

CHAPTER FIVE

The Buyer's Right of Avoidance and the Requirement of Fundamental Breach

5.0 Introduction

This chapter explores the provisions within the United Nations Convention on Contracts for the International Sale of Goods 1980¹ dealing with the buyer's right of avoidance.² The chapter examines when the seller's failure to perform its obligations will allow the buyer the right to avoid the contract.

The chapter initially analyses art 25 because it deals with fundamental breach, the main requirement allowing the buyer the right to avoid the contract.³ The chapter examines circumstances where the breach is sufficiently serious to establish the remedy.⁴ Additionally, the chapter assesses the buyer's right to avoid the contract, provided for in art 49 which includes fundamental breach as well as other mechanisms.⁵ The meaning, implications and justifications for the remedy are discussed and analysed. The interpretative mechanisms of art 7 are employed to undertake this task.⁶ The chapter also examines how arts 6, 8 and art 9 serve as interpretative tools as well as to supplement the terms of the contract in order to make the remedy more certain.⁷ The chapter analyses the meaning of avoidance in

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

² CISG, arts 49, 25 and 47.

³ CISG, art 49(1).

⁴ CISG, art 25.

⁵ CISG, art 49(1)(b).

⁶ See discussion at chapter 3.4.

⁷ See discussion at chapter 4.1, chapter 4.2 and chapter 4.3; The use of these provisions will aid in the interpretation of the contract and to discern the parties' intent in the event of a dispute. Additionally, the buyer can refer to these provisions when drafting the sales contract to reflect their contractual expectations.

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the context of non-performance⁸ and defective performance.⁹ Furthermore, art 47(1) is assessed and its impact on the buyer's right to avoid the contract discussed.¹⁰ The chapter also examines whether the UNIDROIT Principles¹¹ can be used to fill in the gaps and ambiguities contained in the provisions dealing with the buyer's right of avoidance.¹² Comparisons will be made with the English common law,¹³ in conjunction with the Sale of Goods Act 1979,¹⁴ dealing with the buyer's right to terminate the contract.¹⁵ The chapter considers whether English law would provide a more effective remedy for the buyer who wishes to terminate the contract.¹⁶

5.1 The Requirement of Fundamental Breach

The main requirement to establishing the buyer's right of avoidance, lies in the existence of a 'fundamental breach'.¹⁷ The remedy of avoidance under the CISG is seen as a remedy of last resort, meaning that only those breaches which are sufficiently serious will allow the buyer the right to declare the contract avoided.¹⁸ Article 25 provides a definition of fundamental breach.¹⁹

⁸ CISG, art 49(1)(b).

⁹ CISG, art 35.

¹⁰ Fixing an additional time for performance.

¹¹ Hereinafter referred to as 'UNIDROIT Principles' or 'Principles'; International Institute for the Unification of Private Law, 'UNIDROIT Principles 2010'

<www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> accessed 18 July 2014.

¹² See discussion at chapter 3.6; International Institute for the Unification of Private Law, 'UNIDROIT Principles of International Commercial Contracts'

<www.unidroit.org/english/principles/contracts/main.htm> accessed 13 October 2013; Katharina Boele-Woelki, 'Terms of Co-Existence the CISG and the UNIDROIT Principles' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer 2001) 203.

¹³ Hereinafter referred to as 'English law'.

¹⁴ Hereinafter referred to as SGA; Sale of Goods Act 1979, SR & O 1983/1572.

¹⁵ Under English law 'termination' has the same meaning as 'avoidance' under the CISG.

¹⁶ See discussion at chapter 1.2, chapter 2.4.1 and chapter 3.7.1.

¹⁷ CISG, art 49(1)(a).

¹⁸ Ulrich Schroeter, 'Article 25' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 400.

¹⁹ CISG, art 25 states: 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'.

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This provision is riddled with ambiguous terminology such as: 'substantially to deprive', expectation and foreseeability, all of which are not given any further clarification under the CISG. Therefore, it is necessary to examine the legislative history, case law, literature and the Principles to determine if any further clarification can be ascertained.

5.1.1 Legislative History of Article 25 CISG

The origins of fundamental breach can be found in art 10 ULIS,²⁰ which was drafted with the aim of preventing avoidance from inconsequential contractual breaches.²¹ However, the only basis for assessing whether the breach was fundamental was linked to whether the breaching party or a reasonable person in the same situation would have foreseen the breach when the contract was concluded.²² Although art 10 ULIS contained elements of subjectivity²³ and objectivity,²⁴ it was criticised as being too 'hypothetical' and 'fanciful' in that the breaching party would have to possess '*ex-post-facto*'²⁵ knowledge of the events.²⁶ As a result of these criticisms, a more 'material' test was mandated for the CISG.²⁷

²⁰ ULIS, art 10 states: 'For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects'.

²¹ Michael Will, 'Article 25' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 206.

²² Conclusion of the contract refers to when the contract is formed i.e. offer and acceptance.

²³ Refers to party state of mind, '...breach of contract shall be regarded as fundamental wherever the party breach knew...'

²⁴ Refers to the reasonable person, '...ought to have known, at the time of the conclusion of the contract that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects'.

²⁵ After the fact.

²⁶ Will (n 21) 206; See also Jacob Ziegel, 'The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Nina Galston & Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Juris 1984) 9; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 124.

²⁷ UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975

<www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 September 2014; See also Will (n 21) 206.

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The criterion of 'substantial detriment' was suggested by the Mexican delegation as a means of deciding whether the breach had serious consequences for the expectations of the non-breaching party.²⁸ This criterion will apply to *all* of the detrimental effects caused by the breach, not just those expressly stipulated in the contract.²⁹ Furthermore, the detriment does not have to result in monetary losses but can be attributed to other factors.³⁰ These factors can include a loss of business reputation for the non-breaching party; for instance a late or non-conforming delivery may result in the buyer losing customers or being forced to discount the price of the goods.³¹

The criterion of 'foreseeability' was altered from its role as a guideline for determining fundamental breach under ULIS to a means for the breaching party to escape liability under the CISG.³² Therefore, the breach will be fundamental if it results in substantial detriment 'unless' the breaching party and 'a reasonable person of the same kind in the same circumstances would not have foreseen such a result'.³³ The wording of this part of the provision, with its subjective and objective elements, prevents the breaching party from claiming that the result of the breach was

²⁸ UNCITRAL, 'Yearbook: Volume VI (1975)' A/CN.9/SER.A/1975 <www.uncitral.org/pdf/english/yearbooks/yb-1975-e/yb_1975_e.pdf> accessed 06 September 2014.

²⁹ Will (n 21) 207; cf Schroeter (n 18) 401.

³⁰ See discussion below at chapters 5.1.2 and 5.2.7.5; This is supported by the Secretariat Commentary to the CISG; Will (n 21) 207; See also UNCITRAL, 'Yearbook: Volume VIII (1977)' A/CN.9/SER.A/1977 <www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf> accessed 30 May 2014.

³¹ Robert Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' in Pace (eds) *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* (Kluwer 1999) 177, 352; See also Germany 5 April 1995 District Court Landshut (*Sport clothing case*) (IICL, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950405g1.html>> accessed 01 August 2014.

³² Schroeter (n 18) 401.

³³ This change was suggested by the delegation from the Philippines; UNCITRAL, 'Yearbook: Volume VIII (1977)' A/CN.9/SER.A/1977 <www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf> accessed 30 May 2014.

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unforeseeable because his professional knowledge was below average.³⁴ These changes and proposals which led to the wording of art 25 have been criticised. For example Will argues that, '[t]hose who do not want to be bothered or who distrust esoteric phraseology, quickly find ways round Article 25'.³⁵ Ziegel supports this and states:

In my view, the new test is too severe and will make it very difficult in practice for a...buyer...to cancel a contract because of defective performance...the definition will lead to undesirable results. However, it should be borne in mind that the parties are free to adopt their own definition.³⁶

The thesis disagrees and argues that art 25 cannot be deemed too severe from its wording alone, rather it is the interpretation of that wording that will be important. The next part of the chapter examines the meaning and purpose of art 25 to determine how the changes identified affects the buyer's right of avoidance, specifically is the test too difficult to establish?

5.1.2 Meaning and Purpose of Article 25 CISG

In order for a breach to be 'fundamental', it must result in a 'detriment' that substantially deprives the non-breaching party of its contractual expectations. However, the CISG, does not define the term 'detriment'. Will argues that, 'detriment...fills the...function of filtering out certain cases as for example where breach of a fundamental obligation has occurred but not caused injury'.³⁷ For example, the seller may have breached his obligations to package the goods in a specified manner, yet the goods are safely delivered and there is no harm to the

³⁴ 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) 115.

³⁵ Will (n 21) 208.

³⁶ Jacob Ziegel, 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (*IJCL*, 23 April 1999)

<www.cisg.law.pace.edu/cisg/text/ziegel6.html> accessed 16 November 2013.

³⁷ Will (n 21) 211.

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buyer's interests.³⁸ This is supported by the general principles of the CISG namely: the promotion of co-operation and reasonableness to preserve the contract and to protect the parties' contractual expectations.³⁹ The drafting delegation wanted an 'economically efficient system of remedies' whereby avoidance, which involves high costs of transporting the goods to another destination, would be reserved for serious breaches.⁴⁰ The Secretariat Commentary to the CISG stated that:

The determination whether the injury is substantial must be made in light of the circumstances of each case for example, the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.⁴¹

However the emphasis on monetary losses was reduced over the course of drafting the CISG and substantial detriment was increasingly linked to the parties' contractual interests instead.⁴² This means that substantial detriment is directly linked to the terms of the contract; that is, what the parties considered of importance to the performance of the contract. For example, as outlined above, if the seller breaches his obligation to package the goods in the manner stipulated by the contract but the goods arrive safely, this is not a fundamental breach. However, if the failure to package the goods as stipulated in the contract results in the buyer being unable to resell or reship the goods, this *is* a fundamental breach of contract.⁴³

It has been argued that the criterion of substantial detriment under art 25 is superfluous, in that the terms 'substantial' and 'fundamental' both used to

³⁸ *ibid*; See also CISG, art 35 (2)(d).

³⁹ See discussion at chapter 3.5; Robert Hillman, 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21.

⁴⁰ Schroeter (n 18) 403; See also Lachmi Singh and Benjamin Leisinger, 'A Law for International Sale of Goods: A Reply to Michael Bridge' (2008) Pace Int'l L Rev 161, 168.

⁴¹ UNCITRAL, 'Yearbook: Volume VII (1976)' A/CN.9/SER.A/1976 <www.uncitral.org/pdf/english/yearbooks/yb-1976-e/yb_1976_e.pdf> accessed 17 September 2014.

⁴² Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Clarendon 1998) 176.

⁴³ Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 59.

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characterise the breach are a tautology, making it difficult to ascertain when substantial detriment amounts to a fundamental breach.⁴⁴ However, it is suggested that the criterion of 'substantial detriment' to establish a fundamental breach merely reinforces the fact that avoidance is a remedy of last resort under the CISG.⁴⁵ Thus, the remedy will not permit avoidance for minor breaches of contract. For instance late delivery would only amount to fundamental breach if the contract reflected that the buyer had a special interest in timely delivery as in the case of seasonal goods where timely delivery is essential.⁴⁶

As noted above the two concepts of substantial detriment and contractual expectation are linked together, since substantial detriment can result in fundamental breach if the non-breaching party is deprived of his expectations under the contract. Under the general principle of freedom of contract parties are free to decide when a breach is to be deemed fundamental.⁴⁷ This is supported by judicial authority which states that the buyer should make use of the, 'opportunity to expressly state in the contract which obligations it considers essential'.⁴⁸ However, it is not only the express contractual terms that determine fundamental breach, other sources of the seller's obligations can be discerned from the CISG,⁴⁹ usages,⁵⁰ intentions, practices

⁴⁴ Leonardo Graffi, 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention' (2003) 3 IBLJ 338; Will (n 21) 212; Enderlein and Maskow (n 34) 113.

⁴⁵ Ulrich Magnus, 'The Remedy of Avoidance of Contract under CISG -- General Remarks and Special Cases' (2005) 25 JL & Com 423,424; Markus Müller-Chen, 'Article 49' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 747.

⁴⁶ See discussion below at chapter 5.2.5; *Italdecor v Yiu's Industries* [Appellate Court] (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/980320i3.html>> accessed 15 May 2014.

⁴⁷ See discussion at chapter 4.1; Ingeborg Schwenzer, 'The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents' (2005) 36 VUWLR 795, 801; See also Chengwei Liu, 'The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and Case Law' (*IICL*, 23 May 2005) <www.cisg.law.pace.edu/cisg/biblio/liu8.html> accessed 24 August 2013.

⁴⁸ 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.

⁴⁹ CISG, art 30 states: 'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'.

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and negotiations.⁵¹ The principle of party autonomy in art 6 also means that the parties can agree to *sui generis*⁵² obligations, which if breached, would also result in a fundamental breach.⁵³ An example of this would be where the parties agree to deal exclusively with each other. While this is not a primary obligation of the seller, any breach could cause serious harm to the buyer's interests.⁵⁴

The next criterion to be examined is foreseeability. The function of this criterion is to rule out a fundamental breach where the substantial detriment occurs unforeseeably; it is a mechanism which allows the breaching party to escape avoidance of the contract. Since it is improbable that the breaching party would acknowledge that they foresaw the detriment occurring, the standard of the 'reasonable person' was established by the drafting delegates.⁵⁵ When the non-breaching party claims that a substantial detriment exists, the party in breach, in order to escape avoidance, has to show that neither he nor a reasonable person would have foreseen the negative result.⁵⁶ A reasonable person is considered to be a reasonable merchant in the same trade and of the same socio-economic background.⁵⁷ This approach is compatible with the criteria used in art 8 to determine the intent of the parties.⁵⁸ Article 8 is of utmost importance to ascertaining the parties' intent on important matters pertaining to the contract; thus, to employ the standard of the reasonable person in determining fundamental breach

⁵⁰ See discussion at chapter 4.3; CISG, art 9.

⁵¹ See discussion at chapter 4.2; CISG, art 8.

⁵² Particular.

⁵³ Schroeter (n 18) 406; See also 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.

⁵⁴ 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.

⁵⁵ Will (n 21) 216; See also Alexander Lorenz, 'Fundamental Breach under the CISG' (*IICL*, 21 September 1998) <<http://cisgw3.law.pace.edu/cisg/biblio/lorenz.html>> accessed 20 September 2014.

⁵⁶ Will (n 21) 216.

⁵⁷ Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*) (*IICL*, 9 December 2009) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> accessed 10 July 2014; Will (n 21) 218.

⁵⁸ See discussion at chapter 4.2; Will (n 21) 218.

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helps to keep the two provisions on equal footing. Parties may have also addressed an issue during negotiations without making an express provision for it in the contract; as such, art 8(3) would make it difficult for the seller to argue that he did not foresee the detriment.⁵⁹ An example of this would be where the buyer has made known to the seller, during negotiations, that the goods are required by the contractual delivery date to fulfil his obligations to third parties.⁶⁰

There have been numerous commentaries on the question as to the point in time when the detrimental result must be foreseen.⁶¹ The CISG offers no further elucidation on whether foreseeability should be decided at the time the contract was concluded or when the breach took place.⁶² During the drafting process several delegates suggested that the point in time at which the breaching party ought to have foreseen the detriment should be the time when the parties entered into contractual relations.⁶³ However, this proposal was withdrawn.⁶⁴ Honnold points out that as the contractual terms establishes the rights and responsibilities of the buyer and seller, the decisive time for when foreseeability is determined should be when the contract is concluded.⁶⁵ He adds that to do otherwise would mean that one party could provide the other with further information, after the conclusion of the contract, thereby changing the expectations.⁶⁶ Conversely, Graffi argues that if the general

⁵⁹ See discussion at chapter 4.2; Schroeter (n 18) 413.

⁶⁰ ICC Arbitration Case No 8128 of 1995 (*Chemical fertilizer case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/958128i1.html>> accessed 20 September 2014.

⁶¹ Andrew Babiak, 'Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods' (1992) 6 *Temple Int'l and Comp LJ* 113, 126; Lorenz (n 55); Honnold (n 26) 206; Liu (n 47).

⁶² Text to n 22.

⁶³ UNCITRAL, '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' A/CON.97/19 <www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 20 September 2014.

⁶⁴ *ibid.*

⁶⁵ Text to n 22; Honnold (n 26) 207.

⁶⁶ Honnold (n 26) 207.

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principle of good faith was taken into account, credence must be given to any information received by the breaching party after the contract was concluded.⁶⁷

The thesis supports the approach that the time of foreseeability should be judged at the time of the conclusion of the contract to produce a fair result to both parties.⁶⁸ This is supported by the case law. For instance, where the buyer had not indicated at the conclusion⁶⁹ of the contract that timely delivery was of essence, the seller could not have foreseen that late delivery would result in substantial deprivation of the buyer's contractual interests.⁷⁰ If the buyer attempted to convey this information to the seller *after* the contract was concluded it would have been too late as there was nothing the seller could do at that stage to alter the shipment date.⁷¹ Therefore it is important that parties use either the mechanisms of art 6 to incorporate express terms, or express their intent through their negotiations and conduct in accordance with art 8. In the absence of these stipulations judges will be left to decide whether the breach meets the threshold of fundamental breach based on the criteria of art 25 alone. This approach could mean that unless the breach meets the definition of substantial detriment in art 25, avoidance will not be permitted. Furthermore as demonstrated above, detriment must be linked to the contractual expectations, thus if there is no indication that the buyer thought the term to be important, avoidance may not be permitted. The next part of the chapter examines whether the Principles can be used to clarify some of the ambiguities contained in the wording of art 25.⁷²

⁶⁷ Text to n 22; Graffi (n 44) 340.

⁶⁸ Text to n 22; Honnold (n 26) 207.

⁶⁹ Text to n 22.

⁷⁰ Germany 24 April 1997 Appellate Court Düsseldorf (*Shoes case*) (*IICL*, 8 June 2006) <<http://cisgw3.law.pace.edu/cases/970424g1.html>> accessed 3 June 2014; cf China 18 August 1997 CIETAC Arbitration proceeding (*Vitamin C case*) (*IICL*, 23 May 2007) <<http://cisgw3.law.pace.edu/cases/970818c1.html>> accessed 20 September 2014.

⁷¹ China 18 August 1997 CIETAC Arbitration proceeding (*Vitamin C case*) (*IICL*, 23 May 2007) <<http://cisgw3.law.pace.edu/cases/970818c1.html>> accessed 20 September 2014.

⁷² Chapter three examined the legitimacy of using the UNIDROIT Principles to supplement the various gaps and ambiguities in the CISG. The thesis concluded that resort to the UNIDROIT

5.1.3 Can the UNIDROIT Principles be used to Interpret Article 25 CISG?

Article 7.3.1 UNIDROIT deals with 'fundamental non-performance'⁷³ it is the corresponding provision to art 25 CISG under the Principles.⁷⁴ At first glance it appears to offer more detail and guidance than its CISG counterpart. However, Schroeter cautions that notions of similarities between the CISG and the Principles on this issue are no more than '*faux amis*'⁷⁵ and regard should be had to the legislative history of art 25 to fill in gaps rather than external sources.⁷⁶ Other commentators have adopted a contrary view and argue that the two provisions have a similar underlying purpose.⁷⁷ There are concerns as to whether the terminology of fundamental 'non-performance' used in the Principles had the same meaning as fundamental 'breach' used in the CISG.⁷⁸ For instance 'non-performance' may not encompass breaches of defective or non-conforming performance as envisioned under art 25.⁷⁹ However the wording of art 7.3.1 UNIDROIT *does* include late

Principles should be allowed as long as the two provisions are compatible, and indeed it is preferable to use the Principles as opposed to resort to domestic laws.

⁷³ Under the UNIDROIT Principles 'non-performance' has the same meaning as 'breach' under the CISG.

⁷⁴ UNIDROIT, art 7.3.1 states: '(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance. (2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether: (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the obligation which has not been performed is of essence under the contract; (c) the non-performance is intentional or reckless; (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated. (3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired'.

⁷⁵ False friends.

⁷⁶ Schroeter (n 18) 405.

⁷⁷ 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> accessed 14 January 2014; Liu (n 47); Benjamin Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Sellier 2007) 33.

⁷⁸ Schroeter (n 18) 405.

⁷⁹ See discussion below at chapter 5.2.5 and 5.2.7.

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performance as well as non-conforming performance.⁸⁰ The official commentary to art 7.3.1 supports this, stating that, 'performance may be so late or so defective that the aggrieved party cannot use it for its intended purpose'.⁸¹ The Principles go further in art 7.3.1(2)(a)-(e) to provide instances of fundamental non-performance. Article 7.3.1(2)(a) embodies the same criterion as art 25 CISG namely non-performance substantially depriving the other party of its expectations. However, the criterion of 'foreseeability' under the Principles is worded differently from art 25. Specifically there is no reference made to 'a reasonable person of the same kind in the same circumstances'; instead the Principles refer to results that the 'other party did not foresee and could not reasonably have foreseen'. In this regard the Principles are more restrictive than the CISG, as the latter would allow a wider objective approach to the interpretation of the reasonable person. Under the CISG the reasonable person is considered someone in the same trade and of the same socio-economic background.⁸² Whereas under the Principles foreseeability is only restricted to what the breaching party could reasonably foresee.⁸³ The official commentary to art 7.3.1 expressly states that the relevant time for foreseeability is at the *conclusion* of the contract;⁸⁴ thus, this part of the provision can be used to fill the gap, discussed above, in art 25 CISG.⁸⁵

Article 7.3.1(2)(b) UNIDROIT deals with termination for fundamental non-performance of an obligation which is of 'essence' to the contract. These include

⁸⁰ Elbi Janse van Vuuren, 'Termination of International Commercial Contracts for Breach of Contract: The Provisions of [South African Contract Law, U.S. Contract Law, German Contract Law and] the UNIDROIT Principles of International Commercial Contracts' (1998) 15 *Ariz J Int'l & Comp L* 583; Fabian Burkart, *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles* (Nomos 2000) 234.

⁸¹ UNIDROIT, art 7.3.1 official commentary para 2.

⁸² See discussion above at chapter 5.1.2; Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*) (*IICL*, 9 December 2009) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> accessed 10 July 2014.

⁸³ Will (n 21) 218.

⁸⁴ Text to n 22.

⁸⁵ See discussion above at chapter 5.1.2; UNIDROIT, art 7.3.1 official commentary para 3.

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express stipulations regarding conformity of the goods, timely delivery and other obligations.⁸⁶ These 'essential' obligations can be discerned from the terms of the contract, negotiations and practices as well as usages.⁸⁷ This approach is compatible with the general principle of party autonomy⁸⁸ as well as arts 8 and 9 CISG.⁸⁹

Article 7.3.1(2)(c) UNIDROIT states that non-performance is fundamental if it is 'intentional or reckless'. This criterion falls outside the scope of the CISG because fault is not generally a condition to a finding of contractual liability, thus intentional or reckless performance in itself should not render a breach fundamental under art 25.⁹⁰ Some commentators disagree with this contention arguing instead that deliberate breaches may lead to loss of trust and no further interest in performance.⁹¹ However, the case law makes it clear that a deliberate breach will not in itself amount to a fundamental breach *unless* all of the other criteria in art 25 have *also* been satisfied.⁹² The approach to deliberate breaches adopted by the Principles is compatible with its position on good faith, whereby good faith is an obligation placed on the parties.⁹³ However, the CISG places the observance of good faith on the courts when interpreting its provisions. Therefore, art 7.3.1(2)(c) UNIDROIT cannot be used to supplement art 25 as the underlying principles are incompatible.⁹⁴

⁸⁶ See discussion below at chapter 5.2.7.1; UNIDROIT, art 7.3.1 official commentary para 3.

⁸⁷ Leisinger (n 77) 33.

⁸⁸ CISG, art 6.

⁸⁹ See discussion at chapter 4.1, chapter 4.2 and chapter 4.3.

⁹⁰ See discussion at chapter 3.6 and below at chapter 5.2.2.

⁹¹ Martin Karollus, 'Article 25' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (Springer 2009) 23; cf Leisinger (n 77) 98.

⁹² 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.

⁹³ UNIDROIT, art 1.7.

⁹⁴ See discussion at chapter 3.4.3 and chapter 3.6.

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Article 7.3.1(2)(d) UNIDROIT deals with non-performance affecting reliance on future performance. Although this issue falls within the scope of the CISG, it falls outside the scope of the thesis.⁹⁵ Further examination is, therefore, unnecessary.

Article 7.3.1(2)(e) UNIDROIT states that the non-performance will not be a fundamental breach if the breaching party would suffer a disproportionate loss from avoidance of the contract. This approach is *not* applicable to the CISG.⁹⁶ There is no mention of disproportionate losses in the legislative history of art 25 and nothing to suggest that this should be a consideration in determining fundamental breach. Furthermore, there are no analogous provisions under the CISG to support this approach.⁹⁷ To adopt such an approach would cause uncertainty as there are no guidelines for determining when the breaching party's loss becomes significant.⁹⁸ Furthermore, it is unclear whether this approach would only consider monetary losses or some other measure? The official commentary to art 7.3.1(2)(e) suggests that the losses referred to are those incurred by the breaching party in preparing for the contract.⁹⁹ In that case art 7.3.1(2)(e) cannot be used to interpret art 25 CISG as the general principles of good faith and reasonableness under the CISG would not deprive the aggrieved party the opportunity to avoid the contract based on the breaching party's losses.¹⁰⁰ It is, therefore, the party in breach that should bear those losses.

Article 7.3.1(3) UNIDROIT makes reference to art 7.1.5, where, in the case of delay, the buyer can fix an additional time for performance. If the non-performance

⁹⁵ CISG, art 73.

⁹⁶ Koch (n 77).

⁹⁷ See discussion at chapter 3.5.2.

⁹⁸ Koch (n 77).

⁹⁹ UNIDROIT, art 7.3.1(e) official commentary para 3(e).

¹⁰⁰ Hillman (n 39) 21; See also Schlechtriem (n 42); 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.

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was fundamental from the outset, the party can terminate the contract before the expiry of the additional time. However, if the non-performance was not fundamental, the party must wait for the expiry of the additional time before terminating the contract.¹⁰¹ This issue will be examined later in the chapter.¹⁰²

In summary, this part of the chapter has shown that it is justifiable in certain limited circumstances to use the Principles to supplement art 25 CISG.¹⁰³ However, some parts of art 7.3.1 UNIDROIT, which, if taken into account in interpreting art 25, would undermine its wording and the general principles upon which the CISG is based.¹⁰⁴ Therefore, the provisions of art 7.3.1 cannot be used to interpret art 25 simply because they are more detailed or desirable.¹⁰⁵ The chapter now examines the position in English law on the criteria needed to terminate the contract, it will determine whether English law would offer the buyer a swifter and more certain approach.

5.1.4 English Law as Compared to the CISG on Fundamental Breach

In previous chapters the thesis examined the basis for using English law as a method of comparison.¹⁰⁶ It was argued that English law provides certainty and swift termination rights because it is more established than the CISG.¹⁰⁷ Fundamental breach, in particular, is singled out as unsuitable for certain contracts

¹⁰¹ UNIDROIT, art 7.1.5, official commentary para 2.

¹⁰² See discussion below at chapter 5.2.8.

¹⁰³ UNIDROIT, art 7.3.1(2)(a) barring the omission of a reasonable person of the same kind; UNIDROIT, art 7.3.1(2)(b).

¹⁰⁴ UNIDROIT, art 7.3.1(2)(c) and (e).

¹⁰⁵ 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> accessed 05 December 2013.

¹⁰⁶ See discussion at chapter 1.2, chapter 2.2 and chapter 3.7.1.

¹⁰⁷ A G Guest and Guenter Treitel, *Benjamin's Sale of Goods*, (5th edn, Sweet & Maxwell 1997) 18-004; Christiana Fountoulakis, 'The Parties' Choice of "Neutral Law" in International Sales Contracts' (2005) 7:3 EJLR 303, 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.

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that require swift avoidance as the criteria required under art 25 may be difficult to establish.¹⁰⁸

Under the system of classification of terms used in English law only a breach of 'condition',¹⁰⁹ or 'innominate',¹¹⁰ term would allow the buyer the right to terminate the contract.¹¹¹ Terms could be classed as conditions by statute¹¹² or by the importance of the term in the contract. Conditions are regarded as essential obligations of the contract thus, if breached, the aggrieved party would have the right to terminate the contract.¹¹³ Terms classed as conditions favour certainty and allow the buyer to make swift decisions whether or not to accept or reject the goods or documents representing those goods.¹¹⁴ However, this certainty is eroded by the enactment of s 15A SGA which restricts the right to reject the goods if the buyer is a non-consumer.¹¹⁵ Section 15A applies to ss 13-15 SGA, implied conditions, which deal with breaches of description, quality and conformity to sample respectively. It applies to exclude those cases where 'the breach is so slight that it would be unreasonable...to reject them'.¹¹⁶ However, Mullis suggests that s 15A is unlikely to have an impact as s 15A(2) states that the section will not apply if a 'contrary

¹⁰⁸ See discussion above at chapter 5.1; Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, OUP 2007) 5; 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) 335, 338.

¹⁰⁹ SGA, s 11(3).

¹¹⁰ If the consequences were serious; *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

¹¹¹ For a brief period time (1950s-1960s) there was the recognition of a 'fundamental' term where the term was considered of utmost importance that the breaching party could not use an exemption clause to escape liability. This category of term was rejected in *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361. These terms are now treated in the same way as conditions.

¹¹² SGA, ss12-15.

¹¹³ Alternatively SGA, s 11(2) allows the party to affirm the contract and claim damages.

¹¹⁴ John Adams and Hector MacQueen, *Atiyah's Sale of Goods* (12th edn, Pearson 2010) 87.

¹¹⁵ This amendment was inserted by virtue of the Sale and Supply of Goods Act 1994.

¹¹⁶ SGA, s 15A.

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intention appears in, or is to be implied from, the contract'.¹¹⁷ If there is no contrary intention, s 15A will be applicable.

It is argued that s 15A places a limitation on the buyer's right to reject the goods for a breach of the implied conditions in ss 13-15 SGA. Sections 13-15 deal with breaches of description and quality of the goods, these areas are where most breaches are likely to occur. Thus, the certainty of English law is diminished unless the contract contains express stipulations on the conformity of the goods or alternatively there is a custom or usage that demonstrates a contrary intention. For instance, the term 'CIF'¹¹⁸ would denote that timely delivery is of essence to the contract.¹¹⁹ In this regard the CISG and English law would produce a similar outcome, as in the case of the latter it is the parties' intent that will determine whether the buyer can reject the goods and terminate the contract.¹²⁰

The use of innominate terms by the courts is another source of uncertainty in English law. In these cases the right to terminate the contract will depend on the actual outcome of the breach.¹²¹ In *The Hansa Nord* case, the buyer was unable to reject the goods as the stipulation that the goods be shipped 'in good condition' was deemed an innominate term which had no serious consequences for the buyer as he was still able to make use of the goods.¹²²

The approaches of English law and the CISG are not vastly different. Section 15A SGA and the use of innominate terms restrict the buyer's right to reject the

¹¹⁷ A contrary intention can be discerned from express terms agreed on by the parties, or implied into the contracts by the courts, statute or by custom or usage; 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 Mindy Chen-Wishart, *Contract Law* (2nd edn, OUP 2008) 397.

¹¹⁸ Cost, Insurance, Freight.

¹¹⁹ *Bowes v Shand* (1877) 2 App Cas 455.

¹²⁰ See discussion at chapter 3.7.1-3.7.4.

¹²¹ Adams and MacQueen (n 114) 88; See also Mullis (n 117) 137.

¹²² See discussion at chapter 3.7.1-3.7.4; *Cehave NV v Bremer Handelgesellschaft mbH (The Hansa Nord)* [1976] QB 44.

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goods to serious breaches.¹²³ The approach in art 25 CISG for fundamental breach, is similar in the sense that the buyer cannot escape his obligations for trivial breaches. Instead the breach must result in 'such detriment' to the buyer 'as substantially to deprive him' of his contractual expectations. English law and the CISG are based on the underlying principle of freedom of contract where parties can agree to essential terms, thus it is the parties' contractual expectations that will be the determining factor whether termination or avoidance of the contract is permitted.¹²⁴ However, in the absence of express terms, English law will apply the mechanisms of innominate terms or s 15A SGA.

The one area where the CISG and English law differ is on the issue of foreseeability. Article 25 allows the breaching party to escape liability for fundamental breach if he or a reasonable person of the same kind would not have foreseen it. There is no requirement of foreseeability in English law to exercise the right to reject the goods and terminate the contract.¹²⁵ It can be argued that under English law this gives the buyer more certainty in exercising termination. However, there are no reported CISG cases of the seller successfully avoiding liability on these grounds.¹²⁶ The subjective and objective tests in art 25 make it doubtful that the seller will be able to use this provision to his advantage. Furthermore, as the buyer's

¹²³ Those breaches that fall within SGA, ss 13-15.

¹²⁴ See discussion at chapter 3.7.1-3.7.4 and chapter 4.1; CISG, art 6; Mackenzie Chalmers, *Sale of Goods Act 1893* (W Clowes & Sons 1894).

¹²⁵ Foreseeability does come into the liability for damages; *Hadley v Baxendale* [1854] EWHC Exch J70.

¹²⁶ Spain 16 February 2012 Las Palmas Canary Islands (*Margarine case*) (*IICL*, 26 August 2014) <<http://cisgw3.law.pace.edu/cases/120216s4.html>> accessed 01 October 2014; Russia 2 November 2004 Arbitration proceeding 188/2003 (*IICL*, 27 September 2006) <<http://cisgw3.law.pace.edu/cases/041102r1.html>> accessed 01 October 2014.

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expectations are discerned from a wide range of sources,¹²⁷ lack of foreseeability is an unlikely possibility.¹²⁸

5.1.5 Conclusion to Article 25 CISG

It has been demonstrated that, although the wording of art 25 contains certain ambiguous phrases and gaps, it is one of the most important provisions for allowing the buyer to avoid the contract. The thesis has shown that any ambiguities can be resolved by examining the drafter's intent as well as the general principles of the CISG. The use of art 7.3.1 UNIDROIT to interpret art 25 was somewhat limited as it contained certain criteria that fell outside the scope of the CISG.¹²⁹ The examination of English law, on the rules for terminating the contract, revealed that breaches of conditions, or breaches of innominate terms that have serious consequences, were similar to the requirements of fundamental breach. The former is linked to the parties' intent and the latter to the outcome of the breach. Both of these elements are present in the interpretation of art 25. The next part of the chapter examines art 49 CISG, the buyer's right of avoidance. The meaning, implications and justifications for this remedy will be discussed and analysed. Additionally, the chapter examines how the provisions of art 49 are interpreted and applied by the courts to deal with different types of breaches that are common in international sale of goods contracts.

¹²⁷ Terms of the contract, negotiations, conduct, practices and usages,

¹²⁸ CISG, arts 6, 8 and 9; Although English law does not require foreseeability in exercising the right to terminate the contract, the concept is used to determine the extent of the seller's liability for damages *Hadley v Baxendale* [1854] EWHC Exch J70.

¹²⁹ UNIDROIT, art 7.3.1(2)(c) and (e).

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5.2 Article 49 CISG Buyer's Right of Avoidance

Article 49 CISG addresses the buyer's right to avoid the contract.¹³⁰ Article 49 is one of the most important provisions in the CISG as it has resulted in many cases.¹³¹ Article 49(1) sets out two conditions where the buyer may declare the contract avoided. Article 49(1)(a) states that the buyer may declare the contract avoided if the seller's failure to perform its obligations amounts to a fundamental breach of contract. This first paragraph is worded to cover *all* types of breaches which meet the threshold of fundamental breach.¹³²

In contrast to the first paragraph, art 49(1)(b) only deals with one type of breach. It stipulates that in the case of non-delivery of the goods, the buyer may declare the contract avoided where the seller fails to deliver within the additional time fixed under art 47(1) CISG.¹³³

Article 49(2) deals with the situation where the seller has delivered the goods and identifies some of the conditions under which the buyer loses the right to avoid the contract. The rules embodied in art 49(2) are entirely separate from art 49(1)(b),

¹³⁰ CISG, art 49 states: '(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) 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 paragraph (1) of article 47 or declares that he will not deliver within the period so fixed. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance'.

¹³¹ See discussion at chapter 1.1; Ingeborg Schwenzer, 'The Right to Avoid the Contract' (2012) 3 *Belgrade Law Review* 207, 210; There are 391 reported cases on the Institute of International Commercial Law CISG database; Pace Law School Institute of International Commercial Law, 'Cases Involving CISG Article 49' (*IJCL*, 10 April 2014) <www.cisg.law.pace.edu/cisg/cisgintro.html> accessed 29 May 2014.

¹³² See discussion above at chapter 5.1.2.

¹³³ See discussion below at chapter 5.2.8; Michael Will, 'Article 49' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 359; CISG, art 47(1) states: 'The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations'.

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which only looks at cases of non-delivery of the goods. In contrast art 49(2) applies when the goods have come into the buyer's possession. As the goods are in the buyer's possession, avoidance under these circumstances requires a stricter standard and the general principle of the observance of good faith.¹³⁴ Therefore, it would be contrary to the general principles of the CISG to allow the buyer to delay the decision whether or not to avoid the contract once the goods have been delivered as this could cause uncertainty for the seller. Specifically the seller will need to make arrangements to transport and resell the goods in the case of avoidance. Article 49(2)(a) deals with the issue of late delivery, in such cases the buyer must declare the contract avoided within a reasonable time after delivery has been made or he will lose the remedy of avoidance. Article 49(2)(b) deals with all other breaches aside from late delivery, including breaches for non-conforming goods.¹³⁵ In these cases the buyer must declare the contract avoided within a reasonable time after he knew or ought to have known of the breach.¹³⁶ Alternatively the buyer must declare the contract avoided within a reasonable time if the seller failed to perform its obligations after fixing an additional period of time¹³⁷ or if the seller failed to cure the breach.¹³⁸

5.2.1 Legislative History of Article 49 CISG

Will describes art 49 as 'the most drastic of all the buyer's remedies'.¹³⁹ Magnus agrees, stating that the remedy of avoidance 'is a remedy of last resort, or an *ultima ratio* remedy, which should not be granted easily'.¹⁴⁰ In light of these comments it is necessary to examine the antecedent legislation upon which the CISG

¹³⁴ See discussion at chapter 3.4.3; Will (n 133) 364.

¹³⁵ CISG, art 35 deals with the issue of conformity of the goods.

¹³⁶ CISG, art 49 (2)(b)(i).

¹³⁷ CISG, arts 49 (2)(b)(ii) and 47(1).

¹³⁸ CISG, arts 49 (2)(b)(iii) and 48(2).

¹³⁹ Will (n 133) 359.

¹⁴⁰ Magnus (n 45) 424; Müller-Chen (n 45) 747.

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was based to better understand the purpose of art 49. ULIS contained the buyer's remedy of avoidance, yet the format was very different to that of the CISG. The system for establishing the buyer's remedy of avoidance under ULIS was two-fold; there were circumstances where the buyer could either declare the contract avoided or alternatively *ipso facto*¹⁴¹ avoidance would apply.¹⁴² Article 26 ULIS dealt with the issue of the seller's failure to deliver the goods at the date fixed in the contract.¹⁴³ According to art 26(1) the buyer could require performance by the seller or declare the contract avoided if the failure to perform amounted to a fundamental breach. If the buyer did not make known his decision to the seller within a reasonable time the contract was automatically avoided. Similarly, if the seller asked the buyer to give a decision and the buyer failed to do so expeditiously, the contract would be automatically avoided.¹⁴⁴ If the seller delivered the goods before the buyer communicated his decision and the buyer did not declare the contract avoided straightaway, he would lose that right altogether.¹⁴⁵ However, if the buyer informed the seller that he required performance of the contract and the seller failed to oblige within a reasonable time, the buyer could declare the contract avoided.¹⁴⁶ Article 30 ULIS dealt with the issue of the seller's failure to deliver the goods at the place as

¹⁴¹ By the mere fact.

¹⁴² Will (n 133) 360.

¹⁴³ ULIS, art 26 states: 'Article 26 (1) Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He shall inform the seller of his decision within a reasonable time, otherwise the contract shall be ipso facto avoided. (2) If the seller requests the buyer to make known his decision under paragraph 1 of this Article and the buyer does not comply promptly, the contract shall be ipso facto avoided. (3) If the seller has effected delivery before the buyer has made known his decision under paragraph 1 of this Article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided. (4) Where the buyer has chosen performance of the contract and does not obtain it within a reasonable time, he may declare the contract avoided'.

¹⁴⁴ ULIS, art 26(2).

¹⁴⁵ ULIS, art 26(3).

¹⁴⁶ ULIS, art 26(4).

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well as the date fixed in the contract.¹⁴⁷ In these circumstances, the failure to deliver to the contractual location must be linked to the failure to deliver within the specified date to establish a fundamental breach. Whereas the latter was 'irreparable' the former could still be achieved within the contractual period.¹⁴⁸ Therefore, to establish a fundamental breach, both components were required.¹⁴⁹ The wording and requirements of art 30 are largely the same as those in art 26 ULIS with the notable exception of the last paragraph, namely if the buyer made known to the seller that he required performance of the contract and the seller failed to oblige within a reasonable time the buyer could declare the contract avoided. However this right is implied into the meaning of art 30.¹⁵⁰ Article 43 ULIS dealt with the issue of the buyer's right to declare the contract avoided if the goods were non-conforming to the contract.¹⁵¹ In this provision there is also a link to a breach in the date for performance, therefore both non-conformity of the goods *and* a failure to perform by the contractual date must be present to establish a fundamental breach. The buyer will not be able to exercise the remedy of avoidance if he does not promptly declare the contract avoided after tendering a notice of non-conformity to the seller. This

¹⁴⁷ ULIS, art 30 states: '(1) Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. The buyer shall inform the seller of his decision within a reasonable time; otherwise the contract shall be ipso facto avoided. (2) If the seller requests the buyer to make known his decision under paragraph 1 of this Article and the buyer does not comply promptly, the contract shall be ipso facto avoided. (3) If the seller has transported the goods to the place fixed before the buyer has made known his decision under paragraph 1 of this Article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided'.

¹⁴⁸ André Tunc, 'Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale' (*IICL*, 30 April 1998) <www.cisg.law.pace.edu/cisg/biblio/tunc.html> accessed 31 May 2014.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ ULIS, art 43 states: 'The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in the case to which paragraph 2 of Article 42 applies, after the expiration of the period referred to in that paragraph'.

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approach is justified on the basis that the buyer should not be allowed time to take advantage of fluctuating market prices and also the fact that the goods have been delivered to the buyer.¹⁵² Therefore, avoidance of the contract would entail the expense of transporting the goods to back to the seller. Article 51 ULIS dealt with the buyer's right to avoid the contract if the seller failed to hand over any documents relating to the goods.¹⁵³ The buyer may exercise the same rights as seen in arts 26 and 30 ULIS if the documents were not handed over at the place and time fixed in the contract or if the documents are not conforming to the contract. Under art 44(2) ULIS the buyer could fix an additional time for the seller to perform any of his obligations, if this additional period passed without performance, the buyer could declare the contract avoided.¹⁵⁴ Article 55 ULIS dealt with the buyer's right of avoidance for any other breaches not covered above which amounted to fundamental breach.¹⁵⁵

In examining the wording of art 49 CISG, it can be observed that the buyer's remedy of avoidance has been streamlined when compared to its predecessor. The approach of the CISG drafting delegation was to abandon the instances of *ipso facto*

¹⁵² Tunc (n 148).

¹⁵³ ULIS, art 51 states: 'If the seller fails to hand over documents as provided in Article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under Articles 24 to 32 or under Articles 41 to 49, as the case may be'.

¹⁵⁴ ULIS, art 44 states: '(1) In cases not provided for in Article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. (2) The buyer may however fix an additional period of time of reasonable length for the further delivery or the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided'.

¹⁵⁵ ULIS, art 55 states: '(1) If the seller fails to perform any obligation other than those referred to in Articles 20 to 53, the buyer may: (a) where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with Articles 84 to 87, or (b) in any other case, claim damages in accordance with Article 82. (2) The buyer may also require performance by the seller of his obligation, unless the contract is avoided'.

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avoidance found in ULIS as it was considered too uncertain for the outcome of the contract.¹⁵⁶ This uncertainty could mean that the seller is unclear on whether the contract was still in effect, this could lead to unwanted performance and wasted expenditure.¹⁵⁷ Under the CISG the uncertainty is minimised because the buyer would have to make a declaration of avoidance.¹⁵⁸ Another significant difference between the two legal instruments is that under ULIS *any* breach of contract could constitute a fundamental breach leading to avoidance if the buyer fixed an additional time for performance and the seller did not perform within this time.¹⁵⁹ Therefore, fixing an additional time could convert a minor breach into a fundamental breach. Under the CISG the fixing of an additional time is only relevant in the case of non-delivery.¹⁶⁰ In these cases a non-fundamental breach could become fundamental if the seller fails to perform within the additional time.¹⁶¹ Although the CISG does not make special reference to the remedies available to the buyer as a result of the seller's failure to hand over documents, art 49 by analogy also applies to these types of breaches.¹⁶² This approach would accommodate trade usages such as INCOTERMS 'CIF'¹⁶³ as well as commodity sales as both of these types of

¹⁵⁶ UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973

<www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 28 May 2014.

¹⁵⁷ Will (n 133) 360; See also UNCITRAL, 'Yearbook: Volume III (1972)' A/CN.9/SER.A/1972

<www.uncitral.org/pdf/english/yearbooks/yb-1972-e/yb_1972_e.pdf> accessed 28 May 2014;

UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973

<www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 28 May 2014.

¹⁵⁸ See discussion at chapter 7.1; Will (n 133) 360; See also UNCITRAL, 'Yearbook: Volume III (1972)' A/CN.9/SER.A/1972 <www.uncitral.org/pdf/english/yearbooks/yb-1972-e/yb_1972_e.pdf>

accessed 28 May 2014; UNCITRAL, 'Yearbook: Volume IV (1973)' A/CN.9/SER.A/1973

<www.uncitral.org/pdf/english/yearbooks/yb-1973-e/1973_e.pdf> accessed 28 May 2014.

¹⁵⁹ Will (n 133) 361; Schlechtriem (n 43) 78.

¹⁶⁰ CISG, art 49(1)(b).

¹⁶¹ Will (n 133) 361; Schlechtriem (n 43) 78.

¹⁶² See discussion at chapter 3.5.2; Schlechtriem (n 43) 78.

¹⁶³ INCOTERMS a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC). ICC, *Incoterms 2010* (ICC Publication No 715, 2010).

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contracts are seen as a sale of documents rather than a sale of physical delivery of the goods.¹⁶⁴

Therefore it can be argued that art 49 offers a clearer approach than its ULIS counterparts, the buyer's right to avoid the contract is clearly defined in the wording. Specifically the buyer's right to avoid the contract is limited to the existence of certain circumstances¹⁶⁵ and embodied in one provision making it straightforward in its application. Most importantly, in removing the remedy of automatic avoidance, the CISG has provided both parties with certainty, as the seller will be able to make arrangements to store, transport or resell the goods. The next section examines the meaning and purpose of art 49 to determine how it is interpreted and applied by the courts.

5.2.2 Meaning and Purpose of Article 49(1)(a) CISG

Chapter II of the CISG details the obligations of the seller, these provisions are contained in arts 30 through 42. These obligations are supplemented by any usages or practices established between the parties.¹⁶⁶ Article 45(1)(a) sets out the remedies available to the buyer, 'if the seller fails to perform any of his obligations under the contract or this Convention...'.¹⁶⁷ One remedy available to the buyer is the right to avoid the contract as set out in art 49.

Article 49(1)(a) limits the remedy of avoidance to those breaches that are sufficiently serious and deprive the buyer of his contractual expectations.¹⁶⁸ This approach is justified on the basis that avoidance of the contract will have serious

¹⁶⁴ See discussion at chapter 1.2 and chapter 2.4.1; Mullis (n 117) 137; Bridge (108) 132.

¹⁶⁵ Fundamental breach or late delivery.

¹⁶⁶ See discussion at chapter 4.2 and chapter 4.3; CISG, arts 8 and 9.

¹⁶⁷ CISG, art 45 (1)(a) states: 'If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may exercise the rights provided in articles 46 to 52'.

¹⁶⁸ See discussion above at chapter 5.1.

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economic consequences.¹⁶⁹ Specifically, the seller will have to transport the goods to another location and warehouse them, which involves additional expense, as well as risk of damage or loss.¹⁷⁰ Therefore limiting avoidance to serious breaches would prevent the buyer from trying to escape a bad bargain by taking advantage of market price fluctuations.¹⁷¹

When determining if a fundamental breach has occurred, decision makers must assess the breach in light of all facts.¹⁷² This is supported by the subjective and objective criteria of foreseeability under art 25. Fundamental breach can occur in circumstances beyond the scope of the seller's duties under the CISG. Ferrari states that, 'the CISG does not distinguish between the breach of principal and ancillary obligations' this contention is supported by case law.¹⁷³ In a case for the sale of shoes, the Italian seller had breached an agreement of exclusivity with the German buyer when it displayed trademarked goods at a trade fair.¹⁷⁴ The courts reasoned that although the duty to deal exclusively with the buyer was a not a primary one, nevertheless the breach permitted the buyer to avoid the contract as such a breach could not be remedied and the buyer's contractual interests had been impaired.¹⁷⁵ Therefore, it can be observed that the criteria needed to establish a fundamental breach have all been met. Specifically, the buyer was substantially deprived of what he had expected under the contract and this result could have been foreseen by the

¹⁶⁹ Will (n 133) 363.

¹⁷⁰ See discussion at chapter 7.2.1; Will (n 133) 363.

¹⁷¹ Will (n 133) 363.

¹⁷² See discussion above at chapter 5.1.2; Honnold (n 26) 327.

¹⁷³ Franco Ferrari, 'Fundamental Breach of Contract under the UN Sales Convention-25 Years of Article 25 CISG' (2006) 25 *JL & Com* 489, 492.

¹⁷⁴ See discussion above at chapter 5.1.2; 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.

¹⁷⁵ 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.

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seller at the conclusion of the contract.¹⁷⁶ Furthermore, the availability of the buyer's remedy of avoidance under the CISG is not dependent on the breaching party being at fault either intentionally or negligently.¹⁷⁷ The buyer must establish that he was substantially deprived of his contractual expectations, the actions of the breaching party must demonstrate this burden.¹⁷⁸ It can be argued that deliberate breaches *should* amount to fundamental breach, the reason being that although the breach alone may not be sufficiently serious, the buyer may have lost trust in the seller's ability or intention to perform its obligations.¹⁷⁹ The issues of the seller's deliberate breaches and the buyer's loss of trust in continuing the contractual relationship were raised in the *Shoes case* discussed above.¹⁸⁰ In this case avoidance was permitted. However, the courts have since taken a narrow approach to this issue. In a subsequent case for the sale of cobalt sulphate in a series of contracts between a Dutch seller and a German buyer, the buyer alleged it was agreed that the goods should be of British origin evidenced by certificates of origin as well as quality.¹⁸¹ On delivery it was discovered that the certificates were incorrect and the goods were in fact of South African origin. The buyer sought, *inter alia*, to avoid the contract for fundamental breach based on the inaccurate certificates.¹⁸² The court rejected this argument stating that avoidance for the buyer's loss of trust in the seller was not a legitimate ground for establishing a fundamental breach under art 25.¹⁸³ This approach is arguably correct for three reasons. First, the CISG makes no mention of

¹⁷⁶ Text to n 22.

¹⁷⁷ cf UNIDROIT, art 7.3.1(2) states: 'In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether... the non-performance is intentional or reckless'.

¹⁷⁸ Magnus (n 45) 424; Schwenger (n 131) 209.

¹⁷⁹ Karollus (n 91) 98.

¹⁸⁰ Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IJCL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 May 2014.

¹⁸¹ Germany 3 April 1996 Supreme Court (*Cobalt sulphate case*) (*IJCL*, 15 November 2007) <<http://cisgw3.law.pace.edu/cases/960403g1.html>> accessed 30 May 2014.

¹⁸² *ibid.*

¹⁸³ *ibid.*

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avoidance for loss of trust or that loss of trust is a criterion of fundamental breach and to imply this would be contrary to wording of art 25 and the general principles of the CISG.¹⁸⁴ Secondly, if the buyer had alleged that the seller had fraudulently tendered the incorrect certificates, which he had not, this would not have been a ground for avoidance as fraud does not fall under the purview of the CISG and would have to be settled by national laws.¹⁸⁵ Thirdly, the decision of whether or not to allow avoidance for fundamental breach should be based on whether the buyer has been substantially deprived of its contractual expectations under art 25. On the facts of this case the threshold was not met. Although in the initial negotiations the buyer had asked for goods of British origin, this was not expressly stated in the contract or in the later negotiations leading up to the contract, thus the buyer failed to emphasise the importance of this requirement.¹⁸⁶ Furthermore, the courts reasoned that the obligation to procure these certificates in documentary sales was not a main obligation of the seller and the buyer could have obtained the correct certificate without difficulty.¹⁸⁷ The court also pointed out that the buyer could resell the goods, albeit at a lower price and that in light of all relevant circumstances, it had not been deprived of its contractual interests.¹⁸⁸ Therefore when it comes to intentional breaches or loss of trust by either party, these factors alone cannot be the main reason for determining a fundamental breach.¹⁸⁹ Instead courts must look at the other factors such as whether the threshold of fundamental breach is met, whether

¹⁸⁴ See discussion at chapter 3.5.

¹⁸⁵ 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.

¹⁸⁶ See discussion below at chapter 5.2.7.1; In other words the buyer did not make use of CISG, art 8; 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.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ Leisinger (n 77) 99.

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the breach can be cured¹⁹⁰ or whether another remedy such as price reduction or damages may be appropriate.¹⁹¹ If this reasoning is applied to the cases analysed above, the thesis has demonstrated that in the *Shoes case*,¹⁹² notwithstanding the issue of the intentionality of the breach and the loss of trust, the breach itself not only satisfied the criteria of fundamental breach but it also could *not* be remedied by cure or any other measure, thus avoidance was allowed. In contrast, the breach of tendering incorrect certificates of origin¹⁹³ *could* be remedied by the buyer obtaining new certificates along with the remedy of price reduction or damages to reflect any losses incurred.¹⁹⁴

One of the important factors taken into consideration by the court in the *Colbalt Sulphate case* was that the requirement that the goods be of British origin was not made sufficiently clear in negotiations or made an express term of the contract.¹⁹⁵

Schwenzer states:

[t]he aggrieved party must be substantially deprived of what it was entitled to expect. Insofar the importance of the interest which the contract creates for the promisee is crucial. It is the contract itself that not only creates obligations but also defines their respective importance for the parties.¹⁹⁶

In his editorial remarks on the case, Schlechtriem states:

[it] is primarily the responsibility of the parties to clearly specify in the contract the importance of certain qualities of the goods so that the absence of such qualities would amount to a fundamental breach of contract by the seller.¹⁹⁷

¹⁹⁰ See discussion at chapter 6.

¹⁹¹ Leisinger (n 77) 99.

¹⁹² Germany 17 September 1991 Appellate Court Frankfurt (*Shoes case*) (*IJCL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 29 May 2014.

¹⁹³ Germany 3 April 1996 Supreme Court (*Colbalt sulphate case*) (*IJCL*, 15 November 2007) <<http://cisgw3.law.pace.edu/cases/960403g1.html>> accessed 30 May 2014.

¹⁹⁴ Leisinger (n 77) 101.

¹⁹⁵ April 1996 Supreme Court (*Colbalt sulphate case*) (*IJCL*, 15 November 2007) <<http://cisgw3.law.pace.edu/cases/960403g1.html>> accessed 30 May 2014.

¹⁹⁶ Schwenzer (n 131) 209; See also Peter Huber, 'Avoidance of the Contract' in Peter Huber and Alastair Mullis (eds), *The CISG: A new textbook for Students and Practitioners* (Sellier 2007).

¹⁹⁷ Peter Schlechtriem, 'Uniform Sales Law in the Decisions of the Bundesgerichtshof' (*IJCL*, 15 April 2002) <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem3.html>> accessed 1 June 2014;

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These statements are correct, if the buyer had effectively made use of arts 6,¹⁹⁸ 8¹⁹⁹ and 9 CISG²⁰⁰ the pitfalls of establishing a fundamental breach could be avoided.²⁰¹ For example, the use of art 6 would have meant that the buyer could set its own threshold for fundamental breach.²⁰² This would have been closely linked to the contractual interest placed in receiving goods of British origin. Based on the facts of the case, the buyer could not rely on art 8 to demonstrate his intentions. The reason for this is he did not make known his intent that only goods of British origin would suffice, nor would the reasonable person have discerned this, as the origin of the goods was only mentioned in early negotiations but was not conveyed to the broker who entered into the final contract on the buyer's behalf.²⁰³ Thus, in absence of these stipulations the court *had* to resort to the standards set in art 25 to establish fundamental breach, a standard which was not met. One interesting point worth noting is the seller's argument that the buyer was not unaware that the company only sold cobalt sulphate from South Africa and further that it was a customary usage that certificates of British origin be issued for such goods as the term 'origin' meant the country of import and not where the goods were produced.²⁰⁴ Although the court dismissed this argument in light of the facts of the case, if indeed such a usage did exist, it would have further hindered the buyer's claim for avoidance, as arts 8(3) and

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.

¹⁹⁸ Party autonomy.

¹⁹⁹ Parties intent and practices.

²⁰⁰ Usages.

²⁰¹ See discussion at chapter 4.1, chapter 4.2 and chapter 4.3.

²⁰² Party autonomy, derogation and variation.

²⁰³ 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.

²⁰⁴ *ibid.*

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9 would have also been used to interpret the contract and the usage would have been given effect.²⁰⁵

Indeed, as discussed in chapter four, the buyer's intent and expectations can be discerned from the contract and other surrounding circumstances such as negotiations, conduct and practices of the parties as well as usages.²⁰⁶ Thus, if the buyer makes known either expressly or impliedly that the goods need to be delivered by a specified date or meet a technical standard, such a breach will be fundamental even if no actual losses are incurred.²⁰⁷ Schroeter argues that, 'avoidance of the contract will also prevent or reduce a loss, for example by enabling a favourable substitute transaction to be made or expenditure to be avoided'.²⁰⁸ This argument was supported by the Czechoslovakian delegate at the drafting of the CISG.²⁰⁹ The delegate made the important point that establishing a fundamental breach does *not* mean that there has to be 'fundamental damages'.²¹⁰ Instead avoidance of the contract can serve to prevent these economic losses by allowing the buyer to lawfully end the contract and enter into another transaction.²¹¹

This chapter examines the buyer's right to avoid the contract for fundamental breach in three circumstances. These include fundamental breach for non-delivery of the goods and documents representing the goods, late delivery of the goods and documents representing the goods and delivery of non-conforming documents or goods. It is important that the different types of breaches are examined separately as

²⁰⁵ See discussion at chapter 4.2 and chapter 4.3.

²⁰⁶ CISG, art 8(3).

²⁰⁷ See discussion at chapter 4.2; Schwenger (n 131) 209; See also Schroeter (n 18) 409; CISG, art 33(a) states: 'The seller must deliver the goods: if a date is fixed by or determinable from the contract, on that date'.

²⁰⁸ Schroeter (n 18) 401.

²⁰⁹ UNCITRAL, 'Yearbook: Volume VIII (1977)' A/CN.9/SER.A/1977
<www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf> accessed 30 May 2014.

²¹⁰ *ibid.*

²¹¹ *ibid.*

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each one will entail its own unique characteristics and have varying implications for international sale of goods contracts. Therefore to argue that the buyer's remedy of avoidance is suitable for each type of breach, a separate examination is needed.²¹²

5.2.3 Fundamental Breach for Non-delivery

This part of the chapter will examine fundamental breach for non-delivery. The circumstances which may lead the seller to commit this breach are both wide and varied. For the purposes of this part of the chapter non-delivery of the goods is determined on the same principles as non-delivery of documents of title, the reason being that if the seller fails to deliver the document of title allowing the buyer to take up ownership of the goods or otherwise dispose of them, it will be considered a serious breach permitting avoidance.²¹³ The seller's failure to deliver the goods or documents representing the goods²¹⁴ may stem from the fact that he does not have good title to sell those goods²¹⁵ or he has wrongfully sold the goods to another party.²¹⁶ Schwenger states that, 'definite non-delivery almost always amounts to a fundamental breach'.²¹⁷ In one case the seller was not permitted to rely on a claim of hardship²¹⁸ when his supplier failed to procure the goods which resulted in non-

²¹² See discussion at chapter 2.4.3; 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.

²¹³ Müller-Chen (n 45) 751.

²¹⁴ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

²¹⁵ Germany 22 August 2002 District Court Freiburg (*Automobile case*) (*IICL*, 7 December 2006) <<http://cisgw3.law.pace.edu/cases/020822g1.html>> accessed 1 June 2014; See also Schroeter (n 18) 417.

²¹⁶ Germany 24 May 1995 Appellate Court Celle (*Used printing press case*) (*IICL*, 20 February 2007) <<http://cisgw3.law.pace.edu/cases/950524g1.html>> accessed 1 June 2014; See also CISG, art 40 states: 'The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer'.

²¹⁷ Schwenger (n 131) 210.

²¹⁸ CISG, art 79 states: '(1) 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

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delivery to the buyer.²¹⁹ The reasoning of the court in this case was that the goods were generic goods, thus the onus was on the seller to try and procure goods from an alternate supplier, failing to do so resulted in the seller bearing the risk of non-delivery.²²⁰ In another case the buyer was able to avoid the contract for fundamental breach when the seller failed to deliver the goods, falsely claiming an order had never been received.²²¹ Although the buyer in this case resorted to using another manufacturer to fulfil its commitments to third party retailers, it could not do so on time and the non-delivery from the first contract resulted in the cancellations of those sub-contracts.²²² However, the seller will not be liable for non-delivery where he is entitled to withhold performance upon the buyer fulfilling a condition precedent, for example opening a letter of credit.²²³ The seller *must* justify the allegation of the buyer's lack of creditworthiness, failure to do so will result in unlawfully withholding performance and the buyer may be permitted the right to avoid the

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. (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him'.

²¹⁹ ICC Arbitration Case No 9978 of March 1999 (*IICL*, 20 March 2007)

<<http://cisgw3.law.pace.edu/cases/999978i1.html>> accessed 1 June 2014.

²²⁰ *ibid.*

²²¹ France 21 October 1999 Appellate Court Grenoble (*Calzados Magnanni v Shoes General International*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/991021f1.html>> accessed 1 June 2014.

²²² *ibid.*; See discussion above at chapter 5.1.1.

²²³ CISG, article 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'; China 4 June 1999 CIETAC Arbitration proceeding (*Industrial raw material case*) (*IICL*, 27 October 2008) <<http://cisgw3.law.pace.edu/cases/990604c1.html>> accessed 13 October 2013.

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contract.²²⁴ Furthermore the seller cannot withhold delivery of the goods in respect of a set-off against any other claims.²²⁵ In a final point on fundamental breach for non-delivery, if the seller delivers the goods to a destination not stipulated in the contract this is not in itself considered non-delivery if the buyer is aware of this arrangement and impliedly consents to it.²²⁶ The chapter now compares the position of the CISG on fundamental breach for non-delivery with English law to determine if English law provides a more certain and swift remedy.

5.2.4 English Law on Termination for Non-Delivery

Under English law it is the duty of the seller to deliver the goods 'in accordance with the terms of the contract of sale'.²²⁷ If the seller fails to deliver the goods or the documents representing those goods altogether, then the buyer may terminate the contract for breach of condition.²²⁸ If the seller is unable to deliver the goods to the buyer because he has no right to sell the goods, this would be a breach of one of the implied conditions under s 12 SGA and the buyer would be entitled to rescind the contract and reclaim the contract price.²²⁹ Additionally, if the seller failed to deliver the goods because he wrongfully sold the goods to another party, this would give the buyer the right to terminate the contract.²³⁰ The seller may argue that he be excused

²²⁴ Switzerland 17 July 2007 Supreme Court (*Kickboards, scooters case*) (IICL, 22 October 2010) <<http://cisgw3.law.pace.edu/cases/070717s1.html>> accessed 02 June 2014.

²²⁵ Germany 29 December 1998 Hamburg Arbitration proceeding (*Cheese case*) (IICL, 16 August 2005) <<http://cisgw3.law.pace.edu/cases/981229g1.html>> accessed 2 June 2014.

²²⁶ Schroeter (n 18) 418.

²²⁷ SGA, s 27.

²²⁸ Adams and MacQueen (n 114) 126; SGA, s 10(2); See also *Hartley v Hymans* [1920] 3 KB 475.

²²⁹ See discussion at chapter 3.7.4; The application of SGA, 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 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; See also *Niblett Ltd v Confectioners Materials Co Ltd* [1921] 3 KB 387.

²³⁰ This would depend of if the goods are specific or ascertained goods, in the case of the latter the goods must be unconditionally appropriated to the contract; *Carlos Federspiel & Co SA v Charles Twigg & Co Ltd* [1957] 1 Lloyd's Rep 240; See also claim for tort of conversion.

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from performance in two limited circumstances. First, ss 6²³¹ and 7²³² SGA states that where specific goods perish, the contract of sale or the agreement to sell is void.²³³ This provision may offer the seller little protection in the case of non-delivery as it only applies to specific goods.²³⁴ In international sale of goods contracts, specific goods are rarities as most goods are unascertained and generic in nature; that is, the goods are identified by description such that the buyer is not contracting for that particular thing but rather something that answers that description.²³⁵ Secondly, the seller may try to argue that the contract is frustrated by either the impossibility of procuring the goods or the destruction of the goods.²³⁶ These arguments are futile because destruction of generic goods cannot frustrate the contract as there will always be stock available for the seller to procure an alternative shipment.²³⁷ If the seller is unable to obtain substitute goods, he will be liable for non-delivery.²³⁸ The English courts have also taken a narrow approach where the seller argues that delivery has become impossible owing to some other circumstance. For instance, in *Tsakiroglou & Co v Nolee & Thorl GmbH*, the court held that the

²³¹ SGA, s 6 states: 'Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void'.

²³² SGA, s 7 states: 'Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided'.

²³³ SGA, s 61(1) Specific goods are defined as 'goods identified and agreed on at the time a contract of sale is made'.

²³⁴ SGA, s 61(1); Thus 500 tonnes of grain could be any 500 tonnes; cf *Howell v Coupland* (1876) 1 QBD 258.

²³⁵ Bridge (n 108) 317.

²³⁶ Frustration is defined as an unforeseen, subsequent and supervening, event, for which neither party is responsible, which makes the contract impossible, or illegal to perform or radically different from that originally contemplated see *Davis Contractors Ltd v Fareham Urban District Council* (1956) 3 WLR 37; Frustration operates to discharge the contract, meaning that the parties are released from any further contractual performance after the supervening event has occurred that makes performance impossible see The Law Reform (Frustrated Contracts) Act 1943.

²³⁷ *Adams and MacQueen* (n 114) 351; There are two exceptions where frustration may apply: first if the crop to be grown on particular field fails due to events beyond the control of the parties see *Howell v Coupland* (1876) 1 QBD 258; Second where the building housing machinery to be sold is completely destroyed see *Appleby v Myers* [1867] LR 2 CP 651.

²³⁸ *Monkland v Jack Barclay Ltd* [1951] 2 KB 252.

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closure of the Suez Canal did not frustrate the contract as the seller could still deliver the goods, albeit at a higher cost.²³⁹

Under s 19 SGA the seller may reserve title to the goods even after delivery to the buyer.²⁴⁰ This reservation of title is not to be treated as a breach of the seller's obligations to deliver. The seller may be inclined to reserve title as a means of security against the buyer until he is paid for the goods.²⁴¹ The reservation of title will not automatically apply, the seller must expressly incorporate it into the contract.²⁴²

Whether the seller is to deliver the goods to a specific place will depend on the express or implied terms of the contract.²⁴³ If the seller delivers the goods to another location this will not automatically give the buyer the right to terminate the contract unless the consequences of the breach are serious.²⁴⁴ In the absence of any express or implied terms as to the place of delivery, s 29(2) states that delivery will take place at the seller's place of business.²⁴⁵ Therefore, if the buyer does not arrange for

²³⁹ [1962] AC 93; *Lewis Emmanuel & Son Ltd v Sammut* [1959] 2 Lloyd's Rep 629; cf *Re Badische Co Ltd* [1921] 2 Ch 331.

²⁴⁰ SGA, s 19 states: '(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal. (3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him'.

²⁴¹ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

²⁴² *Adams and MacQueen* (n 114) 468.

²⁴³ SGA, s 29(1).

²⁴⁴ See discussion at chapter 3.7.2; *Adams and MacQueen* (n 114) 119.

²⁴⁵ SGA, s 29 states: '(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. (2) Apart from any such contract, express or implied, the place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery. (3) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send

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transport from the seller's place of business, the seller cannot be liable for non-delivery.

The seller's delivery obligation under English law is an important term of the contract and the circumstances permitting him to evade liability will be construed narrowly by the court. Although both English law and the CISG allow the seller to argue hardship or impossibility, it is unlikely that these provisions will offer the sellers an excuse for non-performance of his delivery obligations.²⁴⁶ Furthermore although reservation of title clauses do not fall within the scope of the CISG,²⁴⁷ arts 81²⁴⁸ and 82 CISG²⁴⁹ offer the seller protection in the case of avoidance as the buyer must return the goods to the seller. If he is unable to restore the goods to the seller the remedy of avoidance is not permitted.²⁵⁰

Therefore it is evident that under the CISG definite non-delivery of the goods or documents representing those goods will amount to fundamental breach entitling the

them within a reasonable time. (4) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; but nothing in this section affects the operation of the issue or transfer of any document of title to goods. (5) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact. (6) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller'.

²⁴⁶ CISG, art 79 and doctrine of frustration.

²⁴⁷ CISG, art 4(b).

²⁴⁸ CISG, art 81 states: '(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract. (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently'.

²⁴⁹ CISG, art 82 states: '(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. (2) The preceding paragraph does not apply: (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity'.

²⁵⁰ See discussion at chapter 7.2.1 and chapter 7.2.2; CISG, art 81(2).

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buyer the right to avoid the contract. In these cases the buyer can lawfully exercise the remedy of avoidance swiftly and with certainty.

The chapter now examines fundamental breach in cases of late-delivery of the goods and documents representing the goods under the CISG. These breaches differ from non-delivery as the seller may still be able to perform his obligations under the contract.

5.2.5 Fundamental Breach for Late Delivery

Article 33 CISG stipulates the time for the seller's delivery obligations.²⁵¹ *Prima facie*, late delivery of the goods or documents representing those goods²⁵² *does not* amount to a fundamental breach of contract under the CISG if performance is still possible.²⁵³ However, there are exceptions to this position. For example, where the terms of the contract stipulate the importance of the delivery date to the buyer or time is of the essence in the contract.²⁵⁴ The latter can be discerned either by the express terms of the contract or by any applicable usages such as INCOTERMS.²⁵⁵ The CISG's *prima facie* position on the issue of late delivery was applied in a case involving seasonal clothing where the contract stipulated a period for delivery and the seller delivered the goods one day late. It was held that the buyer was not permitted to avoid the contract.²⁵⁶ The court reasoned that a one day delay in delivery did not amount to a fundamental breach as there were no

²⁵¹ CISG, art 33 states: 'The seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract'.

²⁵² Christoph Brunner, *UN-Kaufrecht – CISG* (Stampfli 2004); Schroeter (n 18) 418.

²⁵³ For the purposes of this part of the chapter late delivery of the goods is decided on the same principles as late delivery of documents of title. The reason being that if the seller fails to make timely delivery of the document of title allowing the buyer to take up ownership of the goods or otherwise dispose of them, this will be considered a serious breach allowing avoidance; Schroeter (n 18) 418.

²⁵⁴ Schroeter (n 18) 418.

²⁵⁵ See discussion at chapter 4.3.2.

²⁵⁶ Germany 27 March 1996 District Court Oldenburg (*Clothes case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/960327g1.html>> accessed 3 June 2014.

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stipulations in the contract to indicate that the buyer's interest in performance would be impeded by the late delivery that is, time was *not* of essence in this case.²⁵⁷ However, this decision can be compared to another case involving late delivery for seasonal goods, delivery to be made 3 December.²⁵⁸ In this case the buyer *was* allowed avoidance for late delivery because the contract and negotiations had made it clear that the buyer needed delivery of the goods before the end of year sales.²⁵⁹ Therefore, in the latter case the breach was fundamental as the buyer's interest in performance was extinguished when it could not make use of the goods within the seasonal period. The buyer's interest in timely performance must be conveyed to the seller in such a manner that the seller is precluded from claiming that it was not foreseeable that a late delivery would injure the buyer's contractual interests.²⁶⁰ The only way to ensure certainty that the buyer is protected against breaches of late performance by the seller is to make it an express term of the contract using clear and definitive wording. The wording used in the contract will be of utmost importance in determining fundamental breach.²⁶¹ The wording does not have to include a specific date; rather it is the urgency that is expressed that will be important. In one case the use of the words 'as soon as possible' coupled with the seller's undertaking to 'hand over the goods immediately after buyer's payment had arrived' resulted in time being of the essence, thus when the seller failed to render

²⁵⁷ *ibid*; See also Koch (n 31) 177.

²⁵⁸ *Italdecor v Yiu's Industries* [Appellate Court] (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/980320i3.html>> accessed 15 May 2014.

²⁵⁹ *ibid*.

²⁶⁰ See discussion above at chapter 5.1.2; Germany 24 April 1997 Appellate Court Düsseldorf (*Shoes case*) (*IICL*, 8 June 2006) <<http://cisgw3.law.pace.edu/cases/970424g1.html>> accessed 3 June 2014.

²⁶¹ Schwenzler (n 131) 210.

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timely performance the buyer was able to avoid the contract for fundamental breach.²⁶²

In the absence of any express term in the contract²⁶³ courts can take an objective view of the circumstances²⁶⁴ taking in to account negotiations, practices, usages and conduct which the parties have established between themselves.²⁶⁵ These circumstances include any particulars made known to the seller about the contract. One case that demonstrates this approach is *Diversitel Communications Inc v Glacier Bay Inc*,²⁶⁶ where the Canadian buyer entered into a contract with the American supplier for the sale of vacuum panel installation. During the negotiations the supplier was made aware that the goods were required by the buyer to fulfil its contract with a third party and furthermore that the goods were to be used in equipment that was to be installed during the Arctic summer, a period which only lasts a few weeks.²⁶⁷ The court found that since the contract stipulated a fixed schedule for delivery, the seller had committed a fundamental breach for failure to deliver in a timely manner. The case was important in demonstrating that the court was willing to look beyond the express terms of the contract. Specifically the court used the guidance set out in art 8 and also took into consideration foreign CISG case law on the matter.²⁶⁸ In *Diversitel* the court looked to a case decided by the Swiss court on a similar issue.²⁶⁹ In that case not only was there a fixed date for

²⁶² Germany 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (*Mobile car phones case*) (IICL, 19 September 2008) <<http://cisgw3.law.pace.edu/cases/040421g3.html>> accessed 04 June 2014.

²⁶³ CISG, art 8(1).

²⁶⁴ CISG, art 8(2).

²⁶⁵ CISG, art 8(3).

²⁶⁶ *Diversitel Communications Inc v Glacier Bay Inc* [2003] 42 CPC (5th) 196.

²⁶⁷ *ibid.*

²⁶⁸ See discussion at chapter 3.4.1 and chapter 3.4.2; Rajeev Sharma, 'The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience' (2005) 4 VUWLR 847, 854.

²⁶⁹ 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.

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performance, but the buyer had also made known to the seller that the goods were needed to fulfil contracts made with third parties.²⁷⁰ In the Swiss case, the courts considered that a claim for fundamental breach should be allowed in cases of late delivery if the goods were of a kind subject to major price fluctuations.²⁷¹ However, the courts stressed that price fluctuations would have to occur 'suddenly and considerably'.²⁷² This point is of particular importance to the sale of commodity goods.²⁷³ Most commodity contracts are subject to volatile price fluctuations based on supply and demand, quality, transportation and storage.²⁷⁴ The issue of price fluctuations is also of importance to documentary sales.²⁷⁵ The goods are often bought and sold numerous times while in transit, commonly referred to as the 'string sale'. Documents that represent those goods are transferred from seller to buyer and it is the final buyer in the string sale that will deal with receiving the physical goods.²⁷⁶ Thus, late delivery of the documents or goods may vary the price 'suddenly and considerably' if there is a falling market resulting in the buyer being substantially deprived of its contractual interest.²⁷⁷ However a German court took a different approach.²⁷⁸ It correctly pointed out that not all volatile price fluctuations will result in fundamental breach for the buyer. The reason for this is that the buyer

²⁷⁰ *ibid.*

²⁷¹ *ibid.*

²⁷² *ibid.*; Schroeter (n 18) 419.

²⁷³ Stanley Kroll and Irwin Shishko, *The Commodity Futures Market Guide* (Harper and Row 1973) 13.

²⁷⁴ See discussion at chapter 2.4.1; Kevin Dhuyvetter, 'Basis: The Cash/Futures Price Relationship' (*Kansas State University*, November 1992)

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

²⁷⁵ The buyer pays the price upon the seller's tender of documents of title covering the goods (in most cases this is the bill of lading).

²⁷⁶ Zeller (n 107) 629.

²⁷⁷ 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; Schroeter (n 18) 419.

²⁷⁸ Germany 12 November 2001 Appellate Court Hamm (*Memory module case*) (*IICL*, 27 June 2007) <<http://cisgw3.law.pace.edu/cases/011112g1.html>> accessed 4 June 2014.

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may still be interested in taking delivery, albeit late rather than claiming fundamental breach in cases where the price for those goods have increased.²⁷⁹

In the absence of a specified delivery date or any of the factors mentioned above, indicating that time is of the essence to the contract, the courts can also resort to interpreting any usages incorporated in the contract.²⁸⁰ Under the CISG usages can either be expressly agreed between the parties²⁸¹ or impliedly incorporated into the contract if the parties ought to have known of it and the usage is widely known or observed in international trade.²⁸² The delivery obligations found under INCOTERMS have been particularly influential in this area.²⁸³ A case that demonstrates this point involved a contract for the sale of iron molybdenum on delivery terms 'CIF Rotterdam'.²⁸⁴ The court found that the buyer was allowed to avoid the contract for fundamental breach caused by late delivery, as the use of INCOTERMS 'CIF' and the documentary nature of the transaction left little doubt that timely performance was essential to the buyer.²⁸⁵ However usages such as INCOTERMS may not always denote timely performance and ultimately it will be left to contractual interpretation of the parties' intentions to determine if time is of the essence.²⁸⁶ If it is evident that there are other terms in the contract that clearly and expressly defines the parties' intent and expectations under the contract, preference should be given to this intent rather than the international meaning given to the usage.²⁸⁷ This approach is supported by the principle of party autonomy under

²⁷⁹ *ibid*; Schroeter (n 18) 419.

²⁸⁰ See discussion at chapter 4.3.

²⁸¹ CISG, art 9(1).

²⁸² CISG, art 9(2).

²⁸³ See discussion at chapter 4.3.2.

²⁸⁴ 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.

²⁸⁵ *ibid*; Koch (n 31) 177.

²⁸⁶ See discussion at chapter 4.3.2; Schroeter (n 18) 421.

²⁸⁷ Schroeter (n 18) 421; See also Gyula Eörsi, 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 *Am J Comp L* 333, 340.

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the CISG.²⁸⁸ This is demonstrated in a case for the sale of crude metal where the contract was concluded on terms 'CFR'.²⁸⁹ The parties also agreed to a 15 day period of tolerance for delivery, a penalty clause to be enforced after the period of tolerance had expired.²⁹⁰ It was held that the INCOTERM 'CFR' did *not* denote that time of delivery was of the essence. The judgement stated:

Even though there might exist a usage of the trade to the effect that *in the absence of provisions to the contrary* in the relevant contract, a CFR contract has to be understood as a fixed term contract, - which can be left open - such usage of the trade would certainly not prevent the parties from providing to the contrary in their specific contractual agreement.²⁹¹

In this case the terms of the contract reflected that the buyer was inclined to wait until the 15 days tolerance had expired before exercising the remedies contained in the penalty clause. Thus, avoidance before this period had expired could not be seen as a fundamental breach irrespective of the meaning of the INCOTERM 'CFR' usage.²⁹²

Thus, the terms of the contract are the deciding factor when determining if late delivery of the goods or documents relating to the goods amounts to a fundamental breach. The buyer, in order to lawfully exercise the remedy of avoidance, would need to either stipulate that time is of the essence²⁹³ or incorporate the use of INCOTERMS to establish a fundamental breach. In the case of the latter the buyer must be certain that the express wording of the contract does not contradict the

²⁸⁸ See discussion at chapter 4.1.

²⁸⁹ Cost and Freight, named port of destination; ICC Arbitration Case No 7645 of March 1995 (*Crude metal case*) (IICL, 15 February 2007) <<http://cisgw3.law.pace.edu/cases/957645i1.html>> accessed 5 June 2014.

²⁹⁰ ICC Arbitration Case No 7645 of March 1995 (*Crude metal case*) (IICL, 15 February 2007) <<http://cisgw3.law.pace.edu/cases/957645i1.html>> accessed 5 June 2014.

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ By giving a specific date or use of appropriate wording.

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meaning attributed to the delivery term as the courts will construe this in accordance with art 8 and the parties' intent.²⁹⁴

The chapter now compares the position of the CISG on fundamental breach for late delivery with English law to determine if English law would provide the buyer with a swifter exercise of termination of the contract.

5.2.6 English Law on Termination for Late Delivery

Section 10 SGA states that although time for payment is not of essence to the contract all other stipulations on time will depend on the terms of the contract.²⁹⁵

The common law has further developed the position on time for delivery stating that in commercial contracts *prima facie* time will be of essence, a breach of which will allow for termination.²⁹⁶ If the contract stipulates a fixed date or period of time for delivery, the seller has until the last day to perform his obligations.²⁹⁷ However, if there is no date fixed for delivery, s 29(3) states that the seller must make delivery within a reasonable time. Particular circumstances such as bad weather or strikes are taken into account when deciding what constitutes a reasonable time.²⁹⁸ Failure to deliver within a reasonable time will amount to a breach of condition and the buyer is entitled to reject the goods even if no monetary losses have been incurred.²⁹⁹

Although the approach in English law will ultimately result in the buyer rejecting the goods for late delivery, it is usually not because he cannot make use of them but

²⁹⁴ ICC Arbitration Case No 7645 of March 1995 (*Crude metal case*) (IICL, 15 February 2007) <<http://cisgw3.law.pace.edu/cases/957645i1.html>> accessed 5 June 2014.

²⁹⁵ SGA, s 10 states: '(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale. (2) Whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract. (3) In a contract of sale "month" prima facie means calendar month'.

²⁹⁶ *Hartley v Hymans* [1920] 3 KB 475; This is even the case for early delivery the buyer is entitled to reject the goods see *Bowes v Shand* (1877) 2 App Cas 455.

²⁹⁷ *Adams and MacQueen* (n 114) 126.

²⁹⁸ *ibid* 127.

²⁹⁹ *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep 17; *Bowes v Shand* (1877) 2 App Cas 455.

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rather to escape a bad bargain on a falling market.³⁰⁰ This position is seen as preferable to determining the motives of the parties seeking to terminate the contract as this can be difficult to prove.³⁰¹ It is also worth pointing out that breaches for timely delivery are not affected by s 15A SGA and therefore the triviality of the breach is not taken into account.³⁰²

The CISG and English law have both taken a strict approach to breaches of late delivery, particularly where the contract stipulates a fixed date or period of time for delivery. However, in cases where there is no date fixed the English law approach of a reasonable time in s 29(3) appears to be ambiguous and will depend on many factors outside the control of the parties. The approach of the CISG in the absence of express stipulations is to determine intent in accordance with art 8 or whether the parties have incorporated any usages under art 9.³⁰³ It is recalled that in the absence of an express stipulation, English law will not automatically apply the INCOTERMS meaning to delivery terms 'CIF' and 'FOB' as these terms have their own definitions under English law.³⁰⁴ However, both English law and INCOTERMS interpret delivery terms 'CIF' and 'FOB' as meaning timely delivery is of essence to the contract.³⁰⁵ The chapter now examines fundamental breach in cases where non-conforming goods or documents relating to the goods are delivered to the buyer under the CISG.

5.2.7 Fundamental Breach for Non-conformity

³⁰⁰ Adams and MacQueen (n 114) 128; cf Position in CISG is the opposite, without express stipulations a party cannot avoid the contract for a trivial breach see Schroeter (n 18) 400.

³⁰¹ Adams and MacQueen (n 114) 128.

³⁰² SGA, s 15A only applies to ss-13-15.

³⁰³ *Diversitel Communications Inc v Glacier Bay Inc* [2003] 42 CPC (5th) 196; 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.

³⁰⁴ See discussion at chapter 4.3.5.

³⁰⁵ *Bowes v Shand* (1877) 2 App Cas 455.

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The buyer's right to avoid the contract for fundamental breach as a result of non-conformity of the goods or the documents that represent those goods is a problematic area under the CISG.³⁰⁶ Graffi states:

[t]he delivery of defective goods is certainly the most recurrent situation in international sales litigation. The number of decisions dealing with this issue is remarkably high, but often it is rather problematic to establish which kind of deficiencies in the goods may amount to a fundamental breach.³⁰⁷

Whether or not non-conformity of the goods amounts to fundamental breach is closely linked to the terms of the contract and the standards set by the parties.³⁰⁸ This is reflected in art 35 CISG.³⁰⁹ The seller's obligation to deliver conforming goods under art 35(1), when read in conjunction with the requirements of fundamental breach in art 25, means that the buyer can make it clear which aspects of conformity are important so that avoidance may be permissible if the term is breached.³¹⁰ Under the CISG, the courts can interpret the parties' intent either expressly using art 8(1) or, in the absence of that express intent, use art 8(2) to objectively examine the circumstances.³¹¹

³⁰⁶ For example the bill of lading.

³⁰⁷ Graffi (n 44) 341; Leisinger (n 77) 3.

³⁰⁸ Schroeter (n 18) 421.

³⁰⁹ CISG, art 35 states: '(1) 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. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity'.

³¹⁰ Singh and Leisinger (n 40) 165.

³¹¹ See discussion at chapter 4.2.

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There are numerous reported cases dealing with the parties' threshold for conformity of the goods.³¹² Conformity refers to both quality and quantity of the goods. Some jurisdictions³¹³ make a distinction between delivery of non-conforming goods and goods of a different nature. However, the CISG has avoided these distinctions in favour of a harmonising approach to sales law, thus all discrepancies in the nature of the goods are treated as breaches of non-conformity.³¹⁴ Kramer states that:

[t]he introduction of modern uniform private law should provide a timely opportunity to critically re-evaluate traditional dogmatic incrustation and nit-pickiness of domestic legal systems and to abandon these, to the extent that this can be done for good reason, in favour of a harmonisation of uniform private law and domestic private law.³¹⁵

While the decision to eliminate domestic connotations from the CISG certainly has its merits, mainly furthering uniformity and its international character, it does create a problem with regard to delivery of the goods of a different kind altogether.³¹⁶ Some commentators struggle to understand why goods of a different kind are treated as non-conformity, arguing that the seller has failed in its delivery obligations as set out in art 30.³¹⁷ If the buyer contracted with the seller for a shipment of bananas and instead receives watermelons, this is not a question of a breach of conformity but rather the wrong goods altogether. However, the case law on this subject is clear that delivery of the wrong goods is not to be treated as non-delivery but rather must

³¹² UNCITRAL cites 131 cases in its 2012 Digest of Article 35 case law; Pace Law School Institute of International Commercial Law, 'UNCITRAL Digest cases for Article 35' (*IJCL*, 18 June 2014) <www.cisg.law.pace.edu/cisg/text/digest-cases-35.html> accessed 7 June 2014.

³¹³ See for example Austria, Turkey, Switzerland and Germany.

³¹⁴ Schroeter (n 18) 574; cf ULIS, art 33(1)(b).

³¹⁵ Ernst Kramer, *Noch einmal zur aliud-Lieferung beim Gattungskauf* (Stämpfli 1997) 83; Fountoulakis (n 107) fn 34.

³¹⁶ See discussion at chapter 3.4.1 and chapter 3.4.2; CISG art 7(1).

³¹⁷ CISG, art 30 states: 'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'; Schroeter (n 18) 574; See also Peter Schlechtriem, *Einheitliches Kaufrecht Und Nationales Obligationenrecht: Referate Und Diskussionen Der Fachtagung Einheitliches Kaufrecht* (Nomos 1987).

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be dealt with under the provisions of art 35.³¹⁸ This thesis does not consider this issue crucial in relation to a buyer exercising a right of avoidance as art 45 already allows the buyer to exercise *any* of the rights available under the CISG for breach of contract by the seller.³¹⁹ Therefore, as the buyer can easily establish that the delivery of the *wrong* goods constitutes a fundamental breach the remedy of avoidance will be permissible. In relation to a breach of non-conformity, art 38(1) states that 'the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances'.³²⁰ This is followed by art 39(1) which provides that 'the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it'.³²¹ Therefore, if the buyer fails to examine the goods within a reasonable time and give notice of the non-conformity he may lose the right to rely on the breach and to avoid the contract.³²² However, in the case of wrongful delivery, the seller will be unable to rely on the notice for non-conformity requirement as art 40 states that 'the seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer'. In one case for the supply of milling equipment, the seller was prevented from relying on the lack of notice of non-conformity when he knowingly supplied the buyer with parts of Russian and Turkish origin when the

³¹⁸ Leisinger (n 77) 13; Germany 12 March 2001 Appellate Court Stuttgart (*Apple juice concentrate case*) (*IICL*, 11 June 2007) <<http://cisgw3.law.pace.edu/cases/010312g1.html>> accessed 10 June 2014.

³¹⁹ Pace Law School Institute of International Commercial Law, 'Guide to CISG Article 31' (*IICL*, 29 August 2006) <www.cisg.law.pace.edu/cisg/text/secomm/secomm-31.html> accessed 15 June 2014.

³²⁰ See discussion at chapter 2.4.5 and chapter 3.7.5.

³²¹ See discussion below at chapter 5.2.9.

³²² Nb the notice of non-conformity (CISG, art 39) is not the same as the notice of avoidance (CISG, art 26). These are two separate requirements.

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buyer has specifically asked for German parts.³²³ Thus, the buyer's right of avoidance in cases where goods of a different kind are delivered is not impeded by the notice requirement found in art 39.

Fundamental breach for non-conforming goods must be examined in two separate circumstances as each will provide a different outcome for the buyer's right to avoid the contract. The first is where the contract makes express stipulations on the conformity of the goods, and secondly where the contract contains no express stipulations on conformity.

5.2.7.1 Express Stipulations on Conformity of Goods

The parties can expressly or impliedly agree on the standards of conformity of the contractual goods.³²⁴ In doing so Bianca states, 'the criteria of Article 35 are to be applied only in the absence of an express or implied contractual provision. Thus, one must first seek the proper content of the seller's obligations through interpretation of the contract...Article 8'.³²⁵ This means that the court must first examine the contract for evidence of the parties' express or implied intent. The courts can also apply art 9 to determine if the seller's obligations are guided by any relevant usages.³²⁶ In *Rynpoort Trading v Meneba Meel* the Belgian buyer contracted to buy wheat flour from the Dutch seller, but the goods did not conform to the contract as the seller had added potassium bromate to the flour as a preserving agent.³²⁷ This substance had been banned in the Netherlands and the rest of the

³²³ Germany 2 February 2004 Appellate Court Zweibrücken (*Milling equipment case*) (*IICL*, 17 May 2006) <<http://cisgw3.law.pace.edu/cases/040202g1.html>> accessed 15 June 2014.

³²⁴ Cesare Massimo Bianca, 'Article 35' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 272.

³²⁵ *ibid.*

³²⁶ *ibid.*

³²⁷ Netherlands 23 April 2003 Appellate Court Gravenhage (*Rynpoort Trading v Meneba Meel*) (*IICL*, 19 January 2005) <<http://cisgw3.law.pace.edu/cases/030423n1.html>> accessed 10 June 2014.

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European Union³²⁸ for many years.³²⁹ The court held that this non-conformity amounted to fundamental breach as the buyer made it clear during the negotiations and in the contract that the quality of the goods was of great importance as the goods were for human consumption.³³⁰ Furthermore, the court applied art 9(2) and reasoned that in any case the ban on potassium bromate was considered to be an international standard of which the seller ought to have been aware.³³¹

In another case involving non-conformity for quality of the goods, the court found that the seller had breached its obligation to provide skin care products with vitamin A content of 1000 - 3000 IU/g.³³² Citing art 35(3), the seller argued that he was not in breach of his obligations as the buyer was aware that over time certain chemicals would deteriorate and this would result in a lower vitamin content.³³³ This argument was dismissed by the courts for three reasons. First, the vitamin A content was a term that was expressly provided for in the contract.³³⁴ Secondly, the seller had agreed a shelf-life of the product of at least thirty months, which implied that the vitamin A content should not have deteriorated before that time.³³⁵ Thirdly, the fact that the buyer had allowed for a wide range of vitamin A content in the contract meant that the buyer had already taken into consideration the issue of deterioration and as the goods fell short of that range it was considered a fundamental breach.³³⁶

³²⁸ Hereinafter referred to as the 'EU'.

³²⁹ Contrary to Dutch Food and Drugs Act (*Warenwet*). Potassium bromate has been found to be carcinogenic in animals and nephrotoxic in humans.

³³⁰ Netherlands 23 April 2003 Appellate Court Gravenhage (*Rynpoort Trading v Meneba Meel*) (*IICL*, 19 January 2005) <<http://cisgw3.law.pace.edu/cases/030423n1.html>> accessed 10 June 2014.

³³¹ *ibid.*

³³² Finland 30 June 1998 Helsinki Court of Appeal (*Skin care products case*) (*IICL*, 14 January 2014) <<http://cisgw3.law.pace.edu/cases/980630f5.html>> accessed 10 June 2014.

³³³ *ibid.*

³³⁴ *ibid.*

³³⁵ *ibid.*

³³⁶ *ibid.*

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In these two cases it is observed that the courts, in determining fundamental breach, are willing to discern the contractual specifications of the goods from a wide range of sources including the express and implied terms, usages as well as the parties' intent.

Thus far the thesis has examined the case law on fundamental breach for non-conformity in quality; however, there can also be a fundamental breach for non-conformity in the *quantity* of the goods.³³⁷ This type of breach is interesting as it raises the issue of whether the shortfall in delivery should be treated as non-delivery rather than non-conformity. The issue of avoidance for partial delivery and partial conformity is dealt with under art 51 CISG.³³⁸ Although this issue falls outside the scope of the thesis, it is necessary to make a brief examination. The problem with the distinction between breaches of non-delivery and non-conformity for the purposes of art 49(1)(a),³³⁹ is that if the failure to deliver the correct quantity is treated as *non-delivery* the buyer can declare the contract avoided by exercising notice under art 26 CISG.³⁴⁰ Furthermore, if from the outset the failure to deliver the correct quantity is *not* a fundamental breach the buyer could fix an additional time for performance³⁴¹ by using art 49(1)(b) and if the seller fails to deliver within this additional time the buyer could declare the contract avoided.³⁴² However, if the difference in quantity is treated as *non-conformity*, the buyer must fulfil his obligations to examine the

³³⁷ Difference in quantity does not include any principles of *de minimis*, tolerances allowed for either in the contract or by virtue of CISG, art 9.

³³⁸ CISG, art 51 states: '(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform. (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract'.

³³⁹ Avoidance for fundamental breach.

³⁴⁰ See discussion at chapter 7.1; Leisinger (n 77) 9.

³⁴¹ CISG, art 47(1).

³⁴² See discussion below at chapter 5.2.8.

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goods³⁴³ and give notice under art 39.³⁴⁴ Additionally, if the shortfall in quantity should amount to a fundamental breach and the buyer wanted to declare the contract avoided, he would need to do so in accordance with art 26. For the purposes of art 49(1)(a), a shortfall in the quantity of the goods would amount to non-conformity rather than non-delivery. Therefore, if it breaches the terms expressly agreed in the contract and this substantially deprives the buyer of its contractual interest the shortfall should be regarded as a fundamental breach.³⁴⁵ This contention is supported by academic opinion and case law.³⁴⁶ Academic literature on this issue emphasises the point that art 35 makes express reference to the *quantity* of the goods as an aspect of conformity therefore it should be treated as such.³⁴⁷ This would mean that the buyer will have to examine the goods and give notice of non-conformity in accordance with arts 38 and 39 respectively.³⁴⁸

In the above mentioned cases the importance of party autonomy found in art 6 is demonstrated.³⁴⁹ These cases also support the arguments made in chapter four that if the buyer utilises the tools contained in arts 8 and 9 they could essentially set their own standards and establish their own threshold for fundamental breach.³⁵⁰ This approach would remove any uncertainty for the buyer exercising the right of

³⁴³ CISG, art 38.

³⁴⁴ Leisinger (n 77) 10.

³⁴⁵ *ibid* 9; See also Germany 31 January 1997 Appellate Court Koblenz (*Acrylic blankets case*) (*IICL*, 19 June 2007) <<http://cisgw3.law.pace.edu/cases/970131g1.html>> accessed 20 June 2014; Germany 25 June 1997 Supreme Court (*Stainless steel wire case*) (*IICL*, 21 February 2007) <<http://cisgw3.law.pace.edu/cases/970625g2.html>> accessed 21 June 2014.

³⁴⁶ Leisinger (n 77) 11; Stefan Kroll, 'Burden of Proof for the Non-Conformity of Goods under Article 35 CISG' (2011) 3 *Belgrade Law Review* 162; See also Adam Giuliano, 'Non-conformity in the Sale of Goods between the United States and China: The New Chinese Contract Law, the Uniform Commercial Code, and the Convention on Contracts for the International Sale of Goods' (*IICL*, 24 January 2006) <www.cisg.law.pace.edu/cisg/biblio/giuliano.html> accessed 18 June 2014.

³⁴⁷ *ibid*.

³⁴⁸ Germany 8 January 1993 Appellate Court Düsseldorf (*Tinned cucumbers case*) (*IICL*, 2 December 2005) <<http://cisgw3.law.pace.edu/cases/930108g1.html>> accessed 20 June 2014.

³⁴⁹ Netherlands 23 April 2003 Appellate Court Gravenhage (*Rynpoort Trading v Meneba Meel*) (*IICL*, 19 January 2005) <<http://cisgw3.law.pace.edu/cases/030423n1.html>> accessed 10 June 2014; Finland 30 June 1998 Helsinki Court of Appeal (*Skin care products case*) (*IICL*, 14 January 2014) <<http://cisgw3.law.pace.edu/cases/980630f5.html>> accessed 10 June 2014.

³⁵⁰ See discussion at chapter 4.2.4 and chapter 4.3.4; Schroeter (n 18) 422.

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avoidance, it will allow the buyer to confidently determine if the goods are conforming and tender the notice of non-conformity if art 35 is breached. The use of express stipulations on conformity is *not* derogation from the CISG,³⁵¹ instead the buyer is using the CISG's provisions to make clear the terms of the contract, that is, the terms are the main determinant of the standards of conformity.³⁵² Therefore the buyer's remedy of avoidance is suitable³⁵³ for breaches of non-conforming goods where the parties have made express stipulations on the standards on conformity, regardless of the types of goods. The remedy can be swiftly and lawfully exercised in these circumstances. The chapter now examines the corresponding provision in English law.

5.2.7.2 English Law Express Stipulations on Conformity of Goods

Under English law breaches of non-conformity are divided by: description,³⁵⁴ quality and fitness for purpose³⁵⁵ and correspondence to sample.³⁵⁶ These distinctions on the kinds of non-conformities can be confusing for parties unfamiliar with English law for a number of reasons.³⁵⁷ First, not all statements regarding the conformity of the goods will amount to terms of the contract, some statements could be treated as mere representations³⁵⁸ or have no legal significance at all.³⁵⁹ If so, the buyer may be unable to bring an action for breach of contract.³⁶⁰ Secondly, a buyer

³⁵¹ CISG, art 6.

³⁵² Bianca (n 324) 272; See also Allan Farnsworth, 'Rights and Obligations of the Seller' (Wiener Übereinkommen von 1980 über den internationalen Warenkauf Kolloquium im Schweizerischen Institut für Rechtsvergleichung, Zurich, 1985).

³⁵³ Text to n 212.

³⁵⁴ SGA, s 13.

³⁵⁵ SGA, s 14.

³⁵⁶ See discussion at chapter 3.7.4; SGA, s 15.

³⁵⁷ Whereas under the CISG breaches for non-conformity all fall under art 35.

³⁵⁸ *Oscar Chess Ltd v Williams* [1957] 1 WLR 370.

³⁵⁹ See discussion at chapter 4.2.5; *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989.

³⁶⁰ The CISG takes a broader approach, art 8 makes no distinction between representations and terms, instead it uses the term 'statements' this means that all statements made by the parties will be relevant when determining if the buyer can exercise the remedy of avoidance; Under English law the buyer

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can only bring an action for a breach of description if according to s 13 SGA the contract is 'for the sale of goods by description'. Case law has established that the words used in the contract *must* 'identify' the goods in some way.³⁶¹ Therefore, if the words that are the subject of the dispute do not identify an important aspect of the goods, the buyer will be unable to bring an action for breach of s 13.³⁶² Thirdly, whether the buyer can reject the goods under ss 13-15 will be subject to s 15A, where 'the breach is so slight that it would be unreasonable...to reject them'.³⁶³ Fourthly, the seller's failure to deliver the correct *quantity* of the goods do not fall under ss 13 or 14 but rather s 30 SGA. Section 30(1) states that if the seller delivers a shortfall in the goods, the buyer can reject them, except where the breach is 'so slight it would be unreasonable for him to do so'.³⁶⁴ The problem with having a separate provision dealing with breaches of quantity is that ss 13-15 are subject to s 6(3) of the Unfair Contract Terms Act 1977.³⁶⁵ Section 6(3) UCTA permits the seller the use of exclusion of liability clauses if it satisfies the requirement of

may have an action under Misrepresentation Act 1967; See also *Harlington & Leinster v Christopher Hull Fine Art* [1991] 1 QB 564.

³⁶¹ See discussion at chapter 3.7.4; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] 1 AC 441; cf *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989; Under the CISG the principles of party autonomy and parties' intent would mean that parties were free to decide what characteristics would form part of the description include these would physical as well as intangible characteristics; See also 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.

³⁶² *Reardon Smith Line Ltd v Hansen-Tangen (The Diana Prosperity)* [1976] 1 WLR 989; English law does however allow for the use of trade descriptions to be taken into account see *Lemy v Watson* [1915] 3 KB 731; *Peter Darlington Partners Ltd v Gosho Co Ltd* [1964] 1 Lloyd's Rep 149.

³⁶³ See discussion at chapter 3.7.4.

³⁶⁴ SGA, s 30(2A).

³⁶⁵ See discussion at chapter 3.7.4; Hereinafter refer to as UCTA; The CISG does not deal with unfair terms such matters are left to national laws, however parties choosing English law to govern the sales contract must be aware of the legal instruments that could affect the outcome of the contract.

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reasonableness.³⁶⁶ Conversely, section 30 SGA is not subject to UCTA, so this could result in the seller excluding his liability for such breaches.³⁶⁷

Therefore under English law the approach to breaches for non-conformity of the goods is fragmented and may result in complications for parties using English law to govern the contract.³⁶⁸ The CISG treats all statements made by the parties equally, thus there is no need to distinguish which statements will amount to terms of the contract. Furthermore by embodying the rules on non-conformity into one provision the CISG avoids drawing distinctions between description, quality and quantity. As s 15A SGA and s 6(3) UCTA limits the buyer's right to reject the goods for the aforementioned breaches the buyer could be prevented from rejecting the goods and terminating the contract.³⁶⁹ The chapter now examines the position where there are no express stipulations on conformity of the goods in the CISG.

5.2.7.3 No Express Stipulations on Conformity of Goods

In the absence of express provisions to establish a fundamental breach for non-conformity of the goods, art 35(2)(a)-(d) sets out a list of criteria for courts to use. Article 35(2)(a) states that the goods must be fit for purposes for which they would ordinarily be used. The Secretariat Commentary supports this, stating:

[g]oods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for all the purposes for which goods of the same description are ordinarily used.³⁷⁰

³⁶⁶ UCTA, s 11.

³⁶⁷ Parties to international sale of goods contracts will not be able to rely on UCTA, s 3 as this only applies where the party 'deals as a consumer'. The one exception is if the buyer is dealing on the seller's standard form contract.

³⁶⁸ Especially those parties unfamiliar with English law i.e. located in other countries.

³⁶⁹ UCTA, s 6(3) does not apply to SGA, s 30.

³⁷⁰ 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> accessed 15 June 2014.

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This standard is a common feature of numerous civil and common law legal systems.³⁷¹ To determine the 'ordinary' purpose of the goods, it is necessary to examine their common commercial purpose.³⁷² Article 35(2)(a) provides that the goods do not have to be suitable for *all* purposes that it could possibly be used for, that is, occasional purposes are excluded from this section.³⁷³ For example, offal is commonly used in the production of animal foods and fertiliser, so these uses would be considered part of its common purpose. However, it is considered by some to be a delicacy for human consumption, in this case such a purpose would not fall under the heading of art 35(2)(a)³⁷⁴ but rather art 35(2)(b) which deals with particular purpose of the goods. In a case involving an Italian seller and a French buyer for the supply of wine, the court found that the seller had breached its obligation to supply conforming goods within the meaning of art 35(2)(a).³⁷⁵ Here, the seller had employed a technique called 'chaptalization' to increase the alcohol content of the wine by adding sugar to the unfermented grape. This resulted in the wine turning to vinegar and being unfit for human consumption, thus it could not be used or resold.³⁷⁶

³⁷¹ Germany BGB, s 434 states: 'The thing is free from material defects if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been agreed, the thing is free of material defects: 1. if it is suitable for the use intended under the contract, 2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing; USA: UCC, s 2-314 states: 'Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; UK SGA, s 14(2B) states: 'For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—(a) fitness for all the purposes for which goods of the kind in question are commonly supplied'.

³⁷² Leisinger (n 77) 18; Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

³⁷³ Leisinger (n 77) 18.

³⁷⁴ Ordinary purpose.

³⁷⁵ France 23 January 1996 Supreme Court (*Sacovini/M Marrazza v Les fils de Henri Ramel*) (*IICL*, 19 June 2007) <<http://cisgw3.law.pace.edu/cases/960123f1.html>> accessed 18 June 2014.

³⁷⁶ *ibid.*

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The term 'ordinary use' has been interpreted widely by different courts. Some courts have found that, 'the goods have to comply with the expectations of an average user',³⁷⁷ while others have used a test of 'resaleability or tradability'.³⁷⁸ However, the use of 'reasonable' quality seems to be the correct test under the CISG as reasonableness is a general principle of the CISG.³⁷⁹ This approach would be consistent and analogous with the 'reasonable person' criterion used to determine the intent of the parties in art 8.³⁸⁰

The Secretariat Commentary states that quality must be determined by, 'the normal expectations of persons buying goods of this contract description' and that furthermore, if the buyer is intending to resell the goods, 'they must be honestly resalable in the ordinary course of business'.³⁸¹ This guidance from the drafting delegates is of paramount importance when deciding if the goods are fit for their ordinary purpose. The statement directs that in assessing quality, regard is to be had to 'normal expectations of persons buying the goods'. This indicates that quality is assessed by the standards of the buyer's country, that is, what would be considered reasonable quality in that jurisdiction. This is important as there are significant public law considerations such as health and safety standards that may affect the ability to use or resell the goods and this could have an impact on the buyer's

³⁷⁷ Germany 12 December 2006 District Court Coburg (*Plants case*) (*IICL*, 7 November 2008) <<http://cisgw3.law.pace.edu/cases/061212g1.html>> accessed 18 June 2014; Germany 15 September 1994 District Court Berlin (*Shoes case*) (*IICL*, 20 February 2007) <<http://cisgw3.law.pace.edu/cases/940915g1.html>> accessed 29 May 2014.

³⁷⁸ 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; Australia 17 January 2003 Supreme Court of Western Australia (*Ginza Pte Ltd v Vista Corporation Pty Ltd*) (*IICL*, 31 July 2009) <<http://cisgw3.law.pace.edu/cases/030117a2.html>> accessed 18 June 2014.

³⁷⁹ 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.

³⁸⁰ See discussion at chapter 4.2.2.

³⁸¹ 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> accessed 15 June 2014.

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contractual interest.³⁸² In examining the case law on this issue, it is clear that the courts take a contrary approach to that expressed by the drafting delegates and have held that the standard of quality was to be judged in accordance with the seller's country stating:

[a] foreign seller can simply not be required to know the not easily determinable public law provisions and/or administrative practices of the country to which he exports, and that the purchaser, therefore, cannot rationally rely upon such knowledge of the seller, but rather, the buyer can be expected to have such expert knowledge of the conditions in his own country or in the place of destination, as determined by him, and, therefore, he can be expected to inform the seller accordingly.³⁸³

This issue of which standards of quality apply in the absence of specific provisions by the buyer is clearly demonstrated by a well-known case involving the sale of New Zealand mussels.³⁸⁴ The case involved a Swiss seller and a German buyer, the buyer claiming that the levels of cadmium in the mussels exceeded the recommended limit by the health authority in Germany and that this was a fundamental breach permitting avoidance of the contract.³⁸⁵ The German Supreme Court rejected this argument and found that despite the increased cadmium levels the mussels were still edible and as the buyer had not informed the seller of the health restrictions in its home country the seller could not be expected to know.³⁸⁶ This approach was correct. The seller had fulfilled its obligations of conformity under art 35(2)(a) as the goods were fit for their ordinary purpose, that is, for human consumption. Furthermore the buyer had failed to make the seller aware of its interest in receiving

³⁸² Leisinger (n 77) 20.

³⁸³ Germany 8 March 1995 Supreme Court (*New Zealand mussels case*) (*IICL*, 19 May 2009) <<http://cisgw3.law.pace.edu/cases/950308g3.html>> accessed 08 February 2014.

³⁸⁴ *ibid*; See also Peter Schlechtriem, 'Compliance with local law, Seller's obligations and liability: Annotation to German Supreme Court decision of 2 March 2005' (*IICL*, 5 December 2005) <<http://cisgw3.law.pace.edu/cisg/biblio/slechtriem7.html>> accessed 25 June 2014; Harry Flechtner, 'Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and Notice thereof under the United Nations Sales Convention (CISG)' (2008) *BU Int'l LJ* 1.

³⁸⁵ Germany 8 March 1995 Supreme Court (*New Zealand mussels case*) (*IICL*, 19 May 2009) <<http://cisgw3.law.pace.edu/cases/950308g3.html>> 08 February 2014.

³⁸⁶ *ibid*.

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mussels that contained specified levels of cadmium. Therefore, the buyer did not establish its contractual interest in receiving goods of this kind in accordance with art 25 and the seller could not foresee that any detriment would result.³⁸⁷ However, there are some exceptions to this approach. For instance, if the seller regularly transacts business in the buyer's country and *should* have been aware of the standards,³⁸⁸ if the seller had dealt with the buyer on previous occasions³⁸⁹ or if the standards were considered to be industry standards known to parties in the trade.³⁹⁰ The latter can include '*Conformité Européenne*'³⁹¹ markings that indicate the goods are in compliance with EU legislation and can be sold on the European markets.³⁹² Furthermore, standards can be set by the International Organization for Standardization.³⁹³ Both CE and ISO standards would be considered usages under art 9.³⁹⁴

Therefore, on the issue of fundamental breach for non-conformity of the goods, art 35(2)(a) directs that in the absence of express stipulations as to the quality of the goods, the courts are to look to the ordinary purpose of those goods. It is important to regard what the buyer would consider to be reasonable quality, yet it is necessary that the buyer make known to the seller any public law restrictions that may hinder the use of the goods in its home country, otherwise the courts will not attribute this knowledge to the seller unless it falls within the exceptions noted above.

³⁸⁷ See discussion at above chapter 5.1.2.

³⁸⁸ Germany 21 August 1995 District Court Ellwangen (*Spanish paprika case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950821g2.html>> accessed 27 June 2014; See also CISG, art 8(2).

³⁸⁹ France 13 September 1995 Appellate Court Grenoble (*Caito Roger v Société française de factoring*) (*IICL*, 9 February 2007) <<http://cisgw3.law.pace.edu/cases/950913f1.html>> accessed 30 June 2014; See also CISG, art 8(2).

³⁹⁰ Germany 24 March 1999 Supreme Court (*Vine wax case*) (*IICL*, 26 November 2007) <www.cisg.law.pace.edu/cases/990324g1.html> accessed 27 June 2014; See also CISG, art 9.

³⁹¹ Hereinafter referred to as 'CE'.

³⁹² EUROPA, 'CE marking' (*EUROPA*, 3 June 2014) <http://ec.europa.eu/enterprise/policies/single-market-goods/cemarking/about-ce-marking/index_en.htm> accessed 5 July 2014.

³⁹³ International Organization for Standardization, 'Standards' <www.iso.org/iso/home/standards.htm> accessed 5 July 2014.

³⁹⁴ Hereinafter referred to as the 'ISO'; Leisinger (n 77) 20.

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Under art 35(2)(b) the buyer can expressly or impliedly make known to the seller any particular purpose for which he wishes to use the goods, this does not have to be an ordinary purpose. If the goods fail to conform to this particular purpose, it could amount to a fundamental breach giving the buyer the right to avoid the contract. This type of provision is found in the sales law of common law jurisdictions.³⁹⁵ The buyer must make known to the seller the particular purpose of the goods before the contract is concluded. This provision raises a few questions, for instance, what is a particular purpose of the goods? Particular purposes can include factors such as the technical standards of the goods,³⁹⁶ and whether they need to be used in a certain climate³⁹⁷ or comply with any public law requirements in the market where they will be used.³⁹⁸ An example of the latter can be seen in a contract for the supply of scaffold hooks, the buyer claiming that the seller failed to deliver goods that were in accordance with the specifications set out in the European Harmonization Document 1000³⁹⁹ and as a result the hooks were not strong enough and would bend under the weight of the workers.⁴⁰⁰ The seller argued that the hooks were in compliance with HD 1000 but also included the French amendments to this

³⁹⁵ UK SGA s14(3) states: 'Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—to the seller any particular purpose for which the goods are being bought, there is an implied that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller...'; USA UCC, s 2-315 states: 'Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose'.

³⁹⁶ Finland 30 June 1998 Helsinki Court of Appeal (*Skin care products case*) (*IICL*, 14 January 2014) <<http://cisgw3.law.pace.edu/cases/980630f5.html>> accessed 10 June 2014.

³⁹⁷ Germany 12 December 2006 District Court Coburg (*Plants case*) (*IICL*, 7 November 2008) <<http://cisgw3.law.pace.edu/cases/061212g1.html>> accessed 09 July 2014.

³⁹⁸ Germany 8 March 1995 Supreme Court (*New Zealand mussels case*) (*IICL*, 19 May 2009) <<http://cisgw3.law.pace.edu/cases/950308g3.html>> accessed 08 February 2014; Ingeborg Schwenzer, 'Obligations of the Seller: Article 35' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP 2010) 581.

³⁹⁹ Hereinafter referred to as 'HD 1000'.

⁴⁰⁰ Austria 19 April 2007 Supreme Court (*Scaffold hooks case*) (*IICL*, 7 November 2008) <<http://cisgw3.law.pace.edu/cases/070419a3.html>> accessed 09 July 2014.

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standard; and that as the hooks conformed to standards in the seller's country, the seller could not be liable for the lack of conformity due to the public law rules in the buyer's country.⁴⁰¹ The court rejected the seller's argument and found that the goods did not comply with art 35(2)(b) because the seller was aware that the hooks were needed to join the scaffolding and carry the weight of the workers, a purpose which it failed to fulfil.⁴⁰² The court stated that, 'the seller agreed to deliver goods complying with the buyer's specifications of which the seller knew or ought to have known, irrespective of whether the parties have expressly incorporated these specifications into the contract'.⁴⁰³ What, then, does the buyer need to do to 'make known' the particular purpose of the goods to the seller? Leisinger states that, 'making known means that the information merely has to reach the seller's sphere of perception, thus making the seller reasonably able to obtain the knowledge concerned'.⁴⁰⁴ This is supported by the wording of art 35(2)(b) which states that the purpose must be, 'expressly or impliedly made known to the seller'. Similar to the wording of some domestic legislation⁴⁰⁵ the wording of the CISG states that the particular purpose may be impliedly known to the seller.⁴⁰⁶ Thus, if the particular use of the goods was knowledge which the seller *ought* to have been aware of, this would also satisfy the criteria of art 35(2)(b). This application is demonstrated in a case for the delivery of inflatable triumphal arches to be used for advertising

⁴⁰¹ *ibid.*

⁴⁰² *ibid.*

⁴⁰³ *ibid.*

⁴⁰⁴ Leisinger (n 77) 15; See also Wilhelm Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Luchterhand 2000).

⁴⁰⁵ SGA, s 14(3) states: 'Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—(a) to the seller...any particular purpose for which the goods are being bought, there is an implied that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied...'

⁴⁰⁶ Bianca (n 324) 274.

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purposes at a car racing event.⁴⁰⁷ The buyer brought a claim for fundamental breach and declared the contract avoided when the arches collapsed from the vibration of the cars racing on the track.⁴⁰⁸ Although in this case the court did not allow avoidance for fundamental breach,⁴⁰⁹ it stated that the buyer had correctly invoked art 35(2)(b) as the seller was aware of the venue of the event and should have known that the arches needed to withstand the vibrations of the vehicles.⁴¹⁰ A similar result⁴¹¹ was reached in another case where the buyer wanted globes that would be used for 'long-term' advertising purposes in its offices. The court held that such a requirement should have meant that the seller ought to have delivered goods that would last 'up to three years' of continuous use.⁴¹² The approach adopted by the court is correct and based on the general principle of reasonableness under art 7 CISG.⁴¹³ Article 35(2)(b) allows fairness to *both* parties. Although the courts may imply the seller's common knowledge on the use of the goods⁴¹⁴ the wording of art 35(2) does allow for the parties to agree otherwise.⁴¹⁵ Thus, if the seller raises an objection to the particular use of the goods, the buyer would be hard-pressed to argue he was unaware of the non-conformity.⁴¹⁶

⁴⁰⁷ Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*) (IICL, 9 December 2009) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> accessed 10 July 2014.

⁴⁰⁸ *ibid.*

⁴⁰⁹ In this case there was no avoidance for fundamental breach as the breach could be remedied.

⁴¹⁰ Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*) (IICL, 9 December 2009) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> accessed 10 July 2014.

⁴¹¹ In this case there was no avoidance for fundamental breach as the breach could be remedied.

⁴¹² 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.

⁴¹³ See discussion at chapter 3.5; Bianca (n 324) 274.

⁴¹⁴ Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (*Inflatable triumphal arch case*) (IICL, 9 December 2009) <<http://cisgw3.law.pace.edu/cases/021105s1.html>> accessed 10 July 2014; 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.

⁴¹⁵ CISG, art 35(2) states: 'Except where the parties have agreed otherwise, the goods do not conform with the contract unless they...'

⁴¹⁶ CISG, art 35(3) states: 'The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the

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In order for the buyer to prove fundamental breach under art 35(2)(b) the particular purpose of the goods must have been made known to the seller at the conclusion⁴¹⁷ of the contract; subsequent disclosure will not suffice.⁴¹⁸ The buyer is prevented from claiming non-conformity for a breach of art 35(2)(b) where he did not rely or it was unreasonable for him to rely on the seller's skill and judgment. It has been suggested that if the seller is the manufacturer or has specialist knowledge of the goods it is reasonable for the buyer to rely on his skill and judgement.⁴¹⁹ However, where the buyer has experience contracting for those specific types of goods for that purpose⁴²⁰ or possesses specialist knowledge about the goods, it would not be reasonable for him to rely on the seller's skill and judgement alone.⁴²¹ The latter is demonstrated in a case for the delivery of plants, where the buyer claimed that the plants were not fit for their particular purpose as they could not withstand the climate in the contractually agreed destination.⁴²² The court decided that although the particular use of the plants was brought to the seller's attention, the buyer, a specialist in gardening and landscaping, was *equally* placed to know that the plants would struggle to thrive in the local climate. Therefore, it was unreasonable to rely on the seller's knowledge alone.⁴²³

The buyer may also bring a claim for fundamental breach caused by a breach of art 35(2)(c) where the good are non-conforming unless they 'possess the qualities of

buyer knew or could not have been unaware of such lack of conformity'; Arbitration Chamber of Paris Case No 9926 of 2007 [assumed date] (*Chemical compound case*) (*IICL*, 01 May 2009) <<http://cisgw3.law.pace.edu/cases/079926f1.html>> accessed 14 July 2014.

⁴¹⁷ Text to n 22.

⁴¹⁸ Schwenger (n 398) 581.

⁴¹⁹ *ibid*; See also Leisinger (n 77) 16.

⁴²⁰ New Zealand 30 July 2010 High Court of New Zealand (*RJ & AM Smallmon v Transport Sales Limited and Grant Alan Miller*) (*IICL*, 09 June 2011)

<<http://cisgw3.law.pace.edu/cases/100730n6.html>> accessed 18 July 2014.

⁴²¹ Germany 12 December 2006 District Court Coburg (*Plants case*) (*IICL*, 7 November 2008)

<<http://cisgw3.law.pace.edu/cases/061212g1.html>> accessed 18 June 2014.

⁴²² *ibid*.

⁴²³ *ibid*.

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goods which the seller has held out to the buyer as a sample or model'. In *Delchi Carrier SpA v Rotorex Corp*⁴²⁴ the seller failed to deliver goods that conformed to the sample when the cooling capacity and power consumption of compressors to be used in air conditioners were different from the sample. The court found that this was a fundamental breach as, 'cooling capacity and power consumption are important determinants of the value of air conditioner compressors, so that the buyer did not actually receive what it was entitled to expect under the contract'.⁴²⁵

The next criteria for determining the conformity of the goods in the absence of the parties' express stipulations relates to the packaging of the goods. Article 35(2)(d) states that goods are to be packaged in the 'usual' manner or if there is no usual manner then in such a way as to protect and preserve the goods. Although there are some cases dealing with this issue, there were no reported cases where a breach of art 35(2)(d) amounted to a fundamental breach.⁴²⁶ This is consistent with the stringent criteria for establishing fundamental breach, therefore unless the goods were severely damaged or lost as a result of defective packing it would be unlikely that this would reach the threshold of substantially depriving the buyer of its contractual expectations.

The general principle of reasonableness that underlies the CISG supports the position that the burden of proving the breach should rest with the buyer.⁴²⁷ This position is also supported by case law⁴²⁸ and the use of analogy by way of art 79(1)

⁴²⁴ 71 F3d 1024 (2d Cir 1995).

⁴²⁵ *Delchi Carrier SpA v Rotorex Corp* 71 F3d 1024 (2d Cir 1995).

⁴²⁶ France 13 September 1995 Appellate Court Grenoble (*Caito Roger v Société française de factoring*) (*IICL*, 09 February 2007) <<http://cisgw3.law.pace.edu/cases/950913f1.html>> accessed 18 July 2014; Germany 17 January 2007 Appellate Court Saarbrücken (*Marble panel case*) (*IICL*, 06 June 2013) <<http://cisgw3.law.pace.edu/cases/070117g1.html>> accessed 18 July 2014.

⁴²⁷ See discussion at chapter 3.5; Schwenger (n 398) 594.

⁴²⁸ *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.

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CISG.⁴²⁹ Under art 79(1) it is for the party relying on the breach to provide evidence in favour of its claim.⁴³⁰ The next section examines the position in English law where there are no express stipulations on the conformity of the goods.

5.2.7.4 English Law no Express Stipulations on Conformity of Goods

Section 14(2) SGA states that goods must be of satisfactory quality. Satisfactory quality includes 'fitness for all common purposes for which goods of the kind in question are commonly supplied' as well as other factors where relevant, these include: appearance and finish, freedom from minor defects, safety and durability.⁴³¹ The courts have interpreted s 14(2B)(a) to mean that the goods must be fit for all common purposes. For example a plastic pail must be fit to carry liquids. If however it will be carrying chemicals and stored in extreme temperatures,⁴³² this would not be a common but a particular purpose and would fall under s 14(3).⁴³³ This point also applies to the safety standards of the goods. Under English law the buyer must make known to the seller if he intends to export the goods to a particular country where the goods may be unfit for use or resale.⁴³⁴ For the buyer to claim a breach of s 14(3) he must show that he relied on the seller's judgement and it was reasonable to do so. Therefore where the buyer is equally or better placed to have such knowledge, he would be unable to rely on the breach.⁴³⁵ Section 14(2C) sets

⁴²⁹ See discussion at chapter 3.5.2; 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'.

⁴³⁰ Switzerland 27 April 2007 Canton Appellate Court Valais (*Oven case*) (IICL, 22 October 2010) <<http://cisgw3.law.pace.edu/cases/070427s1.html>> accessed 18 July 2014.

⁴³¹ See discussion at chapter 3.7.4; SGA, s 14(2B) (a-e).

⁴³² *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1.

⁴³³ Although *Aswan Engineering* was decided under the old test of merchantability, the result would be the same today.

⁴³⁴ *Sumner Permain & Co v Webb & Co* (1922) 1 KB 55; This position is the same under the CISG see Germany 8 March 1995 Supreme Court (*New Zealand mussels case*) (IICL, 19 May 2009) <<http://cisgw3.law.pace.edu/cases/950308g3.html>> accessed 08 February 2014.

⁴³⁵ SGA, s 13 see *Harlington & Leinster v Christopher Hull Fine Art* [1991] 1 QB 564; SGA, s 14 *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545.

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out the circumstances in which the implied condition on quality and fitness of the goods will not apply.⁴³⁶ The seller will not be able to rely on this section if the defect is one that the buyer could not discern on reasonable examination, such as a latent defect.⁴³⁷ Under English law it will be for the buyer to prove that the goods were not fit for purpose.⁴³⁸

Although the CISG does not explicitly state factors such as those found in s 14(2B) (a-e) SGA to determine the quality of the goods, if art 35 is interpreted correctly, these factors are all attributes of conformity.⁴³⁹ For example, CISG case law has dealt with issues covering safety,⁴⁴⁰ durability⁴⁴¹ and minor defects.⁴⁴² Bridge agrees, stating that art 35 'substantially tracks its counterpart in English law'.⁴⁴³ The CISG is perhaps more favourable to the buyer in that s 14 SGA is curtailed by s 15A, thus the buyer will be unable to reject the goods and terminate the contract where the breach is slight and it would be unreasonable to do so. Furthermore, under s 6(3) UCTA the seller can exclude his liability for breaches of s 14 if it passes the test of reasonableness.

The next part of the chapter examines avoidance for fundamental breach in cases of non-conforming documents under the CISG.

5.2.7.5 Non-Conformity and Documentary Sales

⁴³⁶ 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.

⁴³⁷ See discussion at chapter 3.7.4; *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321.

⁴³⁸ *Leicester Circuits Ltd v Coates Brothers plc* [2003] EWCA Civ 290.

⁴³⁹ SGA, s 14(2B)(b-e).

⁴⁴⁰ 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.

⁴⁴¹ 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.

⁴⁴² 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.

⁴⁴³ Bridge (n 108) 560.

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Article 30 CISG states that 'the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention'. Most international sale of goods contracts can be referred to as documentary sales contracts as the buyer will usually pay the price upon the seller's tender of documents of title covering the goods.⁴⁴⁴ Furthermore, incorporation of INCOTERMS⁴⁴⁵ in the contract will place an obligation on the seller to provide the buyer with documents of title.⁴⁴⁶ The buyer can also stipulate the documentary obligations of the seller in the terms of the contract, as this approach is permitted under the general principle of party autonomy.⁴⁴⁷ Some commentators argue that the buyer's remedy of avoidance, with its requirement of fundamental breach, is not suited to documentary sales contracts.⁴⁴⁸ Mullis argues that the CISG may be unsuitable because documentary sales are complex, often involving commodity goods, strong price fluctuations and multiple parties in the 'string sale'.⁴⁴⁹ This thesis refutes this contention and argues that documentary sales fall within the scope of the CISG and that it was the intention of the drafting delegates that it should govern these types of contracts.⁴⁵⁰ Documents commonly found in international sales can be divided into two groups: documents of title that

⁴⁴⁴ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IJCL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

⁴⁴⁵ Either expressly or by the application of CISG, art 9(2).

⁴⁴⁶ INCOTERMS, r A8.

⁴⁴⁷ CISG, art 6.

⁴⁴⁸ Mullis (n 117) 137; Michael Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 *Pace Int'l L Rev* 55.

⁴⁴⁹ Mullis (n 117) 137.

⁴⁵⁰ See discussion at chapter 1.1 and chapter 2.4.1; UNCITRAL, 'Commentary on the Draft Convention on Contracts for the International Sale of Goods' A/CON.97/5 <www.uncitral.org/pdf/a_conf.97_5-ocred.pdf> accessed 30 May 2014; Peter Schlechtriem, 'Interpretation, gap-filling and further development of the UN Sales Convention' (CISG - Auslegung, Lückenfüllung und Weiterentwicklung, Basel, May 2004); See also CISG, arts 2 and 3.

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allow the buyer to dispose of the goods and accompanying documents.⁴⁵¹ The former consists of documents such as the bill of lading, dock or warehouse receipts, whereas the latter can include documents such as insurance policies, certificates of origin, export certificates and certificates of quality.⁴⁵² Non-conforming bills of lading and other documents of title will usually satisfy the requirements of fundamental breach as it will have serious repercussions for the buyer's ability to resell the goods or pledge them for documentary credit.⁴⁵³ For instance, banks usually require a 'clean' bill of lading as a prerequisite for opening a letter of credit, that is, a bill of lading that shows the goods shipped in good order and condition.⁴⁵⁴ This requirement is considered a usage under art 9(2).⁴⁵⁵ Conversely, establishing fundamental breach for non-conforming accompanying documents can prove to be more difficult as demonstrated above in the *Cobalt Sulphate case*, where the courts reasoned that the buyer can usually procure replacement documents without difficulty.⁴⁵⁶ However, in one case the buyer was able to avoid the contract for fundamental breach when the seller failed to procure a certificate of origin which was necessary in order for the goods to be exported.⁴⁵⁷ However in this case avoidance for fundamental breach was permitted because the parties had expressly agreed on this stipulation in the contract.

⁴⁵¹ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

⁴⁵² Müller-Chen (n 45) 751.

⁴⁵³ *ibid.*

⁴⁵⁴ Schroeter (n 18) 432; *Magellan International Corporation v Salzgitter Handel GmbH* 76 F Supp 2d 919 (ND Ill 1999).

⁴⁵⁵ Schroeter (n 18) 432; See also Maartje Bijl, 'Fundamental Breach in Documentary Sales Contracts: The Doctrine of Strict Compliance with the Underlying Sales Contract' (2009) 1 *EJCL* 19.

⁴⁵⁶ 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.

⁴⁵⁷ Spain 12 February 2002 Appellate Court Barcelona (*Comercial San Antonio SA v. Grupo Blocnesa SL*) (*IICL*, 10 September 2009) <<http://cisgw3.law.pace.edu/cases/020212s4.html>> accessed 01 October 2014.

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Therefore, breaches for non-conforming documents can be fundamental in three ways. First, if the terms of the contract indicate that the documentary obligation was an important one, then the principle of party autonomy⁴⁵⁸ and the criterion of contractual expectation found in art 25 would allow the buyer to avoid the contract. This would be the case even if there was no monetary loss.⁴⁵⁹ Secondly, if the document was one passing title to the buyer or allowing him to dispose of the goods, then the tender of non-conforming documents may amount to fundamental breach. This approach would satisfy the criterion of substantial deprivation under art 25. Thirdly, if the contract has incorporated usages such as INCOTERMS, then the documentary obligations of the seller are considered strictly.⁴⁶⁰

It is also worth noting that the buyer claiming fundamental breach for non-conformity of the documents must also tender a notice of non-conformity in accordance with art 39(1). Even though the wording of art 39(1) states that, 'the buyer loses the right to rely on a lack of conformity of the *goods*⁴⁶¹ if he does not give notice', the legislative history and academic commentary indicates that the requirement is 'analogously applied...to a lack of conformity of documents'.⁴⁶² Therefore, the buyer seeking to avoid the contract for fundamental breach caused by non-conforming documents would have to tender the notice of non-conformity as well as a notice of avoidance.⁴⁶³

The chapter proceeds to examine corresponding English law on non-conforming documents.

⁴⁵⁸ CISG, art 6.

⁴⁵⁹ Will (n 21) 207; See also UNCITRAL, 'Yearbook: Volume VIII (1977)' A/CN.9/SER.A/1977 <www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf> accessed 30 May 2014.

⁴⁶⁰ Unless there is a contrary intention from the express terms of the contract.

⁴⁶¹ Emphasis added.

⁴⁶² CISG, art 39(1); Enderlein and Maskow (n 34) 158; See also Bernard Audit, 'The Vienna Sales Convention and the Lex Mercatoria' in in Thomas Carbonneau (ed), *Lex Mercatoria and Arbitration* (Juris 1998) 188, the French text of CISG is more general 'défaut de conformité'.

⁴⁶³ See discussion at chapter 2.4.5 and chapter 7.1.

5.2.7.6 English Law on Non-Conformity and Documentary Sales

Documentary sales under English law has a narrower meaning than under the CISG, specifically it is limited to the sale of commodity goods using delivery terms 'CIF' or 'FOB'.⁴⁶⁴ 'CIF' contracts, in particular, carry strict documentary obligations: the seller is under a duty to tender the bill of lading, insurance document and contract of carriage in exchange for the contract price.⁴⁶⁵ These three documents are considered sacrosanct such that non-conformities will entitle the buyer to reject them. However, the parties may agree to additional documentary responsibilities.⁴⁶⁶ The conformity of the documents will be of importance as the banks may reject them if the buyer requires a letter of credit.⁴⁶⁷ If the documents are non-conforming, for example a bill of lading outside of the shipment date, the buyer is entitled to reject the documents even if no losses have been incurred.⁴⁶⁸ Similarly if the bill of lading indicates that the goods were not shipped in good condition or do not cover the whole of the voyage, the buyer will be entitled to reject the documents.⁴⁶⁹ It is a well-established principle in English law that the buyer must accept the documents if they conform to the contract even if he suspects the goods may be non-conforming on arrival.⁴⁷⁰ The two rights of rejection are separate and successive, the buyer cannot reject non-conforming goods if he does not accept the conforming documents.⁴⁷¹ This may pose a problem where the documents disclose that the goods are non-conforming but the document itself *is* conforming.⁴⁷² For example, a

⁴⁶⁴ Bridge (n 108) 7; Nb these terms denote their meaning in English law not INCOTERMS.

⁴⁶⁵ *Biddell Brothers v E Clemens Horst Co* [1912] AC 18.

⁴⁶⁶ Bridge (n 108) 132.

⁴⁶⁷ Adams and MacQueen (n 114) 416.

⁴⁶⁸ *Proctor & Gamble Philippine Manufacturing Co v Kurt Becher GmbH* [1988] 2 Lloyds's Rep 21.

⁴⁶⁹ *Boukadoura Maritime Corp v Societe Anonyme Marocaine de l'Industrie et du Raffinage (The Boukadoura)* [1989] 1 Lloyd's Rep 393.

⁴⁷⁰ Nicholas Ryder, Margaret Griffiths and Lachmi Singh, *Commercial Law Principles and Policy* (CUP 2012) 191.

⁴⁷¹ *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459.

⁴⁷² Mullis (n 117) 137.

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certificate of quality that reveals that the goods contain a higher percentage of foreign matter than was stated in the contract.⁴⁷³ The courts determined that the buyer cannot reject the document unless the defect revealed amounted to a breach of condition.⁴⁷⁴ This approach is subject to s 15A SGA, thus if the breach is slight, the buyer will be unable to reject the documents.⁴⁷⁵ Therefore, the buyer even in a 'CIF' contract may find he is unable to reject the documents on this basis. The approach in the CISG is more straightforward as it does not distinguish terms as conditions, rather it looks at whether the buyer is substantially deprived of his contractual interests which is linked to the terms of the contract⁴⁷⁶ as well as any practices, conduct, negotiations⁴⁷⁷ and usages.⁴⁷⁸ Mullis supports this contention by stating that English law's claim to a 'clear and settled result is over-exaggerated'.⁴⁷⁹

In the analysis above the chapter has thoroughly examined fundamental breach which is the main requirement for the buyer who wishes to establish a right of avoidance. The chapter now proceeds to examine an alternative means for the buyer to avoid the contract, specifically by examining the provisions of art 49(1)(b) CISG. This provision is important in cases of non-delivery as the buyer may wish to avoid the contract for fundamental breach but is uncertain whether the breach is serious enough to meet the threshold. The fixing of an additional time for the seller to perform will reduce this uncertainty.

5.2.8 Meaning and Purpose of Article 49(1)(b) CISG

⁴⁷³ *Tradax Internacional SA v Goldschmidt SA* 1977] 2 Lloyd's Rep 604.

⁴⁷⁴ *ibid*; cf *Vargas Pena Apeztegui y Cia v Peter Cremer GmbH* [1987] 1 Lloyd's Rep 394.

⁴⁷⁵ Mullis (n 117) 137.

⁴⁷⁶ CISG, art 6.

⁴⁷⁷ CISG, art 8.

⁴⁷⁸ CISG, art 9.

⁴⁷⁹ Mullis (n 117) 137.

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It is recalled in the arguments presented earlier in the chapter that the seller's failure to deliver the goods or documents representing those goods⁴⁸⁰ in accordance with the time fixed in the contract will not ordinarily amount to a fundamental breach of contract.⁴⁸¹ However, there are certain exceptions to this position, for instance if the terms of the contract, negotiations or certain usages indicate that time is of the essence.⁴⁸² In the absence of certainty to avoid the contract for fundamental breach by reason of the seller's failure to deliver, the buyer can use the mechanism of art 49(1)(b) to fix an additional time for performance in accordance with art 47(1).⁴⁸³ If the seller fails to perform within the additional time fixed or indicates that he will not perform, the buyer may declare the contract avoided. The origins of fixing an additional time for performance or *Nachfrist*⁴⁸⁴ can be found in s 326 of the *Bürgerliches Gesetzbuch*.⁴⁸⁵ Under the CISG the buyer's right to avoid the contract after the expiry of the additional time to perform is limited to breaches of timely delivery, thus the fixing of an additional time *cannot* convert all breaches from non-fundamental to fundamental.⁴⁸⁶

Under art 47(1) the buyer may fix an additional time for performance by indicating a given date or a period of time; the seller has until the last day to perform

⁴⁸⁰ For example the bill of lading; CISG, art 30.

⁴⁸¹ CISG, art 33 states: 'The seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract'; See also Schroeter (n 18) 418.

⁴⁸² See discussion above at chapter 5.2.5; Germany 27 March 1996 District Court Oldenburg (*Clothes case*) (IICL, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/960327g1.html>> accessed 3 June 2014; *Diversitel Communications Inc v Glacier Bay Inc* [2003] 42 CPC (5th) 196; *Italdecor v Yiu's Industries* [Appellate Court] (IICL, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/980320i3.html>> accessed 15 May 2014.

⁴⁸³ CISG, art 47(1) states: 'The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations'.

⁴⁸⁴ Grace period.

⁴⁸⁵ See discussion at chapter 2.4.3; German Civil Code; Hereinafter referred to as the 'BGB'; On 02 January 2002, the new *Bürgerliches Gesetzbuch* came into force, the old s326 can now be found in the amended BGB, s 281.

⁴⁸⁶ Michael Will, 'Article 47' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 343.

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his obligations. Bridge criticises the notion of fixing an additional time for performance as it allows a party already in breach to continue to delay performance.⁴⁸⁷ However, the provisions of art 47(1) lend certainty to the buyer's decision to avoid the contract for non-delivery.⁴⁸⁸ As the observance of good faith and preservation of the contract are both general principles under the CISG, in addition to the criterion of substantial deprivation under art 25, these factors could potentially affect the buyer's right to lawfully avoid the contract if he chooses *not* to exercise art 47(1).⁴⁸⁹ Examination of the case law on this issue indicates that the courts will take into account whether or not the buyer has allowed for an additional period of time for performance, in determining if non-delivery amounts to a fundamental breach. An example of this is found in a case where it was held 'that mere non- or late delivery does not constitute a fundamental breach under article 25 provided that delivery is *objectively possible* and the seller was willing to deliver'.⁴⁹⁰ Therefore, in the absence of any of the exceptions indicating time is of the essence of the contract the buyer would be advised to use the provisions of art 47(1) before declaring the contract avoided.⁴⁹¹

The period of time fixed under art 47(1) must be reasonable. Thus, considerations such as the type of the goods, the nature of the seller's performance and what caused the delay need to be taken into account.⁴⁹² The courts have determined that an additional period of two weeks was not suitable for a delivery of

⁴⁸⁷ Bridge (n 108) 572.

⁴⁸⁸ Enderlein and Maskow (n 34) 181.

⁴⁸⁹ See discussion at chapter 3.4 and chapter 3.4.3; Hillman (n 39) 21; See also Schlechtriem (n 42); Powers (n 100) 345.

⁴⁹⁰ Germany 18 November 1993 Appellate Court Düsseldorf (*Key press case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/931118g1.html>> accessed 01 October 2014; See also Koch (n 31) 177; Germany 24 April 1990 Lower Court Oldenburg in Holstein (*Fashion textiles case*) (*IICL*, 08 June 2006) <<http://cisgw3.law.pace.edu/cases/900424g1.html>> accessed 01 October 2014.

⁴⁹¹ The exceptions are: if the terms of the contract, negotiations or certain usages indicate that time is of the essence.

⁴⁹² Enderlein and Maskow (n 34) 181.

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three printing machines from Germany to Egypt.⁴⁹³ However, the buyer was permitted avoidance of the contract as he did not make the declaration of avoidance until seven weeks after the date stipulated in the contract, at which time the seller still had not delivered the goods.⁴⁹⁴ It must be noted that during the period of time fixed in accordance with art 47(1) the buyer cannot resort to any other remedies for breach of contract, unless the seller has indicated that he will not perform. This approach is to protect the seller who may have embarked on performance, perhaps already incurring expenses in doing so.⁴⁹⁵

The purpose behind art 49(1)(b) is to emphasise that delivery is considered an essential obligation under the CISG.⁴⁹⁶ Therefore, the buyer cannot use the mechanism to avoid the contract for other breaches that fail to meet the test for fundamental breach. This approach is consistent with the general principles of the CISG, where avoidance is limited to serious breaches as there are significant costs of transport as well as loss or damage of the goods to consider when avoidance is permitted.⁴⁹⁷ Müller-Chen suggests that there may be an exception to art 49(1)(b) only being used for cases of non-delivery.⁴⁹⁸ He points out that if the goods are discovered to be non-conforming before they are dispatched, for example in an *ex works* contract, where the buyer would collect the goods from the seller's premises, the breach would be one of non-delivery rather than non-conformity.⁴⁹⁹ Thus, in these cases the buyer could use art 49(1)(b) to fix an additional time for the seller to

⁴⁹³ Germany 24 May 1995 Appellate Court Celle (*Used printing press case*) (*IJCL*, 20 February 2007) <<http://cisgw3.law.pace.edu/cases/950524g1.html>> accessed 01 October 2014.

⁴⁹⁴ *ibid.*

⁴⁹⁵ Chengwei Liu, 'Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL' (*IJCL*, 03 October 2003) <www.cisg.law.pace.edu/cisg/biblio/chengwei.html> accessed 01 October 2014.

⁴⁹⁶ Will (n 133) 363.

⁴⁹⁷ See discussion above at chapter 5.1.

⁴⁹⁸ Müller-Chen (n 45) 754.

⁴⁹⁹ *ibid.*

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perform his obligation to 'deliver' the contractual goods. If the seller fails to do so within the time fixed, this would permit the buyer the right to declare the contract avoided. The thesis takes a cautionary approach to the situation outlined above. There are no reported cases on this issue. It is argued that for art 49(1)(b) to be applied to the situation of non-conformity amounting to non-delivery, the buyer would need to have discovered the non-conformity *before* taking delivery of the goods.⁵⁰⁰ This will prove problematic as art 31(c) states that the seller's delivery obligation can be fulfilled by, 'placing the goods at the buyer's disposal at the place where the seller had his place of business'. Thus if 'delivery' has already taken place, albeit without the buyer having removed the goods from the seller's premises, this would preclude the use of art 49(1)(b). Therefore, art 49(1)(b) should only be used in cases of non-delivery and not non-conformity as to do otherwise would undermine the purpose of the remedy.

Article 49(1)(b) will apply to cases of non-delivery of goods as well as the documents that represent those goods, for instance the bill of lading.⁵⁰¹ If the documents on delivery are found to be non-conforming this will not fall under art 49(1)(b). Furthermore, non-delivery of documents that are not representative of the goods, that is, they are not documents of title or allow the buyer to dispose of the goods, will not fall under art 49(1)(b).⁵⁰² The CISG Advisory Council argues that missing accompanying documents such as insurance policies and certificates of

⁵⁰⁰ Corinne Widmer, 'Article 31' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 516.

⁵⁰¹ Schwenzer (n 47) 795

⁵⁰² Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

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origin do not amount to non-delivery of the goods.⁵⁰³ Whether the buyer can avoid the contract for a breach of missing accompanying documents will depend on whether fundamental breach can be proved using art 49(1)(a), which will depend on the terms of the contract and whether the buyer can still make use of the goods.⁵⁰⁴

In examining the wording the art 49(1)(b) the question arises whether the buyer must wait for the expiry of the additional time fixed for performance before declaring the contract avoided? The wording of art 49(1)(b) indicates that the buyer can declare the contract avoided 'if the seller does not deliver the goods within the additional period of time fixed' or the seller 'declares that he will not deliver within the period so fixed'. Therefore, if the seller indicates his refusal to perform, the buyer is not under an obligation to wait for the expiry of the additional time.⁵⁰⁵ Furthermore the seller is precluded from withholding delivery based on some other condition which does not form part of the contract.⁵⁰⁶ For instance, withholding performance based on a claim for set-off from a previous contract⁵⁰⁷ or demanding cash payment in advance of shipment.⁵⁰⁸

In the absence of the seller's refusal to perform, the buyer can continue to fix additional times for performance of the contract until he declares the contract avoided in accordance with art 26.⁵⁰⁹ Once the contract is declared avoided, the

⁵⁰³ *ibid*; See also 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.

⁵⁰⁴ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 5: The buyer's right to avoid the contract in case of non-conforming goods or documents (Article 49 CISG)' (*IICL*, 16 November 2005) <www.cisg.law.pace.edu/cisg/CISG-AC-op5.html> accessed 01 June 2014.

⁵⁰⁵ Switzerland 14 December 2009 *Kantonsgericht* [District Court] Zug (*Spinning company case*) (*IICL*, 08 March 2010) <<http://cisgw3.law.pace.edu/cases/091214s1.html>> accessed 01 October 2014.

⁵⁰⁶ Switzerland 20 December 2006 Federal Supreme Court (*Machines case*) (*IICL*, 22 October 2010) <<http://cisgw3.law.pace.edu/cases/061220s1.html>> accessed 01 October 2014.

⁵⁰⁷ *ibid*.

⁵⁰⁸ Germany 24 May 1995 Appellate Court Celle (*Used printing press case*) (*IICL*, 20 February 2007) <<http://cisgw3.law.pace.edu/cases/950524g1.html>> accessed 01 October 2014.

⁵⁰⁹ See discussion at chapter 7.1.

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buyer cannot revoke the declaration if the seller has relied on it.⁵¹⁰ A new contract would have to be concluded if the buyer wishes to continue with the transaction.⁵¹¹

Therefore, this approach balances the rights of both the buyer and seller. On the one hand, the buyer cannot avoid the contract for insignificant breaches, where on a falling market it may be advantageous for him to do so. On the other hand, because delivery is held to be an essential obligation although it may not start out as a fundamental breach, it has the capacity to impair the buyer's contractual expectations if the seller fails to deliver the goods.

The chapter proceeds to examine whether the Principles can assist with the interpretation on art 49(1)(b) CISG.

5.2.8.1 Can the UNIDROIT Principles be used to Interpret Article 49(1)(b) CISG?

Article 7.1.5(3) UNIDROIT deals with the issue of fixing an additional time for performance in circumstances where the delay in performance is not fundamental from the outset.⁵¹² The application of this provision is similar to art 47(1) CISG in that the buyer can terminate the contract after the expiry of the additional time. There is however one slight variation in that if the time fixed by the buyer is deemed unreasonable then an additional period of time will be fixed. This approach is wholly compatible with the CISG in that the period of time fixed must take into consideration the type of the goods as well as the nature of the seller's delivery

⁵¹⁰ Christiana Fountoulakis, 'Article 26' in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 443; cf Christopher Jacobs, 'Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice, and the Question of Revocability' (2003) 64 U Pitt L Rev 407.

⁵¹¹ Fountoulakis (n 510) 443.

⁵¹² UNIDROIT, art 7.1.5(3) states: 'Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate'.

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obligations.⁵¹³ This is supported by the general principles of reasonableness and the observance of good faith.⁵¹⁴ It would be contrary to these principles to allow the buyer to set a period of time that is too short, in light of the nature of the goods as well as the length of journey needed to deliver them. The use of art 7.1.5(3) to supplement art 49(1)(b) would mean that the buyer cannot manipulate the remedy of avoidance by fixing an unreasonable time thus resulting in the seller's inability to deliver the goods.

The next section examines the approach of English law on fixing additional time for performance.

5.2.8.2 English Law on Fixing an Additional Time for Performance

English law does not recognise the notion of fixing an additional time for performance as timely delivery is of the essence in commercial contracts.⁵¹⁵ The one exception to this is in the case of a sale of land, where the notice to perform by a specified date can be given if the other party has caused improper or undue delay in performance.⁵¹⁶ The courts have declined to extend the exception to any other types of contracts unless it can be shown that *if* a time for completion *had* been stated in the contract, time would have been of the essence. In this case the aggrieved party can make time of the essence by serving a reasonable notice on the other party.⁵¹⁷ This approach is different from art 47(1) CISG as English law is not fixing an

⁵¹³ Koch (n 77).

⁵¹⁴ Enderlein and Maskow (n 34) 181; Germany 24 May 1995 Appellate Court Celle (*Used printing press case*) (IICL, 20 February 2007) <<http://cisgw3.law.pace.edu/cases/950524g1.html>> accessed 01 October 2014.

⁵¹⁵ See discussion above at chapter 5.2.6; *Hartley v Hymans* [1920] 3 KB 475; This is even the case for early delivery the buyer is entitled to reject the goods see *Bowes v Shand* (1877) 2 App Cas 455.

⁵¹⁶ Bridge (n 108) 572.

⁵¹⁷ *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] QB 842.

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additional time for performance after the expiry of the original time, rather it is stipulating a time for performance where there was no previously stated time.

Fixing an additional time under the CISG can be more beneficial to the buyer than applying English law in circumstances where the buyer has a vested interest in delivery, for example, in the case of bespoke goods that may be difficult to obtain from elsewhere or commodity goods on a rising market where the buyer would not want to have to pay more for a substitute transaction. Furthermore, as the buyer's rejection of the goods involves high costs of transport to an alternative destination to be borne by the seller as well as risk of damage, the buyer should not be allowed to avoid the contract unless the breach is fundamental.

The chapter proceeds to examine the circumstances where the buyer may lose the right to avoid the contract under art 49(2) CISG.

5.2.9 Circumstances Where the Buyer Loses the Right to Avoid the Contract

Article 49(2), examines the circumstances under which the buyer loses the right to avoid the contract after the seller has delivered the goods. Article 49(2) covers any breaches that fall within the scope of art 49(1)(a), avoidance for fundamental breach.⁵¹⁸ Enderlein and Maskow contend that art 49(2) 'contains the most complicated rule of the entire Convention'.⁵¹⁹ The reason for this contention is that the CISG does not have a specified time limit on the buyer's right to declare the contract avoided. Therefore, the seller should not be left in an uncertain position once the goods have come into the buyer's possession.

Although the CISG has no time limit to declare avoidance, the buyer may lose the right if he waits too long. This is demonstrated in a case where the buyer lost the

⁵¹⁸ Will (n 133) 364.

⁵¹⁹ Enderlein and Maskow (n 34) 192.

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right to avoid the contract for non-delivery as he waited over two years to make the declaration of avoidance.⁵²⁰ The court determined that to allow avoidance after such an extensive lapse of time would be contrary to the general principle of the observance of good faith found in the CISG.

Therefore, the fact that the goods have been delivered and are in the buyer's possession justifies stricter standards, such that the buyer must not delay in deciding whether to avoid or the right will be lost.⁵²¹ For instance if the buyer wishes to declare the contract avoided the seller needs to be notified of this intention immediately so that arrangements can be made to transport and resell the goods.

Article 49(2)(a) deals with the issue of late delivery, the buyer must declare the contract avoided 'within a reasonable time after he has discovered that delivery has been made'. This provision does not interfere with the buyer's right to declare the contract avoided for a breach of art 49(1)(a), if the delay amounts to a fundamental breach.⁵²² Article 49(2)(a) also does not affect the buyer's right to declare the contract avoided after the expiry of additional time for performance in accordance with arts 47(1) and 49(1)(b). However, if the buyer prefers to wait for delivery, he must declare the contract avoided within a reasonable time thereafter if the delay amounts to a fundamental breach. A reasonable time should take into consideration: trade practices, the type of goods as well as the market conditions.⁵²³ Specifically in the case of the commodities markets, the buyer might try to avoid making a decision on avoidance in a rising market.⁵²⁴ However, the ability to delay avoidance may be limited given the general principle to interpret the CISG with the observance good

⁵²⁰ Germany 8 February 1995 Appellate Court München [7 U 1720/94] (*Automobiles case*) (IICL, 06 December 2006) <<http://cisgw3.law.pace.edu/cases/950208g1.html>> accessed 01 October 2014.

⁵²¹ Will (n 133) 364; See also Schlechtriem (n 43) 78.

⁵²² Honnold (n 26) 330.

⁵²³ Will (n 133) 364.

⁵²⁴ Müller-Chen (n 45) 760; On the other hand the buyer may want to reject the goods on a falling market where he can obtain them at a cheaper price.

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faith.⁵²⁵ Thus, it is unlikely that the buyer will be able to benefit from such delays. In any case the period of 'reasonable time' will begin to run from when the buyer knows or becomes aware of the delivery and this will include receiving transport documents corresponding to the delivery. The buyer's window to declare avoidance will thus be narrow.⁵²⁶

For any breach *other* than late delivery, art 49(2)(b) stipulates that avoidance must be carried out within a reasonable time. These breaches can consist of delivery of non-conforming goods and documents.

Article 49(2)(b)(i) states that the buyer must declare avoidance within a reasonable time 'after he knew or ought to have known of the breach'. Thus the buyer's failure to examine the goods in accordance with art 38 may result in the loss of the right to avoid the contract.⁵²⁷ If the buyer is unaware of the extent of the breach at the time of examination, as in the case of latent defects, the buyer may have already lost his right to avoid the contract when the seriousness of the breach is discovered.⁵²⁸ Since arts 39(1)⁵²⁹ and 49(2)(b)(i)⁵³⁰ require the buyer to give notice within a reasonable time from when he ought to have known of the breach, it creates the impression that the time for giving notice is one and the same.⁵³¹ However, this is not always the case, and there are two situations that should be distinguished.

⁵²⁵ See discussion at chapter 3.4.3

⁵²⁶ Michael Martinek and Ulrich Magnus, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener Kaufrecht (CISG)* (Sellier 2005).

⁵²⁷ CISG, art 38 states: '(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination'.

⁵²⁸ Ari Korpinen, 'On Legal Uncertainty Regarding Timely Notification of Avoidance of the Sales Contract' (*IICL*, 2004) <www.cisg.law.pace.edu/cisg/biblio/korpinen.html> accessed 30 June 2014.

⁵²⁹ Notice of non-conformity.

⁵³⁰ Notice of avoidance.

⁵³¹ Korpinen (n 528).

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First if the contract makes express stipulations or the parties' intent is evident as to the standards of conformity and the breach is discernible from a reasonable examination of the goods, then the buyer should give both notices at the same time. To allow the buyer additional time to declare the contract avoided in this circumstance would be unfair as the breach is evident. The second situation applies in the absence of express stipulations on conformity and particularly in the case of latent defects. In this case it would be unreasonable to require the buyer to give the notice of non-conformity at the same time as the notice of avoidance.⁵³² These approaches are supported by the case law,⁵³³ the general principles of reasonableness and the observance of good faith⁵³⁴ and the CISG Advisory Council.⁵³⁵

The question of what constitutes a reasonable time for declaring the contract avoided must take into consideration: the type of goods, the nature of the defect as well as actions of the seller when he is notified of the non-conformity.⁵³⁶ In one case the court determined that the buyer had lost the right to avoid the contract after eight months had passed since he was made aware of the non-conformity.⁵³⁷ The courts dismissed the buyer's contention that he was awaiting an expert report as the defects of the goods were discernible on examination as soon as they were delivered.

⁵³² Nb CISG, art 40, the buyer does not have to give notice of non-conformity if the lack of conformity relates to facts of which the seller 'knew or could not have been unaware and which he did not disclose to the buyer'.

⁵³³ Switzerland 26 April 1995 Commercial Court Zürich (*Saltwater isolation tank case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950426s1.html>> accessed 30 June 2014; Italy 13 December 2001 District Court Busto Arsizio (*Machinery case*) (*IICL*, 26 November 2012) <<http://cisgw3.law.pace.edu/cases/011213i3.html>> accessed 30 June 2014; See also Spain 21 March 2006 Appellate Court Castellón (*Apparatus for the reduction of consumption of gasoline*) (*IICL*, 08 November 2007) <<http://cisgw3.law.pace.edu/cases/060321s4.html>> accessed 30 June 2014.

⁵³⁴ Hillman (n 39) 21; See also Schlechtriem (n 42); Powers (n 100) 345.

⁵³⁵ See discussion at chapter 2.4.5; Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 2: Examination of the Goods and Notice of Non-Conformity Articles 38 and 39' (*IICL*, 26 June 2006) <www.cisg.law.pace.edu/cisg/CISG-AC-op2.html> accessed 07 October 2014.

⁵³⁶ James White and Robert Summers, *Uniform Commercial Code* (5th edn, Thompson 2000); See also Müller-Chen (n 45) 762.

⁵³⁷ France 14 June 2001 Appellate Court Paris (*Aluminium and Light Industries Company v Saint Bernard Miroiterie Vitrierie*) (*IICL*, 02 December 2005) <<http://cisgw3.law.pace.edu/cases/010614f1.html>> accessed 07 October 2014.

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Articles 49(2)(b)(ii) and (iii) deal with the issues where the buyer loses the right to avoid the contract if he does not do so within a reasonable time after the expiry of any additional time fixed⁵³⁸ or where the seller fails to cure the breach within the time indicated.⁵³⁹ The former was dealt with earlier in the chapter⁵⁴⁰ and the latter will be dealt with in chapter six.⁵⁴¹ Article 82(1) states that the buyer will also lose the right to avoid the contract if he cannot return the goods to the seller in a similar condition in which he received them. This will be examined further in chapter seven.⁵⁴²

The chapter now examines the circumstances in English law where the buyer will lose the right to reject the goods and terminate the contract.

5.2.9.1 English Law and the Loss of the Right to Terminate the Contract

Section 35 SGA sets out three circumstances where the buyer will lose the right to reject the goods. The first is where: 'he intimates to the seller that he has accepted them'.⁵⁴³ The second is where 'he does any act in relation to them which is inconsistent with the ownership of the seller'⁵⁴⁴ and the third if 'after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them'.⁵⁴⁵ With regard to the first circumstance, s 35(2) states that the buyer will not be deemed to have accepted the goods until he has had a reasonable

⁵³⁸ CISG, art 47(1).

⁵³⁹ CISG, art 48(2).

⁵⁴⁰ See discussion above at chapter 5.2.8.

⁵⁴¹ See discussion at chapter 6.

⁵⁴² See discussion at chapter 7.2.2; CISG, art 82 states: '(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. (2) The preceding paragraph does not apply: (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity'.

⁵⁴³ SGA, s 35(1)(a).

⁵⁴⁴ SGA, s 35(1)(b).

⁵⁴⁵ SGA, s 35(4).

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opportunity to examine them in accordance with s 34. Thus, the buyer signing a delivery order or receipt will not amount to acceptance until he has examined the goods.⁵⁴⁶

The buyer may also lose the right to reject the goods and terminate the contract if he commits an act that is inconsistent with the ownership of the seller. Section 35(6)(b) states that the buyer is *not* deemed to have accepted the goods by virtue of having resold them to a sub-buyer. This approach makes sense as in most international sales contracts the buyer may not have the opportunity to examine the goods before they are resold, for example in string sales. Thus an 'act that is inconsistent with the ownership of the seller' must mean that the buyer has transformed or destroyed the character of the goods in some way, such that he cannot restore the goods to the seller.⁵⁴⁷

The buyer may also be deemed to have accepted the goods where a reasonable time has passed and he has not indicated to the seller that he wants to reject the goods.⁵⁴⁸ This circumstance will also be contingent on whether the buyer has had a reasonable opportunity to examine the goods.⁵⁴⁹ In *Truk (UK) Ltd v Tokmakidis GmbH* it was stated that a reasonable time to reject the goods cannot be less than the reasonable time for examination, however the time for rejection may be extended if there are on-going dealings between the parties such as a request for repair.⁵⁵⁰

In each of the circumstances examined above the buyer's acceptance of the goods is linked to his right to examine them.⁵⁵¹ It is worth noting that the buyer's

⁵⁴⁶ *Schofield (JW) & Sons v Rowson, Drew and Clydesdale Ltd* (1922) 10 LI LR 480.

⁵⁴⁷ There is little case law to illustrate this point, however it can include obtaining a proprietary right over the goods see *Armaghdown Motors v Gray* [1963] NZLR 5; *Adams and MacQueen* (n 114) 515.

⁵⁴⁸ SGA, s 35(4).

⁵⁴⁹ SGA, s 35(5).

⁵⁵⁰ [2000] 2 All ER (Comm) 594.

⁵⁵¹ SGA, s 34.

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right to examine the goods can be excluded by the seller in commercial sales.⁵⁵²

Therefore under English law the buyer may lose the right to reject the goods without examination if there is an exclusion clause to this effect.⁵⁵³

5.3 Conclusion

This chapter has established that the buyer's right to avoid the contract under the CISG is a suitable remedy for international sale of goods contracts.⁵⁵⁴ Contrary to the opinion of some commentators, the chapter has demonstrated that the main requirement of fundamental breach found in art 25 is not rigid in its application.⁵⁵⁵ If the wording and purpose of art 25 are correctly interpreted, it is the parties express stipulations that will take precedence over any other meaning. Specifically, it is for the buyer to decide what terms, if breached, would substantially deprive him of his contractual expectations. This is supported by art 6, the principle of party autonomy. If the terms are clearly set out in the contract, it will be difficult for the seller to argue that detriment was unforeseeable. In the absence of express contractual stipulations, the CISG allows for the parties' intent, conduct and practices, as well as pre-contractual negotiations, to be taken into account when determining fundamental breach. Furthermore, the CISG allows for terms to be incorporated by usages under art 9; these can be expressly agreed or internationally known. In this regard the chapter has shown that the CISG is equally as flexible as English law and in some cases it may offer more certainty as the latter is subject to the classification of terms and the impact of s 15A SGA as well as the seller's exclusion of liability under UCTA.

⁵⁵² This is subject to UCTA, s 3(1) where the parties have contracted on the other party's 'written standard terms of business'; See also *Chester Grosvenor Hotel v Alfred McAlpine Management Ltd* (1991) 56 Build LR 115; It can also include standard terms of a third-party, that is industry standards; *British Fermentation v Compare Reavell* [1989] 2 All ER (Comm) 389.

⁵⁵³ Ryder, Griffiths and Singh (n 470) 107.

⁵⁵⁴ Text to n 212.

⁵⁵⁵ Bridge (n 108) 567; See also Hellner (n 108) 338.

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Article 49 CISG goes further than avoidance for fundamental breach and allows the buyer in the case of non-delivery⁵⁵⁶ the right to avoid the contract after the expiry of an additional time to perform.⁵⁵⁷ The chapter has demonstrated that this mechanism is a useful tool for international trade as delays may not be fundamental from the outset. However delivery remains an essential obligation of the seller. The fixing of an additional time for performance helps to reduce the high costs associated with avoidance of the contract as well as being beneficial to the buyer if he has a vested interest in delivery. This mechanism is useful for contracts for both bespoke goods as well as commodity goods on a rising market.

The next chapter analyses the relationship between the seller's right to cure defects and the buyer's right to avoid the contract. It concentrates on art 34,⁵⁵⁸ art 37⁵⁵⁹ and, most controversially, art 48.⁵⁶⁰

⁵⁵⁶ CISG, art 49(1)(b).

⁵⁵⁷ CISG, art 47(1).

⁵⁵⁸ Curing defects in the documents before the date of performance.

⁵⁵⁹ Curing defects in the goods before the date of performance.

⁵⁶⁰ Curing defects *after* the date of performance.