

THE DANGER OF DOMESTIC PRE- CONCEIVED VIEWS WITH RESPECT TO THE UNIFORM INTERPRETATION OF THE CISG: THE QUESTION OF AVOIDANCE IN THE CASE OF NON-CONFORMING GOODS AND DOCUMENTS

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Professor Schwenzer compares common law notions about a party's ability to avoid a sales contract with the position under article 49 of the Convention on the International Sale of Goods. Having noted that the approach of the CISG has given rise to criticism, she then argues that such criticism is unfounded and that, moreover, the CISG's provisions reflect the reality of international sales practice and case law.

I FRAMEWORK OF DISCUSSION

Article 49(1)(a) of the United Nations Convention on the International Sale of Goods (CISG)¹ provides that avoidance of a contract is possible, and only possible:

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.

According to article 25 of the CISG, a breach is fundamental:

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1 United Nations Convention on Contracts for the International Sale of Goods (11 April 1980) 1489 UNTS 3 (CISG).

if it results in such detriment to the [buyer] as substantially to deprive him of what he is entitled to expect under the contract, unless the [seller] did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Reference to case law shows that the interpretation by national courts of the notion of fundamental breach in cases of non-conforming goods differs considerably even within one single legal system. The topic of today's discussion is concerned with how the systematic approach under article 49 of the CISG, which stands in contrast to domestic legal systems, can nonetheless be used as a true uniform sales law solution regarding the requirements for avoidance of contract due to lack of conformity.

II DOMESTIC LEGAL SYSTEMS

A Continental Legal Systems

There have been great differences of opinion among domestic legal systems concerning the circumstances in which the buyer may avoid the contract in case of any non-conforming tender. In continental legal systems, which were originally based upon Roman sales law principles, in the case of defects in the quality of the goods, the buyer always had the right either to demand reduction of the purchase price (*actio quanti minoris*) or to avoid the contract (*actio redhibitoria*).² However, this has changed with the enactment of modern statutes, such as the German Statute on Modernisation of the Law of Obligations,³ the Scandinavian Sales Laws,⁴ or the Netherlands Wetboek,⁵ which apply the notion of fundamental breach or similar key concepts within the framework for avoidance or cancellation of the contract. The same is true for ongoing projects for the unification of the law, such as the International Institute for the Unification of Private Law (UNIDROIT) Principles,⁶ and the Principles of European Contract Law.⁷

B The Traditional English Approach

In contrast to the "continental" approach, the common law legal systems are based upon different principles. In the United Kingdom, the initial state of the law was that the remedies available for lack of conformity depended on whether the non-conformity could be classified as

breach of a "condition" or breach of a "warranty". The interpretation of these terms require examination of both the statute and case law on this area. Under the Sale of Goods Act 1979 (breach of a condition gives rise to the right to reject the goods and treat the contract as repudiated whereas breach of a warranty can only give rise to a right to claim for damages.⁸ An interesting limitation of these principles is found in the context of acceptance. Under section 11(4) of the Act, once the buyer has accepted the goods, even a breach of a condition will only give rise to a claim in damages. The case law in this area applies yet another interpretation. In *Cehave v Bremer Handelsgesellschaft mbH*,⁹ attention was paid to the vast majority of stipulations that do not fall so neatly into the two categories of warranty and condition, the so-called "innominate terms". The remedy available for breach of an innominate term depends on the seriousness of the effect of the breach. To the extent that the lack of conformity results from breach of an innominate term, where the breach substantially deprives the buyer of the whole benefit of the entire contract, avoidance can be available.

C The New Zealand Legal System and Recent English Developments

The New Zealand approach regarding remedies for lack of conformity is based upon the English system. Under section 13 of the Sale of Goods Act 1908, a buyer will have the right to reject goods if the non-conformity amounts to a breach of a "condition" of the contract, even though the substance of the breach itself may be relatively minor. Under section 54 of the Act, any breach of a "warranty" only gives rise to a claim for damages or mitigation of the price, but grants no right to reject the goods. Therefore, any right the buyer may have to reject for "lack of conformity" depends on whether such lack of conformity is classifiable as a breach of condition or breach of warranty. Under section 13(2) of the Act, such classification will depend on the construction of the contract. A limitation on this is that, as with the United Kingdom system, the acceptance of goods automatically "reduces" the nature of the breach to that of a breach of warranty (section 13(3)). Under the law of the United Kingdom, the legislature has recently, in 1994, gone one step further with section 15A of the Sale of Goods Act 1979 (UK), which states that, with respect to implied conditions, if the buyer does not deal as a consumer, the breach may not be treated as a breach of condition if the breach was so slight that it would be unreasonable for the buyer to reject the goods.

D The United States Legal System

The sales law of the United States was traditionally based upon the idea that the buyer could only avoid the contract if the non-conformity amounted to a fundamental breach, or "substantial impairment".¹⁰ The requirement that the breach be fundamental, however, only applies to accep

2 Compare Germany: former BGB 1900, § 462 (in force until 31 December 2001); France: Code Civil 1804, art 1644; Switzerland: OR 1912, art 205. But see Austria: ABGB 1812, art 932, only giving a right to avoid the contract in cases where repair is not feasible and a proper use is not possible.

3 BGB, § 323 (in force from 1 January 2002).

4 Norwegian Sale of Goods Act 1988, § 39; Finnish Sale of Goods Act 1987, § 39.

5 Burgerlijk Wetboek 1992, art 6.265.

6 UNIDROIT (ed) *Principles of International Commercial Contracts* (Rome, 1994/2004), art 7.3.1.

7 Commission on European Contract Law *Principles of European Contract Law* (Kluwer Law International, The Hague, 1999) art 4.303.

8 Sale of Goods Act 1979 (UK), s 11(3).

9 *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] 1 QB 44 (CA).

10 See definition in the Uniform Commercial Code (UCC), § 2-608(1), § 2-612(3).

goods,¹¹ thus, in uniformity with the United Kingdom and New Zealand approach, making *acceptance* a key notion, which is unknown in the Continental legal systems. Under § 2-601 of the Uniform Commercial Code (UCC), before there has been acceptance, the so-called "perfect tender rule" applies, giving the buyer the right to reject the goods if they do not conform to the contract in any respect. In recent times, however, United States courts have limited the perfect tender rule by applying the good faith principle, especially in cases of a rightful and effective cure by the seller in accordance with § 2-508 of the UCC.¹²

In the course of the most recent revision of the UCC, there was great discussion as to whether the perfect tender rule should be replaced with a requirement that would permit rejection only if a non-conformity "substantially impairs the value of the performance to the buyer".¹³ Ultimately, a majority of the Study Group recommended that the perfect tender rule remain the standard,¹⁴ the general common law concept of "material breach" has not been adopted.

III THE LEGISLATIVE HISTORY OF ARTICLE 49(1)(A) OF THE CISG

Article 49(1)(a) of the CISG. This provision, which is based on article 43 of the Uniform Law on the International Sale of Goods (ULIS), and derives its effect from the notion of fundamental breach. The basic concept of fundamental breach was already present in article 10 of the ULIS and

was not questioned during the preparatory work for the CISG. The function of this concept in the case of tender or delivery of non-conforming goods was to avoid causing these goods to be returned, which would result in considerable economic consequences. Here, the differentiation needed to be made between "non-fundamental" breaches, which merely gave rise to a claim for damages, and fundamental breaches, which in turn entitled the non-breaching party to declare the contract avoided. In light of the requirements of international trade, upon which basis the CISG was drafted, the avoidance of the contract was to be regarded as the "*ultima ratio*" remedy, the remedy of last resort. Not only article 49(1)(a) but also many other provisions confirm that the CISG will allow contract avoidance only under narrow conditions and only as a last resort.¹⁵ If possible, an economically "expensive" cancellation of the sale is to be avoided. Only in cases where the gravity of the breach is unacceptable should the aggrieved party be able to get out of the contract.

Although in drafting of the CISG the concept of fundamental breach itself was unquestioned, the preconditions for the breach being fundamental and the requirements for declaring the contract avoided remained in dispute until the Vienna Conference. Firstly, the issue of whether "fundamentality" was to be interpreted subjectively or objectively was in dispute right from the stage of discussions on ULIS. A further concern was whether the sole decisive factor for determining the "fundamentality" of a breach of contract should be "substantial detriment". Ultimately, it was decided that the seriousness of the breach should be determined by reference to the interests of the promisee, in this case the buyer, as actually laid down and circumscribed by the contract.¹⁶ Concerning the avoidance of the contract, the CISG clearly deviates from ULIS, as *only* in cases of non-delivery does the fixing of an additional period of time "elevate" an otherwise potentially non-fundamental breach to a fundamental one, thus giving the buyer the right to avoid the contract. This right to avoid the contract because of expiry of an additional period can only be

11 In the UCC (US), acceptance is dealt with in § 2-606. Acceptance occurs in three different ways: according to § 2-606(1)(a), the first possibility is that the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods conform or that he will take or retain them in spite of their non-conformity. Pursuant to § 2-606(1)(b) UCC, acceptance also occurs if the buyer fails to make effective rejection after the buyer had a reasonable opportunity to inspect the goods. Finally, acceptance occurs if, according to § 2-606(1)(c) UCC, "the buyer does any act inconsistent with the seller's ownership". Here, the buyer's knowledge and behaviour is decisive. James White and Robert Summers *Uniform Commercial Code* (5 ed, St Paul, Minnesota, 2000) § 8-2.

12 Such a cure can be the delivery of conforming replacement goods, repair or even price adjustments sufficient to compensate the buyer and reduction in the price. See for replacement goods: *TW Oil Inc v Consolidated Edison Co* (1982) 457 NYS 2d 458 (2nd Cir); Louis Del Duca, Egan Guttman and Alphonse Squillante *Problems and Materials on Sales under the Uniform Commercial Code and the Convention on International Sale of Goods* (Anderson, Cincinnati, 1993) 359; John Calamari and Joseph Perillo *Contracts* (3 ed, St Paul, Minnesota, 1988) § 11-20. See for repair: *Wilson v Scampoli* (1967) 228 A 2d 848 (DC Cir). For price adjustments and reduction see James White and Robert Summers, above, n 11, § 8-6; *Oral-X Corp v Farnam Cos Inc* (1991) 931 F 2d 667 (10th Cir).

13 See the unofficial draft of UCC, § 2-501 as of July 1996, which was later deleted as inconsistent with the decision to retain the perfect tender rule, University of Pennsylvania Law School <www.law.upenn.edu> (last accessed 18 June 2005).

14 See UCC Draft 2002 § 2-601; for the whole discussion see William Lawrence "Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller" (1994) 35 Wm & Mary L Rev 1635. See also Henry Gabriel *How International is the Sales Law of the United States* (Centro di studi e ricerche di ditto comparator c straniero, Rom3, 1999) 24 <<http://w3.uniroma1.it/idccentro/publications/34gabriel.pdf>> (last accessed 18 June 2005).

15 See CISG, above n 1, arts 25, 34, 37, 47, 48, 49, 63, 64. See Ulrich Magnus "General Principles of UN-Sales Law" <<http://www.cisg.law.pace.edu>> (last accessed 26 June 2005); B Audit *La Vente Internationale de Marchandises* (Paris 1990) 51; Chassimo Bianca and Michael Bonell *Commentary on the International Sales Law, The 1980 Vienna Sales Convention* (West, Milan, 1987) art 7 note 2.3.2.2; Ernst v Caemmerer "Die Wesentliche Vertragsverletzung im Internationalen Einheitlichen Kaufrecht" in Norbert Horn, Klaus Luig and Alfred Söllner (eds) *Europäisches Rechtsdenken in Geschichte und Gegenwart* (FS Helmut Coing II, Munich, 1982) 32 and following, 50; John Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (3 ed, Deventer, Boston, 1999) note 245.1; Ulrich Magnus in Julius v Staudingers *Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)* (2 ed, Sellier, Saarbrücken, 1999) art 7, note 49; Gabriel, above n 14, 33; *BGH*, 3 April 1996, *CISG-online* no 135 <www.cisg-online.ch> (last accessed 10 October 2005).

16 Compare United Nations Conference on Contracts for the International Sale of Goods (1981) A/CONF 97/19 295 and following, 300; Peter Schlechtriem in Peter Schlechtriem and Ingeborg Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2 ed, Oxford University Press, Oxford, 2005) art 25, para 2.

asserted in cases of non-delivery, and not, as under ULIS, in any other situations of breach, such as the delivery of non-conforming goods.¹⁷

IV INTERACTION BETWEEN DOMESTIC SYSTEMS AND THE CISG

The history of the CISG clearly documents that it contains no equivalent to the original perfect tender rule found in Anglo-American law. The CISG approach is somewhat different in its conception of the buyer's remedial options. Under the CISG, the buyer has no power to "reject" the goods in the sense of "rejection" being the prerequisite for "avoidance". Despite its ambiguous wording, article 86 does not give the buyer an unconditional right to reject any non-conforming tender. Rather, any right to reject must be read in conjunction with the other provisions of the Convention. According to the Convention, the right to reject the goods is limited to certain situations: article 52 of the CISG allows the buyer to refuse to take delivery only if the seller delivers the goods before the date fixed or if the seller delivers a quantity of goods greater than that provided for in the contract. However, such refusal does not pre-empt any right to avoid the contract. Unlike common law legal systems, the CISG does not provide for any causal relationship between "rejection" and "avoidance". There is no requirement that the buyer "reject" the goods; avoidance under the CISG depends solely on the character of the breach involved.

V APPLICATION OF THE CISG TO COMMODITIES

A Critique

The approach of "breach categorisation" as a prerequisite to avoidance under the CISG has prompted criticism from certain legal scholars. In England, where the CISG has not yet been adopted, the view has been expressed that the CISG, whilst plausible for transactions involving goods, could not be applied to transactions involving commodity sales, as the "hair trigger rights of termination ... in a commodity sale"¹⁸ are at odds with the CISG system for determining fundamental breach – including the service of notices and the entitlement to cure.¹⁹

B Response

An analysis of the operation of the CISG with respect to the notions of non-conformity and avoidance demonstrates that this view cannot be supported. The CISG provides a means of solving problems and cases in the area of commodity sales in a uniform and reasonable manner that extends beyond the narrow confines of national pre-conceived views.

17 Markus Müller-Chen in Schlechtriem and Schwenzler, above n 16, art 49, paras 15, 16; Tobias Plate "The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?" (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration* 67.

18 Michael Bridge "Uniformity and Diversity in the Law of International Sales" (2003) 15 *Pace Int'l L Rev*, 55, 68.

19 CISG, above n 1, arts 47(1) and 48(1).

VI INTERPRETATION

A General Remarks

A fundamental breach of contract giving the buyer the right to avoid the contract presumes that the defect has a certain objective importance. Therefore, the lack of conformity must be serious that the buyer cannot be required to retain the goods and could not be adequately compensated by damages or a price reduction. The substantiality of the detriment to the buyer is ascertained by having regard to the express stipulations of the parties, the purpose for which the goods are bought and finally, to the question of whether it is possible to cure the defect.

B Express Stipulations

With regard to express stipulations, it is up to the parties to stipulate what they consider to be the essence of the contract. If the seller then fails to deliver in accordance with the express stipulation given, he cannot argue that he did not foresee any detriment that occurs to the buyer. Consequently, it is not surprising that courts have found a fundamental breach of contract to exist where the defect was made by the seller in derogation from the agreed central features of the goods.²⁰

C Purpose for which Goods are Bought

In the absence of express stipulations, regard should be had to the purpose for which the goods in question were bought. Whether or not the goods actually fulfil this purpose will be relevant in determining whether there is a fundamental breach. This principle is also applied under Zealand sales law in section 16(a) of the Sale of Goods Act 1908, according to which, where a seller makes his purpose for the goods known to the seller, there is an implied condition that the goods shall be reasonably fit for such purpose. Where the buyer wants to use the goods himself, the fact that the goods could be resold, whether at a discount price or not, is irrelevant.²¹ Rather, the decisive factor is whether the goods are totally improper for the use intended by the buyer, to the extent that the buyer is not able to make use of or to process the goods differently without unreasonable expenditure.²² Where, however, the buyer is in the resale business, the issue of potentially being able to "on-sell" the goods becomes relevant. A fundamental breach will exist if the goods cannot

20 *OLG Stuttgart*, 12 March 2001 CISG-online no 841 <www.cisg-online.ch> (last accessed 19 June 2005); *CIETAC (China International Economic and Trade Arbitration Commission)*, 30 October 1991 CISG-online no 842 <www.cisg-online.ch> (last accessed 19 June 2005); *Zivilgericht Basel-Stadt*, 1 March 2001 CISG-online no 729 <www.cisg-online.ch> (last accessed 19 June 2005).

21 *LG München*, 27 February 2002 CISG-online no 654 <www.cisg-online.ch> (last accessed 19 June 2005).

22 *ICC International Court of Arbitration*, 7754 of 1995 CISG-online no 843 <www.cisg-online.ch> (last accessed 19 June 2005); *OLG Stuttgart*, 12 March 2001 CISG-online no 841 <www.cisg-online.ch> (last accessed 19 June 2005). But see *LG München*, 27 February 2002 CISG-online no 654 <www.cisg-online.ch> (last accessed 19 June 2005). Globes still could be used for advertising even though they are not able to rotate.

resold at all, for example food not complying with national health regulations.²³ In other cases, the question is whether resale of non-conforming goods can reasonably be expected from the individual buyer in his normal course of business. A wholesaler with broader access to markets in the business concerned has more opportunities to resell the goods than a retailer. A retailer cannot be expected to resell the goods at a discount price if, by doing so, he would be likely to damage his own reputation.²⁴ In determining the likelihood of this, regard is to be had to the retailer's specific target group of customers.²⁵

D Seller's Possibility to Cure

An important limitation on avoidance under the CISG is the seller's possibility to cure. Though the objective essential nature of the defect is always a necessary condition to establish a fundamental breach of contract, it will not always be sufficient. In cases where cure by the seller – for example by repairing the goods²⁶ or delivering substitute or missing goods²⁷ – is still possible without causing unreasonable delay or inconvenience to the buyer, there is not yet a fundamental breach, or rather, the buyer may not yet avoid the contract even though the breach otherwise appears to be fundamental.²⁸ Here, due regard is to be given to the purposes for which the buyer needs the goods. If timely delivery is of the essence of the contract, repair or replacement by the seller will usually lead to unreasonable delay within the meaning of article 48(1) of the CISG.²⁹ Furthermore,

the buyer should not be expected to accept cure by the seller if the basis of trust for the contract has been destroyed, for example, due to the seller's deceitful behaviour. When the seller either refuses to cure the defect, simply fails to react, or if the defect cannot be cured by a reasonable number of attempts within a reasonable time, then a fundamental breach will also be deemed to have occurred.

E Documents and "Avoidance"

With respect to international sales contracts involving documents, special uniform rules and trade usages have been established by the International Chamber of Commerce. The Incoterms 2000³⁰ contain detailed rules governing the obligations of the seller to provide for documents, and the buyer to accept them,³² respectively, whereas the Uniform Customs and Practice for Documentary Credits of the ICC (UCP 500)³³ lay down special rules for cases where payments are made by means of documentary credit, including standby letters of credit. Both sets of rules are widely incorporated into international sales contracts, either by express reference or – according to the prevailing view, especially in court decisions³⁴ – as a usage in international trade with the meaning of article 9(2) of the CISG.

In international sales contracts involving documents, a distinction needs to be made at the outset between three different situations: First, there are various documents that usually accompany

23 *LG Ellwangen*, 21 August 1995 CISG-online no 279 <www.cisg-online> (last accessed 19 June 2005); *ICC International Court of Arbitration*, 8128 of 1995 CISG-online no 526 <www.cisg-online.ch> (last accessed 19 June 2005); *Zivilgericht Basel-Stadt*, 1 March 2002 CISG-online no 729 <www.cisg-online.ch> (last accessed 19 June 2005). But see *LG Darmstadt*, 22 December 1992 CISG-online no 177 <www.cisg-online.ch> (last accessed 19 June 2005), affirmed by *BGH*, 8 March 1995 CISG-online no 144 <www.cisg-online.ch> (last accessed 19 June 2005). Mussels were still good for consumption because there was no health risk.

24 See *LG Landshut*, 5 April 1995 CISG-online no 193 <www.cisg-online.ch> (last accessed 19 June 2005), clothes; *Hans OLG Hamburg*, 26 November 1999 CISG-online no 515 <www.cisg-online.ch> (last accessed 19 June 2005), jeans; *OLG Köln*, 14 October 2002 CISG-online no 709 <www.cisg-online.ch> (last accessed 19 June 2005), designer clothes. See also *LG Oldenburg*, 6 July 1994 CISG-online no 274 <www.cisg-online.ch> (last accessed 19 June 2005), partly revising, but not regarding the arguments to article 25 CISG, *OLG Koblenz*, 1 February 1995 CISG-online no 253 <www.cisg-online.ch> (last accessed 19 June 2005). A limited circle of interested sub-buyers would only buy the goods at a discount of 50 per cent.

25 *OLG Köln*, 14 October 2002 CISG-online no 709 <www.cisg-online.ch> (last accessed 19 June 2005). Buyers of designer clothes have higher standards.

26 *Handelsgericht des Kantons Aargau*, 5 November 2002 CISG-online no 715 <www.cisg-online.ch> (last accessed 19 June 2005).

27 *LG Köln*, 16 November 1995 CISG-online no 265 <www.cisg-online.ch> (last accessed 19 June 2005).

28 Honnold, above n 15, 327-332.

29 All Incoterms 2000 clauses (International Chamber of Commerce *Incoterms 2000* (ICC Books Worldwide, SA, 2000)), in A4 call for delivery "on the date or within the period agreed for delivery". One German court, *OLG Hamburg*, 28 February 1997 (CISG-online no 261 <www.cisg-online.ch> (last accessed 19 June 2005)), has argued that a CIF contract has to be understood as a fixed term contract. But see *International Court of Arbitration*, 7645 of 1995 CISG-online no 844 <www.cisg-online.ch> (last accessed 19 June 2005), the Incoterms clauses CFR do not, however, specify that staying within the time limit is an obligation of especially essential importance.

30 *Incoterms 2000*, above n 29.

31 *Incoterms 2000*, above n 29, A8 of the respective clauses.

32 *Incoterms 2000*, above n 29, B8 of the respective clauses.

33 International Chamber of Commerce *Uniform Customs and Practice for Documentary Credits (UCP)* (ICC Books Worldwide, SA, 1994).

34 For UCP 500, above n 33 see Wolfgang Witz in Wolfgang Witz, Hans-Christian Salger and Manuel L. (eds) *International Einheitliches Kaufrecht* (Heidelberg, 2000) art 60 para 13, art 54 para 3, Incoterms 2000 Wolfgang Witz, above, art 9 para 14; *Marc Rich & Co AG v Iritecna SpA*, CISG-online no 315 <www.cisg-online.ch> (last accessed 19 June 2005); *Elastar Sacifia v Bettcher Industries, Inc*, CISG-online no 615 <www.cisg-online.ch> (last accessed 19 June 2005); *St Paul Ins 'Co v Neuromed Med Sys*, CISG-online no 615 <www.cisg-online.ch> (last accessed 19 June 2005); *BP International Ltd and BP Exploration & Production Inc, Plaintiffs-Appellants v Empresa Estatal Petroleos de Ecuador, et al, Defendants, Empresa Estatal Petroleos de Ecuador and Saybolt, Inc, Defendants-Appellees*, CISG-online no 730 <www.cisg-online.ch> (last accessed 19 June 2005). More differentiated: Michael Bridge *The International Sale of Goods* (Oxford: Oxford University Press, 1999) 2.48, 2.49; Martin Schmidt-Kessel in Schlechtriem and Schwenzler, at n 15, art 9 para 26.

contract of sale, such as insurance policies, certificates of origin, certificates of inspections, customs clearance certificates and so forth. Secondly, a contract of sale can require delivery by the handing over of documents of title, such as bills of lading, dock warrants, warehouse receipts or their respective electronic equivalents. Finally, one has to consider the special situation of payment by documentary credit including letter of credit.

1 *Accompanying documents*

In the case of accompanying documents, the question of whether the buyer may avoid the contract if those documents are missing or are insufficient must be decided by resorting to the general mechanisms of the Convention already established for determining a fundamental breach.³⁵ If the documents are delivered but do not conform to the contract description, this is to be treated like a defect in quality. Thus, initially, what is decisive is whether the defective documents limit the buyer in reselling the goods or using them according to its plans. If they do not, a fundamental breach can never be assumed. If the documents do limit the buyer in reselling the goods, the seriousness of the defect depends upon whether the buyer can still use the goods in a reasonable way even with unclean documents, or – if not – whether it can easily acquire clean documents independently.³⁶ The case of missing accompanying documents is to be treated like a defect in quantity and not as an equivalent to non-delivery of the goods. That means that also in this case, a fundamental breach of contract has to be established on the individual facts of the case, thus enabling the buyer to avoid the contract only in accordance with article 49(1)(a) of the CISG; article 49(1)(b) is not applicable.

2 *Documentary sales*

Nowadays, the vast majority of international sales contracts incorporate the Incoterms of the International Chamber of Commerce. They have become a usage in international trade within the meaning of article 9(2) of the CISG,³⁷ thereby complementing the rules of the Convention. Except

35 See *BGH*, 3 April 1996 CISG-online no 135 <www.cisg-online.ch> (last accessed 19 June 2005).

36 For example *BGH*, 3 April 1996 CISG-online no 135 <www.cisg-online.ch> (last accessed 19 June 2005). In this case, seller provided for a non-conforming certificate of origin and a non-conforming certificate of analysis. The court held that the seller could easily get a new certificate of origin from the local Chamber of Commerce and that the certificate made by buyer's expert was a valid new certificate of analysis.

37 See *UCP*, above n 33; Wolfgang Witz, above n 34, art 60, para 13, art 54 para 3, for Incoterms, above n 29, see art 9 para 14; *Marc Rich & Co AG v Iritecna SpA*. CISG-online no 315 <www.cisg-online.ch> (last accessed 19 June 2005); *Elastar Sacifia v Bettcher Industries, Inc* CISG-online no 461 <www.cisg-online.ch> (last accessed 19 June 2005); *St Paul Ins Co v Neuromed Med Sys* CISG-online 615 <www.cisg-online.ch> (last accessed 19 June 2005); *BP International, Ltd and BP Exploration & Oil, Inc, Plaintiffs-Appellants v Empresa Estatal Petroleos de Ecuador, et al, Defendants, Empresa Estatal Petroleos de Ecuador and Saybolt, Inc, Defendants-Appellees* CISG-online no 730 <www.cisg-online.ch> (last accessed 19 June 2005). More differentiated: Bridge, above n 34, 2.48 and 2.49; Schmidt-Kessel in Schlechtriem and Schwenzler, above n 16, art 9 para 26.

for EXW, all Incoterms 2000 clauses contain the seller's obligation to deliver certified title.³⁸ Thus, in turn, all such contracts can be referred to as documentary sales contracts.

According to article 1(1) of the CISG, the Convention applies to contracts of sale of goods. However, there cannot be any doubt that documentary sales of goods are covered by the Convention as well, "though in some legal systems such sales may be characterized as sale of paper".³⁹ This even holds true for so-called "string transactions", when documents are transferred several times until the final purchaser takes physical delivery of the goods.

In documentary sales contracts, the tender of clean documents is of the essence. Thus, B8 of all Incoterms 2000 clauses (except for EXW) provides that the buyer's tender of transport document and/or other evidence of delivery in accordance with the seller's tender implies the buyer's right to reject any tender of non-conforming documents irrespective of actual conformity or non-conformity with the contract.

However, the seller may cure any lack of conformity in the documents. If, for example, the bill of lading is "unclean" because it refers to damage to the goods or their packaging, the seller may tender a new bill of lading relating to other goods, which does not contain such a reference. If the bill of lading indicates a late loading date, the seller may subsequently purchase the goods which were loaded on time and tender to the buyer the bill of lading issued on time. According to the second sentence of article 34 of the CISG, this is possible without restriction if the seller handed over the "unclean" documents before the time for tender. After this date, cure is only possible under the prerequisites of article 48 of the CISG. That means that the seller may only remedy the failure if he can do so without unreasonably prejudice to the buyer. Special regard is to be had to the stipulations of the contract and the circumstances of the case that may make timely performance of central importance.⁴¹

3 *Documentary credits*

In the majority of international sales contracts, the parties stipulate that the purchase price is to be paid by means of documentary credit or standby letter of credit.⁴² In this case,

38 See *Incoterms 2000*, above n 29, A8 of the respective clauses.

39 See Secretariat Commentary in United Nations Conference on Contracts for the International Sale of Goods, above n 16, art 2 para 8.

40 See the thorough discussion of this question in Peter Schlechtriem "Interpretation, Gap-Filling and Development of the UN Sales Convention" <<http://www.cisg-online.ch>> (last accessed 19 June 2005), footnotes 15-24.

41 For commodities see Part VI Interpretation.

42 Rolf Schütze *Das Dokumentenakkreditiv im Internationalen Handelsverkehr* (5 ed, Heine Verlag, 2004). See also ICC Homepage <<http://www.iccwbo.org>> (last accessed 19 June 2005).

usually apply, either by express reference or as an international trade usage,⁴³ within the meaning of article 9(2) of the CISG. Even if the UCP 500, as such, are not considered to be international trade usages, they at least offer some useful guidelines as to what reasonable parties would regard to be a fundamental breach of contract within the context of the CISG.

If the contract provides for payment by documentary credit, this implies that the documents have to be "clean" in every respect. Otherwise, the buyer has the right to avoid the contract.⁴⁴ This necessity of strict compliance of documents can be derived directly from article 13(a) of the UCP 500. Article 20 and following of the UCP 500 set out, in detail, the circumstances under which documents are to be accepted as clean, or may be rejected.

4 Commodity trade

With regard to commodities, special standards have to be applied in determining whether there is a fundamental breach. In the commodity market, string transactions prevail and prices are subject to considerable fluctuations.⁴⁵ Therefore, timely delivery by the handing over of clean documents – that can be resold in the normal course of business – is always of the essence of the contract.⁴⁶ If the parties do not stipulate this importance by respective clauses, this can be derived from the circumstances by an interpretation of the contract pursuant to article 8(2) and (3) of the CISG.⁴⁷ As a result, in practice, possibility for the seller to cure any defect in the documents according to article 48(1) of the CISG does not exist in the commodity trade.⁴⁸ Thus, in this specific trade branch, the

43 See for a list of countries that have acknowledged collectively and banks in further countries which also have acknowledged them: Schütze, above n 42, appendix V 341.

44 See also UNIDROIT Principles 2004, above n 6, art 7.3.1, 3b.

45 See for agricultural products Wilfried Fuhrmann and Ricardo Giucci "Warenterminbörsen in Deutschland" (Working Paper 9603, 2a Universität Potsdam) <<http://www.uni-potsdam.de>> (last accessed on 19 June 2005). For iron molybdenum see *OLG Hamburg*, 28 February 1997 CISG-online no 261 <www.cisg-online.ch> (last accessed 19 June 2005): price was 9.70 US \$/kg and changed to 30 US \$/kg. For commodity prices in general, see Klaus Matthies and Hans-Joachim Timm "World Commodity Prices 1999-2000" (Association d'Instituts Européens de Conjoncture Economique - Working Group on Commodity Prices, 1999) Hamburg Institute of International Economics <<http://www.hwwa.de>> (last accessed 19 June 2005).

46 Compare UNIDROIT Principles 2004, above n 6, art 7.3.1, Official Comment; Michael Bridge *The Sale of Goods* (Oxford University Press, Oxford, 1997) 155; Jill Poole *Textbook on Contract Law* (7 ed, Oxford University Press, Oxford, 2004) para 7.5.3.2; Peter Schlechtriem "Interpretation, Gap-filling and Further Development of the UN Sales Convention" above n 41, I.1; Alastair Mullis "Termination for Breach of Contract in CIF Contracts Under the Vienna Convention and English Law: Is there a Substantial Difference?" in Eva Lommicka and C G (Robin) Morse (eds) *Contemporary Issues in Commercial Law: Essays in Honor of Prof AG Guest* (Sweet & Maxwell, London, 1997) 137-160, online available <www.cisg.law.pace.edu> (last accessed 29 September 2005).

47 Schlechtriem, above n 40, I.1.

48 Schlechtriem, above n 40, 4.

solution under the CISG is quite similar to that under the perfect tender rule in contract law in other jurisdictions.⁴⁹

VII FINAL REMARKS: THE CISG AS AN EFFECTIVE SOLUTION

The concept underlying the CISG of the essential nature of a breach being the decisive factor for the continuing existence of a contract provides an effective system of remedies at both national and international level. The CISG concept of avoidance receives support not only due to its role in upholding the contract, whereby cancellation should only be a remedy of last resort, but also as a reflection of real business practice and the case law on the area. Importantly, as shown in the discussion today, the CISG, used in conjunction with the INCOTERMS and the UCP 500, provides a workable solution for the scope of issues and potential problems in the area of commercial documentary sales law. Rather than working against the pressures of time and efficiency in such transactions, the CISG instead plays a supplementary role. Consequently, the fears about the use of the CISG in documentary and commodity sales have proven to be unjustified and can be laid to rest. In this way, despite the continuing presence of pre-conceived domestic law, the CISG will define its position as *the* true international sales law instrument, which may be as palatable to the United Kingdom – one day!

49 Schlechtriem, above n 40, II.