

CHAPTER TWO

Methodology and Literature Review

2.0 Introduction

In order to answer the research questions in chapter one it is imperative that the methods and methodology utilised stand up to scrutiny. It is often difficult to categorise a thesis, particularly one on the subject of law under any specific headings, as many works of this type involve a hybrid of methods.¹ Henn et al makes the important distinction between ‘method’ and ‘methodology’.² They state that ‘method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole’.³ This is important as the research strategy of the thesis is doctrinal, it examines the wording of the United Nations Convention on Contracts for the International Sale of Goods 1980 as well as the rationale of its case decisions to determine if the buyer’s remedy of avoidance is suitable⁴ for international sale of goods contracts.⁵ Additionally, the thesis adopts a comparative method, where appropriate, to examine the mechanisms in the common law of England and Wales⁶

¹ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 31.

² Matt Henn, Mark Weinstein and Nick Foard, ‘A Critical Introduction to Social Research’ (2nd edn, Sage 2006) 10.

³ *ibid.*

⁴ 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. Additionally the remedy must one that the parties can lawfully establish and exercise swiftly and with certainty.

⁵ 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.

⁶ Hereinafter referred to as ‘English law’.

in conjunction with the Sale of Goods Act 1979,⁷ to determine if its provisions on termination of the contract are less rigid and offer more certainty.⁸

The scope of this thesis encompasses qualitative research of a doctrinal and comparative nature. Qualitative research is defined as, ‘the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made’.⁹ This research begins with a ‘doctrinal’ or ‘black letter law’ methodology. This means that some of the research is based on analysing the legal rules under the CISG and their logical connections or disjunctions via examination of the cases, the wording and interpretation of the CISG, as well as existing literature. This approach enables the researcher to critically analyse the meanings and implications of these rules and the principles which underpin them. The thesis adopts a comparative method, as a means of assessing the suitability of the buyer’s right to avoid the contract in international sale of goods transactions.¹⁰ Where relevant, it will seek to look at English law to determine how it would respond to similar issues. This aspect of the research determines whether the remedy is suitable for those product markets which can be volatile and require speedy avoidance.¹¹ It seeks to address contentions suggested by Bridge, Guest and Treitel that English law is better suited to deal with international sales as it can provide more certainty.¹² Moreover, it also looks to other sources of optional or ‘soft’ law such as the those principles of commercial contract law drafted by the International Institute for the Unification of

⁷ Hereinafter referred to as the ‘SGA’; Sale of Goods Act 1979, SR & O 1983/1572.

⁸ See discussion at chapter 3.7.1; Under English law ‘termination’ has the same meaning as ‘avoidance’ under the CISG.

⁹ Ian Parker, ‘Qualitative Research’ in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds), *Qualitative Methods in Psychology: A Research Guide* (OU 1994) 2.

¹⁰ Text to n 4.

¹¹ See discussion at chapter 2.4.1.

¹² A G Guest and Guenter Treitel, *Benjamin’s Sale of Goods*, (5th edn, Sweet & Maxwell 1997) 18-004; Michael Bridge, ‘A Law for International Sale of Goods’ (2007) 37 HKLJ 17.

Private Law¹³ to see if these rules can help to supplement the provisions of the CISG and to aid in its interpretation.¹⁴

2.1 Doctrinal Methodology

Doctrinal research has been defined as, ‘a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine’.¹⁵ This approach is acceptable as contract law is largely a black letter law subject which is based on the interpretation of statutes and cases. However, it is important to note that even though the study of law, in this case contract law, is based on logical conclusions; these conclusions are not an exact science. Instead they are formed of judgment, which can be influenced by other factors, such as history, culture, politics and economics.¹⁶ Vick describes these overlapping factors as ‘interdisciplinarity’, a convergence of different academic areas of study.¹⁷ Nissani asserts that interdisciplinary research can be undertaken at differing degrees of integration.¹⁸ For example, a researcher can highlight the connectivity of two areas without going so far as to combine them.¹⁹ Vick states that, ‘[m]any interdisciplinarians perceive doctrinalists to be intellectually rigid, inflexible, and inward looking; many doctrinalists regard [socio-legal] interdisciplinary research as amateurish dabbling with theories and methods the researchers do not fully understand’.²⁰ The thesis aims to be neither rigid nor looking to establish any claims to socio-legal research, rather its primary aim is to provide a thorough, in-depth examination of the buyer’s

¹³ Hereinafter referred to as ‘UNIDROIT Principles’ or ‘Principles’.

¹⁴ International Institute for the Unification of Private Law, ‘UNIDROIT Principles 2010’ <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 18 July 2014.

¹⁵ Salter and Mason (n 1) 49.

¹⁶ Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10:8 Harv L Rev 457, 465–6.

¹⁷ Douglas Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 JL & Soc 163, 164.

¹⁸ Moti Nissani, ‘Fruits, Salads, and Smoothies: A Working Definition of Interdisciplinarity’ (1995)

29 Journal of Educational Thought 121, 124.

¹⁹ *ibid.*

²⁰ Vick (n 17) 164.

remedy of avoidance. An examination of the CISG, which is ratified and adopted by different member states, each with its own legal traditions, will inevitably lead the researcher to look beyond the black letter law. For example, when examining a CISG decision of a German court on the interpretation of the term ‘good faith’, it might be necessary to look at German national laws to see how this concept is defined, its historical roots, and what social and economic factors may have led to the decision. However, that is not to say that the thesis is interdisciplinary, it is not seeking to answer the research questions from a socio-legal perspective, instead the researcher is using a set of interpretative tools and methods to bring order and to assess a particular area of the law.²¹ Once there is a clear and comprehensive system for assessment in place, the researcher will provide recommendations based on the findings.²² Therefore, the thesis does not encompass any strong interdisciplinary aspects to the research as this would expand the parameters of the thesis beyond the scope of what was intended and would render the thesis difficult to defend.²³ Instead the thesis is firmly doctrinal in its methodology as it entails a critical, qualitative analysis of legal materials that supports a hypothesis.²⁴ This approach involves identifying certain legal rules. For example, in chapter one relevant provisions to be examined are identified, specifically those that deal with the buyer’s remedy of avoidance.²⁵ These include: how the remedy is established,²⁶ exercised²⁷ and what

²¹ Vick (n 17) 165.

²² *ibid.*

²³ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17:1 Deakin LR 83, 84.

²⁴ *ibid* 118.

²⁵ See discussion at chapter 1.1; CISG, art 49 (buyer’s right to avoid the contract); CISG, art 26 (declaration of avoidance); CISG, arts 81-84 (effects of avoidance).

²⁶ See discussion at chapter 5; CISG, arts 49(1)(a) and (b).

²⁷ See discussion at chapter 7; CISG, art 26.

the consequences of avoidance are.²⁸ In examining these provisions it is important to ask:

1. What is the legal meaning of this provision?
2. What are the underlying principles which form the rules of this provision?
3. What is the coherence and system of order in decision making under this provision?

Once the individual legal rules are identified, general legal principles which underlie the CISG begin to emerge. This enables the thesis to identify ambiguities, criticisms and solutions which may exist within the CISG's approach to the buyer's right to avoid the contract.

The main sources of data for doctrinal research will be the legal instrument itself, in this case the CISG and those cases and decisions generated under it. The provisions of the CISG are examined in order to answer the research questions. In doing so it is necessary to look at the wording and legislative history of that provision. Research into the CISG is very accessible, most if not all of the *travaux préparatoires*²⁹ is available online at the Pace Law School Institute of International Commercial Law.³⁰ In examining the legislative history of the CISG provisions, the thesis can identify the various debates that took place amongst delegates when it was drafted.

However, this is not sufficient to identify the general principles that underpin these legal rules.³¹ Therefore, it is necessary to examine and review existing commentaries on the CISG which offer insight on the meanings and possible

²⁸ See discussion at chapter 7; CISG, arts 81-84.

²⁹ Preparatory works.

³⁰ Hereinafter referred to as 'IICL'; Pace Law School Institute of International Commercial Law, 'Legislative History 1980 Vienna Diplomatic Conference and preparations for the Conference' (*IICL*, 16 July 2007) <www.cisg.law.pace.edu/cisg/chronology/chrono25.html> accessed 09 July 2013.

³¹ See discussion at chapter 3.5.

underlying principles of these legal rules. The purpose of examining existing literature on the subject of the buyer's remedy of avoidance and fundamental breach under the CISG is to identify similarities and differences that may exist in the theses and the findings of other scholars. Additionally, it demonstrates a wider understanding of the relevant issues. This approach helps to clarify the meanings of ambiguous wording and phrases as well as classify the various issues within clearly defined parameters. The thesis will be able to extract the relevant information and apply it to the needs of individual sales contracts with the aim of clarifying their meanings. The information will be gathered from a variety of sources including textbooks, refereed journals, conference papers, legislative history and other industry and professional publications. A valuable source of clarifying ambiguous provisions in the CISG has been the CISG Advisory Council, a group of legal scholars that address controversial unresolved issues relating to the CISG and publish reasoned opinions on the subject matter.³² The legal rules identified will be organised according to legislative history, theories and possible meanings given to the wording of provisions. To take a practical example:

1. Legal rule: art 25
2. Ambiguous term: Fundamental breach
3. What is the meaning and general principles of this term? Look at the legislative history, scholarly interpretations and case interpretations.

Another source of data in doctrinal research are the cases that have been generated under the CISG. There are over 2,500 reported CISG cases and over 10,000 case

³² The CISG-AC is a private initiative which aims at promoting a uniform interpretation of the CISG, its members do not represent countries or legal cultures. The primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the CISG on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organizations, professional associations and adjudication bodies; Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council' (*IICL*, 01 May 2013) <www.cisg.law.pace.edu/cisg/CISG-AC-op.html> accessed 09 July 2013.

annotations published on the IICL.³³ These provide a wealth of information on the interpretation of CISG provisions. In analysing relevant decisions, the thesis will determine whether these provisions can be efficiently exercised to deal with the particular characteristics of certain sales contracts.³⁴

The value of using cases under the CISG as a means of evaluating its ability to cope with the needs of international trade has been questioned by some scholars.³⁵ This criticism has centred on the argument that the decisions have no official principle of *stare decisis*.³⁶ One argument put forward is that because courts in one country are not bound by decisions made by courts in another country, this renders the CISG an ineffective means of governing international sales of goods transactions.³⁷ While it is true that there is no express principle of *stare decisis* amongst member states, the thesis advances several arguments in favour of the legitimacy of using CISG decisions as a source of persuasive authority. Firstly, the wording of art 7(1) stipulates the importance of interpreting the CISG, ‘with regard to its international character and to the need to promote uniformity in its application’.³⁸ The wording of this provision dictates that courts should take decisions of other member states under consideration to promote uniformity.³⁹

³³ Pace Law School Institute of International Commercial Law, ‘2,500 cases 10,000 case annotations’ (IICL, 22 February 2010) <<http://cisgw3.law.pace.edu/cisg/text/case-annotations.html>> accessed 15 August 2013.

³⁴ See discussion at chapter 2.4.1.

³⁵ Joseph Lookofsky, ‘Digesting CISG Case Law: How Much Regard Should We Have?’ (2004) 8 *Vindobona Journal of International Commercial Law and Arbitration* 181.

³⁶ Gary Bell, ‘Uniformity through Persuasive International Authorities: Does *Stare Decisis* really Hinder Uniform Interpretation of 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); Ingeborg Schwenzer and Pascal Hachem, ‘Article 7’ in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 126; See also H Glenn, ‘Persuasive Authority’ (1987) 32 *McGill L* 261.

³⁷ Franco Ferrari, ‘CISG Case Law: A New Challenge for Interpreters?’ (1999) 17 *JL & Com* 245.

³⁸ See discussion at chapter 3.4.1-3.4.2; CISG, art 7(1).

³⁹ Larry DiMatteo, ‘An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability’ (1997) 23 *Syracuse J Int’l L & Com* 67.

DiMatteo states that, ‘national stare decisis is to be transplanted by an informal supranational stare decisis’.⁴⁰ This argument is furthered in chapter three when the wording and meaning of art 7 is critically considered. The second argument in favour of recognising the binding authority of CISG decisions would be when dealing with courts within the same common law jurisdiction, lower courts in that member state would be bound to take CISG ‘case law’ into account when that decision was made by a higher court in the same member state. Thirdly, Bell argues that when dealing with international conventions, national courts often do look at foreign sources to support their decisions.⁴¹ He cites the United States⁴² Supreme Court decision in *Benjamins v British European Airways*,⁴³ which applied the provisions of the Warsaw Convention, in this case reference was made to French case law as well as French scholarly opinion.⁴⁴ In examining the decisions from cases under a doctrinal approach it will emerge whether or not there is a system of order and coherence in decision making on provisions dealing with the buyer’s remedy of avoidance.

There are certain advantages of using the doctrinal approach to examine this subject area. As a component of this thesis is to determine the meaning of a particular provision and its underlying principles, a doctrinal approach can provide a sound structural basis from which the thesis can proceed. Specifically it provides continuity and coherence on the subject matter. For example, the thesis cannot determine whether the CISG makes it difficult for the buyer to avoid the contract, and thus making it unsuitable for international sale of goods contracts, if the meaning

⁴⁰ *ibid* 79.

⁴¹ Bell (n 36) 41.

⁴² Hereinafter referred to as ‘US’.

⁴³ *Benjamins v British European Airways* 572 F 2d 913, 919 2d Cir CA (1978).

⁴⁴ Bell (n 36) 41.

and definition both legislatively and in the context of cases are not examined.⁴⁵ Once the ambiguous wording of certain provisions are clearly defined to the extent that the legal instrument and cases can provide, then the thesis can proceed to examine these legal rules in a coherent manner.

However, the doctrinal approach has been subject to criticism. For example, it has been described as being too formalistic in its approach.⁴⁶ This legal formalism can sometimes lead to oversimplifying the legal doctrine and often does not provide enough of a basis on which to support the thesis and the questions it seeks to answer.⁴⁷ Wightman argues that the law of contract is often only examined for its utility and the use of the black letter approach will only result in closing out critical or reflective issues.⁴⁸ However, this would not be the approach of the thesis, as the doctrinal approach is merely the starting point. As stated earlier, traditionally cases and statutes are construed as black letter law, however it is up to the individual researcher to decide how to approach and analyse this material, specifically determining what questions are presented for examination. To suggest that the study of provisions relating to the buyer's remedy of avoidance should be looked at narrowly would not be sufficient to support this thesis.

2.2 Comparative Method

The thesis also incorporates a comparative approach; it uses comparative law as a method of research rather than as a methodology.⁴⁹ Such an approach has been adopted so that the thesis does not focus the research questions or hypotheses on comparing legal systems; rather, it is using comparative law as a method of measuring whether the CISG's provisions on the buyer's remedy of avoidance make

⁴⁵ Text to n 4.

⁴⁶ Salter and Mason (n 1) 99.

⁴⁷ Salter and Mason (n 1) 108.

⁴⁸ John Wightman, *Contract: A Critical Commentary* (Pluto1996) 11.

⁴⁹ Text to n 3.

it suitable to deal with international sale of goods contracts. When incorporating a comparative approach in a thesis it is important to identify why the researcher has chosen this approach and how it can be justified as a legitimate method. It is necessary to identify the benefits that can be obtained from comparing laws from different jurisdictions. For example, it can be to identify common principles from different jurisdictions or to compare legal rules from different jurisdictions to find the best solution.⁵⁰ Collins argues that seeking to use comparative law as a means of transplanting that law into another legal system is not always effective.⁵¹ This is supported by Kahn-Freund who argued that legal rules are a product of historical and social development of that country and that a direct transplant of a rule or body of law may not have the same measure of success as it did in its home jurisdiction.⁵² For example, he cites the Industrial Relations Act 1971, which was based on labour law in the US but had little impact on labour relations in the United Kingdom⁵³ as the rules and norms of behaviour in the two jurisdictions were very different.⁵⁴ In light of these criticisms Collins proposes that the aim of comparative law should be to improve and understand one's own domestic legal system by analysing how foreign jurisdictions have dealt with the same problem.⁵⁵ One of the aims of the thesis is to use comparative law to assess how the buyer's remedy of avoidance is dealt with by courts in different jurisdictions and to assess whether English law could provide a more efficient solution to the same set of problems. Additionally,

⁵⁰ Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11:3 OJLS 396.

⁵¹ *ibid* 397.

⁵² Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

⁵³ Hereinafter referred to as 'UK'.

⁵⁴ Collins (n 50) 398; See also Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 40; Kahn-Freund (n 52) 1.

⁵⁵ Collins (n 50) 399.

the thesis assesses whether a neutral body of non-binding rules such as the UNIDROIT Principles could assist in the interpretation of the CISG.⁵⁶

The thesis encompasses a three-fold comparison. Firstly, the CISG has no specially designated courts to hear disputes; rather these cases are decided in national courts by national judges who are the products of their own legal environment. The thesis compares decisions made by courts in different contracting states to determine if there is in fact uniformity of decisions on the subject of the buyer's remedy of avoidance.⁵⁷ For example, would a court in the US reach the same conclusion on a similar set of facts as a German court? Given the fact that both of these countries belong to different legal systems, common law and civil law respectively, is there agreement or divergence on interpretation and what is the rationale for each approach? Secondly, the comparative approach involves looking at English law, as a non-contracting state, and considers how its laws would respond to similar situations of avoidance that arise under the CISG. Specifically, how would English law have interpreted a case based on similar facts and circumstances as those met by decision makers under the CISG. Thirdly, would a set of optional rules such as the UNIDROIT Principles help to fill the gaps of the CISG making it a more effect instrument of international sales law?

When comparing decisions between contracting states the source material will be gathered from the IICL. These decisions have been helpfully categorised by contracting state as well as the relevant CISG article.⁵⁸ To further assist the researcher the cases are coded to identify specific issues. For example, when looking

⁵⁶ Alejandro Garro, 'The Gap-Filling Role Of The UNIDROIT Principles In International Sales: Some Comments on the Interplay Between the Principles and the CISG' (1995) 69 Tul L Rev 1149, 1160.

⁵⁷ See discussion at chapter 3.4.2.

⁵⁸ Pace Law School Institute of International Commercial Law, 'UNCITRAL Digest cases for Article 49 plus added cases for this Article' (*IICL*, 22 October 2013) <www.cisg.law.pace.edu/cisg/text/digest-cases-49.html> accessed 26 October 2013.

at the buyer's right to avoid the contract art 49 - a case containing the code '49A11' means that that case dealt with the issue of 'consequences of fundamental breach'.⁵⁹ This coding system was developed to correspond to the thesaurus of the United Nations Commission on International Trade Law.⁶⁰ In examining whether English law is better suited for international sales, case law, academic commentary and the SGA will be examined. Most of this material is readily available on databases such as Westlaw and LexisNexis as well as textbooks and journal articles.

A comparative method adds a critical tool for analysis on the CISG's provisions. Furthermore, it assists in distinguishing particular features in the law. For example, how English law deals with serious breaches of conformity of the goods as opposed to the CISG's approach to such breaches. The comparative method also allows for identification of conflicts and similarities in legal concepts, it would permit information to be gathered on whether English law is more appropriate to deal with international sale of goods contracts as opposed to the CISG.⁶¹

One disadvantage of using a comparative approach is that it is sometimes difficult to access information from other jurisdictions, to obtain judgements of cases and other legislative materials. Although the IICL offers a wealth of information it is important to recognise that the thesis can only examine those cases that have been reported as well those that have been translated into English. The Queen Mary Case Translation Programme is helpful with this problem because it provides a public service open to the academic and practising legal communities and provides high quality professional translations into English of foreign case law relating to the

⁵⁹ UNCITRAL 'Outline of the CISG: The UNCITRAL Thesaurus' A/CN.9/SER.C/GUIDE/1 <www.cisg.law.pace.edu/cisg/text/cisgthes.html> accessed 02 November 2014.

⁶⁰ Hereinafter referred to as 'UNCITRAL'; *ibid*.

⁶¹ See discussion at chapter 3.7.1.

CISG.⁶² Another potential disadvantage of the comparative approach is that there is a tendency for it to be used in a purely descriptive manner. For instance, having a comparison for the sake of including it in the research while it may not have any value in the context it is used. This thesis seeks to avoid this use of a comparative method; rather it will only be used where relevant to the issue at hand, to highlight similarities and differences in the approach of the CISG and English law.⁶³

2.3 Literature Review

The literature review has been described as, ‘the foundation and inspiration for substantial, useful research’.⁶⁴ The purpose of a literature review in this thesis is three-fold. Firstly, it provides an examination of existing pieces of research, thus it is the starting point to identify information and terminology relevant to one’s own research and to become familiar with the subject area.⁶⁵ Secondly, it allows the author to critically evaluate the quality of existing scholarly writings and to identify best research techniques and practices.⁶⁶ Thirdly, a literature review can help to put the thesis in context by identifying how it will differ from that of other scholars, making it an original contribution to the subject area.

The purpose of this literature review is to identify academic commentary in the area of the buyer’s remedy of avoidance under the CISG. It sets out the conceptual framework for identifying the main themes of the thesis. The research undertaken by other scholars has been used as a foundation for framing the research questions for

⁶² Pace Law School Institute of International Commercial Law, ‘The Queen Mary Case Translation Programme’ (*IICL*, 23 February 2012) <www.cisg.law.pace.edu/cisg/text/queenmary.html> accessed 12 September 2013.

⁶³ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 34.

⁶⁴ David Boote and Penny Beile, ‘Scholars before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation’ (2005) 36:6 *Educational Researcher* 3.

⁶⁵ David Thomas and Ian Hodges, *Doing a Literature Review in Designing and Managing your Research Project* (Sage 2010) 105.

⁶⁶ *ibid* 105.

the thesis. The literature review was undertaken on the basis of answering the following questions:

1. Who are the eminent scholars in this field?
2. What academic material has been published on the subject of the buyer's remedy of avoidance in the CISG?
3. What factors or areas for examination were identified by other scholars as being relevant to the buyer's remedy of avoidance?
4. What research methods were used to examine the buyer's remedy of avoidance?
5. What were the advantages or disadvantages of those methods?
6. What theories did other scholars use to explain the buyer's remedy of avoidance?

One of the main headings of a literature review is 'coverage', specifically what should be included and excluded from the review.⁶⁷ The criteria of inclusion in the literature review proceeds on the basis of those materials the author selects that covers the relevant topics or themes for examination in the thesis. The main area for examination in the thesis is the buyer's remedy of avoidance; the thesis has identified several ways in which the application of this remedy will be examined.⁶⁸ This includes looking at the wording of the provisions that deal with the buyer's right to avoid the contract⁶⁹ and examining its main requirement of establishing a fundamental breach.⁷⁰ The thesis seeks to answer how the provisions of arts 6, 7, 8 and 9 CISG can help to ensure that the buyer's remedy of avoidance is suitable for

⁶⁷ Boote and Beile (n 64) 8.

⁶⁸ See discussion at chapter 1.1.

⁶⁹ CISG, art 49 (buyer's right to avoid the contract); CISG, art 26 (declaration of avoidance); CISG, arts 81-84 (effects of avoidance).

⁷⁰ CISG, art 25.

all types of sales contracts, including commodity and documentary sales.⁷¹ Furthermore, it examines the impact of the seller's right to cure breaches under the CISG on the buyer's right to avoid the contract.⁷² Next the thesis will seek to examine if English law could provide more certainty to the problems that arise in the cases. Lastly the thesis will also examine if the UNIDROIT Principles could assist with the gaps in interpreting the CISG.

The next heading to address in the literature review is synthesis, namely what has already been written on the subject and where the thesis falls in the broader context of the subject area.⁷³ This heading encompasses elements such as identifying key terminology and gaining a historical understanding of the subject area. These materials will then be critically evaluated on a qualitative basis to assess their ambiguities and whether they support the research outcomes of the thesis or present an opposing viewpoint.⁷⁴ Following from this it is necessary to look at the methodology and techniques used by other scholars in this area,⁷⁵ specifically to identify whether these methodologies were able to support the outcomes reached in its conclusions. Lastly the literature review aims to identify the significance of the work produced by other scholars in the subject area and to demonstrate how the thesis will differ from existing literature.

2.4 Central Themes

The thesis has identified several themes that will be examined thoroughly in subsequent chapters. For the purposes of the literature review the thesis will identify and discuss these areas with a view to other scholarly opinion on the subject matter.

⁷¹ See discussion at chapter 4.

⁷² See discussion at chapter 6.

⁷³ Boote and Beile (n 64) 8.

⁷⁴ Harris Cooper and Larry Hedges, 'Research Synthesis as a Scientific Enterprise' in Harris Cooper and Larry Hedges (eds), *The Handbook of Research Synthesis* (Sage 1994) 3.

⁷⁵ Boote and Beile (n 64) 8.

2.4.1 Suitability of the Buyer's Remedy of Avoidance on Different Types of Sale of Goods Contracts

One of the most eminent authors in this area is Bridge, who argues that the CISG, although a useful tool of international trade, is more suitable for contracts for manufactured goods rather than commodity sales.⁷⁶ He proposes instead that English law would be more suitable to govern these transactions.⁷⁷ Bridge argues that, 'the CISG is a sales instrument that makes it difficult to terminate...a contract. The Sale of Goods Act which, despite modern changes, makes it relatively easy to terminate contracts'.⁷⁸ Bridge advocates the use of a diverse or 'bifocal' approach to international sales contracts and states, 'it should not...be thought that all international sales are alike and that one single uniform sales law should be provided on a "one size fits all" basis'.⁷⁹ While this is true, as discussed below, commodities sales contracts do carry with it unique problems such as string trading and volatile market conditions, which are not prevalent in contracts for manufactured goods, it would be incorrect to say that uniform sales law like the CISG, specifically the buyer's remedy of avoidance could not be used in both types of contracts.

At this juncture it is necessary to briefly identify and define the different types of goods and contracts that fall under the purview of the CISG. The thesis examines case law that involves contracts for the sale of commodities, manufactured and bespoke goods. The United Nations Conference on Trade and Development⁸⁰ defines a commodity as a 'primary product of standardised and consistent quality

⁷⁶ Michael Bridge, 'The Bifocal World of International Sales: Vienna and Non-Vienna' in R Cranston (ed), *Making Commercial Law* (OUP 1997); See also Michael Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 Pace Int'l L Rev 55; Bridge (n 12) 17; Michael Bridge, 'The Nature and Consequences of Avoidance of the Contract under the United Nations Convention on the International Sale of Goods' (2008) 10 International Law Review of Wuhan University 118.

⁷⁷ Bridge (n 12) 18.

⁷⁸ *ibid.*

⁷⁹ Bridge, 'Uniformity and Diversity in the Law of International Sale' (n 76) 55.

⁸⁰ Hereinafter referred to as 'UNCTAD'.

that can be traded on international markets'.⁸¹ Bridge goes further and states that commodities are goods which are homogeneous in nature and can be traded in bulk on the market.⁸² These goods typically include: metals, electricity, oil, beef, orange juice, natural gas and financial currencies.⁸³ The thesis will concentrate on those commodities which fall into the category of agricultural, metals and natural resources because this is where breaches under the CISG's purview are most likely to arise.⁸⁴ Furthermore, art 2 expressly excludes the application of the CISG to contracts for stocks, shares, investment securities, negotiable instruments, money or electricity.⁸⁵ There are many different kinds of commodity contracts that can be used in the market, but this thesis focuses on spot contracts. This approach has been adopted because these are the most common types of commodity contracts used in international sale of goods.⁸⁶ Spot contracts are those which are negotiated between the buyer and seller and will require immediate delivery and payment of the goods.⁸⁷ These types of contracts usually involve perishable commodities such as some agricultural goods, which are prone to greater price fluctuations.⁸⁸ Factors affecting the prices can include supply and demand, quality of the goods, transportation and storage and geographical location amongst others.⁸⁹

⁸¹ UNCTAD, 'Expert meeting on Trade and Development Implications of Financial Services and Commodity Exchanges' (*UNCTAD*, 25 June 2007) UN Doc TD/B/COM.1/EM.33/2.

⁸² Bridge, 'Uniformity and Diversity in the Law of International Sale' (n 76) 64; Katrina Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' (2010) 14 *Vindobona Journal of International Commercial Law and Arbitration* 83, 91.

⁸³ Stanley Kroll and Irwin Shishko, *The Commodity Futures Market Guide* (Harper and Row 1973) 9.

⁸⁴ For example breaches for non-conformity in CISG, art 35.

⁸⁵ CISG art 2.

⁸⁶ Benjamin Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Sellier 2007) 116.

⁸⁷ Winsor (n 82) 91; See also Commodity Futures Trading Commission, 'A Guide to the Language of the Futures Industry' <www.cftc.gov/index.htm> accessed 24 May 2013.

⁸⁸ Kroll and Shishko (n 83) 13.

⁸⁹ Kevin Dhuyvetter, 'Basis: The Cash/Futures Price Relationship' (*Kansas State University*, November 1992)

<www.agmanager.info/livestock/marketing/bulletins_2/price_risk/hedging/mf1003.pdf> accessed 01 February 2014.

The thesis acknowledges that the commodities spot market will have different considerations when determining if the goods are conforming to the contract. For example, ‘medium quality wheat’ may allow for substitutions of a lower grade of wheat while ‘high quality wheat’ may not, this could have an impact on whether the buyer can lawfully avoid the contract as in the latter case there may be a fundamental breach whereas in the former it may not.⁹⁰ Additionally, commodity goods are subject to price volatility, this is demonstrated in the US case *Treibacher Industrie AG v Allegheny Technologies Inc*, where the CISG was the governing law, the price of tantalum carbide, had risen from \$175 per kilogram (US) in 1999 to \$1100 per kilogram (US) in 2000.⁹¹ In this case the buyer would want to ensure a speedy avoidance of the contract without having to deal with uncertainty regarding the lawfulness of avoidance. For example, if the goods were non-conforming the buyer would need to establish that a fundamental breach had occurred to substantially deprive him of his contractual interest.⁹² Another feature of the commodities market is that the goods are often bought and sold numerous times while in transit, commonly referred to as the ‘string sale’. Documents that represent those goods are transferred from the seller to buyer and it is the final buyer in the string sale that will deal with receiving the physical goods.⁹³ Thus, given the highly speculative nature of commodities sales and the multiple parties involved, buyers will require certainty in knowing that they can lawfully exercise the remedy of avoidance consistently to

⁹⁰ International Monetary Fund, ‘Commodity Substitution, Sample Space and New Goods’ in *Export and Import Price Index Manual Theory and Practice* (2009)

<www.imf.org/external/np/sta/tegeipi/ch9.pdf> accessed 10 August 2013.

⁹¹ See discussion at chapter 5.2.5; United States 12 September 2006 Federal Appellate Court 11th Circuit (*Treibacher Industrie AG v Allegheny Technologies Inc*) (*IICL*, 09 January 2009)

<<http://cisgw3.law.pace.edu/cases/060912u1.html>> accessed 01 February 2014.

⁹² CISG, art 25.

⁹³ 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, 629.

the whole of the string sale.⁹⁴ Bridge and Mullis also point out that commodity contracts involve documentary sales⁹⁵ incorporating delivery terms such as ‘CIF’⁹⁶ and ‘FOB’⁹⁷ and the CISG is unsuitable for these transactions as it makes no mention of these types of terms.⁹⁸ The thesis will argue that while the CISG does not make express reference to delivery terms they *can* be correctly interpreted and applied using its provisions.⁹⁹ Furthermore, although art 2 expressly excludes the sale of negotiable instruments,¹⁰⁰ the documents that represent the sale of commodities do *not* fall under this heading, rather negotiable instruments should only be read to mean those representing payment, such as cheques or bills of exchange.¹⁰¹ Honnold confirms this and states, ‘the exclusion of “negotiable instruments”...refers to instruments calling for the payment of money, however documents controlling the delivery of goods...are subject to the Convention when they are employed to effect the delivery of goods’.¹⁰²

The particulars of commodities sales contracts will differ from manufactured goods and specially designed or bespoke contracts. Although contracts for manufactured and specially designed machinery may not carry with it the problems associated with multiple parties and price fluctuations, this is not to say that the CISG, in respect of the buyer’s remedy of avoidance, is only suitable for some

⁹⁴ Winsor (n 82) 92.

⁹⁵ The buyer pays the price upon the seller's tender of documents of title covering the goods (in most cases this is the bill of lading).

⁹⁶ Cost, insurance, freight.

⁹⁷ Free on board.

⁹⁸ 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; Bridge, ‘Uniformity and Diversity in the Law of International Sale’ (n 76) 55.

⁹⁹ See discussion at chapter 4.3.2 and 5.2.5; CISG, arts 7,8 and 9.

¹⁰⁰ CISG, art 2(d).

¹⁰¹ Leisinger (n 86) 122.

¹⁰² John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 48; UNCITRAL, (8th session) ‘Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved or deferred for further consideration by the Working Group at its first five sessions’ (1 April 1975) A/CN.9/100/Annex II para 23-25.

international sales contracts. The term ‘manufactured products’ refers to those goods which are produced from raw materials. This can include goods such as cars, electronic devices, plastics and textiles.¹⁰³ The nature of these goods can be classed as market insensitive items, meaning that for the most part the market prices are quite stable and not subject to rapid fluctuations as is the case with the commodities market.¹⁰⁴ The buyer’s interests in receiving the physical goods are greater than that of commodities sales as the substitute market for such goods may not be as broad. However, the buyer will still want to know when it will be lawful to exercise the remedy of avoidance as they may be waiting to resell the goods or use them for further processing and such delays may deprive them of their contractual interest.¹⁰⁵

Contracts for specially designed products, meaning those goods which are bespoke to the buyer’s exact specifications will carry with it a high interest in contractual performance. An example of this would be a contract for the sale of a printing machine that is able to produce fonts of a precise size and style.¹⁰⁶ In such cases the buyer’s interest in performance will be increased as the substitute market for such a machine may be non-existent or substitute procurement may result in extensive delays and expense. Thus, the rigorous application of the remedy may suit the buyer in this case as it will mean that the seller will not be able to escape its contractual obligations.

2.4.2 Criteria of Fundamental Breach to Establish the Buyer’s Right to Avoid the Contract

Following on from the central theme of the buyer’s right to avoid the contract, Bridge cites art 25 and its requirement of a fundamental breach as one of the main

¹⁰³ UNCTAD, ‘Trade and Development Report’ (Geneva 2002) UNCTAD/TDR/2002.

¹⁰⁴ Bridge (n 12) 17.

¹⁰⁵ See discussion at chapter 5.1.2.

¹⁰⁶ China 14 January 2004 CIETAC Arbitration proceeding (*Printing machine case*) (IICL, 09 August 2007) <<http://cisgw3.law.pace.edu/cases/040114c1.html>> accessed 11 October 2013.

reasons why the CISG is unsuitable for all types of sales of goods contracts.¹⁰⁷ The wording of art 25 contains some ambiguous phrases such as ‘detriment’, ‘substantially to deprive’ and ‘foreseeability’. It has been argued that the doctrine creates uncertainty as to whether the buyer’s right of avoidance is permitted and it is therefore not suited to the swift decision making that is needed especially in commodity markets.¹⁰⁸ However, this argument does not take into consideration the principles of variation and derogation found in art 6 whereby the parties are free to exclude the applicability of art 25 altogether or alternatively change the criteria of fundamental breach.¹⁰⁹ To adduce evidence of this art 8(3) directs the courts to interpret the parties intent with regard to ‘the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties’. For example, parties could expressly set out in the contract the standards of quality that would amount to conforming goods.¹¹⁰ Scholars such as Schwenger and Liu support the use of these stipulations and argue that they are commonly found in international sales contracts.¹¹¹ The thesis takes the view that the use of arts 6 and 8 can assist contracting parties in minimising the risk of uncertainty associated with the doctrine of fundamental breach and the buyer’s remedy of avoidance. The thesis examines reported cases to determine if the courts will uphold the stipulations and intentions of the parties as stated in the contract. Schwenger states that:

¹⁰⁷ Bridge, ‘Uniformity and Diversity in the Law of International Sale’ (n 76) 68.

¹⁰⁸ Guest and Treitel (n 12) 18-004; See also *ibid.*

¹⁰⁹ See discussion at chapter 4.1.4.

¹¹⁰ CISG, art 35(1); Cesare Massimo Bianca, ‘Article 35’ in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 272.

¹¹¹ Ingeborg Schwenger, ‘The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents’ (2005) 36 *VUWLR* 795, 801; Chengwei Liu, ‘The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and Case Law’ (*IJCL*, 23 May 2005) <www.cisg.law.pace.edu/cisg/biblio/liu8.html> accessed 24 August 2013.

The contract...not only creates obligations, but also determines how important they are for the promisee, and thus the importance of the “detriment” suffered by him. It is, therefore, primarily for the parties themselves to make clear what importance is to be attached to each obligation and to the corresponding interest of the promisee.¹¹²

An example of this can be seen in the case involving aluminium rolls, where the buyer had made known to the seller the exact thickness of each roll, when the goods delivered failed to comply with these instructions, the tribunal held that there had been a fundamental breach of contract.¹¹³ To strengthen the argument that the CISG is a suitable¹¹⁴ sales law even for contracts involving commodity goods, the thesis looks at the relevance of usages.¹¹⁵ In the absence of express contractual stipulations, the courts can also look to art 9 for any usages which have been incorporated. This can either be done through practices established between the parties and usages to which they have agreed¹¹⁶ or usages commonly used and widely known in the trade.¹¹⁷ The thesis incorporates this argument and utilises the decisions of cases to strengthen the point that the buyer’s remedy of avoidance is suitable for the complexities of commodities trade.¹¹⁸ An example of this was a case involving the sale of iron-molybdenum where it was held that a contract which incorporated the term ‘CIF’¹¹⁹ should be interpreted to mean that time of delivery

¹¹² Ulrich Schroeter, ‘Article 25’ in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 409.

¹¹³ China 30 October 1991 CIETAC Arbitration proceeding (*Roll aluminium and aluminium parts case*) (*IICL*, 27 February 2007) <<http://cisgw3.law.pace.edu/cases/911030c1.html>> accessed 10 June 2013.

¹¹⁴ Text to n 4.

¹¹⁵ See discussion at chapter 4.3, 4-3.1, 4.3.2 and 4.3.4.

¹¹⁶ CISG, art 9(1).

¹¹⁷ CISG, art 9(2).

¹¹⁸ See discussion at chapter 4.3.4.

¹¹⁹ Commonly found under INCOTERMS a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC); ICC, *INCOTERMS 2010* (ICC Publication No 715, 2010).

was of the essence to the contract and when breached, the buyer was entitled to avoid the contract.¹²⁰

2.4.3 The Buyer's Right to Avoid the Contract for Different Types of Breaches

As mentioned above the main requirement of art 49 is to establish a fundamental breach. However, the buyer's remedy of avoidance is not limited to establishing a fundamental breach it can also be used in the case where the seller fails to deliver the goods, in that circumstance the buyer can set an additional time for performance.¹²¹ If the seller fails to deliver within the additional time set the buyer can declare the contract avoided.¹²² The notion of fixing an additional time for a party to perform its contractual obligations can be traced back to s 326 of the German Civil Code, *Bürgerliches Gesetzbuch*.¹²³ The idea of the so-called *Nachfrist*¹²⁴ was to give the party additional time to perform its obligations. Under the CISG the buyer's right to exercise the additional time to perform is limited to the specific circumstances mentioned above, thus the fixing of an additional time *cannot* convert all breaches from non-fundamental to fundamental.¹²⁵ Gärtner argues that the fixing of an additional time for performance is not suitable for all types of sale of goods contracts. For example she argues that the buyer may urgently require the delivery of the goods, thus a failure to deliver in these circumstances should *always* be a fundamental breach.¹²⁶ The thesis agrees with Gärtner to some extent and argues

¹²⁰ See discussion at chapter 3.7.1 and 4.3.4; Germany 28 February 1997 Appellate Court Hamburg (*Iron molybdenum case*) (IICL, 12 September 2007)

<<http://cisgw3.law.pace.edu/cases/970228g1.html>> accessed 15 October 2013.

¹²¹ CISG, art 47(1).

¹²² See discussion at chapter 5.2.8; CISG, art 49(1)(b).

¹²³ Hereinafter referred to as the 'BGB'; On 02 January 2002, the new *Bürgerliches Gesetzbuch* came into force, the old s326 can now be found in the amended s 281.

¹²⁴ Meaning 'grace period'.

¹²⁵ Michael Will, 'Article 47' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 343.

¹²⁶ Anette Gärtner, 'The Vienna Convention and Standard Form Contracts' in Pace International Law Review (eds), *Review of the Convention on Contracts for International Sale of Goods* (Kluwer 2001) 59.

that *if* the seller's failure to perform its obligations under art 49(1)(b) amounted to a fundamental breach, that is, the parties made it clear in accordance with art 8 that this aspect of performance was essential then the party should *not* have to fix an additional time for performance. However, if this was never implied or expressly stated then it would be incorrect for the courts to adopt such an approach as the parties may still have an interest in performance. Therefore, the thesis will argue that the mechanism of fixing an additional time provides a balance to the buyer and seller, on one hand a party cannot try to escape their contractual obligations for trivial breaches, while on the other hand significant obligations such as delivery can give the buyer the right to avoid the contract if the seller continues to not perform.¹²⁷ The buyer's remedy of avoidance has been criticised as being too complicated.¹²⁸ The reason cited for this criticism is that there are different rules for different types of breaches.¹²⁹ The thesis will respond to this criticism by pointing out that art 49's coverage of specific types of breaches is beneficial to contracting parties as it sets out rules to address situations that commonly arise in international trade. Furthermore once the provision is examined for its meaning and application, the buyer will have more certainty on when avoidance is lawful.

2.4.4 The Impact of the Seller's Right to Cure the Breach on the Buyer's Remedy of Avoidance

The next theme is the seller's ability to cure defects in performance before and after the date of delivery. Firstly, the CISG permits the right to cure defects in the documents before the time of performance has passed.¹³⁰ These documents will relate to the goods and typically consist of the bill of lading, commercial invoices

¹²⁷ Will (n 125) 343.

¹²⁸ Jan Hellner, 'The Vienna Convention and Standard Form Contracts' in Paul Volken and Petar Sarcevic (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) 335, 347.

¹²⁹ *ibid.*

¹³⁰ CISG, art 34.

and insurance documents.¹³¹ Article 34 CISG has remained relatively uncontroversial and there are few reported cases in this area.¹³² Bridge notes that this provision could pose a problem on the CISG's view as to what will amount to a 'clean document' for the purposes of commodities sale of goods.¹³³ The thesis will argue that this issue does not present a problem under the CISG as regard will always be had to party autonomy and the terms of the contract¹³⁴ and the parties' express or implied intentions under art 8(3). Furthermore, the case law demonstrates that courts will also look to any trade terms or practices applicable by virtue of art 9.¹³⁵

The next provision dealing with the issue of cure can be found in art 37 CISG which permits the seller the right to cure any defects in the goods before the date of performance has passed. The seller may exercise the right as long as it does not cause unreasonable inconvenience or expense to the buyer. Keller and Bianca argue that this provision could pose several problems.¹³⁶ For example, the issue arises as to what form the cure can take, a reading of art 37 would indicate that it is at the discretion of the seller whether the cure would be a substitute delivery or a repair, as long as did not cause the buyer unreasonable inconvenience.¹³⁷ Furthermore, it needs to be determined if the buyer could refuse the seller the opportunity to cure the

¹³¹ Ole Lando, 'Article 34' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 265.

¹³² Pace Law School Institute of International Commercial Law, 'UNCITRAL Digest Cases for Article 34' (*IJCL*, 03 October 2012) <www.cisg.law.pace.edu/cisg/text/digest-cases-34.html> accessed 21 October 2013.

¹³³ See discussion at chapter 6.1.2; Bridge (n 12) 30.

¹³⁴ CISG, art 6.

¹³⁵ See discussion at chapter 4.2 and 4.3; ICC Arbitration Case No 7645 of March 1995 (*Crude metal case*) (*IJCL*, 15 February 2007) <<http://cisgw3.law.pace.edu/cases/957645i1.html>> accessed 17 August 2014.

¹³⁶ Bertram Keller, 'Early Delivery and Seller's Right to Cure Lack of Conformity: Article 37 CISG and UNIDROIT Principles Comparative' (*IJCL*, 11 June 2004) <www.cisg.law.pace.edu/cisg/biblio/keller.html> accessed 09 May 2013; See also Cesare Massimo Bianca, 'Article 37' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 294.

¹³⁷ Keller (n 136).

defect, as the wording of the CISG on this point is conflicting.¹³⁸ Article 52(1) CISG states that, ‘if the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery’. Thus, art 37 would have to be interpreted to mean that the buyer has accepted the first tender of those goods even though it was on an earlier date than stated in the contract, leaving the seller open to exercise a second tender of those goods under art 37.¹³⁹ The thesis will argue that the seller’s opportunity to cure defects before the date of performance would have to be looked at in conjunction with the terms of the contract and also with regard to the effect of the breach. If the breach can be cured without causing unreasonable inconvenience or unreasonable expense to the buyer, it would be difficult for the buyer to argue that the breach is fundamental, that is, to cause substantial deprivation of the buyer’s contractual interests.¹⁴⁰ This point would be even harder to argue as the date for contractual performance would not have expired, thus the buyer would be hard-pressed to refuse the seller’s offer to retender.

The most controversial of the cure provisions is art 48 CISG, which grants the seller the right to cure defects in the documents and goods even after the date of performance has passed as long as this does not cause the buyer unreasonable delay or inconvenience. The wording of art 48 has resulted in much academic conjecture because of its direct link to art 49. Article 48(1) states, ‘subject to Article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations...’. Will argues that ‘the relationship between Articles 48 and 49 remains unsettled. Here the interests of buyers and sellers clash so strongly that it seems almost impossible to find a proper balance. In fact, the issue has long

¹³⁸ Bianca (n 136) 294.

¹³⁹ Keller (n 136).

¹⁴⁰ See discussion at chapter 6.2.2.

been one of the most controversial in international sales law'.¹⁴¹ If the words meant that the buyer could not exercise the right to avoid the contract until the seller has had the opportunity to cure the defect, this would place the buyer in an uncertain position.¹⁴² On the other hand if the buyer exercised a swift avoidance of the contract this would preclude the seller from exercising the right to cure the defect.¹⁴³ The result would be one of uncertainty which would be undesirable for either party regardless of the type of contract. Honnold contends that, 'the question whether the breach was "fundamental" for the purpose of avoidance must be answered in the light of the effect of a rightful offer to cure, for otherwise seller's exercise of this right would be futile'.¹⁴⁴ He argues that if cure is possible the breach cannot be fundamental and as a result avoidance of the contract is not possible.¹⁴⁵ However, there are some scholars who disagree. For example, Ziegel states that, 'there is no requirement in the Convention requiring an injured party to give the breaching party an opportunity to cure before exercising his right of avoidance'.¹⁴⁶ The thesis examines the relationship between arts 48 and 49, it will analyse the legislative history to discern the intentions of the drafters as well as examine academic commentary and case decisions.¹⁴⁷ In doing so it will be able to recognise the theoretical debate between these two provisions as well as to understand how it is applied to the cases in practice and further how this will impact on international sales contracts.

¹⁴¹ Michael Will, 'Article 48' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 348.

¹⁴² *ibid.*

¹⁴³ *ibid.*

¹⁴⁴ Honnold (n 102) 209.

¹⁴⁵ *ibid.*; See also Eric Schneider, 'The Seller's Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods' (1989) 7 *Ariz J Int'l & Comp L* 69,89.

¹⁴⁶ Jacob Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Nina Galston & Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Juris 1984) 9.

¹⁴⁷ See discussion at chapter 6.3.2.

2.4.5 Exercise and Effects of the Buyer's Right to Avoid the Contract

The next theme that emerges from the thesis is how the buyer's remedy of avoidance is exercised and what its effects are on the contract. Article 26 CISG states that the party seeking to avoid the contract must give notice to the other party to make the declaration effective.¹⁴⁸ Although the purpose of this approach under the CISG is to eliminate uncertainty that can occur with *ipso facto*¹⁴⁹ avoidance, the wording of art 26 has been criticised as being too ambiguous in its meaning.¹⁵⁰ Jacobs argues that the CISG does not stipulate in what form the notice must be communicated and further that there is no guidance given on the required content of the notice.¹⁵¹ Date-Bah argues that the CISG is deliberately silent on the issue of form as the delegates at the drafting of the CISG wanted to keep the provision flexible.¹⁵² Thus, no formalities are required for communication of the notice and it may be given orally or in written form.¹⁵³ Furthermore, the thesis argues that although the CISG does not offer express guidance on the substance of the notice, the general principles of reasonableness and good faith¹⁵⁴ would indicate that the

¹⁴⁸ See discussion at chapter 7.1.1.

¹⁴⁹ See discussion at chapter 5.2.1; Means 'automatic'.

¹⁵⁰ Samuel Date-Bah, 'Article 26' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 223.

¹⁵¹ Christopher Jacobs, 'Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability' (2003) 64 U Pitt L Rev 407.

¹⁵² Date-Bah (n 150) 224; UNCITRAL, 'Yearbook: Volume VIII (1977)' A/CN.9/SER.A/1977 <www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf> accessed 28 June 2014.

¹⁵³ Unless the member state has made a declaration under CISG, art 96 states: 'A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State'; Date-Bah (n 150) 224.

¹⁵⁴ See discussion at chapter 3.5; Robert Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21; Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, Clarendon 1998) para 27; Paul Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods' (1999) 18 J L & Com 333, 345.

language used should be clear and decisive.¹⁵⁵ Korpinen points out that one of the main problems with the avoidance notice requirement is the timing of when it should be issued.¹⁵⁶ This is demonstrated in cases of non-conforming goods where the buyer must notify the seller of the non-conformity in accordance with art 39 CISG ‘within a reasonable time’. Article 49(2)(b)(i) states that the buyer will lose the right to avoid the contract if he does not make the declaration ‘after he knew or ought to have known of the breach’. Korpinen argues that if the latter provision is interpreted strictly, the buyer could lose the right to avoid the contract altogether if the avoidance notice is not given at the same time as the notice of non-conformity.¹⁵⁷ The nature of the problem is illustrated where the buyer may be aware of the breach but not as to the seriousness, that is, if it is fundamental. An example of this can be where the buyer orders a purpose-built machine and on delivery the machine is slightly non-conforming however the buyer is not aware that the non-conformity will get worse over time. The buyer tenders the notice of non-conformity and the seller may try to remedy the defect or the parties may try to negotiate for another remedy. If the seller fails to remedy the defect or negotiations break down the breach could then become ‘fundamental’ as the buyer’s contractual expectations are not met and he would then tender the notice of avoidance. If art 49(2)(b)(i) is strictly interpreted then the buyer may have already lost the right to avoid the contract. Early case law on this issue is unclear as one decision points to the notices having to be made at the same time¹⁵⁸ while others acknowledge that the notice of avoidance could be given

¹⁵⁵ Jacobs (n 151) 409.

¹⁵⁶ Ari Korpinen, ‘On Legal Uncertainty Regarding Timely Notification of Avoidance of the Sales Contract’ (*IJCL*, 2004) <<http://www.cisg.law.pace.edu/cisg/biblio/korpinen.html>> accessed 30 June 2014.

¹⁵⁷ See discussion at chapter 5.2.9; *ibid*.

¹⁵⁸ Switzerland 26 April 1995 Commercial Court Zürich (*Saltwater isolation tank case*) (*IJCL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950426s1.html>> accessed 30 June 2014.

at a later time than the notice of non-conformity.¹⁵⁹ The thesis favours the latter approach for two reasons, arguing that to do otherwise would undermine the provisions of the CISG. Firstly, art 7(1) requires that the CISG be interpreted with reference to good faith, this would mean that effect should be given to its spirit as well as the wording.¹⁶⁰ Thus the drafters could not have intended for the buyer to lose the right of avoidance if the seriousness of the breach was not immediately apparent, for instance in the case of latent defects. Secondly, regard is to be had to the wording of the contract and the parties' intent¹⁶¹ thus if the parties had made express stipulations on the conformity of the goods, that is, the standards to adhere to, then if these are breached the party *should* give notice of non-conformity and notice of avoidance at the same time, to do otherwise may allow the buyer the opportunity to manipulate the market. However in the absence of these standards and particularly in the case of latent defects it would be unfair to require simultaneous notices as the seriousness of the breach may not yet be known to the buyer.

The last theme to be examined is the effect and consequences of the buyer's avoidance of the contract.¹⁶² Bridge states that the CISG's provisions on the effects of the remedy of avoidance make it one of the 'least easily understood parts of the Convention'.¹⁶³ The consequences of avoidance can be described as both

¹⁵⁹ Italy 13 December 2001 District Court Busto Arsizio (*Machinery case*) (IICL, 26 November 2012) <<http://cisgw3.law.pace.edu/cases/011213i3.html>> accessed 30 June 2014; See also Spain 21 March 2006 Appellate Court Castellón (*Apparatus for the reduction of consumption of gasoline*) (IICL, 08 November 2007) <<http://cisgw3.law.pace.edu/cases/060321s4.html>> accessed 30 June 2014.

¹⁶⁰ See discussion at chapter 3.4.3.

¹⁶¹ CISG, art 8.

¹⁶² See discussion at chapter 7.

¹⁶³ Bridge, 'The Nature and Consequences of Avoidance of the Contract under the United Nations Convention on the International Sale of Goods' (n 76) 128.

retrospective and prospective.¹⁶⁴ Article 81 CISG states that the effect of avoidance on the contract is that it ‘releases both parties from their obligations under it’. The effect of this provision is not to void the contract *ab initio*¹⁶⁵ but rather to redirect the obligations of the parties.¹⁶⁶ Thus, while the parties are relieved from their performance obligations under the original contract, that is, delivery or payment, the breaching party may still be liable to pay damages.¹⁶⁷ Furthermore, contracting parties have to make restitution of any part of the contract that was already performed.¹⁶⁸ The retrospective effects can be seen in the wording of art 81 stating that ‘avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract’.¹⁶⁹ Thus, these types of provisions such as arbitration clauses or agreed damages clauses will continue to remain in place even though the contract has been avoided. Bridge argues that the application of art 81 is not straightforward stating that, ‘restitution under the CISG involves the performance of a resale contract that cancels out the initial sale contract...this resale contract...cannot be a simple mirror image of the original sale contract’.¹⁷⁰ He points out that although art 81(2) states that restitution is to be made

¹⁶⁴ Chengwei Liu, ‘Effects of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and Case Law’ (*IJCL*, 23 June 2005) <<http://www.cisg.law.pace.edu/cisg/biblio/liu12.html>> accessed 24 June 2014.

¹⁶⁵ Means ‘from the beginning’.

¹⁶⁶ 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) 341.

¹⁶⁷ CISG, art 81(1).

¹⁶⁸ CISG, art 81(2).

¹⁶⁹ CISG, art 81(1).

¹⁷⁰ Bridge, ‘The Nature and Consequences of Avoidance of the Contract under the United Nations Convention on the International Sale of Goods’ (n 76) 118.

‘concurrently’, it is silent on issues relating to the time, place and cost of restitution.¹⁷¹

The thesis will argue that although the CISG does not expressly address all issues relating to the above mentioned problems, it is still capable of answering these questions if the wording is interpreted correctly and the scholarly opinion and case law are used effectively. In particular the CISG Advisory Council examined the gaps identified by Bridge and in its opinion No 9, it examined the legislative history of the CISG and the intention of the drafters as well as the relevant case law to demonstrate that the CISG could answer these complex questions.¹⁷² This thesis will go further and argue that provisions dealing with the effects of avoidance under the CISG are thorough in that they work in conjunction with domestic laws to cover those issues that do not fall within its scope. These include: arbitration clauses, issues relating to property in the goods and agreed damages clauses.¹⁷³ Furthermore, the CISG addresses relevant issues such as: situations where the party loses the right to avoid the contract,¹⁷⁴ where restitution is impossible,¹⁷⁵ accounting for benefits received¹⁷⁶ and the payment of interest.¹⁷⁷

2.5 Conclusion

Although there is much scholarly material relevant to the CISG, the majority of the research focuses on small areas for examination. The buyer’s remedy of avoidance remains under-researched in the sense that there are no materials

¹⁷¹ Bridge, ‘The Nature and Consequences of Avoidance of the Contract under the United Nations Convention on the International Sale of Goods’ (n 76) 121.

¹⁷² Pace Law School Institute of International Commercial Law, ‘CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract’ (*IJCL*, 25 February 2009) <www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

¹⁷³ Denis Tallon, ‘Article 81’ in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 603.

¹⁷⁴ CISG, art 82(1).

¹⁷⁵ CISG, art 82(2).

¹⁷⁶ CISG, art 84(2).

¹⁷⁷ CISG, art 84(1).

published looking at the remedy as a whole, that is, how it is established, exercised and what are its consequences.¹⁷⁸ Rather, the existing literature looks at individual issues such as fundamental breach, the right to cure defects and other surrounding issues. The thesis will also examine the provisions for drafting and interpreting the contract, namely arts 6, 7, 8 and 9. The thesis looks at those surrounding provisions which could affect the exercise of the buyer's right to avoid the contract; this will include the notice requirement,¹⁷⁹ fixing an additional time for performance¹⁸⁰ and the opportunity to cure defects.¹⁸¹ The thesis differs from existing scholarly material in that much of what has been written has been largely abstract, with little or no reference to the existing case decisions and how these provisions are treated in practice. Existing research is largely doctrinal in nature and focuses mainly on the wording of the provisions and the theoretical debates about the possible interpretations. As such it is difficult to determine whether the wording of a provision was merely controversial in the context of an academic debate rather than generating actual disputes in practice.

In examining the existing case decisions the thesis seeks to answer the question whether the remedy of avoidance under the CISG is suitable for international sale of goods.¹⁸² The thesis, examines whether the UNIDROIT Principles could be used to supplement the gaps and ambiguous meanings of certain provisions in the CISG. Lastly, where relevant, the thesis compares how English law would treat similar breaches and analyses whether English law would permit the contract to be

¹⁷⁸ A search has been carried out on various PhD theses Repositories: British Library EThOS; Index to Theses <www.theses.com/> accessed 06 November 2014.

¹⁷⁹ CISG, arts 26 and 39.

¹⁸⁰ CISG, art 47.

¹⁸¹ CISG, arts 34, 37 and 48.

¹⁸² Text to n 4.

terminated in those circumstances. In doing so, the thesis will undertake research which has not previously been examined.

The next chapter will examine the history, scope and purpose of the CISG. It will examine the interpretive provisions of art 7 and look at how it can be used to resolve gaps and clarify ambiguous wording and phraseologies in the CISG. The chapter will move on to examine the legitimacy of using the UNIDROIT Principles as a means of gap-filling and to aid in interpretation. The chapter will conclude by examining the English law on termination of the contract to see if these rules offer the buyer more certainty and swiftness to terminate the contract.