁶² But the Article 28 reference to a forum's own law "does not require a court to apply its law [of specific performance] to a contract governed by the Convention; it simply allows the court to follow domestic law if it so chooses."⁶³ That is, even though forum law does not require specific performance, a court has discretion under the Convention to grant specific performance, since Article 28 was adopted precisely to *avoid forcing* national courts to do what they were not authorized to do.⁶⁴

D. Conclusion: Specific Performance

As the reader will by now have discovered, the "vagaries" and uncertainties surrounding the availability of specific performance are hard to penetrate. Although a contractual approach, as suggested by Kastely, would seem to be protected by the freedom of contract principle underlying the Convention, and by the parties' right to vary the effect of the Convention under

⁶⁰ Fletcher, *supra* note 13, at 60 n.32.

⁶¹ Kastely, *supra* note 14, at 637.

⁶² *Id.*: "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." *Id.* at 638.

⁶³ *Id.*

⁶⁴ *Id.* See also Gonzalez, *supra* note 22, at 97: "The forum court may still enforce the Convention's broader scope of specific performance. Under article 28 it is simply not required to do so."

Article 6, it is uncertain whether a common law court will honor the decision of the parties on this issue. If the seller is seeking specific performance and does not meet the requirements of 2-709, then, the only option left to him would be to "forum-shop" - away from American or common-law courts.