

# INTERNATIONAL REMEDIES ARTICLE

## THE REMEDY OF PRICE REDUCTION IN A MIXED LEGAL ENVIRONMENT\*

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### I. INTRODUCTION

The modern period, characterized by unprecedented economic globalization, is also witness to a growing phenomenon of approximation among differing legal systems.<sup>1</sup> These convergences among legal systems are encouraged and facilitated by international institutions, international treaties, multinational academic projects, technology that allows quick and easy access to infor-

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1. It is customary to distinguish between unification, on the one hand, and harmonization and approximation, on the other. Aubrey L. Diamond, *Conventions and Their Revision*, in *Unification and Comparative Law in Theory and Practice* 45, 45 (Kluwer L. & Tax'n Publishers 1984). Complete unification ordinarily occurs among different districts of a single country or among different states that together constitute a federal union. *Id.* Harmonization and approximation describe a lesser degree of coordination. *Id.* at 46. They attempt to mitigate some of the differences among the various legal systems without aspiring to complete unification. *E.g. id.*

mation, and so forth.<sup>2</sup> The trend offers considerable benefits.<sup>3</sup> With the world rapidly becoming an economic global village, reducing the traditional distinctions among legal systems is crucial. It contributes to removing barriers in international commerce and consequently to increasing economic welfare;<sup>4</sup> it allows parties to multinational contracts to coordinate expectations;<sup>5</sup> it lowers transaction costs;<sup>6</sup> it can reduce the risk of uncertainty inherent in multinational transactions;<sup>7</sup> and it can simplify the resolution of commercial disputes.<sup>8</sup>

As part of this trend, legal concepts and legal doctrines traditionally identified with a particular legal system may penetrate other systems in which those concepts and doctrines were previously unknown.<sup>9</sup> This cross-fertilization among legal systems is normally considered a desirable phenomenon.<sup>10</sup> On the other hand, we must not ignore the potential drawbacks of such cross-fertilization.<sup>11</sup> “Implanting” a legal concept from one legal system

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2. For general discussion of globalization, see Thomas L. Friedman, *The Lexus and the Olive Tree* 1–11 (Rev. ed., Farrar, Straus & Giroux 2000) (discussing how globalization replaced the Cold War system); Roland Robertson, *Mapping the Global Condition: Globalization as the Central Concept*, in *Global Culture: Nationalism, Globalization and Modernity* 15, 15–28 (Mike Featherstone ed., Sage Publ'n 2002) (explaining the concept of globalization in light of shifting world politics). See also Yves Dezalay, *The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field*, in *Global Culture: Nationalism, Globalization and Modernity* 279, 279–286 (Mike Featherstone ed., Sage Publ'n 2002) (discussing globalization in the context of legal theory).

3. See e.g. Eleanor M. Fox, *Harmonization of Law and Procedures in a Globalized World: Why, What, and How?* 60 *Antitrust L.J.* 593, 594–595 (1992) (identifying externalities, unnecessary transaction costs, interdependence, and a sense of integrated community as benefits of international harmonization of antitrust law).

4. *Id.*

5. See Hugh Collins, *Good Faith in European Contract Law*, 14 *Oxford J. Leg. Stud.* 229, 230 (1994) (explaining the deterrent effect of foreign commercial law upon a trader's willingness to enter a foreign market).

6. Fox, *supra* n. 3, at 594.

7. Collins, *supra* n. 5, at 230.

8. Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 *Va. J. Intl. L.* 743, 746 (1999) (explaining the difficulties that arise in a world with multiple legal systems).

9. See e.g. Anne-Marie Slaughter, *Judicial Globalization*, 40 *Va. J. Intl. L.* 1109, 1116 (2000) (discussing the use of judicial cross-fertilization in South Africa).

10. See *id.* at 1118 (explaining Justice Breyer and Justice Rehnquist's suggestions that cross-fertilization of foreign doctrine can cast light onto common law legal problems).

11. See Irma Johanna Mosquera Valderrama, *Legal Transplants and Comparative Law*, 2 *J. Int'l. L.* 261, 265 n. 7 (2003) (explaining the concept of transplant bias when deciding on the applicable foreign law).

to another is not simple.<sup>12</sup> As in the medical field, the host may reject the implant, or less dramatically, the implant may not function properly.<sup>13</sup>

Price reduction is a common civil law remedy for breach of the contractual duty of conformance.<sup>14</sup> It is not a part of common law tradition.<sup>15</sup> Nevertheless, in recent decades, as part of the process of globalization and harmonization, price reduction has made some inroads into common law and mixed jurisdictions.<sup>16</sup>

Israel is one example of a mixed jurisdiction where remedies for breach of contract include both common law and civil law concepts.<sup>17</sup> Under the Israeli system, certain types of breach entitle the aggrieved party to opt for price reduction. Experience has shown that despite its availability, the remedy is almost never used.<sup>18</sup> Careful analysis shows that the limited use of price reduction is attributable to the fact that the civil law remedy is superfluous whenever common law remedies are available. This conclusion is applicable not only to the Israeli legal system but also to any legal system that offers traditional common law remedies along with price reduction.<sup>19</sup>

Accordingly, this Article's thesis is that the use of price reduction in mixed legal systems has limited utility, and even though the remedy may formally be available, rational aggrieved parties will tend to favor the common law remedies.

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12. See e.g. David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 Tul. L. Rev. 949, 950–953 (2001) (discussing the importance of knowing foreign law before transferring foreign concepts into a separate legal culture).

13. See J. D. Briggs, Morag C. Timbury, A. M. Paton & P. R. F. Bell, *Viral Infection and Renal Transplant Rejection*, 4 Brit. Med. J. 520, 520 (1972) (explaining that rejection is the most common complication with a renal transplantation).

14. Michael Stonberg, *Drafting Contracts under the Convention on Contracts for the International Sale of Goods*, 3 Fla. Intl. L.J. 245, 258 (1988).

15. *Id.*

16. See e.g. *Morris N. Palmer Ranch Co. v. Campesi*, 647 F.2d 608, 612 (5th Cir. 1981) (displaying a court of appeals decision utilizing the price reduction remedy).

17. Gabriela Shalev & Yehuda Adar, *The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience*, 12.1 Elec. J. Comp. L. 1, 1 (May 2008) (available at <http://www.ejcl.org/121/art121-1.pdf>).

18. See Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?* 12 Pace Intl. L. Rev. 1, 32 (2000) (discussing that the remedy of price reduction is often not used offensively because the remedy acts as a self-help remedy to the buyer).

19. See e.g. United Nations Convention on Contracts for the International Sales of Goods arts. 45–52 (1980) (available at <http://www.cisg.law.pace.edu/cisg/text/treaty.html>) (explaining the available remedies for breach of contract by the seller) [hereinafter CISG].

Part II introduces the remedy of price reduction. It briefly describes the historical roots of the remedy, the concept upon which it is based, and the computation of the reduction. Part III describes the introduction of price reduction into common law and mixed legal systems since the 1960s.

Part IV is the heart of the Article. It compares the monetary benefit to the aggrieved party of the civil law remedy of price reduction with the traditional common law remedies of damages and restitution following rescission of the contract. This Article then concludes that under almost any realistic market conditions, one of the two common law remedies will be preferable to price reduction from the perspective of the nonbreaching buyer.

## II. THE REMEDY OF PRICE REDUCTION

Price reduction is a monetary remedy for breach of the obligation of conformance.<sup>20</sup> It allows the purchaser to reduce the contract price to what the parties supposedly would have agreed upon had the contract originally been for the purchase of the non-conforming goods.<sup>21</sup> The historical source of the remedy derives from the Roman legal concept of *action quanti minoris*.<sup>22</sup> The remedy of price reduction can be found in most European legal systems today, including Section 1617 of the French Code Civil<sup>23</sup> and Section 441 of the German B.G.B.<sup>24</sup>

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20. Stonberg, *supra* n. 14, at 259.

21. *Id.*

22. For a historical survey of price reduction and its influence on civil law systems, see e.g. Clarence J. Morrow, *Warranty of Quality: A Comparative Survey*, 14 Tul. L. Rev. 327, 354–360 (1940); Catherine Piché, *The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code Remedies in Light of Remedial Principles Recognized under U.S. Law: Are the Remedies of Granting Additional Time to the Defaulting Parties and of Reduction of Price Fair and Efficient Ones?* 28 N.C. J. Intl. L. & Com. Reg. 519, 548–549 (2003); Eyal Zamir, *The Failure of the Remedy of Reduction in Israeli Law—Causes and Lessons*, 23 Isr. L. Rev. 469, 471–474 (1989).

23. Art. 1617 C. civ.

24. § 441 B.G.B. (Germany). Section 441 replaced Section 472 of the previous B.G.B. The 2002 reform modified several facets of the price reduction remedy. *See id.* (explicitly stating that the purchaser is entitled to restitution of the amount above the reduced price that was paid under Section 441(4)). Nevertheless, the formula for computing price reduction remains unchanged. Compare the present B.G.B. Section 441(3) with the prior B.G.B. Section 472(1); see William G. Daniels, *The German Law of Sales: Some Rules and Some Comparisons*, 6 Am. J. Comp. L. 470, 489–495 (1957) (discussing the seller's warranty of quality); Konrad Zweigert, *Aspects of the German Law of Sale*, 9 Int. & Comp. L.Q. 1, 2–4 (1964) (comparing the remedy of price reduction in English and German sales law).

In most civil law systems, price reduction is the monetary remedy to which the buyer is normally entitled when the seller delivers nonconforming goods.<sup>25</sup> Whereas under common law, the typical remedy for such a breach is damages; in classic civil law systems, damages are considered an exceptional remedy and are allowed only where the seller's breach is accompanied by fault.<sup>26</sup>

The rationale behind price reduction is that when the purchaser accepts the nonconforming goods and indicates by his or her action that he or she is interested neither in rescinding nor in enforcing the contract, the law will view the contract as if it had originally been for the purchase of the nonconforming goods.<sup>27</sup> This construction requires the adjustment of the purchase price to

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Price reduction also appears in the Scandinavian legal systems, particularly in various areas of Swedish law. *See e.g.* § 38 Sales L. (Köplagen) (requiring buyer rebates to account for the difference between the reduced and the contract price; § 28 Consumer Sales L. (Konsumentköplagen) (providing buyers the option to demand a reduction associated with the error or cancel of a sale); ch.4, § 19(c) Code of Land Law (Jordabalken) (specifying the deduction on a purchase price for property). It also appears in Finnish law, § 38 Finnish Sales L.; in Danish law, §§ 42–43(1) Danish Sales L. (providing the ratio to calculate buyer requested price reductions); and in Norwegian law, § 38 Norwegian Sales L. (offering a proportionate reduction of price as a remedy for a transaction involving nonconforming goods). Under the influence of the European systems, price reduction was included in Article 9:401 of The Principles of European Contract Law and in Article 3:601 of the Draft Common Frame of Reference. *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Christian von Bar et al. eds., Sellier European L. Publishers 2009) arts. 3:601, 9:101 [hereinafter: DCFR]. For a comparative study of price reduction in various legal systems, see Hanna Sivesand, *The Buyer's Remedies for Non-Conforming Goods: Should There Be Free Choice or Are Restrictions Necessary?* 60–65 (Sellier European L. Publishers 2005) (comparing the usage of price reduction in the Nordic countries, England, and Germany); Zamir, *supra* n. 22, at 472–473 (discussing price reduction usage in Rome, France, and Germany).

25. Stonberg, *supra* n. 14, at 258.

26. Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, 27 *Am. J. Comp. L.* 255, 257, 265 (1979); Piliounis, *supra* n. 18, at 30; Alexander Szakats, *The Influence of Common Law Principles on the Uniform Law on the International Sale of Goods*, 15 *Int'l & Comp. L.Q.*, 749, 762–763 (1966). Fault normally indicates that the breach was accompanied by malice, bad faith, or fraud. *See e.g.* Piché, *supra* n. 22, at 549. Determining whether nonconformance is accompanied by fault, however, is not simple. *See* F.H. Lawson, *Fault and Contract—A Few Comparisons*, 49 *Tul. L. Rev.* 295, 295–300 (1975) (discussing how “fault” is difficult to define and has varied definitions depending on the jurisdiction); Barry Nicholas, *Rules and Terms—Civil Law and Common Law*, 48 *Tul. L. Rev.* 946, 952–954 (1974) (discussing the lack of a bright-line rule in France between there being an implied term requiring good care and acting with fault); Robert A. Riegert, *The West German Civil Code, Its Origins and Its Contract Provisions*, 45 *Tul. L. Rev.* 48, 75–78 (1970) (discussing how German courts require fault but make occasional exceptions).

27. Piché, *supra* n. 22, at 548–549.

reflect the value of the nonconforming goods.<sup>28</sup> The relevant time for determining the adjusted price is the date the contract was formed.<sup>29</sup> Another way of understanding the rationale underlying the remedy of price reduction is to consider the reduction a quasi-partial rescission of the contract.<sup>30</sup> The purchaser effectively rescinds the contract to the extent of the nonconformance and is entitled to a partial restitution of the purchase price.<sup>31</sup>

These rationales dictate the appropriate formula for computing price reduction.<sup>32</sup> In principal, the amount of the reduction should be the difference between the value of conforming goods and the value of the nonconforming goods as of the date the contract was formed.<sup>33</sup> Unfortunately, the contract price for conforming goods does not necessarily reflect market price of the goods.<sup>34</sup>

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28. *Id.*; see e.g. Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parole Evidence, "Validity" and Reduction of Price under Article 50*, 14 J.L. & Com. 153, 171–172 (1995) (discussing how price reduction functions as a remedy in the CISG). For the thesis that price reduction is conceptually a recomputation of the contractual price, see also *Commentary on the UN Convention on the International Sale of Goods (CISG)* 771 (Ingeborg Schwenzer ed., 3d ed., Oxford U. Press 2010) (stating that “[p]rice reduction is thus neither damages nor partial avoidance of the contract, but rather adjustment of the contract”) [hereinafter *Commentary on the UN Convention*].

29. Zamir, *supra* n. 22, at 477, 480.

30. *Id.* at 475.

31. For an analysis of price reduction as a partial rescission, see Bergsten, *supra* n. 26, at 275 (pointing out that “reduction of price as it functions in art. 46 is justified if it is seen as a partial avoidance of the contract”); Zamir, *supra* n. 22, at 475 (stating that “[i]n view of its consequences, reduction resembles restitution following partial rescission of a contract”).

32. Nevertheless, there is considerable disagreement regarding the correct computation of price reduction dating back to Roman times. See Bergsten, *supra* n. 26, at 257 n. 6 (citing conflicting sources and noting that “[t]he manner in which reduction of the price was calculated under Roman Law is a matter of some controversy”).

33. *But see* CISG, *supra* n. 19, at art. 50 (providing that the price difference is to be computed as of the date of delivery). For a discussion of Article 50, see *Commentary on the UN Convention*, *supra* n. 28, at 770–771; see also *infra* n. 108 and accompanying text (explaining the drafters’ reasoning behind making the time of delivery the applicable time).

Use of price reduction in an international sale of goods raises questions, not only of time, but also of place: according to which market should the price difference be computed? The treaty does not address this issue directly, but the assumption is that in the absence of a contrary contractual provision, the computation will be in accordance with the market price in the place of delivery. *Commentary on the UN Convention*, *supra*, n. 28, at 776.

34. The term “market price” often describes a range of prices. See Piliounis, *supra* n. 18, at 34–36 (discussing methods used in calculating the damages when the market price has changed dramatically). In such a case, determining the price that would have been paid for the nonconforming goods can be complicated. *Id.* As the statutory provisions for price reduction assume a specific price, we also adopt that assumption for the duration of this Article. Furthermore, in practice, the proportional computation of nonconformance in

Therefore, price reduction is computed proportionally:<sup>35</sup> in other words, the contract price is multiplied by the ratio of the market value of the nonconforming goods to the market value of conforming goods.<sup>36</sup> For example, if the market price of the nonconforming goods is eighty percent of the market price of conforming goods, then the “reconstituted” price for the nonconforming goods will be eighty percent of the contract price; the difference between the actual contract price and the “reconstituted” price is the amount of the price reduction. Thus, the “reconstituted” price reflects both the relative difference in value between the conforming and the nonconforming goods, and also the relative bargaining powers of the parties at the time the contract was formed.<sup>37</sup>

### III. THE REMEDY OF PRICE REDUCTION IN A MIXED LEGAL ENVIRONMENT

As noted, civil law systems are the natural habitat of the price-reduction remedy.<sup>38</sup> In these systems, price reduction is a monetary remedy in cases of nonconformance.<sup>39</sup> Nonetheless, recent decades have witnessed, as part of the process of globalization, the gradual introduction of price reduction into mixed legal systems and even into some systems based principally on the common law.<sup>40</sup>

During the 1960s, price reduction was included in Article 48 of the Uniform Law on the International Sale of Goods (ULIS).<sup>41</sup>

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the case of *qualitative* nonconformance is more complicated and less exact than the proportional computation of conformance in the case of *quantitative* nonconformance. *Id.* at 32–33. Thus, if the purchaser ordered one thousand bottles of wine and received only eight hundred, the computation will be simpler and more exact than if the purchaser received the correct number of bottles but of an inferior vintage.

35. See Bergsten, *supra* n. 26, at 262 (discussing how price reduction accounts for differences in value with the added “advantage . . . preserv[ing] the balance of the bargain struck between the two parties”).

36. Obviously, when the contract price is equal to the market price, the ratio is one-to-one.

37. Zamir, *supra* n. 22, at 477; Bergsten, *supra* n. 26, at 262.

38. Stonberg, *supra* n. 14, at 258.

39. *Id.* at 259.

40. See e.g. *Morris N. Palmer Ranch Co.*, 647 F.2d at 612 (providing an example that when a buyer wishes to rescind cattle as goods and a full rescission is not possible due to the sale of some of the herd, an alternative remedy is a reduction in price).

41. Convention Relating to a Uniform Law on the International Sale of Goods § I, art. 48 (July 1, 1964), <http://www.unidroit.org/english/conventions/c-ulis.htm> [hereinafter ULIS].

This Section was adopted under the influence of European scholars.<sup>42</sup> Later, in 1980, price reduction was integrated into Article 50 of the Convention on the International Sale of Goods (CISG),<sup>43</sup> which replaced the ULIS. The remedies available under these two treaties reflect a mixed legal environment, influenced by both common law and civil law traditions.<sup>44</sup> Therefore, when the seller breaches the contract by delivering nonconforming goods, the purchaser may choose from a variety of remedies, including specific performance,<sup>45</sup> delivery of substitute goods,<sup>46</sup> repair,<sup>47</sup> avoiding the contract,<sup>48</sup> damages,<sup>49</sup> and price reduction.<sup>50</sup>

Another example of a mixed legal environment in which price reduction operates alongside other remedies is the European Draft Common Frame of Reference (DCFR) Project.<sup>51</sup> Within the framework of this project, influenced by the legal traditions of all European Union member states—those based on civil law traditions as well as those based on a common law tradition—price reduction was included as part of the array of remedies, so that the aggrieved party is entitled to choose among the various remedies, including price reduction and damages (without having to prove fault).<sup>52</sup>

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42. There is evidence to support the idea that price reduction was so unfamiliar to common law scholars who participated in the preparation of the treaty that some of them mistakenly understood it to be, in effect, a set-off. Bergsten, *supra* n. 26, at 255.

43. CISG, *supra* n. 19, at art. 50. CISG was signed at the United Nations Commission on International Trade Law (UNCITRAL) conference in Vienna in April 1980. Maureen T. Murphy, *United Nations Convention on Contracts for the International Sale of Goods: Creating Uniformity in International Sales Law*, 12 *Fordham Intl L.J.* 727, 728 (1989).

44. See generally CISG, *supra* n. 19 (including price reduction as a remedy in Article 50); ULIS, *supra* n. 41 (including price reduction in Article 48 as a defense to a claim for payment).

45. CISG, *supra* n. 19, at art. 46(1).

46. *Id.* at art. 46(2). This remedy is only available when the lack of conformity constitutes a fundamental breach of contract. *Id.*

47. *Id.* at art. 46(3).

48. *Id.* at art. 49(1). This remedy is only available if the seller's failure to perform any of his or her obligations amounts to a fundamental breach of contract. *Id.* at art. 49(1)(a).

49. *Id.* at arts. 74–77.

50. *Id.* at art. 50.

51. The DCFR is a draft of the civil code prepared by a committee of experts for the European Union. Laura Macgregor, *Report on the Draft Common Frame of Reference 2* (2008) (available at [http://www.law.ed.ac.uk/file\\_download/publications/3\\_871\\_areportpreparedforthecivildivisionofthes.pdf](http://www.law.ed.ac.uk/file_download/publications/3_871_areportpreparedforthecivildivisionofthes.pdf)). Its future and its proper legal status are presently topics of discussion. See generally DCFR, *supra* n. 24 (proposing model rules in European private law to be adopted by the European Commission).

52. *Id.* at §§ III-3:101 to III-3:713. Section III-3:601 deals with price reduction (previously Section 9:401 of the Principles of European Contract Law (PECL)). *Id.* at § III-3:601.



Furthermore, the ULIS and CISG treaties were indirectly responsible for price reduction's penetration into the domestic law of some countries.<sup>53</sup> For instance, the Israeli Law of Sales, enacted in 1968, is based primarily on the ULIS; accordingly, Section 28 of the statute provides for price reduction.<sup>54</sup> Nevertheless, the purchaser's right to opt for price reduction does not preclude his or her right to choose one or more of the general remedies for breach

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It is interesting to note that within the framework of the PECL, it was proposed that price reduction be a general remedy, not limited to conformance of goods but for any "tender of performance not conforming to the contract." Comm'n on European Contract L, *Principles of European Contract Law* § 9:401 (1999) (available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm)). Also, "[a] creditor who accepts a performance not conforming to the terms regulating the obligation may reduce the price." DCFR, *supra* n. 24, at § III-3:601. A droll example of the use of the remedy of price reduction is as follows:

A passenger flies with a ticket for business class. Unfortunately, an economy class passenger dies during the flight. As economy class is fully booked, the crew decide to transfer the corpse to business class and to tie it to the seat next to the one occupied by A. A may ask for a reduction of price which he or she paid for the flight, because having to sit next to a corpse in business class does not conform with the passenger's legitimate expectations, even if the air operator had no alternative option to solve the problem. In such a case it is difficult to determine a value of the reduction, since there is not a market for flights with a corpse placed next to your seat. Possibly the price should at least be reduced to the level of the price for economy class.

*Common Frame of Reference and Existing EC Contract Law* 322–323 (Reiner Schulze ed., European L. Publishers 2008).

Interestingly, this hypothetical is less fanciful than it may appear. Recently, *The Australian* published the following news item:

Lena Pettersson had just boarded her Tanzania-bound flight at Amsterdam Airport Schiphol when she noticed a man in his [thirties] looking unwell, the Expressen daily reported. Ms[.] Pettersson, a journalist with Sveriges Radio, told the broadcaster that the man "was sweating and had cramps [seizures]." After the Kenya Airways plane took off, the man died, the Expressen reported. Cabin crew laid out the dead man across three seats and covered him with a blanket—but left his legs and feet sticking out, Ms[.] Pettersson said. For the remainder of the overnight flight, Ms[.] Pettersson was forced to sit near the dead man, with just an aisle separating her and the corpse. "Of course it was unpleasant, but I am not a person who makes a fuss," Ms[.] Pettersson said. After her holiday in Tanzania, Ms[.] Pettersson lodged a complaint with Kenya Airways, eventually receiving a [seven-hundred-dollar] refund, half the price of her plane ticket.

NewsCore, *Refund for Swedish Woman Forced to Sit near Corpse during International Flight*, *The Australian*, <http://www.theaustralian.com.au/news/breaking-news/refund-for-swedish-woman-forced-to-sit-near-corpse-during-international-flight/story-fn3dxity-1226406843074> (June 24, 2012).

53. Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25(1) J.L. & Com. 1, 1–3 (2006).

54. L.S.I., L. of Sales, 1968 § 28.

of contract available under Israeli law.<sup>55</sup> These remedies include damages<sup>56</sup> and rescission of the contract.<sup>57</sup>

#### IV. COMPARISON OF PRICE REDUCTION AND COMMON LAW REMEDIES

As previously explained, whenever price reduction is integrated into a mixed legal environment or into a legal environment based upon common law principles, an aggrieved purchaser is allowed to choose either price reduction or one of the common law remedies, such as damages or rescission.<sup>58</sup> It would seem that such integration broadens the range of available remedies and is therefore beneficial from the perspective of the aggrieved party. Nevertheless, a closer examination will show that the benefit to the aggrieved party of this broader range of remedies is limited.<sup>59</sup> The reason is that in almost any factual situation, one of the common law remedies available to the aggrieved party (damages

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55. *Id.* at §§ 27–32.

56. *Id.* at § 31.

57. *Id.* at § 30.

58. It should be emphasized that damages for the direct loss resulting from nonconformance (i.e., damages quantifying the difference in market value between conforming and nonconforming goods) on the one hand, and price reduction on the other, are alternative and not cumulative. Bergsten, *supra* n. 26, at 255–256. Under the principles of election of remedies, remedies may not be combined when they are substantively contradictory or when the result is a double recovery for the same loss. Andrew Burrows, *Remedies for Torts and Breach of Contract* 14 (3d ed., Oxford U. Press 2005); Michael J. Tilbury, *Civil Remedies* vol. 1, 23 (Butterworths 1990); Stephen Watterson, *Alternative and Cumulative Remedies: What Is the Difference?* 11 *Restitution L. Rev.* 7, 18–19 (2003). Each of these principles would prevent combining damages and price reduction. First, despite the fact that both are monetary remedies, they are substantively incompatible due to the fact that each rests on a fundamentally different rationale: damages are based on the expectation interest, which has the goal to place the aggrieved party in the same condition he or she would have been had the original contract been fulfilled, while price reduction is based on the idea of the purchaser accepting the goods as delivered and a corresponding reconstruction of the contract price. Comm'n on European Contract L., *supra* n. 52, at §§ 9:401–9:502 (1999) (available at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/PECL%20engelsk/engelsk\\_partI\\_og\\_II.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm)). Secondly, combining the two remedies would result in a double recovery of the same loss (the reduced value of the goods due to the nonconformance). Zamir, *supra* n. 22, at 479. Section III-3:601(3) of the DCFR states, “A creditor who reduces the price cannot also recover damages for the loss thereby compensated. . . .” DCFR, *supra* n. 24, at § III-3:601(3).

59. DCFR, *supra* n. 24, at ch. 3.

or rescission)<sup>60</sup> will place him or her in a better (or, at least, not worse) monetary position than would price reduction.<sup>61</sup>

This Part of the Article examines the potential use of price reduction in those legal environments in which the aggrieved party may choose among all three remedies.<sup>62</sup> We will assume that a rational aggrieved party will prefer the remedy of price reduction only if the monetary benefits of the use of that remedy are superior to those of the alternatives.<sup>63</sup> Accordingly, we need to determine the circumstances under which price reduction is preferable from the aggrieved party's perspective.<sup>64</sup> Initially, we will assume that there is no legal or other impediment to choosing any of the remedies. Pursuant to this assumption, we will construct a preference table ranking the relative utility of the remedies in various circumstances. Subsequently, we will focus on those situations in which price reduction is ostensibly the preferred remedy, either because it is ranked highest or because the higher ranked remedy or remedies are unavailable.

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60. Our analysis does not include the remedy of specific performance. U.C.C. § 2-716 (2012) (portraying a buyer's right to specific performance or replevin). From a monetary perspective, the result of specific performance is similar in most cases to that of damages. Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 Cal. L. Rev. 975, 977-978 (2005); contra Daniel Friedmann, *Economic Aspects of Damages and Specific Performance Compared* 68-71 (Ralph Cunnington & Djakhongir Saidov, eds., Hart Publ'g 2008) (examining the differences between specific performance and damages when the case does not have substitutes readily available). First, each protects the expectation interest, and, in theory at least, the aggrieved party is placed in a position similar to the position that he or she would have been in had the contract not been breached. Secondly, our analysis will show that where both damages and rescission are available, price reduction is superfluous. The addition of specific performance would not materially affect that conclusion.

61. Friedmann, *supra* n. 60, at 68-71.

62. We are not going to examine the normative question of which remedy is more appropriate. This question, important as it is, is outside the ambit of this Article. For other articles that portray normative discussions of price reduction, see e.g. Piché, *supra* n. 22, at 558-559; Zamir, *supra* n. 22, at 497-500.

63. There may be some situations in which the aggrieved party will settle for price reduction even though another remedy would allow a greater recovery, e.g., because price reduction is a more moderate remedy or because the rationale behind it is more consistent with cooperation and maintaining cordial relations between the parties (in the same way, the aggrieved party may completely or partially waive his or her right to any of the remedies to which he or she is entitled in certain circumstances). Such considerations are beyond the scope of this Article. Price reduction could reflect cooperative relations between parties. Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 Va. L. Rev. 59, 129-134 (2007).

64. See *id.* (discussing the positive and negative aspects of each contract remedy). For the purpose of our analysis, it is not necessary to specify the exact date.

### A. Relevant Factors for Comparing Price Reduction, Damages, and Rescission (Including Restitution Following Rescission)

As a first step in ranking the three remedies, we will compare each pair of remedies separately: price reduction versus damages, price reduction versus rescission, and damages versus rescission. With regard to each pair, we will determine the circumstances under which the aggrieved party will prefer each of the two alternative remedies. We will then integrate the results and construct a three-dimensional chart that clarifies the order of preference among the three remedies. As noted, at this stage we will assume that there is no impediment to choosing any of the three remedies and that the only question is which remedy leaves the aggrieved party in a better financial position.

For the purpose of our discussion, we will define the terms A1, A2, B1, and B2 as follows:

- A1 = the contract price of conforming goods (i.e., the price agreed upon by the parties).
- A2 = the market price of conforming goods at the time of the breach.<sup>65</sup>
- B1 = the adjusted value of the nonconforming goods at the time the contract was formed (i.e., the market value of the nonconforming goods at the time the contract was formed multiplied by the ratio of the contract price of conforming goods to the market value of the conforming goods at that time. The adjustment of the value of nonconforming goods is due to the proportional method of computing price reduction).<sup>66</sup>

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65. The relevant date for measuring market value for computing damages varies from case to case. Damages may be computed according to the value of the goods on the delivery date, the date of rescission by the aggrieved party, the purchase date of alternative goods, the date on which the nonconformance is repaired, or the date the action is brought. Zamir, *supra* n. 22, at 486. For a useful discussion conceptualizing the flexibility of the date of breach, see G. Tedeschi, *On the Date for Assessing Damage*, 13 *Isr. L. Rev.* 10, 18–20 (1978). For the sake of convenience, we will refer to the relevant date simply as “the time of the breach.”

66. In mathematical form:  $B1 = \text{The market value of nonconforming goods} \times \text{The contract price of conforming goods (A1)}$ . The market value of nonconforming goods is defined as the value at the time the contract was formed.

- B2 = the market value of the nonconforming goods at the time of the breach.

From these definitions it follows that:

- $A1 - B1$  = the adjusted value of the nonconformance at the time the contract was formed (i.e., the difference between the contract price of the conforming goods and the adjusted value of the nonconforming goods. This amount is the price reduction according to the proportional method).
- $A2 - B2$  = the market value of the nonconformance at the time of the breach (i.e., the difference between the market value of the nonconforming goods and the market value of the conforming goods at the time of the breach. This is the amount of damages for direct loss caused by the nonconformance).

### *1. Price Reduction versus Damages*

When the purchaser claims damages for nonconformance, he or she is entitled—in addition to retaining the nonconforming goods—to the difference between the market value of the nonconforming goods at the time of the breach and the market value of conforming goods at that time.<sup>67</sup> This amount, which we referred to as “the market value of the nonconformance at the time of the breach” ( $A2 - B2$ ), will place the purchaser in the same monetary position he or she would have been in were it not for the breach.<sup>68</sup>

When the purchaser claims a price reduction, he or she is entitled—in addition to retaining the nonconforming goods—to the difference between the contract price ( $A1$ ) and “the adjusted value of the nonconforming goods at the time the contract was formed” ( $B1$ ).<sup>69</sup> In other words, he or she is entitled to “the adjusted value of the nonconformance at the time the contract was formed” ( $A1 - B1$ ).<sup>70</sup>

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67. *Supra* pt. IV(A).

68. *Supra* pt. IV(A).

69. *Supra* pt. IV(A).

70. *Supra* pt. IV(A).

Accordingly, the aggrieved party will prefer damages when  $A2 - B2 > A1 - B1$ ; he or she will prefer price reduction when  $A1 - B1 > A2 - B2$ .

Assume, for example, that the market value of conforming goods at the time of the breach was \$100, while the market value of the nonconforming goods at that time was \$80. Assume further that the contract price was \$70. If the adjusted value of the nonconforming goods at the time the contract was formed was greater than \$50, the aggrieved party will prefer damages; while if that value was less than \$50, he or she will prefer price reduction. When the adjusted value of the nonconformance at the time the contract was formed was exactly \$50, both remedies will provide the same monetary result, and the purchaser will be indifferent as to the choice between the two remedies.<sup>71</sup>

## 2. Price Reduction versus Rescission

When the purchaser opts for price reduction, he or she is entitled to  $A1 - B1$  and retains the nonconforming goods in his or her possession ( $B2$ ). When the purchaser chooses to rescind the contract, he or she is entitled to restitution of the contract price ( $A1$ ).<sup>72</sup> Accordingly, the purchaser will prefer price reduction whenever  $(A1 - B1) + B2 > A1$ . In other words, the aggrieved party will prefer price reduction whenever  $B2 > B1$  and will pre-

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71. Our analysis is consistent with the classic method of computing price reduction, in which the date for computing price reduction is the date the contract was formed. The method of computing price reduction according to Section 50 of the CISG Treaty and Section III-3:601 of the DCFR is different. These Sections provide that the amount of price reduction is the value of the nonconformance at the time of delivery ( $A2 - B2$ ), multiplied by the ratio of the contract price ( $A1$ ) to the value of conforming goods at the time of delivery ( $A2$ ). In other words, price reduction will equal  $(A2 - B2)(A1/A2)$ . In accordance with this method of computation, the choice between damages and price reduction will depend upon the comparison between the market value of conforming goods at the time of delivery ( $A2$ ) and the contract price ( $A1$ ). In our example in the text, the price reduction according to the treaty would be  $(\$100 - \$80)(\$70/\$100) = \$14$ . As noted, this formula considers the market value of conforming goods at the time of delivery (\$100), the market value of the nonconforming goods at the time of delivery (\$80), and the contract price (\$70). The market value of the nonconforming goods at the time the contract was formed does not in any way affect the computation of price reduction. *See also infra* n. 108 (noting that the framers' primary consideration when determining how to compute market value was the time of delivery rather than the time at which the contract was formed).

72. For the sake of simplicity, we will rely on nominal values and will ignore both inflation and interest.

fer rescission whenever  $B1 > B2$ .<sup>73</sup> Clearly, when the market value of the nonconforming goods at the time of the breach is equal to the adjusted value of the nonconforming goods at the time the contract is formed ( $B1 = B2$ ), the monetary result of the two remedies will be equal.

### 3. *Damages versus Rescission*

When the purchaser chooses damages, he or she is entitled, in addition to retaining the nonconforming goods ( $B2$ ), to damages in the amount of  $A2 - B2$ . Thus, from a monetary perspective, the remedy of damages places the purchaser in the same position he or she would have been had he or she received conforming goods (worth  $A2$  at the time of the breach).<sup>74</sup> On the other hand, if he or she chooses to rescind the contract, he or she will return the goods and will be entitled to restitution of the contract price ( $A1$ ). Therefore, the purchaser will prefer damages whenever  $A2 > A1$  and rescission whenever  $A1 > A2$ . Obviously, when the contract price is equal to the market value of conforming goods as of the time of the breach ( $A1 = A2$ ), the two remedies will produce equal results.

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73. The argument in the text can, alternatively, be explained as follows. When the aggrieved party chooses price reduction, he or she is entitled to “the adjusted value of the nonconformance at the time the contract was formed” ( $A1 - B1$ ) and may retain the nonconforming goods ( $B2$ ). Should he or she opt for rescission, he or she would be entitled to the restitution of the contract price ( $A1$ ). Conceptually, the contract price ( $A1$ ) may be bifurcated into two parts. In effect, the contract price is the sum of “the adjusted value of the nonconforming goods at the time the contract was formed” ( $B1$ ) and “the adjusted value of the nonconformance at the time the contract was formed” ( $A1 - B1$ ). Seeing that the component referred to as “the adjusted value of the nonconformance at the time the contract was formed” ( $A1 - B1$ ) is common to both remedies, we can ignore it and compare the remainder: in the case of price reduction, it is the nonconforming goods ( $B2$ ), and in the case of rescission, it is “the adjusted value of the nonconforming goods at the time the contract was formed” ( $B1$ ). Therefore, price reduction is preferable whenever  $B2 > B1$ , while rescission is preferable whenever  $B2 < B1$ .

Expressed mathematically, price reduction is preferable whenever  $A1 < (A1 - B1) + B2$ . Clearly,  $A1 = B1 + (A1 - B1)$ . Making substitutions, price reduction is preferable whenever  $B1 + (A1 - B1) < (A1 - B1) + B2$ . Subtracting  $(A1 - B1)$  from each side, we discover that price reduction is preferable whenever  $B1 < B2$ .

74.  $B2 + (A2 - B2) = A2$ .

## B. Ranking the Remedies

In Part IV(A), we compared three pairs of remedies: price reduction versus damages, price reduction versus rescission, and damages versus rescission. In each case, we discovered that the choice of remedy is dependent upon a different factor. When comparing price reduction and damages, a rational aggrieved purchaser will focus on the difference between the adjusted value of the nonconformance at the time the contract was formed and the market value of the nonconformance at the time of the breach ( $A1 - B1$  as opposed to  $A2 - B2$ ). When comparing price reduction and rescission, a rational aggrieved purchaser will focus on the difference between the adjusted value of the nonconforming goods at the time the contract was formed and the market value of the nonconforming goods at the time of the breach ( $B1$  as opposed to  $B2$ ). When comparing damages and rescission, a rational aggrieved purchaser will focus on the difference between the contract price and the market value of conforming goods at the time of the breach ( $A1$  as opposed to  $A2$ ).

Therefore, when comparing all three remedies, we need to consider all three factors. A chart comparing the effects of the three factors would necessarily need to be three dimensional. Due to the technical difficulty of presenting a three-dimensional chart on a two-dimensional surface, however, we conceptually sliced the three-dimensional chart into three sub-tables. The first covers all those situations in which the market value of conforming goods at the time of the breach is greater than the contract price ( $A2 > A1$ ). The second covers all those situations in which the market value of conforming goods at the time of the breach is equal to the contract price ( $A1 = A2$ ). The third covers all those situations in which the market value of conforming goods at the time of the breach is less than the contract price ( $A2 < A1$ ). In each of the sub-tables, the horizontal alternatives refer to the relationship between the market value of the nonconforming goods at the time of the breach ( $B2$ ) and to the adjusted value of the nonconforming goods at the time the contract was formed ( $B1$ ). The vertical alternatives refer to the relationship between the market value of the nonconformance at the time of the breach ( $A2 - B2$ ) and the adjusted value of the nonconformance at the time the contract was formed ( $A1 - B1$ ).



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Within each cell of the table, the remedies are listed in descending order of preference. When two or three remedies appear within parentheses, those remedies are monetarily equivalent; thus, the aggrieved party should be indifferent to the choice between or among them.

$A2 > A1$	$B2 > B1$	$B2 = B1$	$B2 < B1$
$A2 - B2 > A1 - B1$	<u>Cell 1</u> Damages, Price Reduction, Rescission <sup>75</sup>	<u>Cell 2</u> Damages, (Price Reduction, Rescission) <sup>76</sup>	<u>Cell 3</u> Damages, Rescission, Price Reduction <sup>77</sup>
$A2 - B2 = A1 - B1$	<u>Cell 4</u> (Damages, Price Reduction), Rescission <sup>78</sup>	Impossible <sup>79</sup>	Impossible <sup>80</sup>
$A2 - B2 < A1 - B1$	<u>Cell 5</u> Price Reduction, Damages, Rescission <sup>81</sup>	Impossible <sup>82</sup>	Impossible <sup>83</sup>

75. In cell 1, damages are preferable to price reduction because  $A2 - B2 > A1 - B1$ . Price reduction is preferable to rescission because  $B2 > B1$ .

76. In cell 2, damages are preferable to price reduction because  $A2 - B2 > A1 - B1$ . Price reduction is equivalent to rescission because  $B1 = B2$ .

77. In cell 3, damages are preferable to price reduction because  $A2 > A1$ . Rescission is equivalent to price reduction because  $B2 < B1$ .

78. In cell 4, damages are equivalent to price reduction because  $A2 - B2 = A1 - B1$ . Price reduction is preferable to rescission because  $B2 > B1$ .

79. If  $A2 > A1$  and  $B2 = B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

80. If  $A2 > A1$  and  $B2 < B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

81. In cell 5, price reduction is preferable to damages because  $A2 - B2 < A1 - B1$ . Damages are preferable to rescission because  $A2 > A1$ .

82. If  $A2 > A1$  and  $B2 = B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

83. If  $A2 > A1$  and  $B2 < B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

$A2 = A1$	$B2 > B1$	$B2 = B1$	$B2 < B1$
$A2 - B2 > A1 - B1$	Impossible <sup>84</sup>	Impossible <sup>85</sup>	<u>Cell 6</u> (Rescission, Damages), Price Reduction <sup>86</sup>
$A2 - B2 = A1 - B1$	Impossible <sup>87</sup>	<u>Cell 7</u> (Price Reduction, Rescission, Damages) <sup>88</sup>	Impossible <sup>89</sup>
$A2 - B2 < A1 - B1$	<u>Cell 8</u> Price Reduction, (Rescission, Damages) <sup>90</sup>	Impossible <sup>91</sup>	Impossible <sup>92</sup>

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84. If  $A2 = A1$  and  $B2 < B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

85. If  $A2 = A1$  and  $B2 = B1$ , then necessarily  $A2 - B2 = A1 - B1$ .

86. In cell 6, damages are equivalent to rescission because  $A2 = A1$ . Damages are preferable to price reduction because  $A2 - B2 > A1 - B1$ .

87. If  $A2 = A1$  and  $B2 > B1$ , then necessarily  $A2 - B2 < A1 - B1$ .

88. In cell 7, price reduction is equivalent to rescission because  $B1 = B2$ . Rescission is equivalent to damages because  $A2 = A1$ .

89. If  $A2 = A1$  and  $B2 < B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

90. In cell 8, price reduction is preferable to rescission because  $B2 > B1$ . Rescission is equivalent to damages because  $A2 = A1$ .

91. If  $A2 = A1$  and  $B2 = B1$ , then necessarily  $A2 - B2 = A1 - B1$ .

92. If  $A2 = A1$  and  $B2 < B1$ , then necessarily  $A2 - B2 > A1 - B1$ .

$A2 < A1$	$B2 > B1$	$B2 = B1$	$B2 < B1$
$A2 - B2 > A1 - B1$	Impossible <sup>93</sup>	Impossible <sup>94</sup>	<u>Cell 9</u> Rescission, Damages, Price Reduction <sup>95</sup>
$A2 - B2 = A1 - B1$	Impossible <sup>96</sup>	Impossible <sup>97</sup>	<u>Cell 10</u> Rescission, (Price Reduction, Damages) <sup>98</sup>
$A2 - B2 < A1 - B1$	<u>Cell 11</u> Price Reduction, Rescission, Damages <sup>99</sup>	<u>Cell 12</u> (Price Reduction, Rescission), Damages <sup>100</sup>	<u>Cell 13</u> Rescission, Price Reduction, Damages <sup>101</sup>

### C. Analysis

The table summarizes all twenty-seven situations that result from integrating the three significant factors. A glance at the table will show that of the twenty-seven cells, fourteen are mathematically impossible. For the sake of convenience, when numbering the cells in the table, we ignored those cells that represent mathematically impossible situations. In six of the numbered cells (1, 3, 5, 9, 11, 13), there is a clear ranking of the remedies, while in the remaining seven (2, 4, 6, 7, 8, 10, 12), there exists a tie between or among at least two of the remedies. Our discussion will focus on the six cells containing a clear ranking of the remedies. As will be explained, discussing these six cells is sufficient; discussing the remaining seven cells would not add anything meaningful to the discussion.

93. If  $A2 < A1$  and  $B2 > B1$ , then necessarily  $A2 - B2 < A1 - B1$ .

94. If  $A2 < A1$  and  $B2 = B1$ , then necessarily  $A2 - B2 < A1 - B1$ .

95. In cell 9, rescission is preferable to damages because  $A2 < A1$ .

96. If  $A2 < A1$  and  $B2 > B1$ , then necessarily  $A2 - B2 < A1 - B1$ .

97. If  $A2 < A1$  and  $B2 = B1$ , then necessarily  $A2 - B2 < A1 - B1$ .

98. In cell 10, rescission is preferable to price reduction because  $B2 < B1$ . Price reduction is equivalent to damages because  $A2 - B2 = A1 - B1$ .

99. In cell 11, price reduction is preferable to rescission because  $B2 > B1$ . Rescission is preferable to damages because  $A2 < A1$ .

100. In cell 12, price reduction is equivalent to rescission because  $B1 = B2$ . Rescission is equivalent to damages because  $A2 < A1$ .

101. In cell 13, rescission is preferable to price reduction because  $B2 < B1$ . Price reduction is preferable to damages because  $A2 - B2 < A1 - B1$ .

Examination of the six cells that contain a clear ranking of the remedies reveals that in two situations, price reduction is ranked first (cells 5 and 11).<sup>102</sup> We will see that the chances of these situations occurring in practice are remote. In two other cases, price reduction is ranked second (cells 1 and 13). Price reduction in these situations will be relevant only when the first-ranked remedy (damages in cell 1 or rescission in cell 13) is not available. Finally, there are two cells in which price reduction is ranked third (cells 3 and 9). In these cases, the aggrieved buyer only will choose price reduction when there is a legal or practical bar to claiming damages and, furthermore, the aggrieved party cannot rescind the contract and claim restitution. We will examine briefly each of these situations.

### 1. Price Reduction Is Ranked First

In cells 5 and 11, price reduction is ranked first and is preferable to either damages or rescission. These cells, however, describe situations in which the market value of the nonconforming goods at the time of the breach is greater than the adjusted value of the nonconforming goods at the time the contract was formed ( $B2 > B1$ ), while the market value of the nonconformance at the time of the breach is less than the adjusted value of the nonconformance at the time the contract was formed ( $A2 - B2 < A1 - B1$ ). As it is reasonable to assume that in most cases the market behavior of conforming goods will, over time (i.e., from the time the contract was formed until the time of the breach), be similar to the market behavior of nonconforming goods over the same time period, we may assume that confluence of both of the conditions stated will be rare.<sup>103</sup>

When might both conditions nevertheless exist simultaneously? One can imagine a situation in which the conforming and the nonconforming goods are so different that the market forces

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102. As noted, at this stage, we are only concerned with those cells that contain a clear ranking of remedies, and we will address those cells containing either a two- or a three-way tie. *Infra* pt. IV(C)(4).

103. A situation in which the market behavior of conforming goods differs from that of nonconforming goods is uncommon in practice. *Commentary on the UN Convention, supra* n. 28, at 774.

that determine their value are also different.<sup>104</sup> Assume, for example, that the seller was supposed to deliver a particular metal and instead delivered a cheaper metal. At the time of breach, the value of the metal actually delivered was greater than its value at the time the contract was formed, while the value of the metal that was supposed to be delivered had not changed. In such a case, the purchaser will, of course, prefer to retain the metal he or she received and to claim the difference between the values of the two metals at the time the contract was formed (i.e., price reduction). It is highly doubtful under these circumstances, however, that a rational seller will supply the cheaper metal. From the seller's perspective, it is better to refrain from supplying anything<sup>105</sup> and have the purchaser claim damages, rather than supply the nonconforming goods and expose the seller to a demand for price reduction.<sup>106</sup>

We may therefore conclude that the confluence of factors described in cells 5 and 11 is a remote possibility. Moreover, these two cells describe situations in which the ratio between the value of conforming goods and the value of the nonconforming goods is not constant over the time period from the contract formation to the breach.<sup>107</sup> Therefore, while the situation described in cells 5

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104. Of course, the question that will arise here is when the nonconformance is so fundamental that delivery of the nonconforming goods will not even be considered a delivery for the purpose of the contract. The distinction between nonconformance constituting a flaw (*peius*) and delivery of goods so different that it is not considered a "delivery" (*aliud*) is important for our discussion due to the fact that price reduction applies only in the case of nonconformance and not in the case of nondelivery. See Ernst Rabel, *Das Recht des Warenkaufs* 124–126 (Band 2, Walter De Gruyter 1958) (comparing the two types of nonconformance); cf. U.C.C. § 2-713 (2012) (discussing remedies for buyer's damages for nondelivery or repudiation).

105. As noted, price reduction is available only with regard to breaches consisting of nonconformance and not to breaches consisting of nondelivery. *Supra* n. 104.

106. Of course, the seller may be unaware of the nonconformance at the time of delivery. As we are presently concerned with cases in which the difference between conforming goods and the nonconforming goods is so fundamental that different market forces affect their values, it may be assumed that in such a case, ignorance of the nonconformance will be extremely uncommon. Another possibility is that at the time of delivery, the seller could not have foreseen the future market developments. Tedeschi, *supra* n. 65 (noting that the relevant date for calculating damages—referred to in the text as "the date of breach"—may, in certain circumstances, be later than the date of delivery). For this reason, the seller could not have known at the time of delivery that it was preferable from his or her perspective to refrain from delivering anything, rather than deliver the nonconforming goods.

107. If  $A1/B1 = A2/B2$ , then necessarily  $(A1 - B1) = (A2 - B2)$ . One of the conditions of cell 5 is that  $(A2 - B2) < (A1 - B1)$ . With regard to cell 11, two of the conditions are that

and 11 is theoretically possible under the classic formulation of the price reduction remedy, it is impossible under Section 50 of the CISG treaty<sup>108</sup> or under Section III-3:601 of the European DCFR.<sup>109</sup> According to these Sections, price reduction is computed in accordance with the ratio between the value of conforming goods and the value of the nonconforming goods at the time of delivery (not at the time the contract was formed).<sup>110</sup> This wording creates, in effect, an irrefutable assumption according to which the ratio of the value of conforming goods to the value of the nonconforming goods remains constant from the time the contract is formed until the time of delivery.<sup>111</sup> Under this wording of the price reduction remedy, the situations described in cells 5 and 11 can never occur.

## 2. Price Reduction Is Ranked Second

Under the conditions described in cells 1 and 13, price reduction is ranked second among the remedies. The aggrieved party may therefore opt for price reduction only when the higher-ranked remedy (damages in cell 1 or rescission in cell 13) is unavailable. We will briefly and separately consider each of these cases.

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$A2 < A1$  and that  $B2 > B1$ . If, however,  $A1/B1 = A2/B2$  and  $A2 < A1$ , then necessarily  $B2 < B1$ .

108. From the preparatory work of the CISG Treaty, it appears that the framers' primary consideration for this section when determining how to compute value in adopting the time of delivery (instead of the time the contract was formed), was that it is difficult to prove the hypothetical difference in value in the past (the date the contract was formed), while it is relatively simple to prove the difference in value at the time of breach. *Commentary on the UN Convention*, *supra* n. 28, at 774–775. In any case, a side effect of delineating the date of delivery as the date for computing the difference in value is, as mentioned, the creation of an irrefutable presumption that the ratio between the value of conforming goods and that of nonconforming goods is constant from the time the contract was formed until the time of delivery. From our perspective, it means that situations subject to the treaty are governed by one of the cells numbered 1 and 13 in the table. In these two cells, price reduction is always ranked second, and parties will therefore choose price reduction only when the aggrieved party cannot choose the preferred remedy. *Infra* pt. IV(B).

109. This section of the European DCFR allows a creditor to reduce the price proportionately if performance does not conform to the obligation's regulatory terms. DCFR, *supra* n. 24, at § III-3:601. If the creditor has already paid a sum greater than the newly reduced price, the creditor is allowed to recover the difference from the debtor. *Id.*

110. CISG at art. 50; DCFR, *supra* n. 24, at § III-3:601.

111. *Infra* pt. IV(B).

a. Cases in Which Damages Are Preferable to  
Price Reduction (Cell 1)

Under the conditions described in cell 1,<sup>112</sup> damages are preferable to price reduction. Price reduction will only be relevant when the aggrieved party cannot claim damages.

The damages we are considering are for the difference between the market value of conforming goods and the market value of nonconforming goods at the time of breach. This is a direct loss that is relatively simple to prove: it is not difficult to prove the factual causal connection between the breach and this type of loss; it is not difficult to prove that the loss was foreseeable by the party in breach; and it is ordinarily easy to prove the amount of the loss, which is simply the difference in market values between the promised goods and the goods actually delivered.<sup>113</sup>

Proving damages may be difficult, however, when, despite the objective difference in value between nonconforming and conforming goods, there is, from the purchaser's perspective, no subjective difference between them.<sup>114</sup> For example, due to a change in circumstances, the purchaser may no longer have a need for the goods. It is reasonable to assume that in most cases the purchaser will be able to realize the economic potential inherent in the goods by selling them, in which case the difference between the market values of conforming and nonconforming goods will constitute a loss. Another example might be the situation where, from the purchaser's perspective, the difference in market values is irrelevant due to the intended use of the goods. Assume, for instance, that a person purchases a car for the purpose of conducting a crash test. Providing that the nonconformance is not related to the structural or safety features of the car—e.g., the nonconformance is a flaw in the paint job—difference in value is apparently

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112. Namely, that  $B2 > B1$ , that  $A2 - B2 > A1 - B1$ , and that  $A2 > A1$ . As already noted, the ratio between the market value of conforming goods and the market value of nonconforming goods remains constant (from the time the contract is formed until the time of the breach). Therefore, these situations are capable of falling under the ambit of the price-reduction sections in the CISG Treaty and the DCFR. *Supra* pt. IV(C)(1).

113. See e.g. U.C.C. § 2-714(2) (stating that “[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted”).

114. *Supra* pt. IV(B).

irrelevant. A further example raised in the literature is when the purchaser bought the goods for an altruistic purpose, such as presenting it to someone as a gift or donating it to charity.<sup>115</sup>

Our response to each of these examples is that the criteria for determining the amount of damages for nonconformance are, in principle, objective.<sup>116</sup> Ordinarily, the intended use by the purchaser is not taken in consideration.<sup>117</sup> Therefore, the aggrieved party is entitled to claim as damages the difference in market values between conforming goods and the nonconforming goods despite the fact that the subjective loss from the purchaser's perspective is less (or even nonexistent).<sup>118</sup>

#### b. Cases in Which Rescission Is Preferable to Price Reduction

Under the conditions described in cell 13,<sup>119</sup> price reduction is relevant only if the aggrieved party cannot utilize the preferred remedy of rescission.<sup>120</sup>

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115. See Cagdas E. Ergun, *Comparative Study on the Buyer's Remedies under the 1980 Vienna Sales Convention and Turkish Sales Law*, <http://www.cisg.law.pace.edu/cisg/biblio/ergun.html>, pt. II(3) (Sept. 2002); Piché, *supra* n. 22, at 561 (discussing what happens when the buyer has difficulty proving loss); Piliounis, *supra* n. 18, at 33–34 (discussing when buyers would prefer which remedy); Schlechtriem, *supra* n. 28, at 438 (stating that price reduction is not a minus, but it is an aliud).

116. *Supra* pt. IV(B).

117. Zamir, *supra* n. 22, at 476.

118. Nevertheless, cases in which the purchaser's subjective intended use is relevant are conceivable. Returning to the example of the car purchased for the purpose of conducting a crash test where at the time of delivery a flaw was discovered in the paint job, let us assume that immediately upon receiving the car, the purchaser used the car for its intended function, and it was demolished. Could the purchaser then claim the (objective) difference in value at the time of delivery between the promised car and the car actually delivered? This question is particularly difficult. On the one hand, if the legal test for quantifying damages is objective, then the actual use by the purchaser should not be relevant. On the other hand, the objective standard used to compute damages is based, *inter alia*, on the idea that the goods have a "realization potential" in the hands of the purchaser: he or she can elect at any time to sell the goods and realize their market value, so that the lowered value constitutes a loss. In our example, this is no longer feasible once the car is demolished. See *e.g.* U.C.C. § 2-714(2) (stating that it is no longer feasible "unless special circumstances show proximate damages of a different amount").

119. Namely, that  $B2 < B1$ , that  $A2 < A1$ , and that  $A2 - B2 < A1 - B1$ .

120. Clearly, there may be reasons why the purchaser may opt for price reduction even though rescission is preferable from a monetary perspective. For example, the purchaser may prefer a more modest remedy (price reduction) instead of a more drastic remedy (rescission) in order not to undermine the business relationship with the seller in breach. These considerations are outside the purview of our discussion. We are focusing on considerations of direct utility only, such as which remedy provides the best monetary result for the aggrieved party in the given situation.



In many cases, particularly when the nonconformance constitutes a fundamental breach of the contract, the purchaser will be entitled to rescind the contract and demand restitution.<sup>121</sup>

An obstacle to rescission may arise when the purchaser is unable (or unwilling) to return the nonconforming goods.<sup>122</sup> Examples would be cases in which the goods were consumed, destroyed, or damaged; lost or used in a production process; or improved by the purchaser.<sup>123</sup> These circumstances often do not constitute a significant obstacle, however, because many legal systems accept the principle that when restitution in kind is impossible or unreasonable, the purchaser may pay the cash value of the goods received.<sup>124</sup> Therefore, the inability to return the actual goods received will often not constitute an obstacle to rescission.<sup>125</sup>

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121. In some legal systems, there are limitations on the right to rescind. For instance, according to the Israeli Law of Sales, 5928-1968, in the case of nonconforming goods in which the nonconformance could not have been discovered by a reasonable examination at the time of delivery and which is, in fact, discovered more than two years after delivery, the purchaser is entitled to all remedies except for rescission of the contract. L.S.I., L. of Sales, 1968 § 28.

122. See Leslie C. Callahan, *Ozark Kenworth v. Neidecker: A Buyer's Continued Use of Goods after Revocation of Acceptance*, 38 Ark. L. Rev. 857, 862 (1985) (stating that if the buyer revokes the contract but does not return the goods, the buyer's duties are the same as if the buyer had rejected the goods).

123. See *e.g.* U.C.C. § 2-608 cmt. 6. Comment six provides the following:

Under subsection (2) the prior policy is continued of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his [or her] acceptance if the goods have materially deteriorated except by reason of their own defects.

*Id.*

124. See *e.g.* DCFR, *supra* n. 24, at §§ III-3:510(3), III-3:510(4). According to the Israeli Law of Remedies for Breach of Contract, an aggrieved party who cancels the contract due to breach may choose, at his or her discretion, restitution of value (even if restitution in kind is possible and reasonable). L.S.I., L. of Sales, § 5731-1970.

125. See *e.g.* *Restatement (Second) of Contracts* §§ 371, 373 (1981) (defining the rule for restitution when the other party is in breach); E. Allan Farnsworth, *Contracts* 821–823 (3d ed., Aspen Publishers 2004) (discussing unforeseeability as a limitation on the assessment of damages). To demonstrate with a simple numerical example (in which all three conditions of cell 13, namely that  $A_2 < A_1$ , that  $B_2 < B_1$ , and that  $A_2 - B_2 < A_1 - B_1$  are all present), assume that the contract price of conforming goods is \$200 (for the sake of simplicity we will assume that this price represents the market value of the goods at the time the contract is formed). The market value of conforming goods at the time of breach is \$150. The adjusted price of the nonconforming goods at the time the contract is formed is \$100, while the market value of the nonconforming goods at the time of breach is \$75. Given these values, if the purchaser should opt for damages, the amount of damages would be \$75, and the purchaser would retain the nonconforming goods, worth \$75. In sum, the purchaser will have \$150 in money or money's worth (in monetary terms, the purchaser

### 3. Price Reduction Is Ranked Third

In the circumstances described in cells 3 and 9, price reduction is in third place: both damages and rescission are preferable. Price reduction will be relevant only when neither of the other two remedies is available.<sup>126</sup> As demonstrated in Part IV(C)(2), cases are rare in which either of the other two remedies, examined separately, is unavailable. Obviously, cases in which neither of the other remedies is available will be rarer still.<sup>127</sup> In practice, the potential for use of price reduction will be extremely limited under the circumstances described in cells 3 and 9.

### 4. Two or More Remedies Are Ranked Equally

Following our examination of the six cells in which the remedies are distinctly ranked,<sup>128</sup> further analysis of the remaining cells is unnecessary.

- (a) When the table indicates that price reduction and another remedy are tied for first place (cells 4 and 12), price reduction does not add anything from the perspective of the purchaser, who has no reason to prefer it over the alternative remedy. Only when the other remedy is unavailable will the option of price reduction be meaningful. Our discussion of those cases in which price

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will be in the same position as he or she would have been in had the contract not been breached). Should the purchaser opt for price reduction, the amount of price reduction he or she will receive is \$100, and he or she will retain the nonconforming goods worth \$75. In sum, the purchaser will have \$175 in money or money's worth. Should the purchaser opt for rescission, he or she will have to return the nonconforming goods and will in exchange receive his or her \$200 back. Clearly, the option of rescission is best from the perspective of the purchaser. Should the purchaser be incapable of returning the nonconforming goods, he or she is entitled to return their market value. In other words, the purchaser may retain the nonconforming goods (worth \$75) and instead pay the equivalent amount in cash (or, in practical terms, to demand from the seller restitution of \$125, which is the amount of the contract price less the market value of the nonconforming goods at the time of the rescission). In this case also the purchaser will retain money and money's worth of \$200 (\$125 in cash and the nonconforming goods, worth \$75).

126. *Supra* pt. IV(B) (discussing the creation of a table comparing the effects of damages, rescission, and price reduction).

127. *Supra* pt. IV(C)(2) (discussing the fact that price reduction ranks as the second preferred remedy).

128. *See supra* pt. IV(C)(1)–(3) (discussing the situations in the table where price reduction is ranked first, second, and third).

reduction is ranked second can suffice. More precisely, our discussion of cell 1 makes any further discussion of cell 4 superfluous, as cell 4 is merely a specific (borderline) case of cell 1; and our discussion of cell 13 makes any further discussion of cell 12 superfluous, as cell 12 is merely a specific (borderline) case of cell 13.

- (b) When the table indicates that price reduction and another remedy are tied for second (i.e., last) place (cells 2 and 10), the purchaser will avail himself or herself of one of the tied remedies only when the higher ranked remedy (damages in cell 2 or rescission in cell 10) is unavailable. Regarding cell 2, the question of when damages will be unavailable was already considered in our discussion of cell 1. Regarding cell 10, the question of when rescission will not be available was already considered in our discussion of cell 13. Furthermore, even on those rare occasions when the purchaser cannot avail himself or herself of damages (in the situation described in cell 2) or rescission (in the situation described in cell 10), there is no need to opt for price reduction, as the aggrieved party can arrive at an equivalent monetary result by choosing the other remedy, with which price reduction is tied (rescission in cell 2 or damages in cell 10). Thus, in the circumstances described in cell 2 and in cell 10, the aggrieved party will need to rely on price reduction only if neither of the other two remedies is available, a situation equivalent to the one discussed above with regard to cells 3 and 9. As noted, such a situation is extremely rare.
- (c) When the table indicates that damages and rescission are tied for first place ahead of price reduction (cell 6), the aggrieved party will opt for price reduction only if the other two remedies are unavailable. Here also, our discussion of those cases in which both of the other remedies are ranked above price reduction (cells 3 and 9) is sufficient. In other words, cell 6 is simply the borderline case between cells 3 and 9.

- (d) When the table indicates that damages and rescission are tied and ranked below price reduction (cell 8), the relevant questions are identical to those already discussed with regard to cells 5 and 11, in which the other two remedies rank second and third below price reduction. Here, too, cell 8 is merely the borderline between cells 5 and 11 and is, therefore, simply a specific case of the categories already discussed there.
- (e) When the table indicates that all three remedies are equally ranked (cell 7), price reduction will be useful only when the other two remedies are unavailable. Therefore, any discussion of this case will be identical to our discussion above of the circumstances described in cells 3 and 9.

### V. CONCLUDING REMARKS

Price reduction is the primary monetary remedy for nonconforming goods in civil law. In recent decades, as globalization has encouraged approximation among legal systems, the remedy of price reduction has penetrated mixed legal systems<sup>129</sup> and occasionally even legal systems whose law of remedies are based essentially upon common law principles.<sup>130</sup> At first glance, this would appear to broaden and enrich the array of remedies available to the aggrieved party. Closer investigation shows that the utility that the aggrieved purchaser can derive from price reduction in those legal systems is marginal, as in almost any given situation, damages or rescission will, from a monetary perspective, be preferable (or at least no worse) than price reduction.

Only in those legal systems that limit the ability of the aggrieved party to sue for damages or to rescind the contract and receive restitution can price reduction be beneficial from the purchaser's perspective.<sup>131</sup> Thus, civil law does not ordinarily allow

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129. For instance, the CISG Treaty or the European DCFR project.

130. Price reduction has been introduced into English law. European Parliament & Council of the E.U., *Directive 1999/44/EC*, art 3(5) (May 25, 1999) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0044:en:HTML>).

131. *Id.*

the purchaser to claim damages for nonconformance, unless the nonconformance was accompanied by fault on the part of seller.<sup>132</sup> In some legal systems, there are limits on the purchaser's right to rescind the contract and receive restitution of the purchase price.<sup>133</sup> Nevertheless, in a mixed legal environment in which the law of remedies is based essentially on common law principles, the aggrieved purchaser can ordinarily claim damages or rescind the contract.<sup>134</sup> The reason is that damages for direct loss resulting from nonconformance are easy to prove and the purchaser is entitled to them as a matter of routine.<sup>135</sup> In most cases, the purchaser will not only be entitled to damages, but those damages will be calculated objectively, even if the subjective loss is smaller or even nonexistent. The purchaser will also often be entitled to rescind the contract and to receive restitution—at least when the nonconformance is fundamental—even where he or she is incapable of returning the goods received. These legal systems generally allow the purchaser to substitute restitution in kind with restitution of value if restitution in kind is impossible or unreasonable.

Finally, the theoretical analysis presented in this Article is consistent with empirical findings. Experience has shown that in legal systems whose law of remedies includes relatively free use

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132. Szakats, *supra* n. 26, at 761–776.

133. Thus, for instance, under Turkish law, when a suit to rescind a contract for nonconformance is filed and the court is of the opinion that complete rescission of the contract is unjustified, the court is authorized, at its own initiative, to determine that the appropriate remedy under the circumstances is price reduction and not rescission, so that the use of price reduction is, in effect, forced by a decision of the court and not chosen by the aggrieved party. See Ergun, *supra* n. 115, at pt. II(3)(a) (stating that the CISG and Turkish law adopt the proportional method). With regard to French law:

In practice, it is much more common that the buyer asks for termination of the contract than for a price reduction. In some situations price reduction might still be important, for instance where the buyer cannot return the goods to the seller and hence is not entitled to terminate, or the court in its discretion has judged the lack of conformance as not being sufficiently serious in order to enable termination.

Sivesand, *supra* n. 24, at 65. Further on, she adds that “[i]n France . . . price reduction is not often used in practice, at least not in court. This might be connected with the fact that the buyer’s right to terminate is so far-reaching in France.” *Id.* at 66.

134. Szakats, *supra* n. 26, at 759–760.

135. *Id.* at 762.

of damages and of rescission, the use of price reduction is negligible.<sup>136</sup>

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136. *E.g.* Sivesand, *supra* n. 24, at 62 (explaining specifically that until recently, “price reduction was an unknown, or at least unregulated, legal tool” in England); David Elkins & Moshe Gelbard, *The Nonconformity of Price Reduction: The Limited Utility of the Remedy in Israeli Law*, 40 Hebrew U. L. Rev. 183, 183 (2010) (discussing price reduction in Israel). In the United States, a remedy similar to price reduction is price abatement in the sale of land sold by acreage or by some other unit. George E. Palmer, *The Law of Restitution* vol. III 312–316 (Aspen Publishers 1978). This remedy is used in practice due to the fact that neither damages nor rescission is normally available. *Id.* It is possible that reduction of price is used in practice more frequently than is reported. Upon receiving nonconforming goods, a buyer might simply pay or express a willingness to pay the value of the goods received, and such an offer might well be acceptable from the seller’s perspective. Such an arrangement could be simpler for both sides to calculate and prove less acrimonious than a claim for damages. However, such arrangements do not require the existence of formal legal rules for their implementation. Even if the law of remedies relies exclusively upon damages, the parties would be free to adopt a form of price reduction if they so desire. Our argument that price reduction is a largely superfluous legal doctrine in systems with common law remedies would still be valid.