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NON-CONFORMITY AS FUNDAMENTAL BREACH BY THE SELLER UNDER THE CISG

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ABSTRACT

The case law has shown that the CISG rules regarding fundamental breach of the contract in the case of non-conformity of the goods or the documents are interpreted and applied inconsistently among courts. The reason for that is attributed to Article 25 which sets the basic “fundamental breach test” in vague and indefinite terms. Moreover, the CISG high standards for fundamental breach have been criticized as being unsuitable for international documentary sales and commodity trade.

This thesis shall discuss the importance of the foregoing issues. It shall be aimed at providing guiding criteria for the uniform application of the CISG rules to the question whether a particular non-conformity amounts to fundamental breach of the contract. The paper shall demonstrate that despite the generally high threshold for fundamental breach, the Convention may and should be read so as to respond to the particular needs of documentary and commodity trade transactions.

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1. INTRODUCTION

Alongside with the international trade becoming increasingly intensive over the last years, the United Nation Convention on Contracts for the International Sale of Goods (hereinafter the “**Vienna Convention**” or the “**Convention**” or the “**CISG**”) is becoming more and more important. With its, to date, 71 Contracting States, the CISG has become predominant instrument governing the international sales law. Providing a set of uniform substantive rules for the international sale of goods, the Convention eases negotiation and increases efficiency in international sales business.¹ It improves the legal certainty for the parties with regard to the law governing their contract of sale and puts them on equal footing with regard to the familiarity with the applicable rules. In the words of one of the leading CISG scholars, John O. Honnold, the purpose of the Vienna Convention is *to free international commerce from a Babel of diverse domestic legal systems*.²

One of the most frequent problems in international sale disputes and one of the very central concepts in the Convention is that of (non-)conformity. Under the CISG, the seller is liable for every kind of lack of conformity. However, every kind of defect will not have the same significance in terms of remedies available to the buyer. The major distinction in the Convention’s regime is between the non-conformity, which amounts to a fundamental breach of the contract and the non-conformity, which is a breach of contract but a non-fundamental one. Only the non-conformity that represents a fundamental breach of contract entitles the buyer to resort to powerful remedies – the avoidance of contract and the claim of substitute delivery. Otherwise, the buyer is left with the claim for damages and/or demand for price reduction.

¹ It is laid down in the preamble of the CISG that “[...] the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade’.

² Honnold, *Documentary History of the Uniform Law for International Sales*, Kluwer 1989, at 1.

The notion of fundamental breach is a milestone in the Convention's system of remedies. Only the fundamental breach of contract gives the party power to put the contract to an end, i.e. to avoid the contract. The definition of fundamental breach is given by Article 25 CISG. However, the named article is drafted in general and indefinite terms and does not deal with particular instances of fundamental breach, i.e. fundamental breach due to non-conformity. Therefore, it leaves much room for the interpretation in practice.

In the case of non-conformity, the avoidance of contract or the delivery of substitute goods in international trade, which often involves large quantities of goods and transport on a long distance, implies additional costs and a risk for the goods which would have to be stored and sent back to the seller. For these harsh consequences, it is rightfully held by the doctrine and some courts that these remedies, and especially the avoidance of contract, are the remedies of last resort or *ultima ratio*. The avoidance of the contract should be only allowed when the aggrieved party can no longer be reasonably expected to be bound by the contract and be satisfied with the claim for damages. Consequently, "concept of *ultima ratio* remedies" interacts with the notion of fundamental breach raising the threshold considerably.

However, the reference to case law shows that the interpretation of fundamental breach varies considerably between courts of different states or arbitration tribunals; it sometimes differs even within one single legal system.³ The courts are colored by the views stemming from their domestic legal background, which endangers the very purpose of having the uniform law. The ultimate goal is a uniform interpretation and application of the uniform rules. Otherwise, if different national courts apply the CISG rules in different ways, a uniform law will not exist any more. Thus, when applying the Convention, the courts have to

³ CISG-AC Opinion No 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M, professor of Private Law, University of Basel, 1.3.

dissociate themselves from the legal approach of their own domestic law and apply the CISG autonomously.⁴

Another problem arises with respect to the non-conformity of documents in documentary sales and commodity trade. The Vienna Convention, particularly its demanding and indeterminate fundamental breach test offered by Article 25, is criticized as being unsuitable for these kinds of trade, where the principle of “strict compliance” and prompt remedies hold sway. These are the reasons given for exclusion of the CISG application in most of the commodity trade contracts.⁵ However, are these critiques justifiable? Is it possible to read the Convention flexibly enough to respond to the needs of documentary sale and commodity trade?

The question of the non-conformity of goods and documents which amounts to fundamental breach under the CISG has been dealt with by the CISG Advisory Council⁶ in its Opinion No 5.⁷ The matter has also been separately examined by the rapporteur of the said opinion, Professor Dr. Ingeborg Schwenzer⁸ and by Professor Dr. h.c. Peter Schlechtriem⁹.

⁴ Article 7(1) CISG sets the guidance for the interpretation of the Convention:” (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

⁵ Michael Bridge, “Uniformity and Diversity in the Law of International Sale”, 15 *Pace International Law Review* 55, 69 (Spring 2003), available at: <http://www.cisg.law.pace.edu/cisg/biblio/bridge.html>; Roy Goode, *Commercial Law* (3rd ed., Penguin books 2004), 915; Alastair Mullis, *Avoidance for Breach under the Vienna Convention: A Critical Analysis of the Early Cases*, in Andreas & Jarborg eds., *Anglo-Swedish Studies in Law*, Lustus Forlag (1998) 326 et seq., available at: <http://www.cisg.law.pace.edu/cisg/biblio/mullis1.html>.

⁶ CISG Advisory Council has been established in 2001 as a private initiative to respond to the need of promotion and assistance in the uniform interpretation of the CISG, particularly with respect to some controversial and unresolved issues arising out of the Convention. It is composed of prominent CISG’s scholars. In its work, the Council is guided by the mandate of Article 7: in interpretation of the Convention, the paramount regard is to be given to international character of the Convention and the need to promote uniformity.

⁷ see supra note 3.

⁸ Schwenzer, *The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: the Question of Avoidance in the Case of Non-Conforming Goods and Documents*, *Victoria University of Wellington Law Review* (2005/4), 795-807, available at: <http://cisgw3.law.pace.edu/cisg/biblio/schwenzer.html>;

⁹ Schlechtriem, *Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods*, 18 *Pace International Law Review*, Issue No.1 (Spring 2006), available at: <http://www.cisg-online.ch/cisg/Schlechtriem-PaceInt’lLRev.pdf>; Schlechtriem, *Interpretation, gap-filling and further development of the UN Sales Convention*, paras I and II.5.c. available at: <http://www.cisg-online.ch/cisg/publications.html>.

Other leading scholars on the Vienna Convention in their commentaries inevitably have touched upon this subject and related issues.

For the reasons of importance of the issue of non-conformity being a fundamental breach of contract, the inconsistencies still present in its application in practice and abovementioned critiques referring to suitability of the CISG rules to the non-conforming documents in international trade, this thesis shall serve as the opportunity to discuss above raised issues.

The main goal of this study is to give a systematic solution for the uniform application of the CISG rules on fundamental breach in case of non-conformity of goods and documents by providing and analyzing guiding criteria relating to the relevant provisions. The thesis shall demonstrate that despite the broad and indefinite language of the relevant provisions, the CISG can be used as a true uniform sales law instrument. It shall show that, notwithstanding the generally high threshold standards for fundamental breach, the Convention offers suitable solutions for the documentary sale and commodity trade in this respect.

The subject matter of this thesis implies interaction among three important issues: concept of (non-)conformity, particular instance of fundamental breach due to the non-conformity and remedies available to the buyer as consequence of that. Therefore, the thesis shall be composed of three chapters, one devoted to each of these interrelated issues. In the first chapter an introduction shall be given to the concept of non-conformity employed by the CISG. Then, the criteria for evaluating the (non-)conformity shall be briefly examined. Finally, the circumstances in which the buyer loses the possibility to rely on lack of conformity shall be tackled. The focus of the second chapter shall be the central question of this thesis – which lack of conformity amounts to fundamental breach of the contract? It shall be addressed here whether the objective seriousness of defect is enough for the breach to be

fundamental. This chapter shall then set down and examine guiding criteria for assessing “fundamentality” of the defects: contract terms, purpose for which the goods are bought and the seller’s possibility to remedy defect. An important part of this chapter shall be devoted to the question of non-conforming documents in international trade. The third chapter shall deal with the consequences arising out of non-conformity amounting to fundamental breach of contract: the buyer’s right to avoid the contract, the right to demand delivery of substitute goods and the effect on the rules of passage of risk.

This study shall be carried out by the way of interpretation of the rules and principles underlying the Convention, analysis of the relevant case law and reference to significant scholarly writings. On important points, the thesis shall draw a comparison between the relevant CISG rules and the solutions of some predominant domestic legal systems in order to highlight differences and promote the autonomous and uniform application of the Convention.

2. CONCEPT OF NON-CONFORMITY

“Most sales controversies grow out of disputes over whether the goods conform to the contract.”¹⁰ This citation clearly demonstrates that one of the most relevant and frequent issues in the sales litigation is that of the (non-)conformity. According to the Convention and like under all national laws, it is the seller’s obligation to deliver the goods conforming to the contract. However, whereas the domestic legal systems address the issue of non-conformity in different ways, the CISG, as a uniform international sales law instrument, adopts uniform concept of conformity. The buyer has only one ground to sue the seller relying on non-conformity – Article 35 of the Convention.

In this chapter, an introduction will first be given to the concept of (non-)conformity under the Vienna Convention and brief comparison will be drawn between this concept and those employed by different domestic legal systems. Then, the criteria for determining the conformity under the Convention will be examined; primary test for the evaluation is laid down by the parties’ contract itself and subsidiary criteria are provided by the Convention. In the end of this chapter, the paper will touch upon the circumstances when the buyer loses the right to rely on the lack of conformity.

2.1. CISG v. different domestic legal solutions

The CISG defines the seller’s obligation with regard to the conformity of the goods in Article 35. Herein, the Convention adopts the uniform notion of (non-)conformity avoiding diversities among different national rules. This concept of non-conformity pursuant to Article 35 includes not only discrepancies in quality, but also discrepancies in quantity, delivery of an *aliud* and defects in packaging. It does not make distinction, familiar as under the Swiss law,

¹⁰ J. Honnold, *Unifrom Law for International Sales under the 1980 United nations Convention*, Kluwer Law and taxation Publishers, 2nd ed., Kluwer 1991, § 222 (hereinafter the “**Honnold**”).

between the ordinary characteristics of goods and specific warranty that particular characteristics exist, nor as under the Austrian law between *peius* and *aliud*, nor between an *aliud* capable of being approved by the buyer and one which is not. Moreover, Article 35 does not ascribe any significance to distinction made under the French and some other laws between *vice caché* and *vice apparent*.¹¹ Furthermore, the uniform concept of (non-)conformity under the CISG differs also from the common law systems. Likewise, the CISG does not expressly recognize difference between express and implied warranties used under the American law, nor between condition and warranties as used under the English law.¹² Instead of all these distinctions, Article 35 implies the unitary concept of breach of contract. The major distinction underlying the CISG is now between the fundamental breach and non-fundamental breach.¹³

Unlike some national statutes and its predecessor, the Art 33 ULIS, in the CISG clear distinction has been made between the non-performance and defective performance. Under Article 35, if the seller has handed or has placed the goods at the buyer's disposal, he has "delivered the goods" even though the goods do not conform in respect of quantity or quality. The fact that the goods have been "delivered" does not effect the buyer's remedies for their non-conformity.¹⁴

¹¹ In the ICC Court of Arbitration award, 26 March 1993, case no. 6653 of 1993, it was explicitly held that both of these French terms are covered by the Article 35 CISG.

¹² Schwenzer in Schlechtriem, P. & Schwenzer, I. (eds), *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed., Oxford 2005, (hereinafter "**Schlechtriem/Schwenzer**") at 411-412; Bianca in Bianca, C.M. & Bonell, M.J. (eds), *Commentary on the International Sales Law*, Giuffrè: Milan 1987 (hereinafter "**Bianca/Bonell**"), at 270; S.A. Kruisinga, (Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: a uniform concept?, Intersentia 2004, at 26-28.

¹³ Bianca in Bianca/Bonell, 270.

¹⁴ *Commentary on the Draft Convention on Contracts for the international Sale of Goods prepared by the U.N. Secretariat*, UN DOC. A/CONF. 97/5, (hereinafter "**Secretariat Commentary**") Official Records, 32, available at: <http://www.cisg-online.ch/cisg/materials-commentary.html>.

Remarkably, under the CISG, it is generally irrelevant whether there is any fault on the side of the seller, or whether he knew of the lack of conformity.¹⁵ The Convention dispenses with a system of liability based on fault.¹⁶ Therefore, the mere fact that the goods are non-conforming to the contracts is in general enough for the buyer to submit the claim.

2.2. Primary test: contract requirements

According to Article 35 (1), the goods delivered must in the first place conform to the contract. The parties' contract is overriding source for the standard of conformity, thus, the goods must conform to the quantity, quality and description required by the contract and must be contained or packaged in the manner required by the contract.¹⁷ What characteristics are agreed upon between the parties is a matter of interpreting the contract. These requirements may be expressly or impliedly determined.¹⁸ The implied agreement on contractual requirements is likely to occur where the reference is made to particular industry terms.¹⁹ However, such a reference will have to be explicit. Specific requirement to conformity may also be deduced by usages applicable to the contract according to Article 9.²⁰

With this respect, it should be noted that the written contract does not necessarily mean the complete agreement between the parties and some express oral exchanges during the negotiations between the parties may influence what is legitimate for the buyer to expect with regard to quality of the goods. Taking into account Article 11 of the CISG which states that a

¹⁵ Lookofsky, J., The 1980 United Nations Convention on Contracts for the International Sale of Goods, in International Encyclopaedia of Laws - Contracts, (Blanpain, gen. ed., The Hague, 2000), 1, at 94, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/loo35.html>; S.A. Kruisinga, *supra* note 12, at 25.

¹⁶ Tallon in Bianca/Bonell, 573.

¹⁷ Secretariat Commentary, Official Records, 32.

¹⁸ Hyland, Conformity of Goods to the Contract Under the United Nations Sales Convention and Uniform Commercial Code, 305, at 308-309, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/hyland1.html>; S.A. Kruisinga, *supra* note 12, at 30;

¹⁹ Schwenzer in Schlechtriem, Schwenzer, p.413:

²⁰ Enderlein/Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: commentary, New York, Oceana Publications (1992), at 85, (hereinafter "**Enderlein/Maskow**"); Bianca in Bianca/Bonell, 272; Enderlein, Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods, in International Sale of Goods: Dubrovnik Lectures, Sarcevic/Volken (ed.), Oceana (1986), 133, at 137;

contract of sale may be proved by any means, and the language of Article 8(3) requiring that in order to determine the intent of a party, “due consideration is to be given to all relevant circumstances of the case including the negotiation”, common law “parol evidence rule” is inapplicable to the CISG contracts.²¹ However this does not in any way mean that every pre-contractual statement will be given contractual effect. Also, the CISG does not provide for the distinction between description of the quality and promised characteristics, as e.g. under the American law, because Article 8 does not provide for distinction between different types of statements.²²

2.3. Subsidiary test: Convention criteria

In case the parties’ contract does not provide for the conformity criteria or when they are not sufficient, Article 35(2) sets out the four determinative objective standards.

The first standard states that the goods must be fit for the ordinary use. Even though the goods are often bought without any indication as to the intended use, they are always purchased with some purpose in mind – raw materials are bought for processing; machinery is bought for use in production, commodities are bought for resale and use.²³ Buyer is entitled to expect reasonable use-value for its money and, absent to contrary intent, at least fitness for ordinary purpose.²⁴ This requirement also covers the goods which are bought for resale.²⁵ Goods are unfit for the ordinary use when they lack proper ordinary characteristics, when they have defects which impede their material use, or when the defects, though not affecting the

²¹ CISG-AC Opinion No.3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA, *available at*: http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_3.pdf; Bernstein/Lookofsky, Understanding the CISG in Europe: a compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, The Hague: Kluwer Law International 1997, at 54-55; Honnold, 170-171.

²² Honnold, 224.

²³ Honnold, 304.

²⁴ Bernstein/Lookofsky, *supra* note 21, at 59.

²⁵ Secretariat Commentary, Official Records, 32; S.A. Kruisinga, *supra* note 12, at 30.

material use, considerably lessen their trade value.²⁶ Since the goods can be more or less fit for the ordinary use the seller is obliged to deliver the goods of average fitness. However, this standard is neither to be identified with the standard of “average quality”, which is the standard adopted for the quality of generic goods under some civil law systems (e.g. German, Austrian, French and Swiss law), nor with the common law expression of “merchantability”.²⁷ Reasonable duration of the goods sold should be included among the ordinary qualities of the goods. As to that, professor Bianca says that buyer *may expect the goods to last for a normal time. Goods can not be said to be fit for their normal purposes (...) when they endure only for an exceptionally short time.*²⁸

As to the question of whose country’s standards – that of the seller or that of the buyer - are relevant for the goods to be fit for the ordinary use, the following is held in the case law and doctrine. If there is an international usage with regard to the particular characteristics, those have to be considered as minimum characteristics.²⁹ Further, the standards which apply in both, the buyer’s and the seller’s state, must be complied with, unless less stringent requirements apply in the state in which the goods will be used, and it can be discerned from the circumstances (e.g. the price of the goods) that the parties envisaged only that less stringent standard applies. Otherwise, no general rule can be laid down and regard is to be made to the circumstances of the specific case.³⁰

In addition, there are special rules for the compliance of goods with the public law requirements in the buyer’s country. In case such requirements are not required on the basis of

²⁶ Bianca in Bianca/Bonell, 274;

²⁷ Bernstein/Lookofsky, *supra* note 21, at 59; Bianca in Bianca/Bonell, 281; See also Netherlands Arbitration Institution Case No. 2319, 15 October 2002, CISG-online 740/780, where the tribunal held that neither the merchantability test nor the average quality test are to be used in CISG cases and that reasonable standard is to be preferred.

²⁸ Bianca in Bianca/Bonell, 289;

²⁹ Oberlandesgericht, 27 Februar 2003, CISG-online 794.

³⁰ Schwenzer in Schlechtriem/Schwenzer, 419;

ordinary commercial usage or do not apply in both seller's and buyer's country,³¹ the seller cannot generally be required to have knowledge of such a particular requirements in the buyer's state or the state in which the goods will be used. The sole fact that the buyer indicates the country of destination is not enough. In order to infer such an obligation on the seller, the buyer has to ascertain the special public law provisions and to make them part of the contract either under Article 35 (1) or under the Article 35 (2)(b). Otherwise, the seller may only be bound by such requirements when he is already aware of them on account of previous business relationship with the buyer, or because he regularly exports goods to respective country or because he has a branch office in such a state.³²

According to the second criteria enshrined in the Article 35(2)(b), if the buyer expressly or impliedly makes known to the seller particular purpose for which the goods are intended, the seller must deliver such goods fit for that purpose. Such obligation arises for the seller if that particular purpose is made known to him by the time of the conclusion of the contract and if the buyer relies on his skill and judgment and such reliance is reasonable. Expression "made known" does not imply that the special purpose has to be part of the contract. Rather, it is sufficient that a reasonable seller could have recognized the particular purpose from the circumstances.³³ As for the buyer reliance on the seller's skill and judgment, it is to be determined on case by case basis. In general, there will be such reliance if the seller is an expert in the manufacture or sale of goods for the respective particular purpose. On the

³¹ Cour de Cassation, 23 January 1996, CISG-online 159, the case concerned the sale of wine; seller delivered the wine which was "chaptalisé", which means that the sugar was added to the grapes before the beginning of the alcoholic fermentation. Since in both seller's (Italia) and the buyer's country (France) it was forbidden to sell such a wine for consumption, it was held that the seller has breached the contract.

³² Schwenzer in Schlechtriem/Schwenzer, 420; Binca in Binca/Bonell, 273-274 and 283; S.A. Kruisinga, supra note 12, at 43-52; Bundesgerichtshof, 8 March 1995, CISG-online 144 (New Zealand mussels case); *Medical Marketing International Inc v. Internazionale Medico Scientifica, Srl*, U.S. District Court for the E. D. of Louisiana, 17 May 1999, CISG-online 387.

³³ Schwenzer in Schlechtriem/Schwenzer, 421.

contrary, it can be held that is unreasonable for the buyer to rely on the seller's skill or judgment capacity that is not common in the seller's trade branch.³⁴

The third standard provided by the Convention in the Article 35(2) (d) requires the seller to deliver goods in conformity with qualities of the goods the seller has shown to the buyer by the sample or model. Nevertheless, the contracting parties may agree that the sample or the model shown will not bind the seller.

Finally, according to the last criteria, unless the parties agreed otherwise, the seller is obliged to deliver the goods properly contained or packaged. This provision provides an answer to the practice where a lack of conformity is often caused by inadequate packaging of the goods.³⁵ In determining whether the goods were packaged adequately, one must look to the usual manner of packaging of such goods. If there is no usual manner, the packaging should be proper to preserve and protect those goods taking into account the nature of the goods, the duration of the transport, the climatic conditions and similar factors.³⁶ If during the transport the packaging is damaged but not the goods themselves, the seller incurs no liability, unless the packaging forms part of the goods (e.g. original packaging of branded goods).³⁷

In addition, it should be noted that under the Convention, the seller is even liable for immaterial discrepancies.³⁸ Yet, immaterial discrepancies will never amount to fundamental breach unless that lack of conformity which is objectively regarded as immaterial is of vital importance for the buyer. Also, for the buyer to claim other remedies in this case, such as price reduction or damages, there must be deterioration in value of the goods.³⁹

³⁴ Bianca in Bianca/Bonell, 275-276; Secretariat Commentary, Official Records, 32; Schwenzer in Schlechtriem/Schwenzer, 422.

³⁵ S.A.Kruisinga, supra note 12, at 34

³⁶ Bianca in Bianca/Bonell, 277; S.A.Kruisinga, supra note 12, at 34; Enderlein, supra note 20, at 158;

³⁷ Schwenzer in Schlechtriem/Schwenzer, 425;

³⁸ The Article 33(2) of the ULIS which stated that immaterial discrepancies shall not be taken into consideration. However, no similar provision can be found in the CISG.

³⁹ Schwenzer in Schlechtriem/Schwenzer, 425-426, S.A. Kruisinga, supra note 12, at 36-38; Handelsgericht Zürich, 30 November 1998, CISG-online 415, SCIER 1999, 188.

2.4. Exclusion of seller's liability

If at the time of the conclusion of the contract the buyer knew or could not have been unaware of the lack of conformity, the seller is generally not liable for such non-conformity (Article 35(3)). It should be noted that expression “could not have been unaware” denotes more than gross negligence. Liability is only excluded when non-conformity is obvious, and that is to be determined not in a purely objective way but rather by having regard to the buyer's skills.⁴⁰ This thus not imposes the duty of investigations – *these are the facts that are before the eyes of one who can see.*⁴¹

This exemption from seller's liability refers only to the Convention's criteria of conformity and not to contractually agreed standards.⁴² In addition, taking into account general principles embodied in Articles 40 and 7(1) the CISG, fraudulent seller cannot rely on this exclusion of liability. In this case the buyer who is negligently unaware of a defect seems to be more worthy protection than a seller who deliberately sets out to mislead the buyer.⁴³

Another case when the buyer may not rely on lack of conformity in delivered goods is when he fails to give notice of non-conformity within the reasonable time after he has discovered or ought to have discovered the lack of conformity as required under Article 39 CISG. Article 39 CISG should be read in line with Article 38 which provides for the obligation of the seller to examine the goods “within as short a period as is practicable in the circumstances” and thus sets time from which “reasonable time” for dispatching the notice of non-conformity starts to run.⁴⁴

⁴⁰ Schwenger in Schlechtriem/Schwenger, 427.

⁴¹ Honnold, 308.

⁴² Secretariat Commentary, Official records. 32; Schwenger in Schlechtriem/Schwenger, 428; Bianca in Bianca/Bonell, 279-280, Hyland, supra note 18, at 325; S.A. Kruisinga, supra note 12, at 53, but differently Enderelein/Maksow, 147-148 and Enderlein, supra note 20, at 159.

⁴³ Schwenger in Schlechtriem/Schwenger, 427-428; S.A. Kruisinga, supra note 3, at 54; OLG Köln, 21 May 1996, CISG-online 254.

⁴⁴ Schwenger in Schlechtriem/Schwenger, 447; S.A. Kruisinga, supra note 3, at 63.

Finally, the parties by virtue of Article 6 CISG may contract out of the provision of Article 35 in whole or in part. Accordingly, by way of contractual stipulation the seller may reduce or exclude his liability as to the conformity of the goods. Often raised question of proper incorporation of such limitation clauses into contract is determined by Article 14 CISG *et seq.* and their interpretation by Article 8. However, it should be noted that the control of the content of such clauses is the matter of validity which is by virtue of Article 4 excluded from the scope of the Convention and it is to be determined by the domestic law applicable pursuant to the relevant private international rules.⁴⁵

⁴⁵ Schwenzer in Schlechtriem/Schwenzer, 429; Lookofsky, *supra* note 15, at 95-97.

3. NON-CONFORMITY AMOUNTING TO FUNDAMENTAL BREACH

As above mentioned, the CISG does not differentiate between different types of non-conformity introduced under different national laws. Every lack of conformity constitutes breach of the contract and falls under Article 35 CISG. Now, the core distinction employed under the CISG is between fundamental and non-fundamental breach.

The purpose of this chapter is to examine in detail the question when a lack of conformity amounts to fundamental breach. It will first underscore the importance of fundamental breach defect. Second, the attention shall be paid to some differences between the CISG rules and some domestic regimes with this respect. Then, the central fundamental breach test given by Article 25 shall be discussed. Since the said article articulates with the general and broad terms, the significant part of this chapter shall discuss particular and concrete criteria to be used when deciding whether in a given case a lack of conformity is fundamental breach or not. Finally, important problem dealt in this chapter shall be the issue of non-conforming documents. It shall be examined, taking into account different kinds of documents and different kinds of trade, when the defect in documents amounts to fundamental breach.

3.1. “Fundamental” v. “Non-fundamental” non-conformity

It is whether the defect in goods or documents is such as to constitute fundamental breach of the contract, what essentially determines the position of the buyer with regard to available remedies.

The concept of “fundamental breach” is central in the Convention because the remedies of the aggrieved party turn on the character of the breach.⁴⁶ Only in case of the fundamental breach of the contract, the buyer is entitled to “powerful” remedies such as avoidance of the contract (Article 49 (1)(a)) or the right to require delivery of substitute goods (Article 46(2)). If the breach is not fundamental, the aggrieved party is left with “normal” remedies like the right for damages and/or price reduction. Finally, the fundamental breach prevails over the passage of risk rules; the buyer shall still be entitled to avoid the contract or require substitute delivery even though the risk of loss or damage has already passed to him (Article 70). Nevertheless, the main importance of a fundamental breach is that it represents the precondition of avoidance – *it can determine the life or death of the contract*.⁴⁷

Having in mind that the notion of the fundamental breach is essential in the CISG’s system of remedies will help understanding why the Convention sets extremely high standards, as explained below, for the fundamental breach on account of non-conformity. The Convention’s test of fundamental breach appears to go beyond to what the common law lawyers would consider as “material” under the corresponding national law, stricter than the standard of “substantial impairment of value” test of the Uniform Commercial Code (Sections 2-608, 2-612).⁴⁸ Rationale that stands behind is the principle of preservation of the contract – *pacta sunt servanda* - which, for both practical and legal reasons, seems more important and logical in the context of international sales than in mere domestic transactions. Claims that the goods are defective are often made only after delivery, which in world-wide commercial trade implies expensive transport. Unwinding the contract would lead in this case to reshipment or redispotion of the goods in foreign country, which all creates additional losses and

⁴⁶ Rosett as cited in Kritzer ed. Guide to Practical Application of the United Nation Convention on Contracts for the International Sale of Goods (Kluwer, Deventer-Boston, 1999), 203.

⁴⁷ Honnold, 255.

⁴⁸ Lookofsky, *supra* note 15, at 64.

additional risk for the goods.⁴⁹ Thus “the avoidance [...] will hurt the seller very badly and often will not be very advantageous to the buyer either, who may then have to wait a long time for the delivery of another”⁵⁰ goods. The same follows for the buyer’s demand for substitute delivery. For these reasons, these remedies are not available to the buyer in case a defect is immaterial or deprivation is insubstantial. It will be explained below that the fundamental breach will not exist even in case of objectively serious defect where the seller may provide timely remedy not causing by that unreasonable inconvenience to the buyer. Therefore, it may be concluded that the threshold for the fundamental breach under the Convention is justifiably and reasonably extremely high and avoidance of the contract and restitution of non-conforming goods *ultima ratio*. This interaction between the “*ultima ratio* remedies” and the threshold of the fundamental breach is to be kept in mind when assessing the significance of the particular lack of conformity.

3.2. Comparison with domestic legal systems

CISG treatment of non-conformity with the emphasis on distinction between the non-conformity that amounts to “fundamental” and the non-conformity that represents only “non-fundamental” breach of the contract, the criteria for classifying into one of these two categories, buyer’s and seller’s rights and duties that emerge from the non-conforming tender differ considerably from the solutions adopted under the domestic legal systems.

Likewise, under the Convention and unlike under its predecessor the 1964 Hague Convention on Uniform Law for the International Sale of Goods (hereinafter the “**ULIS**”) and some civil law national statutes, it is not possible for the buyer to fix additional period of time

⁴⁹ Audit, B., The Vienna Sales Convention and the Lex Mercatoria, in Lex Mercatoria and Arbitration, Carbonneau ed (1990), 173, at 184, *available at*: <http://cisgw3.law.pace.edu/cisg/biblio/audit.html>; Honnold, 255; Schlechtriem/Schwenzer, 296; Lorenz, A., Fundamental Breach under the CISG, para II.C, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html>.

⁵⁰ Jan Hellner, The Vienna Convention and Standard Form Contracts International Sale of Goods, in International Sale of Goods: Dubrovnik Lectures, Sarcevic/Volken ed., Oceana (1986), 133, at 338;

to upgrade the immaterial defect into the breach permitting the avoidance. According to the Convention, such a device is available to the buyer only in case of non-delivery. Defect itself has to satisfy the fundamental breach test. Also, the CISG does not recognize the idea of “acceptance”, which is common law key notion with respect to the seller’s non-conforming tender. Furthermore, unknown to the CISG system is the so called “perfect tender rule” applicable in the U.S. law and according to which the buyer may reject the non-conforming goods after they have been tendered regardless of the seriousness of the defect. According to the CISG rules, the buyer must accept the goods, but such taking of the goods does not constitute “acceptance” in the common law sense and the power to avoid is not lost.⁵¹

Assuming these as the most important issues, the paper shall separately deal in the third chapter with the comparison between the CISG and different domestic legal systems regarding the remedy of avoidance of the contract due to non-conformity and the seller’s right to cure lack of conformity.

3.3. Basic fundamental breach test – Article 25 CISG

The basic test for determining fundamental breach is provided for by Article 25. It states that the breach is fundamental:

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

Reading the provision, two principle elements are to be stressed. First, the party affected by the breach must suffer substantial deprivation of contractual expectations. Such a

⁵¹ Jonathan Yovel, Buyer’s right to avoid the contract: Comparison between provisions of the CISG (the Article 49) and the counterpart provisions of the PECL (the Articles 9:301, 9:303 and 1:106), para 3, *available at*: <http://cisgw3.law.pace.edu/cisg/biblio/yovel49.html>

deprivation is always an objectively serious detriment, but it is not to be reduced to the amount of material disadvantage. Instead, it is to be deduced from the importance of the interest which the contract and its individual obligations actually create for the promisee.⁵² However, importance of the contractual expectations is not left for the aggrieved party's inner feeling but to the terms of the existing contract.⁵³ Substantial detriment means that essence of the contract can no longer be achieved by the aggrieved party and, thus, he can no longer be expected to be bound by the contract.⁵⁴ The German court explained the substantial deprivation in the following words:

“A breach of contract is fundamental (annotation omitted) when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, the interest in the fulfillment of the contract ceases to exist as a consequence of the breach of the contract.”⁵⁵

The second element of the concept of the fundamental breach, as enshrined in Article 25, is the foreseeability of the substantial detriment. This is the ground for the excuse of the party in breach, who, in order to successfully rely on it, must at the same time prove that substantial detriment was neither foreseeable for him nor for “a reasonable person of the same kind in the same circumstances”. The time point for assessing the foreseeability is not set by the Convention and has been the matter of controversy between the scholars. Part of the legal writers holds that the decisive moment is the time of the conclusion of the contract, because the promisor's foreseeability is linked to the promisee's rights *under the contract*, and the parties define the final scope of their agreement at the time of the conclusion of the contract.⁵⁶ Some other scholars argue that the foreseeability requirement should not ignore the information subsequent to the time of the conclusion, when serious consequences of the

⁵² Schlechtriem in Schlechtriem/Schwenzer, 286.

⁵³ Will in Bianca/Bonell, 215; Lorenz, *supra* note 49, at III.A.

⁵⁴ Enderelein/Maksow, at 113.

⁵⁵ Germany, Oberlandesgericht Frankfurt, 17 September 1991, CISG-online 28.

⁵⁶ Schlechtriem in Schlechtriem/Schwenzer, 290-291; similarly Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives* in Galston & Smith ed. *International Sales: The United Nations Convention on Contracts for International Sale of Goods*, Matthew Bender, Ch.9 (1984), at sub. 9-19;

breach become evident out of this information. However, the information that the party receives too late to affect the performance are outside of the scope of Article 25.⁵⁷ The third approach to the issue underlines the time when the contract is concluded but leaves as an exception a possibility that subsequent information be considered in special circumstances. Here as well, the subsequent information can be taken into the account only up to the time when the preparation for the performance of the contract did start or should have started, thus, before it is too late to affect the performance.⁵⁸

Even though Article 25 provides for the fundamental breach test, it is drafted in general terms and does not offer enough clear and practical guidelines for the distinguishing relevant circumstances in determining whether the non-conformity is such as to “substantially deprives” party of what “he is entitled to expect under the contract”. Thus, more practical directions should be looked for and this thesis shall focus now on that.

3.4. Substantial deprivation in case of non-conforming goods

Obviously, not every non-conformity can constitute fundamental breach. What clearly follows from the general test under Article 25 is that defect must always carry objective weight. The discrepancy must be so serious that the buyer cannot be required to retain the defective goods and be satisfied with claim for damages or price reduction.⁵⁹

As stated before, under the CISG, unlike under some national statutes, it is not possible for the buyer to fix an additional period of time in order to clarify whether the non-conformity represents fundamental breach or not. According to Article the 49(1)(b) such a solution is only possible in case of non-delivery.⁶⁰

⁵⁷ Honnold, 257-258

⁵⁸ Will in Binca/Bonell, 221; Enderelein/Maksow, 116.

⁵⁹ Müller-Chen in Schlechtriem/Schwenzer, 542.

⁶⁰ Schlechtriem, in Schlechtriem/Schwenzer, 295.

Thus, the questions arise – How should particular defect in the seller’s performance be weighed and what particular criteria should be considered? Is the objective weight of the nonconformity sufficient to constitute substantial deprivation of the buyer’s interests under the contract?

Reference to case law has shown that the answers to these questions differ considerably among the courts. Some courts and tribunals although not expressly stating so, have focused on the economic loss suffered by the aggrieved party.⁶¹ However, most authors consider that this criterion should not be taken as decisive because of the fact that damages are not the essential element in the notion of “fundamental breach”. Rather, the core element is the aggrieved party’s special interest in performance of particular obligation as determined by the contract.⁶² On the other hand, the remedy-oriented approach inspired by the German courts’ rulings is focused on the question whether it is reasonable for the buyer to retain the goods, make use of them and then claim damages. This approach is acceptable under the Article 25 and it is in line with the Convention’s remedial system.⁶³ However, it seems that in the light of this approach some courts go too far stating that the fundamental breach exists

⁶¹ *Delchi Carrier, S.p.A v. Rotorex Corp.*, U.S. Circuit Court of Appeals (2d. Cir. 1995), CISG-online 140: fundamental breach was found to exist due to the fact that 93% of air compressors were not-conforming to the contract because they had lower cooling capacity and consumed more energy which are “important determinants of the product value”; ICC Arbitration Tribunal Case no. 7531 (1994) CISG-online 565: fundamental breach was held to have occurred because “an important part” of the scaffold fittings did not conform to the contract and estimated costs of repair would amount to more than one third of the total purchase price; Cour d’appel de Paris, 4 June 2004, CISG-online 872: fundamental breach was based on the fact that almost one third of pressure cookers ordered were defective, which was held to be the number “particularly significant given the nature of the products sold”;

⁶² Koch, R., *The Concept of Fundamental Breach of Contract under the United Nations Conventions on Contracts for the International Sale of Goods*, in *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1998, Kluwer Law International (1999) 177, at 219, available at: <http://www.cisg.law.pace.edu/cisg/biblio/koch.html>; Schlechtriem, P., *Uniform Sales Law: the UN Convention on Contracts for the International Sale of Goods* (1986), 77; Enderlein/Maskow, 113; Will in Binca/Bonell 211-212.

⁶³ Koch, 221-222, 267 and 344.

only if “the default cannot be remedied and the goods practically cannot be used otherwise”. The more balance formula should be preferred.⁶⁴

In order to provide some guidance in assessment of fundamental breach in case of delivery of defective goods, the CISG Advisory Council states that due regard is to be had to the terms of the contract, the purpose for which the goods are bought and, finally, the possibility of remedy of the defect.⁶⁵ This paper shall make further analysis following these criteria.

3.4.1. Contract terms

According to the general principle of freedom of the contract, parties are free to stipulate what contractual obligations are of the essence and, thus, to stipulate the importance of the detriment in the case of non-performance or defective performance of such obligations.⁶⁶ The contract therefore does not create just the obligations but it also may determine how important they are for the promisee.⁶⁷

Therefore, it is up to the parties when agreeing on certain features of the goods- Article 35(1) - to “upgrade” their importance and to clearly specify that the contract shall “stand or fall” with the performance of the respective obligation.⁶⁸ This would be the case when the parties have expressly specified the quality of the goods, e.g. in case of an express warranty.⁶⁹ Similarly, the fact that the buyer has insisted that the goods be fit for a particular purpose may also influence the gravity of defect affecting that particular purpose.⁷⁰

⁶⁴ Müller-Chen in Schlechtriem/Schwenzer, 543, fn. 44, refers to the reasoning in the case Bundesgerichtshof, 3 April 1996, CISG-online 135.

⁶⁵ CISG-AC Opinion No 5, para 4.1.

⁶⁶ CISG-AC Opinion No 5 para. 4.2; Schwenzer, *supra* note 8, para VI.b.

⁶⁷ Schlechtriem in Schlechtriem/Schwenzer, 286-287.

⁶⁸ Schlechtriem in Schlechtriem/Schwenzer, 296.

⁶⁹ Koch, *supra* note 60, at 215.

⁷⁰ Koch, *supra* note 60, at 215; Schlechtriem, *supra* note 62, at 59-60;

According to the abovementioned, considering whether the non-conformity amounted to fundamental breach when the buyer instead of apple juice concentrate received the concentrate mixed with the glucose syrup, the German Court stated that the fundamental breach can be held to exist “if the buyer explicitly ordered apple juice concentrate, which was why the seller had to assume that the receipt of unsugared goods usable for the production of apple juice mattered to the buyer”.⁷¹

Likewise, it was held by the CITAC arbitration tribunal that the thickness of the roll aluminum was clearly stated as of fundamental importance for the buyer because if the roll aluminum did not meet such specifications, buyer's end-user could not use it in its factory. Thus, the tribunal found that by delivering roll aluminum of 0.0118 inches thickness instead of 0.0125 inches that the contract called for, seller committed the fundamental breach of the contract.⁷²

Similarly, in the case of sale of soyprotein products dispute arose whether the delivery of considerable amount of genetically modified goods affected the fundamental interest for the buyer and, therefore amounted to the fundamental breach. Deciding the case, the Swiss court took the following approach:

“... the interest in question, as defined by the breached term of the contract, is clearly of importance to both parties. The question of GM-freedom of foodstuffs is an important and, in terms of public discussion, particularly from the viewpoint of the consumer, a central one. So the Buyer had good reason to deal with that point expressly in the contract, by integrating the correspondence into it. The breach of the Seller's contractual assurance therefore qualifies as a fundamental breach of contract”⁷³

⁷¹ Germany, Oberlandesgericht Stuttgart, 12 march 2001, CISG-online 841.

⁷² CIETAC (China International Economic and Trade Arbitration Commission), 30 October 1991, CISG-online 842.

⁷³ Zivilgericht Basel-Stadt, 1 March 2002, CISG-online 729.

Therefore, it is the parties' contractual stipulations that always should take priority when deciding on the question whether the buyer is *substantially deprived* by non-conformity. But, how should the question be decided when parties' contract is silent with this respect?

3.4.2. Purpose for which the goods are bought

If the contract itself does not clarify what non-conformity amounts to fundamental breach, important issue to be considered is whether the buyer can reasonably be expected to make use of the goods despite defects or resell them even at discount price.⁷⁴

Herewith, it is to be distinguished when the buyer bought the goods with the purpose to use them himself within the scope of his professional and business activity. In that case, generally, the buyer cannot be expected to resell defective goods. Here, decisive factor in determining whether the non-conformity constitutes fundamental nature is whether the goods are improper for the use intended by the buyer and, also, whether the buyer can make the use of the goods or utilize them in the normal course of business and without unreasonable expenditure.⁷⁵

In line with the aforementioned, the German court held that spinning disability of ordered globes did not amount to the fundamental breach of the contract. The court argued that the buyer ordered them for advertising purposes and that they still could serve for that purpose. The pivoting function of the globes only amplified their representative and show effect, but definitely was not one of their key features.⁷⁶

In another case for the sale of apple juice concentrate, the question arises whether the fact that the Seller mixed the juice with the glucose syrup represented fundamental breach.

⁷⁴ UNCITRAL Digest 7 on CISG Art. 25 and UNCITRAL Digest 11 on CISG Art.49; Schlechtriem in Schlechtriem/Schwenzer, 296-297; Muller-Chen in Schlechtriem/Schwenzer, 543; Koch, supra note 62, referring to Huber, 221.

⁷⁵ CISG-AC Opinion No 5 para. 4.3; Schwenzer, supra note 8, para.VI.c.

⁷⁶ Landgericht München, 27 February 2002, CISG-online 654.

The OLG Stuttgart stated that “if the breach of contract - as in the present case - consists of a lack of conformity of the goods, it is decisive whether the buyer was without unreasonable expenditure able to process the goods differently and whether the buyer could reasonably be expected to take such measures”. According to the Court, the fact the goods were used in the end for the production of apple fruit drinks that may contain sugar, speaks contra assuming fundamental breach.⁷⁷

Different approach is to be taken if the buyer of the goods is in the resale business. In this situation, the question of possible further resalability of the defective goods becomes relevant.

First, fundamental breach clearly exists when the non-conformity of the goods is such that the goods are not merchantable at all.⁷⁸ This is the case, for example, when the goods do not comply with the national health regulations which seller has to observe, like in the case between the Spain seller and the German buyer in the contract for the sale of paprika pepper.⁷⁹ In this case, the goods after examination were found to be contaminated with ethylene oxide in the amount not permissible under German Food Safety Law and could not be resold in Germany at all. For this reason and taking into account the fact that the parties to this agreement have agreed the goods to be fit for sale under German safety standards, the Court found existence of fundamental breach of the contract. It can be noted here that if the goods do not conform with the safety standards it cannot be expected, without more, of the buyer to resell the goods to other countries with lower standards.⁸⁰

Second, if the goods despite defects are merchantable, depending on the circumstances, the buyer may be expected to resell the goods despite their shortcomings.

⁷⁷ supra note 71

⁷⁸ CISG-AC Opinion No 5 para. 4.3; Schwenger, supra note 8, para. VI.c.

⁷⁹ LG Ellwangen, 21 August 1995, CISG-online 279.

⁸⁰ Schlechtriem in Schlechtriem/Schwenger, 279.

What should be considered at this point is whether it is reasonable for the buyer to resale the goods in his normal course of business.⁸¹

This way argued the German Supreme Court in the so called “cobalt sulfate case”.⁸² In this case German buyer and Dutch seller entered into agreement for the sale of cobalt sulfate, and agreed that the goods were to be of British origin and accompanied by certificate of origin. After delivery, the goods turned to be of wrong, South African origin, and of poorer quality than agreed upon. Nevertheless, the Court held that the non-conformity did not constitute fundamental breach since first, it was not apparent that the British origin was decisive for the buyer’s purchase and, second, the buyer did not prove that it was more difficult for him to resell such a cobalt sulfate in Germany or abroad.

In another case dealing with purchase of wine between an Italian seller and a French buyer, the French court was considering whether the seller committed fundamental breach of the contract by supplying the chaptalized wine (in this case the wine turned into vinegar). The answer was affirmative. The court argued that the quantity of the added sugar made the wine unfit for the consumption and for any sale in France.⁸³

In addition, with respect to the reasonableness of resale of defective goods, the approach may vary taking into account whether the buyer is wholesaler or retailer. The wholesaler has broader access to the market and, thus, it is easier for him to resell the goods. As for the retailer, he cannot, generally, be expected to resell the defective goods outside of his normal course of business. Furthermore, it is not reasonable to expect retailer to resell the defective goods if by doing so he is facing the risk of damaging his business reputation.⁸⁴

⁸¹ CISG-AC Opinion No 5 para. 4.3; Schwenger, *supra* note 8, para.VI.c; Muller-Chen in Schlechtriem/Schwenger, 543-544.

⁸² Bundesgerichtshof, 3 April 1996, CISG-online 135;

⁸³ Cour de Cassation, 23 January 1996, CISG-online 159.

⁸⁴ CISG-AC Opinion No 5 para. 4.3; Schwenger, *supra* note 8, para.VI.c; Muller-Chen in Schlechtriem/Schwenger, 543-544.

In the case for the sale of sports clothing, the sportswear that was delivered have shrunk about 10 to 15%, or one to two size. Therefore, the customer would not be able to wear them after having washed them for the first time. The court stated that herewith the buyer suffered fundamental breach since if the retailer would have to sell such goods, his customers would either complain to him or would no longer buy the clothes from him.⁸⁵

The likelihood of damaging the image of the retailer is higher if there is strong bond with the customers appreciating quality and thus it is unreasonable in that case to expect from the buyer to re-sell defective goods.⁸⁶ Likewise, in the case with the sale of designer clothes which were poorly cut, the German Court was of the opinion that the fundamental breach is present since the customers of these fashion products have high standards as to the quality and defects rendered clothes unmarketable to them.⁸⁷

We can conclude here, that in the absence of parties' stipulation as to what defect is to be deemed as fundamental breach, the court should look at the purpose for which the goods are bought and, depending on that, examine whether the buyer can be expected to utilize the goods in some other reasonable manner or resold the goods on the market and then claim damages from the seller. Yet, another issue that becomes relevant is how the seller's offer to cure the defect influences the analysis of the fundamental breach.

3.4.3. Seller's possibility to cure

Seller's possibility to cure the defect in his performance has been a matter of controversy during the preparation of the CISG at the Vienna Conference. The debate with this regard is still open among the scholars. The issue is whether the fundamental breach should be determined in the light of an offer to cure. The discussion is kept up by the seller's right to cure after the day of delivery as set in Article 48 and the interpretation of the opening

⁸⁵Landgericht Landshut, 5 April 1995, CISG-online 193.

⁸⁶Muller-Chen in Schlechtriem/Schwenzer, 544

⁸⁷Oberlandesgericht Köln, 14 October 2002, CISG-online 709.

words of the said article stating that this right of the seller is *subject to Article 49*, which provides the buyer with the right to avoid the contract whenever the breach of the contract is fundamental. The posed issue becomes especially important when the contract is declared avoided and the seller has made an offer to cure according to Article 48. The scholarly standings in this dilemma diverge in the following manner

On one side some authors claim that an offer to cure should not be considered in determining fundamental breach.⁸⁸ They argue that holding otherwise would contravene the opening words “subject to Article 49”. According to them the avoidance of the contract should always prevail over the seller’s offer to cure. Thus, the issue of fundamental breach, since it is a precondition for avoidance, cannot be assessed in the light of the seller’s offer to cure.

On the other hand, according to the approach which prevails today, a breach is not fundamental as long as the seller is able and willing to cure the non-conformity, the repair is possible within the reasonable time and without causing the buyer unreasonable inconvenience and unreasonable uncertainty of reimbursement by the seller of expenses advanced by the buyer.⁸⁹ In other words, there is no fundamental breach when the criteria of the acceptable cure under Article 48(1) are satisfied. Holding otherwise would render the Article 48 meaningless. Only at the end of a reasonable period or when it starts to be clear that no cure remedy can be expected does the initially non-fundamental breach become a

⁸⁸ Rolf Herber, *The Rules of the Convention Relating to the Buyer’s Remedies in case of Breach of the Contract*, in *Problems of Unification of International Sales Law*, Oceana Publications (1980), 104, at 123, *available at* <http://cisgw3.law.pace.edu/cisg/biblio/herber.html> ; Andrew Babiak, *Defining “Fundamental Breach” under the United Nations Convention on Contracts for the International Sales of Goods*, 6 *Temple Int’l & Comp. L.J* 113, at 127, footnote 92, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/babiak.html>, Pogledati Enderlein Maskow 187, Endelrein, 193.

⁸⁹ Schlechtriem in Schlechtriem/Schwenzer, 295; Müller-Chen in Schlechtriem/Schwenzer, 544-555; Schwenzner, para VI.D, Honnold, 259 and 375-377; Ziegel, *supra* note 56, at 23, Kritzer, *Guide to Practical Application of the United Nation Convention on Contracts for the International Sale of Goods* (Kluwer, Deventer-Boston, 1999) 413; Bernstein/Lookofsky, *supra* note 21, at 91; CISG-AC Opinion No 5, para 4.4; Will in Bianca/Bonell, 350-352, though starting from different point holding that the rightful seller’s offer to cure suspends the buyer’s right to avoid the contract.

fundamental breach.⁹⁰ Yet, just a mere offer from the seller to cure is not enough and cannot prevent a breach from being fundamental.⁹¹

In my opinion, the latter opinion did prevail correctly. Though, I agree that the Article 48 clearly states that the buyer's right to avoid the contract takes precedence over the seller's right to cure, the rightful avoidance by the buyer under Article 49 is the subject to the existence of fundamental breach. Thus, Seller's possibility to cure and his rightful offer should be read in line with Article 25 and be taken into account as one of the relevant (though not decisive) factors when determining whether the fundamental breach occurred or not. And, indeed, when easy cure of the defect is possible and is to be expected from the seller, it would prevent any "substantial detriment" and, thus, fundamental breach to the buyer.

Likewise, interlink between three CISG Articles: 25, 48(1) and 49(1) (a) is given by the German Appellate court when deciding on the qualification of the alleged non-conformity of the acrylic blankets. Here the court held that the according to Article 49(1) (a), the buyer's right to avoid the contract generally prevailed over the seller's right to cure under Article 48(1). But, the Court further stated that Article 49(1)(a) only prevails if the delivery of non-conforming goods amounted to a fundamental breach. Then, with regard to the question of the fundamental breach, the Court stated that the regard is to be given not only to the gravity of the breach, but also to the willingness of the seller to cure the non-conformity. Accordingly, where the seller is willing to make substitute delivery and such delivery would not cause the buyer unreasonable inconvenience even objectively serious defect does not represent a fundamental breach.⁹²

⁹⁰ Schlechtriem in Schlechtriem/Schwenzer, 295.

⁹¹ Schlechtriem in Schlechtriem/Schwenzer, 295; Will in Bianca/Bonell, 351.

⁹² Oberlandesgericht Koblenz, 31 january 1997, CISG-online 256, including the commentary by R. Koch.

Similar approach is taken by the Swiss Commercial court in the case for the sale of inflatable triumphal arch.⁹³ The Court stated that according to the doctrine as well as the jurisdiction of the UN Sales Law, “an objective fundamental defect does not mean a fundamental breach of contract when the defect is removable and the seller agrees to remedy this defect without creating unreasonable delay or burden on the buyer”. This is because “as long as and so far as (even) a fundamental defect can still be removed by remedy or replacement, the fulfillment of the contract by the seller is still possible and the buyer's essential interest in the performance is not yet definitively at risk”.

One may argue that this solution creates the uncertainty for the buyer. How long should the buyer wait before it becomes apparent that the seller is not willing or not able to cure before he can take some new actions? This uncertainty the buyer may lessen by fixing an additional period of time that is reasonable in the circumstances for the seller to cure, forcing the seller in that way to act. If the seller does not remedy the defect within this period, it will be easier for the buyer to successfully prove unreasonableness.⁹⁴

Finally, relevance of the possible curability of defect by the seller in determination of the fundamental breach is not without exceptions. In some circumstances the buyer may declare the contract avoided even though the defect can be remedied. This is so where the seller's offer to cure is unreasonable for the buyer pursuant to Article 48(1), e.g. when the time is of the essence of the contract and when the delay in performance in itself constitutes the fundamental breach.⁹⁵ Then, the buyer should not be required to accept the seller's offer to cure in case the basis of trust for the contract has been destroyed,⁹⁶ e.g. due to the seller's fraudulent behavior. Furthermore, when the seller either refuses to remedy,⁹⁷ simply fails to

⁹³ Handelsgericht Aargau, 5 November, 2002, CISG-online 715.

⁹⁴ Müller-Chen in Schlechtriem/Schwenzer, 566 and 568.

⁹⁵ Oberlandesgericht Hamburg, 28 February 1997, CISG-online 261.

⁹⁶ Bundesgerichtshof, 3 April 1996, CISG-online 135.

⁹⁷ Landgericht Berlin, 15 September 1994, CISG-online 399.

react, or if the defect cannot be remedied by a reasonable number of attempts within a reasonable time,⁹⁸ then the fundamental breach will be deemed to exist.⁹⁹

3.5. Non-conforming documents

International sales transactions pose different challenges than sales in mere domestic environment. These challenges arose from the fact that the parties are as a rule located in different countries, that the goods are often not in physical possession of the seller, but in the hands of a third person, who may be located in yet different country or on a vessel. The most importantly, the parties to the contract seek for assurance of contractual performance of another party when performing their contractual obligations. These particular needs of international sales are satisfied through the use of documents.¹⁰⁰ Moreover, significance of documents in some areas of international sale law is such that “the volume of paper trading greatly exceeds the volume of dealings in the underlying goods”.¹⁰¹ Documentary trade involves different considerations and raises fundamentally different concerns for the contracting parties than does the trade in machinery and other capital goods.

However, it has to be said that it is in relation to the role of documents in international trade that the CISG was primarily criticized for failing to take proper account. It is said that the harsh standards for fundamental breach and indefinite and vague language of Article 25 of the Convention are unsuitable for the documentary sales. According to the critiques, the rules on fundamental breach do not match to the so called “strict compliance rule”, one of the basic principles in documentary credit transactions according to which any discrepancy allows for rejection of documents. Furthermore, the CISG fundamental breach

⁹⁸ Oberlandesgericht_Oldenburg, 1 February 1995, CISG-online 253.

⁹⁹ CISG-AC Opinion No 5, para 4.4; Schwenger, para VI.d; Müller-Chen in Schlechtriem/Schwenger, 567-568; Bernstein/Lookofsky, *supra* note 21, at 91.

¹⁰⁰ UNCTAD, The Use of Transport Documents in International Trade, UNCTAD/SDTE/TLB/2003/3, 26 November 2006, para 9, available at: http://www.unctad.org/en/docs/sdtetlb20033_en.pdf;

¹⁰¹ Alastair Mullis, *supra* note 5, quoting Michael Bridge at 329.

test is also particularly considered as inappropriate in the sales of commodities. The commodity trade typically involves rapidly fluctuating market, long chains of parties, and potential exposure to huge amounts of damages, which all necessitates a high degree of legal predictability.¹⁰²

Therefore it is important to discuss the CISG rules on non-conformity in relation to documents and address the foregoing critiques.

According to Article 34 of the Convention “if the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract”. Thus any failure of the seller to deliver the documents conforming to the contract represents breach of the contract. Yet, striking question is when non-conformity of documents amounts to fundamental breach. Do the same demanding criteria for fundamental breach, as applicable to goods, apply to defective documents notwithstanding the needs for different standards in documentary sale? Can the CISG be read in line with these particular standards?

With this respect, it is important to make distinction between different types of documents. Firstly, there are documents that accompany a contract of sales such as insurance policy, certificate of analysis, custom clearance certificates, certificate of origin and the like. Secondly, some sales contracts require delivery by the transferring documents of title like bills of lading, dock warrants, load notes, warehouse receipts and so forth. Third, distinction has to be made with regard to the situation where it is provided for the payment by documentary credit. Finally, special standards have to be taken into the account in the case of non-conforming documents in the commodity trade.¹⁰³

¹⁰² Roy Goode, *supra* note 5, at 915.

¹⁰³ Schwenzer, *supra* note 8, at 803-804, CISG-AC Opinion No 5, para 4.7 at seq.

3.5.1. Accompanying documents

When the non-conformity relates to accompanying documents, the occurrence of the fundamental breach is to be assessed according to general mechanisms of the CISG as applied in the case of the non-conformity of the goods.

The issue has arisen in the above mentioned German cobalt sulphate case.¹⁰⁴ The seller failed to deliver the correct certificate of origin and due to that fact and allegedly inferior quality of the goods than agreed upon, the buyer declared the contract avoided. The case came to the German supreme court which addressing the question whether the delivery of the wrong certificate of origin amounted to the fundamental breach, reached the following conclusion:

“It is correct that the delivery of contractually stipulated documents can be an essential contractual obligation, which, if breached, may entitle the buyer to declare the contract avoided according to the Art. 49(1) CISG (citations omitted). [...] The same principles apply to the documents which apply to the goods themselves: If the documents - though faulty - are handed over to the buyer, they are “delivered” with the consequence that the Art. 49(1)(b) CISG does not apply. It is then *relevant whether the buyer, through the defective documents, is substantially deprived of what he was entitled to expect under the contract* (emphasis added). For this, one cannot solely consider the documents alone and whether the goods could be traded or not with the delivered documents. If the buyer can remedy the defect himself without difficulty by obtaining a correct document, he is able to sell the goods or the goods to be manufactured from them without difficulty, unless the goods themselves have grave defects. In such a case it cannot be said that the essential interest in the contract ceases to exist. It is also conceivable that the origin of the goods is irrelevant for the

¹⁰⁴ Bundesgerichtshof, 3 April 1996, CISG-online 135.

further disposal of the goods (sale or manufacturing). If that is the case, the faulty documents all the more so do not lead to a substantial deprivation of the contractual interest."

Thus, decisive point in case of assessing defects in accompanying documents is whether they as such limit the buyer to resell or use the goods as he intended. Accordingly, if defective documents do not limit that, the fundamental breach does not exist. On the other hand, if the documents do limit buyer reselling and using them, the relevant point may be whether the buyer can acquire clean documents himself. Finally, further precondition for the breach to be fundamental is that the seller does not remedy the defect pursuant to Article 34 second sentence, Article 46(2) or (2) or Article 48(1) within a reasonable time.¹⁰⁵

Furthermore, it should be noted that the case of missing accompanying documents is to be treated as a defect in quantity and not as a case of non-delivery. That is important because the buyer in that case is not allowed to fix an additional period of time in order to upgrade the breach into the fundamental one, like it is possible in the case of non-delivery.¹⁰⁶

3.5.2. Documentary sales

In the international sales many transactions are "documentary sales" whereby the payment is required against tender of documents of title. This type of international sale is covered by the CISG "even though, in some legal systems, such sales may be characterized as sales of commercial paper".¹⁰⁷ However, the Convention does not purport to define documentary sales practices.

With respect to documentary sales transactions, International Chamber of Commerce has issued uniform rules on the interpretation of trade terms (INCOTERMS) that were widespread in documentary sales practice. Last updated version of these uniform rules is

¹⁰⁵ Schwenzer in Schlechtriem/Schwenzer, 579: CISG-AC Opinion No 5, para 4.9.

¹⁰⁶ CISG-AC Opinion No 5, para 4.10; Schwenzer, *supra* note 8, at 804.

¹⁰⁷ Secretariat Commentary, Official Records, *supra* note 14, at 16.

INCOTERMS 2000. These rules are widely incorporated into international sales contracts by means of express stipulation or they become applicable as international usage by means of Article 9 (2) of the Convention.¹⁰⁸

When assessing defective documents in the documentary sales, it has to be borne in mind that the tender of clean documents is essential to the contract and any lack of conformity in their content constitutes objectively serious breach. Under the INCOTERMS rules¹⁰⁹ the buyer is obliged to take up the transport documents and/or equivalent which are the evidence of delivery in accordance with the seller's obligation. Accordingly, this implies the buyer's right to reject any tender of the non-conforming documents irrespective of the goods' actual conformity or non-conformity.¹¹⁰ Therefore one may conclude that owing to the peculiarities of documentary trading, the interpretation of Article 25 and the threshold for the fundamental breach should be lower than in the case of defects in the goods themselves.¹¹¹

Nevertheless, here the seller is also allowed to remedy any lack of conformity in documents. Thus, in case 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 the other goods not containing that reservation.¹¹² According to Article 34 of the Convention seller's right to cure is possible without restrictions if the defective documents are handed over before the time stipulated by the contract. Possibility of cure after such a date is to be determined in the light of Article 48(1) of the Convention, thus only if the cure is possible without undue delay and without unreasonable inconvenience to the buyer.¹¹³

¹⁰⁸ CISG-AC Opinion No 5, para 4.11; Schwenger, *supra* note 8, at 804; Schmidt-Kessel in Schlechtriem/Schwenger, 152-153, although claiming that they do not represent a trade usage in their entirety but individual provisions of these rules can be deemed as trade usages; Bianca in Bianca/Bonell, 114-115.

¹⁰⁹ Provision B 8 of all Incoterms 2000 clauses (except for EXF).

¹¹⁰ CISG-AC Opinion No 5, para 4.13; Schwenger, *supra* note 8, at 805, Schlechtriem, Interpretation, gap-filling and further development of the UN Sales Convention, para II.5.c(cc), available at: <http://www.cisg-online.ch/cisg/Slechtriem-e.pdf>.

¹¹¹ Schlechtriem, *supra* note 110, at II.5.c(cc).

¹¹² CISG-AC Opinion No 5, para 4.14; Schwenger, *supra* note 8, at 805.

¹¹³ Schwenger, *supra* note 8, at 805.

3.5.3. Documentary credit

Due to the peculiar risks that distance selling imposes on the parties, they often stipulate that the purchase price is to be paid by means of documentary credit or standby letter of credit. With that respect, another set of codified customary rules, the Uniform Customs and Practices for Documentary Credits (UCP),¹¹⁴ shall be applicable either by express stipulation or as recognized international trade usage and, thus, by way of Article 9(2) of the Convention.¹¹⁵

Here it has to be said that one of the main principles of letter of credit transaction is that of the strict compliance of documents with the letter of credit.¹¹⁶ This means that “there is no room for documents which are almost the same, or which do just as well.”¹¹⁷ The bank has the right not to accept even such “almost the same” documents and not to render the payment to the seller. The question that immediately arises is whether the strict compliance principle applies also when assessing the existence of fundamental breach due to the same non-conforming documents under the underlying sales contract.

With regard to the raised issue, it can be argued that the principle of strict compliance concerns the relation between the seller and the bank and not necessarily the relation between the seller and the buyer since the letter of credit is separate transaction from the underlying sale contract.¹¹⁸ However, while it is true that the banks involved into the particular letter of credit are not in any way bound by the underlying contract of sale, the same cannot be said for the relation between the buyer and the seller. When the letter of credit is stipulated in the sale contract as a method of payment, such a stipulation becomes the term

¹¹⁴ The UCP are issued by the International Chamber of Commerce and represent codification of banking practices relating to the documentary credits. Last version of these rules is UCP 600 and will come into effect on 1 July 2007.

¹¹⁵ CISG-AC Opinion No 5, para 4.15; Schwenger, *supra* note 8, at 806.

¹¹⁶ The principle is not explicitly spelled out in the UCP rules but with some limitations is widely incorporated in the case law.

¹¹⁷ *Equitable Trust Co of New York v. Dawson Partners Ltd* (1927) 27 Ll L Rep 49, at 52;

¹¹⁸ Article 3(a) of the UCP 500 and Article 4(a) as counterpart provision in the new set of rules, UCP 600.

of the contract. This is to be read as an implied reference to and thereby the incorporations of the terms that the payment is only to be made against the fully conforming documents.¹¹⁹ Accordingly, documents in case of sale contract which provides for the payment by the letter of credit have to be “clean” in every respect. Otherwise, and given the fact that the seller has also failed to cure the non-conformity of documents in timely manner, the buyer shall be entitled to avoid the contract.¹²⁰

Therefore it may be concluded with regard to the criticism of the existence of discrepancy between the CISG rules and INCOTERMS, such a criticism fails to take proper account of Article 6 which allows the party to *vary the effect* of particular provisions of the Convention. If the parties do so, either explicitly or impliedly, the parties’ agreement takes priority over the Convention’s rules.

3.5.4. Commodity trade

Firstly, a striking feature of international commodity trade “is the way that the volume of paper trading greatly exceeds the volume of dealings in the underlying goods.”¹²¹ Here the commodity traders enter into a wide range of successive purchase contracts, so called “string transactions”,¹²² where the respective documents are transferred several times but only the end-buyer will finally take physical delivery of the goods. The intermediate buyers in these “onward trading” are not any more primarily linked to the physical condition of the goods and their delivery; rather, their main interest is in timely transfer of the documents required and their conformity with the stipulations of the seller’s obligations in the

¹¹⁹ Schlechtriem, *supra* note 110, at II.5.c)cc).

¹²⁰ Schwenzer, *supra* note 8, at 806; the same is provided under the UNIDROIT Principles of International Commercial Contracts (Rome, 2004), article 7.3.1, 3(b).

¹²¹ Mullis, *supra* note 5, at 329, citing Bridge from International Private Commodity Sales (1991) 19 Canadian Business Law Journal 485, at 485.

¹²² By “string trading” is meant “the linking of two or more contracts which not only covers the same quantity of goods of the same contract description but which are also on substantially the same terms or have essential terms which overlap or are in common save as to the amount of the price.” Mullis, *supra* note 5, at 329, fn. 13 citing Havelock-Allen, *String and Circle Commodity Contracts*, unpublished paper given at the Lloyds of London conference on International Commodity Sales 1992.

sale contract.¹²³ In addition, these activities take place in the active market conditions with rapid fluctuations in prices that cannot be compared with the regular market of other goods where fluctuations, although possible, are likely to be more predictable and less dramatic. Since the commodity markets fluctuate rapidly, the contracts are likely to require time limits on the tendering of documents. If intermediate traders are not to be allowed, by holding documents, to speculate in the markets at the expense of their buyers “down the string” by making unduly favorable matches of supply and resale contracts, then these time limits must be strictly complied with.¹²⁴ Therefore, it can be concluded that the timely delivery is “of the essence” in “paper trading” of commodities.¹²⁵

Turning now to commodity trading in the context of CISG, it is to be noted that these particular “string forms” of trading are not excluded from the scope of the Convention, in particular they are not excluded on the grounds mentioned in Article 2 (d).¹²⁶ Furthermore with respect to legal consequences of the seller’s breach to timely hand over the documents, the Convention can well enough respond to the above mentioned special realm of the commodity sale, especially to the high risk of loss due to extreme market fluctuations. This is because, first, the Convention allows parties to provide in the contract the importance of the timely delivery of documents, and second, if they fail to do so, this can be also derived for adequate interpretation of the contract, taking into account particular commercial background of such contract, which is in accordance with Article 8(2), (3) of the Convention.¹²⁷ Consequently, in the practice of commodity trading, the seller’s possibility to remedy a defect in the documents shall not normally exist.¹²⁸

¹²³ Schlechtriem, *supra* note 110, at para I.1.

¹²⁴ Mullis, *supra* note 5, at 330.

¹²⁵ Mullis, *supra* note 5, at 329, Schlechtriem, *supra* note 110, at para I.1.

¹²⁶ Article 2(d) says that the Convention does not apply to sales “stocks, shares, investment securities, negotiable instruments or money”.

¹²⁷ CISG-AC Opinion No 5, para 4.17; Schlechtriem, *supra* note 110, at para I.1; Schwenzer, *supra* note 8, at 806.

¹²⁸ CISG-AC Opinion No 5, para 4.17; Schwenzer, *supra* note 8, 806.

4. CONSEQUENCES OF NON-CONFORMITY BEING FUNDAMENTAL BREACH

As already mentioned, the threshold for establishing fundamental breach in the case of non-conformity is deduced from the *ultima ratio* nature of the remedies it gives rise to. This chapter shall be devoted to these consequences of the lack of conformity amounting to fundamental breach: first, the buyer's right to avoid the contract, second, the buyer's right to require substitute delivery and finally, the effect of the fundamental breach on the rules on passage of risk between the parties.

4.1. Avoidance of the contract due to non-conformity

Avoidance of the contract is unquestionably most extreme measure the buyer may take in response to non-conformity, putting, thus, the contract to an end. In the words of professor Magnus, *it is the hardest sword that a party to a sales contract can draw if the other party has breached the contract. No other remedy—claim for performance, price reduction, damages—has the same incisive effect.*¹²⁹

Under the CISG, the remedy of avoidance in case of non-conformity is provided for the buyer in Article 49(1) (a) which states that the buyer has the right to declare the contract avoided 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.

¹²⁹ Magnus, U., The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases, in 25 *Journal of Law and Commerce* (2005-06) 423, at 423, available at: <http://cisgw3.law.pace.edu/cisg/biblio/magnus2.html>.

This is the only basis for the buyer to avoid the contract due to the non-conformity. Nachfrist period is not applicable in this case; rather it is reserved for the case of non-delivery.¹³⁰

4.1.2. Comparison with domestic legal systems

The circumstances under which the buyer may rightfully avoid the contract due to the non-conformity under the CISG differ significantly when compared to different domestic legal systems. It is important to underline differences and bear them in mind when interpreting and applying the Convention in a particular case and before a particular domestic court.

4.1.2.1. Civil law countries

In general, civil law systems were originally based on Roman sales law rule which entitles a buyer in case of defective tender either to demand reduction of price (*actio quanti minoris*) or to avoid the contract (*actio redhibitoria*).¹³¹ Buyer is generally allowed to avoid the contract for any defect being more than insignificant. Yet, all statutes impose some other limitations on the aggrieved party to effectively end up the contract. Some civil law countries erects procedural barriers by general rule (followed by some exceptions) that the party must apply to a court to have its contract terminated.¹³² In this case, according to professor Treitel, it is the court which will, when deciding whether to pronounce termination of the contract take into account “various factors such as the defendant’s degree of fault and seriousness of the defect in performance”.¹³³ Other national statutes¹³⁴ impose general requirement that the

¹³⁰ Schwenger, I. & Fountoulakis, C., (eds) International Sales Law, 2007 Routledge-Cavendish (hereinafter the “Schwenger/Fountoulakis”), 374.

¹³¹ Germany: former German Civil Code (BGB), the Article 462 (in force until 32 December 2001); France: the Article 1644 Code Civil; Switzerland: the Article 205 Code of Obligations; Serbia: the Article 488 The Law on Obligations, but differently Austria: the Article 932 Allgemeines Bürgerliches Gesetzbuch (ABGB), which allows the buyer to avoid the contract only in cases where repair is not feasible and a proper use is not possible.

¹³² French, Belgian and Luxembourg Civil Code French, the Article 1184(3).

¹³³ Treitel, Remedies (International Encyclopedia) section 147, also Treitel remedies (1988) Ch. IX and 243.

aggrieved party with respect to any breach must first give to the party in breach additional period of time before it may avoid the contract (*Nachfrist* notice).

However, some civil law countries have enacted modern statutes, like the German Statute on Modernization of the Law on Obligations, the Scandinavian Sales Laws or the Netherlands Civil Code, implementing either notion of fundamental breach or similar concept which strengthens the position of the seller and unable the buyer to easily wind up the contract. These reforms are oriented toward the principle of preservation of the contract, which brings these legal systems closer to the model of CISG. Likewise, the Norwegian Sale of Goods Act (1988) has adopted the concept of the fundamental breach as a precondition for the buyer's avoidance on the ground of non-conformity.¹³⁵ Similarly, the Finnish Sale of Goods Act (1987) provides that generally a buyer can avoid the contract if the breach by the seller is of substantial importance to him and the seller knew or ought to have known this.¹³⁶ On the other hand, new version of the German Civil Code retained the requirement of *Nachfrist* notice and low materiality threshold allowing the buyer to avoid due to nonconformity as long as the nonconformity is more than "immaterial breach of the duty" (Article 323(5)), but with the precedence of the claim for cure and corresponding possibility of a second tender for the seller. Nevertheless, such a second tender generally only occurs in the form demanded by the buyer (Article 439 (1) (2)).

4.1.2.2. Common law countries

Common law legal systems apply as a key concept a notion of "acceptance"¹³⁷ which is totally unfamiliar to the civil law lawyers and it is not adopted by the CISG either. This

¹³⁴ Former German Civil Code, the Article 326 (retained under the new BGB, Article 323(1)); Serbian law on Obligations, Article 490;

¹³⁵ Section 39(1) of the Norwegian Sale of Goods Act (1988).

¹³⁶ Section 25(1) of the Finnish Sale of Goods Act (1987).

¹³⁷ Under the Article 35 (1) of the Sale of Goods Act 1979 (as amended 1994), the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller;

concept implies that different criteria apply with respect to the right of the buyer to reject non-conforming tender prior and after the goods having been accepted. However, concretization of this principle is different between two major common law legal systems: the United Kingdom and the United States Legal System.

Under the English contract law, the right to avoid the contract due to the non-conformity of the goods is dependent on whether the term broken is “condition” or “warranty”. A “condition” is a major term of the contract, a term of such importance that any breach of it is considered to go to the root of the contract so as to entitle the aggrieved party to treat the contract as discharged. On the other hand, a “warranty” is a minor and thus the term of less essential importance, collateral to the main term of the contract. Accordingly, for the breach of warranty, the aggrieved party is not entitled to wind up the contract but just to claim damages.¹³⁸ Pursuant to the Sale of Goods Act 1979, whether a stipulation is a condition or merely a warranty “depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract”.¹³⁹ Thus, in case the non-conformity is such as to breach the condition of the contract, the buyer has a right to reject such a goods. If the buyer exercises the rejection, the situation becomes one of non-delivery, and the seller is entitled to retender if under the contract it is not too late, otherwise he is in breach giving the right to the buyer to treat the contract as repudiated.¹⁴⁰ However, once the goods are accepted, even a breach of a condition can only be treated as a breach of warranty, does giving rise only to damages.¹⁴¹ In addition, the courts have came up with the third category of terms, so called “innominate terms”, denominating that the parties have not

According to the U.S. law, Section 2-606 UCC, the acceptance occurs in the following situations: first, when the buyer after opportunity to inspect the goods, signifies the seller that the goods are conforming or that he will retain them in spite of their non-conformity; second, when the buyer after having opportunity to inspect the goods, fails to make effective rejection; and third, when the buyer does any act inconsistent with the seller’s ownership;

¹³⁸ Roy Goode, *supra* note 5, at 279.

¹³⁹ Article 11(3) of the Sale of Goods Act 1979.

¹⁴⁰ Roy Goode, *supra* note 5, at 342.

¹⁴¹ Article 11(4) of the Sale of Goods Act 1979.

chosen to classify them as either conditions or warranties at the moment of the conclusion of the contract, but left the judgment on importance of these terms be dependent on the seriousness of effect of the breach.¹⁴² Thus in case the lack of conformity arises from the breach of innominate term, the buyer can put an end to the contract only where the breach substantially deprives the buyer of the whole benefit of the entire contract.¹⁴³ The Amendments to the Sale of Goods Act from 1994 impose some further limitations with respect to the buyer's right to reject non-conforming goods. The Section 15A provides that in case the buyer does not deal as a consumer, the breach of implied statutory conditions¹⁴⁴ cannot be treated as a breach of condition but may be treated only as a breach of warranty if it is so slight that it would be unreasonable for the buyer to reject such goods.

According to the U.S. Uniform Commercial Code (UCC), before the acceptance of the goods, the so called "perfect tender rule" applies. This means that the buyer may reject the goods if they fail in any respect to conform to the contract.¹⁴⁵ However, even though the buyer may in these case reject the goods, his right to avoid the contract is generally limited by the right of the seller to cure the breach of the contract by making a conforming tender.¹⁴⁶ Under the UCC, the seller that has performed in good faith always has the right to remedy defect if the agreed time for performance has not expired. If the delivery time has lapsed, the seller that has performed in good faith will have the right to cure the breach if the cure is appropriate and timely under the circumstances. After the goods have been accepted, the buyer will have the right to reject them only in case the non-conformity substantially impairs

¹⁴² Roy Goode, *supra* note 5, at 125

¹⁴³ Roy Goode, *supra* note 5, at 125; Schwenger, *supra* note 8, at 797; Lachmi Singh, United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An examination of the buyer's right to avoid the contract and its effect on different sectors of the (product) market, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/singh.html>;

¹⁴⁴ There five implied statutory conditions: title, correspondence with description, satisfactory quality of the goods, fitness for purpose and correspondence with the sample – sections 12-15 Sale of Goods Act;

¹⁴⁵ UCC § 2-601

¹⁴⁶ UCC § 2-508

the value of the goods to the buyer.¹⁴⁷ When deciding whether the particular non-conformity is substantial impairment or not, U.S. courts have used as guidelines the Restatement (Second) of Contracts, the Section 241, and thus will look to what extent the buyer is reasonably deprived of the benefits of the contract he has reasonably expected, the extent to which the buyer can be adequately compensated for that lost benefit, the extent to which the seller will suffer forfeiture, the likelihood that the seller will cure his failure, and the degree to which the seller's behavior comported with the standard of good faith and fair dealing.¹⁴⁸

4.1.3. Other preconditions for avoidance due to non-conformity

Despite the fact that the lack of conformity amounts to fundamental breach, the buyer may still not be allowed to avoid the contract. The buyer loses the right to rely on non-conformity and avoid the contract due to that if he did not give notice specifying the defects within the reasonable time as required in Article 39, subject to the regulations of Articles 40 and 44. Moreover, having in mind that avoidance of the contract results in extinction of both parties' obligations under the contract (Article 81(1)) and in restitution of whatever has already been paid or supplied pursuant to the contract (Article 81(2)), in general, the buyer loses the right to avoid the contract if he is not able to return the goods delivered in unimpaired condition (Article 82(1)). Yet, the Convention provides for exceptions on this principle (Article 82(2)).

In addition, even if a breach in question is fundamental and unambiguous, under the CISG avoidance is never *ipso facto*; the buyer is required to make a "declaration of avoidance". Pursuant to Article 26 of the Convention, such a declaration of avoidance is "effective only if made by notice to the other party". By giving the notice to that effect, the buyer must clearly express to the seller that he is not bound by the contract any longer and

¹⁴⁷ UCC § 2-608.

¹⁴⁸ E. Allan Farnsworth, *Contracts*, Aspen law & Business (third edition), 586.

that it treats the contract as terminated.¹⁴⁹ Declaration of avoidance does not have to meet any requirement as to the form. Thus, it can be made in writing or orally, or it can be inferred from the buyer's conduct as long as it is unambiguous and clear to the legal consequences. For these reasons, a notice of the buyer specifying a lack of conformity would not, without more, constitute a declaration of avoidance under Article 26, because the buyer who specifies non-conformity may, and often does, choose to retain the goods and claim a reduction in the price or other damages to compensate for the deficiency.¹⁵⁰ The notice for avoidance under Article 26 and notice of non-conformity pursuant to Article 39 of the Convention have to be distinguished; the purpose, the moment from which the time limit is running and the content requirements are different for these two notices. Thus, for the avoidance due to the delivery of non-conforming goods, the buyer will normally send two notices. However, this does not mean that the two separate notices are necessary; it is possible that one notice serve as both Article 26 and Article 39 notice if it adequately meets the requirement of each provision.¹⁵¹

Furthermore, transmission risk of the notice of avoidance (delay, distortion or avoidance) is borne by the seller, provided that the notice has been sent by means stipulated in the contract or, if in the absence of this, by means appropriate in the circumstances. This risk allocation is in accordance with the principle set out in Article 27 of the Convention, which rules that the transmission risk of documents or information falls on the party the party in

¹⁴⁹ With regard to the clarity of the notice of avoidance, useful guidance can be found in the ICC award [March 1999, case 9978, CISG-online 708] where the tribunal held: "[...]notice of avoidance under Art. 26 CISG must satisfy a *high standard of clarity and precision* (emphasis added). [...]. It does not matter that Claimant did not use the technical terms 'avoidance' or 'avoid'. Declarations of avoidance under the Art. 26 CISG may be made implicitly, provided that it is made clear to the other party that the party entitled to avoidance does not intend to stand by the contract any more."

¹⁵⁰ Honnold, 263; Ari Korpinen, On legal uncertainty regarding timely notification of avoidance of the sales contract, para 2.1, available at: <http://cisgw3.law.pace.edu/cisg/biblio/korpinen.html>

¹⁵¹ Camilla Baasch Andersen in "Selected notice Requirements under CISG, PECL and UNIDROIT Principles: CISG Arts. 39 & 26; UNIDROIT Principles Arts. 1.9, 3.14, 7.3.2; PECL Arts. 1.303, 1.304, 4.112, 9.303, 13.104" (November 2004), at III, available at: <http://www.cisg.law.pace.edu/cisg/principles/uni26.html>; Chengwei Liu, Declaration of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and case law (2nd edition, June 2005), at 2.2, available at: <http://www.cisg.law.pace.edu/cisg/biblio/liu10.html>

breach.¹⁵² Nevertheless, the said principle on transmission risk of the notice of avoidance has to be distinguished from the question of when a declaration of avoidance becomes effective and whether and when the sender becomes bound by such declaration. The time of effectiveness of the declaration of avoidance is significant for the calculation of interest and damages and is to be determined by the seller's receipt. Only this understanding respects the importance given to the "notice" by Article 26 and operates a fair apportionment of risk.¹⁵³

Finally, the buyer has to give a declaration of avoidance within the reasonable time. This reasonable time limit runs from the moment the buyer knows of the breach or ought to have known, and it is to be construed in connection with Article 38 pursuant to which the buyer is obliged to conduct the examination of the goods bought and delivered. The length of the "reasonable time" is to be appraised taking into account particular circumstances of the case at hand and must include factors such as length of period for giving notice of defect and the behavior of the seller after receiving such a notice.¹⁵⁴ If the buyer fails to obey with this reasonable time limit he loses the right to avoid the contract. What remains to the buyer in that situation is to claim remedies which are not bound by time limits: price reduction or damages.

4.1.4. The effect of the seller's right to cure: Article 48 CISG and domestic legal systems

According to the Convention, the seller has a right to cure any lack of conformity in documents or the goods tendered prior to the stipulated date of delivery (Articles 34 and 37). Pursuant to Article 48 CISG, the right of the seller to cure exists even after the time of delivery has passed. However, according to Article 48, the right of the seller to remedy defects in tender is "subject to Article 49". Accordingly, in this case, the buyer's right to avoid takes priority over the seller's right to cure. In other words, if the fundamental breach of

¹⁵² Schlechtriem in Schlechtriem/Schwenzer, 303; Honnold, 264.

¹⁵³ Schlechtriem in Schlechtriem/Schwenzer, 303-304,

¹⁵⁴ Müller-Chen in Schlechtriem/Schwenzer, 588-589;

the contract already exists, the buyer is entitled to avoid the contract and the seller cannot claim additional period for subsequent performance relying on Article 48. Yet, as already discussed above, the seller's capacity and willingness to provide the remedy indirectly considerably influence the buyer's right to avoid the contract since they are important factors in consideration of "fundamentality" of the non-conformity.

Comparable provision giving right to the seller to cure defective performance can be found in the U.S. law. The Section 2-508 (1) UCC relates to the seller's right to cure before the expiry of the time for performance and, thus, resembles Article 37 CISG. The cure after the date for delivery is provided by the Section 2-508 (2); according to its wording, it applies to rejection of non-conforming tender but not to the revocation of acceptance. Nevertheless, some courts went beyond the strict reading of cure provision holding that the right to cure is not excluded here as well, justifying the standing by the law's policy of minimization of economic waste. This uncertainty with the seller's right to cure after the date of delivery has been clarified by revision of Article 2 of the UCC.¹⁵⁵ The new section 2-508(2) explicitly states that it applies in the situation of revocation of acceptance as well. In addition, under the current version of the UCC, the seller's right to cure after the date of delivery is restricted to the situation where "the buyer rejects a non-conforming tender which the seller had reasonable ground to believe would be acceptable". This has been also creating problems in the practice. Revised Article 2 of the UCC, section 2-508 (2) uses different and more simplified language; it requires that "the cure is appropriate and timely under the circumstances". Furthermore, requirement of good faith applies to this rule; the initial tender has to be made in good faith which prevents a seller from deliberately tendering goods that the seller knows the buyer cannot use in order to save the contract and then, upon rejection,

¹⁵⁵ The revised version of Article 2 of the UCC is approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 2003, but has not yet been adopted by any State.

insisting on second right to cure.¹⁵⁶ Whether a cure is appropriate and timely is determined by the circumstances and the needs of the buyer.¹⁵⁷

The English Sale of Goods Act does not contain similar provision. Yet, in a number of cases the courts have generally recognized the right of the seller to cure by making a fresh tender which conforms to the contract.¹⁵⁸ This is particularly so when the time of delivery has not yet expired. However, though a retender is not necessarily too late merely because the contract date for delivery has passed, the position of seller's right to remedy is much less certain.¹⁵⁹ The Law Commissions had considered recommending a seller's right to replace or repair defects, but eventually came down against such a solution.¹⁶⁰

Within the civil law countries, some statutes also recognize the seller's right to cure.¹⁶¹ Likewise, the new German Civil Code, grants the seller possibility in case of non-conforming tender to salvage the contract through a "second tender" conforming to the contract. The right of the seller to cure defects is provided by Article 439 of the German Civil Code, and though, terminology might be misleading as to giving the buyer choice between the claim for cure and avoidance of the contract, the provision is introduced as a "seller-friendly" rule according to which the buyer primary relief is to demand supplementary performance, i.e. to require cure by the seller, and this primary relief initially blocks all other secondary remedies otherwise available to the buyer: the right to avoid the contract, to reduce the

¹⁵⁶ Uniform Commercial Code, Official Text with Comments, in *Selected Commercial Statutes*, Chomsky, Kunz, Rusch, & Schiltz, (eds), (Thomson/West, 2005), 118-119.

¹⁵⁷ Uniform Commercial Code, Official Text with Comments, *supra* note 156, at 119.

¹⁵⁸ Roy Goode, *supra* note 5, at 343 citing: *Agricultores Federados Argentinos Sociedad Cooperativa Limitada v. Ampro S.A. Commerciale Industrielle et Financiere* [1965] 2 Lloyd's Rep 157, *Wanganyi Motors (1963) Ltd v. Broadlands Finance Ltd* (1988) 2 NZBLC 103; *Borrowman, Philips & Co. v. Free & Hollis* (1878) 4 Q.B.D. 500.

¹⁵⁹ Roy Goode, *supra* note 5, at 343-345; Anette Gärtner, Britain and the CISG: Case for Ratification – A Comparative Analysis with Special Reference to German Law, II.C.2, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/gartner.html>; Lachmi Singh, *supra* note 143, at para 3.5.c.

¹⁶⁰ The Law Commission and the Scottish Law Commission, (Law Com No 160, Scot Law Com 104, 1987), *Sale and Supply of Goods*, paras 4.13-4.17, *available at*: <http://www.scotlawcom.gov.uk/downloads/rep104.pdf>.

¹⁶¹ the Article 439 of the new German Civil Code 2002; the Article 36 of the Norwegian Sale of Goods Act 1988; the Article 36 of the Finish Sale of Goods Act 1987; Article 36 of the Swedish Sale of Goods Act 1990; the Article 206(2) of the Swiss Code of Obligations.

purchase price and to claim damages.¹⁶² Yet, according to the said Article 439 (1) and unlike under the CISG, the buyer has the right to choose the form of the second tender, i.e. to choose between removal of the defects and supply of a thing free from defects.

4.2. Delivery of substitute goods

Besides the right to avoid the contract, when the non-conformity of the goods constitutes the fundamental breach of the contract, the buyer is entitled to require from the seller a delivery of substitute goods. This right of the buyer is the particular aspect of the right to require performance and it is enshrined in Article 46(2) of the Convention by the following wording:

If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under the article 39 or within a reasonable time thereafter.

This provision can be relied on only in case of sale of generic goods. However, in this case also, the seller does not have to deliver goods of different genus if the entire genus is unavailable. This is even so when another genus may fit the stipulated purpose of the goods. In case of sale of specific goods, the seller's delivery obligation is limited to the specific delivered item.¹⁶³

Besides the nature of the goods, the buyer's right to demand substitute delivery presupposes some other requirements. First, preconditions of general right to require

¹⁶² Tobias Caspary, Consequences of Premature Self-cure: The Lawless Buyer – A Critical Review of the Verdict of the Bundesgerichtshof of 23 February 2005, in German Law Journal No. 1 (1 January 2006), para B.I, available at: <http://www.germanlawjournal.com/article.php?id=683>; the same Schlechtriem, The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe (2002), Oxford U Comparative L Forum 2, para IV.2, available at: <http://ouclf.iuscomp.org/articles/schlechtriem2.shtml>.

¹⁶³ Müller-Chen in Schlechtriem/ Schwenger, 540; Jarno Vanto, Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 46 of the CISG, in Guide to Article 46, para h., available at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp46.html>.

performance set by Article 46 (1) applicable here as well. This implies absence of any remedy inconsistent with the right of the buyer to require performance (e.g. avoidance of contract or price reduction), nonexistence of impediment for which the seller can rightfully claim exemption for failure to perform in accordance with the contract under Article 79 CISG¹⁶⁴ and enforceability of the right to require performance under the domestic law of the forum country (Article 28 CISG).¹⁶⁵

Second, Article 46(2) itself, apart from the necessity of fundamental breach, requires that notice of defect has been delivered pursuant to the Article 39 CISG and time assertion of the remedy either together with the said notice of non-conformity or within the reasonable time thereafter. The reasonable time period is to be determined by the reference to the circumstances of the case and is it include the period consumed by the buyer for giving the notice of non-conformity under Article 39.¹⁶⁶

Finally, the buyer may claim substitute goods only when he is able to return the defective goods in a position originally delivered (Article 82(1)). However, this limitation thus not apply when the impossibility of restitution is not due to the buyer's act or omission, or if the goods have perished or deteriorated as a result of the examination provided for in Article 38, or if the goods, or part of them, are sold in the normal course of business or have been consumed in the course of normal use before the buyer has discovered or ought to have discovered the lack of conformity (Article 82(2)).

Here, as in the case of the right of avoidance, the important issue is the interaction between the right to demand delivery of substitute goods and the right of the seller to cure

¹⁶⁴ It should be, noted, however, that the applicability of Article 79 with regard to the failure to deliver conforming goods is disputable among the scholars.

¹⁶⁵ The Article 28 of the Convention states: *If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.* This means that it is the Convention which is to determine first whether the right to require specific performance exists, and only then the limitation imposed by the Article 28 may be invoked.

¹⁶⁶ Müller-Chen in Schlechtriem/ Schwenger, 547.

defect (Article 48). The question that arises is which right prevails when, on the one hand, the buyer asks for substitute delivery, and on the other, the seller offers to cure defect in goods. As already mentioned, the objective seriousness of the defect, without more, is not enough to constitute fundamental breach. Rather, to reiterate, in general circumstances, possibility of cure and offer to cure by the seller will prevent the breach to be fundamental. Thus, in this case there will be no fundamental breach and the right of the seller to cure will defeat the buyer's request for substitute delivery. However, if the seller does not carry out repair within the reasonable time, then he can no longer avert the buyer's right to avoid the contract.¹⁶⁷

In addition, it is always open for the party to clearly specify in the contract what is of the essence in their contractual expectations and, thus, to determine what non-conformity will constitute fundamental breach notwithstanding the seller's offer to cure. Likewise, according to professor Schlechtriem, the seller's right to cure should yield to the buyer's right to demand substitute goods when the buyer has, e.g. clearly ordered but not received "chips suitable for the tropics."¹⁶⁸

Finally, it is useful to note that although the right to require substitute delivery remains the possibility for the buyer in case foregoing requirements are met, the importance of this remedy should not be over-estimated. This is because first, the seller shall seek himself the opportunity to repair or replace the defective goods in order to preserve good will, reduce damage liability and avoid the harsh remedy of avoidance. Second, in situations where the seller is not willing to cure or does not cure within the reasonable time, the remedy or requiring substitute delivery is usually not as fast and effective remedy as purchasing

¹⁶⁷ Müller-Chen in Schlechtriem/Schwenzer, 548.

¹⁶⁸ Schlechtriem, *supra* note 60, at 78.

substitute goods. The delay inherent in obtaining the substitute delivery usually renders this remedy impractical.¹⁶⁹

4.3. Passing of risk

When the seller's non-conforming tender is fundamental breach, apart from different available remedies, the buyer is availed by special rule affecting the risk of loss or damage. The rule follows from Article 70, which provides that in case *the seller has committed fundamental breach of contract*, rules on passing of risk *do not impair the remedies available to the buyer on account of the breach*. The said principle deals only with the cases where the damage or loss of the goods and the seller's breach of contract are unconnected, i.e. it deals with the accidental losses or damages that occur despite the seller's fundamental breach.¹⁷⁰

It is to be noted, though the Article 70 refers to *remedies available to the buyer on account of the breach*, the draftsmen probably had in mind only those remedies that are exclusively available to the buyer in case of fundamental breach – avoidance of contract and claim for substitute delivery. This is because the named Article does not prevent the risk from passing; rather, it says that the *remedies shall not be impaired*. Therefore, the purpose of the Article 70 is to keep the remedies available when the seller commits a fundamental breach and at the same time the goods are lost or damaged by an accident. Remedies such as the right to require repair, the price reduction or the claim for damages shall not be affected by the risk materialization. However, from the practical point of view, these remedies shall not be appealing to the buyer. They shall be either practically excluded (right to require repair in case of loss or destruction of the goods) or limited in effect since they can cover only the period before the materialization of the risk. The position is different with regard to the exercise of the right of avoidance and claim for substitute delivery. According to Article 82

¹⁶⁹ Honnold, 366.

¹⁷⁰ Schwenger/Fountoulakis, 491; Hager in Schlechtriem/Schwenger, 696.

(1) the buyer is prevented from relying on the remedy of avoidance or demand for substitute delivery if he is not able to return the goods in substantially the same position in which he received them. Thus, Article 70 here preserves the buyer's right of avoidance and request for substitute delivery. Since the buyer shall not be obliged to pay for the damages or loss of the goods, the exercise of these remedies shall have the effect of shifting the risk back to the seller.¹⁷¹

However, it is worth mentioning that the only remedy which reverts the whole risk back to the seller is the remedy of avoidance, whereas the impact of the exercise of the right on substitute delivery is limited by the extent of lack of conformity. For these reasons it may be said that Article 70 encourages the buyer to exercise his right to avoid the contract rather than to salvage what he could from the damaged consignment.¹⁷²

In addition, in case the delivery of non-conforming goods amounts to the fundamental breach, but the buyer nevertheless decides merely to request the repair, the seller would bear the risk if the goods are lost or destroyed during the period provided by the buyer for repair but before the defect is repaired. This is because in such a case the repair becomes impossible solution and the buyer may resort to the avoidance of contract or demand of substitute delivery, and by doing so shift the risk back to the seller. To hold otherwise and leave the buyer to bear the risk would penalize the buyer who was initially prepared to salvage the contract and claim for the seller less burdensome solution.¹⁷³

¹⁷¹ Hager in Schlechtriem/Schwenzer, 697; Annemieke Romein, The passing of Risk A Comparisson between the passing of risk under the CISG and German law (Heidelberg, June 1999), para E.II, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/romein.html>; Schwenzer/Fountoulakis, 491.

¹⁷² Nicholas, B. in Bianca/Bonell, 510; Zoi Valioti, Passing of Risk in international sale contracts: A comparative examination of the rules on the risk under the United Nations Convention on Contracts for the International Sale of Goods (September 2003), para 4.A.vi, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/valioti1.html>; Sylvain Bollée, The Theory of Risks in the 1980 Vienna Sale of Goods Convention, in Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000) 245, 283-285, *available at*: <http://www.cisg.law.pace.edu/cisg/biblio/bollee.html>.

¹⁷³ Hager in Schlechtriem/Schwenzer, 698-699.

5. CONCLUSION

*The constantly developing globalization of market in international commerce, the evolving intensification of traffic and trade and the net-working in production facilities around the globe, have triggered a growing harmonization of fundamental legal concepts.*¹⁷⁴

The Vienna Convention contains set of these harmonized fundamental legal concepts governing the rights and obligations of the buyer and the seller in international sales contracts. Though at the time the Convention came into force it was uncertain what success of the Convention would be, today there is no doubt that the CISG has achieved the rank of the “world sales law”. Parties to the international sale contracts are now offered much more predictability and legal certainty as to the rules that eventually may be applicable to their relationship. However, as it has been presented in this thesis, the application and interpretation of the Convention is not without difficulties. Moreover, soundness of some CISG provisions has been subject to criticism.

This thesis has discussed the issues that raised problems in the practice – the notion of non-conformity interlinked with the notion of fundamental breach of the contract. Since it has been shown that the CISG rules are inconsistently interpreted and applied as to the aforementioned issues, the paper has aimed at providing a systematic solution for the uniform application of the CISG rules on fundamental breach in case of non-conformity of goods and documents. Furthermore, the object of this work was to respond to the dilemma of suitability of CISG principles in international documentary sale and commodity trade and show that Vienna Convention offers rules flexible enough to satisfy the needs of these particular fields of international commerce.

¹⁷⁴ G.M. Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law in International Contracts: International Arbitration in Switzerland* 143 (S.V. Berti ed., Basel/Geneva/Munich, 2000), as cited in: S.A. Kruisinga, *supra* note 12, at 215.

The thesis has first underlined the uniform character of the concept of *non-conformity* employed by the Article 35 of the CISG. This uniform concept includes not only discrepancies in quality, but also discrepancies in quantity, delivery of an *aliud* and defects in packaging. This concept avoids differences among individual domestic legal systems relating to the notion of non-conformity (such as *peius* and *aliud* under the Austrian law, *vice caché* and *vice apparent* in the French law, express and implied warranties in the American or conditions and warranties in the English law). It was stressed that instead of all these distinctions, the core division under the CISG is now between the non-conformity which amounts to fundamental breach and "the rest of non-conformity" which are non-fundamental breach of the contract.

It has been explained that the CISG sets the especially high standards for the fundamental breach test in case of non-conformity. The rationale behind this lies in the role that concept of fundamental breach holds in the CISG system of remedies, on the one hand, and in CISG leading principle of preservation of contract and *ultima ratio* nature of the remedy of avoidance of contract, on the other hand. The powerful remedies – the avoidance of the contract and the claim for substitute delivery – are available to the aggrieved party only in case the other party commits the fundamental breach of the contract. The principle of upholding the contract seems even sounder in case of non-conformity, which as a rule arises only after the goods have already been delivered. Unwinding the contract in these circumstances would lead to redispotion and reshipment of the goods back to the seller. That all in the context of the international trade which involves long and expensive transport, would imply additional losses and additional risk for the goods, as well as waste of time. For these reasons it is reasonable to apply high standards for the fundamental breach test, minimize the avoidance of the contract, and avail the buyer with the remedy of price

reduction and/or damages whenever this can reasonably satisfy his needs arising out of the contract.

The thesis then has discussed the application of the fundamental breach test in case of lack of conformity. The Article 25 CISG offers only the guiding idea for the question when the breach is fundamental, but does not illuminate the problem of particular instances of the breaches, such as the subject matter of this thesis – lack of conformity. For these reasons, the thesis has provided and analyzed the criteria for weighing the non-conformity in practice. The following has been said.

First, when determining whether the particular non-conformity amounts to the fundamental breach, the utmost importance should be given to the parties' agreement. This is because the parties are free not only to determine their rights and obligations but also to attach the importance of performance of the particular obligations and, accordingly, the importance of detriment caused by non-performance of that particular obligation. If the parties stipulate that, contract terms take precedence over all other criteria. Secondly, if the parties fail to clarify the issue in their contract, the purpose for which the goods are bought should be considered. If the buyer has bought the goods for his own professional needs, it should be discussed whether the buyer may make the use of the defective goods or utilize them in the normal course of business and without unreasonable expenditure, and then claim damages from the seller. On the other hand, if the buyer bought the goods for the resale business, the buyer may be expected to resell the defective goods despite their shortcomings. However, the expectations as to the reselling of the defective goods are not to be the same for the buyer-wholesaler and the buyer-retailer. The former has broader access to the market and, thus, it is easier for him to resell the goods. Finally, the defect shall not amount to fundamental breach if it is curable and the seller is willing and offers to remedy it and if that does not cause unreasonable inconvenience for the buyer.

The paper has addressed the special problem arising out of non-conforming documents in international trade. It has been explained that the distinction has to be made between different types of documents and fields of international trade. As to the documents accompanying contract of sale, such as insurance policy, certificate of analysis, custom clearance certificates, certificate of origin and the like, the general criteria are applicable. In the case of documentary sales, contracts with payment by means documentary credit and sales in commodities, more flexible approach is to be taken. This approach has to take into account the role of the principle of *strict compliance* of documents in this mode of international commerce, as well as the fact that the *time is of the essence* in rapidly fluctuating commodity market. The CISG provides the suitable basis for such approach either by means of the Article 6, offering the party to design their contract to suit their particular needs, or by means of the Article 9(2), which calls for observance of trade usages regularly observed in international trade. For these reasons, it can be concluded that the critiques for suitability of the CISG rules in the international documentary sales and commodity trade are not justifiable.

Finally, the importance of the issue of non-conformity which amounts to the fundamental breach has been emphasized. The importance comes from the consequences of the problem. Only in case the lack of conformity constitutes fundamental breach, the buyer is entitled to resort to remedies of avoidance of the contract and claim for substitute delivery. Besides, it has been shown that the issue affects the passage of risk rules. The buyer preserves the right to avoid the contract and claim delivery of substitute goods despite the fact that the goods were lost or damaged after the risk had passed to the buyer.

* * * * *

As final remark to this thesis, the stress is attached to the need of uniform and autonomous interpretation and application of the uniform CISG rules. This is of the utmost importance for the promotion of legal certainty in the international sale of goods. For that

reason, the courts should detach themselves from their domestic legal systems' views. Only if that can be achieved, the international commerce shall be free from the *Babel of diverse domestic legal systems*.¹⁷⁵

¹⁷⁵ Honnold, *supra* note 2, at 1.

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