

CHAPTER ONE

Introduction

1.0 Background to Thesis

Over the last decade the volume of international trade conducted worldwide has continually increased.¹ Specifically, international trade in goods accounted for a large proportion of the world's economy.² According to the World Trade Organisation,³ by the end of the second quarter of 2014 world merchandise trade⁴ amounted to approximately \$9 trillion (US).⁵ There are many complex issues to consider in international trade. For example these include: dealing with a wide range of goods, arranging transport and storage of the goods, buyers and sellers located in different countries and choosing the applicable law to govern the contract.⁶ Having a suitable law to govern international sale of goods contracts is of paramount importance to the contracting parties because it not only sets out the obligations of the buyer and seller but it also provides remedies in the event of a breach of contract.⁷ The United Nations Convention on Contracts for the International Sale of Goods 1980 was drafted with the purpose of harmonising international sale of goods laws and to minimise the uncertainty of legal consequences that can arise when the

¹ World Trade Organisation, 'International Trade Statistics 2013' (WTO, 2013) <www.wto.org/english/res_e/statis_e/its2013_e/its2013_e.pdf> accessed 21 July 2014.

² As compared to trade in commercial services.

³ Hereinafter referred to as the 'WTO'.

⁴ The term 'merchandise trade' includes agricultural products, fuels and mining products and manufactured products; it refers to the movement of goods through a country and includes the import and export of those goods.

⁵ World Trade Organisation, 'Latest Quarterly Trade Trends' (WTO, 16 July 2014) <www.wto.org/english/res_e/statis_e/daily_update_e/latest_trade_trends_e.pdf> accessed 02 November 2014.

⁶ Tobias Plate, 'The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective' (2002) 6 Vindobona Journal of International Commercial Law and Arbitration 57.

⁷ See discussion at chapter 1.1 below for the definition of the term 'suitable'.

parties are located in different countries.⁸ These aims are reflected in the preamble of the CISG which states:

[P]arties to this Convention, bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order, considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.⁹

The purpose of the preamble is to set out the overall aim of the CISG and to lay the foundations for its provisions.¹⁰ Enderlein and Maskow identified two important phrases in the preamble. Firstly, the phrase ‘equality and mutual benefit’ is interpreted to apply not only to the relations between member states but also to the relations between contracting parties.¹¹ If the CISG was the applicable law, it would place the parties on an equal footing, so that neither party would be disadvantaged by the unfamiliar laws of the other party’s home country.¹² Secondly, ‘the adoption of uniform rules...would contribute to the removal of legal barriers...and promote the development of international trade’.¹³ This stipulation helps to further the aim that a

⁸ Hereinafter referred to as the ‘CISG’; United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG); UNCITRAL, ‘United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)’ <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 29 September 2013.

⁹ Pace Law School Institute of International Commercial Law, ‘Annotated Text of CISG: Preamble’ (IICL, 09 August 2002) <www.cisg.law.pace.edu/cisg/text/preamble.html> accessed 29 September 2013.

¹⁰ The CISG is made up of 101 articles. They are organised in four Parts. Part I: Sphere of Application and General Provisions (Articles 1 through 13); Part II: Formation of the Contract (Articles 14 through 24); Part III: Sales of Goods (Articles 25 through 88); Part IV: Final Provisions (Articles 89 through 101).

¹¹ Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods* (Oceana 1992) 21.

¹² *ibid.*

¹³ *ibid.*

unified set of rules would harmonise international trade and that any disputes which may arise could be resolved by applying the provisions of the CISG.¹⁴

1.1 Research Question

The area of examination for this thesis is the interpretation and application of the buyer's remedy of avoidance under the CISG.¹⁵ The thesis examines how the remedy is established,¹⁶ exercised¹⁷ and what the consequences are of avoidance¹⁸ in order to determine whether the remedy is suitable for international sale of goods transactions. For the purposes of the thesis 'suitable' means that the remedy must be capable of being applied to contracts for different kinds of goods and contracts commonly sold in international trade.¹⁹ Additionally the remedy must be one that the parties can lawfully establish and exercise swiftly and with certainty.²⁰ Although the remedy of avoidance is available under other provisions in the CISG,²¹ the thesis focuses on the buyer's right of avoidance embodied in art 49, which can be invoked when the seller has breached its obligations.²² The reason for this approach is that art 49 has generated the highest number of reported cases of any of the provisions dealing with avoidance.²³ Therefore, it is important to examine how the provision is interpreted and applied by the courts. Additionally, under the CISG the seller's main obligations consists of the delivery of the goods and documents pertaining to them.²⁴ Article 49

¹⁴ *ibid.*

¹⁵ CISG, art 49 (buyer's right to avoid the contract).

¹⁶ CISG, arts 49(1)(a) and (b).

¹⁷ CISG, art 26.

¹⁸ CISG, arts 81-84.

¹⁹ See discussion at chapter 2.4.1.

²⁰ Text to n 50.

²¹ CISG, art 64 (seller's right to avoid the contract); CISG, art 72 (avoidance for anticipatory breach); CISG, art 73 (avoidance instalment contracts); CISG, art 51 (avoidance for partial delivery).

²² CISG, art 30 states: 'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'.

²³ Pace Law School Institute of International Commercial Law, '2,500 cases 10,000 case annotations UNCITRAL Digest cases plus added cases' (*IICL*, 09 August 2012)

<www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html> accessed 02 November 2014; CISG, art 49 has 395 reported cases at the date of submission of the thesis.

²⁴ CISG, art 30.

is a good measure of how successful the CISG has been in dealing with the complexities associated with this obligation where the buyer and seller have their places of business in different countries.²⁵ This is because the seller's delivery obligation can result in breaches for non-delivery, late delivery or non-conformity of the goods and relating documents. These breaches will have financial and other implications for the parties. Buyers need to have confidence in the applicable sales law because they require a measure of certainty and predictability when seeking to exercise the remedy of avoidance.²⁶ Understanding how the case law interprets and applies this remedy allows the buyer to determine if the breach can meet the main threshold, fundamental breach,²⁷ as well as other criteria²⁸ to permit avoidance of the contract.

The rapid growth of trade in goods has had a significant impact on the development of sales law to govern these transactions. The CISG was signed in Vienna on April 11 1980 and after receiving ten ratifications, entered into force on January 1 1988.²⁹ As of September 26 2014, 83 countries have adopted the CISG, making it a very successful instrument.³⁰ The CISG has become the applicable sales

²⁵ Alastair Mullis, 'Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases' in M Andreas and N Jarborg (eds), *Anglo-Swedish Studies in Law* (Lustus Forlag 1998) 326.

²⁶ Peter Huber, 'CISG: The Structure of Remedies' (The Convention on the International Sale of Goods. The 25th Anniversary: Its Impact in the Past, Its Role in The Future, German Society of Comparative Law, Private Law Division Conference, Wurzburg, September 2005) <www.cisg.law.pace.edu/cisg/biblio/huber1.html> accessed 30 September 2013.

²⁷ CISG, art 25 states: 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'.

²⁸ CISG, art 26 (declaration of avoidance); CISG, art 47(1) (fixing of an additional time for performance).

²⁹ UNCITRAL, 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 29 September 2013.

³⁰ Pace Law School Institute of International Commercial Law, 'CISG: Table of Contracting States' (IICL, 02 October 2014) <www.cisg.law.pace.edu/cisg/countries/cntries.html> accessed 02 November 2014.

law for countries that conduct over three quarters of the world's trade.³¹ Contracting states include the United States of America,³² the People's Republic of China,³³ Japan, Germany and France.³⁴ However, it is notable that although the United Kingdom³⁵ played a significant role in the drafting process, it has not adopted the CISG.³⁶ This is because government ministers do not see it as a priority as consultations with the business sector have shown that there is little interest in ratification.³⁷ Furthermore, it is argued that the UK's ratification of the CISG would reduce the number of cases heard in London's international arbitration and litigation centres.³⁸ Most other member states of the European Union³⁹ have successfully adopted the CISG.⁴⁰

The use of the CISG has been the subject of considerable discussion and analysis. The electronic CISG database, hosted by Pace Law School Institute of International Commercial Law⁴¹ contains over 1,500 full texts of law journal commentaries, books, monographs and related materials dedicated to the CISG.⁴² In

³¹ Pace Law School Institute of International Commercial Law, 'CISG by State: Trends' (*IICL*, 03 August 2006) <www.cisg.law.pace.edu/cisg/cisgintro.html> accessed 29 September 2013.

³² Hereinafter referred to as 'US'.

³³ Hereinafter referred to as 'PRC'.

³⁴ Pace Law School Institute of International Commercial Law, 'CISG by State: Trends' (*IICL*, 03 August 2006) <<http://www.cisg.law.pace.edu/cisg/cisgintro.html>> accessed 29 September 2013.

³⁵ Hereinafter referred to as 'UK'.

³⁶ Bruno Zeller, 'The Development of Uniform Laws - A Historical Perspective' (2002) 14 *Pace Int'l L Rev* 163, 168; Sally Moss, 'Why the United Kingdom has not Ratified the CISG' (2005) 25 *JL & Com* 483.

³⁷ Moss (n 36).

³⁸ Department of Trade and Industry (UK), *United Nations Convention of International Sale of Goods: a consultative document* (London: Department of Trade and Industry, 1989); Department of Trade and Industry (UK), *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): a consultation document* (London: Department of Trade and Industry, 1997); Moss (n 36) 484.

³⁹ Hereinafter referred to as 'EU'.

⁴⁰ All European Union member states have ratified the CISG with the exception of UK, Ireland, Portugal, Malta; EUROPA, 'Countries' <<http://europa.eu/about-eu/countries/>> accessed 07 April 2013.

⁴¹ Hereinafter referred to as 'IICL'.

⁴² Pace Law School Institute of International Commercial Law, 'Selected archives: Full-texts of selected scholarly writings on the CISG and the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law' (*IICL*, 23 September 2013) <www.cisg.law.pace.edu/cisg/biblio/bib2.html> accessed 09 August 2013.

a Letter of Submittal of the CISG to the US President, former Secretary of State, George Schultz wrote:

Sales transactions that cross international boundaries are subject to legal uncertainty - doubt as to which legal system will apply and the difficulty of coping with unfamiliar foreign law...the Convention's approach provides an effective solution for this difficult problem. When a contract for an international sale of goods does not make clear which rule of law applies, the Convention provides uniform rules to govern the questions that arise in making and performance of the Contract.⁴³

This endorsement of the use of the CISG by Schultz has been used in the judgments of subsequent cases to promote its use in international trade and to further the use of uniform international contract law rather than domestic laws.⁴⁴

1.2 Aims and Purpose of Thesis

Although there is strong support for the use of the CISG to govern international sale of goods contracts,⁴⁵ some commentators argue that the CISG is *not* suited to these complex transactions.⁴⁶ For example, Guest and Treitel proposed the use of either national law or the neutral laws of a third party that has been dominant in the area of sale of goods.⁴⁷ They argue that buyers and sellers would benefit from the certainty of national laws as they have had a longer gestation period when compared to the CISG.⁴⁸ In particular, the common law of England and Wales⁴⁹ has been cited as being more suitable to govern international sale of goods transactions as it has

⁴³ George Shultz, 'Letter of Submittal from Secretary of State, to Ronald Reagan, President' (1983); S Treaty Doc No 9, 98th Cong, 1st Sess (1984).

⁴⁴ *Asante Tech Inc v PMC-Sierra Inc* 164 F Supp 2d 1142, 1151 (2001); *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc* 201 F Supp 2d 236, 285 (2002).

⁴⁵ Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 115; Ingeborg Schwenzer and Pascal Hachem, 'The CISG - Successes and Pitfalls' (2009) 57 Am J Comp L 457, 478.

⁴⁶ Michael Bridge, 'The Bifocal World of International Sales: Vienna and Non-Vienna' in R Cranston (ed), *Making Commercial Law* (OUP 1997) 277; See also Jan Hellner, 'The Vienna Convention and Standard Form Contracts' in Paul Volken and Petar Sarcevic (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) 333, 338.

⁴⁷ A G Guest and Guenter Treitel, *Benjamin's Sale of Goods*, (5th edn, Sweet & Maxwell 1997) 18-004.

⁴⁸ Guest and Treitel (n 47); cf Christiana Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts' (2005) 7:3 EJLR 303, 306.

⁴⁹ Hereinafter referred to as 'English law'.

been used for centuries and has built up a large body of judicial precedent dealing with a wide range of issues.⁵⁰ Bridge supports this view by referring to the need for certainty in commercial transactions.⁵¹ He added that, ‘the CISG has almost nothing to say about the detailed problems...in reported cases in England’.⁵² Mullis adds, ‘when an English lawyer thinks of international sales he thinks of documentary sales of commodities, carried by sea and sold on CIF or FOB terms. Indeed, it is primarily in relation to the latter type of contract that the English law of international trade has been developed’.⁵³ Bridge states that the lack of definitions in the CISG on delivery terms such as ‘Free on Board’⁵⁴ or ‘Cost, Insurance, Freight’⁵⁵ make it too uncertain for parties to rely on.⁵⁶ Furthermore, he argues that the CISG’s termination rights are more stringent than that of English law and the requirement of fundamental breach is too rigid in its application.⁵⁷ Hellner also criticises the remedy of avoidance, describing the remedy as ‘complicated’ stating that certain rules only apply to specific types of breaches.⁵⁸ Furthermore, he argues that the exercise of the remedy requires giving notice,⁵⁹ the buyer may need to fix an additional time for performance⁶⁰ and the remedy may be limited by the seller’s right to cure the

⁵⁰ Fountoulakis (n 48); See also Bruno Zeller, ‘Commodity Sales and the CISG’ in Camilla Andersen & Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmonds & Hill 2008) 627.

⁵¹ Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, OUP 2007) 5.

⁵² *ibid.*

⁵³ Alastair Mullis, ‘Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law: Is There a Substantial Difference?’ in Eva Lomnicka and Christopher Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honor of Prof AG Guest* (Sweet & Maxwell 1997) 137.

⁵⁴ Hereinafter referred to as ‘FOB’.

⁵⁵ Hereinafter referred to as ‘CIF’.

⁵⁶ Michael Bridge, ‘Uniformity and Diversity in the Law of International Sale’ (2003) 15 Pace Int’l L Rev 55.

⁵⁷ Bridge (n 51) 567.

⁵⁸ CISG, art 49 (1)(a) ‘fundamental breach’; CISG, art 49 (1)(b) ‘non-delivery’; CISG, art 49 (2)(a) ‘late-delivery’; CISG, art 49 (2)(b) ‘non-conformity’; See discussion at chapter 5.2.3, 5.2.5, 5.2.7, 5.2.8-5.2.9.

⁵⁹ CISG, art 26; See discussion at chapter 7.1.

⁶⁰ CISG, art 47(1); See discussion at chapter 5.2.8.

breach.⁶¹ It is Hellner's contention that the remedy of avoidance is suited to contracts where the buyer has a vested interest in the delivery of goods, for example in relation to a machine designed to specification, rather than to contracts involving goods that have fluctuating prices and require swift avoidance such as commodities sales.⁶²

This thesis responds to the criticisms raised by providing a detailed examination of how the buyer's remedy of avoidance is interpreted and applied under the CISG. This entails examining the provisions of the CISG that deal with these issues and the decisions of cases generated under them.⁶³ If the provisions dealing with the buyer's right of avoidance are correctly interpreted and applied the remedy *is* capable of dealing with all types of international sale of goods contracts, even those that may require swift avoidance.⁶⁴ Furthermore, it is argued that if parties opt out of using the CISG⁶⁵ or it is limited to certain types of sales contracts this would weaken its purpose and undermine its function as a tool of international trade.

The thesis examines the buyer's right of avoidance in its entirety, specifically, the circumstances in which it arises,⁶⁶ its limitations,⁶⁷ how it can be exercised⁶⁸ and the consequences of exercising the remedy.⁶⁹ The primary threshold for the buyer successfully exercising the remedy of avoidance lies in establishing the existence of a fundamental breach as set out in art 25 CISG. However, there are other provisions

⁶¹ CISG, art 48; Hellner (n 46) 347; See discussion at chapter 6.1-6.3.

⁶² Hellner (n 46) 338; See discussion at chapter 2.4.1.

⁶³ CISG, art 49 (buyer's right to avoid the contract); CISG, art 26 (declaration of avoidance); CISG, arts 81-84 (effects of avoidance).

⁶⁴ CISG, arts 6, 7, 8 and 9.

⁶⁵ CISG, art 6 states: 'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions'.

⁶⁶ CISG, art 49(1)(a); CISG, art 49(1)(b).

⁶⁷ CISG, art 49(2); CISG, art 25 (fundamental breach); CISG, art 49(2) (circumstances where the buyer loses the right to avoid the contract); CISG, art 48 (seller's right to cure the breach); CISG, art 47(1) (fixing and additional time for performance).

⁶⁸ CISG, art 26 (declaration of avoidance).

⁶⁹ CISG, arts 81-84 (effects of avoidance).

that may allow for avoidance.⁷⁰ For example, art 49(1)(b) states that in the case of non-delivery, the buyer may avoid the contract if the seller does not deliver within the additional time fixed for performance.⁷¹ By examining the main provisions of the CISG dealing with fundamental breach and avoidance, and the case decisions,⁷² the thesis examines how judges have interpreted these provisions and their meanings. Examination is made as to the extent and seriousness of the breach that is needed to fulfil the criteria of art 25 and subsequently declare the contract avoided, specifically looking at whether the threshold is too difficult to establish.

The thesis responds to arguments that the CISG is unsuitable for contracts of market sensitive goods such as commodities and should be used solely for contracts for market insensitive items such as manufactured goods.⁷³ These scholars point out that the provisions of the CISG that deal with the buyer's remedy of avoidance are too complicated and make it difficult to avoid the contract.⁷⁴ In support of this contention, they cite that commodity trade associations such as the Grain and Feed Trade Association⁷⁵ and the Federation of Oil Seeds and Fats Association,⁷⁶ which are based in London, expressly exclude the applicability of the CISG to their

⁷⁰ CISG, art 49(1)(b).

⁷¹ CISG, art 47(1).

⁷² Decisions under the CISG cannot be referred to as 'case law' (that is, cases serving as a source of law under the CISG) as this was not expressly stated by the drafters. However the thesis takes the view that if a decision is of quality and sound legal rationale, based on the principles of the CISG, then it should be binding on other jurisdictions. In any case a decision made in one jurisdiction, for example the United States, dealing with the provisions of the CISG would represent a source of law for other US courts, thus creating case law in that sense. Arguably, overall decisions from one Member State should be binding on other Member States as set out in CISG, art 7, however; this is not always the case in practice; Nb some jurisdictions (primarily civil law jurisdictions do not report the name of the parties eg Germany, Switzerland, France amongst others) Arbitral Tribunals do not report the names of the parties; See also Michael Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146 U Pa L Rev 687.

⁷³ Michael Bridge, 'A Law for International Sale of Goods' (2007) 37 HKLJ 17; See also Hellner (n 46) 338; Mullis (n 53) 137.

⁷⁴ *ibid.*

⁷⁵ Hereinafter referred to as 'GAFTA'.

⁷⁶ Hereinafter referred to as 'FOSFA'.

standard form contracts and choose instead to apply English law to resolve disputes.⁷⁷

The thesis advances the proposition that the buyer's remedy of avoidance under the CISG cannot be deemed too rigid, complex and unsuitable for certain types of sale of goods contracts without analysing the existing case law and using the tools⁷⁸ and general principles⁷⁹ that underpin its provisions. Where relevant, the thesis draws comparisons with English law to determine if, as Bridge argues, English law offers the buyer more certainty in exercising the right to terminate the contract.⁸⁰

The thesis examines cases that involve contracts for the sale of commodity, manufactured and bespoke goods to determine if there are any factors that would make the buyer's remedy of avoidance unsuitable to deal with these types of goods. It will be argued that although each of the different types of contracts mentioned above may have different specific needs, if the remedy of avoidance is correctly interpreted and applied it can uniformly address these concerns and minimise uncertainty for the buyer. It is important to note that the CISG expressly excludes those contracts covered in art 2.⁸¹ Furthermore, it excludes contracts for the sale of goods where a 'substantial' part of the materials are to be supplied by the buyer or alternatively a 'preponderant' part of the seller's obligations are to provide labour

⁷⁷ Exclusion of the CISG altogether is permitted under art 6; GAFTA 100 cl 31 states: 'Buyers and Sellers agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England, and to be performed there...and the Courts of England or Arbitrators appointed in England...shall...have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile, residence or place of business of the parties to this contract may be or become...'; FOSFA 26A r 20; Zeller (n 50) 627,628; See also Bridge (n 56) 61.

⁷⁸ CISG, arts 6, 8, 9.

⁷⁹ CISG, arts 7(2).

⁸⁰ Bridge (n 46) 277; Bridge (n 56) 64.

⁸¹ CISG, art 2 states : 'This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity'.

and other services.⁸² Insofar as the CISG is concerned these are the only exclusions on the types of contracts it can govern. Therefore, the thesis argues that the drafters of the CISG *must* have intended it to be used for all other types of sale of goods contracts, including commodity and documentary sales.⁸³ Additionally, reference must be made to the tools of interpretation as set out in art 7(2) CISG which instructs that, ‘questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based...’.⁸⁴ Thus, the wording of art 7(2) places a duty on decision makers to interpret the provisions of the CISG correctly and efficiently so that it is capable of dealing with the types of contracts that fall within its scope.⁸⁵ Specifically the buyer’s remedy of avoidance must be capable of being applied to these different types of contracts.

The CISG provides tools and mechanisms for parties to use in negotiating the contract terms and also to assist decision makers to interpret the parties’ intent in the event of a dispute. The thesis examines the provision dealing with party autonomy,⁸⁶ which states that parties are free to exclude the application of the CISG or ‘derogate from or vary the effect of any of its provisions’.⁸⁷ Furthermore, the thesis examines the relevance of interpreting the contract in light of any usages,⁸⁸ and the intentions and conduct of the parties upon making the contract.⁸⁹ The thesis will argue that if

⁸² CISG, art 3.

⁸³ UNCITRAL, ‘Commentary on the Draft Convention on Contracts for the International Sale of Goods’ A/CON.97/5 <www.uncitral.org/pdf/a_conf.97_5-ocred.pdf> accessed 30 May 2014; Peter Schlechtriem, ‘Interpretation, gap-filling and further development of the UN Sales Convention’ (CISG - Auslegung, Lückenfüllung und Weiterentwicklung, Basel, May 2004); See discussion at chapter 5.2.7.5.

⁸⁴ CISG, art 7.

⁸⁵ Van Alstine (n 72) 687; See discussion at chapter 3.5.

⁸⁶ CISG, art 6; See discussion at chapter 4.1.

⁸⁷ With the exception of CISG, art 12, where contracting states require contracts to be made in writing.

⁸⁸ CISG, art 9; See discussion at chapter 4.3.

⁸⁹ CISG, art 8; See discussion at chapter 4.2.

these provisions are effectively used by contracting parties in conjunction with the correct interpretation by decision makers, this will reduce the uncertainty associated with the buyer's remedy of avoidance under the CISG and make it suitable for all types of sales contracts it was intended to govern. In short, if buyers are aware of the relevant mechanisms and how they are interpreted and applied by the courts they can avoid the pitfalls of lengthy and costly delays when deciding if avoidance is lawful. The thesis will also examine other provisions of the CISG which influence the buyer's right to avoid the contract. For example, this can be seen in arts 34, 37 and 48 CISG which allow the right to cure defective performance in the documents and the goods respectively. Further, examination will be made of art 47 CISG which allows the buyer to fix an additional time for performance.

Although the thesis is centred on the buyer's remedy of avoidance, where relevant, it briefly refers to other remedies in the CISG, including where avoidance was not permitted but another remedy was granted instead. These remedies consist of: specific performance,⁹⁰ delivery of replacement goods,⁹¹ repair,⁹² price reduction⁹³ and damages.⁹⁴

The thesis draws comparisons between decisions made by both civil and common law contracting states to determine how, if at all, domestic law has influenced decision making under the CISG. This is essential as there are no independent bodies created to hear disputes governed by the CISG; it is up to national courts and the judiciary to apply the rules in the spirit that was intended by its drafters, that is, to adhere to its international character and to promote

⁹⁰ CISG, art 46(1) (buyer's right to require performance).

⁹¹ CISG, art 46(2) (buyer's right to substitute delivery of goods).

⁹² CISG, art 46(3) (buyer's right to repair of goods).

⁹³ CISG, art 50 (buyer's right to price reduction).

⁹⁴ CISG, arts 74, 75 and 76 (damages).

uniformity.⁹⁵ As mentioned earlier, the thesis examines if the English common law, in conjunction with the Sale of Goods Act 1979,⁹⁶ would provide a more certain outcome to the buyer's right to terminate the contract.⁹⁷ Specifically does English law provide a more clearly defined set of rules for the buyer to terminate the contract? The thesis also examines the legitimacy of 'soft law' such as those principles of commercial contract law, UNIDROIT Principles 2010, drafted by the International Institute for the Unification of Private Law⁹⁸ as a method of filling in the gaps and ambiguities in the wording of the CISG.⁹⁹

This thesis concludes by offering suggestions to improve the way in which the CISG is interpreted and applied. Judges and contracting parties will be able to use the tools and mechanisms within the CISG to address the problems that can arise in international sale of goods contracts. In presenting an analysis of the case law on the buyer's remedy of avoidance, judges will be able to grasp the significant impact of their decision making on the current and future success of the CISG. A strong body of case law will be essential to establishing familiarity and certainty when exercising the remedy of avoidance.

1.3 Structure of Thesis

Chapter two of the thesis examines the methodology used, namely the adoption of the doctrinal and comparative approaches, as well as a brief discussion of their respective strengths and weaknesses. Additionally, it presents a literature review

⁹⁵ CISG, art 7(1); See discussion at chapter 3.4.1 and 3.4.2.

⁹⁶ Hereinafter referred to as the 'SGA'; Sale of Goods Act 1979, SR & O 1983/1572.

⁹⁷ See discussion at chapter 3.7.1.

⁹⁸ Hereinafter referred to as 'UNIDROIT Principles' or 'Principles'; International Institute for the Unification of Private Law, 'UNIDROIT Principles 2010' <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 18 July 2014.

⁹⁹ International Institute for the Unification of Private Law, 'UNIDROIT Principles of International Commercial Contracts' <www.unidroit.org/english/principles/contracts/main.htm> accessed 13 October 2013; Katharina Boele-Woelki, 'Terms of Co-Existence the CISG and the UNIDROIT Principles' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer 2001) 203; See discussion at chapter 3.6.

identifying main themes and areas for examination and critically analysing the existing publications in the subject area. Chapter three provides a historical account and review of the CISG and seeks to encapsulate the difficulty that arises when countries with different legal systems had to agree on the wording of its provisions, the result of which is sometimes seen in vague and ambiguous wording. Furthermore, it is necessary to examine the interpretive provisions of art 7, which runs through the entire thesis and is integral to understanding the strengths and recognising the ambiguities of the CISG. The chapter then proceeds to examine the UNIDROIT Principles on the rules of termination¹⁰⁰ to determine if these rules can help to supplement the gaps in the CISG. The final part of the chapter examines the English law on termination of the contract, which will set the foundation for subsequent chapters that involve a comparison of the CISG and the English law approaches to termination of the contract.¹⁰¹

Chapter four examines the provisions of arts 6, 8 and 9 which deal with party autonomy, parties' intentions and conduct and usages respectively. These provisions can help to reduce the uncertainty of the remedy of avoidance if used effectively and efficiently. Chapter five focuses on examining the concept of the buyer's right of avoidance as a remedy¹⁰² and its main requirement of fundamental breach.¹⁰³ The meaning, implications and justifications for having the remedy will be discussed and analysed. The chapter also examines art 47(1) and its impact on the buyer's right to avoid the contract.¹⁰⁴ Chapter six analyses the relationship between the seller's right to cure defects and the buyer's right to avoid the contract. It concentrates on art

¹⁰⁰ Under the UNIDROIT Principles 'termination' has the same meaning as 'avoidance' under the CISG.

¹⁰¹ Under English law 'termination' has the same meaning as 'avoidance' under the CISG.

¹⁰² CISG, art 49.

¹⁰³ CISG, art 25.

¹⁰⁴ Fixing an additional time for performance.

34,¹⁰⁵ art 37¹⁰⁶ and art 48.¹⁰⁷ Chapter seven examines the exercise of the right to avoid the contract, namely art 26 CISG where the rules of notice and time are examined. This chapter also examines the consequences of avoidance, namely arts 81-84 CISG which deal with damage for avoidance and restitution. Finally, chapter eight will summarise the findings, respond to criticisms of the buyer's remedy of avoidance and suggest a way forward for the CISG.

The next chapter examines the method and methodology used in this thesis. This chapter also includes a literature review of the issues relating to the buyer's remedy of avoidance.

¹⁰⁵ Curing defects in the documents.

¹⁰⁶ Curing defects in the good before the date of performance.

¹⁰⁷ Curing defects in documents or goods after the date of performance.