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**MISSING SPECIFICATIONS IN  
INTERNATIONAL SALES**

**ARTICLE 65 OF THE  
UNITED NATIONS CONVENTION ON  
CONTRACTS FOR THE  
INTERNATIONAL SALE OF  
GOODS**

by **Ralph Amissah†**

A fundamental principle of the *United Nations Convention on Contracts for the International Sale of Goods*<sup>1</sup> is the recognition of the international character<sup>2</sup> of the transaction it regulates. Cancellation of an international contract can impose greater burdens than the typical domestic transaction. Accordingly, the Convention contains a number of provisions designed to help preserve the bargain the parties have made.<sup>3</sup> Article 65 is one such provision. It states:

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<sup>1</sup> U.N. Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (1980), *reprinted in* 19 Int'l Legal Mats. 668 1980 [hereinafter CISG or Convention]. Official Records of the United Nations Conference on Contracts for the International Sale of Goods, 10 March – 11 April, 1980 A/Conf. 97/19 [hereinafter Official Records]. The UN-certified English text is published in 52 Fed. Reg. 6262, 6264-6280 (Mar. 2, 1987).

<sup>2</sup> As of February 1997, the international sales law consists of 47 Contracting States: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-and-Herzegovina, Bulgaria, Canada, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Mexico, Netherlands, New Zealand, Norway, Poland, Republic of Moldova, Romania, Russian Federation, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uzbekistan, Yugoslavia, and Zambia.

<sup>3</sup> Illustrated by the gap filling for price where none is agreed Article 55. Also by the restricted grounds for avoidance of contract Articles 49, 64 and 73. Further by such Articles providing remedies as 46, 47, 48, 50, 51, 52(2), and 65. Beyond these Articles it may be described as pervasive throughout the Convention and

- (1) If *under the contract* the buyer is to specify the *form, measurement or other features* of the goods and he fails to make such specification either on the date agreed upon or within a *reasonable time* after *receipt* of a request from the seller, the seller may, *without prejudice* to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that *may be known to him*.<sup>4</sup>
- (2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a *reasonable time* within which the buyer may make a different specification. If, after *receipt* of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.<sup>5</sup>

Since the discussion over its retention at the Vienna Conference,<sup>6</sup> Article 65 has generated little academic debate beyond the commentaries in which it appears<sup>7</sup> and even less "litigation."<sup>8</sup> This paper examines the workings of the provision through analysis of its key words.<sup>9</sup> It seeks to develop and supplement an understanding of their meaning by reference to the legislative history of this provision, scholarly writings on it and, where possible, by analogy<sup>10</sup> to other parts of the Convention.

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manifested in the Convention's implied terms which provide the parties with an agreement in the absence of their agreeing express terms.

<sup>4</sup> CISG, *supra* note 1, art. 65. Italicization of keywords added by author.

<sup>5</sup> CISG, *supra* note 1, art. 65.

<sup>6</sup> The text of the Vienna Conference appears in Annex I of the Final Act of the 1980 Vienna Conference, U.N. Doc. A/Conf. 97/19 (1980) [hereinafter Vienna Conference].

<sup>7</sup> Article 65 is historically tied to Article 67 of the Uniform Law for International Sales (ULIS) under the 1964 Hague Sales Convention and was Article 61 in the 1978 UNCITRAL Draft Convention. There was considerable discussion in the Vienna Conference as to whether Article 61 of the Draft Convention should be retained. See Vienna Conference, *supra* note 6. Suggestions included that it gave the seller a privilege for which the buyer had no equivalent; that it was not in line with existing trading practice, which gave adequate protection in the provisions related to fundamental breach. For a comparison with the earlier ULIS text, see V. Knapp, *Specification by Seller*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 476 (C. M. Bianca & M. J. Bonell eds., 1987).

<sup>8</sup> The word "litigation" encompasses reported arbitral proceedings as well.

<sup>9</sup> The key statutory words are: "under the contract"; "form, measurement or other features"; "reasonable time"; "receipt"; "may be known to"; "seller may"; "without prejudice"; and "binding".

<sup>10</sup> For further reading on this subject see J. Hellner, *Gap Filling by Analogy - Article 7 of the U.N. Sales Convention in its Historical Context*, in FESTSKRIFT TILL LARS HJERNER, STUDIES IN INTERNATIONAL LAW 219 (Norstedts Förlag, et al. eds., 1990).

An attempt has been made to place Article 65 within the context of the Convention as a whole.

Article 65 applies in circumstances where not all the details related to the characteristics of the goods are fixed in the agreement. It is agreed or assumed from the Article that the buyer should specify the missing details later. The Article leaves no doubt that the contract is formed without the details, which are yet to be provided by the buyer.

Where the buyer fails to provide these specifications, the Article facilitates the seller's ability to perform, providing a convenient mechanism for the seller to keep the contract alive by laying down a procedure whereby the seller can ultimately supply the seller's own specifications.<sup>11</sup> This enables the seller to perform a contract that would otherwise have been too vague. The Article protects the buyer by the obligations it places on the seller who chooses to use the provision.<sup>12</sup> It also gives the buyer every opportunity to make its own specifications, even after the time that the buyer should have done so.<sup>13</sup> By allowing the fixing of the goods in a specification sale, Article 65 may assist in the determination of damages under Articles 74 to 77.<sup>14</sup>

### UNDER THE CONTRACT

The buyer's obligation to set the specifications may be expressly stated in the contract or may arise under the contract pursuant to Article 8 (interpretation of statements or other conduct of a party)<sup>15</sup> or Article 9 (usages and practices applicable to the contract).<sup>16</sup> The Secretariat Commentary appears to distinguish between a buyer's contract right to set the specifications and contract obligation to set the specifications.<sup>17</sup> Other commentators do not so distinguish. Instead, they hold that a right

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<sup>11</sup> See CISG, *supra* note 1, art. 65(1).

<sup>12</sup> See *id.* art. 65(2).

<sup>13</sup> See *id.*

<sup>14</sup> See CISG, *supra* note 1, arts. 74 to 77. For other reference to the role of Article 65 in the context of its antecedent, Article 67 of the ULIS, see HANS DOLLE, KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 394 (1976). For specific references to CISG Articles 74 and 75, see J. HONNOLD, Uniform Law for International Sales Under the 1980 United Nations Convention 447 (2d ed. 1991).

<sup>15</sup> CISG, *supra* note 1, art. 8.

<sup>16</sup> See *id.* art. 9.

<sup>17</sup> Secretariat Commentary, CISG Ann. art. 65, ¶ 5 (1993).

to specify should be interpreted as an obligation to specify.<sup>18</sup> The latter is the preferred view.

Article 65 only applies when a contract of sale has been concluded. Under the Convention, for a proposal to be capable of ripening into a contract, it must be "sufficiently definite."<sup>19</sup> A prerequisite to a proposal ripening into a contract is that the proposal must indicate the goods.<sup>20</sup> A general agreement that the buyer should specify the goods required would be too broad to qualify under Article 65 and "would have no legal effect."<sup>21</sup> However, an indication of the goods without specifying their "form, measurement or other features,"<sup>22</sup> can be regarded as sufficient.<sup>23</sup>

### FORM, MEASUREMENT OR OTHER FEATURES

Intent<sup>24</sup> is the key to determining the scope of the phrase "form, measurement or other features."<sup>25</sup> Where the requisite intent is present, this phrase is sufficiently wide to cover most characteristics of the goods, including such matters as dimensions, size, shape, style, version, model, aspects of design, color, texture, hardness, quality, and technical details of the goods. One commentator is of the view that:

When the contract states a fixed price, rather than a 'cost plus' or similar formula, the parties probably would not intend that the buyer's specifications should substantially affect the cost. Similarly, the parties probably would not intend that the seller could have wide discretion to decide the characteristics of the buyer's goods. Consequently, references in the contract and in Article 65 to 'the form, measurements or other features of the goods' should be construed with sufficient strictness to avoid these problems.<sup>26</sup>

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<sup>18</sup> Knapp, *supra* note 7, at 482. See also FRITZ ENDERLEIN & DIETRICH MAS-KOW, INTERNATIONAL SALES LAW 249 (1992).

<sup>19</sup> CISG, *supra* note 1, art. 14.

<sup>20</sup> Knapp, *supra* note 7, at 477.

<sup>21</sup> See *id.*

<sup>22</sup> See CISG, *supra* note 1, art. 65.

<sup>23</sup> Secretariat Commentary, *supra* note 17, ¶ 4.

<sup>24</sup> For a definition of intent, see CISG, *supra* note 1, art. 8.

<sup>25</sup> CISG, *supra* note 1, art. 65(1).

<sup>26</sup> HONNOLD, *supra* note 14, at 447-48.

**“REASONABLE TIME”**

The phrase “reasonable time” appears in Article 65(1) and (2).<sup>27</sup> Article 65 provides that where the contract does not set the date on which the buyer is to make the specification, the seller may request him to make the specification within a “reasonable time.”<sup>28</sup> If the seller proceeds to fix the specification pursuant to Article 65(2), the buyer must be given a “reasonable time” within which to make a different specification.<sup>29</sup> In either instance, what is “reasonable” will vary depending on the circumstances of the case, including such factors as the location of the parties and their known requirements.

No time is indicated by which the seller is to make his Article 65(1) request, or by which the seller is to inform the buyer of the details of a specification fixed by the seller pursuant to Article 65(2). In either case it should be early enough, with respect to the other obligations under the contract, to give the buyer reasonable time within which to comply (or to make a different specification), and for the seller subsequently to make delivery.<sup>30</sup>

It has been said, with respect to the seller’s Article 65(1) request:

Where the seller invites the buyer only when the contract is nearing his performance, the period will be a short one for the buyer could adapt himself to the specification ever since the conclusion of the contract; and the mechanism regulated here cannot be abused so as to grant him additional options for observing the market situation to the detriment of the seller.<sup>31</sup>

With respect to the seller’s Article 65(2) notice, it has been said that the reasonable time “will be a short time in general because the buyer is already in breach of contract and he is only required to make a decision.”<sup>32</sup> With respect to the time in which the seller is to act, “[t]he seller should specify early enough to leave the buyer a reasonable time to react before

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<sup>27</sup> CISG, *supra* note 1, art. 65.

<sup>28</sup> *See id.* art. 65(1).

<sup>29</sup> *See id.* art. 65(2).

<sup>30</sup> *See* ENDERLEIN & MASKOW, *supra* note 18, at 250.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 252.

manufacture must commence. Where this is no longer possible, the seller will reflect on whether he exercises his right at all.”<sup>33</sup>

### RECEIPT

The word “receipt” also appears in Article 65(1) and (2).<sup>34</sup> The general rule under Part III of the Convention states that “if any notice, request or other communication is given or made by a party . . . by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.”<sup>35</sup> This rule does not apply to either a request under Article 65(1) or a notice of specification made by the seller pursuant to Article 65(2). In either case, to be effective, the communication must be received by the buyer.<sup>36</sup> This places an added burden on the seller<sup>37</sup> who must be assured that the communication has been received.<sup>38</sup>

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<sup>33</sup> See *id.* at 251.

<sup>34</sup> CISG, *supra* note 1, art. 65.

<sup>35</sup> See *id.* art. 27.

<sup>36</sup> The two general rules on effective communications relate to dispatch (Part II, CISG, *supra* note 1, art. 24) and to receipt (Part III, CISG, *supra* note 1, art. 27). Receipt as used here is regarded as analogous to its definition and use in Part II.

Article 24 which applies to Part II of the Convention determines for that Part when a communication “reaches” the person to whom it is addressed. See HONNOLD, *supra* note 14, at 249. It is persuasively argued that it should be applied by analogy to the exceptions to the dispatch rule applied in Part III of the Convention. See HONNOLD, *supra* note 14, at 250. This results in a consistent solution for the definition of receipt within the Convention and means that the much greater detail existing on receipt in relation to Article 24 can be applied here. See, *e.g.*, the Official Records of the prior uniform law, ULIS, p. 26.

Because a communication that ‘reaches’ the addressee when it is delivered to his place of business or mailing address . . . will have legal effect even though some time may pass before the addressee . . . knows of it . . . even though the addressee may not know of its delivery. (Secretariat Commentary, paragraphs 3 and 4), a prudent response to application of Article 24 concepts to Part III of the Convention is the use of a contract clause which identifies by position title, parties to whom notices or other communications must be sent.

A. KRITZER, 1 INT. CONTRACT MAN., 193 (1994).

<sup>37</sup> Burden of proof and other procedural issues are traditionally for the determination of the domestic court; further discussion is outside the scope of this paper.

<sup>38</sup> A German court has added a further definition to the Convention’s term “reaches.” See *Amstergericht Kehl* 6 October 1995 (3C 925/93) *Wirtschaftsrechtliche Beratung* (München) 1996, 398. There, the court held that to “reach” the addressee, the communication should be in the addressee’s language. *Id.*

Although the general rule on communications does not apply to the seller's communications made pursuant to Article 65, it does apply to the buyer's responses to such communications. A delay or error in the transmission of the response, or its failure to arrive, does not deprive the buyer of the right to rely on it, as long as the response was made by means appropriate in the circumstances.<sup>39</sup>

### MAY BE KNOWN TO

The right to request the buyer to make the specification is beneficial to the seller because it has "teeth." If the buyer fails to make the specification, the seller may do so.<sup>40</sup> However, whether it will be prudent for the seller to take advantage of this right will depend on the circumstances. In the normal situation, the request alone should produce the response desired. When it does not, the reasons may range from the buyer who does not care as to the unspecified form, measurement or other features of the goods that he has ordered to the recalcitrant buyer who no longer desires to consummate the contract.

In the latter case, the rule that the seller can only make the specification unilaterally in accordance with the requirements of the buyer that "may be known to." the seller can present difficulties. These difficulties stem from the meaning of the phrase "may be known to." Controversy can be associated with the dimensions of this phrase and what the seller knows or may be presumed to know.

Elsewhere within the Convention there are several references to knowledge and awareness which express different gradations of the requirement.<sup>41</sup> The words "may be known to," and the circumstances in which they are used, allow appropri-

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<sup>39</sup> See CISG, *supra* note 1, art. 27.

<sup>40</sup> See *id.* art. 65.

<sup>41</sup> Provisions on anticipatory breach and installment contracts contain three gradations of knowledge: "is clear that" (CISG, *supra* note 1, art. 72); "gives good grounds to conclude" (*Id.* art. 73); and "becomes apparent that" (*see id.* art. 71). Elsewhere, the Convention contains other gradations of knowledge: "knew" (*see id.* at arts. 31(b) and 43(2)); "known to" (*see id.* at arts. 9(2), 10(a), and 35(2)(b)); "is aware of" (CISG, *supra* note 1, art. 69(2)); "knew or could not have been unaware of" (*see id.* at arts. 8(1), 35(3), 40, 42(1) and 42(2)(a)); "knew or ought to have known" (*see id.* at arts. 9(2), 38(3), 49(2)(b)(i), 64(2)(b)(i), 68, 74 and 79(4)); "has become aware or ought to have become aware of" (*see id.* art. 43(1)); and "discovered or ought to have discovered" (*see id.* art. 82(2)(c)).

ate application of the tests provided by Article 8 (intent)<sup>42</sup> and Article 9 (usages)<sup>43</sup> in defining the scope of this phrase:

The requirements of the buyer that the seller may be presumed to know and take into account with respect to the setting of specifications include the intent of the buyer that the seller is expected to have understood, as determined through application of Article 8, and any relevant usages that the seller should have taken into account as defined by Article 9.

Articles 8 and 9 are contained in Part I, General Provisions, and permeate the Convention. An argument may be made that they should be applied directly to what the seller may be presumed to know when making the specifications. In any event, the circumstances in which "may be known to" is used within Article 65 make appropriate a closely analogous understanding to Articles 8 and 9, with much the same result: a uniform interpretation of Article 65 that is in accordance with the general principles on which the Convention is based.<sup>44</sup>

Article 8 applies to pre-contract and post-contract communications and actions, which communications are similarly relevant under Article 65. Both the subjective and objective tests provided by Article 8 are relevant. Under Article 8(1) what the seller is asked is whether the seller "knew or could not have been unaware" of information which impacts upon the specification the seller is to make.<sup>45</sup> There are two parts to this standard. The first is "*Could not have been unaware.*" Of what a party "could not have been unaware," it has been suggested that this "does not [impose] an express obligation to conduct relevant research."<sup>46</sup> The second is "*What may be known.*" Similarly, what "may be known to" the seller, has been said to require knowledge or a strong assumption of knowledge on the part of the seller, so that a seller "may have known" requirements of the buyer that the seller is presumed to know, having been in a good position to learn them.<sup>47</sup> It is said that although this "does

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<sup>42</sup> CISG, *supra* note 1, art. 8.

<sup>43</sup> *See id.* art. 9.

<sup>44</sup> *See id.* art. 7.

<sup>45</sup> *See id.* art. 8(1).

<sup>46</sup> ENDERLEIN & MASKOW, *supra* note 18, at 170.

<sup>47</sup> *See id.* at 251.

not require the seller . . . to make efforts to obtain such knowledge . . . [the seller] must not ignore clues.”<sup>48</sup>

The objective tests in Article 8(2) and (3) offer further assistance in defining the scope of what the seller is to be regarded as having known or understood from communications with the buyer (providing a measure of the comprehension objectively expected of the seller with regard to any “clues”).<sup>49</sup> Article 8(2) applies whenever it is not possible to apply Article 8(1). This suggests that, based on the buyer’s communication to the seller, the seller should have the understanding of “a reasonable person of the same kind [as the seller] . . . in the same circumstances.”<sup>50</sup> Article 8(3) states that in determining the degree of “understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”<sup>51</sup> Where there is a usage of which the seller should take account in making his specification, the formulation in Article 9 which uses the words “knew or ought to have known”<sup>52</sup> should be applied.

Distinguishing the formulations in Article 8 and 9, it has been commented that “‘Could not have been unaware’ appears close to actual knowledge. It can be contrasted with ‘ought to have known’ or ‘discovered’ which is used in several other provisions of the Convention . . . . While the latter formula appears to impose a duty to investigate the former may not . . . .”<sup>53</sup> It has also been suggested that in accordance with the principle of good faith, the seller is obligated to take into consideration “probable or presumed needs of the buyer;” and that the seller cannot, for example, take the chance of specifying non-stylish goods “when he is aware of fashion trends in the buyer’s coun-

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<sup>48</sup> *See id.*

<sup>49</sup> *See CISG, supra* note 1, art. 8.

<sup>50</sup> *See id.* art. 8(2).

<sup>51</sup> *See id.* art. 8(3). As of particular interest, and beyond the scope of this paper, other commentaries on the Convention should be examined for further elucidation with respect to the scope of Article 8.

<sup>52</sup> CISG, *supra* note 1, art. 9.

<sup>53</sup> The United Nations Convention on Contracts for the International Sale of Goods: New Zealand’s Proposed Acceptance, Report No. 23 of the Law Commission 40 (1992). For the text of this report, *see* Introductions to the CISG, *supra* note 38.

try, even when he is not informed of the concrete needs of the buyer."<sup>54</sup>

That a party in the sale of goods has responsibility for the acts or omissions of his "employees"<sup>55</sup> may be stated to be a tenet of the Convention and perhaps further as *lex mercatoria*<sup>56</sup> for international sales. This may be assumed from the discussion of the formulation of the text for Article 80 of the words "by his own act or omission"<sup>57</sup> where it was concluded that no additional provision was necessary to include "persons whom that party may employ in the performance of the contract" as it was universally accepted that such "employees" would be included by reference to the party.<sup>58</sup>

This must also apply to the knowledge of such employee or agent, either:

1. By an analogous presumption applied to the knowledge of employees. The seller and his relevant employees being regarded as a single entity. Such employees being understood to be covered within the meaning of the word "seller". Thereby imputing upon the seller all the knowledge of his employees who are part of the transaction; or

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<sup>54</sup> CISG, *supra* note 1, art. 7. This Article is concerned with the interpretation of the Convention. To apply here, the principle of good faith would be used in the interpretation of the scope that should be attributed to the words "known to" as used in Article 65. In addition to this there is a growing use of good faith and loyalty principles in relation to the Convention and international sales. *Id.* For references to building a good faith requirement into international sales contracts and loyalty to the other party to the contract as a general principle of the Convention, see, for the former, J.A. Manwaring, *Reforming Domestic Sales Law: Lessons to be learned from the International Sale of Goods in ACTES DU COLLOQUE SUR LA VENTE INTERNATIONALE* 146 (Peret and Lacasse eds., 1989); and, for the latter, Leif Sevón reported in J. Honnold, *Einheitliches Kaufrecht und Nationales Obligationenrecht*, in *UNIFORM WORDS AND UNIFORM APPLICATION. THE 1980 SALES CONVENTION AND INTERNATIONAL JURIDICAL PRACTICE* 139-40 (Peter Schlechtriem ed., 1987).

<sup>55</sup> Employees, as used in this article, refers to persons engaged by the party in the performance of the contract.

<sup>56</sup> *Lex mercatoria* is defined as the law merchant; commercial law. See BLACK'S LAW DICTIONARY 911 (6th ed. 1990).

<sup>57</sup> CISG, *supra* note 1, art. 80.

<sup>58</sup> Exchange between Professors Rognlien (Norway - who raised the question), Maskow (German Democratic Republic), Michida (Japan), Khoo (Singapore), Loewe (Austria - Chairman), Shafik (Egypt). *Summary Records of the First Comm., U.N. Conf. on Contracts for the Int'l Sale of Goods, 37th mtg., Agenda Items 87 and 88, at 430, U.N. Doc. A/Conf.97/C.1/SR.37 (1980).*

2. By direct application of the principle – of the seller having responsibility for the acts and omissions of employees involved in the transaction. Where the seller is unaware of relevant knowledge possessed by his “employees” this can be regarded as an omission on the part of the seller for which the seller is responsible. The seller should thus act to ensure that he possesses relevant information known to his “employees” before making the specification himself.

The former imposes a more strict responsibility. The seller cannot excuse itself from failure to discover some obscure item of information provided by the buyer to the seller’s employee, which may not on its own appear to be significant, and, of which, on the latter formulation, the seller may be able to avail itself in some circumstances. This could be unduly harsh on a long drawn-out transaction involving several individuals on both sides, or the seller’s side.

Given the safeguards provided the buyer within Article 65, the latter interpretation should be sufficient. In either event, it is clear that, with respect to “employees”,<sup>59</sup> the seller is under an obligation at the very least, to investigate what they know about the buyer’s requirements that is relevant to the specification the seller makes. However, the seller who did not actually know and could not have known the buyer’s requirements, is not bound to consider them. Determination of what “may be known to” the seller is a question of evidence and appraisal of the circumstances.<sup>60</sup>

If the seller avails himself of Article 65, on failure to make specifications in accordance with the provisions of Article 65, the seller is himself in breach of contract.<sup>61</sup> The remedies available to the buyer are all those that may be relevant in the circumstances as resulting from the seller’s breach.<sup>62</sup> Where the seller does not take into account requirements which “may be

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<sup>59</sup> *Supra* note 55.

<sup>60</sup> *See supra* text accompanying note 37.

<sup>61</sup> This includes in addition to the setting of specifications, the provision of notices and giving of reasonable time. It has been suggested that where the seller fails to take into account the requirements of the buyer the specification made will not be binding. Knapp, *supra* note 7, at 479. F. Enderlein & D. Maskow conclude otherwise and are consistent with the view expressed here. *See* ENDERLEIN & MASKOW, *supra* note 18.

<sup>62</sup> *See* CISG, *supra* note 1, art. 45(1). Avoidance, as a remedy, is only available in the limited circumstances provided by the Convention.

known to" him, and subsequently delivers goods, such goods would be regarded as non-conforming goods.<sup>63</sup> Also, in considering evidentiary issues, the seller must be mindful of the Convention's "informality principle," pursuant to which evidence of such knowledge need not be confined to written communications.<sup>64</sup>

#### SELLER MAY

The seller's right to use the remedy prescribed by Article 65 is a discretionary one, the seller is under no obligation to do so. However, whether the seller does or does not use the remedy, the seller must take into account the consequences for mitigation of loss.<sup>65</sup> Several factors will influence the seller's decision as to whether to utilize the provision. Practical considerations will be important, including: the time available for performance under the contract; the seller's appraisal of the buyer's commitment to the contract; the certainty of payment under the contract; and any implications for future business relations.

#### WITHOUT PREJUDICE

Action under Article 65 is "without prejudice" to other remedies available to the seller. Damages are the typical remedy sought for breach of contract. For the seller to assert his right to damages<sup>66</sup> he "must take such measures as are reasonable in the circumstances to mitigate the loss."<sup>67</sup>

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<sup>63</sup> See CISG, *supra* note 1, art. 35 (especially §§ (1) and (2)(b)).

<sup>64</sup> The informality principle provides that "sales contracts are not subject to any formal requirements" as applied to Articles 8(3), 11 and 29. See J. Rajski *Form of Contracts*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 121 (C. M. Bianca & M. J. Bonell eds., 1987).

<sup>65</sup> Literally, the sole consequence Article 77 imposes for non-mitigation of loss is the reduction of an otherwise applicable claim for damages. See CISG, *supra* note 1, art. 77. On the other hand, resort to Article 7(2), general principles of the Convention, can likely lead to an expanded obligation to mitigate one's loss. *Id.* art. 7(2). A basis for such a broader obligation would be the reading into the Convention of a general principle of "loyalty to the other party to the contract." See Sevón *supra* note 54. For a further reference to the principle of loyalty to the other party, see Peter Schlechtriem, *Recent Developments in International Sales Law*, 18 ISRAEL L. REV. 309, 320-21 (1983).

<sup>66</sup> CISG, *supra* note 1, arts. 61 and 74, 75 or 76.

<sup>67</sup> See *id.* art. 77. The Secretariat Commentary makes it clear that specifying a vessel can be a mitigation obligation of the seller in cases of delivery of the goods FOB INCOTERMS (free on board in compliance with terms) when the buyer de-

The setting of specifications can also have a bearing on the seller's right to obtain specific performance under Article 62,<sup>68</sup> or to avoid the contract under Article 64.<sup>69</sup> In the case of specific performance, Article 65 is designed to assist in the prevention of the buyer escaping its obligations by refusing to supply missing specifications when contractually bound to do so. However, an attempt to use Article 65 as a device for making the buyer perform his part of the contract in circumstances in which he is reluctant or refuses to do so, will in practice seldom be the most beneficial legal solution for the seller. In these circumstances, Article 65 leaves room for the buyer to raise complicated questions of evidence and appraisal.

The fact pattern that leads to examination of Article 65 (buyer's non-compliance with his obligation to specify the form, measurement or other features of the goods) can also be cross-referenced to Article 80 as such a non-compliance by the buyer can be a defense to allegations of non-performance on the part of the seller. Other cross-references to consider are Articles 71 and 72. The buyer's non-compliance can have a bearing on a seller's right to suspend performance and to determine whether there has been an anticipatory breach of contract.

#### **BINDING - ARTICLE 65 AND ITS INTERACTION WITH THE RIGHT TO AVOID. SPECIAL ISSUES**

Article 65 confers an optional right<sup>70</sup> on the seller to make his own specifications and keep the contract alive.<sup>71</sup> Furthermore, Article 65 is to operate without prejudice to the seller's other rights.<sup>72</sup> Where the seller chooses not to perform by making his own specifications, but instead makes a request that the buyer should perform, under Article 62, the breach may eventu-

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faults on his obligation to name the vessel. Secretariat Commentary, *supra* note 17, art. 62, ¶ 9. The same principle would apply to specifications as to the nature of the goods under fact patterns encompassed by Article 65.

<sup>68</sup> See CISG, *supra* note 1, art. 62.

<sup>69</sup> *Id.* art. 64. For a fuller discussion of such matters and of "Nachfrist" issues under Article 63 see ENDERLEIN & MASKOW, *supra* note 18, at 240-41, and A. Kritzer, *supra* note 36, at 499-507.

<sup>70</sup> The optional right is indicated by use of the word "may". See CISG, *supra* note 1, art. 65(1).

<sup>71</sup> See *id.* art. 65(1).

<sup>72</sup> See *id.* art. 65.

ally become fundamental, if the buyer refuses to perform.<sup>73</sup> The “without prejudice” language of Article 65 appears to indicate that it is not intended to affect any other available remedies, including the right to avoid the contract. Despite this, taking the Convention as a whole and the integral working of its provisions, it would appear that exercise of seller’s rights under Article 65 can affect the seller’s right to avoid the contract. This area is complicated because Article 65 is designed to assist performance of the contract, not its avoidance. Put simply, the ability for the seller to make a binding specification in Article 65 is not synonymous with performance, nor is it necessarily regarded by the seller as making an election to perform.<sup>74</sup> Yet, prior to use of Article 65, the seller may be entitled to avoid the contract should the buyer not supply the missing specifications; and after application of the Article, this right to avoid may be lost.<sup>75</sup>

One caveat is that the phrase “without prejudice to any other rights” does not necessarily mean that a failure to exercise this optional remedy will not prejudice a party’s ability to exercise still another right. As an example, like Article 65, Article 63 provides an optional remedy<sup>76</sup> (in that case, the CISG’s “Nachfrist”-type remedy).<sup>77</sup> In that setting, a court has indi-

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<sup>73</sup> See *id.* art. 62. An exception to this is where, looking to the intent of the parties (Article 8), it is clear that the selection is of no importance to the buyer. See *id.* art. 8. In this circumstance, the seller is obliged to supply the goods as required under Article 35 of the Convention. See *id.* art. 35.

<sup>74</sup> The remedy in Article 65 provides the mechanism for supplying missing specifications consequently making performance possible. This is distinct from performance. The language used appears to indicate that Article 65 is not meant to be inconsistent or to interfere with the right to avoid. Specifically, one might assume (mistakenly as it turns out) that no election is being made at the time of using Article 65 to perform (i.e., not to avoid) and that the words within the Article “without prejudice to any other rights” include the remedy of avoidance of contract if then available.

<sup>75</sup> For example, see Official Records *supra* note 1, at 51-52. Other commentaries, however, point out the incompatibility of the two remedies. Enderlein & Maskow conclude “[t]he seller has no obligation to make the specification himself . . . [i]f he specifies, nevertheless, he insofar removes for himself the right to avoid the contract.” ENDERLEIN & MASKOW, *supra* note 18, at 251.

<sup>76</sup> CISG, *supra* note 1, art. 63.

<sup>77</sup> Involving the fixing of an additional period within which to perform an obligation that is due. In the case of payment of the price and taking delivery, failure to perform after this additional time permits the seller to avoid the contract, under Article 64(1)(b). For a discussion of “Nachfrist” issues under Article 63, see EN-

cated that failure to exercise this optional remedy prejudiced a buyer's ability to avoid the contract.<sup>78</sup> There can be circumstances in which a similar logic may be applied to a seller's failure to exercise the optional remedy provided under Article 65.

#### FUNDAMENTAL BREACH AND AVOIDANCE OF CONTRACT UNDER ARTICLE 64(1)(A) OR ARTICLE 72

The problem concerns the relationship between the provisions of Article 65 being "without prejudice to any other rights" and those defining fundamental breach<sup>79</sup> and the consequentially available remedies.<sup>80</sup> Where the breach is "fundamental," it gives the seller the right to avoid the contract.<sup>81</sup> The buyer's initial failure to make a specification will not amount to a fundamental breach unless the seller is deprived of what he is entitled to expect under the contract.<sup>82</sup> This can only happen where time is, for whatever reason, essential to the seller.

On their natural meaning, the words "without prejudice to any other rights" in Article 65(1) might seem to apply to the whole of Article 65 and the remedy it provides. For this to be true, the seller would have to be entitled to avoid even after the seller's specification has become binding under the Article. Whether this is possible, will depend on the way in which Article 65 operates in relation to a fundamental breach as defined in the Convention.<sup>83</sup> If the effect of the breach is to be looked at in the light of the seller's specifications having become binding, and, thus, enabling the seller to perform, the breach will not be fundamental.<sup>84</sup> The result is that "without prejudice" to the seller's other rights, as used in Article 65 with respect to avoid-

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DERLEIN & MASKOW, *supra* note 18, at 240-241. For a detailed analysis of Article 63, see A. KRITZER *supra* note 36, at 499-507.

<sup>78</sup> Amtsgericht Oldenburg in Holstein (Germany) 24 April 1990, IPRax (1991) 336. See UNCITRAL abstract reported in A/CN.9/SER.C/Abstracts 1 (19 May 1993) [CLOUT abstract no. 7]. For related data on this case, see Case Presentation dated April 1997 <<http://www.cisg.law.pace.edu>>.

<sup>79</sup> See CISG, *supra* note 1, art. 25, for a definition of fundamental breach.

<sup>80</sup> See *id.* art. 61 for available remedies.

<sup>81</sup> See *id.* arts. 64(1)(a) and 72.

<sup>82</sup> See *id.* art. 25.

<sup>83</sup> See *id.*

<sup>84</sup> In the case of the reluctant buyer (not unlikely, given his refusal to co-operate), it may be regarded as an element of anticipatory breach under Article 72. See CISG, *supra* note 1, art. 72.

ance of the contract, is confined to the seller putting into motion the apparatus for making a binding specification, and no longer applies once these specifications have become binding.<sup>85</sup>

#### AVOIDANCE OF CONTRACT UNDER ARTICLES 63 AND 64(1)(B)

The Secretariat Commentary suggests, with respect to factual circumstances to which Article 65 would apply, that one of the alternatives includes that under Article 63 the seller may “fix an additional period of reasonable length for the buyer to perform his obligation,”<sup>86</sup> and on his subsequent non-performance, the seller may avoid under Article 64(1)(b).<sup>87</sup> The obligation to which Article 64(1)(b) refers is restricted to the buyer’s obligation to “perform his obligation to pay the price or take delivery of the goods.”<sup>88</sup> To extend it to the buyer’s obligation to provide specifications as part of the buyer’s “obligation to . . . take delivery of the goods”<sup>89</sup> would put a strained construction on the wording of Article 64(1)(b), which singles out and limits its scope to the two primary obligations of the buyer, namely, payment and delivery.<sup>90</sup> Indeed several authors regard the Commentary to be in error on this point.<sup>91</sup>

Clearly, an argument against the right to avoid after the fixing of an additional time is that a minor breach of contract should not be made fundamental by the setting of a deadline. However, without Article 65 it is likely that a similar effect will

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<sup>85</sup> An alternative interpretation of “without prejudice to any other rights he may have”, as used in Article 65, is that it applies to the seller’s use of those specifications even after they become binding. This interpretation must be incorrect. At this stage where the seller is in a position to perform a binding contract, he must do so or be in breach of contract. The exception is where, along with other factors, the buyer’s non-co-operation can be taken to indicate that the buyer “will not perform a substantial part of his obligations” or as amounting to an anticipatory fundamental breach of contract. On making a specification under Article 65, the seller will similarly be bound to perform should the buyer provide an alternative specification under paragraph 2 sentence 1. For more on the above reasoning, see ENDERLEIN & MASKOW, *supra* note 18, at 251.

<sup>86</sup> Secretariat Commentary, *supra* note 17, art. 63 ¶ 1.

<sup>87</sup> *See id.* ¶ 7.

<sup>88</sup> CISG, *supra* note 1, art. 64(1)(b).

<sup>89</sup> *See id.*

<sup>90</sup> Secretariat Commentary, *supra* note 17, art. 64 ¶ 6.

<sup>91</sup> *See, e.g.,* Knapp, *supra* note 7, at 478 and ENDERLEIN & MASKOW, *supra* note 18, at 251 (the reference to Article 64(1) in the Secretariat Commentary is inaccurate). *But see* J. HONNOLD, *supra* note 14, at 440 and 448.

eventually result (the seller being entitled to avoid for fundamental breach), unless it is possible for the seller also to perform without the aid of Article 65, as argued above.