CISG Advisory Council Opinion No. 25

The Reduction of the Price under Article 50 of the CISG

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R**eproduction of this opinion is authorized.**

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** The CISG AC started as a private initiative which was founded and supported by Albert H Kritzer Executive Secretary of the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG. At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Law Studies, Queen Mary, University of London, was elected Secretary. The founding members of the CISG-AC were Prof. Emeritus Eric E. Bergsten, Pace University School of Law, Prof. Michael Joachim Bonell, University of Rome La Sapienza, Prof. E. Allan Farnsworth, Columbia University School of Law, Prof. Alejandro M. Garro, Columbia University School of Law, Prof. Sir Roy M. Goode, Oxford, Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation, Prof. Jan Ramberg, University of Stockholm, Faculty of Law, Prof. Peter Schlechtriem, Freiburg University, Prof. Hiroo Sono, Faculty of Law, Hokkaido University, Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council.*
At subsequent meetings, the CISG-AC elected as additional members Prof. Pilar Perales Viscasillas, Universidad Carlos III, Madrid; Prof. Ingeborg Schwenzer, University of Basel; Prof. John Y. Gotanda, Villanova University; Prof. Michael G. Bridge, London School of Economics; Prof. Han Shiyuan, Tsinghua University and Prof. Yeşim Atamer, Istanbul Bilgi University, Turkey, Prof. Ulrich G. Schroeter, University of Mannheim, Germany, Prof. Lauro Gama Jnr, Pontifical Catholic University, Justice Johnny Herre, Justice of the Supreme Court of Sweden, Prof. Harry M. Flechtner, University of Pittsburgh, Prof. Sieg Eiselen, Department of Private Law of the University of South Africa, Prof. Edgardo Muñoz López, Universidad Panamericana, Guadalajara, México, Assoc. Prof. Lisa Spagnolo, Deakin Law School, and Prof. Jean-Sébastien Borghetti, Université Paris-Panthéon-Assas.
Prof. Jan Ramberg served for a three-year term as the second Chair of the CISG-AC. At its 11th meeting in Wuhan, People's Republic of China, Prof. Eric E. Bergsten of Pace University School of Law was elected Chair of the CISG-AC and Prof. Sieg Eiselen of the Department of Private Law of the University of South Africa was elected Secretary. At its 14th meeting in Belgrade, Serbia, Prof. Ingeborg Schwenzer of the University of Basel was elected Chair and at its 24th meeting in Antigua, Guatemala, Prof. Michael G. Bridge of the London School of Economics was elected Chair of the CISG-AC. At its 26th meeting in Asunción, Paraguay, Ass. Prof. Milena Djordjević, University of Belgrade, Serbia, was elected Secretary, and she was re-elected short after the 37th meeting in Rio de Janeiro. Prof. Pilar Perales Viscasillas of the University Carlos III of Madrid was elected Chair of the CISG-AC after the 37th meeting in Rio de Janeiro.
*** The meeting was kindly hosted by CIARB Kenya branch. The Council expresses its sincere gratitude to its Chair, Prof. Kenneth Mutuma, and to the CIARB President, Prof. Cesar Pereira, for their invaluable support in making the meeting possible.*

Article 50

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.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Black Letter Rules

1. **The buyer's remedy of price reduction in respect of non-conforming goods is a remedy, distinct from damages, that adjusts the price agreed for conforming goods to take account of the value of the goods actually delivered.**
2. **Where non-conforming goods are delivered to a buyer, the buyer if not avoiding the contract may, as a remedy under Article 50, reduce the price of the goods, subject to the seller's right to remedy the non-conformity.**
3. **The seller's exemption from liability in damages under Article 79 does not prevent the buyer from reducing the price.**
4. **The remedy of price reduction for non-conforming goods applies also in cases of third party rights or claims under Article 41, and third party rights or claims based on industrial or intellectual property under Article 42.**
5. **The remedy of price reduction**
   (a) may not be exercised during a period of reasonable time given by the buyer to the seller under Article 47(2) to perform its obligations;
   (b) is subject to cure of the non-conformity by the seller under Article 37 or Article 48; and
   (c) is not available if the contract has been avoided by the buyer under Article 49(1).
6. **The exercise of the buyer's remedy of price reduction may be (a) made by express notice to the seller or (b) reasonably inferred from the buyer's conduct.**
7. **(a) A buyer who reduces the price is barred from resorting to an inconsistent remedy for the same non-conformity of the goods, in particular,**

replacement or repair under Article 46(2) and (3), avoidance of the contract under Article 49(1), or damages under Article 45(1)(b) in conjunction with Article 74 so far as these measure the value difference between conforming and non-conforming goods.

(b) Nevertheless, a buyer declaring avoidance of the contract when it is not entitled to do so is not thereafter barred from reducing the price.

8. **The price is reduced under Article 50 according to the ratio of the actual value of the non-conforming goods at the time of delivery to the value that conforming goods would have had at that time.**
9. **Under Article 51, the price may be reduced according to the formula laid down in Article 50 where either (a) only some of the goods delivered are in conformity with the contract, or (b) there is a delivery of conforming goods but they amount to less than the contract quantity.**
10. **If the goods are valueless because of their non-conformity, the price may be reduced to zero under Article 50.**
11. **The amount of buyer's price reduction, if disputed by the seller, is ultimately to be quantified by the court or tribunal in accordance with Rule 8.**
12. **A buyer who has paid the contract price may recover from the seller the difference between the contract price and the reduced price. A buyer who has not paid the contract price may pay the reduced price in full performance of its payment obligation.**
13. **The value of the goods actually delivered is determined at the time and place of delivery and by reference to the market in those cases where goods of the contract type are traded in market conditions.**
14. **Where the goods are not traded in market conditions, the value of the goods actually delivered may be determined by reference to the cost of repair of the non-conforming goods at the time and place of delivery.**
15. **The burden of proving the value of the non-conforming goods actually delivered and the value that conforming goods would have had rests upon the buyer.**
16. **(1) The lessened value attributed to the non-conformity of goods may be treated as a loss under Article 74, so that the buyer may pursue a claim for damages for that loss instead of reducing the price under Article 50.**
    (2) In addition to a price reduction under Article 50, a buyer may also have a claim for damages for further loss, subject to Article 74.
17. **Sums repayable by the seller under Article 50 bear interest from the date the seller receives the price to the date that repayment is made at the rate appropriate for restitution under Article 84, and not at the rate for sums in arrears under Article 78.**

COMMENTS

General

1. The buyer's remedy of price reduction in respect of non-conforming goods is a remedy, distinct from damages, that adjusts the price agreed for conforming goods to take account of the value of the goods actually delivered.

1.1 In response to the seller's breach of contract, the buyer reducing the price is exercising a unilateral right[1] to modify the contractually agreed price,[2] and is not exercising a right of set-off.[3] The price reduction remedy is not a damages remedy: the buyer does not have the burden of establishing that the non-conformity has caused any loss. Rather, it is a matter of the buyer establishing that it has paid or agreed to pay an excessive price for what in fact has been delivered and recovering or declining to pay the amount of the excess, the excess being measured according to the formula laid down in Article 50. The right to withhold payment may be exercised outside legal proceedings but this does not mean that proceedings will not be needed to assess the correctness of the price reduction claimed by the buyer. The buyer does not have a sovereign right to dictate the amount of price reduction.[4] As will be seen, however, the buyer may make a reasonable reduction in order to avoid liability for failing to pay the contract price.[5]

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[1] Without there being a formal requirement that an expert be brought in (cf the former version of the French Code civil Article 1644 prior to 18 February 2015): see P Piliounis, "The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG" (2000) 12 Pace International Law Review 1.

[2] S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 731 (Bach). See, however, E Bergsten and A Miller, "The Remedy of Reduction of Price" (1979) 27 American Journal of Comparative Law 255 for the view that it amounts to partial avoidance of the contract, a view not supported in this Opinion, and I Schwenzer and E Muñoz, *Global Sales Law* (2nd edn), para 48.01 ("[f]unctionally…a partial avoidance of the contract"). For criticism of partial avoidance language, see N Jansen and R Zimmermann, *Commentaries on European Contract Laws*, Art 9:401 (K Boosfeld), paras 9-10.

[3] See *Maxxsonics USA Inc v Fenshung Peiying Electro Acoustic Co*, CISG-online 2372 (US District Court, 21 March 2012).

[4] See rule 10.

[5] See comment 10.2.

1.2 In claiming a price reduction, the buyer is restoring the equivalence of performances under the contract[6] and is not constrained by the requirement of foreseeability of loss in Article 74.[7] The price reduction remedy of the buyer is shaped to protect the buyer's entitlement to receive the promised performance so that the buyer is not left in the position of one who has paid an excessive price for what has been delivered. That is why the price reduction is assessed at the point of delivery, at which point the buyer's claim crystallises. There is nothing more the buyer can do to reduce or increase the loss of value. Nevertheless, it has been asserted that the mitigation rule is applicable to a price reduction claim.[8] This assertion cannot be sustained, because the mitigation rule in Article 77 is concerned to stem the flow of losses occurring after a breach of contract has been committed. Its target, above all, is consequential losses flowing from the breach for which the defendant would otherwise be liable but for the ability of the claimant to take evasive action to stem that flow of losses. If the mitigation rule were for example to be applied so as to compel a buyer to repair non-conforming goods,[9] the cost of repair would be recoverable as damages under Article 74[10] and any remaining difference in value between originally conforming goods and repaired goods could be made the subject of a price reduction claim. The seller's financial position would in no way be improved. This is because the loss arising out of the non-conformity of the goods would not be eliminated by the buyer's action. The better view, therefore, is that the mitigation rule does not apply to a price reduction claim.[11]

[6] See CISG-online 4413 (Supreme Court of Poland, 2 June 2017); N Jansen and R Zimmermann, *Commentaries on European Contract Laws*, Art 9:401 (K Boosfeld) (a comparative treatment of various price reduction laws).

[7] S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 731 (Bach).

[8] J Honnold (ed H Flechtner), *Uniform Law for International Sales* (Kluwer Law International, 4th edn), 600, noting by reference to the second sentence of Article 50 "the pervasive significance of the duty to mitigate damages in Article 77". But an Article 50 claim is not a damages claim, and anyway Article 77 is about mitigation of loss, not mitigation of damages. See S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 731 (Bach); also Opinion No 21 on "Delivery of Substitute Goods and Repair under the CISG" (2020), footnote 243.

[9] As might particularly be the case if mitigation were to avert or stem the flow of consequential losses.

[10] On the appropriateness of the cost of repair as recoverable damages, see rule 13.

[11] UN Secretariat Commentary on the Draft Convention on Contracts for the International Sale of Goods (A.CONF.97/5), Article 73 para 3.

1.3 Price reduction applies whether or not the buyer has already paid some or all of the price.[12] If the buyer is seeking monetary recovery from the seller, its prior payment of the price should not of itself be taken to be a surrender by the buyer of its remedy under Article 50.[13] Depending upon the circumstances, however, payment of the agreed price by the buyer when aware of the non-conformity might amount to a surrender of its Article 50 remedy, but this will not be true in all such instances. For example, a buyer may be under commercial pressure to pay, pending the resolution of a quality dispute; or the buyer may wish to be treated as not having repudiated its obligations if its complaint turns out later not to be justified.

1.4 Price reduction has a long history in civil law systems, stemming from the aedilician *actio quanti minoris*[14] and from the *actio empti*,[15] where it played a significant role given the limitations on the recovery of damages, which still exist in some civil law systems demanding personal fault on the part of the seller, a feature that of course is absent from the CISG. Price reduction is a feature of modern civil law systems,[16] but it has no real, organic equivalent in common law systems.[17] As with any other provision in the CISG, it has to be defined and understood within the four corners of that instrument and should not be assumed to be a reproduction of whatever is to be found in any particular civil law system, or even in civil law systems as a whole, especially since they do not treat price reduction in a uniform manner.[18] For example, not all civil law

[12] S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 732 (Bach).

[13] I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 4.

[14] F de Zulueta, *The Roman Law of Sale* (Oxford 1945), pp 47, 50.

[15] For the differences in the method of calculation and prescription, see K Boosfeld, "Von der actio *quanti minoris* zur *performance reduction"* (2018) 218 Archiv für die civilistische Praxis 944, 947.

[16] In recent years given a general role in the French Code civil (Article 1223) over and above its application to sale (Article 1644). The absence of general price reduction in the Unidroit Principles of International Commercial Contracts is noticeable.

[17] Apart from the special consumer sale provision introduced via an EU Directive: Consumer Rights Act 2015, s 24. There is an argument that a type of price reduction exists in the case of short delivery (Sale of Goods Act 1979, s 30) and price abatement (Sale of Goods Act 1979, s 53(1)(a)).

[18] For discussion of the price reduction in civil law systems, see R Zimmermann, *The Law of Obligations*, pp 318, 320; I Schwenzer and E Muñoz, *Global Sales Law* (2nd edn), ch 48. For further detail from Roman law, see K Boosfeld, "Von der *actio quanti minoris* zur *performance reduction*" (2018) 218 Archiv für die civilistische Praxis 944, 947. Price reduction has also found its way into EU sales law via directives, the more recent of which is Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May

systems extend price reduction beyond non-conformity so as also to include partial delivery.[19] Again, German law is distinctive in that it looks to the relationship between conforming value and non-conforming value as of the time and place of conclusion of the contract.[20] One drawback with this latter approach is that the particular goods the subject of the contract may not yet have been identified.[21]

2. Where non-conforming goods are delivered to a buyer, the buyer if not avoiding the contract may, as a remedy under Article 50, reduce the price of the goods, subject to the seller's right to remedy the non-conformity.

2.1 Article 50 of the CISG deals with the case of goods that have actually been delivered and does not on its terms permit price reduction prior to delivery even if the buyer has good reason to believe that the goods will be non-conforming on delivery.[22] In advance of delivery, the buyer usually cannot form an accurate assessment of the value of the goods forming the basis of the price reduction formula in Article 50. Furthermore, delivery might never occur, so that no price reduction could be effected, with the buyer then going on to avoid the contract for non-delivery. Other avenues are open to a buyer who expects non-conforming delivery. With price reduction not yet available, depending upon the circumstances a buyer required by the contract to pay before taking physical delivery of the goods might suspend performance of the contract under Article 71 if it becomes "apparent" that there will occur substantial non-performance, or avoid the contract under Article 72, in those instances where it is "clear" that the seller will commit a fundamental breach concerning the conformity of the goods. Suspension and avoidance would be particularly significant where the

2019. It was also present in Arts 120 and 155 of the Common European Sales Law, also in Art III.-3:601 of the Draft Common Frame of Reference.

[19] I Schwenzer and E Muñoz, *Global Sales Law* (2nd edn), paras 48.06 to 48.08.

[20] BGB §441(3). This was true also of the Uniform Law on International Sales (Article 46) and the 1978 draft of the CISG.

[21] M Bianca and M Bonell (eds), *Commentary on the International Sales Law*, p 369 (Will) (who also notes that postponing the date of assessment gives the buyer a more informed picture when it comes to choosing between damages and price reduction).

[22] *Urica Inc v Pharmaplast SAE*, CISG-online 2952 (US District Court, 8 August 2014).

buyer is contractually bound to make payment in whole or in part before delivery, when, for example, the buyer's inspection of the goods prior to delivery reveals them to be non-conforming. If the buyer has already paid in full or in part, avoidance of the contract will result in the buyer's recovery of the sum paid pursuant to Article 81.

2.2 An issue of some considerable difficulty arises if, prior to making payment, the buyer demands a price reduction in excess of the amount to which it is entitled and tenders in payment a corresponding sum. The buyer does not have an unrestrained discretionary right to evaluate the degree of non-conformity, so the question that arises is whether the buyer itself is acting in breach of its payment obligation even if its incorrect assessment is one that a reasonable buyer would have made.[23] A striking feature of the price reduction remedy is that it has both a provisional and a final character. It may provisionally be exercised prior to legal proceedings, but the extent of the reduction will be determined at a later date, either in those proceedings or by the agreement of the parties themselves.

2.3 A further issue concerned with the retention of payment or with part-payment is the buyer's right to withhold payment, whether altogether or to the extent of the perceived non-conformity, pending a possible cure by the seller. Article 50 bars price reduction where the seller effects a cure under either Article 37 or Article 48, but it does not speak to the case of a seller who has expressed an intention to effect a cure but who has not yet performed the necessary actions. Article 48(2), however, provides that the buyer may not resort to any remedy that is inconsistent with performance by a seller who has indicated an intention to cure. The question is whether this prevents a buyer from provisionally withholding the price to the extent of the present non-conformity pending an effective cure by the seller. Such action on the part of the buyer would not be inconsistent with the effecting of a cure by the seller.[24] Furthermore, the buyer's right to act in this provisional way, as part of a broader suspension of its obligations pending cure, is discernible as a general principle

[23] See comment 10.2.
[24] See comment 5.1.

under the CISG;[25] its exercise should be dependent on a reasonable assessment by the buyer of the diminished value of the goods.[26]

2.4 Another question that presents itself concerns the intersection of price reduction and the transfer of risk to the buyer. In some instances, the buyer may take delivery of the goods[27] at a time when the risk is still on the seller. It has been claimed that, because of Article 36, the price may not be reduced before the risk is transferred to the buyer[28] but this is incorrect where delivery precedes the transfer of risk. Any perceived conflict between Articles 36 and 50 should be resolved in favour of the latter. If the buyer is on risk after delivery, with a claim against the seller for the non-conformity present before the transfer of risk, any further deterioration or loss after the transfer of risk should not be charged against the seller under Article 50. In this latter case, moreover, the casualty may in exceptional circumstances absorb the earlier non-conformity[29] so as to eradicate the buyer's entitlement. For example, non-conforming goods may be shipped on CIF terms on a vessel that subsequently founders when the risk has been transferred to the buyer on shipment. The complications posed by risk arise in particular where the buyer has not yet acquired actual possession, for example, where delivery occurs when either the goods are placed at the buyer's disposal at the seller's premises but have not yet been collected, and where goods are handed over to a carrier. Article 31 clearly provides that the seller's delivery obligation is performed in these two instances[30] and Article 50 is clear

[25] See Article 7(2) and Opinion No 21 on "Delivery of Substitute Goods and Repair under the CISG" (2020), para 3.55 (together with the cases cited in note 386), referring to Article 46(2), (3). See also rule 7 and comments.

[26] See further rule 11 and comment.

[27] The residual rule on risk transfer provides that risk is transferred to a buyer who "takes over" the goods, a clumsy expression that stands as a surrogate for delivery and supposedly avoids some of the complications inherent in the notion of delivery: Art 69(1).

[28] As is asserted in I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 2: "Since the seller's liability under Article 36 depends upon the existence of defects in the goods at the time when the risk passes, price reduction is generally possible only after the risk has passed"; see also paras 9-11.

[29] For example, non-conforming goods are destroyed by a fire that would also have destroyed conforming goods.

[30] See comment 13.1 for the reason why no distinction should be drawn between the performance of the seller's duty to deliver and the fact of delivery itself.

that the right to a price reduction arises on delivery.[31] The amount of that reduction, however, may turn on subsequent events.[32]

2.5 A final point concerns the significance of timing the accrual of a right to reduce the price. In practical terms, it becomes important only if payment is required before the buyer collects the goods from the seller's premises or before the goods arrive at their destination. If the right to reduce the price has not yet arisen before those events occur, then the buyer, subject to Articles 71 and 72, will be in breach of contract if not paying in full. Suppose the contract concerns goods identified before or at the time of contracting, such as a particular flock of sheep or a fleet of motor vehicles. A buyer having to pay in full without price reduction is placed in the difficult position of having to pay in full before subsequently pursuing the seller to recover a portion of the price. Any argument that a buyer may refuse to accept a tender of delivery where the goods are to any extent non-conforming is fraught with difficulty.[33]

3. The seller's exemption from liability in damages under Article 79 does not prevent the buyer from reducing the price.

3.1 The status of the buyer's Article 50 price reduction claim as not being concerned with damages is reinforced by Article 79(5), which makes it clear that the exercise of a non-damages right is not precluded by Article 79, a provision that exempts a non-performing party from liability in damages.[34] Article 50

[31] See S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 740 (Bach). A proposal by Argentina, Spain and Portugal to assess value as at the buyer's place of business or residence (A/Conf.97/C.1/L.168) was rejected in the course of the First Committee's deliberations: J Honnold, *Documentary History of the Uniform Law for International Sales*, p 580.

[32] For example, the value of contaminated bottles packed in a way unfit to withstand carriage may depend upon what happens to the bottles in the course of carriage, with the seller remaining on risk notwithstanding delivery to the carrier, in accordance with Article 66 (damage due to seller's act): see CISG-online 1408 (Oberlandesgericht Koblenz, 14 December 2006).

[33] See Opinion No 5 on "The buyer's right to avoid the contract in case of non-conforming goods or documents" (2005); MG Bridge, *The International Sale of Goods* (5th edn, Oxford 2023), paras 12-08-12.09.

[34] Hence, whereas generally a buyer may indifferently choose between a price reduction claim and a damages action, the former will be the appropriate course where the seller is able to claim exemption under Article 79.

operates by adjusting the price and not by imposing liability. It can provide a defence to non-performance or the basis of a claim for the recovery of some or all of the price. Above all, Article 50 is concerned with establishing a proper base for the bargain agreed between seller and buyer. The price is reduced to restore the contractual equilibrium.[35]

3.2 By way of contrast with the reference to Article 79, it might be added that Article 80, a provision of general application, should not be invoked in aid of reducing the price where the non-conformity stems from an act or omission on the part of the buyer.

4. The remedy of price reduction for non-conforming goods applies also in cases of third party rights or claims under Article 41, and third party rights or claims based on industrial or intellectual property under Article 42.

4.1 The language of non-conformity is present in Article 35, in respect of quantity, quality and description, yet it is absent from Article 41. Even though this is the case, there is every good reason, as the Advisory Council has stated in an earlier Opinion,[36] for treating goods that infringe the requirements of Article 41 as non-conforming.[37] An Article 41 claim should therefore be available for price reduction under Article 50.[38] Although a proposal to extend Article 50 expressly to Article 41 claims was withdrawn by its proposer in the proceedings leading up to the conclusion of the CISG,[39] as in other instances the lack of support for a proposal is not to be equated with opposition to the substance of the proposal itself. This is because proposals can founder for various other

[35] See rule 2 and comments.
[36] Opinion No 21 on "Delivery of Substitute Goods and Repair under the CISG" (2020). See rule 1 (dealing with goods infringing Article 41 as non-conforming for the purpose of Article 46(2), (3)).
[37] For a different view, see I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 2, asserting that Article 45 applies and that Article 79 will rarely arise.
[38] Noting the absence of reported cases, see S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 732 (Bach), also setting out in detail at pp 733-34 the arguments for and against the inclusion of Article 41 claims and making a case for the extension of Article 50 to Article 41 *de lege ferenda*.
[39] Withdrawn by the Norwegian proposer (A.CONF.97/C.1/L.181) on the ground that the matter could be left to the courts when interpreting Article 50: J Honnold, *Documentary History of the Uniform Law for International Sales*, pp 581-82.

reasons, such as lack of time for due consideration of a proposed amendment by the delegates. Furthermore, there is some textual support for the application of Article 50 to Article 41 claims. This is because Article 44, when referring to Article 43 and third party notices, recognises that, despite a delay in the giving of a notice of non-conformity under Article 39, the price may yet be reduced if the buyer has a reasonable excuse for the delay. That said, it will be no easy matter to evaluate the amount of the price reduction in Article 41 cases in view of the uncertainty of the third party right or claim ever being vindicated.

4.2 Price reduction is a remedy that does not arise in court or tribunal proceedings, but the amount is subject to final quantification in such proceedings[40] and the assistance of the court may be required for the recovery of part of the price paid. It therefore may, in some cases at least, avoid the delays of litigation. As such, Article 50 may be treated as laying down a general principle[41] so as to apply by analogy to claims under Article 41 even if Article 41 claims are not as such captured by Article 50 itself. As for intellectual property claims under Article 42, the existence of price reduction here should also be recognised further to Article 44 as being available under Article 50,[42] whether directly or by analogy.

4.3 As for whether Article 50 might apply in the case where the seller does not transfer the property as required by Article 30, this is not a matter of non-conformity in its narrow sense, nor does it concern third party rights, but rather it concerns the seller's refusal or failure to transfer its property rights to the buyer. The matter cannot be dealt with under Article 41 because the seller is not a third party. Although Article 30 lays down on the seller a duty to transfer the property in the goods, it leaves the rules governing the transfer to the applicable national law. Such a breach by the seller, in a case where delivery has been made, would be highly unusual. The seller's breach would surely be serious enough to justify

[40] See rule 10.
[41] In accordance with Article 7(2).
[42] See CISG Advisory Council Opinion No 22, "The Seller's Liability for Goods Infringing Intellectual Property Rights under Article 42" (2022), rule 13.

avoidance here, so that the buyer should recover the price paid under Article 81 after avoidance of the contract. Price reduction would be an insufficient remedy in such a case.

4.4 The value of the goods may be affected by the quality of the documents that accompany them from the seller. For example, if a CIF contract requires a negotiable, on-board bill of lading as part of the shipping documents accompanying the goods, the tender by the seller of a non-conforming bill will have a detrimental impact on the value of the goods themselves and make it difficult for the buyer to dispose of them in the market or to raise finance from a bank on the security of the shipping documents.[43] Again, the seller may be required to tender to the buyer a certificate of origin or a certificate of authenticity which, if not in conformity with the terms of the contract, may reduce the value of the goods themselves. We are not dealing here with a claim based on a supposed sale of the documents, since the documents themselves are not being sold. There seems no good reason to prevent the application of Article 50 by analogy in such a case.

Price Reduction and Avoidance

5. The remedy of price reduction
(a) may not be exercised during a period of reasonable time given by the buyer to the seller under Article 47(2) to perform its obligations;
(b) is subject to cure of the non-conformity by the seller under Article 37 or Article 48; and
(c) is not available if the contract has been avoided under Article 49(1).

5.1 As Article 50 makes clear, the remedy of price reduction is subordinated to the seller's right to cure a failure to perform its obligations. The seller's right to cure under Articles 37 or 48, not granted by the buyer in the way that additional time is granted under Article 47, overrides any claimed price reduction to the extent that the latter is held in suspense pending the provision of the cure. It does not as such render unlawful any prior expressed claim of a price

[43] See *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36.

reduction by the buyer, nor does it prohibit any stated intention of the buyer to seek a price reduction if the cure is not forthcoming or falls short of the contractual standard of conformity of the goods. Article 50 imposes no requirement that the cure be a perfect one. Nor, as earlier stated, does it prevent a buyer who has not yet paid from provisionally withholding part of the price pending the seller effecting a cure.[44]

5.2 Article 47(1) permits the buyer to give the seller an additional period of time of a reasonable length to perform its obligations. Article 47(2) then provides that the buyer may not resort to any remedy for breach of contract during that additional period.[45] If the buyer has already claimed a price reduction or stated its intention to do so, then giving the seller more time to perform will prevent the buyer from taking practical steps to recover any part of the price paid during that additional period. If, upon allowing further time to the seller, the buyer has not yet stated its intention to reduce the price, this ought not to prevent a buyer from stating within that period its intention to do so if the seller does not perform in accordance with the time allowance given by the buyer. Taking now the specific case of a buyer's request for repair, the position under Article 46(3) is as follows, The buyer giving the seller additional time to repair the goods may not withhold payment in full as and when payment falls due, going beyond any provisional retention of a sum corresponding to the perceived non-conformity of the goods.[46] The position is the same for a buyer who gives the seller additional time to provide substitute goods under Article 46(2). The effect of a buyer's request for repair or substitution on its rights under Article 50 is therefore the same as it is if it is the seller who is seeking to cure and who initiates repair or substitution under Article 48(2).

5.3 Where the buyer has the right to avoid the contract for fundamental breach and indeed does so, the buyer forgoes any right to reduce the price. The two

[44] S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 736 (Bach); see also comment 2.2.
[45] See I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 7.
[46] See comment 11.2.

rights are mutually exclusive. Consequently, a buyer may not obtain both avoidance and price reduction. This applies, not only to a declaration of avoidance under Article 49 but also to what may be termed partial avoidance where the buyer rejects a part or instalment of the contract goods.[47] The remedies of avoidance and price reduction are inconsistent because avoidance releases the buyer from further contractual obligations and requires the buyer to make any goods delivered available to the seller.[48] Moreover, price reduction is premised on the continuance of the buyer's obligation to pay the (reduced) price in those cases where the price has not yet been paid. Avoidance of the contract discharges the buyer from its contractual obligation to make payment. If payment has been made, the restitution of only part of a price already paid falls short of the mutual restitution of money, goods and benefits stated by Article 81 to be the effects of avoidance of the contract.[49] If the buyer claims a price reduction after delivery of the goods, this means either that the buyer with a right of avoidance has chosen to affirm the contract,[50] or that the buyer never had the right of avoidance in the first place because the non-conformity did not amount to a fundamental breach of contract.

6. The exercise of the buyer's remedy of price reduction may be (a) made by express notice to the seller or (b) reasonably inferred from the buyer's conduct.

6.1 Article 50 makes no mention of any duty on the part of the buyer to declare or give notice that it has reduced the price or that it intends to make a future reduction. But if the buyer does make such a communication to the seller, this may be significant, as where for example it prevents a buyer from avoiding the contract.[51] The 1978 draft of what later became Article 50 stated that "the buyer may declare the price to be reduced",[52] but this reference to a buyer's

[47] See Articles 51(2) and 73.
[48] Article 84.
[49] Even in those rare instances where the goods have no value (see rule 14), a claim under Article 50 for the recovery of the whole price will not amount to avoidance under Article 81: the buyer is not bound to release the goods to the seller under Article 50.
[50] See rule 5.
[51] See rule 7.
[52] Draft Article 46.

declaration was later eliminated. The reason for this appears to have had nothing to do with the merits or otherwise of a declaration, but rather to a concern that the draft article did not sufficiently make clear that the buyer had a right to reduce the price.[53] There is, nevertheless, a substantial literature supporting the need for a declaration on the part of the buyer in general terms, but without in its totality making it clear how far the requirement of a declaration goes and whether a distinction is to be drawn between a declaration and a notice.[54] The case law on the whole does not provide substantial assistance in the matter. The[55] silence of Article 50 should be compared with other provisions in the CISG that call for declaration or a notice.

6.2 As for the distinction between a declaration and a notice, it is one that is not formally recognised in the CISG, which makes use of both expressions.[56] Taking

[53] See the deliberations of the First Committee in J Honnold, *Documentary History of the Uniform Law for International Sales*, p 580.

[54] The question of a declaration was extensively dealt with in 2011 by M Djordjević, "Declaration of Price Reduction under the CISG: Much Ado About Nothing?" in S Kröll, L Mistelis, et al (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International 2011) pp 551-569. See also the commentaries cited on the need for a declaration, including the following: P Schlechtriem & I Schwenzer (Oxford University Press, 2010) (Müller-Chen), 772-773; C Bianca & M Bonell, *Commentary on the International Sales Law – the 1980 Vienna Sales Convention* (Giuffrè, 1987), (Will) 368-369; P Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz, 1986); Enderlein, "Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods", in P Sarcevic & P Volken (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana, 1996), 196-197; C Liu, *Remedies in International Sales - Perspectives from CISG, UNIDROIT Principles and PECL* (Juris Net, 2007), 131; H Gabriel, "General Provisions, Obligations of the Seller, and Remedies for Breach of Contract by the Seller", in F Ferrari, H Flechtner and R Brand, *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved* (Sellier, 2004), 359; P Huber & A Mullis, *The CISG –A new textbook for students and practitioners* (Sellier, 2007), 250; D Saidov, "Cases on CISG Decided in the Russian Federation" (2003) Vindobona Journal of International Commercial Law and Arbitration, 33; H Flechtner (ed), *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer Law International, 4th edn), 452; P Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 1998), Art. 50 (U Huber) 444; C Shin, "Declaration of Price Reduction under the CISG Article 50 Price Reduction Remedy" (2006) Journal of Law and Commerce, 351-352. See now eg S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, Article 50 (Bach) paras 4, 29-30; I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) paras 4-6.

[55] But see CISG-online 592 (Landgericht Stendal, 12 October 2000) ("proper notice specifying the lack of conformity of the goods"); CISG-online 853 (Cour de Justice de Genève, 15 November 2002) (communication required before price reduction takes effect); CISG-online 108 (Oberlandesgericht München, 2 March 1994) (no reduction because buyer failed to make a declaration in a case where it seemed an Article 39 notice had been given).

[56] But see a recognition of the distinction between the two: Articles 26 (declaration of avoidance to be followed by notice to the other party) and 72 future non-performance with notice of intention to declare

first the requirement of a notice, it appears in numerous instances, including the rules on offer and acceptance,[57] but most importantly when it comes to communicating avoidance of the contract to the other party,[58] notifying the other party of non-conformity[59] and notifying the other party that an impediment to performance has arisen.[60] Apart from the diplomatic provisions in Part IV, the CISG refers to declarations in two categories on case: first, where a contracting party exercises its right to avoid a contract for fundamental breach;[61] and secondly, where an offer is accepted.[62] If a distinction has to be drawn between declarations and notices for the purpose of Article 50, a declaration would be more apt than a notice. A notice is something that of its nature has to be express but a declaration is not so formally constrained and might embrace conduct on the part of the buyer clearly evincing its intention in the matter. The word "communication" is therefore to be preferred in respect of any statement of the buyer's actions or intention concerning price reduction.

6.3 The right of a buyer to reduce the price is a form of self-help, at least where payment has not yet been made. Self-help does not of itself impose a requirement of a declaration or notice. For example, a seller declining to hand over the goods to a buyer who does not tender payment in accordance with contract is also exercising a self-help remedy[63] but no explicit requirement of notice or declaration of intention exists in such a case.[64] In certain cases falling outside Article 50, nevertheless, a notice or declaration is required in order to exercise even a remedy that does not need to be sanctioned in advance by the

avoidance).

[57] Articles 18-21.

[58] Article 26.

[59] Articles 39, 43-44.

[60] Article 79(4). See also Articles 32 (notice of consignment of goods), 47-48 (notice that seller will not perform in an additional period granted by the buyer), 63 (notice that buyer will not perform in additional period), 67 (transfer of risk), 71-72 (suspension and avoidance concerning future non-performance) and 88 (seller's intention to sell preserved goods).

[61] Articles 26, 49, 51, 64, 72-73, 82-84.

[62] Article 24 (arrival of acceptance – the only time declaration is used in the contract formation provisions).

[63] Article 58(1). The provision does say that the seller may make payment a condition of the handing over of the goods or documents to the buyer, but this may be done earlier in the contract itself.

[64] Cf Article 65 where a seller, fixing the specification of the goods where the buyer fails to do so, is required to provide the details of that specification to the buyer.

court or tribunal. The right to avoid a contract for fundamental breach is lost if not exercised in time[65] and by notice.[66] Similarly, a notice is required if avoidance is sought where in advance of performance a party will commit a fundamental breach.[67] These cases do not amount to expressions of a general principle supporting a requirement that the buyer communicate a price reduction or its intention to do so prior to legal proceedings.

6.4 No good practical reason exists for a formal requirement that the buyer communicate to the seller a reduction of the price or its intention to reduce the price. If there were such a requirement, this would only give rise to difficulties concerning the timing and content of the communication. A communication requirement that however was not made subject to a time limit[68] would be tantamount to the absence of any requirement. Furthermore, the price reduction is calculated as of the date of delivery and not by any reference to the time of any communication of the buyer's actions or intention. It would therefore be inappropriate to make a buyer's communication without delay a condition of its right to reduce the price, in the way that a claim for non-conformity has to satisfy the notice requirement of Article 39, nor is there any ground for introducing a time limit prior to the commencement of legal proceedings.[69] The CISG is prescriptive when it comes to the content and timing of notices of non-conformity under Article 39 and therefore its silence about notices or declarations in Article 50 is eloquent. A price reduction claim, nevertheless, does depend upon the buyer having given an Article 39 notice, which may well alert the seller to the possibility of price reduction by the buyer. A further reason why it would be undesirable to impose a notice or declaration requirement on a buyer under Article 50 is that it might lead to courts inventing unwarranted sanctions on a buyer failing to provide a notice or declaration.[70]

[65] Article 49(2), 64(2).
[66] Article 26.
[67] Article 72(2).
[68] See CISG-online 5497 (Tribunal Cantonal du Valais, 20 August 2020).
[69] See S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods* (Bach), para 4.
[70] See, for example, CISG-online 5478 (Court of Appeal Kraków, 4 September 2015) (price reduction limited to circumstances existing at the time of the declaration).

The buyer's claim in itself does not liquidate the amount of the price that the seller may claim or retain – that is a matter for a court or tribunal[71] – which also points away from a formal requirement that the buyer communicate its actions or intention to the seller. Price reduction is not a remedy that a court or tribunal might award of its own motion; it is a remedy asserted by the buyer, though, as stated below,[72] its quantification is subject to approval by the court or tribunal.

6.5 Despite the absence of a formal requirement that the buyer communicate its actions or intention under Article 50, as a matter of prudence, it may well be appropriate for the buyer to inform the seller of its intentions, even prior to launching a claim before a court or tribunal. If a buyer's statement or conduct made it clear that the buyer was claiming a reimbursement of the price,[73] this should inform the seller that the buyer is not in breach of its payment obligation.[74] Consequently, the buyer's assertion of a price reduction claim ought to facilitate the settlement of the parties' dispute. The buyer's assertion of a claim for damages would not be as effective in encouraging settlement since a damages claim might embrace consequential matters in excess of the value of the goods and therefore be more difficult to calculate. There is also the procedural aspect of the matter to consider. Since the court or tribunal does not award the remedy of price reduction of its own motion, a buyer seeking price reduction had better plead its claim sufficiently according to the forum's rules of procedure. The identity of procedural rules in this area will turn upon the place and nature of the forum dealing with the matter. These might well vary from place to place or differ as between a court and an arbitral tribunal, particularly with regard to whether the remedy might be claimed for the first time in the course of legal proceedings.[75]

[71] See rule 10.
[72] See rule 10.
[73] It has been said that the notice is subject to a requirement of clarity: CISG-online 2596 (Bundesgerichtshof, 21 January 2015). See also CISG-online 4413 (Supreme Court of Poland, 2 June 2017) ("implicit" notice permitted but must be unambiguous).
[74] See comment 11.2.
[75] See CISG-online 853 (Cour de Justice de Genève, 15 November 2002) and CISG-online 1041 (Oberster Gerichtshof, 23 May 2005).

6.6 What might amount to a sufficient statement of the buyer's position for the above procedural purpose depends very much on the circumstances of the case. In assessing any communications from buyer to seller, guidance should be taken from Article 8. If the seller does not in fact know the buyer's intention, then resort should be had to the understanding of a reasonable person in the same position as the seller. A notice of non-conformity under Article 39 when coupled with the payment of a reduced price might be thought sufficient. If[76] the buyer merely pays a reduced price, this is unlikely to convey to a reasonable seller the buyer's intention to reduce the price. The payment of a lesser sum may be made for other reasons. Article 8(3) encourages due consideration to be given to all the circumstances of the case.

6.7 Where the buyer by notice or by conduct indicates an intention to reduce the price, there should be no need at this stage to state the amount of the reduction claimed.[77] Indeed, at this stage, the buyer has not in fact reduced the price. At a later stage when legal proceedings are in progress, the rules of the forum may demand a greater degree of precision. As the next rule demonstrates, if the buyer does choose to give a notice or declaration prior to proceedings, this may prevent the buyer from claiming a remedy inconsistent with price reduction.

7. (a) A buyer who reduces the price or states its intention to do so is barred from claiming or exercising an inconsistent remedy, in particular, replacement or repair under Article 46(2) and (3), avoidance of the contract under Article 49(1), or damages under Article 45(1)(b) in conjunction with Article 74 so far as these measure the value difference between conforming and non-conforming goods.
(b) Nevertheless, a buyer purportedly declaring avoidance when it is not entitled to do so is not thereafter barred from reducing the price.

[76] But see I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 4. See also S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, Article 50 (Bach) para 29 (neither the mere payment of a reduced sum nor the buyer's demand that the seller take back the goods or reduce the price is sufficient).
[77] I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 4.

7.1 A buyer exercising price reduction or asserting the right to do so intimates to the seller that the buyer will not claim avoidance of the contract since price reduction indicates the buyer's intention to retain the goods (*non venire contra factum proprium*).[78] Even if the buyer's claim is for a greater amount than the seller is legally bound to repay or forgo, avoidance should still be now unavailable because the buyer has made a clear choice of a remedy that is inconsistent with avoidance[79] and should remain bound by that choice. This notion of a binding election is designed to further the cause of constancy and predictability in legal dealings. It applies also where the buyer seeks other remedies inconsistent with price reduction, such as a demand for substitute goods or repair under Article 46.

7.2 A more difficult case is where the buyer claims damages for consequential loss arising from the non-conformity of the goods. A loss of value claim under Article 74 is calculated differently from a loss of value claim under Article 50 but both claims deal with the same type of loss. To the extent that a damages claim is not for the diminished value of the goods themselves, however, it should not be regarded as inconsistent with a price reduction claim under Article 50. An example of this would be the damages claim of a buyer that has had to shut down production in order to modify non-conforming parts delivered by the seller.

7.3 It should be stressed, however, that a binding election occurs only in respect of the same non-conformity. If, for example, a buyer decides on a price reduction instead of avoidance in the case concerning the physical state of the goods, this should not prevent the buyer later from avoiding the contract if for example a sufficiently serious infringement of a third party's industrial property rights later comes to light.

[78] A buyer claiming a price reduction should be seen as disabled from claiming avoidance of the contract if the seller has altered its position in response to the claim: see I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 5.
[79] See rule 7.

7.4 Where the buyer cannot, or is no longer able to, declare avoidance, or has waived the right to avoid the contract, this does not preclude the buyer's lesser right to a price reduction. Even if the buyer has unsuccessfully claimed avoidance after the goods have been delivered, this should not be a ground for giving the non-performing seller a windfall benefit by retaining the price paid or payable in full. The buyer in such a case has not made a binding choice between two remedies since only the one remedy was available. If the seller were able to avoid the contract because the buyer had unlawfully claimed avoidance to an extent amounting to a fundamental breach, this should not operate retrospectively to deprive the buyer of its vested entitlement to reduce the price, any more than it would deprive the buyer of an action for damages in respect of non-conforming goods delivered to it, for otherwise this would amount to a penalty. A buyer claiming a non-existent remedy should not thereby be deprived of one that does exist.

The Price Reduction Calculation

8. The price is reduced under Article 50 according to the ratio of the actual value of the non-conforming goods at the time of delivery to the value that conforming goods would have had at that time.

8.1 The buyer is **not** entitled under Article 50 to the difference between the value that conforming goods would have had at the time of delivery and the value that the non-conforming goods actually had at that time, as would be appropriate in an action for damages, where the contract price is not taken into account.[80] Price reduction is not the same as damages and is not a remedy that is designed to fulfil a buyer's expectation interest.

Example 1 The contract price of goods is €108,000. On a rising market, conforming goods would have been worth €120,000 at the time of delivery. In their non-conforming state that that time, they are worth €96,000. The reduced price is eight-tenths of €108,000 = €86,400. If the buyer has paid, the buyer recovers €21,600 (€108,000-€86,400).

[80] See generally R Beheshti, "Price reduction vs Damages: a Battle without a Winner" [2016] Uniform Law Review 216.

Example 2 The contract price of goods is €110,000. On a falling market, conforming goods would have been worth €100,000 at the time of delivery. In their non-conforming state at that time, they are worth €90,000. The reduced price is nine-tenths of €110,000 = €99,000. If the buyer has paid, the buyer recovers €11,000 (€110,000-€99,000).

8.2 A damages action would be advantageous to the buyer on a rising market and disadvantageous to the buyer on a falling market. A damages action in Example 1 would give the buyer the difference between the value of the goods at the date of delivery and the value they should have had (€120,000 - €96,000 = €24,000), whereas Article 50 would, as seen above, give the buyer €21,600 (€108,000-€86,400). Example 2 would give the buyer €10,000 (€100,000-€90,000) as damages but, as seen above, €11,000 as a result of the price reduction (€110,000-€99,000). The price reduction formula divides the risk of a post-contractual rise or fall in the market for the contract goods between seller and buyer,[81] whereas the damages action puts the risk of post-contractual market movement, whether up or down, exclusively on the buyer in those cases where the buyer does not avoid the contract.[82] It also maintains the original equivalence ratio between the objective value of the goods and the price at the reduced level.[83]

9. Under Article 51, the price may be reduced according to the formula laid down in Article 50 where either (a) only some of the goods delivered are not in conformity with the contract, or (b) there is a delivery of conforming goods but they amount to less than the contract quantity.

9.1 As short delivery is an instance of non-conformity under Article 35, price reduction is available in such cases under Article 50. This is so despite the presence also of Article 51, which deals in more specific terms with short delivery and partial non-conformity of the goods actually delivered. Since Article

[81] For the view that price reduction does not as such protect the buyer's expectation interest, see G Treitel, *Remedies for Breach of Contract*, para 100.
[82] The Article 50 formula "allows for the parties to keep in line with their good or bad bargain": M Bianca and M Bonell (eds), *Commentary on the International Sales Law*, p 370 (Will).
[83] CISG-online 2592 (Bundesgericht, 2 April 2015).

50 on its terms is applicable to instances where some of the goods are conforming and some are not, there is consequently a significant overlap between the Articles 50 and 51. All that Article 51 does is to apply to short and partially non-conforming delivery cases the formula laid down in Article 50.[84]

9.2 Articles 50 and 51 both apply to contracts calling either for a single delivery or for delivery in instalments. For both types of delivery, the seller may deliver some goods that conform to the contract, either because delivery is incomplete or because only some of the goods are conforming. In these instances, the price reduction will be applied to the non-conforming or to the missing goods, as the case may be. Although Article 50 provides no guidance as to the assessment of value, the best approach would be to assume a unit pricing formula.[85] Consequently, for example, it should not be assumed that the value to be attached to each unit of goods would be on a diminishing scale as the quantity of goods supplied under the contract increases.

9.3 It has been argued, nevertheless, that Articles 50 and 51 may arrive at different conclusions in a particular case. The argument is that Article 50 should not apply to the case of partial non-conformity affecting only some of the goods but not others when the goods belong to more than one type, with different market movements operating between the two types. The reason given is that otherwise Article 50 might provide a price reduction result different from that in Article 51.[86] This would happen because Article 50 would blend the two types of goods so as to create an average of market movement, whereas Article 51 would keep separate the two market movements. Owing to the treatment of quantitative deficiency as an example of non-conformity under Article 35, this argument contradicts the language of the CISG and therefore cannot be sustained.

[84] But see comment 9.3 for possible differences in the calculation of the price reduction between Article 50 and 51.
[85] CISG-online 853 (Cour de Justice de Genève, 15 November 2002).
[86] S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, Article 50 (Bach), pp 734-35.

9.4 The buyer making its case for a price reduction should be able to choose between Articles 50 and 51 in framing its price reduction claim. Both provisions are consistent regarding the outcome of a buyer's price reduction claim for non-conformity arising out of short delivery.

10. If the goods are valueless because of their non-conformity, the price may be reduced to zero under Article 50.

10.1 If the price may be reduced because the goods are almost valueless, there is no good reason for excluding price reduction where they are wholly valueless.[87] It would be odd to admit an Article 50 claim where the value of goods is 5 percent of the contract price but reject the claim if the value was 0 per cent. Where the goods are valueless, the seller will most likely have committed a fundamental breach of contract. It does not follow, however, that the buyer is bound to treat the matter as one of fundamental breach. In the case of Article 50, the buyer to whom the goods have been delivered is not required to make restitution of them to the seller, as would be so if the contract were avoided for fundamental breach.[88] Consequently, the Article 50 buyer should be able to avoid the position of incurring expenditure in arranging carriage of goods to the seller, which would then generate a claim against the seller for the cost of such carriage.[89] It may be easier for the buyer instead to dispose of worthless goods in its home territory. Again, a buyer may be prevented from avoiding the contract because of lapse of time (Article 49(2)), which would not preclude a reduction of the price.

10.2 In some instances, goods may have a negative value because the cost of disposing of them exceeds the contract price. Any such added cost may be recoverable as damages according to the provisions of Article 74.

[87] Supporting a complete price reduction, see CISG-online 4413 (Supreme Court of Poland, 2 June 2017); CISG-online 1041 (Oberster Gerichtshof, 23 May 2005); CISG-online 1408 (Oberlandesgericht Koblenz, 14 December 2006); cf CISG-online 5886 (Rechtbank Overijssel, 6 April 2022).
[88] Article 84(2)(a).
[89] Under Article 74. See Opinion No 9, "Consequences of Avoidance of the Contract" (2008), comment para 3.16.

11. The amount of a buyer's price reduction, if not agreed by the parties themselves, is ultimately to be quantified by the court or tribunal in accordance with Rule 8.

11.1 Although price reduction is a self-help remedy for a buyer who has not yet paid, this does not mean that the buyer has an unfettered right to determine the amount.[90] The precise amount is a matter for the court or tribunal unless the parties themselves have expressly or impliedly agreed the amount, as might occur if the buyer asserts its right and tenders a sum less than the contract price, which sum the seller accepts without demur (*non venire contra factum proprium*). It would for example preclude a claim by the seller requiring further payment by the buyer.[91]

11.2 Article 50, however, clearly implies that a buyer need not wait for legal proceedings before exercising the remedy when in a position to withhold payment in full. A means must therefore be found to reconcile the buyer's right to do so with the quantification of the permissible reduction in legal proceedings. Suppose the buyer retains a part of the agreed price greater than the amount quantified in later proceedings. A buyer in this position and relying upon Article 50 should not be regarded as acting in breach of contract, provided that the buyer is making provisionally a reasonable reduction pending trial of the matter. Otherwise, there would arise an unacceptable risk for a buyer exercising its rights under Article 50. A buyer deducting or claiming to deduct an unreasonable amount may be treated as failing or refusing to pay the agreed sum in accordance with Article 53 if, in the interpretation of Article 50 in accordance with good faith as stated by Article 7(1), the buyer is thus deprived of the defensive shield afforded by Article 50.

[90] See further comment to rule 2.
[91] Article 62.

12. If the buyer has already paid the contract price, the buyer may recover from the seller the difference between the contract price and the reduced price. If the buyer has not yet paid, the buyer may pay the seller the reduced price in full performance of its payment obligation.

12.1 A buyer claiming reimbursement under Article 50 is in effect asserting a restitutionary claim. This is not a matter for the applicable law for restitutionary claims, the application of which would detract from the uniformity of the CISG as provided for in Article 7(1), since restitution is embedded in the CISG itself. This is evident in the text of Articles 81(2) and 84(2). Arguments advanced that the buyer's claim for restitution is governed by Article 81(2) and not by Article 50 do not make a practical difference to the buyer's recovery[92] but they wrongly locate price reduction in the area of contractual avoidance.[93] Furthermore, it cannot be too strongly emphasised that the buyer's right under Article 50 is not a right to claim damages. This is significant when it comes to the award of interest on the recoverable sum.[94]

12.2 As stated elsewhere, the buyer has by claiming price reduction unilaterally varied the contract so as to redefine its payment obligation and has kept that contract alive.[95]

Valuing the Goods

13. The value of goods is determined at the time and place of delivery and by reference to the market in those cases where goods of the contract type are traded in market conditions.

13.1 The value of the goods is not based upon their value at the date of conclusion of the contract.[96] Instead, in this rule and in rule 14, it is based upon

[92] See CISG-online 853 (Cour de Justice de Genève, 15 November 2002, also the texts mentioned in S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 742 note 77 (Bach).
[93] See rule 1 and comment 1.1.
[94] See rule 17 and comments thereon.
[95] See comments 1.1 and 16.1.
[96] CISG-online 308 (Oberlandesgericht Graz, 9 November 1995).

their value at the time and in the place of delivery, calculated in accordance with the formula laid down in rule 8. The market is not an abstract notion but rather is defined by reference to the time and place of delivery.

13.2 Delivery is the subject of Article 31, which does not as such define the time of delivery but instead states what the seller has to do in order to perform its delivery obligation. Delivery is an event marking the transfer of possession whereas making goods available to the buyer is the performance of an obligation that precedes this transfer. The drawing of a distinction between the time of delivery and the time the seller has performed its delivery obligation, for the purpose of Article 50, would be unduly subtle. The better view therefore is to treat Article 31 as also laying down the time of delivery for the purpose of Article 50. Price reduction is then determined by an objective assessment of the value of the goods.[97] It does not turn upon the subjective assessment of the buyer when examining the goods after receiving them.

13.3 In cases involving carriage, since the seller's delivery obligation is performed when the goods are handed over to the carrier, indeed to the first carrier where there is more than one carrier or form of carriage,[98] the valuation of the goods will take place before the buyer obtains actual possession of them.[99] Although it is sometimes asserted that the value of the goods should be assessed when they arrive at their destination, the completion of the seller's delivery obligation is clearly spelt out in Article 31 in such a way as to occur in numerous instances before the buyer comes into actual possession of the goods.

13.4 Although Article 50 makes no mention of the place of delivery, for the purpose of assessing value, the assessment of value, presumptively at least, should be carried out according to the place where the performance of the

[97] CISG-online 1041 (Oberster Gerichtshof, 23 May 2005).
[98] Article 31(a).
[99] But see I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 9 (on the question-begging ground that "the object of sale derives its economic value from the destination" and so value in the case of carriage should be assessed at destination).

seller's delivery obligation occurs.[100] Difficulties that sometimes arise in international sales where goods are not delivered and there is no surviving market (for example, a July shipment of wheat on FOB terms once the month has expired)[101] obviously do not arise in Article 50 cases where the goods have actually been delivered.

13.5 Valuation according to the market establishes the default position. There will, however, be cases where there is no effective market on the particular occasion because the goods are too specialised for there to be a sufficiency of supply and demand yielding a market price. In such a case, a reference to trading in the most closely related goods in market conditions may be appropriate in some instances.

14. Where goods are not traded in market conditions, the difference in value between non-conforming goods and conforming goods is presumptively the cost of repair of the non-conforming goods.

14.1 This presumptive rule, which can be rebutted, is appropriate for instances where the goods are sold on the basis of a seller's or manufacturer's standard prices and not according to the price in a fluctuating market. Although the cost of repair is commonly used in connection with a damages claim, it may also be just as appropriate as a measure for determining the difference in value

[100] The argument made in I Schwenzer and U Schroeter (eds), *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) about delaying the valuation of the goods in some instances, to the time they arrive at their destination or the buyer actually receives them, necessarily results in the author similarly deferring the place of valuation in the same instances: para 12. An example given is that of the Hong Kong car dealer taking delivery of a Mercedes ex works in Germany. It is far from clear that Hong Kong values should govern the price reduction. The German seller may know the car is destined for Hong Kong but its responsibilities cease upon delivery in Germany.

[101] Suggested by a case involving assessment under an insolvency clause in a commodities contract, where the court took account of ensuing CIF July trades in goods initially shipped on FOB June terms and stripped the insurance and freight elements out of the CIF price: *Esteve Trading Corp v Agropec International (The Golden Rio)* [1990] 2 Lloyd's Rep 273. For a dramatic C&F case concerning whether goods should be valued as at the port of shipment or valued on shore at destination, see *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14, [2024] Bus LR 871.

between conforming and non-conforming goods under Article 50.[102] The cost of repair is an accessible measure of value loss. The buyer recovering a sum equivalent to the cost of repair, whether or not the repair is carried out, is therefore not put to the extent and trouble of disposing of the goods in order to establish the permissible price reduction. An issue of some little difficulty arises if the cost of repair is disproportionate to the value of the goods once repaired, especially if the goods are serviceable without the repair and the buyer open to the temptation of retaining the sum in question without spending it. Although the cost of repair is presumptively the measure of the difference between the two values stated in Article 50, the strength of this presumption should not be overstated. In particular, as the example of disproportionality shows, the measure of recoverable damages should not routinely be assessed in terms of the cost of effecting a cure of the non-conformity.[103] Since the contract price sets a ceiling on the amount recoverable under Article 50, this is less of a problem than its equivalent where damages are claimed under Article 74 instead. It may therefore be disregarded for present purposes.

14.2 The strength of the presumption set out in rule 14 should not be overstated. There are other ways in which the price reduction might in an appropriate case be calculated. For example, in an appropriate case, the difference in value may be based on the discounted price for which the buyer is able to sub-sell the goods.[104] This would be a proper measure if the buyer in fact does dispose of the goods prior to the evaluation of the price reduction claim. If the buyer has disposed of the goods, it should not be able to claim a higher price reduction based on the cost of repair. In some cases, there is no adequate means of assessment, which has led in one case to the unacceptable conclusion that the matter is one of free discretion for the

[102] Applying the cost of repair, see CISG-online 2561 (Bundesgericht, 26 March 2013) and CISG-online 5588 (Varna District Court, 9 January 2019). Contra CISG-online 853 (Cour de Justice de Genève, 15 November 2002); CISG-online 488 (Handelsgericht des Kantons Zürich, 10 February 1999).
[103] Cf G Treitel, *Remedies for Breach of Contract*, para 100 (general opposition to the cost of cure).
[104] CISG-online 2561 (Bundesgericht, 26 March 2013).

court,[105] when the requirement of evidence of loss of value[106] is thus compromised. Impressionistic assessments of loss of value should be avoided wherever possible.

14.3 Calculating the price reduction where the goods delivered are entirely different from those ordered (a so-called *aliud*), which is a situation much more likely to be encountered in a textbook than in commercial life, is no easy matter, if only because the goods delivered may by some measures be more valuable in objective terms than those the subject of the contract. Although the notion of an *aliud* has been rejected by the CISG as a means of determining the difference between non-delivery and non-conformity,[107] it may serve a purpose in this instance. The usefulness of the goods to the buyer, measured by reference to the buyer's particular circumstances and the ease or otherwise of disposing of the goods, may assist in the measurement of the price reduction. It may be, however, that in a case of this nature the remedy of avoidance for fundamental breach, together with the consequences that flow from that, might be a more sensible remedy for the buyer to pursue.

15. The burden of proving the loss of value and its extent under Article 50 rests upon the buyer.

15.1 Placing the burden on the buyer accords with the maxim that those who assert a fact or a state of affairs should bear the burden of proving its existence. The buyer has the burden of proving the non-conformity of the goods and the extent of that non-conformity, for the purpose of assessing value, should equally fall on the buyer since no good reason exists for distinguishing the two.[108] Since

[105] CISG-online 3822 (Cour d'Appel de Liège, 18 June 2015) (*ex aequo et bono*).
[106] Required by *Zodiac Seats US LLC v Synergy Aerospace Corp*, CISG-online 5172 (US District Court, 8 April 2020). See also CISG-online 5478 (Court of Appeal Kraków, 4 September 2015) (claimant refused expert access to the goods).
[107] See *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Introduction (Schwenzer), p 5.
[108] CISG-online 2727 (Oberlandesgericht Brandenburg, 8 April 2016) (citing in support at note 129 cases dealing with the burden of proof of non-conformity).

the buyer has received delivery of the goods, the buyer is well placed to prove the extent of the non-conformity of which the buyer complains.

Damages and Interest

> **16(1) The lessened value attributed to the non-conformity of goods may be treated as a loss under Article 74, so that the buyer may pursue a claim for damages for that loss instead of reducing the price under Article 50.**
>
> **(2) In addition to a price reduction under Article 50, a buyer may also claim damages for further loss, subject to Article 74.**

16.1 A reduction of the price under Article 50 amounts to a permissible unilateral variation of the contract by the buyer. The original price is displaced by the reduced price. It is not correct, however, to say that the seller's duty to deliver conforming goods is varied accordingly.[109] The seller's breach of contract remains and the buyer may also have a claim for additional damage arising out of the non-conformity.[110] As stated above,[111] a buyer excusably delaying repair of the goods may claim an addition to the cost of repair in the form of damages on top of price reduction.

16.2 If the buyer receives non-conforming goods that are worth less than conforming goods would have been, the buyer is deprived of its justified contractual expectation. This expectation right is protected by Article 74. The CISG does not compel the buyer to choose price reduction instead of expectation damages. Instead, it adopts both the civil law remedy of price reduction (absent from the common law) and the common law rule of damages, recoverable even in the absence of personal fault,[112] leaving the choice of remedy to the buyer. The two approaches to monetary recovery may

[109] A further reason for price reduction not being treated as a partial avoidance of the contract.
[110] See rule 16(2) and comment.
[111] See comment 14.1.
[112] For the unusual view that the absence of a fault requirement in Article 74 is "surprising", see S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, p 730 (Bach). It might just as well be said that the absence of a fault requirement in Article 50 is "surprising".

therefore co-exist and the buyer is free to choose.[113] Despite their apparent similarity, price reduction and damages perform different functions, with the former looking to restitution by the seller and the latter to compensation for the buyer for a lost expectation.[114]

16.3 The circumstances in which the buyer may gain an advantage by seeking price reduction instead of damages have, however, been described as "rare".[115] Nevertheless, Article 50 has been said to be advantageous for a buyer who has not paid and thus has a defence when justifiably refusing payment in full.[116] A price reduction would also be advantageous to those buyers able to pass on the goods to a sub-buyer without incurring a provable loss of profit.[117] Suppose a compounder of animal feed contracts to buy Grade A soya bean meal, receiving instead the lower-priced Grade B. The compounder, using the sub-standard soya bean meal in reduced portions for each batch of animal feed, is able eventually to use it all over a lengthier period without a loss of profit on sub-sales. Article 50 gives the buyer a price reduction taking account of the difference between the values of Grade A and Grade B soya bean meal. The buyer paid for the higher grade goods and the seller was never entitled to the excess of the price over lower grade goods.

16.4 A price reduction claim and a damages claim may, in certain instances, be combined, even though the exercise of a price reduction modifies the contract. Such modification does not affect a damages claim that has either fallen due or is set in train by the breach of contract by the seller that occurred prior to the modification of the contract. Apart from the case where a buyer's claim for

[113] See CISG-online 4413 (Supreme Court of Poland, 2 June 2017); *Schlechtriem and Schwenzer*: *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Article 50 (Müller-Chen) para 18.
[114] M Bianca and M Bonell (eds), *Commentary on the International Sales Law*, p 372 (Will).
[115] J Honnold (ed H Flechtner), *Uniform Law for International Sales* (Kluwer Law International, 4th edn), 596 ("Article 50…plays an important role only when the seller is not liable for the non-conformity").
[116] M Bianca and M Bonell (eds), *Commentary on the International Sales Law*, p 373 (Will).
[117] In an English Sale of Goods Act case, the damages recoverable in this case were nominal: *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87. For a comparison of English law and Article 50, see R Beheshti, "Price Reduction vs Damages: a Battle without a Winner" [2016] Uniform Law Review 216.

damages is not associated with non-conformity (for example, a claim for damages for late delivery), a buyer may claim damages, as well as obtain a price reduction, if incurring additional costs because of the non-conformity of the goods. A non-conforming machine might, for example, damage or destroy the buyer's raw materials or other machinery of the buyer. Again, the seller may cure the non-conformity thus depriving the buyer of a price reduction with the buyer nevertheless having suffered a loss arising out of the initial non-conformity of the goods.[118] If the buyer claims damages and also imposes a price reduction, however, care must be taken to avoid double-counting and hence over-compensation.[119] For example, a non-conforming machine may be reduced in value because it is less productive than a conforming machine. If the buyer were to receive, in addition to price reduction, damages representing the loss of expected production from the machine, this would be a case of double-counting. The non-conformity of the machine reduces its value in order to take account of its diminished productive capacity. More productive machines may be expected to command a higher price than less profitable ones. The buyer should in this case elect between price reduction and damages for the loss of production. That said, these calculations are notoriously difficult. At some point, according to accountancy standards, the price of capital goods will have been amortised over a given period of years. This does not necessarily mean that the buyer may from that time onwards claim loss of profits, for the buyer may be subject to a requirement under Article 77 to mitigate its loss and replace the machine with a more productive one, and indeed in some instances may do so in fact.

17. Sums paid by the buyer and subject to recovery from the seller under Article 50 bear interest at the rate appropriate for restitution under Article 84 and not at the rate appropriate for sums that are payable but in arrears under Article 78.

[118] See CISG-online 488 (Handelsgericht des Kantons Zürich, 10 February 1999).
[119] See CISG-online 4413 (Supreme Court of Poland, 2 June 2017).

17.1 Just as a seller in receipt of money prior to the avoidance of a contract must in accordance with Article 84 pay interest on that sum from the time of receipt, so a seller in receipt of payment, whether in part or in full, must pay interest on any sum recovered by the buyer under Article 50. It is not a case of the seller being at fault in retaining money due to the buyer. Rather, the seller's obligation is of a restitutionary character, so that the seller must restore the interest-bearing value of money paid by analogy with the principle governing interest in Article 84 cases.[120] If the buyer delays unreasonably in notifying the seller of its claim under Article 50 to recover a sum paid, it might be argued that the seller's duty to pay interest should be excluded to the extent of that unreasonable delay. Since, however, there is no corresponding limit on the recovery of interest where a damages claim is made, this argument cannot be sustained. The seller's profitable use of money recoverable by the buyer continues whether or not the seller is informed of the buyer's claim.[121] Where the seller has been notified of the buyer's claim but delays in making reimbursement, a case might be made for the payment of interest in accordance with Article 84 up to the point of the notification, with interest thereafter due on the sum to be repaid as one "in arrears" running under Article 78, but this may fairly be seen as unduly complicating proceedings.

[120] See CISG Advisory Council, Opinion No 9 (Consequences of Avoidance of the Contract) (2009).

[121] For an elaborate discussion of whether interest should be calculated in accordance with either Article 78 or Article 84, depending upon whether a buyer claims interest under Article 50 itself or Article 82, see S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on the International Sale of Goods*, pp 743-44 (Bach).