

## CHAPTER THREE

### Background and Interpretation of the CISG

#### 3.0 Introduction

This chapter examines the background and scope of the United Nations Convention on Contracts for the International Sale of Goods 1980 with the aim of understanding its purpose and interpretative tools.<sup>1</sup> Specifically the chapter provides an in-depth analysis of art 7 CISG which provides the key to understanding the provisions of the CISG. This discussion assists in understanding how the buyer's remedy of avoidance is interpreted and applied.<sup>2</sup> Additionally, the chapter considers the legitimacy of 'soft law' such as those principles of commercial contract law drafted by the International Institute for the Unification of Private Law<sup>3</sup> as a method of filling in the gaps and clarifying the ambiguities of the CISG.<sup>4</sup> Lastly the chapter examines the English common law,<sup>5</sup> in conjunction with the Sale of Goods Act 1979,<sup>6</sup> dealing with termination of the contract.<sup>7</sup> This analysis addresses claims that English law is better suited<sup>8</sup> to international sale of goods contracts<sup>9</sup> and sets the

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<sup>1</sup> 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](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html)> accessed 29 September 2013.

<sup>2</sup> See discussion at chapter 5.

<sup>3</sup> 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](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010)> accessed 18 July 2014.

<sup>4</sup> International Institute for the Unification of Private Law, 'UNIDROIT Principles of International Commercial Contracts' <[www.unidroit.org/english/principles/contracts/main.htm](http://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.

<sup>5</sup> Hereinafter referred to as 'English law'.

<sup>6</sup> Hereinafter referred to as 'SGA'; Sale of Goods Act 1979, SR & O 1983/1572.

<sup>7</sup> Under English law 'termination' has the same meaning as 'avoidance' under the CISG.

<sup>8</sup> 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.

<sup>9</sup> See discussion at chapter 1.2.

foundations for subsequent chapters that involve a comparison of the CISG and the English law approaches to termination of the contract.<sup>10</sup>

### 3.1 Historical Background

In the late twentieth century, the international community expressed the need for a harmonised instrument of international sales law.<sup>11</sup> Honka commented that, ‘expanding trade will...increase the number of international contracts concluded and especially the economic volume involved and further necessitate the harmonized handling of contractual disputes’.<sup>12</sup> It is contended that such a harmonising measure would aid in increasing international trade, promoting fairness and reducing the negotiation cost of transactions.<sup>13</sup> In 1929, Rabel working with UNIDROIT, sought to establish a uniform law governing international transactions of sale.<sup>14</sup> This resulted in two Hague Conventions in 1964: the Uniform Law for the International Sale of Goods<sup>15</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods.<sup>16</sup> These came into force in 1972, but they had limited success as uniform law, because they were generally considered too broad and thought to favour industrialised nations.<sup>17</sup> Consequently, they were only ratified by nine countries.<sup>18</sup>

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<sup>10</sup> 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; See also Michael Bridge, ‘Uniformity and Diversity in the Law of International Sale’ (2003) 15 Pace Int’l L Rev 55.

<sup>11</sup> Hannu Honka, ‘Harmonization of Contract Law Through International Trade: A Nordic Perspective’ (1996) 11 Tul Eur & Civ LF 111.

<sup>12</sup> *ibid* 113.

<sup>13</sup> James Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 Cornell Int’l L J 273, 277.

<sup>14</sup> Sieg Eiselen, ‘Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa’ (1999) 116 SALJ 323, 333.

<sup>15</sup> Hereinafter referred to as ‘ULIS’.

<sup>16</sup> Hereinafter referred to as ‘ULF’; Bailey (n 13) 278.

<sup>17</sup> Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (2<sup>nd</sup> edn, Transnational 1997).

<sup>18</sup> United Kingdom, San Marino, Belgium, Israel, The Netherlands, Italy, Federal Republic of Germany, Gambia and Luxembourg; Bailey (n 13) 278.

The failure of these conventions to gain widespread ratification, suggested that more effort was needed to create a uniform sales law that could be applied to all countries regardless of their legal, social or economic backgrounds. In 1966, the General Assembly of the United Nations<sup>19</sup> established the United Nations Commission on International Trade Law.<sup>20</sup> This working group set to work to review the ULIS and ULF in order to create a new convention.<sup>21</sup> At the UN Diplomatic Conference, which adopted the CISG, 62 countries participated: 22 European and other developed western countries,<sup>22</sup> 11 members of what is now the former Soviet bloc,<sup>23</sup> 11 South-American, 7 African and 11 Asian countries.<sup>24</sup> The participating nations approved six official CISG texts: Arabic, English, French, Spanish, Chinese and Russian.<sup>25</sup>

### 3.2 Scope of the CISG

The CISG, once ratified by a contracting state, results in its taking precedence over domestic law and choice of legal rules with regard to the sale of goods.<sup>26</sup> The CISG consists of 101 articles and is divided into four parts. Part I deals with its sphere of application and contains general provisions applicable to the rest of the CISG. Part II is concerned with rules for the formation of contracts of sale and Part III with the rules governing the seller's and buyer's substantive obligations. Part IV contains the final provisions on adherence to and ratification of the CISG by

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<sup>19</sup> Hereinafter referred to as the 'UN'.

<sup>20</sup> Hereinafter referred to as 'UNCITRAL'.

<sup>21</sup> Jacob Ziegel, 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 NZBLQ 336, 337.

<sup>22</sup> For example the United States, Canada, Australia.

<sup>23</sup> For example the Former Soviet Union, Poland, Czechoslovakia .

<sup>24</sup> Pace Law School Institute of International Commercial Law, 'CISG by State: Trends' (*IICL*, 03 August 2006) <[www.cisg.law.pace.edu/cisg/cisgintro.html](http://www.cisg.law.pace.edu/cisg/cisgintro.html)> accessed 29 September 2013.

<sup>25</sup> *ibid.*

<sup>26</sup> Michael Bridge, *The International Sale of Goods: Law and Practice* (2<sup>nd</sup> edn, OUP 2007) 17.

contracting states. This includes the reservations that may be made at one of several stages regarding the CISG's applicability to a contracting state.<sup>27</sup>

Article 1(1)(a) states that the CISG applies to contracts for the sale of goods between parties whose places of business are in different contracting states. It also applies when the rules of private international law lead to the application of the law of a contracting state.<sup>28</sup> It is important to note that the CISG is a set of rules for business not consumer contracts.<sup>29</sup> Additionally, certain types of contracts are specifically excluded under the CISG.<sup>30</sup> Questions involving the validity of the contract are outside the CISG, as is the effect that the contract may have on property in the goods sold,<sup>31</sup> and any liability of the seller for defective goods causing death or personal injury to any person.<sup>32</sup> These matters are determined in accordance with national laws. One of the notable features of the CISG is that it allows contracting parties the ability to derogate from,<sup>33</sup> or exclude its provisions altogether.<sup>34</sup> This feature will be examined further in chapter four of the thesis.<sup>35</sup>

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<sup>27</sup> 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](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html)> accessed 29 September 2013.

<sup>28</sup> CISG, art 1(1)(b) states: 'when the rules of private international law lead to the application of the law of a Contracting State'.

<sup>29</sup> Bridge (n 26) 23.

<sup>30</sup> 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'.

<sup>31</sup> CISG, art 4 states: 'This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold'.

<sup>32</sup> CISG, art 5 states: 'This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person'.

<sup>33</sup> Under CISG, art 6 derogation under the Convention is permitted, with the one exception of CISG, art 12.

<sup>34</sup> This exclusion can be done expressly, it is somewhat contentious amongst some scholars if an exclusion can be implied therefore the exclusion can be implied but must be sufficiently clear, parties are advised to make their intentions clear to avoid unwanted results; Bridge argues that some States may require an explicit written exclusion, unlike ULIS the CISG did not specifically say implied exclusions were permissible, thus there is doubt on the issue; See also Bridge (n 26) 540;

### 3.3 Purpose of the CISG

It is necessary to address why the CISG is an important instrument to govern international sale of goods transactions. In order to answer this question, we must examine the position of contracting parties prior to the enactment of the CISG. Before the CISG came into force, contracting parties would usually compromise on the applicable sales law by choosing the foreign law of a third-party country. This would prevent either party from gaining an unfair advantage of greater knowledge or familiarity with the applicable law than the other party.<sup>36</sup> However, this was not always the most prudent approach as difficulties arose with reaching an agreement with foreign parties on the applicable sales law.<sup>37</sup> It is argued that the CISG offers parties a compromise which may decrease the time and legal costs involved in research of foreign laws as well as avoiding any unfair advantage to either party.<sup>38</sup>

However, these claims are contentious as it is debatable whether the CISG has fulfilled the purpose of making international sales transactions more certain, efficient, and less costly.<sup>39</sup> Hobhouse argues that:

These conventions are inevitably and confessedly drafted as multi-cultural compromises between different schemes of law. Consequently they will normally have less merit than most of the individual legal systems from which they have been derived. They lack coherence and consistency. They create problems about their scope. They introduce

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UNCITRAL, 'Yearbook: Volume I (1968-1970)' A/CN.9/SER.A/1970 <[www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb\\_1968\\_1970\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/yb_1968_1970_e.pdf)> accessed 26 October 2013; Ingeborg Schwenzer and Pascal Hachem, 'Article 6' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3<sup>rd</sup> edn, OUP 2010) 103.

<sup>35</sup> See discussion at chapter 4.1.2.

<sup>36</sup> Christiana Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts' (2005) 7:3 EJLR 303.

<sup>37</sup> J VanDuzer, 'The Adolescence of the United Nations Convention on Contracts for the International Sale of Goods in Canada' (Canadian Bar Association's International Law Section Annual Conference, Ottawa, May 2001) <[www.cisg.law.pace.edu/cisg/biblio/vanduzer2.html](http://www.cisg.law.pace.edu/cisg/biblio/vanduzer2.html)> accessed 26 October 2013.

<sup>38</sup> Larry DiMatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' (1997) 22 Yale J Int'l L 111, 143.

<sup>39</sup> 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; Larry DiMatteo and Daniel Ostas, 'Comparative Efficiency in International Sales Law' (2011) 26:2 Am U Int'l L Rev 371.

uncertainty where there was no uncertainty before. They probably deprive the law of those very features which enable it to be an effective tool for the use of international commerce.<sup>40</sup>

The thesis will argue that these criticisms are premature and largely unsubstantiated, even in light of the compromises that would have been made on contentious issues.<sup>41</sup>

Given that the CISG automatically applies to contracts for the sale of goods between parties whose places of business are in different contracting states,<sup>42</sup> those parties do not have to wade through unfamiliar foreign legislation to find common agreement. Thus, harmonised laws help to facilitate international trade by providing predictability and familiar legal standards.<sup>43</sup> When contracts for international sale of goods are involved, the CISG supplants any previous domestic laws of a contracting state,<sup>44</sup> thus making it part of the integral framework of the laws of that country. For example, if there is a contract for the sale of goods involving a seller from the United States<sup>45</sup> and a buyer from Germany, if the contract stipulates it is to be governed by the laws of the seller's country, this would indicate that the CISG is the governing law and not the domestic commercial laws embodied in the Uniform Commercial Code.<sup>46</sup> The position is less certain if the CISG is applicable under art 1(1)(b). In this case, if the buyer is located in a contracting state, Germany, and the seller is in a non-contracting state, for example, the United Kingdom,<sup>47</sup> the CISG only applies if the designated law chosen to govern the transaction is that of a contracting state. An

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<sup>40</sup> Sir John Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 LQR 531, 533.

<sup>41</sup> See discussion below at chapter 3.4.

<sup>42</sup> CISG, art 1(1)(a) states: '(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States (a) when the States are Contracting States'.

<sup>43</sup> Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Ian Fletcher, Loukas Mistelis and Marise Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet and Maxwell 2001) 26.

<sup>44</sup> Subject to the requirements that it meets the criteria to satisfy CISG, art 1-6; Also subject to parties not choosing to opt out of the CISG or derogate from its provisions under CISG, art 6.

<sup>45</sup> Hereinafter referred to as the 'US'.

<sup>46</sup> Hereinafter referred to as the 'UCC'.

<sup>47</sup> Hereinafter referred to as the 'UK'.

example of this is a case involving a Russian buyer (contracting state) and an Indian seller (non-contracting state), whereby the contract stated that the choice of law would be the substantive law of the Russian Federation.<sup>48</sup> The arbitral tribunal interpreted this to mean the CISG was the applicable sales law as Russia is a contracting state therefore the CISG has been incorporated into the laws of that country.<sup>49</sup> This approach is based on the premise that both the buyer and seller are aware that their choice of law forum is governed by the CISG. An alternative to this approach is when the rules pursuant to international conventions lead to its application, for example, through the 1980 Rome Convention on the Law Applicable to Contractual Obligations.<sup>50</sup> The Rome Convention applies to contractual obligations in situations involving a choice of laws, even in the case where the designated law is that of a non-contracting State.<sup>51</sup> Parties are free to choose the law applicable to the whole or a part of the contract and the court that will have jurisdiction over disputes.<sup>52</sup> However, this may not always be the case if the contracting parties have chosen a foreign jurisdiction that prohibits a choice of law by the parties. An example of this is Brazil where the courts are wary of the advantage given to Western laws, thus enforcement of a foreign law in a Brazilian forum is extremely difficult.<sup>53</sup>

The next part of the chapter examines the interpretive tools found in art 7 as these will be important to determine if the buyer's remedy of avoidance is suitable to

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<sup>48</sup> Russia 18 July 2005 Arbitration proceeding 134/2004 (*IICL*, 07 August 2007) <<http://cisgw3.law.pace.edu/cases/050718r1.html>> accessed 26 October 2013.

<sup>49</sup> *ibid.*

<sup>50</sup> Hereinafter referred to as the 'Rome Convention'; Schwenger and Hachem (n 34) 41.

<sup>51</sup> EUROPA, 'Convention on the law applicable to contractual obligations (Rome Convention) 80/934/ECC' (*EUROPA*, 2009)

<[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/133109\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133109_en.htm)> accessed 01 August 2014.

<sup>52</sup> *ibid.*

<sup>53</sup> Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts' (2005) 44 *Colum J Transnat'l L* 959, 960; Schwenger and Hachem (n 34) 41.

deal to with contracts for international sale of goods.<sup>54</sup> If the provisions dealing with the remedy are correctly interpreted and applied, the remedy is appropriate for all types of breaches that may occur in different kinds of sale of goods contracts.

### **3.4 Interpretation of the CISG under Article 7**

The examination of whether the buyer's remedy of avoidance under the CISG is suitable for international sale of goods contracts will be determined via its legislative history, scholarly writings and judicial interpretation.<sup>55</sup> The thesis argues that an analysis of the interpretation and application of the CISG's provisions helps to clarify any ambiguities that exist, thereby reducing uncertainties and laying to rest some of the criticisms of its use in sale transactions.<sup>56</sup> This approach has been adopted because it enables us to gain an insight into the interpretation of crucial issues, such as the buyer's avoidance of the contract for fundamental breach.<sup>57</sup> In order to understand why interpretation is significant, the nature and formulation of art 7 must be examined.

Interpretation is the process by which judges and arbitrators in applying the CISG will ascertain the meaning and the legal effects to be given to its individual provisions. As a background to the discussion of the formulation of art 7, it must be understood that as a result of negotiations amongst participating countries, many provisions in the CISG were a product of compromise. Ziegel states that, 'where an acceptable compromise could not be reached the drafters unhappily had to seek refuge in vague or obfuscatory language'.<sup>58</sup> Thus, it is necessary to view the CISG not as a body of rules, providing an explicit solution to every problem that may arise, but as a framework of laws which are capable of generating solutions through its

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<sup>54</sup> Text to n 8.

<sup>55</sup> *ibid.*

<sup>56</sup> See discussion at chapter 1.2 and 2.4.1.

<sup>57</sup> See discussion at chapter 5.1.2.

<sup>58</sup> Ziegel (n 21) 338.

underlying principles. Article 7 provides a good illustration of this point.<sup>59</sup> Koneru states that this ‘is arguably the single most important provision in ensuring the future success of the CISG’.<sup>60</sup> Felemegas contends that:

[t]he area where the battle for international unification will be fought and won, or lost, is the interpretation of the CISG's provisions. Only if the CISG is interpreted in a consistent manner in all legal systems that have adopted it, will the effort put into its drafting be worth anything.<sup>61</sup>

This is demonstrated by the fact that there are no specially designated courts to hear disputes involving the CISG, rather it is up to national courts to make sure the provisions are correctly interpreted and applied.

The origins of art 7 are founded in the CISG’s predecessor ULIS, specifically arts 2<sup>62</sup> and 17.<sup>63</sup> Negotiations and compromises brought about the changes to the text of these articles, and resulted in the present wording of art 7. For example, it was noted with regard to ULIS that guidance on interpretation of the uniform law was noticeably inadequate; art 17 ULIS did not expressly state the general principles on which it was based and what the position would be in the event that judges could not identify those general principles.<sup>64</sup> Therefore, the drafting delegates recognised that to suggest disputes arising under the CISG could be resolved and its ambiguous

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<sup>59</sup> CISG, art 7 states: ‘(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) 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 or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law’.

<sup>60</sup> Phanesh Koneru, ‘The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles’ (1997) 6 Minn J Global Trade 105.

<sup>61</sup> John Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’ in Pace Int’l L Rev (eds), *Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer 2000) 115.

<sup>62</sup> ULIS, art 2 states: ‘Rules of private international law shall be excluded for the purpose of the application of the present law subject to any provision to the contrary in the said law’.

<sup>63</sup> ULIS, art 17 states: ‘Questions concerning matters governed by this law which are not expressly settled in it are to be settled in conformity with the general principles on which the present Law is based’.

<sup>64</sup> Michael Joachim Bonell, ‘Article 7’ in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 66.

terms construed without recourse to domestic law was both unworkable and impractical.<sup>65</sup>

Article 7(1) states that interpretation should be made with regard to: its international character; the need to promote uniformity in its application and the observance of good faith in international trade. The solution to filling in gaps in the CISG was provided for in art 7(2), which creates a hierarchical system of principles for judges and arbitrators to take under consideration. In order to resolve omissions in the CISG, which are often referred to as *praeter legem* gaps,<sup>66</sup> one must look to its internal principles and only when this method has been exhausted can external principles, such as the laws applicable by virtue of private international law, be brought in as a last resort.<sup>67</sup> This internal method of gap filling is referred to as the ‘true code approach’ whereas the use of external legal principles to fill in gaps is referred to as the ‘meta code approach’.<sup>68</sup> It has been argued that during the drafting of the CISG, civil law and common law countries with conflicting ideologies and legal systems could not agree on one particular approach and therefore a compromise was reached by incorporating both systems on a hierarchal basis.<sup>69</sup>

Article 7 is a source of great debate. Although it was designed to clarify and interpret other parts of the CISG which are vague and ambiguous, it is paradoxical that it is *itself* unclear in its direction and wording.<sup>70</sup> For example, no further elaboration is given on what general principles are embodied in the CISG to serve as

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<sup>65</sup> *ibid.*

<sup>66</sup> As opposed to *intra legem* (external gaps); Franco Ferrari, ‘Burden of Proof under the CISG’ in Pace Int’l L Rev (eds), *Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer 2000) 1; Lucia Sica, ‘Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?’ (2006) 1 Nord J Intl L 1.

<sup>67</sup> Bonell (n 64) 75.

<sup>68</sup> Sica (n 66) 5.

<sup>69</sup> *ibid.*

<sup>70</sup> 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; Martin Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’ (2000) 4 Unif L Rev 683.

a guideline for those entrusted with the task of interpreting its provisions. Therefore, art 7 has been the subject of numerous commentaries, as scholars and practitioners attempt to give meaning to its provisions.<sup>71</sup> In order to understand the significance of this provision it is necessary to examine some of these scholarly writings.

### 3.4.1 International Character

The wording of art 7(1) implies that in interpreting the provisions of the CISG judges should abstain from resorting to a domestic definition of a provision or a term which could conflict with its application.<sup>72</sup> For instance, in a case involving the sale of condensate crude oil, where the arbitral body considered the conformity of the goods to the contract,<sup>73</sup> the use of domestic concepts such as ‘merchantability’<sup>74</sup> and ‘average quality’<sup>75</sup> were rejected on the basis that these interpretations would arrive at a different outcome from what was intended by the drafters of the CISG. Instead, the meaning of conformity was interpreted according to the ‘reasonable quality’ criterion which was in line with the general principles of the CISG.<sup>76</sup> Therefore, decision makers must keep in mind the very purpose for which the CISG came into existence, and that any deviation from its ‘international character’ would undermine its legitimacy. Van Alstine puts forth the notion of ‘dynamic treaty interpretation’,

<sup>71</sup> Gyula Eörsi, ‘General Provisions’ in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale Of Goods*, (Juris 1984) 2.01; Bonell (n 64) 88.

<sup>72</sup> Robert Hillman, ‘Cross-References and Editorial Analysis Article 7’ (*IICL*, September 1997) <<http://cisgw3.law.pace.edu/cisg/text/hillman.html>> accessed 28 October 2013.

<sup>73</sup> Netherlands 15 October 2002 Netherlands Arbitration Institute, Case No 2319 (*Condensate crude oil mix case*) (*IICL*, 12 November 2007) <<http://cisgw3.law.pace.edu/cases/021015n1.html>> accessed 28 October 2013.

<sup>74</sup> A standard of conformity found in English common law and under the 1893 version of the SGA the requirement was that the goods are of ‘merchantable quality’ this meant that the goods were commercially saleable. As this term proved to be too ambiguous, in 1973 the first attempt at a statutory definition appeared in Section 14(6) stipulating that the goods were of a merchantable quality if: ‘they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances’. The current definition of ‘satisfactory quality’ was enacted in the 1994 amendments to the Act.

<sup>75</sup> Found in the German, Austrian, French, and Swiss civil codes.

<sup>76</sup> See discussion at chapter 5.2.7.3; Larry DiMatteo and others, ‘The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence’ (2004) 34 *Northwest J Int'l L & Bus* 299, 397.

recognising that the judiciary have an active role to play in interpreting the CISG and developing its body of case law.<sup>77</sup> To be precise, the judiciary have to ascertain and give meaning to the principles of the CISG to aid in the advancement of the law.<sup>78</sup> Criticisms of the way courts have applied provisions of the CISG can be seen in many cases where it has been argued that judges have applied its provisions verbatim without any real analysis or understanding of the meaning or purpose of the provisions.<sup>79</sup> The judiciary, when faced with having to interpret provisions, have done so with a high degree of reserve and formalism.<sup>80</sup> In one case it was observed, ‘to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions’.<sup>81</sup> This attitude towards interpretation has resulted in decisions with either little or no rationale or, in some cases decisions simply contrary to the wording of the CISG.<sup>82</sup> For example, the US has been criticised because its federal courts have made no substantial effort to interpret the CISG.<sup>83</sup> Murray Jnr stated that, ‘many feel the lack of judicial interpretation or construction of [the] CISG permits great leeway for anyone undertaking the formation and enforcement of CISG

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<sup>77</sup> Michael Van Alstine, ‘Dynamic Treaty Interpretation’ (1998) 146 U Pa L Rev 687.

<sup>78</sup> *ibid* 692.

<sup>79</sup> Larry DiMatteo and others, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (CUP 2005) 10; Lachmi Singh, ‘Caveat Emptor are Decisions more Favourable to the Seller on Matters Relating to Letters of Credit? An Examination of CIETAC Decision of 4 June 1999’ (2006) 2 Nordic Journal of Commercial Law 1, 15; See also China 4 June 1999 CIETAC Arbitration proceeding (*Industrial raw material case*) (*IICL*, 27 October 2008) <<http://cisgw3.law.pace.edu/cases/990604c1.html>> accessed 31 October 2013.

<sup>80</sup> Van Alstine (n 77) 687.

<sup>81</sup> *Chan v Korean Air Lines Ltd* 490 US 122, 135 (1989); This is not a CISG case, nevertheless the reasoning behind the quote still exists under the interpretation of the CISG.

<sup>82</sup> *Beijing Metals & Minerals v American Business Center* F 2d 1178, 1183 (5th Cir 1993); China 4 June 1999 CIETAC Arbitration proceeding (*Industrial raw material case*) (*IICL*, 27 October 2008) <<http://cisgw3.law.pace.edu/cases/990604c1.html>> accessed 31 October 2013.

<sup>83</sup> Harry Flechtner, ‘More US Decisions on the UN Sales Convention: Scope, Parol Evidence, “Validity” and Reduction of Price under Article 50’ (1995) 14 J L & Com 153; David Moore, ‘The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying *Beijing Metals & Minerals Import/Export Corp v American Business Center Inc*’ (1995) BYU L Rev 1347.

agreements'.<sup>84</sup> One example of an incorrect application of the CISG on the part of the US judiciary can be seen in the case of *Beijing Metals & Minerals v American Business Center*.<sup>85</sup> Here, the dictum stated that the parole evidence rule would apply to the case even if that case was governed by the CISG.<sup>86</sup> The parole evidence rule refers to the rule that the courts will apply the terms of the contract as written and that extrinsic evidence cannot be used to vary the terms of a written contract, unless one of the exceptions to the rules can be established.<sup>87</sup> These exceptions include a limited number of circumstances including if the contract contains a term that is ambiguous or incomplete<sup>88</sup> and if a fraud or illegality is proven.<sup>89</sup> Thus, the parole evidence rule is based on the premise that the written contract is the sole basis of a contractual agreement, unless one of the exceptions applies in which case extrinsic evidence will be considered.<sup>90</sup> In *Beijing Metals* there was no further explanation or analysis of the rationale for this conclusion even though a contrary decision was reached in a previous case.<sup>91</sup> In the present case such an erroneous judgement could have been avoided if attention had been given to art 8(3) CISG.<sup>92</sup> Article 8(3) impliedly excludes the application of the parole evidence rule because the CISG does

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<sup>84</sup> John Murray Jnr, 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 8 J L & Com 11, 50.

<sup>85</sup> *Beijing Metals & Minerals v American Business Center* F 2d 1178, 1183 (5th Cir 1993); China 4 June 1999 CIETAC Arbitration proceeding (*Industrial raw material case*) (IICL, 27 October 2008) <<http://cisgw3.law.pace.edu/cases/990604c1.html>> accessed 31 October 2013.

<sup>86</sup> This case whilst cited in *MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino* Federal Appellate Court [11th Circuit 1998] was not followed and instead *Filanto v Chilewich* 2nd instance Circuit Court of Appeals, 984 F 2d 58 (2d Cir 1993) was confirmed as the correct judgement in regards to the parole evidence question.

<sup>87</sup> See discussion at chapter 4.2.2; Justin Sweet, 'Contract Making and Parol Evidence Diagnosis and Treatment of a Sick Rule' (1967) 53 Cornell L Rev 1036.

<sup>88</sup> Sweet (n 87) 1036.

<sup>89</sup> *ibid.*

<sup>90</sup> These include: if the written contract is not the whole of the agreement, evidence as to validity of the contract, terms implied by law, evidence as to capacity of parties, to aid in construction of the contract, to prove custom, rectification and to show evidence of a collateral contract.

<sup>91</sup> *Filanto SpA v Chilewich International Corp* 789 F Supp 1229 1237 (SDNY 1992).

<sup>92</sup> CISG, art 8(3) states: 'In determining the intent of a party or 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'.

not need one of the exceptions to apply before consideration will be given to the surrounding circumstances of a case.<sup>93</sup> The CISG directs judges to *always* consider these circumstances. Decisions such as the one presented above are a threat to the international character of the CISG. When judges exercise their interpretative powers in the light of their own domestic laws the purpose of the CISG is diminished. This could have severe consequences for the buyer's remedy of avoidance under the CISG. For example, in the case where the written contract was ambiguous as to whether the buyer and seller had agreed on delivery of 'three integrated drive generators having different part numbers' or 'three integrated drive generators having the same part numbers', the court had to resort to examining the correspondence exchanged during negotiations to determine the parties' intent.<sup>94</sup> Thus, if surrounding circumstances were not considered the buyer could be left without a suitable remedy.

Dynamic treaty interpretation would mean that when gaps emerge within the CISG's express provisions, the judiciary will not restrict themselves to the black letter law provided, instead they should strive to delve deeper into the meaning behind that provision.<sup>95</sup> Judges are encouraged to use interpretive tools such as the legislative history of a provision and to identify general principles in the CISG which can be ascertained from examining the intention of the CISG drafting delegates.<sup>96</sup> The international character of the CISG means that judges have to co-operate with courts in other contracting states in creating decisions which can be relied on and referred to when disputes arise under the CISG.<sup>97</sup> However, in practice judges seem reluctant to follow decisions from foreign jurisdictions even though the CISG is an

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<sup>93</sup> See discussion at chapter 4.2.2.

<sup>94</sup> *Mitchell Aircraft Spares v European Aircraft Service* 23 F Supp 2d 915 (1998).

<sup>95</sup> Van Alstine (n 77) 687.

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

international instrument ratified by all contracting states. Van Alstine notes that a ‘single decision by a foreign tribunal cannot acquire formal precedential status’.<sup>98</sup> Therefore for a rationale to gain widespread acceptance, the approach must be adopted by a number of courts across different contracting states in order to build a body of case law. Although art 7(1) does not expressly require consideration of foreign cases as precedents or case law, consideration of such decisions should be taken into account to maintain the international character of the CISG.<sup>99</sup> This was illustrated in *Diversitel Communications Inc v Glacier Bay Inc*<sup>100</sup> where the Canadian court took into consideration an earlier decision of a Swiss court to determine whether the buyer could avoid the contract for fundamental breach.<sup>101</sup> In both cases not only did the parties stipulate a fixed date for performance, but the buyer had also made known to the seller that the goods were needed to fulfil contracts made with other third-parties, thus late delivery constituted a fundamental breach.<sup>102</sup> This example demonstrates that courts should strive to apply the same rationale when similar facts arise. By recognising that a foreign court has reached the same decision the body of CISG case law is strengthened. The next part of the chapter examines the requirement of uniformity embodied in art 7 to determine its meaning and application.

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<sup>98</sup> *ibid* 788.

<sup>99</sup> See discussion at chapter 2.1; E Farnsworth, ‘The Eason-Weinmann Colloquium on International and comparative Law: Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws’ (1994) 3 *Tul J Int’l & Comp L* 47, 55.

<sup>100</sup> See discussion at chapter 5.2.5; [2003] 42 *CPC* (5th) 196.

<sup>101</sup> Switzerland 15 September 2000 Supreme Court [4C105/2000] (*FCF SA v Adriafile Commerciale Srl*) (*IICL*, 16 February 2007) <<http://cisgw3.law.pace.edu/cases/000915s2.html>> accessed 4 June 2014.

<sup>102</sup> *Diversitel Communications Inc v Glacier Bay Inc* [2003] 42 *CPC* (5th) 196; cf Switzerland 15 September 2000 Supreme Court [4C105/2000] (*FCF SA v Adriafile Commerciale Srl*) (*IICL*, 16 February 2007) <<http://cisgw3.law.pace.edu/cases/000915s2.html>> accessed 4 June 2014.

### 3.4.2 Uniformity

Article 7(1) emphasises the need to promote uniformity when interpreting its provisions. The reasoning behind this instruction is evident: uniformity of decisions will determine if the CISG has been successful in attaining its aims, namely, to remove legal barriers and promote the development of international trade.<sup>103</sup> Additionally, uniformity of decisions helps to promote certainty in transactions and in establishing and exercising the buyer's remedy of avoidance under the CISG.<sup>104</sup> Although no definition of uniformity is offered, scholarly material provides some explanation on this matter.<sup>105</sup> As previously stated, the CISG does not have an independent body set up to hear disputes, rather it is for national courts and tribunals to interpret the meaning of its provisions. Databases such as the Pace Law School Institute of International Commercial Law<sup>106</sup> have made it easier for foreign judges to access decisions made by other member states on the same issues.<sup>107</sup> It is recommended that the international character of the CISG must be interpreted together with the rule of uniformity to ensure that it is correctly applied. Some CISG judgments support this. For example, the Serbian Chamber of Commerce Court of Arbitral stated that interpretation must be, 'consistent with foreign judicial practice,

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<sup>103</sup> Pace Law School Institute of International Commercial Law, 'Annotated Text of CISG: Preamble' (*IICL*, 9 August 9 2002) <[www.cisg.law.pace.edu/cisg/text/preamble.html](http://www.cisg.law.pace.edu/cisg/text/preamble.html)> accessed 29 September 2013.

<sup>104</sup> 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](http://www.cisg.law.pace.edu/cisg/biblio/huber1.html)> accessed 30 September 2013.

<sup>105</sup> Van Alstine (n 77) 687; Camilla Baasch Andersen, 'The Uniform International Sales Law and the Global Jurisconsultorium' (2005) 24 *J L & Com* 159.

<sup>106</sup> Hereinafter referred to as the *IICL*.

<sup>107</sup> See discussion at chapter 2.1.

which was to be taken into consideration for the uniform application of the Convention, on the basis of article 7(1)'.<sup>108</sup>

However, Gebauer contends that autonomous interpretation may not result in uniformity.<sup>109</sup> He argues that courts will decide cases differently and have different autonomous interpretations even when looking at the same legislative history, underlying aims, and analogy with other rules of a particular provision.<sup>110</sup> It is conceded that while this may be true to a certain extent, when viewed objectively it is difficult to reconcile with the purpose of the CISG. If, for example, two cases arose on the same facts, both cases deal with issues that are governed by the CISG but not expressly settled in it. If both decision makers were examining the same set of facts based on legislative history, aims and general principles the decisions should not be altogether dissimilar in outcome, barring minor exceptions. If this is not the case and Gebauer's assertion is correct, it would mean that decision makers are not rising above their own domestic legal philosophies to embrace the international legal structure upon which the CISG is based. The reason why uniformity is likely to prove elusive is that the CISG has no designated court or tribunal equipped with the task of interpreting its provisions; instead that task is left to national courts and national judges who are not isolated entities, they are influenced by their own legal traditions.<sup>111</sup> To deter the ever present threat of the 'homeward trend',<sup>112</sup> the courts need not only to exhaust all the mechanisms provided for within the CISG, but also refer to decisions handed down by courts and tribunals in other countries. Dynamic

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<sup>108</sup> Serbia 15 July 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (*Milk packaging equipment case*) (IICL, 18 March 2011) <<http://cisgw3.law.pace.edu/cases/080715sb.html>> accessed 31 October 2013.

<sup>109</sup> Gebauer (n 70) 683.

<sup>110</sup> *ibid* 685.

<sup>111</sup> Van Alstine (n 77) 687.

<sup>112</sup> John Honnold, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations, and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations* (Kluwer 1989) 1.

interpretation is a task which most courts are reluctant to carry out.<sup>113</sup> Honnold states that:

[the]Convention...will often be applied by tribunals . . . who will be intimately familiar only with their own domestic law. These tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.<sup>114</sup>

Article 7(1) implicitly requires that courts consider the decisions of other contracting states. Gebauer states, ‘these rules not only allow but require consideration of foreign case law, thus promoting uniform application of the Convention and thereby serving legal predictability and security’.<sup>115</sup> However, Bonell and Liguori note that, ‘very rarely do decisions take in to account the solutions adopted on the same point by courts in other countries’.<sup>116</sup> An example of this is *Beijing Metals & Minerals v American Business Center*,<sup>117</sup> where the US courts applied their own domestic laws on the parole evidence rule,<sup>118</sup> rather than art 8, to determine the admissibility of surrounding circumstances.<sup>119</sup> Other illustrations of this practice by US courts include *Delchi Carrier SpA v Rotorex Corp.*<sup>120</sup> Rather than applying the test of ‘foreseeability’ as required under art 74 CISG, the courts instead applied the term ‘reasonably envisioned’.<sup>121</sup> The ambit of the domestic term was narrower than the test of foreseeability as set out in the CISG and stipulated that consequential

<sup>113</sup> Van Alstine (n 77) 687; Bridge (n 10) 75.

<sup>114</sup> Honnold (n 112) 1.

<sup>115</sup> Gebauer (n 70) 691.

<sup>116</sup> Michael Joachim Bonell and Fabio Liguori, ‘The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law-1997 (Part 1)’ (1997) Unif L Rev 385.

<sup>117</sup> *Beijing Metals & Minerals v American Business Center* F 2d 1178, 1183 (5th Cir 1993).

<sup>118</sup> UCC, art 2-202.

<sup>119</sup> *Beijing Metals & Minerals v American Business Center* F 2d 1178, 1183 (5th Cir 1993).

<sup>120</sup> 71 F3d 1024 (2d Cir 1995) where the court applied the wording of New York law to a case involving the award of damages.

<sup>121</sup> 71 F3d 1024 (2d Cir 1995).

damages were only recoverable where the parties had agreed to assume that responsibility.<sup>122</sup>

As there is no international court to confer authority on diverging decisions of national courts, CISG cases depend on the quality of decisions, which will have to demonstrate a rationale for the decision.<sup>123</sup> If a court simply applies a particular provision to a case without explaining *why* it has reached that conclusion, foreign courts would be reluctant to cite that decision as persuasive authority. For instance when faced with a case for establishing fundamental breach under art 25 CISG, if the court simply reaches the conclusion that non-conformity of goods amounted to a fundamental breach without trying to establish *how* each criterion in that provision was met, then the decision is without judicial merit, that is, even though it may be correct, it fails to produce a rationale. An example of a sound rationale is demonstrated in a case for the sale of sports clothing, the seller failed to deliver the goods on time and when delivery was made it was not of the quantity or quality stipulated in the contract.<sup>124</sup> Here, the court allowed the buyer to avoid the contract stating, ‘the seller had not delivered goods of the quantity, quality and description required by the contract’, specifically ‘by delivering clothes that shrank about 10-15%, the seller had fundamentally breached the contract, as the buyer had been deprived of what it was entitled to expect under that contract’.<sup>125</sup> Furthermore, the court added that as a result of the shrinkage customers could not wear the sportswear after the first wash.<sup>126</sup> This would result in a high number of customer complaints,

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<sup>122</sup> Eric Schneider, ‘Consequential Damages in the International Sale of Goods: Analysis of Two Decisions’ (1995) 16 *Journal of International Business Law* 615, 618.

<sup>123</sup> Monica Kilian, ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10(2) *J Transnat'l L & Pol'y* 217, 238.

<sup>124</sup> Germany 5 April 1995 District Court Landshut (*Sport clothing case*) (*II CL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950405g1.html>> accessed 01 August 2014.

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

customers would not purchase the clothes which would harm the buyer's interests.<sup>127</sup>

Here we can see the German court providing a clear rationale for arriving at the conclusion that a fundamental breach had occurred.<sup>128</sup>

Another factor which may affect the interpretation of the CISG and hinder the principle of uniformity is the issue of multiple languages. The CISG has six official languages, yet most of the drafting was carried out in English and French.<sup>129</sup> Some commentators have indicated that if there is an issue of conflicting linguistic interpretation then priority should be given to the English and French versions.<sup>130</sup> The Vienna Convention on the Law of Treaties 1969<sup>131</sup> states, 'when a comparison of the authentic texts discloses a difference of meaning...the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.<sup>132</sup> This would entail having regard to the drafting and conclusion of the conference leading up to the completion of the CISG.<sup>133</sup> An example of conflicting language interpretations can be seen in art 3(1) CISG which uses the term 'substantial part' to exclude the possibility of the party who is ordering the goods supplying a substantial part of those materials. The term used in the corresponding French text is 'part essentielle', which could have a different interpretation from its English counterpart. The term has been interpreted to mean the economic value of the materials, thus if the economic value of the materials being supplied by the party ordering them was greater than the party supplying them, then the CISG would be

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<sup>127</sup> *ibid.*

<sup>128</sup> See discussion at chapter 5.1.2.

<sup>129</sup> See discussion above at chapter 3.1.

<sup>130</sup> Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2<sup>nd</sup> edn, Clarendon 1998) para 27; Bruno Zeller, 'International Trade Law -- Problems of Language and Concepts?' (2003) 23 J L & Com 39,43.

<sup>131</sup> Hereinafter referred to as 'VCLT'.

<sup>132</sup> VCLT, art 33(4).

<sup>133</sup> Ingeborg Schwenzer and Pascal Hachem, 'Intro to Arts 1-6' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3<sup>rd</sup> edn, OUP 2010) 25.

excluded.<sup>134</sup> Conversely, there is support for interpreting the term to mean essential as in its purpose or function in relation to the goods as a whole.<sup>135</sup> In one case involving the sale of window units, the courts held that, ‘the few tools which were to be supplied by the buyer are neither with respect to their value nor their function essential ones’.<sup>136</sup> The CISG Advisory Council examined this issue and in its opinion No 4, it examined the legislative history of the CISG and the intention of the drafters.<sup>137</sup> The Advisory Council concluded that the drafters deliberately omitted the term ‘essential’ from the wording of the English text of the CISG. This was done in light of examining the dissatisfaction of ULIS and ULF both of which contained the term, ‘an essential and substantial part of the materials’.<sup>138</sup> The Advisory Council went on to state that:

The word “essential” was deleted suggesting that the essential criteria was rejected by the drafters of the CISG. However, despite the fact that “essential” was there “thrown out the door”, it re-entered “through the window” via the French text of the Convention, and the interpretation made by some legal writers and in some of the case law.<sup>139</sup>

<sup>134</sup> John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3<sup>rd</sup> edn, Kluwer 1999) 57; See also Germany 24 March 1998 District Court Berlin (*Knitwear case*) (*IICL*, 13 December 2006) <<http://cisgw3.law.pace.edu/cases/980324g1.html>> accessed 02 February 2014.

<sup>135</sup> Bernard Audit, ‘La vente internationale de marchandises (Convention des Nations-Unies du 11 Avril 1980)’ (1990) 25 LGDJ 25.

<sup>136</sup> Germany 3 December 1999 Appellate Court München (*Window production plant case*) (*IICL*, 21 February 2007) <<http://cisgw3.law.pace.edu/cases/991203g1.html>> accessed 02 February 2014.

<sup>137</sup> Pace Law School Institute of International Commercial Law, ‘CISG-Advisory Council Opinion No 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)’ (*IICL*, 25 January 2005) <[www.cisg.law.pace.edu/cisg/CISG-AC-op4.html](http://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html)> accessed 02 February 2014.

<sup>138</sup> ULIS, art 6 states: ‘Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production’; ULF, art 1(7) states: ‘Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production’.

<sup>139</sup> Pace Law School Institute of International Commercial Law, ‘CISG-Advisory Council Opinion No 4: Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)’ (*IICL*, 25 January 2005) para 2.5 <[www.cisg.law.pace.edu/cisg/CISG-AC-op4.html](http://www.cisg.law.pace.edu/cisg/CISG-AC-op4.html)> accessed 02 February 2014.

The problem of language interpretation can have a detrimental impact on the remedy of avoidance under the CISG. Although the thesis focuses on art 49, the buyer's right to avoid the contract, as pointed out in chapter one there are other provisions in the CISG that deal with avoidance.<sup>140</sup> One of these provisions is art 72, the right to declare the contract avoided for anticipatory breach. While further examination will not be made of this provision in the thesis, it nonetheless serves to demonstrate the problems that can occur with language interpretation. Under the English version of the CISG there is a distinction in the wording of art 71,<sup>141</sup> the right to suspend performance for the other parties' inability to perform and art 72,<sup>142</sup> the right to declare the contract avoided for anticipatory breach.<sup>143</sup> The standard of certainty required in art 72 that the other party will not perform is more rigorous than that of art 71.<sup>144</sup> This is justified on the basis that avoidance is a final act whereas suspension is temporary, thus the former requires a stricter standard.<sup>145</sup> Therefore, the anticipated breach under art 71 to suspend performance needs only to be

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<sup>140</sup> See discussion at chapter 1.1; CISG, art 64 (seller's right to avoid the contract); CISG, art 72 (anticipatory breach); CISG, art 73 (instalment contracts); CISG, art 51 partial delivery.

<sup>141</sup> CISG, art 71 states: '(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance'.

<sup>142</sup> CISG, art 72 states: '(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations'.

<sup>143</sup> Harry Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)' (1998) 14 J L & Com 187, 190.

<sup>144</sup> *ibid.*

<sup>145</sup> Harry Flechtner, 'Remedies under the New International Sales Convention: The Perspective from Article 2 of the UCC' (1988) 8 J L & Com 53, 91; Keith Rowley, 'A Brief History of Anticipatory Repudiation in American Contract Law' (2001) 69 U Cin L Rev 633.

‘apparent’ whereas it needs to be ‘clear’ under art 72.<sup>146</sup> However, if we compare the French version of the CISG, there is *no* distinction in the wording of the required standard, both provisions use the term ‘essentielle’.<sup>147</sup> Therefore, when presented with this problem regard should be had to the meaning and purpose of the provision. As such, the standards of exercising art 72 *should* be stricter, since the underlying principles of the CISG indicate the remedy of avoidance ‘is a remedy of last resort’.<sup>148</sup> This is supported by the requirement of establishing a fundamental breach. It is important that when in doubt as to the meaning of a particular phrase or term, especially when it has been translated from English, judges interpret the CISG with a view to the drafters’ intent rather than their own domestic notions. The next part of the chapter examines the role of ‘good faith’ under the CISG, in particular the problems associated with its meaning and how its interpretation will impact decision making.

### 3.4.3 Good Faith

The concept of ‘good faith’ in the CISG is one illustration of the tension amongst civil and common law countries; the manner in which it is worded is a reflection of this tension.<sup>149</sup> The extent to which commercial law should emulate and uphold standards of morality is controversial.<sup>150</sup> The reconciling of morality with

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<sup>146</sup> *ibid.*

<sup>147</sup> CISG, art 71 states that, to justify suspension, a party must threaten non-performance of ‘une partie essentielle de ses obligations’ and CISG, art 72 requires a threat of ‘une contravention essentielle au contrat’.

<sup>148</sup> See discussion at chapter 5.1; Ulrich Magnus, ‘The Remedy of Avoidance of Contract under CISG -- General Remarks and Special Cases’ (2005) 25 J L & Com 423, 424; Markus Müller-Chen, ‘Article 49’ in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3<sup>rd</sup> edn, OUP 2010) 747.

<sup>149</sup> Pace Law School Institute of International Commercial Law, ‘Legislative History 1980 Vienna Diplomatic Conference: Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses’ (*IICL*, 29 July 2004) <<http://cisgw3.law.pace.edu/cisg/Fdraft.html>> accessed 02 February 2014.

<sup>150</sup> Troy Keily, ‘Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)’ 3 *Vindobona Journal of International Commercial Law and Arbitration* 15.

the law has been approached in opposing ways by civil and common law systems.<sup>151</sup> For example, this concept is addressed in s 242 of the *Bürgerliches Gesetzbuch*,<sup>152</sup> which stipulates that ‘an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration’.<sup>153</sup> However, English law has adopted a very different stance. In the case of commercial contracts, ‘broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent’.<sup>154</sup>

Given the differences in ideology regarding the role of good faith, Farnsworth describes art 7(1) as a, ‘statesmanlike compromise’.<sup>155</sup> The common law approach appears to have been more influential since good faith is not imposed as a legal obligation on contracting parties. Instead good faith was shifted to the role of interpreting the CISG with the ‘observance of good faith in international trade’, ‘giving it an honourable burial’, according to Eörsi.<sup>156</sup> However, it is difficult to imagine that judges and arbitrators, in interpreting the CISG, would not take into consideration the conduct of the parties when making a decision. As Koneru argues, ‘good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate’.<sup>157</sup> Schlechtriem attempts to put this quandary to rest by advancing the idea that good faith in the CISG should amount to a general principle, based on internationally accepted standards, such as carrying out

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<sup>151</sup> *ibid.*

<sup>152</sup> German Civil Code; Hereinafter referred to as the ‘BGB’.

<sup>153</sup> BGB, s 242.

<sup>154</sup> *Banque Financiere de la Cité SA v Westgate Insurance Co Ltd* (unreported, Court of Appeal of England, 28 July 1988); However English Law does recognise certain contracts of utmost good faith-*uberrimae fides*. Usually seen in insurance or trustee/beneficiary contracts; See also Keily (n 150) 15.

<sup>155</sup> Farnsworth (n 99) 55.

<sup>156</sup> Eörsi (n 71) 2.03.

<sup>157</sup> Koneru (n 60) 139.

performance in an honourable manner.<sup>158</sup> The latter approach would be consistent with art 8, which looks at the intentions and conduct of the parties and, furthermore, art 25, which deals with fundamental breach and does not allow for avoidance of the contract for trivial matters. In support of this the CISG provides remedies such as curing breaches before<sup>159</sup> and after<sup>160</sup> the date of performance.<sup>161</sup> However, Bridge is firmly opposed to the idea of a general obligation of good faith.<sup>162</sup> He argues that it does not take into account the diversity of commercial contracting, and will undermine the CISG by opening the door to further ambiguity and less certainty.<sup>163</sup>

The role of interpretation with regard to good faith has had some impact on the buyer's remedy of avoidance. Although the requirement of establishing a fundamental breach is not dependent on the breaching party being at 'fault' it is argued that deliberate breaches should entitle the buyer to avoid the contract.<sup>164</sup> This has been supported in case law where the basis of trust had been destroyed between the parties as a result of the actions of the breaching party.<sup>165</sup> However, subsequent cases have rejected this argument stating that avoidance for the buyer's loss of trust in the seller was not a valid criterion for establishing fundamental under art 25.<sup>166</sup>

It is not the purpose of this study to advance the argument of the benefits or the detriments of the good faith requirement in art 7(1). Instead it proceeds on the

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<sup>158</sup> Schlechtriem (n 130) 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.

<sup>159</sup> CISG, art 34 (Documents); CISG, art 37 CISG (Goods).

<sup>160</sup> CISG, art 48.

<sup>161</sup> See discussion at chapter 6.

<sup>162</sup> Michael Bridge, 'Good Faith in Commercial Contracts' Roger Brownsword (ed), *Good Faith in Contract Concept and Context* (Ashgate 1999) 163.

<sup>163</sup> *ibid.*

<sup>164</sup> See discussion at chapter 5.1.3; Martin Karollus, 'Article 25' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 2009) 23; cf Benjamin Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Sellier 2007) 98.

<sup>165</sup> Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 May 2014.

<sup>166</sup> See discussion at chapter 5.1.3; Germany 3 April 1996 Supreme Court (*Cobalt sulphate case*) (*IICL*, 15 November 2007) <<http://cisgw3.law.pace.edu/cases/960403g1.html>> accessed 30 May 2014.

premise that interpretation of the CISG requires the observance of good faith in international trade and should be taken into account when making decisions. However, it is necessary to examine the extent to which different legal systems use good faith in their decision making process. This assists in discerning to what extent national courts are succeeding in developing a uniform approach to interpretation. The chapter proceeds to examine the general principles upon which the CISG is based and how decision makers can ascertain those principles and apply it to the case law.

### **3.5 General Principles**

In the drafting of the CISG, delegates of civil law countries advocated the use of general principles on which it should be based. Furthermore, they were in favour of using analogy as one of the methods of filling in gaps under art 7, in other words a ‘true code’ methodology.<sup>167</sup> However, delegates of common law countries doubted that such principles could be found in the CISG that would be clear and certain enough to address every problem that might arise. Therefore, they advocated the use of domestic laws to fill in the gaps if the CISG did not expressly refer to an issue.<sup>168</sup> Article 7(2) states that filling in ‘gaps’ is permitted when matters are governed but not expressly settled within the CISG. Furthermore, it instructs decision makers to look to the general principles on which it is based to fill in those gaps. If those general principles do not exist, then the CISG allows for the rules of private international law to fill in the gaps. In the wording of art 7(2), ambiguities are evident as the CISG fails to state what exactly these general principles are, and how they can be ascertained. The thesis recalls one of the criticisms made earlier of art 17 ULIS where the negotiating delegation disapproved of the lack of any general

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<sup>167</sup> Hillman (n 70) 21; Wayne Barnes, ‘Contemplating a Civil Law Paradigm for a Future International Commercial Code’ (2005) 65 La L Rev 677.

<sup>168</sup> Hillman (n 70) 21.

principles listed in that convention to serve as useful guidelines. However the CISG offers no improvement on that matter.<sup>169</sup> The CISG itself, neither in its provisions nor in the Secretariat Commentary,<sup>170</sup> states what these general principles are but the academic commentary assists in this matter.

There are four basic policies underlying the CISG: freedom of contract, promotion of co-operation and reasonableness to preserve the contract, facilitation of exchange even in the event that something goes wrong, and to provide compensation for the aggrieved party.<sup>171</sup> Many scholars support this,<sup>172</sup> and advance the idea that given these underlying policies there should always be an answer *within* the CISG itself to fill any gaps that may arise, thus making the resort to domestic law unwarranted.<sup>173</sup> To avoid the problem of interpretation based on domestic law, judges should instead use all the internal mechanisms available to them, including the text of the CISG, statutory purpose, public policy<sup>174</sup> and legislative history.<sup>175</sup> Specific provisions in the CISG cannot be regarded as general principles, for they are merely rules.<sup>176</sup> General principles underpin these rules and a general principle should form part of the foundation of the CISG. General principles can be extracted by analysing the contents of specific provisions of the CISG and how these are interpreted in the case law.<sup>177</sup> For example, the principle of reasonableness can be seen in avoidance provisions, the standard of the reasonable person in those circumstances, or in the provisions to take reasonable steps to mitigate damages or

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<sup>169</sup> See discussion above at chapter 3.4; Bonell (n 64) 66.

<sup>170</sup> The closest thing the CISG has to a reliable official commentary.

<sup>171</sup> Hillman (n 70) 21.

<sup>172</sup> Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 Ga J Int'l & Comp L 183; Felemegas (n 61) 115.

<sup>173</sup> Except, of course, for those issues outside the CISG's scope.

<sup>174</sup> Public policy at the international level in the sphere of commercial law includes decision making which contributes to the removal of legal barriers and promotion of the development of international trade; Van Alstine (n 77) 687.

<sup>175</sup> Van Alstine (n 77) 690.

<sup>176</sup> Felemegas (n 61) 115.

<sup>177</sup> *ibid.*

preserve the contract.<sup>178</sup> The next section of the chapter examines some of the mechanisms available to decision makers to identify the general principles underlying the CISG.

### 3.5.1 Legislative History

The VCLT 1969, is the most widely accepted agreement dealing with interpretation of treaties.<sup>179</sup> Article 31 VCLT states, ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.<sup>180</sup> Furthermore, art 32 VCLT states:

Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.<sup>181</sup>

The importance of the VCLT cannot be underestimated, although there is some uncertainty as to whether it can apply to the CISG, as the VCLT was designed to govern obligations between governments<sup>182</sup> while the CISG governs obligations between private parties.<sup>183</sup> However, the VCLT can be applicable to the CISG. Although the interpretative provisions of art 7 CISG extend to parts one, two and

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<sup>178</sup> Ulrich Magnus, ‘Rabels Zeitschrift for Foreign and International Private Law: General Principles of UN-Sales Law’ (1995) 59 (3/4) Max-Planck-Institute for Foreign and International Private Law 1.

<sup>179</sup> Brigitte Stern, ‘Interpretation In International Trade Law’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Brill 2010).

<sup>180</sup> Vienna Convention on the Law of Treaties 1969 UN Doc A/CONF.39/27.

<sup>181</sup> Vienna Convention on the Law of Treaties 1969 UN Doc A/CONF.39/27.

<sup>182</sup> Bruno Zeller, ‘Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’ (*IICL*, 2003)

<[www.cisg.law.pace.edu/cisg/biblio/4corners.html](http://www.cisg.law.pace.edu/cisg/biblio/4corners.html)> accessed 20 October 2013.

<sup>183</sup> *ibid.*

three of the CISG, part four is governed by the VCLT.<sup>184</sup> Honnold supports this and argues that:

Article 7 of the Sales Convention embodies mutual obligations of the Contracting States as to how their tribunals will construe the Convention. Hence, the 1969 Vienna Convention would be pertinent to a question concerning the construction of Article 7, but the 1969 Convention would not govern the interpretation of the articles dealing with the obligations of the parties to the sales contract, for these articles are to be construed according to the principles (properly construed) of Article 7.<sup>185</sup>

Thus, the VCLT will not be applicable to the CISG when dealing with obligations between private individuals. However, as judges are national entities entrusted with interpreting the CISG, the guidelines set out in arts 31 and 32 VCLT can be used to interpret art 7.

The idea of looking to the legislative history of a provision to determine an answer can be frustrating and ambiguous, because of the many contentious issues under the CISG which led to vague compromises.<sup>186</sup> Easterbrook rejects the idea of looking at the legislative history of a provision. He states, ‘intent is elusive for a natural person, fictive for a collective body’,<sup>187</sup> pointing out that the legislative process can be influenced by different interests and motivations which often leave ambiguous, conflicting statements in the drafting records.<sup>188</sup> Although this contention may be well founded, examining the draft commentary of the provision in question could prove fruitful as it could help to guide the decision maker as regards the concerns and overall intention of the drafters. Thus, the legislative history of a provision should not be the only mechanism judges consult when trying to fill in a gap in the CISG but it is certainly a useful first step in trying to do so. This approach

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<sup>184</sup> *ibid.*

<sup>185</sup> Honnold (n 134) fn 44; cf *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 282–283.

<sup>186</sup> Robert Skilton, ‘Some Comments on the Comments to the Uniform Commercial Code’ (1966) *Wis L Rev* 597, 606.

<sup>187</sup> Frank Easterbrook, ‘Statutes’ Domains’ (1983) 50 *U Chi L Rev* 533.

<sup>188</sup> *ibid* 547.

can be seen in cases involving the payment of interest under the CISG.<sup>189</sup> After examining the legislative history of the CISG it was clear that although provisions were made for the payment of interest<sup>190</sup> the issue of the rate of calculating that interest was never expressly settled by the drafters. Thus the question arose, whether resort to domestic laws on this issue was permissible?<sup>191</sup> A German court, in a case involving a Swiss seller and German buyer, applied domestic law and determined that interest should be paid at the rate of 5%, which was the statutory interest rate under both German and Swiss laws.<sup>192</sup> However in another case decided by the Swiss court involving a French seller and a German buyer the court held that the rate of interest was an issue that fell within the scope of the CISG.<sup>193</sup>

The issue of the rate of interest is of importance to the buyer's remedy of avoidance, specifically the consequences of avoidance. The effect of avoidance on the contract is to require each party to make restitution of what they had exchanged before the contract was avoided.<sup>194</sup> Article 84 CISG states that, 'if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid'. This approach was applied to a case for the delivery of sunflower oil where the seller failed to make delivery of the first instalment even though the

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<sup>189</sup> Germany 20 April 1994 Appellate Court Frankfurt (*New Zealand mussels case*) (*IICL*, 10 August 2005) <<http://cisgw3.law.pace.edu/cases/940420g1.html>> accessed 08 February 2014; Germany 20 July 1995 District Court Aachen (*IICL*, 11 August 2005) <<http://cisgw3.law.pace.edu/cases/950720g1.html>> accessed 08 February 2014; Switzerland 5 February 1997 Commercial Court Zürich (*Sunflower oil case*) (*IICL*, 08 November 2006) <<http://cisgw3.law.pace.edu/cases/970205s1.html>> accessed 02 August 2014.

<sup>190</sup> CISG, arts 78 and 84.

<sup>191</sup> Alan Zoccolillo, 'Determination of the Interest Rate under the 1980 United Nations Convention on Contracts for the International Sale of Goods: General Principles vs National Law' (1997) 1 *Vindobona Journal of International Commercial Law and Arbitration* 3.

<sup>192</sup> Germany 20 April 1994 Appellate Court Frankfurt (*New Zealand mussels case*) (*IICL*, 10 August 2005) <<http://cisgw3.law.pace.edu/cases/940420g1.html>> accessed 08 February 2014.

<sup>193</sup> Switzerland 5 February 1997 Commercial Court Zürich (*Sunflower oil case*) (*IICL*, 08 November 2006) <<http://cisgw3.law.pace.edu/cases/970205s1.html>> accessed 02 August 2014.

<sup>194</sup> See discussion at chapter 2.4.5 and 7.2.1; CISG, art 81 (2).

buyer had paid the price for the goods.<sup>195</sup> The courts granted avoidance for fundamental breach and awarded interest based on the rate at the seller's place of business.<sup>196</sup> This makes sense and provides a fair outcome to the parties as the seller does not receive an unfair advantage for interest accumulated on the price paid for the goods. In absence of a choice of law clause the applicable rate of interest should be calculated according to the rate of the country where the seller has his place of business as this is most likely where he would have invested the payments.<sup>197</sup>

### 3.5.2 Analogy

This section examines the legitimacy of using analogy as a means of discerning general provisions under the CISG. The use of analogy in the interpretation of statutory instruments has existed for many years. The Prussian *Allgemeines Landrecht für die Preussischen Staaten* 1794,<sup>198</sup> made provisions for the use of analogy.<sup>199</sup> Section 49 ALR examines the situation that arises in a dispute where no specific rule is applicable, directing judges to, 'decide on the basis of the general principles adopted in the code, and according to his best judgment, having regard to existing provisions applicable to analogous cases'.<sup>200</sup> Methods of interpretation using analogy are also used in the Austrian *Allgemeines Bürgerliches Gesetzbuch* 1811,<sup>201</sup> s 7 states:

If a case cannot be decided with reference to the words of the law, regard shall be had to analogous cases explicitly dealt with in the Code and to the policies underlying other kindred laws. If the case still remains in

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<sup>195</sup> Switzerland 5 February 1997 Commercial Court Zürich (*Sunflower oil case*) (*IICL*, 08 November 2006) <<http://cisgw3.law.pace.edu/cases/970205s1.html>> accessed 02 August 2014.

<sup>196</sup> *ibid.*

<sup>197</sup> Denis Tallon, 'Article 84' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 611.

<sup>198</sup> Hereinafter referred to as 'ALR'; The ALR regulated the civil law, penal law, family law, public law and administrative law.

<sup>199</sup> Jan Hellner, 'Gap-Filling by Analogy Article 7 of the UN Sales Convention in its Historical Context' in Jan Ramberg (ed), *Studies in International Law: Festschrift til Lars Hjerner* (Stockholm 1990) 219.

<sup>200</sup> *ibid.*

<sup>201</sup> Hereinafter referred to as 'ABGB'.

doubt, it shall with careful consideration of the surrounding circumstances, be decided according to the principles of natural law.<sup>202</sup>

Enderlein and Maskrow contend that:

Gap filling can be done by applying such interpretative methods as extensive interpretation and analogy. The admissibility of analogy is directly addressed in the wording contained in the CISG because it is aimed at obtaining from several comparable rules, one rule for a not expressly covered fact or a general rule under which the fact can be subsumed.<sup>203</sup>

Analogy can be described as the discovery of a specific provision dealing with similar issues to the one present in the gap. However, there *must* be a link between the gap and the analogous situation.<sup>204</sup> Using analogy as a means of interpretation requires a detailed examination of the provision in question because the rule in the provision may be restricted to a particular situation thus making the analogy contrary to the drafter's intention.<sup>205</sup> For example, the Italian court examined the question of which party must bear the burden of proving the lack of conformity of the goods.<sup>206</sup> The court rejected the contention that the burden of proof was a question excluded from the CISG and should be governed by the applicable domestic law.<sup>207</sup> It held that the burden of proof is a matter governed but not expressly settled by the CISG. Therefore, it was to be settled in conformity with the general principles underlying the CISG as seen in art 7(2).<sup>208</sup> In the court's view, it is a general principle underlying the CISG that the claimant should provide evidence in favour of its

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<sup>202</sup> ABGB, s 7; Hellner (n 199) 219.

<sup>203</sup> 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) 58.

<sup>204</sup> *ibid.*

<sup>205</sup> Hillman (n 70) 21.

<sup>206</sup> *Rheinland Versicherungen v Atlarex Italy* 12 July 2000 District Court Vigevano (*II*CL, 05 December 2005) <<http://cisgw3.law.pace.edu/cases/000712i3.html>> accessed 08 February 2014.

<sup>207</sup> CISG, arts 4 and 7(2).

<sup>208</sup> *Rheinland Versicherungen v Atlarex Italy* 12 July 2000 District Court Vigevano (*II*CL, 05 December 2005) <<http://cisgw3.law.pace.edu/cases/000712i3.html>> accessed 08 February 2014.

claim.<sup>209</sup> The principle may be derived from using art 79(1) CISG in the form of an analogy, which in referring to a party's failure to perform its obligations, makes reference to the issue of burden of proof.<sup>210</sup> Therefore, the buyer must prove the lack of conformity and the damage resulting from it.<sup>211</sup> These decisions could have an impact on the buyer's remedy of avoidance, specifically establishing a fundamental breach as it will for the party seeking avoidance to bear the burden of proving it.

Brandner considers the use of analogy under the CISG since it is not expressly mentioned as a means of gap filling in art 7.<sup>212</sup> He argues that since autonomous interpretation is required and the words in the CISG should not be assumed to mean the same as they do in domestic law, the use of domestic law should be a last resort.<sup>213</sup> Civil law countries favour analogy, whereas common law courts are often unwilling to go further than the wording of the treaty to deduce objective teleological criteria.<sup>214</sup> This is supported by the criticisms and later limitations in *Pepper v Hart*, which allowed English courts to examine the legislative history of a statutory instrument when faced with ambiguous wording of the legislative text.<sup>215</sup> Prior to this, such an action would have breached art 9 of the Bill of Rights 1689 and the rules of parliamentary privilege.<sup>216</sup> However, this approach has been criticised:

It would have been a fiction for the House to say that as a matter of historical fact the explanation of the Financial Secretary reflected the intention of Parliament. Such a fact cannot in the nature of things be

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<sup>209</sup> *Rheinland Versicherungen v Atlarex* Italy 12 July 2000 District Court Vigevano (*IICL*, 05 December 2005) <<http://cisgw3.law.pace.edu/cases/000712i3.html>> accessed 08 February 2014.

<sup>210</sup> See discussion at chapter 5.2.7.3; CISG, art 79(1) states: 'A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences'.

<sup>211</sup> *Rheinland Versicherungen v Atlarex* Italy 12 July 2000 District Court Vigevano (*IICL*, 05 December 2005) <<http://cisgw3.law.pace.edu/cases/000712i3.html>> accessed 08 February 2014.

<sup>212</sup> Gert Brandner, 'Admissibility of Analogy in Gap-filling under the CISG' (*IICL*, 21 December 1999) <<http://cisgw3.law.pace.edu/cisg/biblio/brandner.html>> accessed 22 October 2013.

<sup>213</sup> *ibid.*

<sup>214</sup> *ibid.*

<sup>215</sup> *Pepper v Hart* [1993] AC 593.

<sup>216</sup> Johan Steyn, '*Pepper v Hart*: A Re-examination' (2001) 21 OJLS 59.

deduced from Hansard. Arguably the House may have had in mind in *Pepper v Hart* that an intention derivable from the Financial Secretary's statement ought to be imputed to Parliament. If that were the case, the reasoning would rest on a complete fiction. My view is that the only relevant intention of Parliament can be the intention of the composite and artificial body to enact the statute as printed. If there is substance in this part of the analysis, it tends to undermine the very core of the reasoning in *Pepper v Hart*.<sup>217</sup>

These arguments are based on the premise that examination of Hansard,<sup>218</sup> is expensive to the litigants and often proves to be fruitless as it may not provide any further clarification.<sup>219</sup> It is argued that the intention of Parliament is in fact rooted in the final printed text of the statute and nothing else.<sup>220</sup>

Bonell believes analogy to be included in the recourse to general principles, even though the legislative history of art 7 is inconclusive on the issue.<sup>221</sup> He states that:

[i]n the case of a gap in the Convention the first attempt to be made is to settle the unsolved question by means of an analogical application of specific provisions. To this effect the discovery of a provision dealing with similar cases is a necessary but not a sufficient prerequisite.<sup>222</sup>

However, analogy should only be used in cases where it is clear that the wording of a specific provision was not limited to certain circumstances.<sup>223</sup> For example the wording of art 49(1)(b) which states that the buyer may declare the contract avoided, 'in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with para (1) of art 47'.<sup>224</sup> This provision was deliberately restricted to allowing the fixing of an additional time to breaches for non-delivery and thus extension of its scope to other types of breaches

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<sup>217</sup> *ibid* 66.

<sup>218</sup> Hansard is the edited verbatim report of proceedings of both the House of Commons and the House of Lords.

<sup>219</sup> Steyn (n 216) 59; See also Geoffrey Marshall, 'Hansard and the interpretation of statutes' in D Oliver and G Drewry (eds), *The Law and Parliament* (CUP 1998).

<sup>220</sup> Steyn (n 216) 59.

<sup>221</sup> Bonell (n 64) 82; Brander (n 212).

<sup>222</sup> Bonell (n 64) 78.

<sup>223</sup> *ibid*.

<sup>224</sup> CISG, art 49(1)(b).

would undermine the meaning of the provision and be contrary to the drafters' intent.<sup>225</sup> Therefore, a breach for non-delivery, even if not fundamental from the outset, could be transformed into a fundamental breach if the seller fails to perform within the additional time.<sup>226</sup> It is arguable, therefore, that analogy is permitted as a means of ascertaining general principles under the CISG. However, it has to be apparent that there is a clear and unmistakable link between the problem in question and the analogy being used, and furthermore that the wording of the provision was not limited to specific circumstances. The next part of the chapter will examine an external means for filling in the gaps in the CISG, specifically the UNIDROIT Principles to determine when it will be legitimate to use soft law as a means of interpretation.

### 3.6 UNIDROIT Principles

The chapter has analysed the merits of some of the *internal* mechanisms available to decision makers to ascertain general principles within the CISG. This section examines one of the *external* methods of gap filling without the recourse to domestic law. UNIDROIT is an independent intergovernmental organisation, whose purpose is to 'study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law between States and groups of States'.<sup>227</sup> The UNIDROIT Principles were discussed and drafted by legal scholars from different countries, whose opinions did not represent any particular country or

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<sup>225</sup> Bonell (n 64) 78; Michael Will, 'Article 49' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 360; See also UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973 <[www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973\\_e.pdf](http://www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf)> accessed 26 October 2013.

<sup>226</sup> See discussion at chapter 5.2.8.

<sup>227</sup> International Institute for the Unification of Private Law, 'History and Overview' (*UNIDROIT*, 2014) <[www.unidroit.org/about-unidroit/overview](http://www.unidroit.org/about-unidroit/overview)> accessed 04 February 2014.

legal system.<sup>228</sup> This approach precluded the need to adopt diplomatic solutions when deciding the scope and wording of provisions, thus important issues were not obscured with ambiguous phraseology born of compromise amongst member states.<sup>229</sup> Furthermore, the unequal bargaining power that may exist in international treaties between stronger trading nations, was not present in the drafting of the Principles.<sup>230</sup> The Principles provides an in-depth official commentary to each article, these comments and the examples that illustrate them are an important tool of interpretation and application of the rules.<sup>231</sup> The purpose of the Principles is described as, ‘fleshing out bones already present in the skeletal structure of the uniform law’.<sup>232</sup> The Principles 2010<sup>233</sup> set out rules for international commercial contracts and the preamble states that they will be applicable when parties have agreed that the contract shall be governed by them.<sup>234</sup> The Principles may also apply when parties have decided their contract should be governed by general principles of law such as the *lex mercatoria*,<sup>235</sup> or alternatively have not chosen a law to govern the contract.<sup>236</sup> Furthermore they may be used to interpret and supplement international and domestic laws.<sup>237</sup>

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<sup>228</sup> 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.

<sup>229</sup> *ibid.*

<sup>230</sup> *ibid.*

<sup>231</sup> The International Institute for the Unification of Private Law, ‘History and Overview’ (UNIDROIT, 2014) <[www.unidroit.org/about-unidroit/overview](http://www.unidroit.org/about-unidroit/overview)> accessed 04 February 2014.

<sup>232</sup> John Felemegas, *An International Approach to the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 31; Felemegas attributes this analogy to Albert Kitzler.

<sup>233</sup> Earlier versions in 1994, 2004.

<sup>234</sup> International Institute for the Unification of Private Law, ‘UNIDROIT Principles 2010’ (UNIDROIT, 2014) <[www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles)> accessed 04 February 2014.

<sup>235</sup> Merchant law.

<sup>236</sup> The International Institute for the Unification of Private Law, ‘UNIDROIT Principles 2010’ (UNIDROIT, 2014) <[www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles)> accessed 04 February 2014.

<sup>237</sup> *ibid.*

Although the Principles are not legally binding on any member states, their flexibility offers advantages over the CISG including that the wording of difficult terms such ‘hardship’ are clearly defined whereas in the CISG agreement could not be reached.<sup>238</sup> Furthermore, the non-binding nature of the Principles means that they can be altered and amended to keep up with changes in international trade, whereas the CISG would require agreement and ratification of any changes by all contracting states, a prospect that is both daunting and unrealistic.<sup>239</sup> The thesis compares both the nature and scope of the Principles and the CISG in order to determine when it would be legitimate to use the Principles as a means of resolving those issues which are *praeter legem*<sup>240</sup> within the CISG.<sup>241</sup> In addressing this question, it is necessary to examine the difference between rules and principles. The two concepts differ in their application, rules are of a mandatory nature and set out the legal obligations of the parties, the rule itself being strict and indivisible and therefore requiring acceptance as a whole.<sup>242</sup> Dworkin states that, ‘if the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision’.<sup>243</sup> Principles on the other hand fulfil a more abstract purpose than rules in that they carry an element of justice or fairness, and such principles tend to underlie rules.<sup>244</sup> This can be observed in art 48(2) CISG which deals with the seller’s right to cure a breach, in this provision the underlying principle of co-operation is present as the buyer must

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<sup>238</sup> UNIDROIT, art 6.2.2 states: ‘There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished’; Garro (n 228) 1160.

<sup>239</sup> Garro (n 228) 1164.

<sup>240</sup> Internal gaps.

<sup>241</sup> As opposed to *intra legem* (external gaps); Ferrari (n 66) 1; Sica (n 66) 1.

<sup>242</sup> Ronald Dworkin, ‘The Model of Rules’ (1967) 35 Loy U Chi L Rev 14, 23; Sica (n 66) 8.

<sup>243</sup> Dworkin (n 242) 23; Sica (n 66) 8.

<sup>244</sup> *ibid.*

communicate with the seller otherwise he will lose his other remedies.<sup>245</sup> It is on that basis that the Principles can be used to fill in the gaps inherent in the CISG, as both instruments are based on similar general principles such as fairness and reasonableness and are more equally accessible to parties than national laws.<sup>246</sup>

Although it can be argued that recourse to the Principles as a means of gap filling can be as dangerous to the goal of uniformity as resorting to domestic laws, there is a subtle difference between the two approaches. When deciding if it is legitimate to use the Principles to interpret the CISG, courts should look at the drafters' intent, and if this is not helpful then look to the underlying purpose of the provision.<sup>247</sup> Once this mechanism is exhausted, decision makers can resort to the Principles as a means of interpretation.<sup>248</sup> Therefore, the Principles cannot be used to interpret the CISG simply because they are more detailed or desirable.<sup>249</sup>

The thesis proceeds on the premise that using the Principles, as a means of gap filling in the CISG is legitimate, provided the internal mechanisms are exhausted; it is more advantageous to use the Principles instead of domestic law if the international character and uniformity of the CISG are to be protected. In particular, as set out in the preamble, the Principles can supplement international uniform law instruments and aid decision makers when faced with a gap in those instruments.<sup>250</sup> The aim is to prevent decision makers from 'falling back' on national laws, to keep rationales for judgments within the international sphere and ensure fairness to the parties as they will both have equal access to the provisions.<sup>251</sup>

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<sup>245</sup> See discussion at chapter 6.3.2.

<sup>246</sup> Garro (n 228) 1160; Boele-Woelki (n 4) 236.

<sup>247</sup> Jacob Ziegel, 'The UNIDROIT Contract Principles, CISG and National Law' (UNIDROIT Principles seminar, Venezuela November 1996) <[www.cisg.law.pace.edu/cisg/biblio/ziegel2.html](http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html)> accessed 05 December 2013.

<sup>248</sup> *ibid.*

<sup>249</sup> *ibid.*

<sup>250</sup> Garro (n 228) 1152.

<sup>251</sup> *ibid* 1153.

Most scholars agree that the CISG and the Principles are complementary, both advocating many of the same policies, such as good faith,<sup>252</sup> party autonomy, freedom of form, the remedy of cure, preventing trivial termination<sup>253</sup> of the contract, promoting mutual co-operation and the remedy of damages for foreseeable breach of contract.<sup>254</sup> The Principles can be used to guide interpretation of the CISG, insofar as it does not contradict the parties' intentions, mandatory law or any usages.<sup>255</sup> An example of how the Principles can be used to interpret and supplement the buyer's remedy of avoidance under the CISG is illustrated in determining the existence of a fundamental breach.<sup>256</sup> The CISG states that, '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'.<sup>257</sup> However, it does not define what is meant by the term 'substantially to deprive'.<sup>258</sup> Conversely, the Principles go further and provide several factors to be taken into account when determining fundamental non-performance.<sup>259</sup> Factors include: whether performance was of essence to the contract,<sup>260</sup> no reliance on future performance<sup>261</sup> or intentional or reckless performance amongst others.<sup>262</sup> The latter criterion is a good example of when the

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<sup>252</sup> However in the UNIDROIT Principles 2010 good faith is referred to in the context of behaviour of the parties (art 1.7), appropriate terms (art 4.8) and implied obligations (art 5.1.2).

<sup>253</sup> Under the UNIDROIT Principles 'termination' has the same meaning as 'avoidance' under the CISG.

<sup>254</sup> Garro (n 228) 1165; Boele-Woelki (n 4) 203; Sica (n 66) 1.

<sup>255</sup> Garro (n 228) 1156; Bridge (n 10) 82.

<sup>256</sup> See discussion at chapter 5.1.2.

<sup>257</sup> CISG, art 25.

<sup>258</sup> Robert Koch, 'Commentary on Whether the UNIDROIT Principles of International Commercial Contracts may be used to Interpret or Supplement Article 25 CISG' (*IJCL*, 05 January 2005) <[www.cisg.law.pace.edu/cisg/biblio/koch1.html](http://www.cisg.law.pace.edu/cisg/biblio/koch1.html)> accessed 14 January 2014.

<sup>259</sup> Under the UNIDROIT Principles 'non-performance' has the same meaning as 'breach' under the CISG.

<sup>260</sup> UNIDROIT, art 7.3.1 (b).

<sup>261</sup> UNIDROIT, art 7.3.1 (d).

<sup>262</sup> See discussion at chapter 5.1.3; UNIDROIT, art 7.3.1 (c).

Principles should *not* be applied to interpret the CISG, as the CISG makes it clear that the behaviour of the parties is not a factor in determining fundamental breach.<sup>263</sup>

These instruments, while complementary, do contain differences in scope and application and decision makers should be wary of using the Principles on matters which the CISG deliberately did not want to cover.<sup>264</sup> For instance the role of good faith, as mentioned above, art 7(2) places the observance of good faith in the interpretation of the CISG, whereas the Principles places the obligation on the parties.<sup>265</sup>

Consequently, it is important that the Principles are only used to supplement and guide interpretation of the CISG where the matter is governed but not expressly settled in it. Furthermore the same general principles must underpin the rules of both instruments and the use of the Principles cannot be contrary to mandatory law, the parties' intentions or any relevant usages. The last part of this chapter examines English common law, in conjunction with the SGA dealing with the right to terminate the contract. This examination responds to claims that English law is better equipped to deal with international sale of goods contracts as it offers more certainty and a swifter remedy.<sup>266</sup>

### 3.7 Background on English Law

In English contract law, the law relating to sale of goods is of paramount importance to business as well as consumer contracts. The common law in conjunction with the SGA operates to provide a framework within which goods are bought and sold. The SGA 1979 (as amended), provides the current framework for sale of goods contracts in the UK. The original statutory body of law was the Sale of

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<sup>263</sup> Germany 3 April 1996 Supreme Court (*Cobalt sulphate case*) (*IICL*, 15 November 2007) <<http://cisgw3.law.pace.edu/cases/960403g1.html>> accessed 30 May 2014.

<sup>264</sup> Michael Bonell, *An International Restatement of Contract Law* (Transnational 1997).

<sup>265</sup> See discussion at chapter 5.1.3; UNIDROIT, art 1.7; Bonell (n 264).

<sup>266</sup> Mullis (n 10) 137; Bridge (n 10) 55.

Goods Act 1893, which codified the pre-existing common law.<sup>267</sup> The Act ‘endeavoured to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in Committee on the authority of the legislature’.<sup>268</sup> The 1979 Act was amended in 1994<sup>269</sup> and 1995.<sup>270</sup> The SGA provides the statutory framework for contracts of sale. Although most provisions are mandatory<sup>271</sup> some, such as the rules on passing of risk, can be amended by the express agreement of the parties to the contract.<sup>272</sup> Since its enactment, the SGA has striven to protect the interests of consumers and businesses. Under the SGA, consumer buyers are allowed a greater scope of remedies for a breach of contract than their non-consumer counterparts.<sup>273</sup> As the thesis and the CISG are only concerned with commercial contracts the rights and remedies of consumers under the SGA are excluded from the scope of examination.

### 3.7.1 English Law as a Method of Comparison

Although there is strong support for the use of the CISG to govern international sale of goods contracts,<sup>274</sup> some commentators maintain that the CISG is *not* suited to these transactions.<sup>275</sup> For instance Guest and Treitel, propose the use of English law as it is dominant in the area.<sup>276</sup> It is argued that if the CISG was applied to international sales contracts currently governed by English law the effect would be significantly different because the wording of the CISG’s provisions are too

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<sup>267</sup> John Adams and Hector Macqueen, *Atiyah’s Sale of Goods* (12<sup>th</sup> edn, Pearson 2010) 3.

<sup>268</sup> Mackenzie Chalmers, *Sale of Goods Act 1893* (W Clowes & Sons 1894).

<sup>269</sup> Sale and Supply of Goods Act 1994 hereinafter referred to as the ‘SSGA’ 1994; Sale of Goods (Amendment) Act 1995.

<sup>270</sup> Sale of Goods (Amendment) Act 1995.

<sup>271</sup> SGA, ss 12-15.

<sup>272</sup> SGA, s 20.

<sup>273</sup> SGA, ss 15A and 48A-F.

<sup>274</sup> 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.

<sup>275</sup> Text to n 8; Bridge (n 39) 277; See also Hellner (n 39) 338.

<sup>276</sup> A G Guest and Guenter Treitel, *Benjamin’s Sale of Goods*, (5<sup>th</sup> edn, Sweet & Maxwell 1997) 18-004.

ambiguous and would cause uncertainty.<sup>277</sup> English law is cited as being more suitable to govern disputes involving the sale of commodity goods and documentary sales because it has been used for centuries and there are specialist courts in London.<sup>278</sup> Bridge and Hellner argue that the CISG's termination rights are stricter than that of English law and are better suited to contracts where there is relatively little volatility, rather than to commodities sales which require swift avoidance.<sup>279</sup> English case law is often cited as one of the main reasons the UK has not adopted the CISG.<sup>280</sup>

The thesis responds to these assertions by examining the English law on termination of the contract and argues that even though English law has had longer to develop than the CISG, there is still uncertainty in any law. It is only by examining how the law is understood, interpreted and applied that uncertainty can be minimised. The strength of English law as a means of governing international sale of goods contracts lies in its well-developed judicial precedent which has evolved over several centuries.<sup>281</sup> However, this does not guarantee certainty, nor does it further the aims of harmonisation where parties are located in different countries.<sup>282</sup> If neither of the parties has their place of business in the UK, choosing English law may place both parties at a disadvantage as only some issues are governed by the SGA whereas others are governed by the common law. For example, documentary sales is not covered in the SGA but rather on the rules built up in the common law. Therefore, parties unfamiliar with English common law may find it difficult to

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<sup>277</sup> *ibid.*

<sup>278</sup> Text to n 8; Fountoulakis (n 36) 306; 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.

<sup>279</sup> Bridge (n 26) 5; See also Hellner (n 39) 338.

<sup>280</sup> Guest and Treitel (n 276); cf Fountoulakis (n 36) 306.

<sup>281</sup> Mullis (n 10) 137.

<sup>282</sup> Honka (n 11) 111.

understand when they can lawfully terminate the contract for this type of breach.<sup>283</sup> The thesis argues many of the criticisms aimed at the CISG, specifically the buyer's remedy of avoidance are without merit and upon examination of its provisions and the decisions generated under it, the CISG is more than capable of dealing with international sale of goods contracts. For instance, English law is cited as being more suitable to deal with delivery terms such as 'CIF',<sup>284</sup> commonly used in documentary commodity sales.<sup>285</sup> Guest and Treitel argue that, 'English law's rules on termination for breach in the context of CIF contracts lead to "clear and easily predictable results", adoption of the Convention would cause considerable uncertainty'.<sup>286</sup> This argument is unfounded as the CISG has interpreted these delivery terms in light of art 8 dealing with the parties' intent, as well as art 9 dealing with usages and has arrived at the same conclusions as English law, that is, these terms are to be interpreted as meaning time is of the essence and the buyer can avoid the contract for a breach of these terms.<sup>287</sup> The next section examines the remedy of termination under English common law through the system of classification of terms to determine when English law will permit lawful termination of the contract.

### 3.7.2 Classification of Terms

Although the CISG uses the criteria of fundamental breach<sup>288</sup> to permit lawful avoidance of the contract, English law bases the right to terminate the contract using a system of classification of terms. Contractual terms can either be classified as conditions, warranties or intermediate (innominate) terms. It is important for parties

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<sup>283</sup> See discussion at chapter 5.2.7.6.

<sup>284</sup> 'Cost, Insurance, Freight'.

<sup>285</sup> See discussion at chapter 1.2; Bridge (n 10) 55.

<sup>286</sup> Guest and Treitel (n 276) 18-004; Mullis (n 10) 137.

<sup>287</sup> See discussion at chapter 4.2 and 4.3; 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; See also Leisinger (n 164) 139.

<sup>288</sup> CISG, art 25.

to correctly identify the status of terms in the event of a breach of contract, as the type of term breached will establish the available remedy. A party may be allowed to terminate the contract where the breach is repudiatory.<sup>289</sup> In *Decro-Wall International SA v Practitioners in Marketing Ltd* Buckley LJ stated:

To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. It has been said that the breach must be of an essential term, or of a fundamental term of the contract, or that it must go to the root of the contract... Will the consequences of the breach be such that it would be unfair to the injured party to hold him to the contract and leave him to his remedy in damages as when a breach or breaches may occur? If this would be so, then a repudiation has taken place.<sup>290</sup>

Although at one time there was support in the common law for the application of a ‘fundamental term’ meaning a core obligation of the contract, as mentioned in the dictum of Buckley LJ, the courts have since rejected this approach.<sup>291</sup> In *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* Lord Upjohn argued:

[t]here is no magic in the words “fundamental breach”; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case.<sup>292</sup>

Therefore, a ‘fundamental term’ is treated in the same way as a term classified as a condition.<sup>293</sup> Section 11(3) SGA states that a contract can be terminated if the term broken is a condition, that is, its breach goes to the ‘root’ of the contract.<sup>294</sup> Put

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<sup>289</sup> Mindy Chen-Wishart, *Contract Law* (2<sup>nd</sup> edn, OUP 2008) 505.

<sup>290</sup> [1971] 1 WLR 361, 380.

<sup>291</sup> Hugh Beale, *Chitty on Contracts* (31<sup>st</sup> edn, Sweet and Maxwell 2012) 12-024.

<sup>292</sup> [1967] AC 361, 421 - 422.

<sup>293</sup> Beale (n 291) 12-024.

<sup>294</sup> Chen-Wishart (n 289) 505.

another way, such a term is essential to the contract so, if it is broken, the aggrieved party has the right to bring the contract to an end and claim damages or, alternatively s 11(2) allows the party to affirm the contract and claim damages.<sup>295</sup> A term may be classed as a condition by statute<sup>296</sup> or, alternatively, by the parties' intention and the role of the term in the contract. An example of conditions implied by statute can be found in ss 12-15 SGA.<sup>297</sup> For instance s 13 deals with breaches of description and s 14 with quality and fitness of the goods, these provisions will be discussed later in the chapter.<sup>298</sup> A term may also be a condition where it is the parties' intention that it should go to the root of the contract. In *Lombard North Central Plc v Butterworth* it was held that the term relating to prompt payment was a condition of the contract as discerned from the wording of the agreement.<sup>299</sup> However, not every use of the word 'condition' will entitle the party to terminate the contract. For example, in *Schuler AG v Wickman Machine Tool Sales Ltd* it was held that despite the fact the contract had used the word 'condition', the parties actually intended it to be a warranty and so the innocent party was unable to terminate the contract on grounds of the term's breach.<sup>300</sup> It is interesting to note that the English common law will automatically treat time stipulations in some commercial contracts as conditions. Although s 10(1) SGA states that, 'stipulations as to time of payment are not of the essence of a contract of sale', s 10(2) states, 'whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract'. In *Bunge Corporation v Tradax* it was held that the time for notice of readiness to load the goods was a condition; the need for certainty in commercial contracts justified

<sup>295</sup> Paul Todd, *Cases and Materials on International Trade Law* (1<sup>st</sup> edn, Thomson 2002 ) 333; Jill Poole, *Textbook on Contract Law* (9<sup>th</sup> edn, OUP 2008) 242.

<sup>296</sup> See discussion below at chapter 3.7.4.

<sup>297</sup> Poole (n 295) 243.

<sup>298</sup> See discussion at chapter 3.7.4.

<sup>299</sup> [1987] 2 WLR 7; SGA, s 11(3).

<sup>300</sup> [1973] 2 WLR 683.

this approach.<sup>301</sup> This approach was applied in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)*<sup>302</sup> and confirmed in *The Naxos*.<sup>303</sup>

The courts also take a strict approach to time stipulations in commercial sales where the shipping documents are tendered late.<sup>304</sup> However, in *Torvald Klaveness A/S v Arni Maritime Corp (The Gregos)*<sup>305</sup> a case that dealt with the redelivery of a vessel at the end of a charterparty, Lord Mustill stated that stipulations as to time in this situation was not a condition. He contends that conditions were:

[l]argely determined by its practical importance in the scheme of the contract, and this is not easily judged in relation to the obligation to redeliver, since the occasions for the cancellation of a charter on the ground of a few days' delay at the end of the chartered service are likely to be few.<sup>306</sup>

Thus, not all time stipulations in commercial contracts will be treated as conditions as the English courts are wary of contracting parties using this position to escape a bad bargain or manipulate market prices and instead may use the approach that sometimes stipulations should be treated as intermediate or innominate terms.<sup>307</sup>

The second category of terms is warranties. Under the English common law warranties have been described as minor or lesser terms of the contract because they do not go to the root of the contract. A breach of warranty does not allow the party to terminate the contract.<sup>308</sup> The only remedy for a breach of warranty is a claim for damages. Section 61(1) SGA describes warranties as being collateral to the main purpose of the contract. Section 53 SGA deals with the buyer's right to claim damages for a breach of warranty, stipulating that the buyer is not permitted to reject

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<sup>301</sup> [1981] 1 WLR 711.

<sup>302</sup> [1971] 1 QB 164.

<sup>303</sup> *Cie Commerciale Sucrés et Denrés v C Czarnikow Ltd (The Naxos)* [1990] 1WLR 1337.

<sup>304</sup> *Toepfer v Lenersan-Poortman* [1981] 1 Lloyd's Rep 143.

<sup>305</sup> [1994] 1 WLR 1465.

<sup>306</sup> [1994] 1 WLR 1465, 1475.

<sup>307</sup> [1994] 1 WLR 1465.

<sup>308</sup> Poole (n 295) 242.

such goods but may make a claim for damages which is *prima facie* the difference in value between the value of the goods when they were delivered and the value of the goods if they had fulfilled the warranty.

The third category of terms are referred to as intermediate or innominate terms. The traditional approach of the courts in classifying terms as conditions or warranties on their construction, that is, does it go to the root of the contract, proved to be too simplistic as it was not always easy to determine if the contract was silent or ambiguous on the matter or where a minor term of the contract resulted in serious consequences for continued performance. Innominate terms are neither distinguishable on their construction as a condition or warranty; rather, what needs to be looked at is whether one party has been deprived substantially of the whole benefit which it was intended it would receive.<sup>309</sup> Only where the innocent party is substantially deprived of the whole benefit, will they be entitled to treat the contract as at an end, otherwise only a claim for damages can be made.<sup>310</sup> This term was developed under the common law in the case of *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha*,<sup>311</sup> where the owners hired the ship out to the defendants for a period of 24 months. The ship was unseaworthy and needed some 20 weeks of repairs; the courts stated that unseaworthiness gives a right to damages but not an automatic right to terminate unless the breach deprived the injured party of substantially the whole benefit of the bargain.<sup>312</sup> The innominate term approach helps to avoid termination of the contract for slight or technical breaches.<sup>313</sup> A breach of condition will entitle the injured party to repudiate the contract,

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<sup>309</sup> Todd (n 295) 506.

<sup>310</sup> Chen-Wishart (n 289) 506.

<sup>311</sup> [1962] 2 QB 26.

<sup>312</sup> [1962] 2 QB 26.

<sup>313</sup> *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989; cf *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470.

irrespective of the actual consequences, whereas innominate terms consider the ‘gravity of the breach’.<sup>314</sup> Repudiation can be risky if the injured party makes a wrongful repudiation he can be sued by the other party.<sup>315</sup> This point was illustrated in the case *Gill & Duffus SA v Berger & Co Inc*<sup>316</sup> where in a ‘CIF’ contract the buyer wrongfully rejected and refused to pay against documents that *were* conforming to the contract when the physical goods arrived and were found to be non-conforming. This was contrary to the well-established principle that ‘CIF’ contracts allow for rejection in two circumstances, first the buyer can only reject the documents if they are non-conforming, he cannot reject conforming documents on the knowledge that the goods are non-conforming.<sup>317</sup> If the goods are non-conforming that will give rise to a separate rejection right. The court held that the buyer’s wrongful repudiation entitled the seller to be relieved of their primary obligations under the contract.<sup>318</sup>

Innominate terms, when applied to international sale of goods, creates uncertainty for the parties as it is difficult to predict how courts will interpret these terms.<sup>319</sup> This is demonstrated in *Cehave NV v Bremer Handelgesellschaft mbH (The Hansa Nord)*<sup>320</sup> where the contract stipulated ‘shipment to be made in good condition’. The buyer sought to reject the goods on the basis of non-conformity and as a result of this repudiation the seller resold the goods on the market. The price for the goods had fallen greatly and the buyer was able to repurchase the goods at the much lower price and use them for the purpose intended, albeit as a slightly lower quality than was originally intended. The court held that the words ‘shipment to be

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<sup>314</sup> Todd (n 295) 333.

<sup>315</sup> *ibid* 437.

<sup>316</sup> [1984] AC 382.

<sup>317</sup> Bridge (n 26) 437.

<sup>318</sup> [1984] AC 382.

<sup>319</sup> Mullis (n 10) 137.

<sup>320</sup> [1976] QB 44.

made in good condition' was not a condition but rather an innominate term and as it had no serious consequences the buyer was not entitled to repudiate the contract.<sup>321</sup>

The next part of this chapter will examine the scope and application of the SGA, specifically the implied terms that allow the parties to repudiate the contract.

### 3.7.3 Scope of Sale of Goods Act 1979

The SGA applies to all contracts for the sale of goods.<sup>322</sup> Yet it differs to the CISG, specifically the SGA governs consumer contracts,<sup>323</sup> auctions,<sup>324</sup> sales on judicial or administrative execution,<sup>325</sup> electricity, ships, vessels, hovercraft or aircraft all of which are excluded under the CISG. Both instruments mutually exclude sales of: stocks, shares, investment securities, negotiable instruments or money.<sup>326</sup> Furthermore, both the SGA and the CISG allow for the sale of existing as well as future goods.<sup>327</sup> Section 2(1) SGA defines a contract of sale as follows: 'A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price'. Under the CISG there is no requirement of consideration to enforce the contract, art 29 CISG stating that 'A contract may be modified or terminated by the mere agreement of the parties'. Furthermore, there is no mention of the requirement of consideration in the CISG's rules on formation of the contract.<sup>328</sup> The thesis agrees with the approach to exclude consideration from the scope of the CISG as it is a uniquely common law requirement. Since one of the aims of the CISG is to

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<sup>321</sup> See discussion at chapter 5.1.4; [1976] QB 44.

<sup>322</sup> SGA, s 1; With the exception of SGA, s 14 SGA which only applies to sales in the 'course of business'.

<sup>323</sup> SGA, s 61(1).

<sup>324</sup> SGA, s 57.

<sup>325</sup> Subject to SGA, s 21(2)(b).

<sup>326</sup> SGA, s 61(1); CISG, art 2(d).

<sup>327</sup> SGA, s 5; CISG, art 3 (1).

<sup>328</sup> Petra Butler, 'The Doctrines of Parol Evidence Rule and Consideration-a Deterrence to the Common Law Lawyer?' (Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods, Singapore, September 2005).

promote uniformity, the use of national concepts would deter from this aim. Furthermore, the CISG only deals with commercial contracts and thus it is implicit that there will be a price paid in exchange for the goods.

#### 3.7.4 Interpretation of the Implied Conditions

The implied terms in ss 12-15 SGA apply to all contracts of sale notwithstanding the nature of the goods and these terms are treated as conditions of the contract.<sup>329</sup> Section 12(1) stipulates that it is ‘an implied on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass’. This term is implied into all contracts of sale regardless of whether the seller is in the course of business or a private seller.<sup>330</sup> The liability for a breach of s 12(1) cannot be excluded or restricted by the seller under the Unfair Contract Terms Act 1977.<sup>331</sup> The right to sell the goods does not mean that the seller is the owner of the goods.<sup>332</sup> For example, the seller may be given the goods to sell by the true owner of the goods. Alternatively, the seller may physically own the goods but is restricted from selling the goods due to some other claim over them.<sup>333</sup> In *Niblett Ltd v Confectioners Materials Co Ltd* the defendants were an American company that had contracted to sell 3,000 cans of ‘Nissly’ brand condensed milk.<sup>334</sup> The goods were confiscated by the customs authorities on arrival in the UK as they infringed the copyright of the Nestlé company.<sup>335</sup> It was held that the defendants were liable for a

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<sup>329</sup> With the exception of SGA, s 14 which only applies if the seller is in the course of business; See also Nicholas Ryder, Margaret Griffiths and Lachmi Singh, *Commercial Law Principles and Policy* (CUP 2012) 79.

<sup>330</sup> Ryder, Griffiths and Singh (n 329) 80.

<sup>331</sup> The CISG does not deal with unfair terms such matters are left to national laws; Hereinafter referred to as ‘UCTA’; UCTA, s 6(1).

<sup>332</sup> Ryder, Griffiths and Singh (n 329) 81.

<sup>333</sup> *ibid.*

<sup>334</sup> [1921] 3 KB 387.

<sup>335</sup> *Niblett Ltd v Confectioners Materials Co Ltd* [1921] 3 KB 387.

breach of s 12(1) as they did not have the legal right to sell the goods in the UK.<sup>336</sup> The remedy for a breach of this section is a full refund of the purchase price as a breach would constitute a total failure of consideration, in the sense that without good title the buyer has received nothing of value under the contract.<sup>337</sup> The buyer is not under a duty to account monetarily to the seller for any benefit received from the use of the goods.<sup>338</sup> The application of s 12 means that if the seller has no good title to pass to the buyer at the time of sale then English law treats this as if nothing has been delivered under the contract. The buyer is entitled to rescind the contract upon discovering that the breach has occurred and can claim a full refund of the contract price. The CISG is not dissimilar in its approach for breaches for defective title, Schroeter argues that, ‘a failure to deliver goods owing to objective or subjective impossibility probably always represents a fundamental breach of contract’.<sup>339</sup> He supports this by citing the example of the seller being unable to transfer property in the goods.<sup>340</sup> Although both instruments allow for avoidance or termination of the contract, the consequences resulting from the breach of s 12 SGA could lead to unsatisfactory results if the buyer has made use of the goods for a period of time and has benefitted or profited from this use. Over a period of time the goods may have depreciated in value and under the SGA the buyer will not have to account for this benefit or use. In *Butterworth v Kingsway Motors Ltd* the buyer had eleven and a half months use of a car when they discovered that the hirer under a hire-purchase agreement had wrongly sold the car to another party who in turn sold it to the

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<sup>336</sup> *ibid.*

<sup>337</sup> Ryder, Griffiths and Singh (n 329) 82.

<sup>338</sup> *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286; Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987).

<sup>339</sup> Ulrich Schroeter, ‘Article 25’ in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3<sup>rd</sup> edn, OUP 2010) 417.

<sup>340</sup> *Ibid* 409; See also Germany 22 August 2002 District Court Freiburg (*Automobile case*) (IIICL, 07 December 2006) <<http://cisgw3.law.pace.edu/cases/020822g1.html>> accessed 01 August 2014.

claimant.<sup>341</sup> In that time the car which was worth £1275 when purchased had depreciated to a value of £800, yet the buyer was entitled to recover the full price. Upon review by the Law Commission, it was decided that the issue of unjust enrichment was too complex to be included in the SGA and furthermore it would not be fair to expect the buyer to pay the seller for the use of property belonging to somebody else.<sup>342</sup> The thesis argues that the CISG's provisions on the consequences of avoidance are more detailed and offer a fairer solution to *both* parties. Article 81(2) CISG states that both parties are bound to make restitution of any part of the contract that had been performed. Furthermore art 84(1) CISG requires the seller to refund the contract price, payable with interest from the date on which it was paid. Article 84(2) CISG places an obligation on the buyer to account to the seller for all benefits which he has received from the use of the goods.<sup>343</sup> Thus neither party has an unfair advantage over the other.

The next implied condition to be examined is s 13 SGA which stipulates that, 'where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description'. Section 13 will apply to all contracts for the sale of goods regardless of whether the seller is a business or a private seller.<sup>344</sup> A 'sale by description' can include goods sold on the internet, by catalogue, future or bespoke goods.<sup>345</sup> A sale by description can also be applied where the buyer has seen the actual goods, in *Grant v Australian Knitting Mills Ltd*<sup>346</sup> Lord Wright stated that, 'even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so

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<sup>341</sup> [1954] 1 WLR 1286.

<sup>342</sup> Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987).

<sup>343</sup> See discussion at chapter 2.4.5 and 7.2.3.

<sup>344</sup> Ryder, Griffiths and Singh (n 329) 85.

<sup>345</sup> *ibid.*

<sup>346</sup> [1936] AC 85.

long as it is sold not merely as the specific thing but as a thing corresponding to a description'.<sup>347</sup> However, the buyer must be relying on the description in order to claim a breach of s 13, if the buyer makes it clear that only those specific goods will suffice, then the sale cannot be a sale by description.<sup>348</sup> To meet the threshold of a breach of condition the words forming the description must identify the goods in some manner. In *Ashington Piggeries Ltd v Christopher Hill Ltd*<sup>349</sup> Lord Diplock stated:

The “description”... is, in my view, confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied ... Ultimately the test is whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy. The key to s.13 is identification.<sup>350</sup>

In *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)*<sup>351</sup> the claim for a breach of description failed as the shipyard number was not relevant to the identification of the ship itself. It used to be the position in English law that if there was a breach of description, even if slight or technical, this allowed the non-breaching party to terminate the contract. In *Arcos Ltd v Ronaasen & Son*<sup>352</sup> the buyer was allowed to reject the goods where the contract called for staves half an inch thick. However, when delivered, the majority of staves exceeded this measurement. This was a repudiatory breach even though the goods could still be used for their purpose.<sup>353</sup> Similarly in *Re Moore & Co Ltd v Landauer & Co Ltd*<sup>354</sup> the buyer sought to reject the goods as the cans were packed in cases of 24 instead of

<sup>347</sup> *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 100; *Beale v Taylor* [1967] 1 WLR 1193; See also SGA, s 13(3).

<sup>348</sup> *Harlington & Leinster v Christopher Hull Fine Art* [1991] 1 QB 564.

<sup>349</sup> [1972] 1 AC 441.

<sup>350</sup> *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] 1 AC 441, 503.

<sup>351</sup> [1976] 1 WLR 989.

<sup>352</sup> [1933] AC 470.

<sup>353</sup> *Arcos Ltd v Ronaasen & Son* [1933] AC 470.

<sup>354</sup> [1921] 2 KB 519.

30 as stated in the contract. The buyer succeeded even though the packaging of the cans did not affect the overall volume and value of the goods.<sup>355</sup> A breach of s 13 allows the buyer the right to reject the goods. However, where the buyer is a non-consumer this right has been restricted to exclude those cases where ‘the breach is so slight that it would be unreasonable for him to reject them’.<sup>356</sup> In such cases the buyer is only restricted to a claim for damages. This amendment was inserted by virtue of the SSGA 1994 and in the case of a non-consumer, s 15A SGA would only permit rejection of the goods where the breach is serious. It is for the seller to prove that it would be unreasonable for the buyer to reject the goods.<sup>357</sup> As such, cases like *Arcos Ltd v Ronaasen & Son*<sup>358</sup> and *Re Moore & Co Ltd v Landauer & Co Ltd*<sup>359</sup> might be decided differently today. Although the SGA does not define the term ‘non-consumer’, s 61 SGA defines a business as, ‘a profession and the activities of any government department...or local or public authority’. Furthermore s 61 states that a consumer contract, ‘has the same meaning as in Section 25(1) of the Unfair Contract Terms Act 1977’. Section 25(1) UCTA states that, ‘the consumer does not deal or hold himself out as dealing, in the course of a business and...the goods are of a type ordinarily supplied for private use or consumption’.<sup>360</sup> For the purposes of UCTA a business could be a consumer. For example, in *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd*<sup>361</sup> the buyer, a director of a company, bought a car for personal as well as business use. The contract contained an exclusion clause that ‘any warranty or condition as to condition, description, quality or fitness for any particular purpose was excluded from the contract of sale unless the buyer was

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<sup>355</sup> [1921] 2 KB 519.

<sup>356</sup> SGA, s 15A.

<sup>357</sup> SGA, s 15A(3).

<sup>358</sup> [1933] AC 470.

<sup>359</sup> [1921] 2 KB 519.

<sup>360</sup> UCTA, s 12.

<sup>361</sup> [1988] 1 WLR 321.

dealing as a consumer.<sup>362</sup> It was held that the company had not held itself out as making the contract in the course of business, and on the facts, the necessary degree of regularity had not been shown, the company was thus dealing as a consumer within the meaning of UCTA, and therefore the implied term could not be excluded.<sup>363</sup> In the case of non-consumers, s 6(3) UCTA permits the use of an exclusion of liability clause with regard to s 13 SGA if it satisfies the requirement of reasonableness. The test of reasonableness is set out in s 11 UCTA it states:

[whether] a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.<sup>364</sup>

Schedule 2 UCTA sets out a non-exhaustive list of guidelines for the courts to consider when deciding if the term is reasonable, including: the bargaining strength of the parties, inducements to agree to the term, whether the other party knew or ought to have known of the term, whether it was practical for the condition to be complied with and if the goods were made to the specifications of the buyer.

The CISG also allows for avoidance<sup>365</sup> of the contract where there is a breach of description, as this would amount to non-conformity,<sup>366</sup> and if the non-conformity met the criteria of fundamental breach<sup>367</sup> the buyer would be entitled to avoid the contract. As s 15A SGA restricts the right to reject the goods to serious breaches of description, one could argue that the approaches under the two instruments are not altogether dissimilar, in the sense that a party cannot escape his obligations for trivial

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<sup>362</sup> [1988] 1 WLR 321.

<sup>363</sup> [1988] 1 WLR 321.

<sup>364</sup> UCTA, s 11(2).

<sup>365</sup> CISG, art 49 (1)(a).

<sup>366</sup> CISG, art 35(1) states: 'The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract'.

<sup>367</sup> CISG, art 25.

breaches. Mullis argues that s 15A is unlikely to have an impact on international sale of goods transactions, in particular ‘CIF’ contracts as s 15A(2) states that the section will not apply if a ‘contrary intention appears in, or is to be implied from, the contract’.<sup>368</sup> This approach even if discernible from the contract, does not give English law an advantage over the CISG as the latter also has these mechanisms for determining intent and setting standards for conformity, including arts 6, 8 and 9 CISG.<sup>369</sup>

Both English law and the CISG allow a wide meaning to be attributed to the word ‘description’. In *Ashington Piggeries* Lord Diplock stated that the key to description was whether the words identified the goods in some manner.<sup>370</sup> These could include: weight, dimensions, make, model, trademark etc. The CISG on the other hand has permitted a breach of description in cases involving physical as well as intangible characteristics.<sup>371</sup> Henschel argues that:

The starting point is that there are no limits to the contractual requirements which the parties may agree with respect to the goods, for example, that the goods may not be made by child workers, that the goods should be produced in an environmentally-friendly way ... that the goods should satisfy the special safety and environmental requirements of the buyer's country, etc. Only the imaginations of the parties and mandatory public law rules can set limits to what can be validly agreed.<sup>372</sup>

Thus under the CISG the principles of party autonomy<sup>373</sup> and parties’ intent<sup>374</sup> would mean that parties were free to decide what characteristics would form part of the description. One of the main divergences in the approach of the SGA when

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<sup>368</sup> Mullis (n 10) 137.

<sup>369</sup> See discussion at chapter 4.

<sup>370</sup> *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] 1 AC 441.

<sup>371</sup> Belgium 4 June 2004 District Court Kortrijk (*Steinbock-Bjonustan EHF v NV Duma*) (IICL, 15 February 2005) <<http://cisgw3.law.pace.edu/cases/040604b1.html>> accessed 05 August 2014.

<sup>372</sup> Ren Henschel, *Conformity of Goods in International Sales* (GadJura 2005) 162; Kristian Maley, ‘The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2009) *International Trade & Business Law Review* 82, 103.

<sup>373</sup> CISG, art 6.

<sup>374</sup> CISG, art 8.

compared to the CISG, is that s 13 SGA deals exclusively with breach of description and *not* breach of quality. The latter is dealt with under s 14 SGA. The courts have interpreted this distinction very clearly and while a breach of ss 13 and 14 SGA may arise out of the same set of facts<sup>375</sup> they are dealt with separately under the statute. In *Ashington Piggeries* a sale of ‘Norwegian Herring Meal’ contaminated with a poisonous toxin was held not to be a breach of description as it could still meet its description albeit not of a merchantable quality, therefore this was not a breach of s 13 SGA.<sup>376</sup> This is relevant to international sale of goods transactions as s 14 deals with a breach of quality, this section only applies where the seller is in the course of business, which will not be an issue for international sale of goods contracts as sellers are in the course of business.<sup>377</sup> However, if the sales contract contains an exclusion clause<sup>378</sup> with regard to conformity for quality the buyer could find themselves unable to reject the goods if there is no claim for a breach of description.<sup>379</sup> The CISG does not distinguish between quality and description and both breaches are embodied in art 35(1) CISG which states that, ‘the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract’. The buyer will be able to avoid the contract for a breach of this provision if it is a fundamental breach.<sup>380</sup> Furthermore the matter of exclusion clauses, although not expressly mentioned in the CISG, falls under the purview of art 6 which allows the parties to derogate from or vary any of the provisions of the CISG.<sup>381</sup> The

<sup>375</sup> *Cotter v Luckie* [1918] NZLR 811 ‘polled Angus bull’ was impotent and unable to breed.

<sup>376</sup> *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] 1 AC 441.

<sup>377</sup> Also the thesis and the CISG are only concerned with commercial contracts.

<sup>378</sup> UCTA, s 6(2).

<sup>379</sup> *Ryder, Griffiths and Singh* (n 329) 89.

<sup>380</sup> See discussion at chapter 5.2.7.3; CISG, art 25.

<sup>381</sup> See discussion at chapter 4.1; Subject to CISG, art 12 which states: ‘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

exclusion of these provisions is not dependent on the test of reasonableness, as is the standard of s 11 UCTA, rather it is more decisive and is based on the clear agreement of the parties.<sup>382</sup>

Section 14 SGA is the implied term as to quality and fitness of the goods. Section 14(2) states that, 'where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality'. The test of quality was amended by the SSGA 1994, where the requirement of 'merchantability' was replaced by 'satisfactory quality' to make it more flexible to accommodate a wider range of sales contracts.<sup>383</sup> The test is an objective one 'taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances'.<sup>384</sup> Section 14(2B) states that quality includes, fitness for all common purposes as well as other factors where relevant, these include appearance and finish, freedom from minor defects, safety and durability.<sup>385</sup> The provisions of s 14 will only apply where the seller is in the course of business, thus excluding private sellers.<sup>386</sup> Section 14(2C) sets out the circumstances where the implied condition will not apply: if the defect has been brought to the buyer's attention before the contract was formed, where the buyer has examined the goods and that examination ought to have revealed the defect and in a sale by sample, any defect which would have been discernible on a reasonable examination of the goods. Section 14(3) states that the goods must be fit for any particular purpose that the

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than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article'.

<sup>382</sup> Netherlands 2 January 2007 Appellate Court Hertogenbosch (*GWA Bernards v Carstenfelder Baumschulen Pflanzenhandel GmbH*) (IIICL, 25 May 2010)

<<http://cisgw3.law.pace.edu/cases/070102n1.html>> accessed 04 August 2014; See also Daan Dokter, 'Interpretation of exclusion-clauses of the Vienna Sales Convention' (2004) 68 *Rabels Z* 430.

<sup>383</sup> Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987) 3.11; Ryder, Griffiths and Singh (n 329) 94.

<sup>384</sup> SGA, s 14(2A).

<sup>385</sup> SGA, s 14(2B) (b-e).

<sup>386</sup> SGA, s 14(2); *Stevenson v Rogers* [1999] 2 WLR 1064.

buyer has expressly or impliedly made known to the seller. It must be reasonable for the buyer to rely on the seller's expertise. In *Slater v Finning Ltd*<sup>387</sup> the goods had a defect of which neither party was aware; the court decided that it would be unreasonable in such circumstances to hold the seller liable.<sup>388</sup> Similar to s 13, a breach of s 14 would only permit the non-consumer buyer to reject the goods if the breach was not so slight as to be unreasonable, otherwise the breach is treated as a warranty and the buyer can only claim damages.<sup>389</sup> In the case of a non-consumer buyer, any term purporting to exclude liability for a breach of s 14 must satisfy the test of reasonableness under s 11 of UCTA.<sup>390</sup>

An in-depth examination of the provisions and case law dealing with breaches for quality of the goods under the CISG will be carried out in chapter five.<sup>391</sup> However, at this stage it is necessary to draw a few comparisons with s 14 SGA to see how the two instruments match up with regard to stipulations as to quality. As mentioned earlier, stipulations as to quality are covered under art 35 CISG, which permits the buyer to reject the goods and avoid the contract<sup>392</sup> if the breach of quality amounts to a fundamental breach of contract.<sup>393</sup> Although art 35 does not expressly stipulate the standards of quality the goods must possess, the legislative history of the provision<sup>394</sup> in addition to scholarly material<sup>395</sup> and case law<sup>396</sup> indicates using the objective standard of what is 'reasonably expected' to determine if the goods are

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<sup>387</sup> [1996] 3 WLR 190.

<sup>388</sup> [1996] 3 WLR 190.

<sup>389</sup> SGA, s 15A.

<sup>390</sup> UCTA, s 6(3).

<sup>391</sup> See discussion at chapter 5.2.7.

<sup>392</sup> CISG, art 49(1)(a).

<sup>393</sup> CISG, art 25.

<sup>394</sup> Pace Law School Institute of International Commercial Law, 'Guide to CISG Article 35' (*IICL*, 29 August 2006) <[www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html](http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html)> accessed 15 June 2014.

<sup>395</sup> Cesare Massimo Bianca, 'Article 35' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 281.

<sup>396</sup> Netherlands 15 October 2002 Netherlands Arbitration Institute Case No 2319 (*Condensate crude oil mix case*) (*IICL*, 12 November 2007) <<http://cisgw3.law.pace.edu/cases/021015n1.html>> accessed 18 June 2014.

conforming to the contract. The standard of reasonableness takes into account the terms of the contract, the parties' intent and the price amongst other factors.<sup>397</sup> Article 35(2)(a) states that the goods are not conforming unless they are fit for purposes that goods of the same description would ordinarily be used. This provision is comparable to s 14(2B)(a) SGA, however s 14(2B)(b-e) provides a non-exhaustive list of factors to take into account when assessing the quality of the goods. The thesis argues although the CISG does not explicitly state these factors, if interpreted correctly, these factors are certainly all attributes of quality. For example the case law has dealt with issues covering safety,<sup>398</sup> durability<sup>399</sup> and minor defects.<sup>400</sup> Bridge agrees with this contention and states that art 35 'substantially tracks its counterpart in English law'.<sup>401</sup> Article 35 also includes provisions for any special purpose for the goods made known to the seller at the time of the conclusion of the contract, unless it was unreasonable for the buyer to rely on the seller's skill or expertise.<sup>402</sup> Furthermore, art 35(3) states that the seller will not be liable for the non-conformity if at the conclusion of the contract the buyer 'knew or could not have been unaware of such lack of conformity'. Therefore the wording of art 35(3) may be more favourable to the buyer than English law. Under the latter, if the buyer examines the goods and fails to notice the defect they will be unable to rely on the non-conformity.<sup>403</sup>

The last implied term in the SGA is found in s 15 which deals with the seller's liability in cases of sale by sample. Section 15(2) states that the quality of the goods

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<sup>397</sup> Bianca (n 395) 281.

<sup>398</sup> Germany 2 March 2005 Federal Supreme Court (*Frozen pork case*) (*IICL*, 29 May 2008) <<http://cisgw3.law.pace.edu/cases/050302g1.html>> accessed 18 June 2014.

<sup>399</sup> Germany 27 February 2002 District Court München (*Globes case*) (*IICL*, 21 February 2007) <<http://cisgw3.law.pace.edu/cases/020227g1.html>> accessed 11 July 2014.

<sup>400</sup> Spain 17 January 2008 Supreme Court (*Used automobiles case*) (*IICL*, 04 June 2009) <<http://cisgw3.law.pace.edu/cases/080117s4.html>> accessed 15 June 2014.

<sup>401</sup> Bridge (n 26) 560.

<sup>402</sup> CISG, art 35(2)(b).

<sup>403</sup> Bridge (n 26) 563.

has to correspond to the quality of the sample<sup>404</sup> and the goods are to be free from any defect which a reasonable examination of the sample would not have revealed.<sup>405</sup> Section 15A SGA will also apply to s 15 in the same manner as ss13-14, equally exclusion clauses are only permitted if the term satisfies the test of reasonableness.<sup>406</sup> Although the CISG does not expressly mention sales by sample, art 35(c) CISG requires that the quality of goods correspond to the sample.

Under s 35 SGA the buyer will lose the right to reject the goods if he has been deemed to have accepted them. Notwithstanding the time required to examine the goods<sup>407</sup> the buyer will be deemed to accept the goods where: 'he intimates to the seller that he has accepted them',<sup>408</sup> after a reasonable lapse of time and he has retained the goods in his possession without indicating to the seller that he will reject them<sup>409</sup> or 'when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller'.<sup>410</sup> A request for repair or disposing of the goods to a sub buyer is not an act of acceptance barring rejection.<sup>411</sup>

Under art 49(2)(b)(i) CISG the buyer will lose the right to avoid the contract if declaration of avoidance is not made within a reasonable time 'after he knew or ought to have known of the breach'. Alternatively he will lose the right to avoid the contract if declaration of avoidance is not made within a reasonable time after the expiration of any additional period<sup>412</sup> of time fixed for performance<sup>413</sup> or on the

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<sup>404</sup> SGA, s 15(2)(a).

<sup>405</sup> SGA, s 15(2)(c); *Mody v Gregson* (1868) 4 Ex 49.

<sup>406</sup> UCTA, s 6(3).

<sup>407</sup> SGA, s 35(2).

<sup>408</sup> SGA, s 35(1) (a).

<sup>409</sup> SGA, s 35(4).

<sup>410</sup> SGA, s 35(1) (b).

<sup>411</sup> SGA, s 35(6).

<sup>412</sup> CISG, art 47(1).

<sup>413</sup> CISG, art 49(2)(b)(ii).

expiration of any time set by the seller under art 48(2) CISG.<sup>414</sup> Therefore CISG's approach to the loss of the buyer's right to reject the goods and avoid the contract is broader than that of s 35 SGA. Thus, from this comparison it can be concluded that the CISG's rules on breaches of quality of the goods are similar to its English counterpart or in some cases it provides greater flexibility. This issue will be examined further in chapter five of the thesis.<sup>415</sup>

### **3.7.5 How do the Two Instruments Differ?**

The two instruments have comparable provisions on the issues discussed above and in some cases the CISG may prove to be more straightforward in its application to sale of goods contracts. Therefore, while ss 12-15 SGA are implied statutory conditions which allow the buyer to reject the goods and treat the contract as repudiated, the exercise of these rights will be restricted by ss 15A and 35 SGA and in some cases by exclusion clauses in the contract.<sup>416</sup> The CISG does not contain any express provisions to deal with exclusion clauses, however the principle of party autonomy under art 6 permits parties the right to include them in the sales contract. Article 4 stipulates that the validity of these clauses will be governed by the applicable domestic law. It is important at this stage to point out some of the differences in the two instruments. Firstly, the breaches relating to ss 13-15 SGA deal with conformity of description, quality and fitness for purpose and correspondence to sample respectively. Under the CISG these breaches all fall under the general heading of non-conformity in art 35 CISG. Article 38 CISG requires that the goods be examined within a 'short a period as is practicable in the circumstances', following from this a breach of conformity requires that the buyer give the seller notice of the non-conformity within a reasonable time otherwise he

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<sup>414</sup> CISG, art 49(2)(b)(iii).

<sup>415</sup> See discussion at chapter 5.2.7.2.

<sup>416</sup> These exclude SGA, s 12.

will lose the right to rely on it.<sup>417</sup> Secondly, if the non-conformity is a fundamental breach<sup>418</sup> the buyer must also give a separate notice to the seller if he wishes to avoid the contract.<sup>419</sup> Section 34 SGA requires that the seller ‘is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract’. There is however no counterpart in English law that the buyer give notice of the non-conformity or notice of avoidance. The thesis argues that the notice provisions in the CISG are not a hindrance to international trade but rather that they serve to promote certainty and avoid economic waste.<sup>420</sup> The notice of non-conformity may provide the seller with the opportunity to remedy the defect, thereby avoiding unnecessary costs of transporting the goods back to the seller.<sup>421</sup> It can also serve as evidence as to the condition of the goods if the seller needs to make a claim against another party, for example the carrier responsible for transporting the goods to their destination.<sup>422</sup> The thesis argues that the notice requirement under art 39 CISG places the buyer and seller in a fair position as, the buyer must tender the notice within a reasonable time,<sup>423</sup> and in any event he must give notice at the ‘latest within a period of two years from the date on which the goods were actually handed over’.<sup>424</sup> This latter approach would allow for discovery of latent defects. Article 44 CISG allows the buyer, if he has a reasonable excuse for failing to give notice, the right to still claim a price reduction<sup>425</sup> or damages.<sup>426</sup> A reasonable excuse has been interpreted by the

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<sup>417</sup> CISG, art 39.

<sup>418</sup> CISG, art 25.

<sup>419</sup> See discussion at chapter 7; CISG, art 26.

<sup>420</sup> See discussion at chapter 5.3 and 7.5; Samuel Date-Bah, ‘Article 26’ in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 223.

<sup>421</sup> See discussion at chapter 6.

<sup>422</sup> Honnold (n 134) 278.

<sup>423</sup> CISG, art 39 (1).

<sup>424</sup> CISG, art 39(2).

<sup>425</sup> CISG, art 50.

<sup>426</sup> CISG, art 74, but in this case not for loss of profit.

case law to include the type of business activity the buyer was engaged in, and also the size of the organisation, that is, whether the buyer had employees to carry out the task of examination?<sup>427</sup> Under art 40 CISG the seller is not permitted to rely on the lack of notice of non-conformity if the non-conformity ‘relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.’

The additional requirement to give notice of avoidance under art 26 CISG also serves to reduce uncertainty and avoid waste of resources. Honnold argues that without the notice, ‘a party might be led to perform in ignorance of the other party’s decision to refuse the performance’.<sup>428</sup> He goes on to state that ‘a buyer’s declaration of avoidance, to be effective under art 26, must inform the seller that the buyer will not accept or keep the goods’.<sup>429</sup>

Chapter seven of the thesis provides an in-depth examination of the notice of avoidance, and argues that the notice has important implications for storage, transport and preservation of the goods. Additionally the notice serves to prevent one party from trying to manipulate the fluctuations in market prices to their advantage.<sup>430</sup>

### 3.8 Conclusion

This chapter has examined the history, scope, purpose and interpretative provisions of the CISG. In doing so, its aim was to highlight some of the problematic issues and controversies surrounding the CISG, including the problems that can arise when countries with differing legal backgrounds have to agree on the wording and meaning of a particular provision. The chapter has demonstrated that if the internal interpretative mechanisms within the CISG are correctly applied, the

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<sup>427</sup> Switzerland 8 January 1997 Appellate Court Luzern (*Blood infusion devices case*) (*IICL*, 16 February 2007) <<http://cisgw3.law.pace.edu/cases/970108s1.html>> accessed 07 August 2007.

<sup>428</sup> Honnold (n 134) 212.

<sup>429</sup> See discussion at chapter 7; Honnold (n 134) 215.

<sup>430</sup> See discussion at chapter 7.1.4.

CISG can address all issues that fall within its scope. This chapter has furthered the aims of the thesis, specifically by identifying the tools of interpretation. These tools assist in the interpretation of the provisions dealing with the buyer's remedy of avoidance to be examined in subsequent chapters. Additionally, it has been demonstrated that if there are internal gaps that cannot be filled by reference to art 7, the resort to using the Principles is legitimate and preferable to resort to domestic law. The chapter has examined the English law on termination of the contract to determine if the use of these laws would provide a better approach to international sale of goods contracts. The examination demonstrated that for the most part the two instruments may produce a similar result and on those issues where they do differ, the CISG may prove to be a more comprehensive body of law for foreign parties to use in their sales contracts. Subsequent chapters of the thesis will continue to provide a comparison of the CISG and the English law approaches to termination of the contract. The next chapter examines the tools and mechanisms for parties to use which can assist not only in the event of a dispute regarding avoidance of the contract but also in negotiating the contractual terms to make their intent clear and unambiguous.