

CHAPTER EIGHT

Conclusion

8.0 The Research Question and its Impact on the Existing Literature

The purpose of this thesis has been to examine the interpretation and application of the buyer's remedy of avoidance¹ under the United Nations Convention on Contracts for the International Sale of Goods 1980.² The main research question was: 'How is the remedy established, exercised and what are the consequences of avoidance?' The aim of the examination was to determine whether the remedy was suitable for international sale of goods transactions. For the purposes of this thesis 'suitable' was defined as meaning that the remedy must be capable of being applied to contracts for different types of goods and contracts commonly bought and sold in international trade.³ Additionally the remedy must be one that the parties can lawfully establish and exercise swiftly and with certainty.⁴ The research question was designed to respond to certain criticisms of the CISG mainly in reference to the buyer's remedy of avoidance. A number of criticisms have been levelled against the remedy, including that it is overly 'complicated', specifically that certain rules only apply to specific types of breaches; that the exercise of the remedy requires giving notice; that the buyer needs to fix an additional time for performance; and that the remedy is limited by the seller's right to cure the breach.⁵ However, the most serious criticism of the buyer's remedy of avoidance under the CISG is that its main

¹ CISG, art 49.

² 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.

³ These were identified as commodity goods on the spot market (including documentary sales); manufactured goods and bespoke goods.

⁴ Sir John Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 LQR 531, 532.

⁵ Jan Hellner, 'The Vienna Convention and Standard Form Contracts' in Paul Volken and Petar Sarcevic (eds), *International Sale of Goods: Dubrovnik Lectures* (Oceana 1986) 335, 347.

requirement of ‘fundamental breach’⁶ is too strict in its wording, thus making it difficult to establish.⁷ Those academics opposed to the use of the CISG in international sale of goods transactions argue that English law provides the buyer with more certainty and swifter termination rights under the contract.⁸

In reviewing the existing literature on the subject, this thesis observed that there were no published materials which examined the remedy as a whole, that is, how it is established, exercised and what its consequences are. Instead, the existing literature focussed on individual issues such as fundamental breach, the right to cure defects and other surrounding issues. Much of the published literature on the buyer’s remedy of avoidance was theoretical, with little or no reference to the existing case law. Therefore, it was necessary to address the criticisms of the remedy by examining how the courts have interpreted some of the important issues that have arisen under its provisions. This thesis set out to show that the buyer’s remedy of avoidance under the CISG was suitable to deal with a wide range of breaches and types of goods commonly found in international trade. The main arguments were rooted in the contention that if the CISG’s mechanisms for interpretation were correctly applied by the courts the buyer’s remedy of avoidance could be exercised swiftly and with certainty. The mechanisms examined were: art 6 (party autonomy), art 7 (general principles), art 8 (parties’ conduct and intentions) and art 9 (usages). The next part of the chapter will discuss the conclusions drawn from this thesis.

⁶ CISG, art 25.

⁷ Michael Bridge, *The International Sale of Goods: Law and Practice* (2nd edn, OUP 2007) 567.

⁸ Alastair Mullis, ‘Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law: Is There a Substantial Difference?’ in Eva Lomnicka and Christopher Morse (eds), *Contemporary Issues in Commercial Law: Essays in Honor of Prof AG Guest* (Sweet & Maxwell 1997) 137; Michael Bridge, ‘Uniformity and Diversity in the Law of International Sale’ (2003) 15 Pace Int’l L Rev 55.

8.1 Conclusions on the Suitability of the Buyer's Remedy of Avoidance for International Sale of Goods Contracts

Chapter three concluded that some of the main criticisms of the CISG stemmed from the ambiguous wording of its provisions. These ambiguities were often the result of compromises between different countries that made up the drafting delegation of the CISG. Countries with a civil law background often clashed with those from common law legal systems as to the meanings and applications of certain provisions. Notwithstanding these ambiguities, the chapter concluded that if the internal interpretative mechanisms of art 7 were correctly applied by the courts, the CISG can address all issues that fall within its scope. These internal interpretive mechanisms include: the legislative history, analogy, general principles and academic commentary of a provision. Additionally, it was demonstrated that if there were internal gaps that could not be filled by reference to art 7, then resort to using 'soft law' such as the UNIDROIT Principles was legitimate and preferable to resort to domestic law as the former kept decision making within the international sphere.⁹ However, judges had to be certain that the issue was covered within the scope of the CISG, if it was not, then the Principles could not be used simply because they were more detailed or desirable. The chapter also examined claims that English law on termination of the contract could provide a more suitable approach to international sale of goods contracts. The examination demonstrated that for the most part English law and the CISG produced a similar result on the issue of termination of the contract. It was argued that the CISG may prove to be a more straightforward body of law as English sale of goods law was made up of the common law as well as a

⁹ 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.

statutory framework, the Sale of Goods Act 1979,¹⁰ and this could be confusing for foreign parties unfamiliar with its rules.

Chapter four examined the mechanisms of arts 6, 8 and 9 CISG, which dealt with party autonomy, parties' intentions and usages respectively. It was concluded that these provisions assisted the parties not only in the event of a dispute regarding avoidance of the contract but also in negotiating the contractual terms to make their intent clear and unambiguous. Article 6 allowed buyers to set their own thresholds for avoidance and fundamental breach. Furthermore, arts 8 and 9 impacted on establishing the lawful availability and exercise of the remedy of avoidance. These provisions play an important role in establishing the standards for conformity of the goods. Thus if the terms are breached, it could allow the buyer the right to avoid the contract. This chapter concluded that the CISG provided a clearer set of rules for foreign parties to use in their contracts than English law, as the latter did not treat all statements under the contract as terms, instead there were different regimes for representations which differed from terms. Furthermore, the CISG's approach to determining intent was not limited by the parole evidence rule and the courts were permitted to examine a wide range of extrinsic evidence to deduce the parties' intent. Chapter five examined the substantive area of the thesis, that is, the provisions dealing with the buyer's right to avoid the contract¹¹ and its main requirement, fundamental breach.¹² The chapter concluded that although the criteria needed for fundamental breach may appear to be difficult to establish, on examination of the case law, a clearer picture emerged. It was determined that courts gave effect to the parties' express stipulations as to their contractual expectations. Therefore, any breach of these expectations amounted to a fundamental breach. Here we see the use

¹⁰ Hereinafter 'SGA'.

¹¹ CISG, art 49.

¹² CISG, art 25.

of art 6 and the general principle of freedom of contract at the forefront of interpretation. In the absence of any express stipulations, the courts looked to the parties' express and implied intentions in accordance with art 8 and well as the relevance of any usages incorporated under art 9. The latter includes those usages expressly agreed upon by the parties and impliedly incorporated under the CISG. The chapter also provided an in-depth examination of art 49 which embodies the buyer's right to avoid the contract not only for fundamental breach but also after the fixing of an additional time in accordance with art 47. By examining the buyer's right to avoid the contract for different types of breaches (non-delivery, late delivery and non-conformity) using case law involving different types of goods (commodity, manufactured and bespoke), this thesis was able to demonstrate that the CISG's provisions on avoidance could be exercised lawfully and swiftly to allow both parties to be released from their contractual obligations. Additionally, the chapter was able to demonstrate that the CISG is equally as flexible as English law and, in some cases, may offer more certainty as the latter is subject to the classification of terms and the impact of s 15A SGA as well as the seller's exclusion of liability under the Unfair Contract Terms Act 1977.¹³

Chapter six addressed the contention that the seller's right to cure defective performance hindered the buyer's right to exercise the remedy of avoidance. The chapter concluded that the seller's right to cure does not impede the buyer's right to avoid the contract. This is demonstrated by the application of arts 34 and 37, cure of the documents and goods before the date of performance respectively. An examination of the case law revealed that arts 34 and 37 would very rarely cause the buyer unreasonable inconvenience. Furthermore, breaches before the date of

¹³ Hereinafter referred to as 'UTCA'.

performance would not meet the threshold of fundamental breach as set out in art 25 CISG, therefore its interference with the buyer's right to avoid the contract was minimal as the two provisions were separate from each other. The chapter demonstrated that in most cases the buyer would prefer a cure before the date of performance so that he can avoid costly delays if he is reselling the goods elsewhere or needs the goods for immediate production. Examination of art 48, cure after the date of performance, revealed that the buyer's right to avoid the contract will still take precedence over this provision. Thus, if the breach is fundamental, the buyer does not have to wait for the seller's offer to cure; he can declare the contract avoided immediately. Therefore, concerns about the impact of the seller's right to cure over the buyer's right to avoid the contract were unfounded as the case law demonstrated that preference is still given to the parties express stipulations as to what will amount to fundamental breach.

Chapter seven considered the issues of notification and the consequences of avoidance. Regarding the former, the chapter concluded that art 26 offered the buyer certainty in declaring his intent to avoid the contract. Similarly the seller was able to use this declaration to make alternative arrangements to preserve, transport and resell the goods elsewhere. The chapter demonstrated that on declaration of avoidance, arts 81-84 applied the principle of restitution so that both the buyer and seller would, where possible, return any benefits received under the contract. This principle operated to prevent unjust enrichment by either party.

8.2 The Way Forward

One of the aims of having a harmonised instrument of international commercial law is to aid in uniformity of decisions. Uniformity of decisions helps to promote certainty and predictability in the law. This thesis has argued that the CISG has been

able to fulfil these functions as an instrument of international sales of goods law. It has used the buyer's remedy of avoidance as a way of measuring how successful the CISG has been in promoting uniformity and predictability. When interpreted and applied consistently with the underlying general principles the remedy provides simple, clear rules which enable the buyer to establish his right to avoid the contract quickly and to exercise the remedy to minimise losses. The thesis has proven that the CISG's provisions on avoidance can meet the needs of the international commercial community, specifically by addressing the different kinds of breaches that commonly occur in international trade. This success is demonstrated in the CISG's ratification by 83 contracting states including major trading nations such as the United States,¹⁴ People's Republic of China, Germany and Japan. The CISG does not replace all pre-existing domestic sales law, nor was it ever designed to do so, rather a successful harmonised legal instrument should work in conjunction with national laws. Thus, those issues that fall outside the scope of the CISG will be covered by the applicable national law, providing seamless protection to the contracting parties. Uniformity and predictability of decisions lend to certainty and reduces transactional costs. However this is not the only goal of harmonised sales law. The ratification and use of the CISG to govern sale of goods transactions will help to recognise and promote international legal norms and standards, such as the notion of avoidance for fundamental breach and the principle of restitution. The former makes it clear that in the absence of express contractual stipulations minor breaches will not allow for avoidance. Thus, parties cannot avoid the contract for trivial breaches in order to escape a bad bargain on the market. The latter upholds the principle that contract law is not punitive, thus parties should, as far as possible, be restored to their pre-

¹⁴ Hereinafter referred to as the 'US'.

contractual position while also having to account for any benefits received under the contract.

It is argued, therefore, that the future success of the CISG depends on its interpretation and building a strong body of case law. This is a challenge, as it will depend on the application of its provisions by national courts that have to strive to avoid resorting to their own domestic laws. One of the issues encountered in the research of this thesis was that most reported cases on the CISG were from courts that used a civil law system; the majority of reported decisions were from German courts. There were only a few reported cases from common law jurisdictions such as the US and Australia. Thus it was difficult to find a definitive answer to the question whether courts from one legal system were influenced by their national laws when compared to courts from other legal systems. However, it was clear from the quality of reported decisions that courts were making a real effort in the absence of express provisions to find an answer based on the general principles of the CISG, using either its legislative history or by drawing analogies with other provisions.

8.3 Further Areas for Research

In undertaking this research there were several other areas that clearly require further examination. Although this thesis focussed on the buyer's remedy of avoidance, avoidance is also covered in other provisions of the CISG. These include: art 64 (seller's right to avoid the contract), art 72 (avoidance for anticipatory breach), art 73 (avoidance in instalment contracts), art 51 (avoidance for partial delivery). It would be useful to examine these other provisions to compare their interpretation and application with art 49. This would present a clearer picture on the entire remedy for avoidance. Another area for examination was the other

remedies available to the parties under the CISG including: specific performance,¹⁵ delivery of replacement goods,¹⁶ repair,¹⁷ price reduction¹⁸ and damages.¹⁹ In some cases, where avoidance was not granted because the breach was not fundamental, these other remedies were granted instead. It would be beneficial to examine these other remedies in the context of international sale of goods transactions, specifically if they would provide a suitable remedy for contracting parties.

¹⁵ CISG, art 46(1) (buyer's right to require performance).

¹⁶ CISG, art 46(2) (buyer's right to substitute delivery of goods).

¹⁷ CISG, art 46(3) (buyer's right to repair of goods).

¹⁸ CISG, art 50 (buyer's right to price reduction).

¹⁹ CISG, arts 74, 75, 76 (damages).