

# Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis

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## Abstract

This article deals with fundamental breach in the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and the 1979 Sale of Goods Act (SGA). It provides ways of terminating sale contracts in the two legal systems. There are ambiguous terms in the CISG and this article explains them. At the same time, this article emphasises the questions to which satisfactory answers have not yet been provided, and provides appropriate answers to them. In this article the writer undertook comparative analysis on the rules of avoidance of contract under the CISG and SGA. It ends with an appreciation of when a sale contract could be terminated under both laws. The comparative analysis revealed that the CISG discourages the avoidance of contracts and allows it only in the case of a fundamental breach. However, the SGA allows it only if a condition is breached. It has also been revealed that the SGA seeks to gain certainty, but the CISG seeks to achieve justice in commercial transactions. However, a question remains: should certainty override justice?

**Key words:** CISG, SGA, Fundamental Breach, Avoidance of Contract, Substantially Deprive.

## Introduction

The CISG is considered as the most successful international convention in the area of business law. It was drafted by the United Nations Commission for International Trade Law (UNCITRAL) in 1980.<sup>1</sup>

The importance of the CISG can be seen more obviously in some countries implementing and enacting it as national law, such as the Scandinavian countries, with some differences in implementation. Sweden and Finland introduced the CISG alongside domestic sales law based on the CISG and Norway has implemented the CISG as an international convention and as its domestic sales law. Furthermore, there are other ways in which the CISG has had an influence on the domestic law of other countries because even though the CISG has not been introduced as domestic law by some, uniform law was taken into account when they reformed their contract law. For example, the Netherlands Civil Code of 1992 had already been influenced by ULIS and ULFIS, and reform of the German law of obligations of 1984 was robustly influenced by ULIS, ULFIS and later by CISG, in particular breach of obligations.<sup>2</sup>

Moreover, the SGA has been a successful Act in the UK for governing contracts. It has gained popularity in the international trade sector, which can be verified by the use of the choice of British courts as a forum for disagreement resolution and the selection of an English law clause in contracts that allows the SGA to be applied in a case even if the case has no connection with the UK.<sup>3</sup> It is a more definitive and less ambiguous Act compared with the CISG. For example, remedies which are given for the breach of contract are clearer than those given in the CISG, which is one of the reasons that the UK has given for not ratifying the CISG.<sup>4</sup>

The CISG considers the avoidance of contract as a last resort because of the enormous sums of money involved in international commercial transactions. Consequently, avoidance of contract is discouraged by the CISG and it is allowed only in the case of a fundamental breach. However, under the SGA, terms are simply divided into conditions and warranties, and thus, if conditions are breached, the injured party is entitled to avoid the contract.<sup>5</sup>

Under English law the avoidance of contract is allowed even for minor non-conformities according to the rule of perfect tender. Nevertheless, the CISG gives the solution of the avoidance of contracts only where the breach is essential and serious, defined in its provisions as a fundamental breach.<sup>6</sup>

It is the belief of the researchers that this paper will help international merchants to understand when they are

<sup>1</sup>Sally Moss, 'Why the United Kingdom has not ratified the CISG' (2005) 25 JLC 483.

<sup>2</sup>Peter Schelchetriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations' (2005) JI 27, 30

<sup>3</sup>Indira Carr, *International Trade Law* (5<sup>th</sup> edn, Routledge 2014) 61

<sup>4</sup>Peter Schelchetriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations' (2005) JI 27, 31

<sup>5</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>6</sup>Peter Schelchetriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations' (2005) JI 27, 31

entitled to terminate a contract according to the CISG and SGA.

### 1. Avoidance under the CISG: the Concept of Fundamental Breach

Avoidance of contract is the harshest remedy and is, therefore, the last resort in the CISG and strict requirements must be established for giving this remedy.<sup>1</sup> It could be noticed that the CISG favours performance of a contract and restricts avoidance to exceptional cases of fundamental breach, which is to give an opportunity to the party in breach to remedy its breach. Overall, the CISG aims to maintain the parties' promise and encourage them to complete their bargain.<sup>2</sup>

Article 25 of the CISG defines fundamental breach. Thus, to clarify the concept of fundamental breach, Article 25 is explained below.

#### 1.1. Analysis of Article 25 CISG

To explain Article 25, it needs to be quoted, which states:<sup>3</sup>

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

Article 25 has been criticised for its vagueness and the lack of explanation it gives on the meaning and scope of its internal features. Such vagueness is due to dissimilarities in defining fundamental breach by different legal systems and this made obstacles before the drafters to agree on what kind of breach can give rise to avoidance of contract. The CISG does not even provide an example of what may amount to a fundamental breach. The CISG only provides general guiding principle.<sup>4</sup> Nevertheless, care must be taken to consider that one of the CISG's characteristics is to avoid defining crucial terminologies. Due to this characteristic, some of the terms in Article 25 are not defined and remain vague. These terms will be clarified.<sup>5</sup>

It is worth noting that Article 7 of the CISG must be taken into consideration in the interpretation and clarification of any ambiguity in the CISG. According to Article 7 of the CISG, international character, the necessity to promote consistency and the observance of good faith in international commercial transactions must be considered in applying and interpreting the CISG. The CISG must be autonomously interpreted from national laws and the general principles on which the CISG is grounded must be taken into consideration.<sup>6</sup> It should also be borne in mind that although courts are obligated to take Article 7 into account, there have been case decisions which have not taken Article 7 into consideration.<sup>7</sup> For instance, in *Travelers Property Casualty Company of America et al. v Saint-Gobain Technical Fabrics Canada Limited*, the US court interpreted the breach according to its domestic law (Uniform Commercial Code) rather than the CISG.<sup>8</sup> However, the number of cases which have complied with Article 7 outweighs those which are not in compliance with it.<sup>9</sup> For example, in one case, the court stated that 'courts applying the CISG cannot substitute familiar principles of domestic law when the Convention requires a different result'.<sup>10</sup>

Four basic principles of the CISG have to be taken into consideration in the interpretation and

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<sup>1</sup>.Ibid

<sup>2</sup>.Marco Torsello, 'Substantial and Jurisdictional Aspects of International Remedies: A Comment on Avery Katz's Remedies for Breach of Contract under the CISG' (2005) 25 IRLE 397,403.

<sup>3</sup>.United Nations Convention on Contracts for International Sale of Goods 1980, Article 25.

<sup>4</sup>. Leonardo Graffi, 'Case Law on the Concept of Fundamental Breach in the Vienna Sales Convention' (2003) 3 IBLJ 338; Judit Glavanits, 'Changing Rules of Sales: International and Hungarian Regulation of Export Contracts' (Conference Paper presented on the 1<sup>st</sup> Inaugural Conference of Society International Public Law, Florence, Italy, 27 June 2014).

<sup>5</sup>. Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59 ICLQ 911

<sup>6</sup>. Lachmi Singh, 'Caveat Emptor: Are Decisions more Favourable to the Seller on Matters Relating to Letters of Credit?' (2006) 2 NJCL 7; Andrew Babiak, 'Defining Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 14 June 2006) <<http://www.cisg.law.pace.edu/cisg/biblio/babiak.html>> accessed 4 January 2015.

<sup>7</sup>. Franco Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts' (CISG, 21 July 2010) <<http://www.cisg.law.pace.edu/cisg/biblio/ferrari18.html#32>> accessed 21 January 2015.

<sup>8</sup>. *The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v Saint-Gobain Technical Fabrics Canada Limited* [2007] Civ. 04-4386 ADM/AJBUS District Court, Minnesota.

<sup>9</sup>. Franco Ferrari, 'Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretation by Courts' (CISG, 21 July 2010) <<http://www.cisg.law.pace.edu/cisg/biblio/ferrari18.html#32>> accessed 21 January 2015.

<sup>10</sup>. *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino, S.p.A.* [1998] 222 US Federal Court of Appeals, Eleventh Circuit.

clarification of any vagueness: freedom of contract, facilitating exchange if something goes wrong, encouraging cooperation and rationality to keep the contract, and, ultimately, providing compensation to the aggrieved party.<sup>1</sup>

### 1.1.1. Breach

The word 'breach' is not defined under the CISG, but it is noticed that it covers both unexcused and excused non-performance. Defective performance and complete failure of performance are also considered to be a breach under the CISG. For example, in a case which will be clarified in the next chapter, the court held that total failure to deliver amounted to a breach.<sup>2</sup> There have also been cases (clarified in the next chapter) where defective performance and even delivery one day late have been amounted to a breach but not a fundamental one.<sup>3</sup> The CISG adopts a unitary conception which means that all breaches of any obligation by any party to the contract, particularly, non-conforming and non-delivery goods are dealt with by the CISG.<sup>4</sup> It can be deduced that according to Article 79 of the CISG breach includes both unjustifiable and justifiable failure. Moreover, under the CISG, if a breach is justifiable (*force majeure* or exemption), the party in breach is only not liable for damages, but still liable for the breach.<sup>5</sup>

### 1.1.2. Detriment

The concept of detriment is not defined by the CISG and the CISG does not give any example of detriment that reaches the level of fundamental breach. Thus, the courts and arbitral tribunals has clarified and interpreted the meaning of detriment.<sup>6</sup> Although the CISG does not define the concept of detriment, its meaning cannot be restricted to material damages only. It has to be broadly interpreted to encompass both immaterial and material damage, for example, loss of resale and loss of customers.<sup>7</sup> The purpose of including detriment is to prevent the parties from terminating the contract if there is no harm.<sup>8</sup> Thus, detriment includes all kinds of loss, pecuniary or otherwise. In other words, the extension of detriment may include intangible interests, for instance, reputation, disappointment and inconvenience.<sup>9</sup> It is worth observing that detriment does not equal damages but is broader, hence the aggrieved party is entitled to claim damages under Article 74 of the CISG even if the breach does not amount to fundamental.<sup>10</sup>

Furthermore, for detriment to be fundamental the aggrieved party must be substantially deprived of what he/she is entitled to predict under the contract.<sup>11</sup> Detriment has become a contentious issue because Article 25 of the CISG has given a tautology between fundamental and substantial, which makes it difficult to establish when detriment is amounted to fundamental.<sup>12</sup> Even though some factors, explained later, have been determined to make a decision of when detriment can be amounted to fundamental, it is a matter of fact and it should be decided in the light of the circumstances of each case.<sup>13</sup>

It must be borne in mind that a breach could be fundamental, regardless of whether the breached obligation is main or subsidiary. According to the principle of freedom of contract the parties are free to state in their contract which breach is considered to be fundamental and the parties' special interests are also a significant

<sup>1</sup> . Robert Hillman, 'Cross References and Editorial Analysis Article 7' (CISG, September 1997) <<http://www.cisg.law.pace.edu/cisg/text/hillman.html>> accessed 4 January 2015

<sup>2</sup> . *Unknown parties* (1999) 9978 ICC

<sup>3</sup> . *Unknown parties* (1995) 1 KfH O 32/95 LG Ellwangen; *Delchi Carrier, S.p.A v RotorexCorp* [1994] 88-CV-1078 USDC, NDNY; *Unknown parties* (1990) 4 C 549/90 AG Ludwigsbur

<sup>4</sup> . Roy Goode, Herbert Kronke and Ewan Mckendrick, *Transnational Commercial Law* (5<sup>th</sup> edn, Oxford University Press 2011) 297

<sup>5</sup> . Robert Koch, 'The Concept of Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 16 December 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/koch.html>> accessed 4 January 2015. Ewan McKendrick, *Goode on Commercial Law* (Penguin Group, 4<sup>th</sup> edn, 2010) 1027

<sup>6</sup> . Ingacio Corbera Dale, 'Fundamental Breach of Contract under the CISG' (UIA 29 June 2013); Robert Koch, 'The Concept of Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 16 December 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/koch.html>> accessed 4 January 2015

<sup>7</sup> . Alexandra Lorenz, 'Fundamental Breach under the CISG' (CISG, 21 September 1998) <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>> accessed 5 January 2015; Markus Muller-Chen and Lara Pair, 'Avoidance for Non-Conformity of Goods under Article 49 (1) (a) CISG' (2011) LAEB 655, 668

<sup>8</sup> . Nicholas Ryder, Margaret Griffiths and Lachmi Singh, *Commercial Law: Principles and Policy* (The USA, Cambridge University Press 2012) 207

<sup>9</sup> . Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59 ICLQ 911,918; Benjamin Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Sellier. European Law Publishers 2007) 38.

<sup>10</sup> Leonardo Graffi, 'Case Law on the Concept of Fundamental Breach in the Vienna Sales Convention' (2003) 3 IBLJ 338.

<sup>11</sup> Robert Koch, 'The Concept of Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 16 December 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/koch.html>> accessed 4 January 2015.

<sup>12</sup> . Alexandra Lorenz, 'Fundamental Breach under the CISG' (CISG, 21 September 1998) <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>> accessed 5 January 2015.

<sup>13</sup> Lachmi Singh, 'Caveat Emptor: Are Decisions more Favourable to the Seller on Matters Relating to Letters of Credit?' (2006) 2 NJCL 8.

decisive factor in proving whether a breach is fundamental. Therefore, there is an argument that a breach can be fundamental if the buyer's intended use becomes unfeasible.<sup>1</sup> For instance, in a *sports clothing* case where the bought sportswear shrank approximately 10-15% after being washed, it was held that the buyer had the right to terminate the contract because it was impossible to use the clothes for the intended purpose.<sup>2</sup>

However, the courts have decided that if there is any feasibility of using goods, even if it is not for the intended purpose that the buyer bought the goods for, the purchaser has to use them and claim for damages or a price reduction or both. Consequently, as long as the goods are not totally worthless, the buyer should be restricted to claiming for damages or a price reduction. In addition, if the goods are defective but the defect can be remedied, it can be a decisive factor and the breach is not amounted to fundamental.<sup>3</sup> For example, in a case where a German purchaser concluded a contract with a Swiss vendor for the supply of 'three inflatable triumphal arches bearing a specified advertising slogan' from the seller, one of the arches had damaged on the first day of the races. Hence, the purchaser claimed that the goods could not be used for the intended purpose and thus terminated the contract, but it was held that the buyer did not have the right to terminate the contract, because the goods could be cured.<sup>4</sup> However, if a health risk is involved in the defective goods, the court is likely to decide that a breach amounts to fundamental, even if the breach can be cured. In a case where a Swiss buyer signed a contract with a Belgian seller for the supply of 'food-shaper products for making vegetarian escalopes', the goods involved genetically modified organisms which contradicted a contractual term. It was held that the buyer had the right to avoid the contract.<sup>5</sup>

### 1.1.3. Foreseeability Component

Although the innocent party may have established fundamental breach, the party in breach can defend itself by establishing the test of foreseeability as stipulated in Article 25 of the CISG. If the party in breach establishes that substantial detriment has occurred unforeseeably, the aggrieved party will be prevented from terminating the contract.<sup>6</sup> For the test of foreseeability, a subjectivity and objectivity test are required under Article 25 of the CISG because, as the party in breach possibly does not admit that he/she foresaw the detriment, the objective test is recognised, which requires a reasonable person. If substantial detriment is established, the party in breach has to show that the negative consequence was unforeseeable, and a reasonable person of the same kind in the same situation would not have foreseen it either, in order to preclude the innocent party from avoiding the contract. It is noteworthy that the burden of proving foreseeability test is on the party in breach.<sup>7</sup>

Although Article 25 of the CISG requires the objectivity test, it is still unclear because of taking many characteristic features into consideration in determining a reasonable person. There is suggested that the reasonable person has to have the same socio-economic background as the breaching party. With regard to 'the same circumstance', global and regional market conditions must be taken into consideration, as well as prior dealings, legislation and political climate to find out whether a reasonable person would have foreseen such a result.<sup>8</sup>

In addition, the most controversial issue under Article 25 of the CISG is the time of foreseeability test, because Article 25 of the CISG does not determine a time at which the detrimental result has to be foreseen. Hence, it is not clear whether the time of forming the contract or the time of breaching the contract has to be taken into consideration. Some scholars believe that the time of concluding the contract should be decisive because that is when the obligations and rights of both parties are determined,<sup>9</sup> thus the formation of the contract is the critical time for foreseeability. Conversely, one party could provide further information to the other, and thus change what was considered to be a substantial interest and fundamental breach could be justified due to the

<sup>1</sup> Anna Kazimierska, 'The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods' (CISG, 9 May 2001) <<http://www.cisg.law.pace.edu/cisg/biblio/kazimierska.html#125>> accessed 21 January 2015.

<sup>2</sup> *Unknown parties* [1995] 54 O 644/94 LG Landshut.

<sup>3</sup> Alexandra Lorenz, 'Fundamental Breach under the CISG' (CISG, 21 September 1998) <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>> accessed 5 January 2015.

<sup>4</sup> *X. GmbH v Y. e.V* (2002) OR.2001.00029 HG Aargau; Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59 ICLQ 911,922.

<sup>5</sup> *Unknown parties* [2003] 33/2002/SAS/soAppellationsgericht Basel-Stadt.

<sup>6</sup> Maartje Bijl, 'Fundamental Breach in Documentary Sales Contracts: The Doctrine of Strict Compliance with the Underlying Sales Contract' (CISG, 30 September 2009) <<http://www.cisg.law.pace.edu/cisg/biblio/bijl.html>> accessed 6 January 2015; Alexandra Lorenz, 'Fundamental Breach under the CISG' (CISG, 21 September 1998) <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>> accessed 5 January 2015.

<sup>7</sup> Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law* (5<sup>th</sup> edn, Oxford University Press 2011) 297.

<sup>8</sup> Lachmi Singh, 'Caveat Emptor: Are Decisions more Favourable to the Seller on Matters Relating to Letters of Credit?' (2006) 2 NJCL 8.

<sup>9</sup> Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law* (5<sup>th</sup> edn, Oxford University Press 2011) 297.



change.<sup>1</sup>

Nevertheless, others do not agree with the above view. They argue that the concept of good faith has to be taken into consideration, and credence then must be given to any information obtained by the breaching party after the contract was finalised.<sup>2</sup> Some authors believe that the time of the foreseeability test should be after the formation of the contract but before the time of the breach. Furthermore, others suggest that the time after the conclusion of the contract can only be taken into consideration in exceptional cases and only up to the time when the preparations for the performance of the contract started.<sup>3</sup> There is also an argument that the silence of Article 25 of the CISG on this issue is evidence for believing that any time 'prior to the breach is relevant, at least in some cases'. For example, it is argued that the time of the foreseeability test should be examined on a case-by-case basis. Hence, the facts and circumstances of each case play a significant role in deciding the time of foresight.<sup>4</sup>

## 1.2. Principles Underlying Fundamental Breach

When courts interpret the concept of fundamental breach, they are obligated to take the underlying principle of '*favor contractus* or preservation of original agreements into consideration, notwithstanding breach wherever possible'.<sup>5</sup> The presence of *favor contractus* within the CISG could be proved by the relative availability of damages, specific performance, and price reduction to the parties where a breach is not fundamental. The existence of *favor contractus* is also shown by the requirement of a very high level test under Article 25 of the CISG.<sup>6</sup>

In addition, *favor contractus* is essential to contractual certainty, because the conditions of international trade make avoidance costly but attractive and in international transactions contract avoidance includes a considerable amount of money due to storage and reshipment costs. Avoiding a contract might cost more money than carrying out an obligation, such as curing defective goods or specific performance. Therefore, in terminating any contract balance must be kept between the interests of both parties.<sup>7</sup>

## 2. Avoidance of Contract by the Buyer

The buyer may breach any of its obligations at any time and, therefore, the CISG and SGA have provided remedial systems for its breach.

### 2.1. The Possibility of the Avoidance of Contract by the Buyer under the CISG

Article 45 of the CISG provides remedial rights to the buyer in the case of the seller's failure to carry out any of its contractual obligations. Specifically, Article 49 of the CISG allows the buyer to terminate the contract. For the purpose of this sub-chapter, Article 49(1) is quoted as stipulating that:<sup>8</sup>

- (1) The buyer may declare the contract avoided:
- (2) (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
- (3) (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.

One can deduce that sub-paragraph (a) deals with fundamental breach and sub-paragraph (b) gives an exception to terminate the contract in the event of non-fundamental breach.<sup>9</sup>

Under Article 49(1)(a), two elements need to be proved. Firstly, it has to be established that an obligation of the Convention or contract has been breached by the seller. Secondly, it must be proved that the breach of the seller

<sup>1</sup>Lachmi Singh, 'Caveat Emptor: Are Decisions more Favourable to the Seller on Matters Relating to Letters of Credit?' (2006) 2 NJCL 9; Leonardo Graffi, 'Case Law on the Concept of Fundamental Breach in the Vienna Sales Convention' (2003) 3 IBLJ 338.

<sup>2</sup> Alexandra Lorenz, 'Fundamental Breach under the CISG' (CISG, 21 September 1998) <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>> accessed 5 January 2015.

<sup>3</sup>Leonardo Graffi, 'Case Law on the Concept of Fundamental Breach in the Vienna Sales Convention' (2003) 3 IBLJ 338.

<sup>4</sup>Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59 ICLQ 911, 926.

<sup>5</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>6</sup>Fernando Gomez and Marian Gili-Saldana, 'Termination as a Remedy in the Common European Sales Law: A Law and Economics Approach' (2014) 10 ERCL 331, 324; Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>7</sup>Fernando Gomez and Marian Gili-Saldana, 'Termination as a Remedy in the Common European Sales Law: A Law and Economics Approach' (2014) 10 ERCL 331, 324.

<sup>8</sup>United Nations Convention on Contracts for International Sale of Goods (1980), Article 49.

<sup>9</sup>Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (CISG, 5 April 2005) <<http://www.cisg.law.pace.edu/cisg/biblio/loo49.html>> accessed 12 January 2015.

amounts to a fundamental breach in accordance with the meaning of Article 25 of the CISG.<sup>1</sup>

The most common breaches by sellers are delivery of defective goods, non-delivery and delay.<sup>2</sup> This research clarifies each breach with cases. Some factors are taken into consideration in determining whether the breach is fundamental or not, such as the gravity of the consequence of the breach and the quality of the goods.<sup>3</sup>

#### A. Non-Delivery

The courts have made it clear that definite non-delivery considered a fundamental breach. For instance, in a case where the goods were not delivered by the seller, the buyer terminated the contract. The International Chamber of Commerce (ICC) ruled that the buyer was right in terminating the contract.<sup>4</sup> Refusal to hand in goods also amounts to a fundamental breach.<sup>5</sup> For example, in *Sté Calzados Magnanni v SARL Shoes General International*, the buyer (a French company) placed an order with the seller (a Spanish company) for 8,651 pairs of shoes to be marketed under the *Pierre Cardin* trade name. Nevertheless, the seller denied getting any order from the buyer and rejected to deliver. Consequently, the buyer terminated the contract and obtained shoes from other manufactures. The court held that: 'refusal, without any legitimate reason, to fulfil an order received by falsely maintaining that the order had not been placed constitutes a fundamental breach by the seller within the meaning of Article 25 of the CISG'<sup>6</sup>

#### B. Non-Conformity of Goods

With regard to the quality of goods (Article 35 of the CISG), there was a case between an Austrian buyer and Danish seller. The buyer rejected to pay the price of goods on the basis that a fundamental breach has been committed by the seller, because the flowers that the buyer bought could not bloom during the whole summer. The court ruled that there was no fundamental breach due to the buyer's failure to verify that the seller guaranteed that the flowers would bloom throughout the entire summer. The court also held that even if the buyer succeeded in proving the non-conformity of the goods, it would have lost its right to terminate the contract because of its failure to give notice to the seller within a reasonable time after the discovery of the defect (Article 39(1) of the CISG).<sup>7</sup>

Nonetheless, in a dispute between a Spanish seller and a German buyer, the court held that non-conformity of goods amounted to a fundamental breach; it should be remembered that it may cause obstacles to avoidance if the goods can still be used or resold.<sup>8</sup> In this case, a shipment of pepper was bought by the buyer under the condition that the goods must have been fit for human consumption. However, 'The pepper contained approximately 150% of the maximum concentration of ethyl oxide admissible under German food and drug law'. The court ruled that a fundamental breach had been committed by the seller, because the pepper contained more ethyl oxide than permissible in German law.<sup>9</sup> In regard to quantity difference, a fundamental breach was recognised by the court in a case where 93% of the compressors involved were rejected by the quality control of the USA due to consuming more energy than the sample model and having a lower cooling ability.<sup>10</sup>

Furthermore, in a *scaffold fittings* case, an Austrian buyer obtained scaffold fittings from a Chinese seller. The buyer declared the contract avoided because of non-conformity of the goods. The arbitral tribunal stated that the buyer was entitled to discharge the contract, as the goods had not been supplied in compliance with Article 35(1 and 2) of the CISG, and the deficiency in goods amounted to a fundamental breach within the meaning of Article 25 of the CISG, because it substantially deprived the buyer of what he/she was entitled to expect under the contract.<sup>11</sup> However, the Russian arbitral tribunal held that in the case of non-conformity with a contract, the breach does not amount to a fundamental breach if there is no substantial loss. In this case, a Russian buyer concluded a contract with a Swiss seller for the supply of chocolate confectionery products. There was a clause in the contract stipulated that 'delivery in the absence of a banker's guarantee'. The buyer did not pay the price and he/she claimed that the seller had committed a fundamental breach by transferring the goods before the buyer had transferred the bank's guarantee. The Russian tribunal stated that the buyer had an obligation to pay the price under Article 53 of the CISG. It also held that breaching the term which was stated for

<sup>1</sup>Ingeborg Schwenzer, 'Avoidance of Contract in Case of Non-Conforming Goods Article (49)(1)(a)' (2006) 25 JLC 437.

<sup>2</sup>Ingeborg Schwenzer, 'The Right to Avoid the Contract' (2012) 3 BLR 207, 210.

<sup>3</sup>Robert Koch, 'The Concept of Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 16 December 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/koch.html>> accessed 4 January 2015.

<sup>4</sup>n 20 above.

<sup>5</sup>Robert Koch, 'The Concept of Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 16 December 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/koch.html>> accessed 4 January 2015.

<sup>6</sup>*Sté Calzados Magnanni v SARL Shoes General International* (1999) 97/03974 CA Grenoble.

<sup>7</sup>*Dansk Blumsterexport A/S v Frick Blumenhandel* (1994) 4 R 161/94 OLG Innsbruck.

<sup>8</sup>Alexandra Lorenz, 'Fundamental Breach under the CISG' (CISG, 21 September 1998) <<http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>> accessed 5 January 2015.

<sup>9</sup>*Unknown parties* (1995) 1 KfH O 32/95 LG Ellwangen.

<sup>10</sup>*Delchi Carrier, S.p.A v Rotorex Corp* [1994] 88-CV-1078 USDC, NDNY.

<sup>11</sup>*Unknown parties* (1994) 7531 ICC.

the dispatch of delivery could not be considered adequate grounds for termination of contract.<sup>1</sup> Conversely, if such a breach caused damage, the buyer would have right to claim damages under Article 37 of the CISG, but he buyer did not claim damages.<sup>2</sup>

### C. Timely Delivery

With regard to timely delivery, in most cases, courts have been reluctant to consider late delivery as a fundamental breach, in particular if there is a short delay. Each case should be treated on a case-by-case basis.<sup>3</sup> For instance, in a case where an Italian seller sold summer clothes to a German buyer, the buyer avoided the contract on the grounds that the seller had dispatched the goods one day later than the time stipulated in the contract. Nevertheless, the court ruled that the buyer was not right in terminating the contract because it was noticed from the fact that delivery of the goods has been taken by the buyer rather than being rejected that time was not of the essence in the contract.<sup>4</sup> In addition, in a *clothes case*, where a French seller vended women's wear to a German buyer, the seller dispatched the goods two days later than the time stipulated in the contract. The court concluded that the harm suffered by the buyer was of minor importance to the buyer and did not, therefore, amount to a fundamental breach.<sup>5</sup>

Nevertheless, in the *Iron molybdenum* case, an English buyer finalised a contract with a German seller for the supply of iron-molybdenum from China CIF Rotterdam. The buyer did not take the delivery of goods because the seller had not received the goods from its Chinese supplier. After the additional time was lapsed, the buyer discharged the contract and bought its goods from another supplier. The court said that the contract was terminated under Article 49(1)(a) and (b). Under paragraph (a), it was held that, even though late delivery does not generally amount to a fundamental breach, it could be amounted to a fundamental breach if delivery within an exact time is of special interest to the buyer, which must be foreseeable at the time of the formation of the contract (Article 25 of the CISG). It was by this definition that CIF determined 'the contract to be a transaction for delivery by a fixed date'.<sup>6</sup>

It is worth noting that in the event of late delivery where the delivery of goods can still be workable and the seller is still willing to perform, the significance of the fixed delivery time is decisive. Whether time is indispensable depends on the terms stated in the contract and the related trade sector. If a certain delivery time is insisted on by the buyer due to a sub-sale, for instance if the contract contains seasonal goods, time is usually vital and any deferral would amount to a fundamental breach.<sup>7</sup> For example, in a case where a Canadian company concluded a contract with an American firm for the supply of vacuum panel insulation, the buyer had already made a contract with a sub-buyer based on its contract with the American seller. Consequently, the buyer stated a term of delivery time as being of essence to the contract. The seller could not deliver the goods on time. Thus, the buyer terminated the contract. The court made the decision in favour of the buyer.<sup>8</sup>

With regard to Article 49(1)(b), if the stipulated time is not of essence to the contract, the buyer might fix an additional time (*Nachfrist*) under Article 47(1) of the CISG.<sup>9</sup> If the seller does not carry out its obligation during the time, then, after the expiry of the additional time, the buyer has a right to terminate the contract irrespective of the seriousness of the breach.<sup>10</sup> Moreover, if the additional time is fixed, but the seller rejects to execute its obligation, the buyer is entitled to discharge the contract before the lapse of the additional time.<sup>11</sup> In the *Iron molybdenum* case clarified earlier, the court stated that the buyer was entitled to terminate the contract due to the seller's failure to deliver the goods within the additional time.<sup>12</sup>

In addition, in all breaches apart from late delivery, according to Article 49(2)(b), after the delivery of the goods the buyer must avoid the contract within a reasonable time.<sup>13</sup> For example, in the *coke* case where a

<sup>1</sup>*Unknown parties* (1995) 200/1994 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry.

<sup>2</sup>United Nations Convention on Contract for the International Sale of Goods (1980), Article 37.

<sup>3</sup>Peter Schlechtriem and Petra Butler, *UN Law on International Sale: The UN Convention on the International Sale of Goods* (Springer 2009) 94; Robert Koch, 'The Concept of Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 16 December 2003) <<http://cisgw3.law.pace.edu/cisg/biblio/koch.html>> accessed 4 January 2015.

<sup>4</sup>*Unknown parties* (1996) 12 O 2541/95 LG Oldenburg.

<sup>5</sup>*Unknown parties* (1990) 4 C 549/90 AG Ludwigsbur.

<sup>6</sup>*Unknown parties* (1997) 1 U 167/95 OLG Hamburg.

<sup>7</sup>Markus Muller-Chen and Lara Pair, 'Avoidance for Non-Conformity of Goods under Article 49(1)(a) CISG' (2011) LAEB 655, 657; Ingeborg Schwenzer, 'The Right to Avoid the Contract' (2012) 3 BLR 207, 210.

<sup>8</sup>*Diversitel Communications, Inc v Glacier Bay Inc* (2003) 03-CV-23776 SROntario.

<sup>9</sup>United Nations Convention on Contract for the International Sale of Goods (1980), Article 47(1).

<sup>10</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>11</sup>Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' (CISG, 5 April 2005) <<http://www.cisg.law.pace.edu/cisg/biblio/loo49.html>> accessed 12 January 2015.

<sup>12</sup>*Unknown parties* (1997) 1 U 167/95 OLG Hamburg.

<sup>13</sup>United Nations Convention on Contract for the International Sale of Goods (1980), Article 49(2)(b).

German buyer bought coke from a Swedish seller, the buyer terminated the contract, claiming that the goods were of inferior quality. The court stated that the inferior quality of the goods did not amount to a fundamental breach and, in any case, the buyer would have lost the right to discharge the contract because of declaring the contract avoided four months after the delivery of the goods, which could not be considered a reasonable time.<sup>1</sup>

#### **D. Partial Avoidance, Instalment Contracts and Anticipatory Breach**

It is significant to clarify partial avoidance in instalment contracts and anticipatory breach. According to Article 51(1) of the CISG, the buyer has a right to avoid the contract where the partial delivery or partially non-confirming goods amount to a fundamental breach.<sup>2</sup> However, if a contract includes the delivery of goods by instalment, the special provision of Article 73 of the CISG will be applied. According to Article 73(1), if there is a seller's failure to perform any of its obligations vis-à-vis instalments, the buyer is entitled to terminate the contract only for the breached instalment. Conversely, Article 73(2) permits the buyer to avoid the contract for future instalments if the seller's breach with regard to an instalment provides the buyer with a good ground to conclude that the seller will commit a fundamental breach in respect to future instalments.<sup>3</sup>

Moreover, anticipatory breach is regulated under Article 71 of the CISG, which provides the right to suspend performance by one party if it is apparent that the other will not perform a considerable part of its duties. Under Article 72(1), the buyer is given a right to discharge the contract if it is obvious that a fundamental breach will be committed by the seller. Nonetheless, pursuant to Article 72(2), if time permits, reasonable notice has to be given by the buyer to the seller so that the seller can provide adequate assurance of its performance.<sup>4</sup> For instance, in a case where the seller announced that he/she would not be able to deliver goods on the agreed time, the buyer avoided the contract, as the stipulated time was of the essence to the contract. The ICC held that the buyer was right to avoid the contract under Article 72(1) of the CISG.<sup>5</sup>

## **2.2. The Possibility of the Avoidance of Contract by the Buyer under English Law**

The seller's duties are determined under section IV of the SGA, and thus the seller will be liable for breaching any of his/her obligations. Unlike the CISG, the right of avoidance by the buyer is dependent upon whether the breach is a condition or an intermediate term.<sup>6</sup> Firstly, the innocent party is entitled to terminate the contract if the seller breaches a condition, irrespective of whether the breach is serious or not, but subject to s. 15(a) SGA. Therefore, the buyer will be allowed to terminate a contract where, for instance, the goods are dispatched later than the agreed time or if the goods or documents are tendered late, even if it is by one day.<sup>7</sup> For example, in *Arcos v Ranaason*, where the buyer entered into a contract with the seller for the supply of wooden staves for making barrels, it was described in the contract that the wooden staves must be 1/2 an inch thick. Some of the wooden staves delivered were slightly different. The buyer was still able to use them for the intended purpose. However, the buyer rejected the goods, because the price of the goods had decreased and it was able to purchase them at a lower price. The court held that the buyer was entitled to terminate the contract under s. 13 SGA as the goods did not comply with the description.<sup>8</sup> In *Toepfer v Lenersan-Poortman*, where the seller tendered documents later than the stipulated time, the court held that the buyer was entitled to terminate the contract because the seller had breached the condition.<sup>9</sup>

Secondly, in the case of breaching an intermediate term, the buyer is entitled to terminate the contract if the breach substantially deprives the buyer of the whole benefit of the contract which the parties to the contract expressed that the buyer should obtain.<sup>10</sup> For example, in *Hong Kong Fir*, which concerned a two-year charterparty, the vessel was off hire due to 'unseaworthiness for all but eight and a half weeks in the first seven months of the charter'. The court held that the term to provide a seaworthy vessel was an intermediate term and not a condition. Therefore, it was held that the charterer was not entitled to terminate the contract.<sup>11</sup> Finally, the buyer has the right to avoid a contract if the seller refuses or is unable to carry out its.<sup>12</sup>

<sup>1</sup>*Unknown parties* (1994) 7 U 4419/93OLG München.

<sup>2</sup>United Nations Convention on Contract for the International Sale of Goods (1980), Article 51.

<sup>3</sup>Andrew Babiak, 'Defining Fundamental Breach Under the United Nations Convention on Contracts for the International Sale of Goods' (CISG, 14 June 2006) <<http://www.cisg.law.pace.edu/cisg/biblio/babiak.html>> accessed 13 January 2015; Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>4</sup>United Nations Convention on Contract for the International Sale of Goods (1980), Articles 71 and 72.

<sup>5</sup>*Unknown parties* [1997] 8786 ICC.

<sup>6</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>7</sup>Alastair Mullis, 'Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases' (CISG, 13 May 2004) <<http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html>> accessed 12 January 2015.

<sup>8</sup>*Arcos Ltd v Ranaason&Son* [1933] AC 470 HL.

<sup>9</sup>*Toepfer v Lenersan-Poortman N.V.*[1981] 1 Lloyd's Rep. 143.

<sup>10</sup>Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29<sup>th</sup> edn, Oxford University Press 2010) 145.

<sup>11</sup>*Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 62.

<sup>12</sup>Alastair Mullis, 'Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases' (CISG,



Furthermore, there is no direct equivalent to the CISG's *Nachfrist* in the SGA, as this was borrowed from German law.<sup>1</sup> There are three sources of contractual conditions. Firstly, some conditions are implied in contracts by the SGA under ss. 13, 14 and 15. Any breach of these implied conditions would entitle the buyer to terminate the contract. However, care should be taken to consider that under s. 15(a), if the breach is slight and the buyer is a non-consumer, then the term is not to be considered a breach of condition but may be considered a breach of warranty. Therefore, the buyer will not be entitled to terminate the contract.<sup>2</sup> Secondly, according to the principle of freedom of contract, the parties to the contract are free to decide which term must be treated as a condition. Finally, some conditions are implied in international sale contracts as common law, such as the term of time, the port of loading in free on board (FOB) contracts and the name of the vessel, if parties agree.<sup>3</sup> For example, in *Bunge Corp v Tradax Export SA*, there was a term which stipulated that Bunge must 'give at least 15 days consecutive notice' of the readiness of the vessel for loading. However, the notice was given four days later and, as a result, *Tradax* terminated the contract. The court held that *Tradax* was right because the term was to be considered as a condition.<sup>4</sup> Regard has to be made that s. 15(a) does not apply to the last two sources (conditions by parties and in common law), thus, even if the breach is trivial, it will entitle the buyer to avoid the contract.<sup>5</sup> It is worth mentioning that in determining whether an obligation amounts to a condition or not, the first reference point is the agreement of the parties. Otherwise, it is universally accepted that determining whether a term is a condition or a warranty is a matter for contract interpretation.<sup>6</sup>

### 3. Avoidance of Contract by the Seller

This chapter now turns to analysing the possibility of avoidance of contract by the seller under both the CISG and SGA.

#### 3.1. The Possibility of Avoidance of Contract by the Seller under the CISG

The obligations of the buyer are explained in chapter III of the CISG, which are to pay the price<sup>7</sup> and receive the goods.<sup>8</sup> Article 64 of the CISG allows the seller to avoid the contract. The seller is entitled to discharge the contract in two circumstances before payment: firstly, if the buyer's breach amounts to a fundamental breach under Article 64(1) of the CISG and, secondly, an additional time, under Article 63, may be fixed for the buyer to carry out his/her obligations. If the buyer does not execute his/her obligations in the fixed time, the seller has a right to terminate the contract.<sup>9</sup> For the purpose of this section, Article 64(1) is quoted, which states that:<sup>10</sup>

The seller may declare the contract avoided:

- (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
- (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

The breach by the buyer in not paying the price on time does not generally amount to a fundamental breach because the seller's interest in getting paid is not substantially impaired due to the delay.<sup>11</sup> For example, in the *Foamed board machinery* case, a Finnish buyer concluded a contract with an Italian seller for the supply of machinery for a production line of foamed boards. The buyer failed to perform its payment obligation on time. The arbitral tribunal stated that the fact that there was some delay in paying the price did not in itself amount to a fundamental breach.<sup>12</sup> However, if the payment time is vital, for instance, in the event of highly fluctuating foreign exchange markets, fundamental breach is accepted.<sup>13</sup> A breach of the payment time could also amount to

13 May 2004) <<http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html>> accessed 12 January 2015.

<sup>1</sup>Peter Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?' (CISG, 4 December 2000) <<http://www.cisg.law.pace.edu/cisg/biblio/piliounis.html>> accessed 16 January 2015.

<sup>2</sup>Paul Richards, *Law of Contract* (11<sup>th</sup> edn, Pearson Education Limited 2013) 174.

<sup>3</sup>Janet O'Sullivan and Jonathan Hilliard, *The Law of Contract* (5<sup>th</sup> edn, Oxford University Press 2012) 362.

<sup>4</sup>*Bunge Corp v Tradax Export SA* [1981] UKHL 11.

<sup>5</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>6</sup>Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (United States, Oxford University Press 2012)714.

<sup>7</sup>United Nations Convention on Contracts for International Sale of Goods (1980), Articles 54-59.

<sup>8</sup>United Nations Convention on Contracts for International Sale of Goods (1980), Article 60.

<sup>9</sup>Alison Butler, 'A Practical Guide to the CISG: Negotiations through Litigation' (CISG, 26 May 2010) <<http://www.cisg.law.pace.edu/cisg/biblio/butler6.html>> accessed 16 January 2015.

<sup>10</sup>United Nations Convention on Contracts for International Sale of Goods (1980), Article 64(1).

<sup>11</sup>Ingeborg Schwenzer, 'The Right to Avoid the Contract' (2012) 3 BLR 207, 212.

<sup>12</sup>*Unknown parties* [1992] 7585 ICC.

<sup>13</sup>Peter Schlechtriem and Petra Butler, *UN Law on International Sale: The UN Convention on the International Sale of Goods*

a fundamental breach where the parties agree that the price should be paid by a letter of credit against documents, because a letter of credit must be opened 'for the seller no later than the first day of the period for shipment'.<sup>1</sup>

Furthermore, a breach is considered to be fundamental if there is a definitive failure to perform payment obligation or if the buyer rejects to pay the purchase price, and the same is correct if the buyer goes insolvent.<sup>2</sup> For instance, in *Doolim Corp. v R Doll, LLC, et al.* an American buyer signed a contract to buy women's custom-made clothing from a South Korean seller. Some of the goods delivered to the buyer, but the buyer failed to pay. An assurance was given to the seller by the buyer to pay the price for the delivered goods. Nevertheless, the buyer again failed to carry out its payment obligation. The court held that the seller had a right to avoid the contract under Article 72 of the CISG.<sup>3</sup> Moreover, in *Roder v Rosedown*, a German seller vended tents to an Australian buyer and the price has to be paid in instalments. The German buyer failed to pay the price because of being insolvent and experiencing economic difficulties. The court said that the seller was entitled to terminate the contract under Articles 61 and 64 of the CISG.<sup>4</sup>

Furthermore, in regard to a buyer's failure to take delivery of goods, a few days delay generally does not amount to a fundamental breach.<sup>5</sup> For instance, in *Ego Fruits v La Verja Begastr*, a French company concluded a contract with a Spanish firm for the supply of pure orange juice. The buyer rejected to take delivery at the time of the delivery. The court stated that being a few days late in taking delivery could not be amounted to a fundamental breach and for the seller to discharge the contract he/she should have fixed an additional time for the buyer to take delivery.<sup>6</sup>

Nevertheless, a buyer's last failure in taking delivery of goods is generally considered as a fundamental breach and if taking delivery of the goods by the buyer at the exact contracted time is of special interest to the seller, for example due to sparse warehouse or transportation capacity, a fundamental breach can be accepted.<sup>7</sup> A definite rejection by the buyer to take delivery also amounts to a fundamental breach.<sup>8</sup> For instance in a *shoes* case, where the buyer failed to perform its payment obligation for two instalments, it was held by the court that if the contract does not include perishable goods or goods which require special care, 'neither frustration of the obligation of taking delivery nor failure to pay the price' verified a fundamental breach. It was also held that to terminate the contract in respect to Article 72(1) and (2) it is significant that the party in breach should have denied executing its obligations in a serious, clear and express manner.<sup>9</sup> In addition, in a *cutlery* case, where a Swiss buyer signed a contract with a German seller for the supply of two sets of cutlery, the buyer rejected to accept the delivery. The seller fixed *Nachfrist* for the buyer, but the buyer did not carry out its obligation. The court held that the seller was entitled to discharge the contract under Articles 61 and 64(1)(b).<sup>10</sup>

Furthermore, the seller's right to fix an additional time (*Nachfrist*) under Article 63 is equal to the buyer's same right under Article 49(1)(b) of CISG.<sup>11</sup> Article 63 states that 'The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations'. Conversely, if an additional time is fixed, the seller's right to use any other remedy is suspended during this time, if the buyer does not refuse to perform its obligations.<sup>12</sup> Under Article 64(1)(b) the seller is conferred upon the right to avoid the contract if the buyer does not execute its obligations to take delivery or pay the price within the period given under Article 63 of the CISG or if the buyer rejects to perform.<sup>13</sup> It can be noticed that a *Nachfrist* mechanism provides a degree of certainty to the seller by allowing the seller to avoid the contract without having to prove fundamental breach. Nevertheless, as explained above, in any other cases, termination of contract depends on the establishment of a

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(Springer 2009) 176.

<sup>1</sup>Ingeborg Schwenzer, 'The Right to Avoid the Contract' (2012) 3 BLR 207, 212.

<sup>2</sup>Ibid 212.

<sup>3</sup>*Doolim Corp. v. R Doll, LLC, et al* [2009] 08 Civ. 1587(BSJ) (HBP) USDC, SDNY.

<sup>4</sup>*Roder Zelt- und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd et al.* [1995] SG 3076 Federal Court, South Australian District, Adelaide.

<sup>5</sup>CISG, 'Digest of Article 64 Case Law' (CISG, 30 July 2012) <<http://www.cisg.law.pace.edu/cisg/text/digest-2012-64.html#8>> accessed 17 January 2012.

<sup>6</sup>*SARL Ego Fruits v Sté La Verja Begasti* [1999] RG 97008146 CA Grenoble.

<sup>7</sup>Peter Schlechtriem and Petra Butler, *UN Law on International Sale: The UN Convention on the International Sale of Goods* (Springer 2009) 176.

<sup>8</sup>CISG, 'Digest of Article 64 Case Law' (CISG, 30 July 2012) <<http://www.cisg.law.pace.edu/cisg/text/digest-2012-64.html#8>> accessed 17 January 2012.

<sup>9</sup>*Unknown parties* [2004] 6 U 210/03 OLG Dusseldorf.

<sup>10</sup>*Unknown parties* [1997] OR.96.0-0013 HG Aargau.

<sup>11</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>12</sup>United Nations Convention on Contracts for International Sale of Goods (1980), Article 63.

<sup>13</sup> Secretariat Commentary, 'Guide to CISG Article 64' (CISG, 30 August 2006) <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-64.html>> accessed 22 January 2015; United Nations Convention on Contracts for International Sale of Goods (1980), Article 64(1)(b).

fundamental breach.<sup>1</sup> For instance, in the Foamed board machinery case, as clarified above, the court ruled that the seller had the right to avoid the contract after the lapse of additional time.<sup>2</sup>

### 3.2. The Possibility of the Avoidance of Contract by the Seller under English Law

Similarly to the CISG, two obligations are imposed on the buyer under the SGA. Firstly, under s. 27 SGA, the buyer has an obligation to pay the purchase price,<sup>3</sup> and, secondly, s. 28 SGA imposes an obligation on the buyer to take delivery of the goods.<sup>4</sup> Nevertheless, compared with the SGA, much greater satisfactory protection is provided to the injured seller by the CISG. While there are general provisions under the SGA dealing with the buyer's right to terminate the contract for repudiation by the seller, it does not contain any such provisions to deal with the equivalent right of the seller. Therefore, in this regard, the SGA does not keep balance in protecting the rights of both parties compared with the CISG.<sup>5</sup>

With regard to late payment by the buyer, s. 10(1) makes a presumption that the time of payment is not a condition.<sup>6</sup> Therefore, if the buyer does not pay on time, the seller is not entitled to avoid the contract, unless the parties have different intentions which are clear in the terms of the contract. Nevertheless, the buyer may receive the interest instead.<sup>7</sup> For instance, in *Wadsworth v Lydall*, the buyer purchased a property from the seller, but the buyer paid some of the money very late. As a result, the court held that the buyer must have paid the seller interest on the unpaid purchase price.<sup>8</sup> Furthermore, it might be off-set by a tendency of the courts to consider terms in relation to time in commercial contracts as conditions that might extend to payment time in certain situations.<sup>9</sup> For example, in a case where the buyer entered into a contract for the sale of a flat, the parties agreed that time was of the essence. The buyer paid 10 minutes later than the agreed time. Therefore, the court held that the seller had the right to terminate the contract.<sup>10</sup>

Nevertheless, an unpaid seller is given some other statutory remedies under which avoidance may be allowed. Under s. 39 SGA the unpaid seller is given a lien on goods while he/she is in possession of them, irrespective of whether the property in the goods has passed to the buyer or not. The unpaid seller is also given the right to stop the goods in transit if the buyer becomes insolvent and has a right to resell them.<sup>11</sup> For example, in *Ex parte Rosevear China Clay Co. Ltd*, the court held that if, in an FOB contract, the goods are in transit and the buyer becomes insolvent, the seller has the right of stoppage.<sup>12</sup> The right of the seller of stoppage in transit according to s. 39(1)(b) is almost equivalent to the right to suspend performance pursuant to Article 71 CISG, although narrower in its ambit. The seller's right to resale is of greatest interest in the context of termination; hence the seller is involved to accept repudiation by the buyer, and to treat the contract as void.<sup>13</sup> Thus, according to s. 48(1), 'a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit'.<sup>14</sup>

Moreover, according to s. 48(4), the seller is granted a right to resell the goods if he/she has explicitly reserved the right to resell on default by the buyer. Furthermore, if the goods are perishable in nature, or if the buyer is provided a notice by the unpaid seller that the unpaid seller's intention is to resell the goods and the buyer does not pay the seller within a reasonable period of time, under s. 48(3) the unpaid seller might resell the goods.<sup>15</sup> For instance, in one case, the court allowed the seller to exercise his right to resell the goods under s. 48(3), and thus the contract was terminated. After terminating the contract the seller could not sue the buyer for the price.<sup>16</sup> It can be observed that Article 48(3) is similar to the *Nachfrist* mechanism in the CISG, which mirrors common law rules that time could be considered of the essence in a contract by the service of notice.<sup>17</sup> It is noteworthy that the rights of the seller in regard to instalment contracts have not been explained under s. 31(2) SGA, under which the buyer is allowed to terminate the contract in regard to the individual parts of an

<sup>1</sup>Ingeborg Schwenzer, 'The Right to Avoid the Contract' (2012) 3 BLR 207,213.

<sup>2</sup>*Unknown parties* [1992] 7585 ICC.

<sup>3</sup>Sale of Goods Act (1979), s. 27.

<sup>4</sup>Sale of Goods Act (1979), s. 28.

<sup>5</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>6</sup>Sale of Goods Act (1979), s. 10(1).

<sup>7</sup>Ewan McKendrick, *Goode on Commercial Law* (4<sup>th</sup> edn, Penguin Group 2010) 426.

<sup>8</sup>*Wadsworth v Lydall* [1981] 2 All ER 401.

<sup>9</sup>Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29<sup>th</sup> edn, Oxford University Press 2010) 442.

<sup>10</sup>*Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514.

<sup>11</sup>Sale of Goods Act (1979), s. 39 (1).

<sup>12</sup>*Ex parte Rosevear China Clay Co. Ltd* [1879] 11 Ch D 560.

<sup>13</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>14</sup>Sale of Goods Act (1979), s. 48 (1).

<sup>15</sup>Sale of Goods Act (1979), s. 48(3) and (4).

<sup>16</sup>*RV Word Ltd v Bignall* [1967] 1 QB 534.

<sup>17</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

instalment contract.<sup>1</sup> However, it can be observed from *Warinco AG v Samor S.p.A.* that the seller has a right to terminate the contract for future instalments if it is obvious that the buyer will not carry out his/her obligations.<sup>2</sup>

#### 4. Advantages and Disadvantages of the Two Legal Systems in International Commercial Transactions

This chapter attempts to carry out a proper evaluation of the SGA and CISG's provisions in international commercial transactions. There is an argument that international commercial contracts should not be dealt with in the identical way as domestic ones because of involving parties from different legal systems and commercial practices. It is also because national laws, which are formulated for domestic transactions, are not necessarily suitable for international transactions.<sup>3</sup> Furthermore, the problem concerning the choice of law can be resolved by uniform conflict of law rules and simplifying trade by removing obstacles resulting from the complexities of different legal regimes from different states.<sup>4</sup> In the circumstance of applying a national law in a foreign court, problems could arise due to the lack of familiarity of the foreign court with the law and hence courts would need experts in the law which cost money and the court could be faced with legal mistakes.<sup>5</sup>

The CISG has established a very structured and comprehensive regime for the termination of contract compared with the SGA because it takes modern commercial practices and realities into consideration.<sup>6</sup> For substantial breaches, the CISG recognised the *Nachfrist* mechanism, which diminishes the vagueness made by the wide definition of a fundamental breach. In addition, it might be observed that no greater certainty is produced under English law, because in the current state English law attempts to favour performance of the contract by the recognition of an intermediate term which reflects modernised international commercial transactions.<sup>7</sup>

In addition, the CISG keeps the balance in providing the right of avoidance to both the buyer and the seller by forming almost identical provision for each party to terminate a contract.<sup>8</sup> However, the SGA does not keep a balance, because it contains a provision allocated to the buyer's right of avoidance but does not have any such provision for the seller. In practice, this might lead English buyers to adopt English law rather than the CISG, while the opposite approach may be adopted by English sellers.<sup>9</sup>

It is worth mentioning that although dissimilarities in domestic law might not have a detrimental effect on international trade, there could be situations which make barriers to international transactions as they make legal uncertainty.<sup>10</sup> This legal uncertainty may have economic detriments for trade; for instance, it could be needed to collect information about foreign law, which costs money.<sup>11</sup> It may also inhibit the parties to a contract reaching an agreement because of the traders' worries about applying foreign domestic law. Small and medium companies, which are deemed to be the backbone of the economy in many States, could be highly affected by differences in law and they could not afford the cost of a specialist to draft their contracts. Thus, having a uniform legal environment is crucial to improving international business and economic growth.<sup>12</sup>

Even though having a uniform law at the international level is desirable, it is very problematic and challenging to put into practice because of the various political perspectives and legal systems in different countries.<sup>13</sup> When uniform commercial laws are implemented by countries, they become part of domestic law, which provides the chance with courts, the legal community and trading parties to access the law easily.

<sup>1</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>2</sup>*Warinco AG v Samor S.p.A.* [1977] 2 Lloyd's Reports 582.

<sup>3</sup>Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law* (5<sup>th</sup> edn, Oxford University Press 2011) 19.

<sup>4</sup>Indira Carr, *International Trade Law* (5<sup>th</sup> edn, Routledge 2014) 59.

<sup>5</sup>Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law* (5<sup>th</sup> edn, Oxford University Press 2011) 19.

<sup>6</sup>Shishir Dholakia, 'Ratifying the CISG - India's Options' (CISG, 2 June 2006) <<http://cisgw3.law.pace.edu/cisg/biblio/dholakia.html>> accessed 23 January 2015.

<sup>7</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>8</sup>ibid 106.

<sup>9</sup>Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG' (2003) 8 ITBLR 106.

<sup>10</sup>GIZ, 'Implementation of the United Nations Convention on the International Sale of Goods and of the System of International Commercial Arbitration in Southeast Europe' (A report on a GTZ Project, undertaken with the support of United Nations Commission on International Trade Law (UNCITRAL), FMECD 1 January 2011) 3.

<sup>11</sup>José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?' (Rev.dr.unif 2009) 15; Ulrich Magnus, 'The Remedy of Avoidance of Contract under CISG –General Remarks and Special Cases' (2006) 25 JLC 423.

<sup>12</sup>GIZ, 'Implementation of the United Nations Convention on the International Sale of Goods and of the System of International Commercial Arbitration in Southeast Europe' (A report on a GTZ Project, undertaken with the support of United Nations Commission on International Trade Law (UNCITRAL), FMECD 1 January 2011) 3.

<sup>13</sup>Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law* (5<sup>th</sup> edn, Oxford University Press 2011) 231.



Therefore, a similar set of rules will be applicable which are similar in all countries that can be more appropriate to international trade than national laws, due to neutrality of the CISG and establishing its own concepts and approach.<sup>1</sup> Furthermore, different legal, social, economic systems have been taken into consideration in the CISG, hence the CISG needs to be interpreted autonomously from domestic law and regard must be made for its international character and the general principles underlying the CISG and which secure its uniformity.<sup>2</sup>

In addition, in respect to avoidance of contract, it can be noticed that the SGA seeks to achieve the advantage of certainty in commercial transactions by classifying the terms as conditions and warranties, as it is believed that in commercial transactions it is significant that the parties should be able to know their rights and obligations unequivocally in the case of any breach. Therefore, the SGA makes it clear for the parties that if a party breaches a condition, it enables the innocent party to avoid the contract. However, obviousness can be inflexible and lead to unfairness, thus the benefit of certainty must be weighed against the need to gain fairness in commercial transactions.<sup>3</sup> Hence, under the SGA, if a condition is breached, the injured party is entitled to terminate the contract, irrespective of the gravity of the consequence of the breach event if the breach is trivial and causes no harm. Therefore, a party may exploit this right to terminate the contract due to changes in the market rather than the breach itself. It has been argued that, in principle, contracts are concluded to be carried out and not to be terminated. Therefore, if there is a free choice between avoidance and performance, the latter should prevail over the former and the courts should not encourage avoidance.<sup>4</sup>

It is worth mentioning that English law now tends to take fairness into account by recognising an intermediate term and s. 15(a) SGA, as explained earlier.<sup>5</sup> In addition, although it is clear that if a condition is breached the injured party is entitled to terminate the contract, it is not clear that when parties stipulate a term into a contract they mean it as a condition or mere representation.<sup>6</sup> It is also observed that the words 'condition' and 'warranty' can be used in a variety of senses. Therefore, they may not be used in their technical sense, and thus it is dependent upon the parties' intention whether they mean 'condition' or 'warranty'.<sup>7</sup>

Furthermore, although the CISG does not give the right of avoidance easily, it could be justified that giving the right of avoidance so easily could have financial drawbacks; for instance, if the goods have been transported to a foreign country and then the seller breached the contract, he/she must re-transport or resell them at a lower price.<sup>8</sup> In international transactions, the transportation of goods may be more costly 'relative to the value of the goods themselves'.<sup>9</sup> If the buyer has breached the contract and a sub-sale contract had been already signed by him/her, he/she has to pay damages to the sub-buyer because of non-delivery.<sup>10</sup> Thus, avoiding a contract might cost more money than carrying out an obligation, such as curing defective goods or specific performance. Therefore, in terminating any contract balance must be kept between the interests of both parties.<sup>11</sup>

Nevertheless, the CISG is not free of problems; it has some difficulties because the ambit of the CISG is confined to the rights and obligations of the parties and the formation of the contract. For example, the sphere of the CISG does not cover all types of contract, but only contracts for the sale of goods and excludes consumer sales from its ambit. The problem of determining whether a contract is for the sale of goods or services also arises when it involves both goods and services. Moreover, the CISG does not encompass the validity of contracts and the legal capacity and competence of the parties. Therefore, if any problem arises in regard to these matters, domestic laws will be applicable.<sup>12</sup> The CISG has also produced legal uncertainties by introducing broad and new legal concepts which remain unclear, such as the notion of a fundamental breach, and must be developed and interpreted by courts and arbitral tribunals.<sup>13</sup> It can be said that the outcome of any dispute is

<sup>1</sup>Ibid 19.

<sup>2</sup>GIZ, 'Implementation of the United Nations Convention on the International Sale of Goods and of the System of International Commercial Arbitration in Southeast Europe' (A report on a GTZ Project, undertaken with the support of United Nations Commission on International Trade Law (UNCITRAL), FMECD 1 January 2011) 3.

<sup>3</sup>Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (5<sup>th</sup> edn, Oxford University Press 2012) 757.

<sup>4</sup>Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29<sup>th</sup> edn, Oxford University Press 2010) 145.

<sup>5</sup>Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (5<sup>th</sup> edn, Oxford University Press 2012) 757.

<sup>6</sup>Paul Richards, *Law of Contract* (11<sup>th</sup> edn, Pearson Education Limited 2013) 138.

<sup>7</sup>Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (29<sup>th</sup> edn, Oxford University Press 2010) 140.

<sup>8</sup>Fernando Gomez and Marian Gili-Saldana, 'Termination as a Remedy in the Common European Sales Law: A Law and Economics Approach' (2014) 10 ERCL 331, 354.

<sup>9</sup>Avery Katz, 'Remedies for Breach of Contract under the CISG' (2005) 25 IRLE 378, 383.

<sup>10</sup>. n 1 above, 423.

<sup>11</sup>Ulrich Magnus, 'The Remedy of Avoidance of Contract under CISG –General Remarks and Special Cases' (2006) 25 JLC 423.

<sup>12</sup>Peter Schlechtriem and Petra Butler, *UN Law on International Sale: The UN Convention on the International Sale of Goods* (Springer 2009) 42.

<sup>13</sup>Shishir Dholakia, 'Ratifying the CISG - India's Options' (CISG, 2 June 2006) <<http://cisgw3.law.pace.edu/cisg/biblio/dholakia.html>> accessed 23 January 2015; Essa Alazemi, 'Passing of Risk in International Contracts of Sale of Goods: A Comparative Study Between the United Nations Convention on Contracts for Sale of Goods 1980 and

difficult to predict as a result of these ambiguous concepts.<sup>1</sup>

## Conclusion

This research explained the importance of the CISG and SGA in international commercial transactions. The research also investigated when the parties to a contract are entitled to terminate the contract under the CISG and SGA. It was found that there are only two ways of terminating contracts in the CISG: firstly, if the breaching party commits a fundamental breach and, secondly, if *Nachfrist* is fixed to the party in breach but he/she does not carry out his/her obligations within the period. Moreover, under the SGA contracts can be avoided in two circumstances: firstly, if a condition is breached and, secondly, if an intermediate, which substantially deprives a party of the whole benefit of the contract which the parties to the contract, is breached.

Finally, the advantages and disadvantages of the two legal systems and their position in international commercial transactions were explained. It was found that the SGA seeks certainty and encourages avoidance because it believes that the parties to a contract should unequivocally know their rights and obligations. However, the CISG seeks justice and discourages avoidance because it believes that, in principle, contracts are made to be performed, not to be avoided. Moreover, it is believed that the SGA produces no greater certainty than the CISG, because in its current state English law attempts to favour performance of a contract by the recognition of an intermediate term, which reflects the modernisation of international commercial transactions. In the authors' view, two types of certainty must be taken into consideration: certainty in justice and certainty in knowing the rights and consequence of breaches. The SGA takes certainty in the consequence of breaches into consideration, but the CISG takes certainty in justice into account. Therefore, the researchers prefer certainty in justice, because at the time of the conclusion of a contract neither the seller nor the buyer knows who is going to breach the contract, but they know that whoever breaches it will receive fair treatment. Thus, in the researchers' view, certainty in justice is preferable to having certainty in the consequence of breaches.

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40. *Warinco AG v Samor SPA* [1977] 2 Lloyd's Reports 582.
41. William Gordon, 'The Civil Law in Scotland' (2001) 5 ELR 130.