

CHAPTER SEVEN

Declaration and Effects of Avoidance

7.0 Introduction

The penultimate chapter of this thesis examines how the remedy of avoidance is exercised¹ and the effects² of avoidance. This examination is necessary to determine how the buyer can lawfully declare the contract avoided under the United Nations Convention on Contracts for the International Sale of Goods 1980.³ As the buyer's remedy of avoidance was considered by its drafters to be a remedy of last resort, it is necessary for the buyer to fulfil a number of requirements before the declaration of avoidance will be valid.⁴ The chapter commences by examining art 26 CISG, the notice requirement; specifically it examines the substance, form and time for giving notice. Next, the chapter examines arts 81-84 CISG, which addresses the effects of the buyer exercising the right to avoid the contract. On declaring the contract avoided the parties are released from their contractual obligations, yet, art 81 stipulates that they remain under a duty to make restitution and if applicable, to pay damages. Article 82 deals with the circumstances where the buyer may be unable to make restitution of the goods. In those cases he may lose the right to avoid the contract unless he can invoke one of the exceptions contained in art 82(2). Article 83 allows the buyer the right to exercise other remedies under the CISG even where the right to avoid the contract has been lost.⁵ Moreover, art 84 places an obligation

¹ CISG, art 26.

² CISG, arts 81-84.

³ 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.

⁴ 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.

⁵ The chapter will only briefly look at CISG, art 83 as the thesis is only examining the buyer's remedy of avoidance.

on both parties to account for any benefits they have received under the avoided contract. The chapter also examines whether the UNIDROIT Principles⁶ can be used to fill in the gaps and ambiguities inherent in the exercise and effects of the buyer's remedy of avoidance under the CISG.⁷ Additionally, comparisons will be made with the English common law,⁸ in conjunction with the Sale of Goods Act 1979,⁹ dealing with the exercise and effects of termination, in order to determine whether English law would provide a swifter and more certain remedy for the buyer to use to terminate the contract.¹⁰

7.1 The Requirement of Notice

Article 26 CISG states that, 'A declaration of avoidance of the contract is effective only if made by notice to the other party'. This provision has no counterpart in the antecedent Uniform Law for the International Sale of Goods.¹¹ The reason for this omission was that the buyer's remedy of avoidance under ULIS could be exercised *ipso facto*,¹² therefore no declaration was required.¹³ However, the drafting delegation abandoned the notion of automatic avoidance in the CISG as it was thought to be too uncertain that the contract could be avoided without the seller's knowledge.¹⁴ Although art 26 was introduced to add certainty to the buyer's

⁶ 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.

⁷ 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.

⁸ Hereinafter referred to as 'English law'.

⁹ Hereinafter referred to as SGA; Sale of Goods Act 1979, SR & O 1983/1572.

¹⁰ See discussion at chapter 1.2, chapter 2.4.1 and chapter 3.7.1; Under English law 'termination' has the same meaning as 'avoidance' under the CISG.

¹¹ Hereinafter referred to as 'ULIS'.

¹² By the mere fact.

¹³ See discussion at chapter 5.2.1; ULIS, arts 26 and 30.

¹⁴ 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; Samuel

remedy of avoidance, it did not stipulate the form, substance or time for giving the notice. The next part of the chapter examines the meaning and purpose of art 26 to determine why the provision was necessary and how avoidance of the contract can be exercised.

7.1.1 Meaning and Purpose of Article 26 CISG

If the buyer wishes to invoke the remedy of avoidance under art 49 CISG,¹⁵ he must declare the contract avoided by giving notice to the seller.¹⁶ The buyer may tender the notice of avoidance without the need for judicial authority.¹⁷ This was confirmed in a case where the seller alleged that the buyer needed a court order to lawfully avoid the contract.¹⁸ The court rejected this argument on the grounds that there was no such requirement under the CISG.¹⁹ This approach supports the fact that avoidance is a ‘self-help’ remedy under the CISG.²⁰ In allowing the buyer to lawfully avoid the contract without judicial intervention, the remedy of avoidance can be exercised swiftly to allow the buyer to enter into a substitute transaction. This

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

¹⁵ 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’.

¹⁶ CISG, art 26.

¹⁷ Christiana Fountoulakis, ‘Article 26’ in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 439.

¹⁸ Spain 27 December 2007 Appellate Court Navarra (*Case involving machine for repair of bricks*) (*IICL*, 04 September 2014) <<http://cisgw3.law.pace.edu/cases/071227s4.html>> accessed 14 August 2014.

¹⁹ *ibid.*

²⁰ Fountoulakis (n 17) 439.

is particularly useful in cases where goods may be subject to price volatility such as the commodities market.²¹

The CISG offers no guidance on the form of the notice. Article 11 CISG states that contracts concluded under it do not have to be evidenced in written form.²² However, this freedom is curtailed by art 12, which states that if a contracting state has made a reservation under art 96 then any ‘contract of sale or its modification or termination’ must be made in writing.²³ Therefore, if a contracting state has not made a reservation under art 96, the buyer may give notice of avoidance in any form, including verbal notice.²⁴ The form of the notice may also be dictated by the express terms of the contract,²⁵ conduct of the parties²⁶ and relevant trade usages.²⁷ For instance, some contracts may expressly exclude the use of electronic communications such as emails when declaring avoidance.²⁸

Although the notice requirement under art 26 was introduced to provide certainty to exercising the remedy of avoidance, the notice itself does not have to be

²¹ See discussion at chapter 2.4.1.

²² CISG, art 11 states: ‘A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses’.

²³ CISG, art 12 states: ‘Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article’; CISG, art 96 states: ‘A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State’.

²⁴ Austria 6 February 1996 Supreme Court (*Propane case*) (*IICL*, 19 June 2007) <<http://cisgw3.law.pace.edu/cases/960206a3.html>> accessed 06 March 2014 (notice by telephone); Chengwei Liu, ‘Declaration of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and Case law’ (*IICL*, 22 June 2005) <www.cisg.law.pace.edu/cisg/biblio/liu10.html> accessed 05 November 2014.

²⁵ CISG, art 6.

²⁶ CISG, art 8.

²⁷ See discussion at chapter 4.1, chapter 4.2 and chapter 4.3; CISG, art 9.

²⁸ Pace Law School Institute of International Commercial Law, ‘CISG-Advisory Council Opinion No 1: ‘Electronic Communications under CISG’ (*IICL*, 26 June 2006) <www.cisg.law.pace.edu/cisg/CISG-AC-op1.html> accessed 09 November 2014.

explicit.²⁹ Thus, the buyer by his conduct may impliedly give notice to avoid the contract.³⁰ Implicit notice would have to be determined in accordance with art 8 CISG.³¹ Article 8(1) applies the subjective test where the seller would be aware of the buyer's intent to avoid the contract. In the absence of subjective intent, art 8(2) applies an objective test and looks at how the reasonable person would interpret the buyer's conduct.³² Case law indicates that there is no requirement that the buyer use the word 'avoid', yet he must make it clear that he is treating the contract as being at an end.³³ In one case the buyer's use of the words 'enough is enough' coupled with a request for the return of the contract price was considered an effective declaration of avoidance.³⁴ Conversely, the courts have determined that circumstances where the buyer simply returns the goods to the seller³⁵ or purchases substitute goods³⁶ are not sufficient to amount to a declaration of avoidance. The reason for this approach is that it is not made clear to the seller that the buyer no longer wishes to proceed with the contract, and the seller could thus presume that the buyer is seeking to exercise one of the other remedies available to him under the CISG.³⁷ Although the

²⁹ 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, 413; Liu (n 24); Fountoulakis (n 17) 440.

³⁰ Jacobs (n 29) 413; Liu (n 24); Fountoulakis (n 17) 440.

³¹ CISG, art 8 states: '(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties'.

³² See discussion at chapter 4.2.

³³ ICC Arbitration Case No 9978 of March 1999 (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/999978i1.html>> accessed 01 June 2014.

³⁴ Belgium 4 June 2004 District Court Kortrijk (*Steinbock-Bjonustan EHF v NV Duma*) (*IICL*, 16 February 2005) <<http://cisgw3.law.pace.edu/cases/040604b1.html>> accessed 05 August 2014.

³⁵ Germany 16 September 1991 District Court Frankfurt (*Shoe case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/910916g1.html>> accessed 29 May 2014.

³⁶ Germany 13 January 1999 Appellate Court Bamberg (*Fabric case*) (*IICL*, 30 October 2007) <<http://cisgw3.law.pace.edu/cases/990113g1.html>> accessed 05 November 2014.

³⁷ Liu (n 24).

notice of avoidance must make it clear that the buyer is treating the contract at an end, it does not have to state the reason for avoidance.³⁸ This is supported by the fact that in most cases of fundamental breach the reason for avoidance is fairly obvious.³⁹ Therefore, the reason for avoidance does not need to be stated in the notice unless requested by the seller. The exception to this is where the contract is avoided on the grounds of non-conforming goods or documents relating to those goods.⁴⁰ In those cases the buyer is required to give notice of the nature of the non-conformity in accordance with art 39 CISG.⁴¹ This leads to examination of the issue of timely notification of avoidance. In chapter five, it was established that if the non-conformity is discernible from a reasonable examination,⁴² then the buyer should tender the notice of non-conformity and notice of avoidance simultaneously.⁴³ It was argued that to permit the buyer any further time to decide whether to avoid the contract would be unreasonable as it could allow him to speculate on the market.⁴⁴ This is supported by art 49(2)(a) and (b) where the buyer

³⁸ Fountoulakis (n 17) 441.

³⁹ In any case the notice will still be effective; 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) 117.

⁴⁰ See discussion at chapter 5.2.7.

⁴¹ *ibid*; CISG, art 39 states: '(1) 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. (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee'.

⁴² 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'.

⁴³ See discussion at chapter 5.2.9; Spain 21 March 2006 Appellate Court Castellón (*case on apparatus for the reduction of consumption of gasoline*) (*IICL*, 08 November 2007) <<http://cisgw3.law.pace.edu/cases/060321s4.html>> accessed 30 June 2014; 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.

⁴⁴ 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

must declare the contract avoided within a ‘reasonable time’, otherwise the right to avoid the contract will be lost altogether.

Article 26 does not state when the notice of avoidance will take effect. However, as the provision falls under ‘Chapter I’ of the general provisions under the CISG, it will be governed by art 27, which applies the dispatch rule⁴⁵ which stipulates that errors or delays in communication will not deprive the buyer the right to rely on the response.⁴⁶ This is the correct approach as it is the seller’s fundamental breach that had resulted in the buyer’s avoidance of the contract. Therefore, it is the seller who should bear the risk of errors or delays in communication. However, it is for the buyer to prove that the notice was actually dispatched within the stipulated time. In one case the buyer was able to rely on a fax confirmation as well as a registered letter to prove that the notice had been dispatched within the five day period allowed for cancellation of the contract.⁴⁷ In cases where the notice of avoidance is given verbally it will be difficult for the buyer to prove that he fulfilled the dispatch requirement.⁴⁸ It is recommended that even if the buyer gives the notice of avoidance verbally this should be followed up by a written notice to prevent problems later on.⁴⁹

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.

⁴⁵ Where the communication takes effect on dispatch not receipt.

⁴⁶ CISG, art 27 states: ‘Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication’.

⁴⁷ Netherlands 11 February 2009 Rechtbank [District Court] Arnhem (*Tree case*) (*IICL*, 03 September 2009) <<http://cisgw3.law.pace.edu/cases/090211n1.html>> accessed 15 February 2014.

⁴⁸ Liu (n 24).

⁴⁹ Austria 30 June 1998 Supreme Court (*Pineapples case*) (*IICL*, 07 September 2007) <<http://cisgw3.law.pace.edu/cases/980630a3.html>> accessed 09 November 2014.

The application of the dispatch rule⁵⁰ to art 26 raises another question, namely at what point in time does the notice take effect? Some commentators suggest that the notice must take effect at the time of dispatch. This is supported by the wording of art 27 and case law.⁵¹ In one case it was determined that the notice took effect when the buyer released the message using an appropriate means of communication.⁵² Others have argued that the notice must take effect on receipt by the seller, as art 27 only applies the dispatch rule to errors or delays in communication and not to the relevant time for the notice to take effect.⁵³ The question of when the notice takes effect will be important in deciding whether the buyer can revoke the notice of avoidance. In the case of the dispatch rule, no revocation is possible whereas under the receipt rule revocation is possible if it takes place before the seller's receives the notice. This distinction is important as in some circumstances the buyer may want to change his mind and keep the contract alive. These can include cases where there is a rising market and it will cost the buyer more to enter into a substitute transaction or where the supply of the goods is scarce and it might be difficult to obtain them elsewhere.⁵⁴ In those cases it is useful for the buyer to have a flexible legal instrument that allows for revocation. If the dispatch rule were applied, the buyer's right to revoke the notice would be non-existent. This approach was taken in a case where the buyer's offer to return the goods was held to be an effective declaration

⁵⁰ CISG, art 27.

⁵¹ Ericson Kimbel, 'Nachfrist Notice and Avoidance under the CISG' (1999) 18 J L & Com 301, 312; See also John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 216.

⁵² Austria 16 September 2002 Appellate Court Graz (*Garments case*) (IIICL, 15 February 2006) <<http://cisgw3.law.pace.edu/cases/020916a3.html>> accessed 09 November 2014.

⁵³ Anna Kazimierska, 'The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods' in Pace (eds), *Pace Review of the Convention on Contracts for the International Sale of Goods* (Kluwer 1999) 115; Rainer Hornung, 'Article 26' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, OUP 2005) 443.

⁵⁴ See discussion at chapter 2.4.1.

under art 26.⁵⁵ As such the buyer's subsequent attempt to resell the goods was not a waiver of the intention to avoid.⁵⁶ If this approach was applied to all cases it would result in a rigid interpretation of art 26. Since the CISG dictates that interpretation should be carried out with the observance of good faith in international trade, a more flexible approach is required.⁵⁷ Two of the general principles on which the CISG is based are: the promotion of co-operation and reasonableness to preserve the contract and facilitation of exchange even in the event that something goes wrong.⁵⁸ These general principles can be observed in arts 16(2)(b)⁵⁹ and 29(2) CISG.⁶⁰ Both of these provisions support the position that revocation cannot take place if the other party has already relied on it.⁶¹ Therefore, if an analogy is drawn between these two provisions and art 26, a revocation of the notice to avoid *should* be possible unless the seller has already relied on it.⁶² It would be for the seller to prove his reliance on the revocation as it would be too difficult for the buyer to prove that the seller did *not* take steps to rely on the revocation.⁶³

In chapter five the thesis dealt with the issue of when the declaration of avoidance must be given. It is recalled that although art 49(2) did not state a time limit for avoidance, it must take place within 'a reasonable time' from when the

⁵⁵ 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.

⁵⁶ *ibid.*

⁵⁷ See discussion at chapter 3.4.3; CISG, art 7(1).

⁵⁸ 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.

⁵⁹ CISG, art 16(2)(b) states: 'However, an offer cannot be revoked: if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer'.

⁶⁰ CISG, art 29(2) states: 'contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct'.

⁶¹ Jacobs (n 29) 426; Fountoulakis (n 17) 443.

⁶² See discussion at chapter 3.5.2.

⁶³ Jacobs (n 29) 427; cf Peter Schlechtriem, 'Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 95.

buyer ought to have known of the breach.⁶⁴ The fact that the goods are in the buyer's possession means that he must not delay in deciding whether to avoid the contract otherwise the right to avoid will be lost.⁶⁵ The seller cannot be left in an uncertain position once the goods have come into the buyer's possession. The seller needs to be notified of the buyer's intention immediately so that arrangements can be made to store, transport and resell the goods.

In light of this examination it is demonstrated that although art 26 does not contain express stipulations as to form, substance or time for the notice, examination of the legislative history, analogy and case law have clarified these issues. The chapter now examines the corresponding provision under the UNIDROIT Principles to see if this can provide further clarity.

7.1.2 Can the UNIDROIT Principles be used to Interpret Article 26 CISG?

Article 7.3.2 of the Principles is the corresponding provision to art 26 CISG.⁶⁶ The wording of art 7.3.2(1) is similar to art 26 in that the remedy of termination can only be exercised by giving notice to the other party. The underlying purpose of the provision is to make clear to the seller that the buyer will no longer accept performance.⁶⁷ The Principles embody the same approach as the CISG in that the buyer is not allowed to speculate or delay the decision regarding whether he will avoid the contract. Article 7.3.2(1) states that the buyer must give notice within a reasonable time after he ought to have known of the breach. However, the Principles

⁶⁴ See discussion at chapter 5.2.9.

⁶⁵ Michael Will, 'Article 49' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 364; See also Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 78.

⁶⁶ UNIDROIT, art 7.3.2 states: '(1) The right of a party to terminate the contract is exercised by notice to the other party. (2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance'.

⁶⁷ UNIDROIT, art 7.3.2 official commentary para 1.

do offer an express stipulation as to when the notice will take effect. The official commentary indicates that the notice will be effective when it is received by the other party.⁶⁸ The Principles defines the term ‘received’ as when the notice is given verbally to the seller or delivered to the seller’s place of business.⁶⁹ It is uncertain whether this approach should be extended to interpreting art 26 because art 24 CISG provides a ‘receipt rule’ which contains a similar definition to the term ‘received’ in the Principles. However, art 24 is embodied in the rules governing the formation of the contract whereas art 26 is contained in the general provisions.⁷⁰ Furthermore, art 26 makes it clear that delays and errors in communication are to be governed by art 27, the ‘dispatch rule’; therefore it is unlikely that the ‘receipt rule’ will apply to same provision. The reliance approach advocated above would provide the buyer with more certainty and flexibility when exercising the right to avoid the contract. Thus, if the seller has not relied on the notice and taken any steps to deal with the goods then in those circumstances the buyer should be able to revoke the notice of avoidance.

Therefore, it can be argued that the Principles offer little in the way of help to interpret or supplement art 26 as for the most part the wordings of the two provisions are similar. With regard to the issue of when the notice will take effect, it is unlikely that the ‘receipt rule’ will apply to art 26 as there is nothing in the legislative history to support this approach. Furthermore, there are no reported cases where this rule has been applied to art 26.

⁶⁸ UNIDROIT, art 7.3.2 official commentary para 4.

⁶⁹ UNIDROIT, art 1.10(3).

⁷⁰ CISG, art 24 states: ‘For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence’.

The chapter proceeds to examine the position in English law on the issue of notice to terminate the contract to determine if it would offer the buyer a clearer solution.

7.1.3 English Law on Notice of Rejection and Termination

The thesis has previously examined the buyer's right to reject the goods and terminate the contract for a breach of the seller's obligations.⁷¹ It is recalled that under English law the buyer may exercise the right to reject the goods and terminate the contract when the seller has breached a condition or an innominate term that substantially deprives him of the whole benefit of the contract.⁷² The buyer's rejection of the goods alone does not automatically terminate the contract. Rejection and termination are two separate remedies, thus if the buyer has not terminated the contract, the seller may continue to perform the contract in an attempt to remedy the breach.⁷³ There are no formal mechanisms in the English common law or the SGA requiring the buyer to tender notices of rejection and termination to the seller. Section 36 SGA states that the buyer must 'intimate' to the seller that he has rejected the goods.⁷⁴ There is no further guidance given on the necessary formality of the rejection. The common law indicates that the buyer should exercise the right of rejection as soon as possible, taking into account his right to examine the goods.⁷⁵ Although the case of *Grimoldby v Wells* pre-dates the SGA, it nevertheless confirms the position in s 36 that there are no formalities applicable to the buyer's notice of

⁷¹ See discussion at chapter 5.2.7.4 and chapter 5.2.7.6.

⁷² See discussion at chapter 3.7.2; *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

⁷³ See discussion at chapter 6.3.3; *Borrowman Phillips & Co v Free & Hollis* (1878) 4 QBD 500; *Stocznia Gdanska SA v Latvian Shipping Company* (No 2) [2002] 2 All ER (Comm); *Ampurius Nu Homes Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577.

⁷⁴ SGA, s 36 states: 'Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them'.

⁷⁵ SGA, s 34; *Lamarra v Capital Bank plc* (2007) SC 95 (Scottish case, but same result under SGA).

rejection.⁷⁶ Instead all that is needed is for the buyer to do any ‘unequivocal’ act to show that he has rejected the goods.⁷⁷ Therefore, unless the contract expressly stipulated formalities as to the notice of termination, it would have to be inferred that the buyer’s notice of rejection also serves as the notice of termination even though they are two separate rights. If that were the case, under English law the buyer would have to make it clear in the notice of rejection that he intends to treat the contract as being at an end, for example, by refusing to pay the outstanding contract price or, if he has already paid, asking to recover the sums paid.⁷⁸ The absence of a formal notice of termination under English law could result in the buyer losing the right to terminate the contract. It is recalled that in the case *Stocznia Gdanska SA v Latvian Shipping Company (No 2)*, Rix LJ pointed out that the period of time between the right to reject the goods and the right to terminate the contract remained a grey area.⁷⁹ Therefore, a delay in termination could mean that the seller can render conforming performance which would then exclude the buyer’s right to terminate.⁸⁰ Thus, the buyer must make it clear that he is not only rejecting the goods but also treating the contract as repudiated as a result of the breach. The Law Commission considered, but declined, to extend the period of time for the buyer to reject the goods and terminate the contract, as the return of the contract price should mean that the buyer has received a total failure of consideration, that is, he has received nothing under the contract.⁸¹ Therefore, a prolonged period for exercise of termination could

⁷⁶ (1875) LR 10 CP 391.

⁷⁷ *ibid* 395.

⁷⁸ See discussion below at chapter 7.4; John Adams and Hector MacQueen, *Atiyah’s Sale of Goods* (12th edn, Pearson 2010) 503.

⁷⁹ See discussion at chapter 6.3.3; *Stocznia Gdanska SA v Latvian Shipping Company (No 2)* [2002] 2 All ER (Comm).

⁸⁰ *Ampurius Nu Homes Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; Kelvin Low, ‘Repair, Rejection & Rescission: An Uneasy Resolution’ (2007) LQR 536, 538.

⁸¹ See discussion at chapter 7.4; Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987).

mean that the buyer has made use of the goods without having to account for the benefit.⁸² The Law Commission did not want to introduce uncertainty and complications as to how this benefit should be calculated.⁸³ The decision not to extend the period of rejection also prevents the buyer from speculating on market prices.

Neither the English common law nor the SGA offers any further clarification on issues such as when the notice will be effective, who bears the risk of delays or errors in transmission or whether the notice is revocable. However, it could be argued that these issues are governed by the general law of contract which is used to interpret the rules of formation. In that case the point in time when the notice will take effect will usually be when it is received by the seller.⁸⁴ The term ‘received’ is interpreted to mean that the message has been communicated during business hours.⁸⁵ In cases of delays or errors in transmission it is ‘sound business practice’ that should dictate where the risk should lie.⁸⁶ Therefore, if the buyer is aware that the message has not been received, then he must resend it, alternatively if the seller knows a message is being sent and it has not been received but the buyer thinks it has been received then the seller must ask for him to resend it.⁸⁷ Under the general principles of contract law revocation is possible any time before acceptance is made by the seller.⁸⁸

⁸² Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987); The exception to this position is for a breach of SGA, s 12, in those cases the buyer can repudiate the contract at any time as the seller had no right to sell the goods, see discussion at chapter 3.7.4.

⁸³ *ibid.*

⁸⁴ *Entores Ltd v Miles Far East Corporation* [1955] QB 327; It is unlikely that the postal rule (dispatch approach) will apply to notices of rejection as this rule only applies to acceptances *Adams v Lindsell* (1818) 1 B & Ald 681.

⁸⁵ *The Brimnes* [1975] QB 929.

⁸⁶ *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34.

⁸⁷ *Entores Ltd v Miles Far East Corporation* [1955] QB 327; Jill Poole, *Textbook on Contract Law* (9th edn, OUP 2008) 73.

⁸⁸ *Offord v Davies* (1862) 12 CB NS 748.

Therefore, it can be argued that both English law and art 26 CISG allow the buyer a notice procedure that is free from formalities. The main requirement for both instruments is that the buyer makes it clear that as a result of the breach he is treating the contract as being at an end. This allows the seller to make decisions for the resale or transport of the goods. The two instruments differ because art 26 makes it clear that the buyer is not merely rejecting the goods but he is also declaring the contract avoided. Under English law mere rejection does not automatically allow for termination, unless the buyer makes it clear that this is his intention. Rejection on its own may lead the seller to think that the buyer is receptive to a repair or substitute delivery of the goods.⁸⁹ In that case, if the seller remedies the defective performance before the buyer has terminated the contract, the breach is no longer repudiatory.⁹⁰ Without a legislative history or a strong body of case law to rely on for answers on the issue of notification of termination, English law creates some uncertainty as to when the buyer is deemed to have lawfully terminated the contract. This could be problematic for the buyer and seller who are not familiar with the general rules of English contract law. In that case it can be argued that art 26 CISG is more straightforward in its application.

7.1.4 Conclusion to Article 26

This part of the chapter has demonstrated that art 26 offers the buyer certainty and flexibility when exercising the remedy of avoidance. The provision allows freedom of form and content such that implicit notice is permitted if the buyer makes it clear that the contract is avoided and he no longer requires performance.⁹¹ The legislative history of the provision also makes it clear that risk of delays and errors

⁸⁹ *J & H Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9.

⁹⁰ *Ampurius Nu Homes Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577.

⁹¹ Jacobs (n 29) 413; Liu (n 24); Fountoulakis (n 17) 440.

are to be governed by the rules contained in art 27, such that the seller will bear the risk of not receiving the message. This position is justifiable as it is the seller's fundamental breach that has resulted in avoidance. However, the buyer must be able to prove that the notice was dispatched.⁹² Although the wording of art 26 does not address the issues of when the notice takes effect or whether revocation was possible, academic commentary was able to assist in this matter to reach a solution based on the general principles found in the CISG.⁹³ The notice requirement also offers certainty to the seller in that he is able to make alternative arrangements to reship and resell the goods elsewhere. The next section examines the effects of avoidance, namely the provisions dealing with the obligations of the parties to make restitution and account for any benefits received under the contract.

7.2 Effects of Avoidance

The CISG contains provisions that set out the effects of avoidance,⁹⁴ which have been described as outlining the structure for the 'reversal of the contract' and providing a 'risk distribution mechanism'.⁹⁵ These provisions only take effect once fundamental breach has been established and the contract has been declared avoided in accordance with art 26.⁹⁶ The provisions of arts 81-84 do not apply to contracts that have been mutually avoided, that is, by mutual consent of the buyer and seller, but instead apply only to unilateral avoidance.⁹⁷ This means that the effects of avoidance as set out under the CISG only applies where one party avoids the contract as a result of a fundamental breach by the other party. This section commences with

⁹² Netherlands 11 February 2009 Rechtbank [District Court] Arnhem (*Tree case*) (*IICL*, 03 September 2009) <<http://cisgw3.law.pace.edu/cases/090211n1.html>> accessed 15 February 2014.

⁹³ Jacobs (n 29) 427; cf Schlechtriem (n 63) 95.

⁹⁴ CISG, arts 81-84.

⁹⁵ Austria 29 June 1999 Supreme Court (*Dividing wall panels case*) (*IICL*, 07 February 2007) <<http://cisgw3.law.pace.edu/cases/990629a3.html>> accessed 12 November 2014.

⁹⁶ See discussion above at chapter 7.1.

⁹⁷ Russia 3 March 1997 Arbitration proceeding 82/1996 (*IICL*, 13 September 2005) <<http://cisgw3.law.pace.edu/cases/970303r1.html>> accessed 11 November 2014.

an examination of art 81 which deals with the parties' obligations after avoidance. The legislative history, meaning and purpose and relevant case law will be analysed.

7.2.1 Article 81 CISG

Article 81 contains three key features. Firstly, it sets out the obligations of the parties when the remedy of avoidance has been invoked.⁹⁸ Secondly, it provides guidance on the contractual provisions that will survive avoidance of the contract. Thirdly, it requires that the parties make restitution of any exchange under the contract.

The antecedent to art 81 CISG can be found in art 78 ULIS.⁹⁹ The wordings of the two provisions are almost the same with the exception of the second sentence contained in art 81(1). This addition contained the stipulations that avoidance of the contract would not displace any provisions in the contract dealing with dispute settlements or any other provision in the contract governing the rights and obligations of the parties after the contract had been avoided. Examples of the latter are provisions dealing with penalty clauses, exemption clauses and restraint of trade clauses.¹⁰⁰ The changes were uncontroversial as it was agreed that the additional wording to what is now art 81 would make it clear that these types of clauses are useful to the parties and were designed to be activated when the contract could no

⁹⁸ 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'.

⁹⁹ ULIS, art 78 states: '(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. (2) If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently'.

¹⁰⁰ Denis Tallon, 'Article 81' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 601.

longer be performed.¹⁰¹ Furthermore, the thesis argues that the aforementioned issues are not governed by the CISG but are left to be decided in accordance with the applicable domestic law,¹⁰² thus art 81 works in conjunction with domestic laws to provide the parties with protection in the event of avoidance. The consequences of avoidance can be described as both retrospective and prospective.¹⁰³ The effect of this provision is not to void the contract *ab initio*¹⁰⁴ but rather to redirect the obligations of the parties.¹⁰⁵ The CISG is not concerned with third party rights, thus issues such as property in the goods that have been resold to a third party or vested with creditors where the seller has become insolvent have to be settled in accordance with the applicable domestic law.¹⁰⁶

The first feature of art 81 that requires examination is that ‘avoidance of the contract releases both parties from their obligations under it’. This means that the buyer who has lawfully avoided the contract¹⁰⁷ is no longer required to pay the contract price.¹⁰⁸ Furthermore, the seller is also released from his obligation to deliver the goods to the buyer.¹⁰⁹ Therefore, the effect of avoidance is that neither party can expect performance of the other’s party’s contractual obligations. Although the parties are released from their obligations to perform, art 81 retains the right of the parties to claim any damages which may be due. The application of this

¹⁰¹ 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; Tallon (n 100) 603.

¹⁰² CISG, art 4.

¹⁰³ Liu (n 24)

¹⁰⁴ From the beginning.

¹⁰⁵ Enderlein and Maskow (n 39) 341.

¹⁰⁶ Christiana Fountoulakis, ‘Article 81’ in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 1104.

¹⁰⁷ Established fundamental breach in accordance with CISG, art 49 and declared avoidance in accordance with CISG, art 26.

¹⁰⁸ Germany 26 November 1999 Appellate Court Hamburg (*Jeans case*) (*II*CL, 22 May 2014) <<http://cisgw3.law.pace.edu/cases/991126g1.html>> accessed 12 November 2014.

¹⁰⁹ Switzerland 20 February 1997 District Court Saane (*Spirits case*) (*II*CL, 16 February 2007) <<http://cisgw3.law.pace.edu/cases/970220s1.html>> accessed 12 November 2014.

provision has been uncontroversial as the courts have recognised that the avoiding party may have a claim for damages against the breaching party.¹¹⁰ These can include recovering costs associated with inspection, customs duties, transport and storage of the goods.¹¹¹

Certain contractual clauses will also remain in force even though the contract has been avoided. The second key feature to be examined in art 81 is its express reference to provisions concerning the settlement of disputes. In *Filanto SpA v Chilewich International Corp* the court upheld a clause in the contract which stipulated that the parties had agreed to arbitrate the dispute in Moscow.¹¹² Other clauses which govern the obligations of the parties after the contract has ended can also remain in force. In one case the International Chamber of Commerce Court of Arbitration held that even after avoidance, the contract continued to be governed by the effects of the penalty clause agreed on by the parties, and the buyer could therefore not rely on the damages provisions under the CISG.¹¹³ The effect of this part of art 81 is to uphold the general principles of party autonomy and freedom of contract found in art 6 CISG.¹¹⁴ Under art 6, parties are free to derogate from any of the CISG provisions which means that if the parties have already allocated risk through the use of penalty clauses or other agreed damages clauses, then this intention should be preserved.¹¹⁵

¹¹⁰ CISG, art 74 states: ‘Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract’.

¹¹¹ Switzerland 15 January 1998 Appellate Court Lugano, Cantone del Ticino (*Cocoa beans case*) (*IICL*, 10 November 2004) <<http://cisgw3.law.pace.edu/cases/980115s1.html>> accessed 12 November 2014.

¹¹² *Filanto SpA v Chilewich International Corp* 789 F Supp 1229 1237 (SDNY 1992).

¹¹³ ICC Arbitration Case No 9978 of March 1999 (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/999978i1.html>> accessed 01 June 2014.

¹¹⁴ See discussion at chapter 4.1.

¹¹⁵ This is supported by CISG, art 8.

The third feature of art 81 is that parties are bound to make restitution of whatever they have received under the contract. This means that if delivery has been made, the buyer must return the actual goods to the seller, substitute goods will not suffice.¹¹⁶ This part of the provision is associated with art 82 where the buyer will lose the right to avoid the contract if he cannot make restitution of the goods; art 82 is examined below.¹¹⁷ The seller is under a duty to make restitution of the contract price if payment has already been made under the contract.¹¹⁸ Article 84, as explained below, stipulates that the seller must pay interest on the contract price.¹¹⁹

When parties are bound to make restitution under art 81(2), they must do so concurrently. This requirement has been interpreted by the courts to mean simultaneous restitution is necessary in order to provide mutual security to both parties.¹²⁰ Therefore, the seller is not bound to repay the contract price until the buyer has returned the goods and reciprocally the buyer may withhold returning the goods until he is reimbursed the contract price.¹²¹ This poses an interesting question, namely, at what point restitution is deemed to take effect? Although the CISG makes no reference to the place of restitution, this issue can be settled using the general principles on which it is based.¹²² One of the general principles of the CISG

¹¹⁶ Austria 29 June 1999 Supreme Court (*Dividing wall panels case*) (*IICL*, 07 February 2007) <<http://cisgw3.law.pace.edu/cases/990629a3.html>> accessed 12 November 2014.

¹¹⁷ See discussion below at chapter 7.2.2.

¹¹⁸ Russia 15 April 1994 Arbitration proceeding 1/1993 (*IICL*, 29 July 2004) <<http://cisgw3.law.pace.edu/cases/940415r1.html>> accessed 14 November 2014.

¹¹⁹ See discussion below at chapter 7.2.3.

¹²⁰ China 30 October 1991 CIETAC Arbitration proceeding (*Roll aluminum and aluminum parts case*) (*IICL*, 07 February 2007) <<http://cisgw3.law.pace.edu/cases/911030c1.html>> accessed 10 June 2013; France 21 November 1996 Appellate Court Aix-en-Provence (*Schreiber v Thermo Dynamique*) (*IICL*, 09 February 2007) <<http://cisgw3.law.pace.edu/cases/961121f1.html>> accessed 12 November 2014.

¹²¹ Australia 28 April 1995 Federal Dist Ct, Adelaide (*Roder v Rosedown*) (*IICL*, 31 July 2009) <<http://cisgw3.law.pace.edu/cases/950428a2.html>> accessed 12 November 2014.

¹²² See discussion at chapter 3.5; Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract' (*IICL*, 25 February 2009) <www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

is to avoid economic waste.¹²³ This can be seen in the criterion of substantial detriment needed to establish a fundamental breach found in art 25. Avoidance is thus not permitted for minor breaches. There are two arguments to support the position that the restitution of the goods should take place at the buyer's place of business. First, the costs of making restitution would be minimised if the goods could be resold in the buyer's country as this would eliminate the need for expensive transport and storage as well as risk of damage to the goods.¹²⁴ Secondly, if it is the seller's fundamental breach which has resulted in avoidance, it would be unreasonable to place the burden of making restitution at the seller's place of business on to the buyer.¹²⁵ In one case for the delivery of a CNC machine, the seller delivered a machine that was rusted and totally unusable, and refused the buyer's request for repair and assembly of the machine.¹²⁶ The court held that this was a clear case of fundamental breach justifying avoidance of the contract, that the place of restitution was the buyer's place of business and that it was the seller's responsibility to remove the machine.¹²⁷

Although art 81 does not make express reference to the costs and time for restitution, case law has been able to provide answers to these issues using the general principle of the observance of good faith in international trade, as found in art 7(1).¹²⁸ Case law has demonstrated that the costs associated with redelivery of

¹²³ See discussion at chapter 3.5.

¹²⁴ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract' (*IICL*, 25 February 2009) <www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

¹²⁵ Germany 24 November 1992 District Court Krefeld (*Shoes case*) (*IICL*, 30 January 2008) <<http://cisgw3.law.pace.edu/cases/921124g1.html>> accessed 12 November 2014; Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract' (*IICL*, 25 February 2009) <www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

¹²⁶ Switzerland 21 February 2005 Appellate Court Valais / Wallis (*CNC machine case*) (*IICL*, 07 May 2010) <<http://cisgw3.law.pace.edu/cases/050221s1.html>> accessed 12 November 2014.

¹²⁷ *ibid.*

¹²⁸ See discussion at chapter 3.4.3.

the goods should be borne by the breaching party, such that if it is the seller's fundamental breach that resulted in avoidance, he should pay the costs of restitution.¹²⁹ If the seller is the breaching party and the buyer has incurred expenses to effect restitution, the buyer is entitled to reclaim these expenses as damages.¹³⁰ The CISG does not stipulate a time limit for restitution, yet the general principles of reasonableness and good faith indicate that restitution should be effected within a reasonable time after the contract is declared avoided.¹³¹ Therefore, if the seller delays in making restitution of the price causing the buyer to incur additional costs to store the goods, the buyer will be able to reclaim these costs as damages.¹³²

The next part of the chapter examines art 82 which deals with the circumstances where the buyer is unable to make restitution of the goods and its exceptions. The legislative history, meaning and purpose as well as the relevant case law are analysed and discussed.

7.2.2 Article 82 CISG

Article 82 contains the provisions dealing with the buyer's inability to restore the goods to the seller. In these cases the buyer will lose the right to avoid the contract unless he can invoke one of the exceptions in art 82(2).¹³³ The antecedent to

¹²⁹ Switzerland 21 February 2005 Appellate Court Valais / Wallis (*CNC machine case*) (*IICL*, 07 May 2010) <<http://cisgw3.law.pace.edu/cases/050221s1.html>> accessed 12 November 2014.

¹³⁰ Fountoulakis (n 100) 1113.

¹³¹ Albert Kritzer, 'Reasonableness' (*IICL*, 23 January 2001) accessed 14 March 2014.

¹³² Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract' (*IICL*, 25 February 2009) <www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

¹³³ 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'.

art 82 CISG can be found in art 79 ULIS.¹³⁴ The wordings of these provisions are similar even though art 82(2) has condensed the five exceptions found in art 79(2) into three specific situations. The one exception that did not carry over to art 82(2) is found in art 79(2)(e) namely that in the event that the buyer cannot make restitution of the goods, he will not lose the right to avoid the contract ‘if the deterioration or transformation of the goods was unimportant’. The reason for the elimination of this provision was that ‘unimportance’ was considered too uncertain to ascertain, specifically it was not clear from whose perspective, the buyer or seller, the deterioration or transformation was to be deemed unimportant?¹³⁵

As art 81 is based on the principle of restitution, art 82(1) stipulates that the buyer will lose the right to avoid the contract where ‘it is impossible to make restitution of the goods substantially in the condition in which he received them’.¹³⁶ Therefore, the right to avoid the contract will lapse if restitution is not possible and the buyer will have to rely on one of the other remedies under the CISG.¹³⁷ There are two key features to be examined in art 82(1). The first is impossibility of restitution. Impossibility in this context encompasses not only actual, but also objective situations.¹³⁸ Impossibility can include circumstances such as the goods

¹³⁴ ULIS, art 79 states: ‘(1) The buyer shall lose his right to declare the contract avoided where it is impossible for him to return the goods in the condition in which he received them. (2) Nevertheless, the buyer may declare the contract avoided: (a) if the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in Article 38; (c) if part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered; (d) if the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible; (e) if the deterioration or transformation of the goods is unimportant’.

¹³⁵ Hans Leser, ‘Article 82’ in Peter Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (1st edn, OUP 1998) 643.

¹³⁶ This section also states that the buyer will lose the right to ask for substitute goods however, this thesis only examines the buyer’s remedy of avoidance.

¹³⁷ CISG, art 83.

¹³⁸ Denis Tallon, ‘Article 82’ in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 607; Christiana Fountoulakis, ‘Article 82’

being resold¹³⁹ or transformed.¹⁴⁰ Secondly, the goods must be returned in substantially the same condition in which they were received. This means that the buyer must redeliver the exact goods, substitute goods will not suffice.¹⁴¹ Normal wear and tear of the goods will not result in the buyer's loss of the right to avoid the contract.¹⁴² In one case involving the restitution of furniture, the loss of a few screws and spare parts did not amount to substantial damage.¹⁴³ The question to be asked is whether the seller can reasonably be expected to accept the goods in their present condition?¹⁴⁴ This approach is the correct one because even though the seller had committed a fundamental breach, the buyer has already been granted the remedy of avoidance. Therefore, it would be unreasonable to deprive the seller of the opportunity to resell or reuse the goods elsewhere. In a case involving marble slabs that were delivered stuck together, the buyer was not allowed to avoid the contract because he could not make restitution to the seller.¹⁴⁵ In this case the buyer had cut the slabs and reprocessed them, as this damage was a result of the buyer's own act and had not occurred in the process of examining the goods¹⁴⁶ the buyer could not invoke any of the exceptions found in art 82(2).¹⁴⁷ It is the seller that bears the burden of proving that the goods are not substantially in the same condition as when

in Ingeborg Schwenzer (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010) 1116.

¹³⁹ Germany 10 February 1994 Appellate Court Düsseldorf [6 U 119/93] (*Fabrics case*) (*IICL*, 19 June 2007) <<http://cisgw3.law.pace.edu/cases/940210g2.html>> accessed 13 November 2014 (Resale occurred after the buyer ought to have known of the non-conformity).

¹⁴⁰ Germany 27 September 1991 Appellate Court Koblenz (*Marble slabs case*) (*IICL*, 23 February 2006) <<http://cisgw3.law.pace.edu/cases/910927g1.html>> accessed 13 November 2014; This may not prevent avoidance if one of the exceptions in CISG, art 82(2) applies, if the exception does not apply avoidance is precluded.

¹⁴¹ Tallon (n 138) 607; Enderlein and Maskow (n 39) 347; Fountoulakis (n 138) 1116.

¹⁴² Enderlein and Maskow (n 39) 347.

¹⁴³ Germany 1 February 1995 Appellate Court Oldenburg (*Furniture case*) (*IICL*, 20 March 2007) <<http://cisgw3.law.pace.edu/cases/950201g1.html>> accessed 30 October 2014.

¹⁴⁴ Fountoulakis (n 138) 1117.

¹⁴⁵ Germany 27 September 1991 Appellate Court Koblenz (*Marble slabs case*) (*IICL*, 23 February 2006) <<http://cisgw3.law.pace.edu/cases/910927g1.html>> accessed 13 November 2014.

¹⁴⁶ CISG, art 82(2)(b).

¹⁴⁷ Germany 27 September 1991 Appellate Court Koblenz (*Marble slabs case*) (*IICL*, 23 February 2006) <<http://cisgw3.law.pace.edu/cases/910927g1.html>> accessed 13 November 2014.

they were delivered.¹⁴⁸ The relevant time for assessing the condition of the goods is when the notice of avoidance is dispatched, deterioration after this time is of no relevance to art 82(1).¹⁴⁹ Furthermore, deterioration or damage as a result of transporting the goods back to the seller will be at the seller's risk.¹⁵⁰

Therefore, art 82(1) provides a balanced approach to the interests of the buyer and seller. Although the seller's fundamental breach will have resulted in avoidance of the contract, once avoidance is declared, the primary obligation of the parties is to make restitution. The general principles of promotion of co-operation, reasonableness and facilitation of exchange found in the CISG can all be used to interpret art 82(1).¹⁵¹ Therefore, the buyer must be able to return the goods to the seller in a state where the seller is able to resell them, otherwise the seller will be disadvantaged by the buyer's remedy of avoidance. The buyer will be denied the remedy of avoidance unless he can make restitution of the same goods in substantially the same condition in which he received them. This does not place any additional burden on the buyer as the condition of the goods is judged at the time of avoidance, and any risk of deterioration during transport back to the seller lies with the seller. If the goods have been damaged or deteriorated at the hands of the buyer, then he should not be allowed to avoid the contract. This is supported by art 86 CISG which requires the buyer to take reasonable steps to preserve the goods.¹⁵²

¹⁴⁸ 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.

¹⁴⁹ Fountoulakis (n 138) 1118.

¹⁵⁰ Germany 19 December 2002 Appellate Court Karlsruhe (*Machine case*) (*IICL*, 08 December 2006) <<http://cisgw3.law.pace.edu/cases/021219g1.html>> accessed 13 November 2014.

¹⁵¹ Hillman (n 58) 21; Martin Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) 4 *Unif L Rev* 683; Kritzer (n 131).

¹⁵² CISG, art 86 states: '(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller. (2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without

The buyer is entitled to claim any expenses incurred to preserve the goods as damages. In any case art 83 allows a buyer, who has lost the right to declare the contract avoided as a result of art 82(1), to retain all other remedies under the contract and the CISG. No further examination will be given to art 83 as it deals with remedies that fall outside the scope of the thesis. However, it is worth noting that these remedies consist of: specific performance,¹⁵³ repair,¹⁵⁴ price reduction¹⁵⁵ and damages.¹⁵⁶

Article 82(2) provides three exceptions to the rule in art 82(1). The first exception is where the impossibility of restoring the goods is not due to the buyer's own act or omission.¹⁵⁷ This exception will apply where the goods have deteriorated due to inherent vice, for example perishable goods. The exception also covers goods which have been seized because of a legal defect.¹⁵⁸ In one case the buyer was able to rely on art 82(2)(a) where the goods were seized as a result of the seller's defective title, it was later revealed that the goods were stolen.¹⁵⁹ The second exception is where restitution is impossible because the goods have been damaged or deteriorated due to the buyer's examination in accordance with art 38.¹⁶⁰ In some cases the buyer's examination of the goods may require using the goods to make sure

unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph'.

¹⁵³ CISG, art 46(1) (buyer's right to require performance).

¹⁵⁴ CISG, art 46(3) (buyer's right to repair of goods).

¹⁵⁵ CISG, art 50 (buyer's right to price reduction).

¹⁵⁶ CISG, arts 74, 75, 76 (damages).

¹⁵⁷ CISG, art 82(2)(a).

¹⁵⁸ Fountoulakis (n 138) 1120.

¹⁵⁹ Germany 22 August 2002 District Court Freiburg (*Automobile case*) (IICL, 07 December 2006) <<http://cisgw3.law.pace.edu/cases/020822g1.html>> accessed 01 August 2014.

¹⁶⁰ CISG, art 82(2)(b); 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'.

they conform to the contract. In one case for the delivery of stainless steel wire the buyer was required to process the wire to verify that it was in conformity with the contract.¹⁶¹ Although the examination resulted in a modification of the original goods, the buyer was able to rely on art 82(2)(b) to avoid the contract.¹⁶² The third exception is where restitution is impossible because the buyer has sold, consumed or transformed the goods in the course of business before he ought to have known of the defect. In one case for the sale of paprika the seller delivered non-conforming goods which contained ethylene oxide.¹⁶³ The buyer did not discover this defect until the goods had been resold to a third party, it was held that the buyer was not precluded the right to avoid the contract even though he could not make restitution of the goods.¹⁶⁴

Therefore, it is argued that the exceptions in art 82(2) are justified on the basis that it is the seller's breach that caused the risks to arise in the first place, therefore the buyer should not be barred from the remedy of avoidance. Specifically, if the goods had conformed to the contract the risk of loss or damage to them would not have occurred. The exceptions in art 82(2) deal with situations where the circumstances are either beyond the buyer's control¹⁶⁵ or he is dealing with the goods in the normal course of business.¹⁶⁶ The provisions in the CISG on the effects of avoidance were designed as 'risk distribution mechanism', thus in these circumstances the seller is best placed to bear the risk.¹⁶⁷ If the buyer cannot make

¹⁶¹ 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.

¹⁶² *ibid.*

¹⁶³ 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.

¹⁶⁴ *ibid.*

¹⁶⁵ CISG, art 82(2)(a).

¹⁶⁶ CISG, art 82(2)(b) and (c).

¹⁶⁷ Austria 29 June 1999 Supreme Court (*Dividing wall panels case*) (IICL, 07 February 2007) <<http://cisgw3.law.pace.edu/cases/990629a3.html>> accessed 12 November 2014.

restitution of the goods he is still under an obligation to account for any benefits he has received from them.¹⁶⁸

The next part of the chapter examines art 84 which deals with the seller's obligation to pay interest on the contract price and the buyer's obligation to account for any benefits derived from the goods. The legislative history, meaning and purpose as well as the relevant case law will be analysed and discussed.

7.2.3 Article 84 CISG

Article 84 reflects the principle of restitution under the CISG. Its purpose is to demonstrate that the remedy of avoidance is not aimed at penalising the breaching party.¹⁶⁹ As neither party should be unjustly enriched as a result of avoidance, art 84(1) requires the seller to pay the buyer interest on the contract price. Correspondingly, art 84(2) states that the buyer must account for any benefit he has derived from the goods. The antecedent to art 84 can be found in art 81 ULIS.¹⁷⁰ The two provisions are almost the same with one exception – the rate of interest. Article 81(1) ULIS makes reference to art 83 ULIS which stated that interest should be calculated based on the rate of the seller's place of business, plus one percent.¹⁷¹ At the drafting of the CISG, delegates could not agree on the calculation of interest so it was left out of the wording of art 84.¹⁷² The chapter now examines the

¹⁶⁸ CISG, art 84(2)(b).

¹⁶⁹ Denis Tallon, 'Article 84' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 611.

¹⁷⁰ ULIS, art 81 states: '(1) Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by Article 83, as from the date of payment. (2) The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be: (a) where he is under an obligation to return the goods or part of them; or (b) where it is impossible for him to return the goods or part of them, but the contract is nevertheless avoided'.

¹⁷¹ ULIS, art 83 states: 'Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%'.

¹⁷² Enderlein and Maskow (n 39) 351.

problems posed by this omission and whether the issue can be resolved using the general principles of the CISG.

Article 84(1) states that in the case of avoidance, the seller is bound to pay interest on the contract price from the date on which it was paid. This position has been upheld in numerous cases.¹⁷³ Although the CISG makes no mention of when interest should cease to accrue, case law has determined that interest is payable until the date of reimbursement.¹⁷⁴ This approach is consistent with the principle of restitution as the buyer must be reimbursed for the entire period that he has been without the return of the contract price. As mentioned earlier, the issue of calculation of interest was left out of the CISG as delegates could not agree on a uniform approach.¹⁷⁵ This has led some courts¹⁷⁶ to interpret the rate of interest by resorting to the applicable domestic law on the basis that this issue falls outside the scope of the CISG.¹⁷⁷ However, this approach would detract from the overall aim of uniformity and interpretation of the CISG with regard to its international character as set out in art 7(1).¹⁷⁸ The calculation of the rate of interest does fall within the scope of the CISG even though the issue is not expressly settled, as such regard is to be had to the general principles upon which it is based.¹⁷⁹ The provisions dealing with the

¹⁷³ Russia 15 April 1994 Arbitration proceeding 1/1993 (*IICL*, 29 July 2004) <<http://cisgw3.law.pace.edu/cases/940415r1.html>> accessed 14 November 2014; Switzerland 15 January 1998 Appellate Court Lugano, Cantone del Ticino (*Cocoa beans case*) (*IICL*, 10 November 2004) <<http://cisgw3.law.pace.edu/cases/980115s1.html>> accessed 12 November 2014; China 18 April 2008 CIETAC Arbitration proceeding (*PTA powder case*) (*IICL*, 27 April 2010) <<http://cisgw3.law.pace.edu/cases/080418c1.html>> accessed 13 November 2014.

¹⁷⁴ Russia 15 April 1994 Arbitration proceeding 1/1993 (*IICL*, 29 July 2004) <<http://cisgw3.law.pace.edu/cases/940415r1.html>> accessed 14 November 2014; Tallon (n 169) 611. ¹⁷⁵ Enderlein and Maskow (n 39) 351.

¹⁷⁶ ICC Arbitration Case No 7660 of 23 August 1994 (*Battery machinery case*) (*IICL*, 15 February 2007) <<http://cisgw3.law.pace.edu/cases/947660i1.html>> accessed 14 November 2014; Switzerland 15 January 1998 Appellate Court Lugano, Cantone del Ticino (*Cocoa beans case*) (*IICL*, 10 November 2004) accessed 12 November 2014; Germany 19 December 2002 Appellate Court Karlsruhe (*Machine case*) (*IICL*, 08 December 2006) <<http://cisgw3.law.pace.edu/cases/021219g1.html>> accessed 13 November 2014.

¹⁷⁷ CISG, art 7(2).

¹⁷⁸ See discussion at chapter 3.4.

¹⁷⁹ CISG, art 7(1).

effects of avoidance are founded on the principle of restitution, therefore neither party is to be unjustly enriched at the expense of the other. In paying the contract price to the seller, the buyer will be deprived of his use of that sum of money for the period from when he made payment to when it is returned. In the meantime the seller has had that money at his disposal which he could use towards his own commercial interests.¹⁸⁰ Therefore, in the absence of any express stipulations to the contrary, it follows that the rate of interest should be calculated based on the country of the seller's place of business.¹⁸¹ This approach upholds the principle of observing good faith in international trade¹⁸² and provides a fair outcome to the parties as the seller does not receive an unjust enrichment for interest accumulated on the price paid for the goods. This approach was applied to a case for the delivery of sunflower oil where the seller failed to make delivery even though the buyer had paid the price for the goods.¹⁸³ The court granted avoidance for fundamental breach and awarded interest based on the rate at the seller's place of business.¹⁸⁴

Article 84(2) stipulates that 'the buyer must account to the seller for all benefits which he has derived from the goods'. Article 84(2)(a) applies where the buyer is able to make restitution of the goods in substantially the same condition he received them under art 82(1), whereas art 84(2)(b) will only apply where the buyer is unable to make restitution, including the circumstances covered by the exceptions in art 82(2). These benefits can include any profits accrued from the goods or any by-products of the original goods. Article 84(2) will only apply if the buyer is able to

¹⁸⁰ Fountoulakis (n 138) 1136.

¹⁸¹ *ibid* 1137; See also Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract' (*IICL*, 25 February 2009) <www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

¹⁸² CISG, art 7(1).

¹⁸³ Switzerland 5 February 1997 Commercial Court Zürich (*Sunflower oil case*) (*IICL*, 08 November 2006) <<http://cisgw3.law.pace.edu/cases/970205s1.html>> accessed 02 August 2014.

¹⁸⁴ *ibid*.

retain the benefit of the goods. For example any money from a sub-sale of the goods would have to be returned to the sub-buyer upon the latter's rejection of the goods, therefore the buyer has received no benefit under the main contract.¹⁸⁵ It will be for the seller to prove that the buyer has derived a benefit from the goods. This can be difficult to establish especially in the case of non-conforming goods.¹⁸⁶ In one case the court found that there could be no benefit to the buyer from the use of defective furniture.¹⁸⁷ In cases where art 84(2)(b) applies, the buyer must account to the seller for any net benefit¹⁸⁸ received as a result of the transformation or resale of the goods.¹⁸⁹ As art 82(2)(c) applies to transformation or resale of the goods in the 'normal course' of business which means that the buyer should only have to account for benefits generated under normal market conditions.¹⁹⁰ Where the goods have perished without the act or omission of the buyer and the buyer has benefitted from any insurance policies on the goods, he must pass this benefit on to the seller.¹⁹¹

It is clear that the CISG strives to achieve a balance in favour of both the buyer's and seller's interests. Therefore, it can be asserted that the remedy of avoidance does not result in unjust enrichment of either party. The seller's obligation to pay interest on the contract price ensures that the buyer is adequately compensated for what he had given up under the contract. Correspondingly, the buyer's obligation to account for any benefits derived from the goods will help to equalise the position between the

¹⁸⁵ Pace Law School Institute of International Commercial Law, 'CISG-Advisory Council Opinion No 9: Consequences of Avoidance of the Contract' (*IICL*, 25 February 2009)

<www.cisg.law.pace.edu/cisg/CISG-AC-op9.html> accessed 30 June 2014.

¹⁸⁶ Germany 1 February 1995 Appellate Court Oldenburg (*Furniture case*) (*IICL*, 20 March 2007)

<<http://cisgw3.law.pace.edu/cases/950201g1.html>> accessed 30 October 2014.

¹⁸⁷ *ibid.*

¹⁸⁸ Less the cost of transformation etc.

¹⁸⁹ Fountoulakis (n 138) 1143.

¹⁹⁰ *ibid* 1144.

¹⁹¹ *ibid* 1143.

parties, particularly in cases where the buyer is unable to make restitution as a result of one of the exceptions in art 82(2).

The chapter now examines the corresponding provisions regarding the effects of avoidance under the UNIDROIT Principles to see if these provisions can help to supplement the gaps found in the CISG.

7.3 Can the UNIDROIT Principles be used to Interpret the Effects of Avoidance under the CISG?

Articles 7.3.5 and 7.3.6 UNIDROIT deal with the effects of termination of the contract and the requirement of restitution respectively.¹⁹² Article 7.3.5 is identical in its application to art 81(1) in that termination will release both parties from future contractual performance.¹⁹³ Furthermore, the parties will retain the right to claim damages incurred as a result of the defective performance.¹⁹⁴ Clauses governing the settlement of disputes and other matters which are intended to be used in the event of termination will continue to function.¹⁹⁵ Article 7.3.6(1) reflects the same approach taken in art 81(2) in that parties must make concurrent restitution of anything received under the contract. However, art 7.3.6(2) differs from the approach in the CISG in that if ‘restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable’. The Principles offer no further

¹⁹² Under the UNIDROIT Principles ‘termination’ has the same meaning as ‘avoidance’ under the CISG; UNIDROIT, art 7.3.5 states; ‘(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance. (2) Termination does not preclude a claim for damages for non-performance. (3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination’; UNIDROIT, art 7.3.6 states; ‘(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract. (2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable. (3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party. (4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received’.

¹⁹³ UNIDROIT, art 7.3.5 (1).

¹⁹⁴ UNIDROIT, art 7.3.5 (2).

¹⁹⁵ UNIDROIT, art 7.3.5 (3).

explanation of what is meant by the term 'in kind'. Even if it were to be inferred that the term 'in kind' under the Principles meant the same as 'substantially in the condition in which he received them' under the CISG, art 7.3.6(2) cannot be used to interpret or supplement the CISG. The reason is that art 84(2)(b) makes it clear that the buyer is to account for any benefit derived from the goods where restitution is not possible. There is no stipulation in the CISG that the buyer must compensate the seller with the equivalent monetary value of the goods. The chapter recalls that the circumstances exempting the buyer from making restitution in art 82(2) are justifiable as it was the seller's fundamental breach that caused the risk to arise. Therefore, to require the buyer to compensate the seller for the value of the goods would be contrary to the principle of restitution. However, if the buyer has retained a benefit from the goods such as a profit from resale or disbursement under an insurance policy, he must account for this in accordance with art 84(2). Article 7.3.6(3) states that the buyer is exempt from the application of art 7.3.6(2) if the impossibility of restitution is attributable to the other party. Although it has already been argued that this section does not apply to the CISG, it can be argued that in this regard the Principles have embraced the position taken in art 82(2). For example, if the goods are damaged as a result of the buyer's examination, as seen in art 82(2)(b), then he is exempt from making restitution as it was the seller who delivered non-conforming goods. The same argument can be applied to art 7.3.6(3) except in this case the buyer will not have to compensate the seller with the monetary value of the goods. Article 7.3.6(4) embodies the same position as art 86 CISG where the buyer is required to take reasonable steps to preserve the goods. The buyer is entitled to claim back any expenses incurred to preserve the goods. The Principles have no

provisions dealing with the obligation of the seller to pay interest on the contract price or for the buyer to account for benefits derived from the goods.¹⁹⁶

Therefore, it is clear that the Principles have little to offer to assist in interpreting or supplementing the CISG on the effects of avoidance. The reason is that the wording and applications of its provisions are either identical to the CISG or they fall outside the scope of the CISG. Furthermore, the Principles do not include any provisions dealing with the payment of interest upon termination of the contract. The chapter now examines the position in English law on the effects of termination of the contract to determine if it would offer the buyer a clearer solution.

7.4 English Law on the Effects of Termination

Under English law the buyer has the right to repudiate the contract for a breach of condition or an innominate term that substantially deprives him of the whole benefit of the contract.¹⁹⁷ On termination of the contract, if the price is still outstanding, the buyer is released from his obligation to pay, alternatively if he has already paid the contract price, he is entitled to recover it.¹⁹⁸ The buyer's recovery of the contract price is based on the premise that he has received no consideration under the contract. Under s 51 SGA, the buyer will retain the right to claim damages for non-delivery when he rejects the goods.¹⁹⁹ The approach under English law of

¹⁹⁶ UNIDROIT, art 7.4.9 deals with the rate of interest when one party fails to pay a sum of money when it falls due, it states that reference must be made to the 'average short-term lending rate to prime borrowers prevailing for the money of payment at the place of payment'. Failing the existence of such a rate, they turn to the same rate in the State of the currency of payment or some other rate fixed by the law of that same State. This approach would be inappropriate for the principle of restitution as this would not be the place where the seller derived the benefit of the accrued interest.

¹⁹⁷ See discussion at chapter 3.7.2; *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

¹⁹⁸ Adams and MacQueen (n 78) 503.

¹⁹⁹ SGA, s 51 states: '(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the

treating the rejection of the goods and termination of the contract as a total failure of consideration means that the buyer has received nothing under the contract and therefore he does not have to account for any benefits received from the use of the goods. This approach results in an unfair advantage to the buyer who may have used the goods for a period of time. Although repudiation needs to be made in a fairly short period of time after delivery is made, in one case dealing with rejection of the goods for the seller's defective title,²⁰⁰ the buyer had use of the goods for up to one year before repudiation.²⁰¹ This position was reviewed by the Law Commission and it was decided that the issue of unjust enrichment was too complex to be included in the SGA and furthermore, that it would not be fair to expect the buyer to pay the seller for the use of property belonging to somebody else.²⁰² While there is some merit in this position with regard to breaches of s 12 SGA,²⁰³ all other repudiatory breaches must be evaluated in light of the buyer's right to make a reasonable examination of the goods under s 34 SGA.²⁰⁴ Under s 35(2) SGA the buyer is not deemed to have accepted the goods until he has had a reasonable opportunity to examine them. Additionally, s 35(6)(b) states that the buyer will not be deemed to have accepted the goods where he resells the goods to a sub-buyer without having had a reasonable opportunity to examine them. These provisions have an impact on the effects of termination of the contract because under s 36 SGA, the buyer is not obligated to return the goods to the seller, instead all that is necessary is that he

contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver'.

²⁰⁰ SGA, s 12.

²⁰¹ See discussion at chapter 3.7.4; *Butterworth v Kingsway Motors Ltd* [1954] 1 WLR 1286.

²⁰² Law Commission, *Sale and Supply of Goods* (Law Com No 160, 1987).

²⁰³ See discussion at chapter 3.7.4.

²⁰⁴ SGA, s 34 states: 'Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and, in the case of a contract for sale by sample, of comparing the bulk with the sample'.

makes it clear that he is rejecting them. The effect of this provision is that, upon receipt of the notice of termination, property in the goods reverts back to the seller such that he is able to deal with the goods as he wishes.²⁰⁵ This position presents a problem where the buyer has already sold the goods on to another party without having had a reasonable opportunity to examine them as it means the seller must then collect the goods from the sub-buyer. This can be an onerous burden if the sub-buyer is located in another country. The buyer may arrange to collect the goods from the sub-buyer, in that case he is allowed to recover these expenses from the seller.²⁰⁶ Once the buyer has terminated the contract he is not entitled to exercise a lien over the goods in exchange for the return of the contract price.²⁰⁷ Furthermore, although s 54 SGA allows the buyer to claim the payment of interest as a head of damages, for example on a bank loan taken out to finance the payment of the goods, the buyer is not entitled to recover interest on the contract price paid to the seller.²⁰⁸ Therefore there is no requirement that the seller account for the benefit received from having money in his account.

The thesis argues that the CISG's provisions on the effects of avoidance are more detailed and offer a fairer solution to both the buyer and seller than provided for in English law. Article 81(2) CISG states that both parties are bound to make restitution of any part of the contract that has been performed. Furthermore art 84(1) CISG requires the seller to refund the contract price, payable with interest from the date on which it was paid. Article 84(2) CISG places an obligation on the buyer to account to the seller for all benefits which he has received from the use of the goods. Thus neither party has an unfair advantage over the other. Under English law both

²⁰⁵ *Hardy & Co v Hillerns & Fowler* (1923) 2 KB 490 (CA).

²⁰⁶ *Molling & Co v Dean & Son Ltd* (1901) 18 TLR 217.

²⁰⁷ *J L Lyons & Co Ltd v May & Baker Ltd* [1923] 1 KB 685.

²⁰⁸ *Hayes v Dodd* [1990] 2 All ER 815.

the buyer and seller are disadvantaged by repudiation of the contract. There is no obligation for the buyer to account to the seller for any benefits derived from the goods. Also the buyer is not under an obligation to return the goods to the seller, and as there is no principle of concurrency of restitution, the seller can take possession of the goods with no guarantee to the buyer that he will recover the contract price already paid.²⁰⁹ Finally, there is no obligation for the seller to refund the contract price with interest, this would mean that the seller retains the benefit of any interests accrued on these sums.

7.5 Conclusion

This chapter has demonstrated that the requirement of notice to avoid the contract as well as the effects of avoidance under the CISG make it a suitable remedy for international sale of goods contracts.²¹⁰ Under art 26, the buyer is offered certainty in declaring his intent to avoid the contract; correspondingly the seller is able to use this declaration to make alternative arrangements to preserve, transport and resell the goods elsewhere. In dealing with the consequences of avoidance, the CISG embraces the principle of restitution where both the buyer and seller should, where possible, return any benefits received under the contract. This position means that the exercise of the remedy of avoidance helps to prevent unjust enrichment by either party. Examination of case law and academic commentary has demonstrated that in exercising the remedy of avoidance, effect is given to the parties express stipulations found in art 6 as well as their intentions in accordance with art 8. Furthermore, in interpreting the provisions dealing with the exercise and effects of avoidance, courts have made express reference to the general principles

²⁰⁹ *J L Lyons & Co Ltd v May & Baker Ltd* [1923] 1 KB 685.

²¹⁰ 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.

upon which the CISG is based thereby preserving its international character and the need to promote uniformity.