

BUYER'S REMEDIES UNDER THE CISG AND ENGLISH SALES LAW: A COMPARATIVE ANALYSIS

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ABSTRACT

This thesis is a comparative analysis between the United Nations Convention on Contracts for the International Sale of Goods (CISG) and English sales law, as applicable to England and Wales. The focus is on the buyer's remedies for breach of contract by the seller, which is the area where the differences between the two systems are identified as particularly striking. There is no satisfactory example in the literature of a traditional comparative analysis of the buyer's remedies in the CISG which are allegedly different to those in English sales law. With the exception of damages, this thesis among other relevant provisions compares the buyer's rights under the CISG to require performance by the seller (including the right to require substitute delivery and repair), to fix an additional period of time for performance, to declare the contract avoided and to reduce the price, with the equivalent English sales law rules, if any.

The aim of this thesis is to identify the differences between the CISG and English sales law and determine whether these differences will have significant practical consequences for merchants in the eventuality the UK accedes to the CISG and the Convention becomes the country's legal regime for contracts for the international sale of goods. By considering unfamiliar CISG provisions against established English sales law knowledge, this thesis also aims to make the CISG more intelligible and digestible to English lawyers. This is necessary, regardless of whether the United Kingdom accedes to the CISG, because, the reality of the CISG as the international sale of goods law of 83 countries means that English commercial actors and lawyers are bound to be frequently coming across it.

In loving memory of my grandfather, Nicos

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‘When you set out on the journey to Ithaca,
pray that the road be long,
full of adventures, full of knowledge. (...)’
C.P. Cavafy, *Ithaca*.

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Chapter 1 Introduction

1.1 Background

During the 19th century, industrialisation and improvements in the means of transport and communications were the main factors behind the realisation by the international community of the importance of uniform laws¹ and consequently the need to unify the substantive rules applicable to international trade.² The Belgian Government's report to King Leopold on the proposed Antwerp Exhibition of 1885 reveals the spirit of the time: 'Commercial relations are at the present day nothing if not international; they are becoming more and more so, and what a leap forward they would take if they were emancipated from the obstacles, uncertainty and expense arising from diversity of laws!'³

The UN Convention on Contracts for the International Sale of Goods (CISG),⁴ adopted at a Diplomatic Conference in Vienna on 10 April 1980,⁵ constitutes a uniform set of rules on contracts for the international sale of goods and stands as one of the pillars of the broad scale unification of law envisioned by the international community in relation to international trade. The CISG currently numbers 83 Contracting States from every part of the world with the exception of the United Kingdom.⁶ With most major trading,

¹ For a definition of uniform laws see Camilla Andersen, *Uniform Application of the International Sales Law: Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (Kluwer Law International 2007) 7: Uniform laws are defined as 'specific legal rules or instruments (not necessarily defined as law in all jurisdictions) of some form deliberately designed to be voluntarily shared across boundaries of different jurisdictions which, when applied, result in varying degrees of similar effects on a legal phenomenon.'

² Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas, 'Introduction to the CISG' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary* (C.H. Beck 2011) 2.

³ As quoted in Thomas Barclay, 'The Antwerp Congress and the Assimilation of Mercantile Law' (1886) 2 LQR 66, 66.

⁴ (1980) 19 ILM 671.

⁵ For the history of the CISG see UN, *United Nations Conference on Contracts for the International Sale of Goods; Official Records* (UN Doc A/CONF.97/19) 3-4; Peter Schlechtriem, *Uniform Sales Law - The UN Convention on Contracts for the International Sale of Goods* (Manz 1986) 17-20. For the documentary history of the CISG see John Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers 1989).

⁶ Status available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

European and common law countries now Parties to the CISG, the country's absence from the ranks of the Convention is certainly notable.⁷

In 2005, when Lord Lester asked Her Majesty's Government 'why they have not ratified [the CISG] which came into force on 1 January 1988,'⁸ Lord Sainsbury, who was then serving as the Parliamentary Under-Secretary of State of the Department of Trade and Industry (DTI) answered that, 'the UK intends to ratify the Convention, subject to the availability of parliamentary time.'⁹ However, Sally Moss of the Department for Business, Innovation and Skills (BIS) (former DTI) reports that, 'Ministers do not see the ratification of the Convention as a legislative priority.'¹⁰ She explains that one of the main reasons for this is that there seems to be relatively little interest in the country to ratify the Convention.¹¹ Indeed, after a number of informal and formal consultations, the UK's accession to the CISG was never clearly endorsed.¹²

⁷ The UK did ratify the CISG's predecessors though, the Convention for the Uniform Law of International Sales (ULIS) and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) but as permitted by Article V ULIS, it also declared that the Uniform Law will only apply to contracts in which the parties have chosen it as the law of the contract. Michael Bridge, *The International Sale of Goods* (3rd edition, OUP 2013) 473 argues that, 'for all practical purposes, this rendered the two Conventions a dead letter as far as the United Kingdom was concerned.'

⁸ For a whole range of reasons as to why the UK has not acceded to the CISG see John Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 LQR 530; Barry Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' *Saggi, Conferenze e Seminari* 9 (March 1993); Angelo Forte, 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1997) 26 U Balt L Rev 51; Roy Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 (4) ICLQ 751; John Linarelli, 'The Economics of Uniform Laws and Uniform Law Making' (2003) 48 Wayne L Rev 1387; Ricardo Borges, 'The United Kingdom and the UN Convention on Contracts for the International Sale of Goods (CISG): To Ratify or Not To Ratify?' (2008) 14 (4) J Int'l Maritime L 331; Alastair Mullis, 'Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention' (2007) 71 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 35, 36-39; Anna Rogowska, 'Some Considerations on the Desirability of Accession to the CISG by the UK' (2013) 2 *Eur J Com Con L* 31.

⁹ HL Deb 7 February 2005, vol 669, col WA86. The 'UK' refers to the United Kingdom of Great Britain and Northern Ireland therefore, if the UK accedes to the CISG it will be as the union of Great Britain (comprised on England, Scotland [subject to the result of the Scottish independence referendum in September 2014] and Wales) and Northern Ireland. However, this thesis only focuses on England and Wales excluding Scotland and Northern Ireland. Accordingly, the term 'English sales law' used throughout this thesis refers to the common law together with the Sale of Goods Act 1979 (SGA 1979) as applicable to England and Wales. Similarly, any references to 'English merchants' or 'English lawyers' or 'practitioners' refer to those who operate under and practice the law of England and Wales.

¹⁰ Sally Moss, 'Why the United Kingdom has not ratified the CISG' (2005) 25 (1) *J. L. & Com.* 483, 483. To the author's best of knowledge, that still seems to be the case today.

¹¹ *Ibid.*

¹² See Letter from The Solicitor, Departments of Industry and Trade to Interested Parties (November 1980); The Law Society, *1980 Convention on Contracts for the International Sale of Goods – Comments by the Council's Law Reform Committee* (April 1981); Department of Trade and Industry, *United Nations*

Therefore, Sally Moss advises parties interested in the UK's accession to the CISG to make their desire 'clear to the government and lobby hard for it' rather than simply wait for the Government to pursue accession.¹³ Bridge confirms that, 'BIS is not inclined to carry forward adoption of the CISG in the absence of a substantial endorsement of such action by business and the legal profession in the United Kingdom.'¹⁴ If this is the case, then the only way forward towards the UK's accession to the CISG truly is through 'a purely private' initiative as Goode suggests.¹⁵

However, empirical research suggests that most practitioners in the UK are not familiar with the CISG¹⁶ whereas the business community's general view in relation to the country's law for the international sale of goods is that 'if it ain't broke, don't try to fix it.'¹⁷ The fact that the UK is not a Party to the CISG though 'does not stop foreign legal culture in the Straits of Dover and is no guarantee to English merchants of immunity from its provisions' as Bridge colourfully puts it.¹⁸ English merchants may have to enter

Convention of International Sale of Goods: A Consultative Document (June 1989); Department of Trade and Industry, *United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention): A Consultation Document* (October 1997); Email from Hugh Beale, Law Commissioner to Tamara Goriely and Adam Sher (October 2004). On file with author.

¹³ Moss, 'Why the United Kingdom has not ratified the CISG' (n10) 483.

¹⁴ Bridge, *The International Sale of Goods* (n7) 471.

¹⁵ See Goode, 'Insularity or Leadership?' (n8) 758: '... what is particularly significant about the Arbitration Act is that, lacking government interest, it started as a purely private enterprise in which one of our leading arbitrators, Mr. Arthur Marriott, persuaded private organisations and individuals to contribute funds for the preparation of an unofficial Bill, which was in due course produced. Eventually the DTI agreed to take over the Bill and the result was the excellent product we have today. But we might not have had it at all if there had been no private initiative. Is this the way to carry our commercial law forward? Perhaps it is!'

¹⁶ See Anna Rogowska, 'Teaching the CISG at U.K. Universities - An Empirical Study of Frequency and Method of Introducing the CISG to UK Students in the Light of the Desirability of the Adoption of the CISG in the UK' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing 2011) 131; Mary Wallace, 'Instruments of International Commercial Harmonisation in England and Wales' (PhD Thesis, University of East Anglia 2013), Chapters 2 and 3. See also Camilla Andersen, 'United Kingdom' in Franco Ferrari (ed), *The CISG and its Impact on National Legal Systems* (Sellier 2008) 303, 306.

¹⁷ Moss, 'Why the United Kingdom has not ratified the CISG' (n10) 484.

¹⁸ Michael Bridge, 'The Bifocal World of International Sales: Vienna and Non-Vienna' in Ross Cranston (ed), *Making Commercial Law Essays in Honour of Roy Goode* (Clarendon Press 1997) 277, 278. See also HL Deb 3 May 1995, vol 563, cols 1457FF. During discussions Lord Steyn voiced his concerns in relation to English sales law and stressed that it 'should in all respects be flexible, attuned to the needs of commerce and responsive to major developments in the international market place. He distinctively said: 'If Britannia still ruled the waves, and if our traders could regularly impose English Law as the applicable law in international transactions, there would be no pressing need to ratify the [CISG]. But the international marketplace for the sale of goods has changed.'

into contracts, which explicitly incorporate the provisions of the CISG¹⁹ or may have entered arbitration agreements that provide for the application of the CISG or the arbitrator may apply the CISG under a general formula such as ‘general principles’ or ‘*lex mercatoria*’ (section 46(1)(b) Arbitration Act 1996, ‘other considerations’).²⁰ They may even find the CISG being applied by courts of the UK if their contract contains a choice of law clause in favour of the law of a CISG Contracting State.²¹ This might often be the case given the number of CISG Parties. Or it might be the case that ‘an English court might be led by its rules of private international law to apply the CISG; the court, applying the rules in the Rome I Regulation, might conclude that the relevant law is, for example, German law as the law of the seller’s place of business and might then conclude that the relevant German law dealing with international sales is the CISG as transposed into German law.’²²

Therefore, even if the UK does not accede to the CISG, English merchants, and English lawyers, are bound to come across it as a result of the fact that it is the international sale of goods law of 83 countries including the USA, Canada, Germany, France and Italy, China and Japan. Accordingly, the business community and lawyers, but also the Government, should not underestimate the significance of the CISG both its terms of its use and quality of substantial provisions aimed at the promotion of international trade particularly in light of the increasing interconnection of national economies and even further advancements in technology, travel, transport and communications.

1.2 The Thesis

The CISG is different to English sales law primarily by virtue of its nature as a uniform law instrument, which had to reconcile various legal traditions.²³ Appreciating the

¹⁹ Anna Rogowska, ‘CISG in the United Kingdom: How does the CISG govern the Contractual Relations of English Businessmen’ (2007) 7 ICCLR 226, 227.

²⁰ Bridge, *The International Sale of Goods* (n7) 471.

²¹ Ibid.

²² Ibid., 476 fn 77.

²³ See Sara Zwart, ‘The New International Law of Sales: A Marriage Between Socialist, Third World, Common and Civil Law Principles’ (1988) 13 N.C.J. Int’l L. & Com. Reg. 109; Alejandro Garro, ‘Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods’ (1989) 23 Int’l Lawyer 443. See also J.D. Feltham, ‘UN Convention on Contracts for the International Sale of Goods’ (1981) JBL 346, 361: ‘Given the difficulty of achieving agreement across a large number of nations, common law and civil law, capitalist and socialist, developed and developing, [the CISG] is probably as good as can be expected.’ Barry Nicholas, ‘The Vienna Convention on

significance of the CISG for English merchants and lawyers and in light of the danger of *prima facie* differences between the CISG and English sales law negatively affecting the development of any genuine interest and support for the CISG in general and the UK's accession to it,²⁴ this thesis provides a comparative analysis of the area where the differences between the CISG and English sales law are claimed to be 'most striking': buyer's remedies.²⁵

The available remedies for breach of contract are a particularly important, if not a decisive factor in the choice of law for parties engaging in the international sale of goods. This is especially the case for the buyer, who invests time and money to research, enquire, negotiate and enter into an international sale contract with a foreign seller, and would like to be assured that if anything goes wrong or the seller deliberately breaches the contract, his remedies under the applicable law will provide him with satisfactory relief. Any merchant who hears that the differences between the buyer's remedies under the CISG and English sales law are striking, is highly likely to take an aversion to the CISG primarily because of fear for the unknown and the impact it may have on his well-known and well-worked English sales law rights in case of breach by the seller.

International Sales Law (1989) 105 LQR 201, 243 was prepared to delete 'probably' from Feltham's statement.

²⁴ Michel de Montaigne, *Essays* (Michael Andrew Screech tr, Penguin 1993): 'Every man calls barbarous anything he is not accustomed to'; H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (2nd edition, Wildy & Sons 1949) 158: 'The abandonment of national rules of law seems to imply that there is something amiss with the rules which are to be displaced, and national *amour propre* suffers accordingly. The citizens of many countries are deeply attached to their national law: at one extreme we have, for instance, the Frenchman who carries in his pocket the *Code Civil*, the dog-eared leaves of which bear witness to the frequency with which it is consulted, and, at the end of the line, we find the Englishman who never looks at a law book but is nevertheless convinced that his common law is the quintessence of human wisdom and justice. It must not be forgotten that to invite the citizen to give up a rule of law to which he has become accustomed to may be to demand almost as great a sacrifice as the abandonment of his national speech or religion. Moreover, lawyers of all nationalities are apt to be hostile to unification, very largely because they may not have the leisure or the inclination to investigate the reasons by which it is prompted.'

²⁵ Michael Bridge and others (eds), *Benjamin's Sale of Goods* (8th edition (Inc. Supp), Sweet & Maxwell 2010) para 12-131: 'The difference between the buyer's remedies under this Convention and under the common law together with the Sale of Goods Act are considerable: indeed it is in the area of remedies that the differences are most striking.' According to Rafal Zakrzewski, *Remedies Reclassified* (OUP 2005) 7, the word 'remedy' has a multiplicity of meanings, some of which overlap. It is, however, used in this thesis to denote the relief that is available to the buyer in light of the seller's failure to perform his contractual obligations. See Donald Harris, David Campbell and Roger Halson, *Remedies in Contract and Tort* (2nd edition, Butterworths 2002) 3: Contractual remedies are defined as 'the courses of action open to a claimant, C, who wishes to take some step to cope with the consequences of the defendant, D's, (threatened) failure to perform his contractual obligation.'

The available remedies for breach of contract are also particularly important for the lawyers advising buyers entering into international sales contracts. After all, ‘we must always remember that legal advice is, at bottom, simply advice as to the remedy likely to be available (or unavailable) to the client.’²⁶

The aim of this thesis is to identify the differences between the buyer’s remedies in the CISG and English sales law and determine whether these differences will have significant practical consequences for merchants in the eventuality the UK accedes to the CISG and the Convention becomes the country’s legal regime for contracts for the international sale of goods. The practical consequences of the differences between the CISG and English sales law this thesis is interested in, and considers significant, is whether the invoking of the buyer’s remedies under the CISG produces a different practical outcome for the buyer than his remedies under English sales law.

The aim of this thesis will be achieved by examining the relevant “unfamiliar” CISG provisions against the equivalent “familiar” English sales law rules in a comparative setting.²⁷ Both the law (theory) and its application (practical outcome) will be closely examined as it is often the case when reading the legal rules of two regimes against each other to identify theoretical differences which in practice have no significance as a result of the application of supplementary rules or the parties’ conduct and choices. By considering and comparing unfamiliar CISG provisions against established English sales law knowledge, at the same time this thesis aims to make the CISG more intelligible and digestible to English lawyers in light of its significance as the international sale of goods law of 83 countries.²⁸

²⁶ Andrew Tettenborn, ‘Remedies: A Neglected Contribution’ [1999] Denning LJ 41, 41. See also David Emmet (ed), *Remedies* (16th edition, OUP 2012) 1 which is a Manual on Remedies written specifically for students on the Bar Professional Training Course stressing their importance and advising student that the client’s crucial and primary question for them, as legal advisers, will be what solution the law offers to the client’s problem, i.e. what is the remedy?

²⁷ See section 1.5 Methodology below.

²⁸ Harry Flechtner, ‘Remedies under the New International Sales Convention: The Perspective from Article 2 of the UCC’ (1988) 8 J L Com 53, 53. Flechtner argues that ‘done carefully, to avoid distorting the new law into either a mere image of the known or a menacing shadow of change, comparisons can build on established knowledge to provide an efficient introduction to unfamiliar provisions.’; Basil Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart Publishing 1997) 41. Markesinis argues that ‘in law familiarity often breeds interest, not contempt.’ He then maintains that ‘when you manage to make the foreign law intelligible to your own colleagues, you are more than halfway towards getting them interested in its solutions and idea.’

Accordingly this thesis poses the following research questions: What are the differences between the buyer's remedies in the CISG and English sales law? Will these differences have significant practical consequences for merchants in the eventuality the UK accedes to the CISG? In other words, do the CISG provisions under examination bring about a different practical outcome than English sales law does so as to justify possible concerns of merchants and lawyers about the impact of incorporating the CISG?

A number of comparative analyses between the CISG and English law have been conducted, but they are too old, too general, too brief (i.e. concentrating on just one, two or three remedial provisions in the CISG) or have different aims.²⁹ Bridge's book, *The International Sale of Goods*,³⁰ which provides a general comparison of the CISG to English law, seems to contain the most recent comparative exercise on remedies between the CISG and English law. However, this is a single chapter more in the form of a general overview on CISG remedies, covers both the buyer and the seller's remedies together and assumes, and consequently requires, prior good knowledge of both the CISG and English sales law. On the whole, there is no satisfactory example of a traditional comparative analysis of the buyer's remedies in the CISG, which are allegedly different to those in English sales law. This thesis aims to fill this lacuna and as such claims to be making a distinctive and original contribution to knowledge by taking a traditional in-depth black-letter law approach to the comparative study of the buyer's remedies in the CISG and English sales law. The chosen pattern of exposition, analysis and comparison of the rules of the two regimes under examination makes this thesis unique in terms of depth, detail, and range of research materials and critical evaluation of a number of debated issues, such as the concept of fundamental breach.

²⁹ See Alastair Mullis, 'Termination for Breach of Contract in CIF Contracts under the Vienna Convention and English Law: Is there a Substantial Difference?' in Lomnicka and Morse (eds), *Contemporary Issues in Commercial Law* (Sweet & Maxwell 1997) 137; Peter Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are these worthwhile changes or additions to English Sales Law?' (2000) *Pace Intl L Rev* 1; Alison Williams, 'Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the United Kingdom', *PACE Review of the Convention on Contracts for the International Sales of Goods (CISG) (2000-2001)* (Kluwer Law International 2001) 9; Anette Gartner, 'Britain and the CISG: The Case for Ratification – A Comparative Analysis with Special Reference to German Law' *PACE Review of the Convention on Contracts for the International Sales of Goods (CISG) (2000-2001)* (Kluwer Law International 2001) 59; Djakhongir Saidov, 'Remedies for a Documentary Breach: English Law and the CISG' in Larry DiMatteo, Qi Zhou, Severine Saintier and Keith Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013) 434.

³⁰ Bridge, *The International Sale of Goods* (n7) Chapter 12.

1.3 An Overview of the Buyer's Remedies in the CISG

Article 45(1) CISG provides that if the seller fails to perform any of his obligations under the contract or this Convention, the buyer may (a) exercise the right provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77. Article 45(2) CISG clarifies that the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Article 45 CISG is sometimes only viewed as a mere recital of the buyer's remedies³¹ but it actually 'serves both as an index to the remedies available to the buyer if the seller fails to perform any of his obligations under the contract and [the CISG] and as the source for the buyer's right to claim damages.'³² Its index function, or legislative 'recording' technique, assists in an easier and more uniform interpretation and application of the CISG by the giving of systematic guidance³³ whilst at the same time establishing the buyer's right to claim damages, which are calculated according to Articles 74 to 77 CISG.³⁴

All of the buyer's remedies listed in Article 45(1) CISG are only available if the seller fails to perform any of his obligations under the contract of the Convention. The obligations of the seller are found in Chapter II, Part III followed by the buyer's remedies. In brief, the seller's obligations are to deliver the goods (Articles 30 and 31 CISG) and do so in accordance with the contract (Articles 30 and 35 CISG), to transfer the property in the goods (Article 30 CISG) free from third party rights or claims (Articles 41 and 42 CISG), to hand over the documents required by the contract or usage (Articles 30 and 34 CISG) and to perform any other acts required by the contract.³⁵ It is important to note though that Article 30 CISG emphasizes that the scope

³¹ Ulrich Magnus, 'Beyond the Digest: Part III (Articles 25-34, 45-52)' in Franco Ferrari, Harry Flechtner and Ronald Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (Sellier 2004) 330.

³² UNCITRAL, Secretariat Commentary, 'Article [45]' in *Official Records* (n5) 37.

³³ Magnus, 'Beyond the Digest' (n31) 330-331.

³⁴ *Oberlandesgericht Zweibrücken* (Germany) 31 March 1998 (Pace); Markus Muller-Chen, 'Article 45' in *Schlechtriem & Schwenzler Commentary* (n5) 690; John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry Flechtner ed, 4th edition, Kluwer Law International) 404-405.

³⁵ Muller-Chen, 'Article 45' (n34) 690-691.

and substance of the seller's obligations are determined primarily by the terms of the contract which override the CISG.³⁶

What constitutes 'failure to perform' or the synonymous term 'breach of contract' must be understood in a very broad sense and must always be determined by reference to the subject matter of the obligation in question.³⁷ The reason for the seller's failure to perform is immaterial.³⁸ This means that the seller will be considered as having 'failed to perform' even where there are grounds for exemption according to Article 79 CISG.³⁹ In such a case, only the buyer's right to damages and, depending on the reason of the non-performance, his right to require performance are excluded;⁴⁰ the remaining remedies provided in section III remain available to the buyer.⁴¹ However, when the seller is exempted because the failure to perform is caused by the buyer's act or omission according to Article 80 CISG,⁴² not only is the buyer's right to damages excluded, but so are all of his remedies.⁴³

However, it must be noted at the outset that some remedies are only available where the seller has delivered non-conforming goods such as the buyer's right to require substitute delivery and repair (Articles 46(2) and (3) CISG) and his right to reduce the price (Article 50 CISG). Moreover, the availability of some of the more drastic remedies such as requiring the seller to deliver substitute goods (Article 46(2) CISG) and declaring the contract avoided (Article 49(1)(a) CISG) requires the 'failure of performance' to be a fundamental breach of contract (Article 25 CISG).⁴⁴ The distinction between a non-

³⁶ Corinne Widmer, 'Article 30' in *Schlechtriem & Schwenzer Commentary* (n5) 490.

³⁷ Muller-Chen, 'Article 45' (n34) 691.

³⁸ Ibid.

³⁹ Ibid 692. According to Article 79 (1) CISG, 'a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.'

⁴⁰ Article 79(5) CISG.

⁴¹ Muller-Chen, 'Article 45' (n34) 692.

⁴² According to Article 80 CISG, 'a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.'

⁴³ Muller-Chen, 'Article 45' (n34) 692.

⁴⁴ It is important at the outset to distinguish the notion of "fundamental breach" in the CISG from the principle of "fundamental breach" in English law which was applied in a different context and developed by the courts with a view to limit the operation of exclusion clauses, the rationale being that no party could exclude or restrict his liability for such a breach. Fundamental breach (Article 25 CISG) is briefly examined in Chapter 2 in the context of the buyer's right to require substitute delivery (Article 46(2) CISG) and examined in detail in Chapter 5 in the context of the buyer's right to declare the contract avoided (Article 49 CISG).

fundamental and a fundamental breach of contract essentially operates as ‘the border’ between situations giving rise to regular remedies for breach of contract such as damages and price reduction and those calling for more drastic remedies such as avoidance of contract and substitute delivery.⁴⁵ Delivery of substitute goods is ‘equated’ with avoidance as it involves similar considerations to avoidance in relation to the fate of the non-conforming goods, which would need to be preserved and returned to the seller.⁴⁶ ‘The reason for limiting particularly drastic legal consequences to cases in which the breach of the contract is fundamental’ takes into account the international nature of the contract and lies in ensuring its performance and in avoiding ‘considerable unnecessary and unproductive costs, such as those associated with the return or storage of the goods’ back to another country.⁴⁷

Articles 46 to 52 CISG provide the buyer with three main remedies in the event that the seller fails to perform one of his obligations: the right to require performance (Article 46 CISG, subject to Article 28 CISG which allows a court to not enter a judgment of specific performance unless it would do so under its own law), to declare the contract avoided (Article 49 CISG) or to claim a price reduction (Article 50 CISG). If the preconditions of all three remedies are satisfied, the buyer must decide among them as ‘it is not possible to combine the three remedies, because their legal consequences are mutually incompatible.’⁴⁸ According to Article 45(2) CISG though, ‘the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.’ Therefore, the buyer has the right to combine a claim for damages with any other remedy available to him.⁴⁹ Such a claim though will only cover the loss that is not compensated for by the other available remedy.⁵⁰

The buyer’s right to fix an additional period of time of reasonable length for performance by the seller of his obligations (Article 47 CISG), the seller’s right to cure

⁴⁵ UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012 Edition) 118.

⁴⁶ See section 2.3, Chapter 2 and section 5.4.1, Chapter 5.

⁴⁷ Franco Ferrari, ‘Fundamental Breach of Contract under the UN Sales Convention -25 Years of Article 25 CISG-’ (2005) 25 (1) J.L. & Com. 489, 490-491; Clemens Pauly, ‘The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law’ (2000) 19 JLC 221, 225.

⁴⁸ Muller-Chen, ‘Article 45’ (n34) 694.

⁴⁹ *Schiedsgericht der Handelskammer* (Arbitral Award, Germany) 21 March 1996 (Unilex); *Supreme Court of Western Australia* (Australia) 17 January 2003 (Unilex).

⁵⁰ UNCITRAL, *Digest* (n45) 225.

any failure to perform his obligations (Article 48 CISG), and the provisions on partial non-performance (Article 51 CISG) and early or excess delivery (Article 52 CISG) are viewed as supplementary to the buyer's main remedies.⁵¹ However, while the rules on partial non-performance and early or excess delivery are in fact only supplementary to the buyer's main remedies, the fixing of an additional period of time and the seller's right to cure not only supplement or facilitate the buyer's main remedies, but sometimes operate as independent remedial mechanisms. This is the case when the seller actually does perform his obligations within the additional period of time fixed by the buyer or successfully cures any failure of his to perform an obligation. In these cases, there is then no need to invoke any of the buyer's main remedies except of course claim any damages that may have arisen.⁵² The fixing of an additional period of time and cure, along with the high threshold required to establish a fundamental breach according to Article 25 CISG, in effect serve to restrain the scope of avoidance as a remedy.⁵³

Article 45(1)(a) CISG 'is not entirely complete' though.⁵⁴ It is missing a reference to Articles 71 to 73 CISG, which govern anticipatory breach and instalment contracts. The CISG 'provides the parties with remedial relief not only in case of a breach of contract after the due date, but also where performance is (merely) endangered.'⁵⁵ Such remedies are viewed as protecting the parties' reasonable expectations, promoting the reliance on contracts, the security of business transactions and certainty that parties need to have regarding their legal positions when they have grounds to suspect that the performance at the due date will not be forthcoming.⁵⁶ There is an implied duty on the parties not to impair each other's expectations that the contract will be performed.⁵⁷ Article 71 CISG refers to an impending future breach of duty by the debtor and 'must be read in context' with Article 72 CISG, which deals with anticipatory fundamental breach of contract,

⁵¹ Muller-Chen, 'Article 45' (n34) 694.

⁵² Article 47(2) CISG: '(...) However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.'; Article 48(1) CISG: '(...) However, the buyer retains any right to claim damages as provided for in this Convention.'

⁵³ Peter Huber, 'CISG – The Structure of Remedies' (2007) 71 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 13, 20.

⁵⁴ Muller-Chen, 'Article 45' (n34) 690.

⁵⁵ Christiana Fountoulakis, 'Article 71' in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods* (3rd edition, OUP 2010) 950.

⁵⁶ Djahongir Saidov, 'Introduction to Articles 71-73' in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n2) 912.

⁵⁷ *Ibid* 912.

and Article 73 CISG, which focuses on interferences during the performance of an instalment contract.⁵⁸

Article 45(1)(a) CISG is also thought to be missing a reference to Article 78 CISG concerning interest in relation to owed sums, a reference to Article 80 CISG which prescribes that ‘a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission’ and Articles 86 to 88 CISG concerning preservation of the goods. However, as can be revealed by the Official Records of the Diplomatic Conference in Vienna, ‘the list of remedies in [Article 45] was not intended to be exhaustive;’⁵⁹ ‘it contained only the most important and primary rights of the buyer.’⁶⁰

Nevertheless, Article 45 CISG is ‘exhaustive in the sense that it pre-empts the buyer from invoking remedies for breach of contract otherwise available under the applicable domestic law, since the Convention excludes recourse to domestic law where the Convention provides a solution.’⁶¹ Therefore, Article 45 CISG provides that if the seller fails to perform any of his obligations there can be no recourse to the remedies available to the buyer under the otherwise applicable domestic national law because ‘to the extent the issue of remedies is covered by the Convention, the Convention reigns supreme.’⁶²

However, except as otherwise expressly provided in the CISG, the Convention is not concerned with (a) the validity of the contract or of any of its provisions or of any usage or with (b) the effect which the contract may have on the property in the goods sold.⁶³ So, where the buyer is ‘induced to conclude the contract by fraud, such a validity issue is not governed by the CISG and needs to be resolved by domestic law (giving the buyer re-course to remedies for fraud).’⁶⁴ “Mistake”, for instance, constitutes a common validity issue. Therefore, and as a matter of principle, a case involving mistake is not

⁵⁸ Fountoulakis, ‘Article 71’ (n55) 950; Saidov, ‘Introduction to Articles 71-73’ (n56) 912.

⁵⁹ Summary Records of the Plenary Meetings, 7th Plenary Meeting (UN Doc A/CONF.97/SR.7) in *Official Records* (n5) 209-210.

⁶⁰ *Ibid.*

⁶¹ UNCITRAL, *Digest* (n45) 224. See *U.S District Court, Southern District of New York* (United States) 10 May 2002 (Unilex); *U.S. District Court, Eastern District of Kentucky* (United States) 18 March 2008 (Unilex).

⁶² Alejandro Garro, ‘Cases, analyses and unresolved issues in Articles 25-34, 45-52’ in Ferrari, Flechtner and Brand, *The Draft UNCITRAL Digest and Beyond* (n31) 375.

⁶³ Article 4 CISG.

⁶⁴ Milena Djordjevic, ‘Article 4’ in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n2) 72-73.

governed by the CISG.⁶⁵ However, where the mistake relates to the characteristics of the goods or creditworthiness or ability of the other party to perform the contract, the CISG applies since the Convention exhaustively deals with those matters.⁶⁶ Accordingly, the general rule that must be borne in mind is that ‘domestic rules that turn on substantially the same facts as the rules of the Convention must be displaced by the Convention.’⁶⁷

The buyer’s right to claim damages is not dependent on fault or lack of good faith and is set out in Article 45(1)(b) CISG, which ‘forms the basis’ of a buyer’s claim in damages.⁶⁸ Articles 74 to 77 CISG then provide the rules for the calculation of the amount of damages; ‘they do not provide the substantive conditions as to whether the claim for damages can be exercised.’⁶⁹ In particular, Article 74 CISG establishes the general formula applicable in all cases where an aggrieved party is entitled to recover damages, Articles 75 and 76 CISG govern cases where the contract has been avoided and by virtue of Article 77 CISG, damages recoverable under Articles 74 to 76 CISG are reduced if it is established that the aggrieved party failed to mitigate losses.⁷⁰ These provisions are exhaustive and exclude recourse to domestic law.⁷¹

1.3.1 General Underlying Principles

The CISG’s pro-contractual spirit is so prevalent that even a mere overview of the buyer’s remedies can easily reveal it. Its performance-oriented provisions are aimed at the preservation of the contract and the fact that a high threshold is required for the buyer to be entitled to declare the contract avoided is consistent with the principle of *favor contractus*. As this principle can be traced back from the CISG’s remedial provisions, it is considered to be an underlying principle of the CISG under Article 7(2).⁷² Honnold explains that the so-called *favor contractus* means that, ‘whenever

⁶⁵ Article 4(a) CISG. See *Oberster Gerichtshof* (Austria) 20 March 1997 (Unilex); *Handelsgericht St. Gallen* (Switzerland) 24 August 1995 (Unilex); *Schweizerisches Bundesgericht* (Switzerland) 11 December 2000 (Unilex).

⁶⁶ Djordjevic, ‘Article 4’ (n2) 71.

⁶⁷ Honnold, *Uniform Law* (n34) 96-97.

⁶⁸ UNCITRAL, Secretariat Commentary, ‘Article [45]’ in *Official Records* (n5) 37.

⁶⁹ *Ibid.*

⁷⁰ UNCITRAL, *Digest* (n45) 343.

⁷¹ *Landgericht Heilbronn* (Germany) 15 September 1997 (Pace).

⁷² Bertram Keller, ‘Favor Contractus: Reading the CISG in Favour of the Contract’ in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries* (Wildy, Simmonds and Hill Publishing 2008) 247, 247, 250: ‘Principle’ means under the CISG a generic term for

possible, a solution should be adopted in favour of the valid existence of the contract and against its premature termination on the initiative of one of the parties.’⁷³ Others rendered it ‘in favour of the contract’ and explained that it means ‘to maintain a contractual bond.’⁷⁴ As a general underlying principle of the CISG, ‘*favor contractus* demands cooperation, a favourable interpretation and sometimes even an adaptation of the contract;’ ‘at all events, disputes will be interpreted “in favour of the contract.”’⁷⁵

Although the principle of the sanctity of contracts, *pacta sunt servanda*, is enshrined in Article 46(1) CISG, which entitles the buyer to require that the seller performs his contractual obligations as previously agreed upon, it must be distinguished from *favor contractus* in being concerned with compliance with the contract rather than its maintenance; ‘in contrast *favor contractus* demands to honor contractual bonds in general.’⁷⁶ It can therefore be argued that the CISG embraces and extends the principle of *pacta sunt servanda* into a broad *favor contractus* principle in the name of the promotion of international trade.

The UNCITRAL Digest argues that ‘the fact that the right to performance is provided for first among the remedies described in Articles 46-52 reflects that, under the Convention, the contractual bond should be preserved as far as possible.’⁷⁷ Preserving the contract as far as possible is achieved, first, through the armouring of the contract and then through the protection and facilitation of performance, albeit sometimes an altered or adjusted form of performance. To be more precise, after a breach of contract, the CISG grants the buyer the unequivocal right to require performance by the seller of his obligations (Article 46(1) CISG) and protects the contract from a capricious avoidance with the fundamental breach mechanism (Articles 25 and 49 CISG).⁷⁸ It then

normative standards suitable to fill gaps and guide interpretation. The application of principles is necessary to achieve the mandate of Article 7(1) to “promote uniformity in its application.” Yet not every thinkable standard is an ‘underlying principle’ of the CISG. A principle is only ‘underlying the Convention,’ if the normative idea can be traced back from its provisions.’ See generally Camilla Andersen, ‘General Principles of the CISG: Generally Impenetrable?’ in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries* (Wildy, Simmonds and Hill Publishing 2008) 13.

⁷³ Honnold, *Uniform Law* (n34) 81.

⁷⁴ Keller, ‘Favor Contractus’ (n72) 247.

⁷⁵ Ibid.

⁷⁶ Ibid 248-249.

⁷⁷ UNCITRAL, *Digest* (n45) 227.

⁷⁸ Article 25 CISG is properly examined in Chapter 5, which deals with Avoidance.

strives to preserve the contract by tangibly facilitating performance through a number of remedial provisions, namely Articles 46(2) and (3) CISG, Article 47 CISG and Article 48 CISG.⁷⁹ The buyer's right to reduce the price (Article 50 CISG) is also aimed at preserving the contract by way of unilateral adjustment by the buyer if he so elects to do so.⁸⁰ Although (wise) parties to international sales transactions do usually attempt to first resolve breach issues amongst themselves whenever possible before turning to either arbitration or litigation, the CISG's specialised remedial framework and explicit legal authorisation to pursue performance after a breach of contract gives an extrajudicial attempt at resolving a breach of an international sales contract strong prospects of success.

1.4 Scope of this Thesis

As already stated, this thesis is a comparative analysis of the remedies available to the buyer under the CISG and English sales law for breach of a valid contract by the seller.⁸¹ However, this thesis is not concerned with contracts that have been breached as a result of an impediment beyond the seller's control (Article 79 CISG), or, in English law terminology, frustration, in light of word restrictions and on the basis that frustration deals with situations conceptually distinct to situations where the seller is responsible (as distinct from being at fault) for the breach which this thesis generally focuses upon.

In particular, this thesis examines the whole of Section III (Remedies for breach of contract by the seller) of Chapter II (Obligations of the seller) of Part III (Sale of Goods) of the CISG, as organized in Articles 45 to 52 with the exclusion of damages. The buyer's right to claim damages for breach of contract by the seller⁸² is referred to

⁷⁹ Articles 47 and 48 CISG are examined in Chapter 3.

⁸⁰ Article 50 CISG is examined in Chapter 4.

⁸¹ This thesis assumes the existence of a valid contract ie. a contract not vitiated by mistake, misrepresentation, duress, illegality or any such factor.

⁸² See generally Ingeborg Schwenzer, 'Article 74', 'Article 75' and 'Article 76' in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n55) 999; John Gotanda, 'Article 74', 'Article 75' and 'Article 76' in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n2) 990; CISG Advisory Council Opinion No. 6, 'Calculation of Damages under CISG Article 74' (2006) available at <http://www.cisgac.com/index.php>; CISG Advisory Council Opinion No. 8, 'Calculation of Damages under CISG Articles 75 and 76' (2008) available at <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=184>

<http://www.cisgac.com/index.php>; Helmut Koziol, 'Reduction of Damages according to Article 77' (2005) 25 (1) J. L. & Com. 385; Djakhongir Saidov, *The Law of Damages in the International Sale of*

throughout this thesis for contextual purposes but the remedy of damages in the sense of a micro-comparative chapter⁸³ has been excluded from this thesis in light of word restrictions, on the basis that the notion of damages is familiar to English law and because damages have already been the subject of related comparative work.⁸⁴ Moreover, the CISG arguably appears to adopt a common law approach as far as damages are concerned and as such cannot possibly pose a point of dispute for English merchants and lawyers alike who are familiar with damages as remedial relief for breach of contract.⁸⁵ Therefore, a micro-comparative chapter on damages would not add to the likely conclusions of the current thesis, which focuses on *prima facie* divergences between the CISG and English sales law, or affect the achievement of its aims. This cannot be boldly argued in relation to the greatest majority of the remedial provisions examined herein given their civil law origin or influence, novelty and distinctive interconnection. On this basis, this thesis will examine the buyer's right to require performance under Article 46 CISG, the buyer's right to declare the contract avoided under Article 49 CISG (including the effects of avoidance (Articles 81 to 84 CISG)) and the buyer's duty to preserve the goods (Articles 86 to 88 CISG)) and the buyer's right to reduce the price under Article 50 CISG. These remedies closely interact with other provisions, such as the buyer's right to fix an additional time for performance according to Article 47 CISG and the seller's right to remedy any failure to perform his obligations according to Articles 34, 37 and 48 CISG, which will also be examined.

Goods: The CISG and other international instruments (Hart Publishing 2008); Ingeborg Schwenzer and Pascal Hachem, 'The Scope of the CISG Provisions on Damages' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 91-106; Djakhongir Saidov, 'The Present State of Damages under the CISG: A Critical Assessment' (2009) 13 (1) VJ 197.

⁸³ See n108 below.

⁸⁴ See Reza Beheshti, 'Comparative and Normative Analysis of Damages under the SGA and the CESL' (2014) 26 St. Thomas L Rev 413, who compares the rules concerning damages under English sales law and the CESL, which has textual uniformity with the CISG particularly in relation to the damages provisions. See also Mullis, 'Twenty-Five Years On – The United Kingdom, Damages and the Vienna Sales Convention' (n8); Saidov, 'Remedies for a Documentary Breach' (n29) 460-464.

⁸⁵ Johan Erauw and Harry Flechtner, 'Remedies under the CISG and Limits to their Uniform Character' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer Law International 2001) 35, 39: 'The Convention appears to stake out a single position and makes a clear choice on the role of 'fault' in its remedial system – a matter that fundamentally divides the common and civil law systems. Nothing in the CISG requires that the breaching party be 'at fault' before incurring liability for damages. Instead, the Convention authorizes an aggrieved party to recover damages (including, under Article 74, what common lawyers would call "consequential damages") whenever the other side "fails to perform any of his obligations under the contract or this Convention," any by doing so causes a form of loss to the aggrieved party.'

Furthermore, this thesis will examine additional provisions supplementing or modifying the aforementioned remedies in cases of partial breaches (Article 51 CISG), early delivery of goods or delivery of an excess quantity of goods (Article 52 CISG), instances of anticipatory breach (Articles 71 and 72 CISG) and issues with instalment contracts (Article 73 CISG) among others.

All of the CISG provisions examined herein are compared with the equivalent English law rules, if any.⁸⁶

1.5 Methodology

This thesis employs comparative law, or, more accurately, a functional comparative method of study and research.⁸⁷ ‘Comparative law’ is a rather misleading term since it does not denote a distinct branch of department of the law but it ‘has become so firmly established that it must be accepted, even if it is misleading, and tends [...] to obscure the real nature of the functions which the comparative method of study is called on to discharge, and the purposes for which it exists.’⁸⁸ Consequently, this thesis uses ‘comparative law’ and ‘comparative method’ interchangeably.

Comparative law can be defined as an ‘intellectual activity with law as its object and comparison as its process’⁸⁹ or as ‘the juxtaposing, contrasting and comparing of legal systems or parts thereof with the aim of finding similarities and differences.’⁹⁰ These definitions, although quite general and perhaps vague to some, satisfy the purposes of this thesis. Zweigert and Kotz argue that ‘comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma’⁹¹ which is precisely what this thesis aims to achieve when it comes to the CISG and English sales law. According to Kahn-Freund, ‘one of the

⁸⁶ See sections 1.5 and 1.5.1 on Methodology and Structure below.

⁸⁷ Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd revised edition, OUP 1998) 34: ‘The basic methodological principle of all comparative law is that of functionality. (...) Incomparables cannot be usefully be compared, and in law the only things that are comparable are those which fulfill the same function.’ See Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 339, who offers an excellent analysis of the functional method.

⁸⁸ Gutteridge, *Comparative Law* (n24) 1.

⁸⁹ Zweigert and Kotz, *An Introduction to Comparative Law* (n87) 2.

⁹⁰ Esin Orucu, ‘Developing Comparative Law’ in Esin Orucu and David Nelken (eds), *Comparative Law; A Handbook* (Hart Publishing 2007) 43, 44.

⁹¹ Zweigert and Kotz, *An Introduction to Comparative Law* (n87) 3.

virtues of legal comparison is that it allows a scholar to place himself outside the labyrinth of minutiae in which legal thinking so easily loses its way and to see the great contours of the law and its dominant characteristics'.⁹² 'Scholarly comparative law' provides 'access to legal knowledge which can be used not only for the purposes of law reform, or as a research tool, or to promote international understanding, but to fulfil the essential task of furthering the universal knowledge and understanding of the phenomenon of law which is under examination'.⁹³

This thesis compares the CISG with English law and is therefore not a traditional comparative study in the sense of comparing the legal systems of two countries. A legal system has been defined as 'the legal rules and institutions of a country in the narrow sense or, in the broad sense as the juristic philosophy and techniques shared by a number of nations with broadly similar legal systems'.⁹⁴ Admittedly, the CISG, an international private law Convention, probably does not fall within the narrow definition of what a 'legal system' is. However, the author sees no restriction in broadly defining the CISG as the juristic philosophy and techniques shared currently by 83 nations as far as the international sale of goods is concerned hence a legal system in its own right. Moreover, a legal system 'has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society'.⁹⁵ The CISG satisfies the requirements referred to in this description with the only exception that it aims to shape the function of sale of goods law *internationally*. Of course, the palpable difference between the CISG, an international Convention, and English Sales Law is not extinguished but simply thought of as inconsequential to the 'success' of this comparative exercise. After all comparative research is considered to be open-ended with no standard methodology;⁹⁶ no promising avenue should be barred by orthodoxy.⁹⁷ Accordingly, this thesis was free to dictate the possibility and conduct a comparative exercise between the CISG and English Sales Law.

⁹² Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, 40.

⁹³ Orucu, 'Developing Comparative Law' (n90) 46.

⁹⁴ Peter de Cruz, *Comparative Law in a Changing World* (3rd edition, Routledge Cavendish 2007) 3.

⁹⁵ David and Brierly as quoted by Orucu, 'Developing Comparative Law' (n90) 57.

⁹⁶ Orucu, 'Developing Comparative Law' (n90) 48-49.

⁹⁷ John Reitz, 'How to Do Comparative Law' (1998) 46 (4) AJCL 617, 618.

If, and when, the UK accedes to the CISG, internal sales transactions will be governed by domestic law while the CISG will govern international sales.⁹⁸ In particular, the CISG will govern contracts for the international sale of goods between parties whose places of business are in different States (a) when such States are Contracting States of the CISG; or (b) when private international law rules lead to the application of the law of a Contracting State.⁹⁹ Given that a set of new international sales of goods rules will essentially be brought into English Law, legal transplantation and theories underpinning is a major underlying theme of this thesis. The CISG forming a compromise between not only civil and common law, but other legal systems as well essentially means that ‘foreign’ law elements will be transplanted into English law as part of the CISG. Therefore, this thesis will also be assessing the chances that the new law will be adjusted to the home environment as well as the risks that it will be rejected.¹⁰⁰ This involves taking into account historical, political, economic and psychological factors.

The exposition of the CISG provisions will take into account the various CISG-dedicated commentaries, the Secretariat’s Commentary¹⁰¹ and the Official Records of the Diplomatic Conference in Vienna, the UNCITRAL Digest on CISG case law,¹⁰² reported CISG case law in the different databases,¹⁰³ and relevant scholarly materials in books and journals. The exposition of the English sales law rules will take into account

⁹⁸ If the UK accedes to the CISG, the Convention will be implemented into the UK by way of primary legislation governing international sales contracts falling within the CISG akin to the ULIS and the ULFC which were brought into force in the UK by the Uniform Laws on International Sales Act 1967. However, in such as case, as the CISG does not cover all types of international sales contracts (see Articles 2 and 3) or all aspects of an international sales contract (see Articles 4 and 5), English law will continue to apply to those international sale contracts and aspects of international sales contracts that are not governed by the CISG provided it passes the test of the applicable law under the Rome I Regulation.

⁹⁹ Article 1 (1) CISG. See Peter Schlechtriem, ‘Requirements of Application and Sphere of Applicability of the CISG’ (2005) 36 *Victoria U Wellington L Rev* 781.

¹⁰⁰ Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 (1) *MLR* 1, 6.

¹⁰¹ The Secretariat Commentary is on the 1978 Draft of the CISG, not the Official Text of the CISG, which during the Diplomatic Conference in Vienna amended and re-numbered most of the articles of the 1978 Draft. To the extent it is relevant to the Official Text of the CISG (after a match-up of the 1978 Draft provisions with the CISG), the Albert H. Kritzer database (Pace) considers it as ‘the most authoritative source one can cite’ and brands it ‘the closest counterpart to an Official Commentary on the CISG.’

¹⁰² In light of the large number of CISG-related cases collected in CLOUT, in 2001, UNCITRAL decided to create a tool specifically designed to present selected information on the interpretation of the CISG in a clear, concise and objective manner. Accordingly, in 2004, the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods was published to further support the goal of uniform interpretation of CISG. It is currently in its second revision and as it is meant to reflect the evolution of case law, UNCITRAL is committed to periodic release of updates.

¹⁰³ Case Law on UNCITRAL Texts (CLOUT), Albert H. Kritzer CISG Database (Pace), Unilex, CISG-Online.

the relevant practitioner's textbooks on English law, namely *Benjamin's Sale of Goods* and *Chitty on Contracts*, other authoritative textbooks, case law and relevant scholarly materials in books and journals. The purpose or intention was not to reproduce an exhaustive report on each CISG provision or English sales law principle akin to the CISG commentaries or practitioner's textbooks but rather collect, organise and succinctly expose the relevant rules of each legal system against each other in a manner and degree which would allow for their efficient comparison in order to satisfy the purposes of this thesis.¹⁰⁴

The CISG is certainly not perfect and therefore has been the subject of criticism both justified and unjustified. There is a large volume of works acknowledging some of the CISG's shortcomings and offering justifications, clarifications or solutions¹⁰⁵ but also works purely criticising the CISG.¹⁰⁶ This thesis is not concerned with the general shortcomings and criticism of the CISG. Where any of the CISG's shortcomings or criticism fall within the scope of this thesis, they will be addressed in the appropriate chapter or section of the thesis.

¹⁰⁴ It must be noted at the outset that CISG case law research unavoidably had to be conducted from a limited number of translated short reports or abstracts available in the different online databases. Nevertheless, every effort was put to locate, research and accurately utilise as many relevant CISG cases as possible.

¹⁰⁵ See Harry Flechtner, "The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)" (1998) 17 J L Com 187; Philip Hackney, 'Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?' (2001) 61 Louisiana L Rev 473; Bruno Zeller, 'International Trade Law – Problems of Language and Concepts' (2003) 23 J L Com 39; Camilla Andersen, 'The Uniform International Sales Law and the Global Jurisconsultorium' (2005) 24 J L Com 159; Joseph Lookofsky and Harry Flechtner, 'Nominating Manfred Forberich: The Worst CISG Decision in 25 years?' (2005) 9 VJ 199; Bruno Zeller, 'The Challenge of a Uniform Application of the CISG – Common Problems and their Solutions' (2006) 3 Macquarie J Bus L 309; Bruno Zeller, 'The Language of International Trade Law: Problems or Salvation?' (2006) 10 Intl Trade Bus L Rev 179; Ingeborg Schwenzer, 'National Preconceptions that Endanger Uniformity' (2007) 19 Pace Intl L Rev 103; Andersen, 'The Global Jurisconsultorium of the CISG Revisited'; Ingeborg Schwenzer and Pascal Hachem, 'The CISG - Successes and Pitfalls' (2009) 57 AJCL 457; Franco Ferrari, 'Homeward Trend and Lex Forism Despite Uniform Sales Law' (2009) 13 VJ 15.

¹⁰⁶ See 'Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods' (1984) 97 (8) Harv L Rev 1984, 1988-1995; Hobhouse, 'International Conventions and Commercial Law' (n8); Bridge, 'The Bifocal World of International Sales' (n18) 277; Steven Walt, 'Novelty and the Risks of Uniform Sales law' (1999) 39 Virginia J Intl L 671, 676-683; James Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32 Cornell Intl L J 273; Michael Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 Pace Intl L Rev 55; Gilles Cuniberti, 'Is the CISG Benefiting Anybody?' (2009) 39 Vanderbilt J Trans L 1511; Jan Smits, 'Problems of Uniform Sales Law – Why the CISG May Not Promote International Trade' (2013) Maastricht Faculty of Law Working Paper No. 2013/1 available at: <http://ssrn.com/abstract=2197468>. See also the Proposal for a Common European Sales Law (CESL) (COM (2011) 635 final, 11 October 2011) 5.

1.5.1 Structure

This thesis comprises of six chapters including the Introduction and the Conclusion.

The differences between the buyer's remedial scheme under the CISG and English law made the structuring of a comparative analysis, other than the actual comparative analysis itself, interesting if not challenging. For example, there are rules in the CISG aimed at performance and consequent preservation of the contract 'that have no counterpart in English law' such as Article 48 CISG, 'rules that on the face of it differ from their English equivalents' such as Article 49(1)(a) CISG and 'rules in English law that are not to be found in the CISG' such as rejection.¹⁰⁷ This is primarily attributed to the different level of importance each system places on the buyer's right to require performance, which affects the importance and operation of each individual remedy as well as the number of remedies and their organisation as a whole.

Chapters 2-5 will compare the specific remedies and relevant rules under examination herein, essentially forming what might be called a *microcomparison* of the CISG and English sales law.¹⁰⁸ These chapters follow Zweigert and Kotz's suggested structure for undertaking a comparative analytical exercise; separate expository reports for each legal system 'free from any critical evaluation, though containing all significant qualifications or modifications,' followed by the comparison.¹⁰⁹ Therefore, unless indicated otherwise, each chapter will take this basic format: first there is an exposition of the CISG provision, followed by an exposition of the English law rule, followed by the relevant comparison and the conclusion. Where there is strictly no equivalent remedy in English sales law, such as in the case of Articles 46(2) and (3) CISG examined in Chapter 2, Article 47 CISG examined in Chapter 3 and Article 50 CISG examined in Chapter 4, the section on English sales law incorporates the comparative analysis.

¹⁰⁷ Bridge, *The International Sale of Goods* (n7) 529.

¹⁰⁸ Zweigert and Kotz, *An Introduction to Comparative Law* (n87) 5: '*Microcomparison*, by contrast [to *macrocomparison*: 'to compare the spirit and style of different legal systems, the methods of thought and procedures they use'], has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems (...). The dividing line between macrocomparison and microcomparison is admittedly flexible. Indeed, one must often do both at the same time, for often one has to study the procedures by which the rules are in fact applied in order to understand why a foreign system solves a particular problem in the way it does.'

¹⁰⁹ Ibid 43.

Following this Introduction, Chapter 2 examines the buyer's general right to require performance by the seller according to Article 46(1) CISG and compares it with the rules on specific performance in English sales law. As there are no explicit equivalent English sales law rules to Articles 46(2) and (3) CISG, the exposition of these particular provisions is followed by a relevant discussion of implicit acknowledgment of such rights in English sales law and whether Articles 46(2) and (3) CISG will have significant practical consequences for merchants. This chapter also includes an examination of the application and effect of Article 28 CISG, which provides that '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.' As Article 28 CISG provides a 'procedural exception primarily tailored to suit the peculiarities of Anglo-American law,'¹¹⁰ it is directly relevant to this thesis.

Chapter 3 examines the buyer's right to fix an additional period of time of reasonable length for performance by the seller of his obligations according to Article 47 CISG and the seller's right to remedy any failure to perform his obligations according to Articles 34, 37 and 48 CISG. As there is no equivalent English sales law rule to Article 47 CISG, the exposition of this particular provision is followed by a relevant discussion of implicit acknowledgment of such a right in English sales law and whether Article 47 CISG will have significant practical consequences for merchants.

Chapter 4 examines the buyer's right to reduce the price according to Article 50 CISG. As there is no equivalent English sales law rule akin to Article 47 CISG, the exposition of Article 50 CISG is followed by a relevant discussion considering possible parallels or implicit acknowledgment of such a right in English sales law and whether the buyer's right to reduce the price under the CISG will have significant practical consequences for merchants.

Chapter 5 examines the buyer's right to declare the contract avoided according to Articles 49, 51 and 73, and 72 CISG, including the effects of avoidance and the loss of the right to declare the contract avoided, and compares it with the rules on the buyer's right to terminate the contract in English sales law.

¹¹⁰ Schlechtriem, *Uniform Sales Law* (n5) 62.

Chapter 6 forms the Conclusion of this thesis where the research questions of this thesis will be re-addressed collectively using the findings and relevant comparative analysis of Chapters 2-5. This chapter will also address further research and relevant recent developments.

Chapter 2 The Buyer's Right to Require Performance

2.1 Introduction

The buyer's right to require performance of the contract by the seller after a breach of contract, is governed by Article 46 CISG. Being thought of as 'a stipulation of the maxim *pacta sunt servanda*,¹ Article 46 CISG lies at the heart of the buyer's remedial scheme. As already mentioned, and as will be expounded herein and in the following Chapters of this thesis, the buyer's remedial scheme is designed and intertwined in such a way so as to protect and facilitate the performance of the contract after a breach of contract by the seller in an effort to preserve the contract whenever possible (*favor contractus*).

In particular, Article 46(1) CISG provides the buyer with the general right to require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. Articles 46(2) and (3) CISG, containing the buyer's right to require substitute delivery and repair, are regarded as 'sub-forms'² or 'variants'³ of the buyer's general right to require performance and only apply when the goods have already been delivered and are found to be non-conforming; they do not apply in cases of non-delivery, which are governed by Article 46(1) CISG. However, it must be clarified that Articles 46(2) and (3) contain the buyer's right to request delivery of substitute goods and repair; 'they do not give the breaching seller the right to repair or replace non-conforming goods.'⁴ The seller's right to effect cure after the due date for performance, is provided by Article 48 CISG, which is examined in Chapter 3.

Without ignoring Article 28 CISG, which provides a 'concession to the rules of the forum' by allowing a court not to grant specific performance unless it would do so under its own law,⁵ this chapter compares Article 46 and related provisions of the CISG with the remedy of specific performance in English sales law as governed by section 52

¹ Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana Publications 1992) 177.

² Vanessa Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (Hart Publishing 2009) 120.

³ Michael Will, 'Article 46' in C.M. Bianca and M.J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 333, 333.

⁴ Harry Flechtner, 'Buyers' Remedies in General and Buyers' Performance-Oriented Remedies' (2005) 25 J.L. & Com. 339, 346.

⁵ John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry Flechtner ed, 4th edition, Kluwer Law International) 408.

SGA 1979 and common law principles. The CISG ‘speaks of a party “requiring” performance by the other’ and, with the exception of Article 28 CISG, ‘does not mention specific performance as such.’⁶ Strictly speaking, “requiring performance” in the CISG should be distinguished from “specific performance” in English law in that ‘the former is broader than the latter.’⁷ However, despite the discrepancy in terminology, the goal and end result of both the CISG’s “requiring performance” and English law’s “specific performance” is that the buyer ‘obtains as nearly as possible the actual subject-matter of his bargain, as opposed to compensation in money for failing to obtain it.’⁸ Specific performance in English sales law is therefore the equivalent remedy of the buyer’s right to require performance as provided by Article 46 CISG. Comparison is, thus, possible.

This Chapter first provides an exposition of the buyer’s general right to require performance according to Article 46(1) CISG followed by an exposition of the English sales law rules on specific performance and the relevant comparative analysis. This Chapter then provides an exposition of the buyer’s right to require substitute delivery and repair according to Articles 46(2) and (3) CISG. However, as there are no equivalent rights in English sales law, the exposition of these particular provisions is followed by a relevant discussion of implicit acknowledgment of such rights in English sales law and whether Articles 46(2) and (3) CISG will have significant practical consequences. Article 28 CISG is intentionally initially disregarded in the aforementioned sections and examined in the end in order to determine the true extent and nature of the differences of the two systems in relation to the rules under examination; ‘even if national courts are not bound to enter a judgment for specific performance (Article 28 CISG), the normative emphasis remains.’⁹

⁶ Michael Bridge, *The International Sale of Goods* (3rd edition, OUP 2013) 601.

⁷ Michael Bridge, *The Sale of Goods* (3rd edition, OUP 2013) 635.

⁸ G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon Press 1988) 43. It is worth noting that Article 9:102 of the Principles of European Contract Law (PECL) uses the term specific performance ‘due to lack of a better, generally understood term.’ See Ole Lando and Hugh Beale (eds), *Principles of European Contract Law; Parts I and II* (Kluwer Law International 2000) 394.

⁹ Bertram Keller, ‘Favor Contractus: Reading the CISG in Favour of the Contract’ in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries* (Wildy, Simmonds and Hill Publishing 2008) 247, 257.

2.2 The Buyer's General Right to Require Performance

2.2.1 Under the CISG

2.2.1.1 General

Article 46 CISG is the very first remedy one comes across in the text of the CISG after Article 45(1)(b) CISG, which gives the buyer the right to claim damages. It reads:

- (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) 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 Article 39 or within a reasonable time thereafter.
- (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.

The CISG 'adopts the general civil law principle that the injured party is entitled to require performance.'¹⁰ Indeed, although the 'construction of the right to require performance as a remedy comes from common law,'¹¹ the importance attributed by the CISG to the buyer's right to require performance 'is consistent with the traditional preference of civil law systems for specific relief.'¹² Although Erauw and Flechtner argue that 'it is not strictly accurate to equate the [CISG's] performance-oriented remedies with the civil law system,' they nonetheless do admit 'a rough correspondence' and state that 'the civil law emphasis is reflected in the unrestricted right to require performance' provided in Article 46 CISG.¹³

¹⁰ Treitel, *Remedies: A Comparative Account* (n8) 73.

¹¹ Markus Muller-Chen, 'Article 46' in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods* (3rd edition, OUP 2010) 706.

¹² Alejandro Garro, 'Reconciliation of Legal Traditions in the UN Convention on Contracts for the International Sale of Goods' (1983) 23 Int'l Lawyer 443, 459. See Solene Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (OUP 2012) whose work is illustrative of the civilian preference for performance.

¹³ Johan Erauw and Harry Flechtner, 'Remedies under the CISG and Limits to their Uniform Character' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer Law International 2001) 35, 46.

The CISG acknowledges that, after a breach of contract, ‘the buyer’s principal concern is often that the seller performs the contract as he originally promised.’¹⁴ Just like civil law, the CISG ‘holds parties to their obligations (*pacta sunt servanda*), and does not readily offer the breaching party the option to buy off his obligation by forcing the aggrieved party to accept a monetary substitute for actual performance.’¹⁵ Choosing this approach to govern international sale of goods was no accident. Given the international nature of the contract, including the distance involved between the parties, and appreciating the risk, time and effort involved in such a transaction, especially on behalf of the buyer, the right to require performance by the seller of his obligations is invaluable to the buyer, especially in cases where he has re-sold the goods. It is also valuable legal authorisation by which the buyer can immediately attempt to secure performance by the seller on his own.

Nonetheless, the UNCITRAL Digest reports that ‘despite its importance, the right to require performance has not often been invoked in reported decisions.’¹⁶ While the claim that ‘in practice, aggrieved parties have generally preferred to pursue other remedies – in particular the right to claim damages’¹⁷ is not questioned, it might also simply be the case that, the parties in international sales contracts are generally able, and strive in order to avoid further costs, to resolve the seller’s failure to perform among themselves without the need to resort to the courts.

2.2.1.2 Article 46(1) CISG

Article 46(1) CISG provides the buyer with the unequivocal right to require performance by the seller of his obligations stressing ‘the idea of *pacta sunt servanda*.’¹⁸ Although there are some limitations,¹⁹ it must be clarified that the buyer is

¹⁴ Secretariat Commentary, ‘Article [46]’ in UN, *United Nations Conference on Contracts for the International Sale of Goods; Official Records* (Vienna, 10 March – 11 April 1980) (UN Doc A/CONF.97/19) 38.

¹⁵ Erauw and Flechtner, ‘Remedies under the CISG’ (n13) 48.

¹⁶ UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012 Edition) 227. Indicatively, the UNCITRAL Digest identifies a total of 31 cases and Unilex a total of 12 cases. While the Albert H. Kritzer Database (Pace) identifies more cases, not all of them are translated. This therefore necessitated more-than-usual reliance on academic commentary and relevant literature although given the nature of CISG case law (from different countries and in a number of languages) and how cases are reported (largely by way of abstracts) overreliance on academic commentary in relation to a number of CISG provisions examined herein was inevitable and arguably one of the challenges of this thesis. See Camilla Andersen, ‘The Global Jurisconsultorium of the CISG Revisited’ (2009) 13 *Vindobona J Int’l Com L & Arb* 43.

¹⁷ UNCITRAL, *Digest* (n16) 227.

¹⁸ Keller, ‘*Favor Contractus*’ (n9) 257.

¹⁹ See section 2.2.1.3 below.

allowed as of right to require and consequently claim performance of the contract by the seller.²⁰ Therefore, ‘if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.’²¹

Article 46(1) CISG presupposes that the seller has failed to perform one of his obligations under the CISG or under the contract.²² The seller for example might have failed to deliver the goods or part of the goods within the prescribed period,²³ to provide the documents as required by the contract or usage,²⁴ to transfer unencumbered property in the goods²⁵ or have failed to perform a contractual obligation such as the installing of the goods.²⁶ Accordingly, the buyer is entitled to request that the goods be delivered,²⁷ that the seller procure a stipulated bank guarantee²⁸ or that the seller respects an exclusive sales agreement.²⁹ Therefore, ‘the subject matter of the right to require performance depends on the obligation that has been violated.’³⁰ However, Article 46(1) CISG requires a clear declaration that the buyer requests the performance of a contractual obligation.³¹

The seller has to bear the costs for performance and if performance can be made in different ways under the contract or the CISG, it should be for the seller to choose the appropriate form of performance.³² However, if the form of performance chosen by the seller would cause unreasonable delay or unreasonable inconvenience to the buyer, pursuant to the general principle of good faith (Article 7(1) CISG underlying Article 48(1) CISG),³³ the buyer should be given the right to insist on another form of performance.³⁴

²⁰ *US District Court of Illinois* (USA) 7 December 1999 (Unilex).

²¹ Secretariat Commentary, ‘Article [46]’ in *Official Records* (n14) 38.

²² Muller-Chen, ‘Article 46’ (n11) 707; UNCITRAL, *Digest* (n16) 227.

²³ Articles 30, 31, 33 CISG.

²⁴ Articles 30, 34 CISG.

²⁵ Article 41 CISG *et seq.*

²⁶ Muller-Chen, ‘Article 46’ (n11) 707.

²⁷ *Court of Arbitration of the International Chamber of Commerce* (Arbitral Award No. 8786) (January 1997) (Pace).

²⁸ *Cairo Chamber of Commerce and Industry* (Egypt) 3 October 1995 (Pace).

²⁹ *Oberlandesgericht Frankfurt* (Germany) 17 September 1991 (Pace).

³⁰ Muller-Chen, ‘Article 46’ (n11) 707.

³¹ UNCITRAL, *Digest* (n16) 228; Peter Huber, ‘Article 46’ in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG); Commentary* (C.H. Beck, Hart and Nomos 2011) 693.

³² Huber, ‘Article 46’ (n31) 693.

³³ Article 48(1) requires that ‘(...) the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without

2.2.1.3 Limitations to Article 46(1) CISG

Inconsistent Remedy

The right to require performance according to Article 46(1) CISG ‘is excluded if the buyer has resorted to a remedy which is inconsistent with that requirement.’³⁵ This also applies to Articles 46(2) and (3) CISG examined below. Inconsistent remedies are avoidance, price reduction and a claim for damages in relation to the seller’s failure to perform because ‘these remedies exclude the claim for specific performance.’³⁶

The inconsistency with avoidance is made explicit in Article 81(1) CISG: ‘avoidance of the contract releases both parties from their obligations under it (...).’³⁷ However, Honnold explains that the rule that a buyer may not require performance if he has declared the contract avoided ‘serves a policy that is deeper than the logic (or esthetics) of inconsistency – the likelihood of reliance on the buyer’s declaration by stopping production, reselling the goods, or cancelling the reservation of shipping space.’³⁸ Price reduction is inconsistent with a demand for performance provided that it was either justified or has been accepted by the seller.³⁹ And while the buyer cannot claim damages in relation to the seller’s failure to perform because eventually the seller will have performed, he can recover any damages he may have suffered as a result of the delay in the seller’s performance.⁴⁰

Article 28 CISG

According to Article 28 CISG, the buyer’s right to require performance under Article 46(1) CISG cannot be enforced if the appropriate court would not enter a judgment of specific performance under its own law in respect of similar contracts of sale not governed by the CISG.⁴¹ In essence, and as succinctly put by Flechtner, who rightly considers Article 28 the most important limitation on Article 46(1) CISG, ‘where the forum’s rules on specific performance are more restricted than those in the [CISG],

causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. (...)’ This provision is examined in greater detail in Chapter 3.

³⁴ Huber, ‘Article 46’ (n31) 693.

³⁵ Muller-Chen, ‘Article 46’ (n11) 707.

³⁶ Ibid; Secretariat Commentary, ‘Article [46]’ in *Official Records* (n14) 38.

³⁷ Honnold, *Uniform Law* (n5) 411.

³⁸ Ibid.

³⁹ Huber, ‘Article 46’ (n31) 690.

⁴⁰ Secretariat Commentary, ‘Article [46]’ in *Official Records* (n14) 38; UNCITRAL, *Digest* (n16) 227.

⁴¹ Article 28 CISG is examined in detail in section 2.4 below.

Article 28 permits the forum to apply its restrictive domestic law to transactions governed by the [CISG].⁴²

Impediments

If the seller's failure to perform is caused by an impediment for which the seller can claim exemption under Article 79 CISG,⁴³ the buyer will have no right to require performance; it would be inconsistent to allow a buyer to require performance where performance is prevented by an impediment that the seller is not required to overcome.⁴⁴ If performance in kind is impossible because, for example, the contract covers a unique good that is destroyed before delivery, then the buyer's right to require performance is also extinguished.⁴⁵ In *Hilaturas Miel S.L. v. Republic of Iraq*⁴⁶ performance of the contract became impossible because of the war in Iraq.

2.2.2 In English Sales Law

2.2.2.1 General

Specific performance in English law is a 'discretionary, equitable, remedy of considerable antiquity'⁴⁷ and it is safe to say that, in general, English law is 'reluctant to compel a party in breach of contract to perform a non-monetary obligation.'⁴⁸ In particular, specific performance will only be awarded where damages are inadequate and in cases where ensuring compliance with a specific performance order will not require continuous supervision by the court.⁴⁹ Furthermore, a specific performance order will not be granted to enforce personal service contracts,⁵⁰ in cases where it would cause undue hardship to the defaulting promisor⁵¹ or where the cost of performance to the defaulting promisor is wholly out of proportion to the benefit that performance would confer on the promisee.⁵² Rowan identifies 'the peculiar origins of the English

⁴² Harry Flechtner, 'Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.' (1988) 8 J.L. & Com. 53, 59.

⁴³ According to Article 79(1) CISG, 'a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'

⁴⁴ Muller-Chen, 'Article 46' (n11) 708.

⁴⁵ UNCITRAL, *Digest* (n16) 227.

⁴⁶ *U.S. District Court, New York (Southern District)* (USA) 20 August 2008 (Unilex).

⁴⁷ *Butler v Countrywide Finance* [1993] 3 N.Z.L.R. 623 at 631.

⁴⁸ Rowan, *Remedies for Breach of Contract* (n12) 25.

⁴⁹ *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL).

⁵⁰ *De Francesco v Barnum* (1890) 45 Ch D 430.

⁵¹ *Patel v Ali* [1984] Ch 283.

⁵² *Tito v Wadell (No 2)* [1977] Ch 106.

legal system, with the enduring tension between the courts of common law and equity' as the historical explanation for the subordination of specific performance to damages, which, however, does not justify why the availability of specific performance continues to be so restricted today.⁵³

It is argued that, the fact that disobedience of a specific performance order is classed as contempt of court, and can be punished by imprisonment, affects the scope of the remedy and is one of the key reasons for specific performance being awarded only exceptionally.⁵⁴ Instead, an award of damages can always be enforced, without personal constraint, by levying execution on the defendant's property.⁵⁵ Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*,⁵⁶ does appear to be endorsing this view by referring to the quasi-criminal procedure of punishment for contempt as a powerful weapon and acknowledging that the heavy-handed nature of the enforcement mechanism is a consideration, which may go to the exercise of the court's discretion.⁵⁷

Rowan dismisses this argument as unconvincing and contradictory assuming that 'since the deterrent effect of punishment for contempt is strong, any rational contracting party would balk at the prospect of continuing a breach where to do so may entail a risk of imprisonment;' therefore, the likelihood of non-performance would be minimal.⁵⁸ In fact though, this argument can be dismissed on the basis that the power of imprisonment which existed in England under section 5 of the Debtors Act 1869 was limited and has been further restricted by section 11 of the Administration of Justice Act 1970 to a degree which makes the method of enforcing a specific performance judgment by personal constraint on the debtor almost completely obsolete.⁵⁹

Another key argument for the restricted availability of specific performance not only in relation to England, but also in relation to other countries, even civil law countries, relates to the costs of enforcement. Although it is argued that 'most of the problems that English courts have anticipatorily associated with constant supervision are overstated,'

⁵³ Rowan, *Remedies for Breach of Contract* (n12) 32.

⁵⁴ Treitel, *A Comparative Account* (n8) 63; Dawson as cited by Rowan, *Remedies for Breach of Contract* (n12) 36.

⁵⁵ Treitel, *Remedies: A Comparative Account* (n8) 63.

⁵⁶ [1998] AC 1 (HL).

⁵⁷ Ibid at 12 (Lord Hoffmann).

⁵⁸ Rowan, *Remedies for Breach of Contract* (n12) 58.

⁵⁹ Treitel, *Remedies: A Comparative Account* (n8) 63.

this argument is based on the assumption that ‘the majority of defaulting promisors against whom specific performance is ordered will endeavour to comply’ and Treitel’s suggestion for the appointment of a court officer to supervise performance which would overcome the need for judicial intervention.⁶⁰ It simply cannot be denied that the costs of enforcing a specific performance order might be higher than enforcing an award of damages or that parties rarely opt for specific performance, even in civil law countries.⁶¹ However, these arguments are not based on the essence of the law but rather on economic, political or other grounds. Law must adapt to the times and serve the appropriate needs of society but without sacrificing intrinsic contractual interests. Concurring with Friedmann, ‘ordinarily, a person enters into a contract because he is interested in getting that which the other party has to offer and because he places a higher value on the other party’s performance than on the cost and trouble he will incur to obtain it.’⁶² Specific performance is the only remedy, which can grant the innocent party precisely what he bargained for⁶³ and, on this basis, the mere option of specific performance should be realistically open to an aggrieved party regardless of the fact that in practice aggrieved parties may not prefer it or pursue it.

Additional arguments that are put forward on the scarce availability of specific performance are that ‘specific performance is intrinsically harsh’ or that ‘specific performance represents an excessive interference with personal freedom.’⁶⁴ It is submitted that awarding specific performance may be harsh in specific cases due to the particular nature of the contract involved or the relevant circumstances⁶⁵ but not in general since usually a specific performance order amounts ‘to no more than forcing the party in breach to sell something or buy something or render some service on a none-too-personal, one-off basis, and such like.’⁶⁶ Moreover, how could specific performance be an excessive interference with personal freedom when it is merely intended to make the promisor discharge a promise or obligation that he, himself, voluntarily undertook in

⁶⁰ Rowan, *Remedies for Breach of Contract* (n12) 57; G.H.Treitel, ‘Specific Performance in the Sale of Goods’ (1966) JBL 211, 228. Treitel points out that the court appointed a receiver to run a mine in a rescission action and asks ‘why should it not do so in an action for specific performance?’

⁶¹ See generally Henrik Lando and Caspar Rose, ‘On the Enforcement of Specific Performance in Civil Law Countries’ (2004) 24 Int’l Rev L Econ. 473.

⁶² Daniel Friedmann, ‘The Performance Interest in Contract Damages’ (1995) 111 LQR 628, 629.

⁶³ Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2003) 95.

⁶⁴ Ibid 96.

⁶⁵ E.g. *Patel v Ali* [1984] Ch 283.

⁶⁶ Kimel, *From Promise to Contract* (n63) 96.

return for consideration?⁶⁷

In light of the above discussion, other than the issue of costs, there is no substantial or convincing reason as to why the availability of specific performance in English law is restricted. While in a great number of cases damages will suffice to fully satisfy the injured promisee, it must not be assumed that the injured promisee is indifferent to whether he receives damages or specific performance.⁶⁸ Moreover, the reluctance of the courts to grant specific performance can sometimes ‘lead to an over-broad view of what constitutes availability in the market, and result in a considerable financial burden on the innocent claimant.’⁶⁹ One such example is *Societe des Industries Metallurgiques S.A. v Bronx Engineering Co Ltd*.⁷⁰ In this case the sellers wrongfully repudiated a contract to sell goods to the buyers who needed between nine and twelve months to obtain similar goods from an alternative source. Nonetheless, ‘even this serious delay failed to persuade the Court of Appeal that the case was a proper one for the grant of specific performance, for the goods were of a type “obtainable on the market in the ordinary course of business” and the additional loss suffered by the buyers as the result of the delay would be covered by an increased award of damages.’⁷¹ It is indeed ‘hard to see why a repudiating seller should be allowed to walk away from actual performance of its contract and leave the innocent buyer to wrestle with the commercial difficulties and added loss and expense of a delay of up to a year when this could so easily have been avoided by an order for specific performance.’⁷² Still, there is ‘little sign of a change in emphasis in English law.’⁷³

2.2.2.2 Specific Performance

Specific performance in English sales law is governed by section 52 SGA 1979 and common law principles as provided by section 62(2) SGA 1979.⁷⁴ In particular, section 52 SGA 1979 reads:

⁶⁷ Ibid 97.

⁶⁸ Rowan, *Remedies for Breach of Contract* (n12) 34.

⁶⁹ Ewan McKendrick (ed), *Goode on Commercial Law* (4th edition, Penguin 2010) 393; Bridge, *The Sale of Goods* (n7) 736.

⁷⁰ [1975] 1 Lloyd’s Rep 465.

⁷¹ McKendrick, *Goode on Commercial Law* (n69) 393.

⁷² Ibid 394.

⁷³ Ibid fn 24.

⁷⁴ Section 62(2) SGA 1979 reads: ‘The rules of the common law, including the law merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of

- (1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
- (2) The plaintiff's application may be made at any time before judgment or decree.
- (3) The judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court.
- (4) The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

In other words, specific performance under English sales law will only be granted to an aggrieved buyer of goods at the discretion of the court. This will be in the form of a judgment or order requiring the seller to deliver the goods to the buyer in conformity with the terms of the contract when the goods are unique and damages are proved to be inadequate.

2.2.2.3 Limitations

Inadequacy of Damages

Atkin L.J. in *Re Wait*⁷⁵ confirms that 'courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy.'⁷⁶ Therefore, damages were said to be 'adequate' unless the goods were 'unique' and not easily obtained elsewhere.⁷⁷ Examples of cases where specific performance was granted against sellers was in relation to a jewel,⁷⁸ two jars 'of unusual beauty, variety and distinction',⁷⁹ and rubble from the old Westminster Bridge.⁸⁰ Since the remedy seemed to have been strictly restricted only to cases in which the claimant could not get a satisfactory substitute because the goods were unique, it is said that it was codified in the SGA in an effort to enlarge its scope.⁸¹ In particular, section 52 is said to go 'back (at least) as far as section

principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating clause, apply to contracts for the sale of goods.'

⁷⁵ [1927] Ch. 606.

⁷⁶ Ibid at 630.

⁷⁷ Treitel, 'Specific Performance' (n60) 214.

⁷⁸ *Pearne v Lisle* (1749) Amb. 75.

⁷⁹ *Falcke v Gray* (1859) 4 Drew. 651.

⁸⁰ *Thorn v Commissioners of Public Works* (1863) 32 Beav. 490.

⁸¹ Hugh Beale (ed), *Chitty on Contracts* (31st edition, Sweet & Maxwell 2012) para. 27-014.

2 of the Mercantile Law Amendment Act 1856 (UK),’ which was inspired by a report of the Mercantile Law Commissioners.⁸² The Commissioners ‘favoured aligning English law with the rather more liberal attitude of Scottish law towards specific performance.’⁸³

‘We see no reason why a buyer of goods should not be entitled to compel the seller to perform specifically his obligation to deliver them in terms of his contract; or why, when such performance is in his power, he should have the option of contravening his engagement and merely paying damages to the buyer.’⁸⁴

However, other than the mere act of codification, the codification of specific performance was arguably not an expansive one nor did it lead, for many years, to a greater willingness on the part of courts to award specific performance in sale of goods contracts; ‘courts continued to apply the same sort of principles as had applied prior to the enactment of the section.’⁸⁵ In *Cohen v Roche*,⁸⁶ specific performance was refused to a buyer of a set of Heppelwhite chairs because he was an antique dealer purchasing the chairs for resale and so was treating them as ‘ordinary articles of commerce.’ In *Behnke v Bede Shipping Co.*⁸⁷ the German buyer specifically bought the ship because she had new boilers and engines that complied with the relevant German regulations. In this case, the buyer’s claim for specific performance succeeded. Wright J. based his decision on the ground that the particular ship was unique:

‘In the present case there is evidence that the *City* was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, being old, having been built in 1892, but her engines and boilers were practically new and such as to satisfy the German regulations, and hence the plaintiff could, as a German shipowner, have her at once put on the German register. A very experienced ship valuer has said that he knew of only one other comparable ship, but that may now have been sold. The plaintiff wants the ship for immediate use, and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done.’⁸⁸

⁸² *Butler v Countrywide Finance* [1993] 3 N.Z.L.R. 623 at 633.

⁸³ *Ibid.*

⁸⁴ The Commissioners as quoted by Treitel, ‘Specific Performance in the Sale of Goods’ (n60) 217.

⁸⁵ *Butler v Countrywide Finance* [1993] 3 N.Z.L.R. 623 at 634; Bridge, *The Sale of Goods* (n7) 630.

⁸⁶ [1927] 1 K.B. 169 at 181.

⁸⁷ [1927] 1 K.B. 649.

⁸⁸ *Ibid* at 661.

And still today, the ‘foremost consideration in the grant of specific performance’ is that the remedy is given only where damages are inadequate, which in relation to sale of goods contracts translates to the goods being unique or irreplaceable and therefore not procured on the market.⁸⁹ Hence, ‘no order should be made if the goods sold were “of a very ordinary description” and were not alleged to be “peculiar” in the sense that similar goods could not be obtained elsewhere’ since the award of damages is considered to be an adequate remedy.⁹⁰ It can therefore be concluded that an English court is highly unlikely to grant a specific performance order in cases where the goods in question are considered by the court to be ordinary articles of commerce readily available in the open market, or acquired from other sources, and of no special value or interest for any special order for delivery to be made.⁹¹

‘Specific or ascertained goods’

Section 52 SGA 1979 explicitly refers to ‘specific or ascertained goods’ and initially, it does seem that it *only* empowers the making of an order for specific performance where the goods to be delivered by the defaulting seller are ‘specific or ascertained.’⁹² Indeed, it is argued that section 52 SGA 1979 ‘does not apply to non-specific or unascertained goods’; ‘in general, the courts will not order a seller to specifically perform such a contract, as the buyer can be adequately compensated for breach in damages.’⁹³

‘Specific goods’ are defined in section 61(1) SGA 1979 as being ‘goods identified and agreed on at the time a contract is made.’ In other words, specific goods are precise articles the buyer is buying which are known at the time the contract is concluded and do not depend on any later selection made either by the seller or by the buyer himself.⁹⁴ This also ‘includes an undivided share, specified as a fraction of percentage, of goods identified and agreed on as aforesaid.’⁹⁵ ‘Ascertained goods’ are not defined in the SGA 1979 but according to Atkin L.J. in *Re Wait* ‘it probably means identified in accordance with the agreement after the time a contract of sale is made.’⁹⁶ In other words,

⁸⁹ Bridge, *The Sale of Goods* (n7) 631.

⁹⁰ Michael Bridge and others (eds), *Benjamin’s Sale of Goods* (8th edition (Inc. Supp), Sweet & Maxwell 2010) para. 17-099.

⁹¹ McKendrick, *Goode on Commercial Law* (n69) 393.

⁹² *Benjamin’s Sale of Goods* (n90) para. 17-097.

⁹³ Michael Mark, *Chalmers’ Sale of Goods Act 1979* (18th edition, Butterworths 1981) 239.

⁹⁴ McKendrick, *Goode on Commercial Law* (n69) 228.

⁹⁵ Words added at the end of the definition of ‘specific goods’ by section 2(d) Sale of Goods (Amendment) Act 1995.

⁹⁶ [1927] 1 Ch. 606 at 630.

‘ascertained goods are those which were unidentified when the contract was made but become identified subsequently as the contract goods.’⁹⁷ All in all, ‘where there is a contract to deliver goods, and these are either identified at the time of the contract or become identified thereafter, the court can order specific performance.’⁹⁸

However, whether specific performance may be ordered in a case outside section 52 SGA 1979 seems to be an open question.⁹⁹ The failure of section 52 SGA 1979 to speak for cases other than those concerning specific goods and ascertained goods, combined with the belief expressed in *Re Wait* that the SGA 1979 should as far as possible be regarded as a comprehensive code,¹⁰⁰ has led to the conviction that the remedy cannot lie where there is a contract for the sale of unascertained goods not yet ascertained.¹⁰¹ However, section 52 SGA 1979 does not *per se* say that specific performance is available to a buyer only where the contract is one to deliver goods which are specific or ascertained.¹⁰² Therefore, where the goods are not of this kind, it can be argued that the remedy should be available on the general principle governing its scope.¹⁰³ In other words, specific performance should be available where the buyer cannot in fact obtain a substitute or be adequately compensated by damages.¹⁰⁴

There have been cases which lend support to this argument such as *Sky Petroleum Ltd v V.S.P. Petroleum Ltd*.¹⁰⁵ In this particular case, an interim injunction was granted during the ‘energy crisis’ in 1973 to stop an oil company from cutting off supplies of petrol to a garage, since alternative sources of supply were not available. The goods in this case were not ‘specific or ascertained’ but purely generic. Accordingly *Sky Petroleum* supports the view that an obligation to deliver goods may be specifically enforced in a case which is not strictly covered by section 52 SGA 1979 in that the goods are specific

⁹⁷ McKendrick, *Goode on Commercial Law* (n69) 229.

⁹⁸ Ibid 393, fn 17.

⁹⁹ *Chitty on Contracts* (n81) para. 27-017; G.H. Treitel, *The Law of Contract* (Edwin Peel (ed), 13th edition, Sweet & Maxwell 2011) 1104.

¹⁰⁰ *Re Wait* [1927] 1 Ch. 606 at 635 *per* Atkin L.J.: ‘The sum total of legal relations (meaning by the word “legal” existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code.’ According to Bridge, *The Sale of Goods* (n7) 732: ‘In reality, however, the Act cannot be treated as a comprehensive code for section 52 does not address itself to injunctive relief, whether in interlocutory or permanent form, that in fact serves the same ends as specific performance. Furthermore, the section deals only with buyers’ actions against sellers and not with sellers’ actions against buyers. There is an uncodified discretion to entertain a specific performance claim in the latter case, (...)’

¹⁰¹ Bridge, *The Sale of Goods* (n7) 732.

¹⁰² *Chitty on Contracts* (n81) para. 27-017; Treitel, *The Law of Contract* (n99) 1104.

¹⁰³ Ibid.

¹⁰⁴ Ibid para. 27-017; Mark, *Chalmers’ Sale of Goods Act 1979* (n93) 239.

¹⁰⁵ [1974] 1 W.L.R. 576.

or ascertained.¹⁰⁶ And although the decision is ‘commercially realistic,’ it is hard to reconcile it not only with the wording of section 52 SGA 1979 but also with both earlier and subsequent authority.¹⁰⁷

Arguably, the extension of the availability of specific performance ‘to situations not within section 52 SGA 1979, as well as its legislative extension to certain cases of defective delivery, represents a more satisfactory approach to the scope of the remedy than that of the older authorities according to which the remedy was available to a buyer of goods which were “unique” or in a similar category.’¹⁰⁸ The question should not be whether damages are an adequate remedy but whether specific performance will do more perfect and complete justice than an award for damages.¹⁰⁹

‘If [the court] thinks fit’

Section 52 SGA 1979 confers a discretionary power to the court to decide whether or not to order specific performance which ‘is akin to the power of a court of equity to order specific performance of a contract and will be exercised on similar principles.’¹¹⁰ This means that ‘the court is not bound to grant it merely because the contract is valid at law and cannot be impeached on some specific equitable ground such as misrepresentation or undue influence.’¹¹¹ However, the court’s discretion is ‘not an arbitrary...discretion, but one to be governed as far as possible by fixed rules and principles.’¹¹² So as well as considering the goods in question, the court is entitled to look at all the circumstances of the case including the conduct of both the buyer and the seller and to consider the hardship which an order would inflict on the seller.¹¹³ The conduct of the buyer applying for specific performance is always an important element for consideration.¹¹⁴ Specific performance can be refused on the ground of severe hardship to the seller for example, where the cost of performance to the seller is wholly

¹⁰⁶ *Chitty on Contracts* (n81) para. 27-017.

¹⁰⁷ McKendrick, *Goode on Commercial Law* (n69) 393.

¹⁰⁸ Treitel, *The Law of Contract* (n99) 1105-1106.

¹⁰⁹ *Ibid.*

¹¹⁰ Mark, *Chalmers’ Sale of Goods Act 1979* (n93) 238.

¹¹¹ Treitel, *The Law of Contract* (n99) 1106.

¹¹² *Ibid.*

¹¹³ *Benjamin’s Sale of Goods* (n90) para. 17-100.

¹¹⁴ Treitel, *The Law of Contract* (n99) 1108.

out of proportion to the benefit which performance will confer on the buyer.¹¹⁵ Conversely, “mere pecuniary difficulties” would “afford no excuse.”¹¹⁶

Section 52(3) SGA 1979

Section 52(3) SGA 1979 provides the court with wide discretion to impose conditions. It provides that ‘the judgment or decree may be unconditional, or on such terms and conditions as to damages, payment of the price and otherwise as seem just to the court.’ For example, ‘the buyer may be ordered to pay the price into court as a condition of the specific performance order being made against the seller.’¹¹⁷

2.2.3 Comparison

The exposition of the relevant legal principles of each legal system in the preceding sections clearly reveals the differences between the CISG and English sales law in relation to the buyer’s general right to obtain performance by the seller of his obligations after a breach of contract.¹¹⁸ The main difference is that while the buyer’s right to require performance by the seller of his obligations in the CISG is supported and promoted by the law itself as an important remedy which should be utilised whenever possible, specific performance in English sales law is an exceptional remedy, which is rarely granted as it is premised on the uniqueness of the goods and the proven inadequacy of damages subject to the court’s discretion. The buyer’s right to performance of the contract in the CISG is not conditioned on the inadequacy of damages and whether the buyer can easily source the goods in the market or elsewhere as in English sales law.¹¹⁹ The limitations imposed on the buyer’s right to require performance of the contract as provided by Article 46(1) CISG only relate to impediments, Article 28 CISG and whether he has resorted to another remedy which is inconsistent with requiring performance by the seller of his obligations as explained above. Except Article 28 CISG, which is a procedural limitation, the other two limitations are based on reasonable considerations in an effort to balance the rights of the buyer and the seller rather than on ‘a working compromise between competing tribunals created through historical accident’ like the adequacy of damages test in

¹¹⁵ *Tito v Waddell (No.2)* [1977] Ch. 106.

¹¹⁶ *Patel v Ali* [1984] Ch. 283 at 288.

¹¹⁷ *Hart v Herwig* (1873) L.R. 8 Ch. App. 860.

¹¹⁸ As already mentioned in the Introduction to this Chapter, this section consciously initially disregards Article 28 CISG, in order to determine the true extent and nature of the differences of the two systems in relation to the rules under examination in this chapter. See section 2.4 below.

¹¹⁹ Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law and Taxation Publishers 1989) 21.

English sales law.¹²⁰ Specific performance in the CISG is available to the buyer as of right which means that if the seller does not respond to the buyer's request for performance, the buyer can file a court claim against the seller and the court (subject to the relevant limitations mentioned above) will order such performance and will enforce that order by the means available to it under its procedural law.¹²¹ Under English sales law, the court may grant specific performance by its judgment or decree in any action for breach of contract to deliver specific or ascertained goods as long as the buyer makes a relevant application at any time before judgment or decree. However, a court will not readily grant a specific performance order. Under English sales law, a court will only grant the buyer a specific performance order 'if it thinks fit.' In order to decide whether the court thinks the ordering of specific performance fit in a particular case, it will not only consider the nature of the goods in question and the inadequacy of damages but will also take into consideration all the circumstances of the case including the conduct of both parties and the hardship an order of specific performance would inflict on the seller.

Although it is an open question whether specific performance may be ordered in a case not involving specific or ascertained goods, specific performance is usually only granted in cases involving specific or ascertained goods as provided by section 52(1) SGA 1979. The CISG on the other hand does not differentiate or require that the goods be specific, ascertained or otherwise identified under the contract in order to grant the buyer his right to performance of the contract by the seller.

Another difference between the two systems is the different style in which Section III on the buyer's remedies, and in particular Article 46 CISG, is drafted, compared to section 52 SGA 1979. The drafting style of the CISG conforms 'to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal.'¹²² Conversely, in section 52 SGA 1979, 'the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgment of a court granting the requested relief.'¹²³

¹²⁰ Rowan, *Remedies for Breach of Contract* (n12) 32.

¹²¹ UNCITRAL, Secretariat Commentary, 'Article [46]' in *Official Records* (n14) 38, para 8.

¹²² UNCITRAL, Secretariat Commentary, 'Article [46]' in *Official Records* (n14) 38.

¹²³ *Ibid.*

The two systems are similar in that the buyer is not precluded for claiming damages for losses because of a delay in performance in addition to specific performance.

In theory, the rules and approaches of the two systems towards specific performance as a remedy and its availability to an innocent buyer are very different. The CISG grants the buyer with the right to require performance, and as such it follows that a court will readily grant a relevant order, whereas English sales law leaves the granting of a specific performance order to the discretion of the court after imposing strict qualifications. As such the practical consequences of the particular differences between the two systems cannot be dismissed as inconsequential and were it not for Article 28, any concerns by merchants and lawyers will have been understandable. Article 28 CISG, however, by allowing a court to not 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 the CISG, extinguishes any theoretical clashes between the two regimes and allows for the same outcome in practice.

Arguably, if Article 28 did not exist, the UK's accession to the CISG would represent a great change in the country's law and long established principles to a point where there would also be issues of incompatibility of the international sales law with the domestic sales law and calls for aligning the country's laws for both international and domestic sales. An international sales law regime, which favours specific performance sitting alongside a domestic sales law regime, which clearly does not, with no let-out provision would mean that a court, but also lawyers advising parties, unless Article 46 CISG was excluded by virtue of Article 6 CISG,¹²⁴ would have to apply a diametrically different reasoning to an international sale dispute compared to a domestic sale dispute with all the consequences that might entail. However, the rationale of the promotion of trade through preservation of the sales contracts is not only relevant in an international context but also in a domestic context as well. Both types of sales of goods represent contracts parties entered into for the exchange of goods for money. On the basis of there being no substantial or insurmountable reason for the limited availability of specific performance in the UK, there would certainly be room for widening the availability of specific performance in the domestic law.¹²⁵

¹²⁴ Muller-Chen, 'Article 46' (n11) 722: 'Derogatory agreements are permitted (Article 6).'

¹²⁵ Rowan, *Remedies for Breach of Contract* (n12) 63-68.

2.3 The Buyer's Right to Require Substitute Delivery and Repair

2.3.1 Under the CISG

2.3.1.1 General

Substitute delivery and repair, in theory, do not enforce the primary obligations of the seller but they provide a remedy that enables the buyer to obtain the end result of performance ie. the delivery of conforming goods.¹²⁶ Therefore, 'the performance interest of the buyer is protected.'¹²⁷ In fact according to Honnold, 'buyers seldom need to coerce sellers to replace or repair defective goods' since 'replacement and repair are opportunities sought by sellers—to preserve good will, reduce damage liability and avoid the drastic remedy of avoidance of the contract.'¹²⁸ Honnold then argues though that, 'in the infrequent instances where sellers are unwilling to perform, coercing performance is seldom so speedy and effective as purchasing substitute goods.'¹²⁹ While this can be generally argued in relation to generic goods, it cannot be confidently argued in relation to all types of goods especially manufactured goods as it might not be possible for the buyer to purchase substitute goods or find a new supplier on time to satisfy his sub-buyers.

The tangible existence of a legal framework supporting performance itself, and the buyer's individual endeavours towards securing performance by the seller of his obligations, arguably increases the chances of the contract eventually being performed; and, a contract performed means goods and money exchanging hands as per the initial intention of the parties. The procedures and mechanisms locked into the legal framework provided by the CISG facilitate performance and protect both parties against bad faith and malicious caprice of the other party. A good example balancing the rights of both parties is the requirement of fundamental breach in order for the buyer to be able to request substitute delivery according to Article 46(2) CISG examined next.

2.3.1.2 Article 46(2) CISG

'Substitute delivery' means that the seller delivers other goods, which are in conformity with the requirements of the contract and the CISG, to substitute the non-conforming

¹²⁶ Mak, *Performance-Oriented Remedies in European Sale of Goods Law* (n2) 117.

¹²⁷ Ibid.

¹²⁸ Honnold, *Uniform Law* (n5) 311. See Article 48(1) CISG.

¹²⁹ Ibid.

goods already delivered.¹³⁰ The substitute delivery ‘has to be effected at the place at which the goods are when their non-conformity is discovered.’¹³¹ The costs of the substitute delivery have to be borne by the seller.¹³² For example, in a case involving the sale of a label printer with certain quality faults, which could not be repaired by the seller, the arbitral tribunal found that the seller should replace the faulty label printer within 60 days after the rendering of the arbitral award.¹³³ ‘If the substitute goods delivered are themselves non-conforming, the remedies under Article 45 *et seq* are created anew for the buyer.’¹³⁴

It must be acknowledged at the outset that the buyer’s request of substitute goods ‘is a burden on the seller in international trade.’¹³⁵ This is because the seller must either arrange for the return of the non-conforming goods at his own expense or dispose them at the buyer’s country, which may be inaccessible and unfamiliar to him, risking additional loss in value of the goods as a result of the passage of time or damage in storage.¹³⁶ Accordingly, the buyer’s entitlement to substitute delivery, just like in the case of avoidance involving the same considerations, is restricted to serious cases that represent a fundamental breach of contract. According to Article 46(2) CISG, in cases where the seller has delivered non-conforming goods, and only where the non-conformity is a fundamental breach of contract, the buyer can require delivery of substitute goods from the seller. In cases of non-fundamental breach, the buyer can request repair, dispose the goods himself and claim damages from the seller, or retain the goods despite the non-conformity and reduce the price.

The application of Article 46(2) CISG in relation to specifically manufactured or second-hand goods admittedly can be problematic or even impossible¹³⁷ even though it is argued that the seller could re-tender goods that are ‘economically equivalent’ to the goods being replaced and which satisfy ‘the buyer’s interests in performance.’¹³⁸

¹³⁰ Huber, ‘Article 46’ (n31) 693. See *Monomeles Protodikio Athinon* (Greece) 8161/2009 (Pace); *Supreme Court of Poland* (Poland) 11 May 2007 (Pace); *Oberlandesgericht Hamm* (Germany) 9 June 1995 (Pace).

¹³¹ Muller-Chen, ‘Article 46’ (n11) 717. Cf. Huber, ‘Article 46’ (n31) 697.

¹³² Huber, ‘Article 46’ (n31) 697.

¹³³ *CIETAC* (China) 24 July 2007 (Pace).

¹³⁴ Muller-Chen, ‘Article 46’ (n11) 719.

¹³⁵ *Ibid* 706.

¹³⁶ *Ibid*.

¹³⁷ Muller-Chen, ‘Article [46]’ (n11) 710-711; Huber, ‘Article 46’ (n31) 696; Peter Huber and Alastair Mullis, *The CISG* (Sellier 2007) 202.

¹³⁸ Muller-Chen, ‘Article 46’ (n11) 711.

Arguably, exercising the right to require delivery of substitute goods according to Article 46(2) CISG is easily exercised in relation to generic goods.¹³⁹ Ultimately, the CISG is silent on this matter which allows the parties to negotiate accordingly and reach an agreement as to whether an effective substitute delivery can be made or not.

2.3.1.3 Limitations to Article 46(2) CISG

If the buyer requires the delivery of substitute goods according to Article 46(2) CISG, the requirements and limits of Article 46(1) CISG in addition to the requirements of Article 46(2) CISG need to be satisfied.¹⁴⁰ To be exact, Article 46(1) CISG requires a breach of contract, that the buyer has not resorted to a remedy which is inconsistent with requiring the seller to perform his obligations, consideration of Article 28 CISG and that there are no impediments which prevent performance.¹⁴¹ Additionally, Article 46(2) CISG requires non-conforming goods, a fundamental breach of contract, a notice of non-conformity in accordance with Article 39 CISG and a timely request for substitute goods as well as the buyer's ability to return the non-conforming goods to the seller.

Non-conforming Goods

Article 46(2) CISG requires that the goods already delivered do not conform to the contract. According to Article 35(1) CISG, 'the seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract.' However, if the seller delivers goods which are subject to third party claims (Articles 41 and 42 CISG), this should not be regarded as a case of non-conformity in the sense of Article 46(2) CISG.¹⁴² Muller-Chen explains that the term 'conformity of the goods' is used in a technical sense, covering only cases falling under Article 35 CISG, and so it excludes third party rights and claims under Articles 41 and 42 CISG.¹⁴³ Moreover, the wording of the relevant heading entitled 'Section II. Conformity of the Goods and Third-Party Claims' clearly distinguishes between conformity of the goods and third party claims.¹⁴⁴ Also, for third party claims there is a separate notice provision provided by Article 43 CISG.

¹³⁹ Ibid 710.

¹⁴⁰ Ibid.

¹⁴¹ See sections 2.2.1.2 and 2.2.1.3 above.

¹⁴² Muller-Chen, 'Article 46' (n11) 712; Huber and Mullis, *The CISG* (n137) 198.

¹⁴³ Muller-Chen, 'Article 46' (n11) 712.

¹⁴⁴ Huber and Mullis, *The CISG* (n137) 198.

Therefore, in cases concerning defects in title, the buyer's right to require performance will be based solely on Article 46(1) CISG.¹⁴⁵

Fundamental Breach

The buyer's right to claim delivery of substitute goods under Article 46(2) CISG requires that 'the lack of conformity constitutes a fundamental breach of contract.'¹⁴⁶ If there is no fundamental breach, as already mentioned, the buyer's remedies will only be the right to claim repair under Article 46(3) CISG,¹⁴⁷ damages under Article 45(1)(b) CISG and price reduction under Article 50 CISG.

The fact that Article 46(2) CISG requires a fundamental breach of contract is in line with both the CISG's spirit in keeping the contract alive even when faced with a fundamental breach of contract and practical considerations in avoiding unnecessary transfers of goods, which 'can be caused as much by a claim for delivery of substitute goods as by an avoidance of the contract.'¹⁴⁸ In both cases, the goods originally delivered have to be transported back to the seller¹⁴⁹ and in fact the delivery of substitute goods 'might turn out to be even harder on the seller than simple avoidance, especially when costs of transport were involved.'¹⁵⁰ Indeed, compared to avoidance of the contract, in the case of requiring substitute goods an extra journey of goods is involved - that of the actual substitute goods.¹⁵¹ It is therefore, 'reasonable to treat claims for delivery of substitute goods and the remedy of avoidance along similar lines.'¹⁵² Accordingly, fundamental breach 'for the purposes of Article 46(2) must be determined in the same way as it is for purposes of avoidance of contract under Article 49(1)(a).'¹⁵³

¹⁴⁵ Muller-Chen, 'Article 46' (n11) 712.

¹⁴⁶ Fundamental breach as defined by Article 25 CISG is only briefly examined in this chapter in the context of Article 46(2) CISG. For a detailed examination of fundamental breach see section 5.4.1, Chapter 5.

¹⁴⁷ Enderlein and Maskow, *International Sales Law* (n1) 180 clarify that 'even if repair is not possible, the defect does not automatically turn into a fundamental breach;' in such a case the buyer is then only left with a right to claim a reduction of the price and/or damages.

¹⁴⁸ Huber, 'Article 46' (n31) 694; Secretariat Commentary, 'Article [46]' in *Official Records* (n14) 38-39. See A.CONF.97/C.1/L.135 (Federal Republic of Germany) in *Official Records* (n14) 112; Summary Records of the First Committee, 19th Meeting (UN Doc A/CONF.97/C.1/SR.19) in *Official Records* (n14) 337.

¹⁴⁹ See Article 82 CISG.

¹⁵⁰ 19th First Committee Meeting in *Official Records* (n14) 337.

¹⁵¹ Huber, 'Article 46' (n31) 694-695.

¹⁵² *Ibid* 695.

¹⁵³ UNCITRAL, *Digest* (n16) 228.

As per the definition in Article 25 CISG, a breach of contract will be fundamental ‘if it results in such detriment to [the buyer] as to substantially deprive him of what he is entitled to expect under the contract unless [the seller] did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.’¹⁵⁴ However, if the buyer can reasonably use or process the goods in the normal course of his business, or if he can resell the goods despite their non-conformity, or even remedy the non-conformity himself then, depending on the circumstances of each case, a finding of fundamental breach might not be accepted by the courts.¹⁵⁵ Moreover, if the seller completely cures the non-conformity of the goods then there will be no fundamental breach.¹⁵⁶ But ‘if the defect is not completely remedied within a reasonable period, or if the seller refuses to carry out the repair, or if he simply fails to act, then a fundamental breach of contract exists;’ the buyer will then be able to ‘demand’ delivery of substitute goods.¹⁵⁷

Time Limit for Request

Article 46(2) CISG entitles the buyer to make a request for substitute goods either in conjunction with notice given under Article 39 CISG or within a reasonable time thereafter. According to Article 39(1) CISG, the buyer must give notice of non-conformity within a reasonable time¹⁵⁸ after he has discovered it or ought to have discovered it¹⁵⁹ otherwise he loses the right to rely on a lack of conformity of the goods.

If the buyer does not combine his request for delivery of substitute goods with the notice of non-conformity according to Article 39 CISG, he must make his request for substitute goods within a reasonable time thereafter. When determining reasonable time in such an instance, the time consumed by the buyer for giving the notice of non-conformity according to Article 39 CISG is to be included.¹⁶⁰

Return of Non-conforming Goods

A buyer can only require and claim delivery of substitute goods if he is in a position to return the non-conforming goods originally delivered to him. According to Article 82(1)

¹⁵⁴ See section 5.4.1.1, Chapter 5.

¹⁵⁵ See section 5.4.1.1, Chapter 5.

¹⁵⁶ Muller-Chen, ‘Article 46’ (n11) 714-715.

¹⁵⁷ Ibid.

¹⁵⁸ Article 39(2) CISG caps reasonable time ‘at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.’

¹⁵⁹ See Article 38 CISG.

¹⁶⁰ Muller-Chen, ‘Article 46’ (n11) 717.

CISG, ‘the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.’¹⁶¹ However, this will not apply if (a) the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in Article 38 CISG; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.¹⁶²

The obligation to return the goods arises as soon as the buyer requires delivery of substitute goods while it is the seller’s duty to organize and pay for return transportation.¹⁶³ Since a request for substitute delivery only arises because the seller did not properly fulfill his obligations under the contract originally, imposing on him the costs for making proper performance in a second attempt is justifiable.¹⁶⁴ Also, ‘the seller must reimburse the buyer for any other detriment cause to him because of the non-conforming first delivery, insofar as they cannot be remedied by the delivery of substitute goods.’¹⁶⁵

2.3.1.4 Article 46(3) CISG

Article 46(3) CISG entitles the buyer to require the seller to remedy the lack of conformity of the goods delivered by repair, unless this is unreasonable having regard to all the circumstances. It is interesting to note that the 1978 Draft version of Article 46 CISG did not include a provision governing the buyer’s right to repair although, the provision governing the buyer’s right to require delivery of substitute goods (now Article 46(2) CISG) was included and, in fact, remained unchanged. Article 46(3) CISG was added at the Vienna Conference after numerous discussions and proposals, which eventually led to the adoption of a joint proposal by the Federal Republic of Germany, Finland, Norway and Sweden.¹⁶⁶ The Finnish delegate argued that ‘such a remedy was

¹⁶¹ See section 5.5.1.5, Chapter 5.

¹⁶² Article 82(2) CISG.

¹⁶³ Muller-Chen, ‘Article 46’ (n11) 718.

¹⁶⁴ Huber, ‘Article 46’ (n31) 697.

¹⁶⁵ Muller-Chen, ‘Article 46’ (n11) 719.

¹⁶⁶ A/CONF.97/C.1/L.199 (Joint Proposal of Finland, Federal Republic of Germany, Norway and Sweden) in *Official Records* (n14) 112.

in the interest of the buyer in cases where no substitute goods could be obtained, and was generally in the interests of both parties in that it offered the fairly lenient remedy which would remove obstacles to a contract.’¹⁶⁷ The delegates generally welcomed the underlying idea of the relevant proposals since, as one of the delegates put it, ‘repair was a well-known remedy in practice.’¹⁶⁸ Moreover, it was argued that the right to repair is sometimes the only effective remedy for the buyer and gave the example of an international contract for the sale of a specially constructed machine, forming part of a complex chain, for a new factory pointing out that the buyer would be faced with considerable losses if he were obliged to hold up production until a new machine could be built.¹⁶⁹

Repair may be effected by repairing the actual goods or by replacing defective parts.¹⁷⁰ The manner of repair is determined by the nature of the non-conformity of the goods in question whereas the means by which to effect repair are selected by the seller.¹⁷¹ If there is no prior explicit agreement between the parties, the seller must repair the goods at the place of destination and if the goods must be taken to the seller’s premises for repair, it is generally the seller’s responsibility to arrange such transport, subject to the principle of good faith and usage.¹⁷² Any repair must be undertaken with a reasonable time or if the buyer fixed an additional period of time for repair according to Article 47(1) CISG, within that additional period of time.¹⁷³ Similarly to the delivery of substitute goods, the seller bears the costs and risk of repair and must compensate the buyer for all losses suffered as a result of a delay in performance (Article 45(2) CISG).

2.3.1.5 Limitations to Article 46(3) CISG

If the buyer requires the seller to remedy the lack of conformity by repair, the requirements and limits of Article 46(1) CISG in addition to the requirements of Article 46(3) CISG need to be satisfied.¹⁷⁴ To recap, Article 46(1) CISG requires a breach of contract, that the buyer has not resorted to a remedy which is inconsistent with requiring the seller to perform his obligations, a consideration of Article 28 CISG and that there

¹⁶⁷ 19th First Committee Meeting in *Official Records* (n14) 332.

¹⁶⁸ *Ibid* 333.

¹⁶⁹ *Ibid*.

¹⁷⁰ Huber, ‘Article 46’ (n31) 700. See *CIETAC* (China) 4 July 1997 (Pace); *Cour d' Appel Grenoble* (France) 26 April 1995 (Pace).

¹⁷¹ Muller-Chen, ‘Article 46’ (n11) 721.

¹⁷² *Ibid* 721-722. Cf. Huber, ‘Article 46’ (n31) 700-701.

¹⁷³ Article 47 CISG is examined in Chapter 3.

¹⁷⁴ Muller-Chen, ‘Article 46’ (n11) 710.

are no impediments which prevent performance.¹⁷⁵ Additionally, and like Article 46(2) CISG, Article 46(3) CISG requires non-conforming goods, a notice of non-conformity according to Article 39 CISG and a timely request for repair.¹⁷⁶ However, unlike Article 46(2) CISG though, Article 46(3) CISG does not require that the non-conformity constitutes fundamental breach of contract. In addition, a repair must be reasonable having regard to all the circumstances.

Reasonableness

According to Article 46(3) CISG, the buyer has the right to require the seller to remedy the lack of conformity by repair, ‘unless this is unreasonable having regard to all the circumstances.’ The buyer’s interests in repair should be weighed against the seller’s expenses and if there is an objective disparity then repair would be unreasonable.¹⁷⁷ The seller has to prove the unreasonableness ‘defence.’¹⁷⁸ This is ‘because the obligation to repair the goods is the rule and unreasonableness the exception.’¹⁷⁹

An example where repair is unreasonable is when the repair is excessively expensive for the seller and bears no reasonable relationship to the advantage that the buyer will derive from the repair of that defect.¹⁸⁰ Another example where repair is unreasonable is to demand the seller, based in another country, to repair the non-conformity when repair is in fact feasible, simple and easier for the buyer to effect who could then claim his repair costs as damages under Article 45(1)(b) and Articles 74 *et seq.*¹⁸¹ However, where the buyer has a special interest in specifically getting the seller to repair the non-conformity because the seller is a specialist, the seller may in certain circumstances be obliged to incur considerable expenditure and effort.¹⁸²

2.3.1.6 Substitute Goods or Repair?

In cases of fundamental breach, where both substitute delivery and repair are available to the buyer and the buyer demands the former, it seems that ‘the seller can defeat the buyer’s choice by offering repair instead of substitute goods as long as both methods are

¹⁷⁵ See sections 2.2.1.2 and 2.2.1.3 above.

¹⁷⁶ See 2.3.1.3 above excluding the section on fundamental breach.

¹⁷⁷ Muller-Chen, ‘Article 46’ (n11) 719-720.

¹⁷⁸ Huber, ‘Article 46’ (n31) 699.

¹⁷⁹ Muller-Chen, ‘Article 46’ (n11) 720.

¹⁸⁰ Ibid 720.

¹⁸¹ Ibid; Honnold, *Uniform Law* (n5) 414.

¹⁸² Ibid; Huber, ‘Article 46’ (n31) 700.

equally suitable and sufficient to remedy the initial breach of contract.’¹⁸³ The seller can do this by virtue of Article 48(1) CISG which allows the seller ‘even after the date for delivery, to remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer;’¹⁸⁴ and also because as a rule, the seller’s breach will not be fundamental if it can be consequently cured by the seller without undue burden for the buyer.¹⁸⁵ Moreover, as it is the seller who has to bear the costs of substitute delivery, ‘it should be up to him to choose between several equally suited measures.’¹⁸⁶ But if the seller does not carry out the repair as required by Article 48(1) CISG, he will then not be able to avert the buyer’s claim for delivery of substitute goods by offering to repair the goods after all.¹⁸⁷ Then if the substitute goods delivered are themselves also non-conforming, the remedies under Article 45 *et seq.* are available anew for the buyer.¹⁸⁸ If the seller refuses or fails to make delivery of substitute goods on time, the buyer can avoid the contract under Article 49(1)(a) CISG in conjunction with Article 49(2)(b)(ii) CISG.¹⁸⁹

2.3.2 In English Sales Law¹⁹⁰

While the CISG provides the buyer with the right to require substitute delivery or repair (Articles 46(2) and (3) CISG) in instances where non-conforming goods have been delivered as sub-forms of the right to require performance, English sales law does not provide the commercial buyer with an explicit right to request replacement or repair of non-conforming goods akin to the CISG. Of course, there is nothing stopping the buyer from requesting substitute delivery or repair from the seller in practice. As Goode argues, ‘the typical buyer, confronted with defective goods,’ ‘tells the seller that the goods are not accepted in the condition in which they are tendered and asks that they be repaired or replaced.’¹⁹¹ In fact, a sophisticated buyer (i.e. one properly advised), and

¹⁸³ Huber, ‘Article 46’ (n31) 697; Muller-Chen, ‘Article 46’ (n11) 718.

¹⁸⁴ Article 48 CISG is examined in Chapter 3.

¹⁸⁵ Huber, ‘Article 46’ (n31) 697.

¹⁸⁶ *Ibid.*

¹⁸⁷ Muller-Chen, ‘Article 46’ (n11) 718.

¹⁸⁸ *Ibid.* 719; Huber, ‘Article 46’ (n31) 698.

¹⁸⁹ *Ibid.* Article 49 CISG is examined in Chapter 5.

¹⁹⁰ This section is only concerned with the buyer’s right to request replacement or repair from the seller according to Articles 46 (2) and (3) CISG as a sub-form of the buyer’s right to require performance, or in English sales law terminology, as a type of specific performance of the contract. Section 3.3, Chapter 3 deals with the seller’s right to effect cure according to Article 48 CISG as an attempt to circumvent avoidance of the contract. See Bridge, *The Sale of Goods* (n7) 575.

¹⁹¹ McKendrick, *Goode on Commercial Law* (n69) 371.

depending on the nature of the goods involved and his line of business, will usually include such a right in the contract. However, the buyer's right to request replacement or repair in English sales law is not explicitly and unequivocally authorised by any legal principle or mechanism like in the CISG. Therefore, if the buyer requires replacement or repair of non-conforming goods, he has to apply for a specific performance order requiring replacement or repair of the goods and satisfy the relevant requirements for the granting of a specific performance order.¹⁹²

Nonetheless, the SGA 1979 does make provision for a repair or replacement arrangement between the buyer and the seller. Section 35(6) SGA 1979, inserted by the Sale and Supply of Goods Act 1994, recognises the possibility that the buyer might want *to ask for*, but also agree to, a repair of the goods.¹⁹³ Accordingly, it safeguards the buyer's right to reject the goods by clarifying that, in instances where the buyer 'asks for, or agrees to, their repair by or under an arrangement with the seller' he will not be deemed to have accepted the goods¹⁹⁴ since this would then bar him from rejecting the goods and treating the contract as repudiated.¹⁹⁵ To be exact, section 35(6) SGA 1979 provides:

(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because-

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or

(b) the goods are delivered to another under a sub-sale or other disposition.

In particular, this provision was inserted to the SGA 1979 by the Sale and Supply of Goods Act 1994 to address 'a fear, particularly among consumer interests, that where

¹⁹² See Flechtner, 'Remedies under the New International Sales Convention' (n42) 60 fn 32. See also the American case *Colorado-Ute Elec. Ass'n v. Envirotech Corp.*, 524 F.Supp. 1152, 1159 (D.Colo. 1981).

¹⁹³ Particular attention here should be drawn to the fact that section 35(6) SGA 1979 primarily acknowledges that the buyer himself might *ask for* the seller to repair non-conforming goods.

¹⁹⁴ Sections 35 (1) to (5) SGA 1979 provide when the buyer is deemed to have accepted the goods and this includes when he intimates to the seller that he has accepted them, 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 and when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. The questions that are material in determining whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and in case of a contract for sale by sample, of comparing the bulk with the sample.

¹⁹⁵ According to section 11(4) SGA 1979, if the buyer accepts the goods, the breach of a condition can only be treated as a breach of warranty, 'and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.'

buyers permitted seller to attempt to rectify defects over a period (...) they might lose the right to reject, whether because this was an implied indication of acceptance, or an act inconsistent with the seller's ownership, or because the attempts caused a reasonable time to elapse.'¹⁹⁶ In their joint Report, the Law Commission and the Scottish Law Commission acknowledged that, if an agreement or request for repair could potentially jeopardise the buyer's definite right to reject a tender of non-conforming goods, then buyers might never allow the seller to try to put the goods right.¹⁹⁷ Rather buyers would insist on rejecting the goods and claiming their money back even where the seller was willing to repair the goods.¹⁹⁸ They did not think that that was 'a reasonable state for the law to be in' also recognising that 'frequently buyers are quite content to allow the seller to repair defective goods even though strictly they might be entitled to reject them.'¹⁹⁹ Although the Commissions were no longer 'recommending the formal right to cure goods which was proposed in the Consultative Document,'²⁰⁰ they still thought 'that informal attempts at cure should be encouraged' and as such recommended that the SGA 1979 should be amended accordingly, which resulted in the insertion of section 35(6).²⁰¹

It must also be noted that a buyer in consumer cases can actually require the seller to repair or replace the goods under English sales law. The buyer's right to require replacement and repair, along with his right to reduce the price, were added to the SGA 1979 (Part 5A SGA 1979 entitled 'Additional Rights of Buyer in Consumer Cases') by the Sale and Supply of Goods to Consumers Regulations 2002,²⁰² which transposed Directive 1999/44/EC (25 May 1999) dealing with certain aspects of sale of consumer goods and associated guarantees into English law. To be exact, section 48B SGA 1979 governs the buyer's right to require the seller to (a) repair the goods, or (b) to replace the goods but only if the buyer deals as a consumer in accordance with section 48A(1).

¹⁹⁶ *Benjamin's Sale of Goods* (n90) para 10-056.

¹⁹⁷ Law Commission and The Scottish Law Commission, *Sale and Supply of Goods Report* (Law Com No 160, Scot Law Com No 101, 1987) para 5.27.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ In the Sale and Supply of Goods Consultative Document, a remedial scheme incorporating the seller's right to effect cure was proposed but only for consumer sales. The possibility of a similar remedial scheme was considered in relation to commercial sales but it was generally rejected. For more discussion on this see section 3.3.1.3, Chapter 3 which deals with Article 48 CISG governing the seller's right to remedy any failure to perform his obligations.

²⁰¹ Law Commission and The Scottish Law Commission, *Sale and Supply of Goods Report* (n197) paras 5.28-5.29.

²⁰² SI 2002 No. 3045 (31 March 2003).

However, when the Consumer Rights Act 2015 comes into force on 1 October 2015 the buyer's right to repair and replacement of the goods in consumer cases will be found in section 23 of the aforementioned Act.²⁰³ Therefore, while consumers do enjoy the right to require the seller to repair or replace the goods, commercial buyers do not.

Interestingly enough, the abovementioned EC Directive appears to have been influenced by the CISG, which means that some of the remedial provisions of the CISG, albeit in a consumer context, have already been a part of English sales law for more than ten years now.²⁰⁴ Arguably, the legal authorisation of repair and replacement as part of the buyer's rights after a breach of contract is therefore not completely alien to English sales law nor, strictly speaking, completely unfamiliar to English merchants and lawyers. Moreover, in practice, parties often co-operate in relation to either replacement or repair of non-conforming goods. Substitute delivery and repair, have the potential of providing the buyer with what he contracted for and helping to salvage the deal and their importance as such within the context of an international transaction must certainly be acknowledged. It is worth noting that in the Diplomatic Conference in Vienna, the delegate representing the USA, a traditionally common law country, found the right to repair reasonable 'although it had no counterpart in the domestic law of the United States, or of other common law countries.'²⁰⁵ Earlier, the Australian delegate said 'that the concept of specific performance under discussion was wider than that customary under Australian law but that her delegation could see the reason for it in international trade and supported the clarification of the buyer's right to repair.'²⁰⁶

Even if there is no equivalent English sales law rule providing for the buyer's right to require delivery of substitute goods or repair, the fact that English sales law since 1994 has been accommodating such an instance by virtue of section 35(6) SGA 1979 allows one to argue that the buyer's rights to substitute delivery and repair in the CISG are not foreign to English sales law. This argument is re-enforced by the fact that for more than ten years the SGA 1979 has included the consumer's right to repair and replacement,

²⁰³ Following Royal Assent for the Consumer Rights Bill given on 26th March 2015, the Consumer Rights Bill 2015 comes into force on 1 October 2015. When this Bill comes into force, Part 5A governing additional rights of the buyer in consumer cases will be effectively removed from the SGA 1979.

²⁰⁴ Michael Bridge, 'A Comment on "Towards a Universal Doctrine of Breach: The Impact of CISG" by Jurgen Basedow' (2005) 25 Int'l Rev L Econ 501, 501-502.

²⁰⁵ 19th First Committee Meeting in *Official Records* (n14) 336.

²⁰⁶ *Ibid.*

which has been incorporated in the new Consumer Rights Act 2015 coming into force on 1 October 2015.

2.4 Article 28 CISG

2.4.1 General

Any concerns as to the practical consequences of the differences between the CISG and English sales law in relation to Article 46 CISG are extinguished by a ‘let-out’ provision.²⁰⁷ Article 28 CISG reads:

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.

Article 28 CISG is viewed as ‘a compromise between legal systems that deal differently with the right of a party to claim specific performance of the contract.’²⁰⁸ Being the only provision in the CISG that specifically refers to ‘specific performance,’ thus, shifting from the CISG’s terminology of ‘requiring performance’ to the common law’s ‘specific performance,’ is a clear indication that this compromise was designed for the benefit of common law systems.²⁰⁹ The official records of the Diplomatic Conference in Vienna can confirm that the purpose of Article 28 CISG is to prevent common law courts from being compelled to order specific performance when they would not ordinarily do so.²¹⁰

Nevertheless, Lookofsky argues against Article 28 CISG being considered a ‘compromise’ maintaining the CISG merely codifies ‘an agreement to disagree and thus to revert to national law.’²¹¹ Others are more direct stating that Article 28 CISG ‘epitomizes the rejection of uniformity and the breakdown of compromise that occurred in relation to the remedy provisions of the [CISG].’²¹² Indeed, it creates unpredictability and uncertainty concerning the availability of specific performance and adds the

²⁰⁷ F.M.B. Reynolds, ‘A Note of Caution’ in P.B.H. Birks (ed), *The Frontiers of Liability*, Vol 2 (OUP 1994) 18, 22.

²⁰⁸ UNCITRAL, *Digest* (n16) 126.

²⁰⁹ Bridge, *The International Sale of Goods* (n6) 602.

²¹⁰ Summary Records of the First Committee, 13th Meeting (UN Doc A/CONF.97/C.1/SR.13) in *Official Records* (n14) 304-305.

²¹¹ Joseph Lookofsky, ‘Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules’ (1991) 39 (2) AJCL 403, 404.

²¹² Erauw and Flechtner, ‘Remedies under the CISG’ (n13) 36.

challenge of identifying the remedy that would be available under national sales law.²¹³ Although this thesis is not concerned with an evaluation of the CISG's attempt at uniformity, it is rightly argued that Article 28 'sacrifices uniformity in the application in return for the support of common law countries – despite which, the [UK] has yet to [accede] to the Convention.'²¹⁴ If Article 28 CISG did not exist though, it is highly likely that common law countries would resist ratifying or acceding to the CISG as a result of the evident civil law influence in the CISG. This can be supported by the fact that, even with Article 28 CISG already in place, the UK and the USA tried to restrict the buyer's right to require performance by the seller as much as possible.

The 1978 draft version of Article 28 CISG provided that 'a court is not bound to enter judgment for specific performance unless the court *could* do so under its own law, 'i.e. it included the word "could" instead of the word "would" it includes now. At the Diplomatic Conference in Vienna, the UK and the USA submitted identical amendments to the 1978 draft version of Article 28 CISG proposing that the word "could" be substituted for the word "would,"²¹⁵ which were adopted by 26 votes to 10.²¹⁶ It was argued that the ULIS formulation, which also used "would" 'had been an attempt to ease the position of those States whose courts regarded specific performance as an exceptional rather than a usual remedy' and that the effect of the "could" formulation 'was to reduce vastly the protection afforded by the earlier provision to those States whose courts did not readily grant the remedy of specific performance.'²¹⁷ It was then pointed out that 'if a national court had jurisdiction to grant specific performance -in other words, if it "could" do so- it would be obliged to give such a judgment if that was, under the Convention, an appropriate remedy in the circumstances.'²¹⁸ According to the UK delegate, this meant common law courts no longer enjoyed the protection extended by the use of the word 'would'; 'since it was not possible to say that common law courts never granted specific performance, they might arguably be compelled to do so under the Convention.'²¹⁹

²¹³ Ibid 53.

²¹⁴ Ibid 47.

²¹⁵ UN Doc A/CONF.97/C.1/L.113 (UK); UN Doc A/CONF.97/C.1/L.117 (USA) in *Official Records* (n14) 100.

²¹⁶ 13th First Committee Meeting in *Official Records* (n14) 305.

²¹⁷ Ibid 304.

²¹⁸ Ibid.

²¹⁹ Ibid 305.

The USA then unsuccessfully attempted to restrict the buyer's right to performance even further by submitting an amendment to the 1978 draft version of Article 46 CISG²²⁰ for the addition of a new paragraph after paragraph (1) to read as follows:

‘(1 *bis*) The buyer may not require performance by the seller if the buyer can purchase substitute goods without substantial additional expense or inconvenience.’

and for the addition of a new paragraph after paragraph (2) to read as follows:

‘(2 *bis*) The buyer loses the right to require performance unless he requests and institutes legal action for it within a reasonable time and before changes in market or other conditions make the exercise of the right unfair or oppressive.’²²¹

The Swedish, French, Greek and Belgian delegates among others opposed this addition. The general reasoning was that the difficulties encountered by the common law countries had already been met to a certain extent by replacing the word “could” by the word “would” in Article 28 CISG and that the result of such an amendment would be to encourage the seller to dishonour his obligations on the pretext that the buyer had the option of securing his goods elsewhere.²²² Moreover, such an amendment would have essentially neutralised the buyer's right to require delivery of substitute good and instead frequently lead to an entitlement for damages rather than substitute delivery. In light of the mere existence of Article 28 CISG and consequent adjustment, which of course can also equally serve civil law systems, this was arguably a shameless last-minute attempt to restrict the buyer's right to require performance of the contract as much as possible and further align the CISG with common law. Unsurprisingly, the UK and Australian delegates supported the addition of a paragraph not allowing the buyer to require performance if he could purchase substitute goods without substantial additional expense or inconvenience. In particular, Mr. Feltham, the UK's delegate, found it ‘difficult to see what interest a buyer could have in forcing a seller to perform’ when the buyer himself could ‘purchase substitute goods, without substantial additional expense

²²⁰ The 1978 draft version of Article 46 CISG read:

‘(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) 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 and a request for substitute goods is made either in conjunction with notice given under Article 37 [now Article 39] or within a reasonable time thereafter.’

²²¹ UN Doc A/CONF.97/C.1/L.180 (USA) in *Official Records* (n14) 111-112.

²²² 18th First Committee Meeting in *Official Records* (n14) 332.

or inconvenience, and obtain compensation for any additional costs incurred.²²³ His reasoning is a perfect example of where the theoretical difference between the common and the civil law lies.

As Erauw and Flechtner explain, ‘civil law remedies, with their emphasis (at least in theory) on exacting actual performance (*en nature*) of obligations, stress the moral obligation of honouring one’s promises.’²²⁴ On the other hand, ‘common law remedies are dominated by the awarding of money damages designed to place the aggrieved party in the position he would have been in had the contract been performed.’²²⁵ Erauw and Flechtner argue that ‘the primary focus of civil law remedies seems to be on correcting the moral shortcomings of the breaching party, whereas common law remedies tend to focus on compensating the party.’²²⁶ Nevertheless, it must be pointed out the basic differences between common law and civil law are solely of a theoretical rather than of practical importance because ‘even in civil law countries an aggrieved party will pursue an action for performance, in general, only if he has a special interest in performance which would not be satisfied by damages.’²²⁷ Empirical evidence suggests that specific performance is in fact a rare remedy not only in some civil law countries but also under the CISG.²²⁸

In relation to the second part of the USA’s proposal, it was argued that ‘a restriction should be placed on the period within which a buyer might require specific performance, otherwise he would be put in a position to speculate at the seller’s expense on a rising market.’²²⁹ Mr. Feltham, the UK’s delegate once again supported the USA’s proposal maintaining that ‘specific performance was a strong remedy and there were good reasons for not extending it to those who did not request it promptly.’²³⁰ Both the proposals in the amendment were rejected but the USA’s and the UK’s intention and effort to restrict the ambit of the buyer’s right to require performance by the seller as much as possible was clear.

²²³ Summary Records of the First Committee, 18th Meeting (UN Doc A/CONF.97/C.1/SR.18) in *Official Records* (n14) 331.

²²⁴ Erauw and Flechtner, ‘Remedies under the CISG’ (n13) 49.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Lando and Beale, *Principles of European Contract Law* (n8) 400.

²²⁸ See Henrik Lando and Caspar Rose, ‘On the Enforcement of Specific Performance in Civil Law Countries’ (2004) 24 *Int’l Rev L Econ.* 473, 475-480.

²²⁹ 18th First Committee Meeting in *Official Records* (n14) 334.

²³⁰ *Ibid* 334-335.

2.4.2 Applying Article 28

2.4.2.1 Courts and Arbitral Tribunals

Article 28 CISG cannot be excluded by the parties despite the fact that Article 6 CISG allows the parties to ‘derogate from or vary the effect of any of [the CISG] provisions.’ This is because ‘Article 28 is directed to the national courts,’²³¹ ‘whether or not to grant specific relief is a remedy within the discretion of the court, not within the discretion of the parties.’²³²

Article 28 CISG only refers to ‘court’. Unlike Article 45(3) CISG, no reference is made to ‘arbitral tribunal’ despite that many international disputes appear before arbitral tribunals.²³³ Even so, it is undisputed that Article 28 CISG equally applies to arbitral tribunals and to courts.²³⁴ The Secretariat Commentary confirms this by referring to both a court and an arbitral tribunal: ‘Although the buyer has a right to the assistance of a court or arbitral tribunal to enforce the seller’s obligation to perform the contract, Article [28] limits that right to a certain degree.’²³⁵

2.4.2.2 ‘Unless it would do so under its own law’

Article 28 CISG provides that a court is not bound to order specific performance unless it would do so under its ‘own law.’ ‘The meaning of the statement “its own law” is far from apparent;’ it could either refer to the substantive domestic law of the forum or to the forum’s entire law, including its conflict of law rules.²³⁶ Unfortunately, ‘Article 28 is unenlightening on this point, and the diplomatic history is inconclusive at best.’²³⁷ Nonetheless, this statement should be construed as referring to the domestic law of the forum State.²³⁸ This is ‘the most straightforward, and most convincing, interpretation’ of this statement as the forum’s private international law rules might point to the laws of

²³¹ Markus Muller-Chen, ‘Article 28’ in Schwenzer, *Schlechtriem and Schwenzer* (n11) 470.

²³² Andrea Bjorklund, ‘Article 28’ in Kroll, Mistelis and Viscasillas, *Commentary* (n31) 379.

²³³ 13th First Committee Meeting in *Official Records* (n14) 305: ‘47. Mr. Kim (Republic of Korea) asked whether article [28] covered arbitration proceedings as well as ordinary judicial proceedings. In England, for instance, the two were closely related. As most international disputes were settled by arbitration, it was important to make it clear that article [28] would also be applicable to such proceedings. 48. The CHAIRMAN pointed out that in many States the relevant legislation also related to arbitration proceedings. That should be taken into account in deciding whether article [28] could or should apply to arbitral tribunals as well.’

²³⁴ Muller-Chen, ‘Article 28’ (n231) 464. Cf. Erauw and Flechtner, ‘Remedies under the CISG’ (n13) 62-64.

²³⁵ UNCITRAL, Secretariat Commentary, ‘Article [46]’ in *Official Records* (n14) 38.

²³⁶ Steven Walt, ‘For Specific Performance under the United Nations Sales Convention’ (1991) 26 *Tex. Int’l L. J.* 211, 218.

²³⁷ *Ibid* 219; 13th First Committee Meeting in *Official Records* (n14) 305.

²³⁸ Muller-Chen, ‘Article 28’ (n231) 464.

a different jurisdiction, which would then require the court to assess whether or not specific performance would be available under that state's law and not its 'own law.'²³⁹ For example 'if a buyer domiciled in Austria brings an action for delivery against a US seller at the Swiss place of performance, Swiss law will decide on the admissibility of the right to require performance.'²⁴⁰ In *Magellan International Corporation v. Salzgitter Handel GMBH*²⁴¹ the court stated that where the CISG entitles a party to claim specific performance, Article 28 CISG allows the court to look to the availability of such relief under its own substantive law in a like case.²⁴² The facts as reported in *Unilex* are as follows. An American distributor entered into negotiations with a German trader with a view to reaching an agreement for the purchase of steel bars from a Ukrainian manufacturer. During the negotiations the parties agreed on several matters. However, a dispute arose when the seller, in view of the buyer's refusal to modify the letter of credit issued for payment, threatened not to perform its contractual obligations and to sell the goods elsewhere. The buyer brought an action for anticipatory breach of contract claiming damages and specific performance of the seller's obligations.

In dealing with the buyer's plea for specific performance, 'the court stated that this remedy is generally available under the CISG (Article 46(1) CISG) with the exception that a court is not bound to enter judgement for specific performance unless it would do so under its own law of contracts (Article 28 CISG).'²⁴³ After looking at the modern judicial interpretation of paragraph 2-716 (1) UCC²⁴⁴ according to which specific performance may be granted when the buyer proves the difficulty of obtaining similar goods on the market, the court upheld the buyer's claim.

Arguably, the wording of Article 28 CISG gives the court some flexibility.²⁴⁵ Indeed, the language of Article 28 CISG 'does not compel a court to follow its own law: if not

²³⁹ Bjorklund, 'Article 28' (n232) 376.

²⁴⁰ Ibid.

²⁴¹ *U.S. District Court of Illinois (USA)* 7 December 1999 (*Unilex*).

²⁴² UNCITRAL, *Digest* (n16) 126.

²⁴³ Ibid.

²⁴⁴ § 2-716. Buyer's Right to Specific Performance or Replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

²⁴⁵ Muller-Chen, 'Article 28' (n231) 469.

bound to grant specific performance, the court nevertheless retains discretion to do so.²⁴⁶ In other words, ‘it may refuse the remedy, but the CISG does not mandate that it do so.’²⁴⁷ However, ‘the CISG itself does not reveal how this discretionary scope it to be utilized;’ ‘instead, it is a matter for the *lex fori* to decide whether room for discretion and evaluation exists and to what extent the courts or arbitral tribunals are permitted to use it.’²⁴⁸

In the case of an arbitral tribunal, its ‘own law’ would be the agreement between the parties, the applicable arbitral rules, the CISG and the law of the place of arbitration (*lex arbitri*).²⁴⁹ Accordingly, ‘the ability of the arbitral tribunals to order specific performance will depend on the *lex arbitri* and will vary depending on the jurisdiction.’²⁵⁰

2.4.2.3 ‘In respect of similar contracts not governed by this Convention’

According to Article 28 CISG, the court is bound to enter a judgment for specific performance only if it would do so under its own law in respect of similar contracts of sale not governed by the CISG. Accordingly, the court must imagine a contract of sale whose content is similar to the case to be adjudicated and is subject to domestic law.²⁵¹ It is thought ‘reasonable to suggest that courts take into account the international features, and the peculiarities attendant on the individual contract of sale, in assessing whether specific performance would be an appropriate remedy.’²⁵²

2.4.3 The Invoking of Article 28 CISG by an English Court

The court must first determine whether the buyer can demand performance from the seller pursuant to the CISG.²⁵³ If the right to require performance exists under the CISG, the court must check by application of its own law whether it would arrive at the same conclusion on an imaginary contract subject to domestic law and containing similar rights and duties, or in other words, whether it would permit the action for

²⁴⁶ Alejandro Garro, ‘Cases, Analyses and Unresolved Issues in Articles 25-34, 45-52’ in Franco Ferrari, Harry Flechtner and Ronald Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Sellier 2004) 362, 368.

²⁴⁷ Erauw and Flechtner, ‘Remedies under the CISG’ (n13) 53.

²⁴⁸ Muller-Chen, ‘Article 28’ (n231) 469-470.

²⁴⁹ Bjorklund, ‘Article 28’ (n232) 376; Muller-Chen, ‘Article 28’ (n231) 464.

²⁵⁰ Ibid.

²⁵¹ Muller-Chen, ‘Article 28’ (n231) 468.

²⁵² Bjorklund, ‘Article 28’ (n232) 379.

²⁵³ Muller-Chen, ‘Article 28’ (n231) 469.

performance.²⁵⁴ In the *Magellan* case, in dealing with the buyer's plea for specific performance, the court stated that this remedy is generally available under CISG (Article 46(1) CISG), with the exception that a court is not bound to enter judgement for specific performance unless it would do so under its own law of contracts (Article 28 CISG).²⁵⁵ After examining whether it would enter a judgment of specific performance under its own law and finding that it would, the court upheld the buyer's claim.²⁵⁶ Accordingly, 'if the national law would also grant specific performance, there is no conflict with the Convention and no problem arises.'²⁵⁷ However, if the court's own law would deny the buyer the right to require performance in a given case, then the action for performance can be dismissed by invoking Article 28 CISG and alternative relief such as damages could be granted instead.²⁵⁸ But 'only enforcement by legal action is blocked'; 'the right to require (subsequent) performance as such (and, of course, all other legal remedies) remains in existence.'²⁵⁹

However, it must be noted that Article 28 CISG 'is a good example of one of those theoretically interesting attempts to deal with irreconcilable conceptual problems which in practice prove unimportant.'²⁶⁰ The latter is confirmed by the UNCITRAL Digest, which reports that, in practice, rather than pursue the right to require performance by the seller (Article 46 CISG), which might have triggered Article 28 CISG, 'aggrieved parties have generally preferred to pursue other remedies – in particular the right to claim damages.'²⁶¹

Arguably, 'from a practical point of view, Article 46 lacks the speed of resolution and no doubt will only be utilized if no other more efficient method to enforce contractual rights is open to the buyer.'²⁶² However, while this may very well be the case in some instances depending on the circumstances of each case, the importance of the buyer's right to performance as provided by Article 46 CISG should not be undermined given

²⁵⁴ Ibid.

²⁵⁵ *U.S. District Court of Illinois (USA)* 7 December 1999 (Unilex).

²⁵⁶ Ibid. See also *Handelsgericht des Kantons Bern* (Switzerland) 1 December 2004 (Pace).

²⁵⁷ UNCITRAL, *Digest* (n16) 126.

²⁵⁸ Ibid.

²⁵⁹ *U.S. District Court of Illinois (USA)* 7 December 1999 (Unilex).

²⁶⁰ Ulrich Magnus, 'Beyond the Digest: Part III (Articles 25-34, 45-52)' in Franco Ferrari, Harry Flechtner and Ronald Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention* (Sellier 2004) 319, 326.

²⁶¹ UNCITRAL, *Digest* (n16) 227; Honnold, *Uniform Law* (n5) 409-410.

²⁶² Bruno Zeller, 'Obligations of the Seller' in Camilla Andersen, Francesco Mazzotta and Bruno Zeller, *A Practitioner's Guide to the CISG* (Juris 2010) 449, 459.

its position and significance within the buyer's remedies and possible use in post-breach negotiations between the parties. For example, a buyer in a contract governed by the CISG by virtue of Article 46(1) CISG can confidently pursue the remedy on his own and demand performance by the seller of his obligations or, in cases of fundamental breach, demand delivery of substitute goods according to Article 46(2) CISG. Of course, one might argue that such requests can also take place even if the governing law does not provide for such rights, however, the force of a request explicitly endorsed by the applicable law must not be underestimated or equated to a similar request not specifically endorsed by the applicable law. In the latter instance, the seller can ignore it asserting no legal obligation to adhere to it whereas it would be harder to ignore a legally endorsed request which could potentially be used as evidence against the seller in future legal proceedings.

2.5 Conclusion

This chapter is able to confirm that, the differences between the CISG and English sales law in relation to buyer's general right to seek performance of the contract after a breach by the seller of his obligations according to Article 46(1) CISG, in theory and on the basis of the relevant English sales law rules as they currently stand, can justifiably render Article 46(1) CISG a major point of contention for merchants and lawyers alike with significant practical consequences especially for merchants. Nevertheless, Article 28 CISG, by allowing an English court to not grant an order for specific performance unless it would do so under its own law, effectively extinguishes any possible concerns of the said community. Although the buyer's right to require performance and his rights to all other legal remedies remain in existence, an English court would be able to invoke Article 28 CISG in cases where it would not grant a specific performance order under its own law. However, on the basis of the parties' preference in practice to opt for damages rather than pursue performance of the contract it can be safely assumed that, in the eventuality the UK accedes to the CISG, courts would rarely have to invoke Article 28 CISG.

As a direct result of specific performance being an exceptional and discretionary remedy, English sales law does not explicitly provide a commercial buyer with a performance-oriented legal framework (including the right to require substitute delivery and repair) akin to the one offered by the CISG. Nevertheless, the buyer's rights in the relation to substitute delivery and repair according to Articles 46(2) and (3) CISG

cannot justifiably stand as contentious for merchants and lawyers on the basis of their implicit acknowledgment in section 35(6) SGA 1979 and their existence as additional remedies for the consumer. Nevertheless, they can also be extinguished by Article 28 CISG.

Article 28 CISG, tackles a large divergence between the two systems which would have had significant practical consequences for the business community by simply allowing for Article 46 CISG to be disregarded in particular circumstances. Although not necessarily the best compromise solution, it nevertheless allows this thesis to conclude that, as far as the application of Article 46 CISG is concerned, there are no significant practical consequences for the parties involved nor should the particular remedy pose as a contentious issue for merchants and lawyers.

Chapter 3 The Buyer's Right to Fix Additional Time for Performance and the Seller's Right to Remedy Failure of Performance

3.1 Introduction

Honnold colourfully writes that 'a sales transaction may be regarded (at the extremes) either as a duel fought with deadly weapons or as a relationship calling for cooperation and accommodation.'¹ He asserts that 'the latter, of course, is the attitude of persons engaged in commerce' and explains that this approach is reflected in several provisions of the CISG.² Just like Articles 46(2) and (3) CISG examined in Chapter 2, the provisions examined herein certainly reflect this approach. Appropriately branded 'performance-oriented,'³ they are invaluable remedial mechanisms facilitating extrajudicial performance and eventual preservation of the contract, which clearly evidences the principle of *favor contractus*.⁴

The first of these mechanisms examined herein is Article 47 CISG, which allows the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations. It can stand independently and effectively as a mechanism the buyer can use to achieve performance by the seller of his obligations but also operates within Article 49 CISG, which governs the buyer's right to declare the contract avoided, as an alternative route to avoidance.⁵ The second of these mechanisms is the seller's right to remedy any failure to perform his obligations according to Articles 34, 37 and 48 CISG. Although this is a right that belongs to the seller, it operates integrally to provide the buyer with remedial relief. As will be elaborated below, these provisions

¹ John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry Flechtner ed, 4th edition, Kluwer Law International) 424.

² Ibid.

³ Johan Erauw and Harry Flechtner, 'Remedies under the CISG and Limits to their Uniform Character' in Petar Sarcevic and Paul Volken (eds), *The International Sale of Goods Revisited* (Kluwer Law International 2001) 35, 42-43.

⁴ Bertram Keller, 'Favor Contractus: Reading the CISG in Favour of the Contract' in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries* (Wildy, Simmonds and Hill Publishing 2008) 247, 259-261.

⁵ This Chapter examines Article 47 CISG in general and especially as a performance-oriented mechanism. For how Article 47 CISG operates within Article 49 CISG see section 5.4.3.1, Chapter 5.

facilitate performance and serve to restrain the scope of avoidance as a remedy by giving the seller, one way or the other, a second chance at performing the contract.⁶

English sales law, in principle, is largely unfamiliar with these mechanisms. Although parties are free to use them in practice, except for Articles 34 and 37 CISG, there is no equivalent, or in relation to Article 48 CISG, settled, legal rule in English sales law.

This Chapter first provides a general exposition of Article 47 CISG in the context of performance. However, as there is no equivalent English sales law rule, the particular section on Article 47 CISG had to depart from the usual comparative format of this thesis. The exposition of Article 47 CISG is instead followed by a discussion on English sales law considering possible parallels or implicit acknowledgment of such a right in English sales law and whether Article 47 CISG can bring about significant practical consequences.

This Chapter also examines the seller's right to remedy any failure to perform his obligations both before the due date for performance according to Articles 34 and 37 CISG and even after the due date for performance according to Article 48 CISG. In both the CISG and English sales law the seller can remedy any failure to perform his obligations before the due date for performance. However, while the seller according to the CISG is also able to do so even after the date for performance, this is not a settled rule in English sales law. Accordingly, the particular section on the seller's right to cure any failure to perform his obligations was able to take the basic format of this thesis: an exposition of the CISG provisions, followed by an exposition of the English law rules, followed by the comparison.

3.2 The Buyer's Right to Fix an Additional Period for Performance

3.2.1 Under the CISG

3.2.1.1 General

Article 47 CISG provides the buyer's right to fix an additional period of time for performance by the seller and is mirrored in Article 63 CISG which provides the seller's right to do so in relation to the buyer. Fixing an additional period of time 'is a rule

⁶ Peter Huber and Alastair Mullis, *The CISG* (Sellier 2007) 183.

addressed to the parties and not to the judges or arbitrators, who, on the contrary, cannot grant to any of the parties a period of grace (Articles 45(3) and 61(3) of the CISG).⁷ This Chapter is only concerned with the buyer's right to fix an additional period of time for performance as provided in Article 47 CISG which reads:

- (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
- (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

The fixing of an additional period of time is sometimes called the *Nachfrist* mechanism as a result of parallels in German law.⁸ However, using the term 'Nachfrist' is dangerous in the sense of allowing German domestic doctrine to infiltrate the CISG⁹ and as such must be avoided. Moreover, the Secretariat Commentary clarifies that even if the mechanism has a certain parentage in the German procedure of *Nachfrist* as well as the French procedure of a *mise en demeure*, it is not the same as either one.¹⁰

Article 47 CISG not only removes the uncertainty about whether and when the seller will perform his obligations,¹¹ but also is particularly important in the context of Article 49 CISG, which governs the buyer's right to declare the contract avoided. In fact it is

⁷ Pilar Perales Viscasillas, 'The Nachfrist Remedy' in Collated Papers of the UNCITRAL and Singapore International Arbitration Centre Conference (SIAC) (22-23 September 2005, Singapore), *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* 89, 89; available at <http://www.cisg.law.pace.edu/cisg/biblio/perales6.html>. Article 45(3) CISG clarifies that if a buyer resorts to a remedy for breach of contract by the seller, a period of grace may not be granted by a court or arbitral tribunal in cases governed by the CISG. The Secretariat Commentary, 'Article [47]' in *Official Records* 39, explains that 'there was no reason to allow the seller to apply to a court for a delay of grace, as is permitted in some legal systems' since in cases where the seller fails to deliver on the contract delivery date, the buyer can only avoid the contract provided that the seller's failure causes him substantial detriment and the seller foresaw, or had reason to foresee, such a result. Furthermore, the procedure of applying to a court for a period of grace was considered as 'particularly inappropriate in the context of international commerce' given that it 'would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties.'

⁸ Peter Huber, 'Article 47' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG); Commentary* (C.H. Beck, Hart and Nomos 2011) 702.

⁹ Michael Bridge, *The International Sale of Goods* (3rd edition, OUP 2013) 575, fn 76.

¹⁰ Secretariat Commentary, 'Article [47]' in UN, *United Nations Conference on Contracts for the International Sale of Goods; Official Records* (Vienna, 10 March – 11 April 1980) (UN Doc A/CONF.97/19) 39.

¹¹ Michael Will, 'Article 47' in C.M. Bianca and M.J. Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) 344.

argued that the importance of Article 47 CISG does not derive from the fact that it explicitly gives the buyer the right to fix an additional period of time for performance by the seller of his obligations, because the buyer could have done so even if there were no express entitlement to this effect in the CISG, but rather from its interaction with Article 49(1)(b) CISG, which essentially provides one of two routes to avoidance.¹²

According to Article 49(1)(b) CISG, the buyer may declare the contract avoided ‘in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.’ Therefore, in cases of non-delivery where time is not of the essence, which means a fundamental breach (Article 25 CISG) cannot be established in order for the buyer to be able to declare the contract avoided according to Article 49(1)(a) CISG, the buyer can fix an additional period of time of reasonable length for the seller to deliver the goods by virtue of Article 47(1) CISG which would give him an actual date by which to expect delivery. Equipped with certainty, if the seller fails to deliver yet another time, the buyer can then proceed according to Article 49(1)(b) CISG and declare the contract avoided.¹³

3.2.1.2 Article 47(1) CISG

The buyer can fix an additional period of time for performance by the seller of his obligations but he is not obliged to do so.¹⁴ In other words, ‘Article 47 gives the buyer the right, but does not create the obligation, to allow the seller a reasonable additional time to perform the seller’s obligations.’¹⁵ Article 47 CISG is a companion of Article 46 CISG¹⁶ as evidenced by the fact that Article 47 CISG is ‘dependent upon [Article 46 CISG].’¹⁷ Indeed, the right to fix an additional period of time ‘requires the existence of

¹² Huber, ‘Article 47’ (n8) 702; Honnold, *Uniform Law* (n1) 418: ‘Article 47(1), read in isolation, seems to empower the buyer to fix an additional final period for the seller to perform any of its obligations. However, the only teeth for the provision are those provided by Article 49(1)(b) (...)’; Markus Muller-Chen, ‘Article 47’ in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods* (3rd edition, OUP 2010) 724-725.

¹³ See section 5.4.3.1, Chapter 5.

¹⁴ *Oberlandesgericht Hamburg* (Germany) 4 July 1997 (Unilex).

¹⁵ Henry Deeb Gabriel, ‘General Provisions, Obligations of the Seller and Remedies for Breach of Contract by the Seller’ in Franco Ferrari, Harry Flechtner and Ronald Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (Sellier 2004) 336, 354.

¹⁶ Secretariat Commentary, ‘Article [47]’ in *Official Records* (n10) 39.

¹⁷ Perales Viscasillas, ‘The Nachfrist Remedy’ (n7) 90.

a claim for performance according to Article 46'; 'its enforceability according to Article 28, however, is irrelevant.'¹⁸

The buyer can fix one or more additional periods of time of reasonable length for performance by the seller of any of his obligations.¹⁹ On the basis of the wording of Article 47 CISG, the buyer's right to fix an additional period of time for performance 'is in principle available for *any* breach of the seller.'²⁰ For example the fixing of an additional period of time 'may entail the delivery of all or part of the goods, the remedy of any lack of conformity by repair of the goods or the delivery of substitute goods, or the performance of any other act which would constitute performance of the seller's obligations.'²¹

There is generally no requirement as to the form the buyer should employ in fixing the additional period of time.²² So, the buyer can fix an additional period of time by a written or oral notice,²³ although the latter is not advisable for evidentiary purposes. An additional period of time might even be given implicitly. In a case where the seller consistently failed to meet the delivery deadlines so that three of the instalments were delivered after the agreed dates, the court held that the buyer's tolerance of the late delivery of the three initial instalments was equivalent to the granting of an additional period of time to the seller, in accordance with Article 47 CISG.²⁴

In order for an additional period of time notice to be effective though, the buyer must stipulate performance by a particular date.²⁵ The demand for performance 'has to be expressed so clearly that no reasonable seller would need any further interpretation or explication in order to realize that the date indicated constitutes his final chance to deliver, and that the buyer is not prepared to go beyond this deadline.'²⁶ The notice must also include a specific demand for performance.²⁷ In a case involving a contract for the sale of shoes from an Italian seller to a German buyer, the buyer's telephone call, in the

¹⁸ Muller-Chen, 'Article 47' (n12) 724, fn 1.

¹⁹ Ibid.

²⁰ Perales Viscasillas, 'The Nachfrist Remedy' (n7) 93.

²¹ Secretariat Commentary, 'Article [47]' (n10) 39.

²² UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012 Edition) 232.

²³ Summary Records of the First Committee, 20th Meeting (UN Doc A/CONF.97/C.1/SR.20) in *Official Records* (n10) 339-340.

²⁴ *Audiencia Provincial de Barcelona* (Spain) 3 November 1997 (CLOUT).

²⁵ Muller-Chen, 'Article 47' (n12) 726.

²⁶ Will, 'Article 47' (n11) 345.

²⁷ Muller-Chen, 'Article 47' (n12) 726.

form of a reminder demanding prompt delivery, did not fix a specific time allowing for performance, and as such, did not fulfill the requirements of Article 47(1) of the CISG.²⁸ The additional period of time fixed by the buyer expires on the day indicated in the notice.

3.2.1.3 Limitations

Any additional period of time fixed must be according to Article 47(1) CISG ‘of reasonable length.’ This, however, can only be decided by taking the circumstances of each individual case into account such as the length of the contractual delivery period; the buyer’s interest in rapid delivery and if such interest was apparent upon conclusion of the contract;²⁹ the scope and nature of the seller’s obligation; the case of non-performance; the transmission period for the declaration fixing an additional period of time and the delivery circumstances themselves³⁰ as well as the conduct of the parties, negotiations, practices and usages³¹ between them.³² For example it was found that an additional eleven-day period of time fixed by the buyer for the seller to deliver six missing items related to a printing machinery from Germany to Egypt was not unreasonable.³³ If the buyer sets an unreasonably short additional period of time, ‘this does not invalidate the buyer’s actions under Article 47 CISG, but merely triggers an additional period of what would be a reasonable extension of time for performance.’³⁴ However, this is not the case under Article 49(1)(b) CISG.³⁵

3.2.1.4 Article 47(2) CISG

Other than the buyer’s right to claim damages for delay in performance, Article 47(2) CISG suspends the buyer’s right to resort to any of the remedies referred to in Article 45(1) CISG within the additional period of time fixed for performance even if the breach of contract is fundamental.³⁶ For example if the buyer fixes an additional period of time for the seller to deliver substitute goods according to Article 46(2) CISG, he will be barred by Article 47(2) CISG from avoiding the contract according to Article

²⁸ *Oberlandesgericht Düsseldorf* (Germany) 24 April 1997 (CLOUT).

²⁹ *Oberlandesgericht Hamburg* (Germany) 28 February 1997 (CLOUT).

³⁰ Muller-Chen, ‘Article 47’ (n12) 727.

³¹ *Hof Arnhem* (The Netherlands) 7 October 2008 (Pace).

³² UNCITRAL, *Digest* (n22) 231.

³³ *Oberlandesgericht Celle* (Germany) 24 May 1995 (Unilex).

³⁴ Deeb Gabriel, ‘General Provisions, Obligations of the Seller and Remedies for Breach of Contract by the Seller’ (n15) 355; Muller-Chen, ‘Article 47’ (n12) 728.

³⁵ See section 5.4.3.1, Chapter 5.

³⁶ Muller-Chen, ‘Article 47’ (n12) 730.

49(1)(a) CISG while the additional period of time fixed is still running. ‘The reason behind the rule is to afford temporary protection to the seller while he may be making efforts, perhaps at considerable expense, to deliver the goods as requested.’³⁷

As already mentioned above, the additional period of time fixed by the buyer expires on the day indicated in the relevant notice in which case the buyer regains his freedom of action. If the seller performs during the additional period of time, the buyer must accept the performance and can claim damages for losses caused by the delay of performance.³⁸ If the seller does not perform within the additional period of time, the buyer may resort to any available remedy.³⁹

However, if the seller, before the expiration of the additional period of time, declares that he will not perform his obligations, irrespective of the seller’s reasons, the buyer ceases to be bound at the moment he receives such notice.⁴⁰ Article 47(2) CISG is thought to have derived from the principle of good faith in the sense that the buyer ‘should not be allowed to act in contradiction to his own previous conduct (*venire contra factum proprium*, estoppel)’ and aims to protect ‘the seller who is entitled to rely on having the period specified by the buyer’ for effecting performance.⁴¹

3.2.2 In English Sales Law

Although in practice the possibility for the buyer to fix an additional period of time for performance by the seller of his obligations does exist, English sales law does not provide the buyer with an explicit general right to fix an additional period of time for the seller to perform his obligations akin to Article 47 CISG.⁴² Nevertheless, the SGA 1979, by acknowledging and accommodating repair of non-conforming goods (section 35(6)),⁴³ arguably acknowledges and accommodates the fixing of an additional period of time since any sort of repair of non-conforming goods necessarily has to be effected within an additional period of time. Thus, by accommodating and therefore indirectly acknowledging the buyer’s right to ask for repair, English sales law also indirectly acknowledges the buyer’s right to fix an additional period of time for performance by

³⁷ Secretariat Commentary, ‘Article [47]’ (n10) 39-40.

³⁸ UNCITRAL, *Digest* (n22) 232.

³⁹ *Ibid.*

⁴⁰ *Schiedsgericht der Hamburger freundschaftlichen Arbitrage* (Germany) 29 December 1998 (CLOUT).

⁴¹ Huber, ‘Article 47’ (n8) 705; Muller-Chen, ‘Article 47’ (n12) 725.

⁴² For how Article 47(1) CISG operates within Article 49(1)(b) CISG see Chapter 5 which deals with avoidance.

⁴³ See section 2.3.2, Chapter 2.

the seller of his obligations. Naturally, a buyer who is in talks with the seller in relation to repair will also have to set a date by which repair must be effected in which time it is only fair that the buyer does not resort to any other remedy akin to Article 47(2) CISG.⁴⁴

Ziegel argues though that Article 47(2) CISG ‘probably goes beyond the common law in one respect’ explaining that ‘at common law an extension of time granted by the buyer, if not supported by consideration, is only binding on the buyer to the extent that the seller has relied on the extension’ and that ‘subject to this consideration, the extension may be retracted by the buyer at any time if he gives reasonable notice of his intention.’⁴⁵ Nevertheless, according to *Charles Rickards Ltd. v. Oppenheim*:⁴⁶

‘Where, as a condition of its performance, time is of the essence of a contract for the sale of goods and, on the lapse of the stipulated time, the buyer continues to press for delivery, thus waiving his right to cancel the contract, he has a right to give notice fixing a reasonable time for delivery, thus making time again of the essence of the contract, which, if not fulfilled by the new time stipulated, he will then have the right to cancel. The reasonableness of the time fixed by the notice must be judged as at the date when it is given.’

As such, in cases of late delivery or non-delivery of the goods, the buyer may agree to accept a late delivery or, in other words, waive his rights in respect of timely delivery of the goods. In such a case, ‘the [seller] has additional time within which to cure the original defect.’⁴⁷

Kritzer argued that the buyer’s right to fix an additional period of time is ‘a feature which, while new to American attorneys, ought not to be difficult for them to understand and appreciate.’⁴⁸ Likewise, this thesis argues that the buyer’s right to fix an additional period of time for English lawyers is a new but perfectly comprehensible feature. Most importantly though, this thesis maintains that Article 47 CISG will not

⁴⁴ *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130.

⁴⁵ Jacob Ziegel, ‘Article 47’ in Jacob Ziegel and Claude Samson, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981) available at <http://www.cisg.law.pace.edu/cisg/text/ziegel47.html>

⁴⁶ (1950) 1 K.B. 616 (C.A). See also *Hartley v Hymans* [1920] 3 K.B. 475; *Crawford v Toogood* (1879) 13 Ch. D. 153.

⁴⁷ Antonia Apps, ‘The Right to Cure Defective Performance’ (1994) LMCLQ 525, 539.

⁴⁸ Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law and Taxation Publishers 1989) 342.

have significant practical consequences for merchants given its use in practice under English sales law as illustrated above.

3.3 The Seller's Right to Remedy Failure of Performance

3.3.1 Under the CISG

3.3.1.1 General

Articles 34 and 37 CISG provide that the seller has a right to cure any non-conformity only up to the date for performance; 'from that point onwards, the seller may only cure under Article 48.'⁴⁹ The division of the seller's right to cure the goods between Articles 34 and 37 CISG dealing with cases where the cure takes place before the delivery date and Article 48 CISG dealing with cases where cure takes place after the delivery date, was present in the ULIS and 'reflects the same division that is present' in section 2-508 of the UCC.⁵⁰

3.3.1.2 Before the Due Date for Performance

Article 37 CISG: Non-conforming Goods

Article 37 CISG 'deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but his performance does not conform with the contract.'⁵¹ However, if prior to the date for performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract (i.e. anticipatory breach) and the lack of conformity cannot be cured either by substitute performance or repair, the other party may declare the contract avoided in accordance with Article 72(1) CISG.⁵² Article 37 CISG reads:

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any

⁴⁹ Corinne Widmer, 'Article 34' in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n12) 564.

⁵⁰ Bridge, *The International Sale of Goods* (n9) 584. According to § 2-508. Cure by Seller of Improper Tender or Delivery; Replacement of the UCC: '(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.'

⁵¹ Secretariat Commentary, 'Article [37]' in *Official Records* (n10) 33.

⁵² Ingeborg Schwenzer, 'Article 37' in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n12) 605; Stefan Kroll, 'Article 37' in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n8) 551. Anticipatory breach as governed by Article 72 CISG is examined in Chapter 5.

lack of conformity in the goods delivered, provided that the exercise of these rights does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Although the buyer is not obliged to accept a premature delivery at all,⁵³ if he does, according to Article 37 CISG, the seller can cure defects right up until the latest delivery date permissible under the contract.⁵⁴ The Secretariat Commentary clarifies that ‘in order for the seller to be made aware of any non-conformity so that he can effectively exercise his right of remedy, the buyer is required by Article [38] to examine the goods within as short a period as is [practicable] in the circumstances and by Article [39] to give the seller notice of the non-conformity.’⁵⁵

The seller’s right to cure a defect exists in relation to any lack of conformity according to Article 35 CISG but also in the case of third party rights or claims (Articles 41 and 42 CISG).⁵⁶ Article 37 CISG itself provides for three ‘types of cure’: delivery of missing parts or making up any deficiency in the quality of the goods, delivery of replacement goods, and repair.⁵⁷ However, ‘the list is not intended to be conclusive.’⁵⁸

The seller can choose the type of cure he will effect as long as it does not cause the buyer unreasonable inconvenience or unreasonable expense as provided by Article 37 CISG.⁵⁹ What amounts to unreasonable inconvenience depends upon the circumstances of each particular case but ‘the seller’s right to cure defects cannot be excluded by mere inconvenience.’⁶⁰ It is argued that ‘the wording of Article 37 does not restrict the seller to one attempt,’ therefore, the seller could, in theory, make several attempts to remedy defects; ‘however, each new attempt will increase the likelihood of unreasonableness for the buyer.’⁶¹ Accordingly, the buyer is not entitled to reject additional tenders unless it causes him unreasonable inconvenience.⁶²

⁵³ Article 52(1) CISG reads: ‘If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.’

⁵⁴ Schwenzer, ‘Article 37’ (n52) 602.

⁵⁵ Secretariat Commentary, ‘Article [37]’ in *Official Records* (n10) 33, fn 2.

⁵⁶ Schwenzer, ‘Article 37’ (n52) 603.

⁵⁷ *Ibid* 603.

⁵⁸ Kroll, ‘Article 37’ (n52) 554.

⁵⁹ *Ibid* 554.

⁶⁰ Schwenzer, ‘Article 37’ (n52) 605.

⁶¹ *Ibid* 604-605.

⁶² Kroll, ‘Article 37’ (n52) 555.

The buyer's right to claim damages for losses suffered as a result of the delivery of non-conforming goods according to Article 45(1)(b) CISG is not affected.⁶³ Such losses include any costs that the buyer has sustained in connection with the seller's efforts to remedy the non-conformity.⁶⁴

After an examination of the case law, as well as the literature, Bridge observes 'a complete lack of impact on the law of international sale' and he is probably right.⁶⁵ There are very few reported cases on this provision and almost nothing is written on it.⁶⁶ Either Article 37 CISG is a perfectly functioning provision that the parties successfully use or it simply provides for an implausible situation given the seller having to perform early enough within the delivery range set by the contract for the buyer to have time to examine, give notice of non-conformity and for the cure to be effected.⁶⁷

Article 34 CISG: Non-conforming Documents

The seller's explicit right to cure non-conforming documents as provided in Article 34 CISG was added to the present provision at the Diplomatic Conference in Vienna following a relevant proposal⁶⁸ in order 'to make clear that the seller's right to "cure" a defective delivery of goods extended to the delivery of documents.'⁶⁹ Article 34 CISG reads:

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. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

The first sentence of Article 34 CISG provides the seller's obligation to hand over documents according to the contract. The second and third sentences of Article 34 CISG

⁶³ *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry* (200/1994) 25 April 1999 (CLOUT).

⁶⁴ Schwenzer, 'Article 37' (n52) 606.

⁶⁵ Bridge, *The International Sale of Goods* (n9) 585.

⁶⁶ See UNCITRAL, *Digest* (n22) 157; Bertram Keller, 'Early Delivery and the Seller's Right to Cure Lack of Conformity: Comparison between the Provisions of Article 37 CISG and the Counter-part Provisions of the UNIDROIT Principles' in John Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 174.

⁶⁷ Bridge, *The International Sale of Goods* (n9) 585.

⁶⁸ UN Doc, A/CONF.97/C.1/L.116 (Canada) in *Official Records* (n10) 309.

⁶⁹ Honnold, *Uniform Law* (n1) 325.

deal with the seller's right to cure non-conforming documents if this can be accomplished by the performance due date and would not cause the buyer unreasonable inconvenience or unreasonable expense. Essentially, the seller can cure non-conforming documents by sending the buyer the missing documents or by replacing the defective documents with correct ones.⁷⁰

If the first, non-conforming, tender of documents causes the buyer to suffer a loss which cannot be remedied by the second, conforming, tender of documents, the buyer can claim damages according to Article 45(1)(b) CISG. For example the buyer can claim the costs of examining and returning non-conforming documents or the costs associated with the impending arrival of the goods which cannot be cancelled after receipt of the non-conforming documents.⁷¹

3.3.1.3 After the Due Date for Performance

Given the existence of the same rule in the UCC thought to be operating in the shadow of the perfect tender rule, which is altogether absent in the CISG, Bridge maintains 'that it is difficult to avoid the conclusion that Article 48 is a classic comparative law example of a failed transplant, where an institution that serves one purpose in a legal system ends up serving an altogether different purpose, or no purpose at all, when carried over into another legal system.'⁷² However, giving the seller the right to cure any failure to perform his obligations even after the due date for performance 'is in line with the overall objective of the [CISG] to save the contract and to avoid restitution of the goods'⁷³ and as such serves a particular purpose. Article 48 CISG reads:

- (1) Subject to Article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
- (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may

⁷⁰ Widmer, 'Article 34' (n49) 565.

⁷¹ Ibid 566.

⁷² Bridge, *The International Sale of Goods* (n9) 585.

⁷³ Peter Huber, 'Article 48' in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n8) 712.

perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 48(1) CISG

Since Article 48(1) CISG provides that the seller may remedy ‘any’ failure to perform his obligations, it follows that the seller is entitled to cure ‘every type of breach of contract’ including ‘delivery of non-conforming goods or of goods with title defects, delayed delivery, handing over of non-conforming documents, partial delivery pursuant to Article 51 CISG, or violation of other agreed obligations (provision of a bank guarantee, assembly, etc).’⁷⁴ Huber though argues that in practice, ‘its main field of application will be the delivery of non-conforming goods.’⁷⁵

According to Article 48(1) CISG, the seller may remedy ‘at his own expense any failure to perform his obligations.’ Accordingly, ‘the seller may not charge to the buyer any additional expenditure incurred as a result of his performance after the date for delivery,’ or ‘make remedying of defects dependent upon the agreement of the buyer to bear such expenses.’⁷⁶ Moreover, he must repay the buyer any costs he incurred.⁷⁷

How the seller remedies any failure to perform his obligations ‘follows from the nature of his obligation breached’ but his failure to perform must be ‘completely remedied.’⁷⁸ If a defect can be remedied by both a delivery of substitute goods or by repair, the seller can choose how he wishes to cure his failure ‘if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer’ as provided by Article

⁷⁴ Markus Muller-Chen, ‘Article 48’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n12) 734–735.

⁷⁵ Huber, ‘Article 48’ (n73) 712.

⁷⁶ Muller-Chen, ‘Article 48’ (n74) 736.

⁷⁷ Ibid.

⁷⁸ Ibid 735.

48 (1) CISG.⁷⁹ ‘Whether the boundaries of reasonableness have been exceeded’ depends on the particular circumstances of each case⁸⁰ but as a rule reasonableness ‘should be assessed on an objective basis from the buyer’s perspective rather than from the seller’s perspective.’⁸¹ It must be noted that if a buyer rejects the seller’s offer to cure, ‘he bears the burden of proving the unreasonableness’ of the cure offered whereas the seller bears the burden of proof for its suitability.⁸²

First, the seller must cure without ‘unreasonable delay’; the reasonableness of the period for cure should be determined according to the standard that is also used in the fixing of an additional period of time for performance by the seller of his obligations according to Article 47 CISG.⁸³ In fact, the buyer can, and it may be best for him, fix an additional period of time that is reasonable under the circumstances for the seller to carry out the repairs; if the seller does not carry out the repairs within that period, ‘it will be easier for the buyer to successfully prove unreasonableness.’⁸⁴

Second, the seller must cure without ‘unreasonable inconvenience.’ This refers to ‘the disturbances that cure would bring to the buyer’s business’ for example noise, dirt, halting or disruption of business or production or the seller’s unprofessional behaviour that leads to several attempts at cure and loss of trust in his ability to cure.⁸⁵ A good example involving unreasonable delay and unreasonable inconvenience to the buyer is a case involving a contract between an Italian seller and a German buyer for the sale of a chemical substance for the production of pharmaceuticals.⁸⁶ After the goods were delivered to the buyer’s place of business, the buyer forwarded the goods to his sub-buyer who complained about non-conformity of the goods, which could not allow him to start production. The parties agreed for the seller to cure the non-conformity of the goods in Italy. The goods were to be sent back to Italy by a German carrier of the seller’s choice and delivered directly to the seller at his own expense. When the buyer contacted the carrier he discovered that the goods had not yet been sent to Italy and

⁷⁹ Ibid 735-736.

⁸⁰ Ibid 736.

⁸¹ Huber, ‘Article 48’ (n73) 713; Muller-Chen, ‘Article 48’ (n74) 737: ‘The governing factor is the buyer’s objective perspective and not the opinions of the seller.’

⁸² Muller-Chen, ‘Article 48’ (n74) 738.

⁸³ Ibid 737; Huber, ‘Article 48’ (n73) 713. See section 3.2.1.2 above.

⁸⁴ Muller-Chen, ‘Article 48’ (n74) 737; Huber, ‘Article 48’ (n73) 713. See *Cour d'Appel de Versailles* (France) 29 January 1998 (Unilex).

⁸⁵ Huber, ‘Article 48’ (n73) 713; Muller-Chen, ‘Article 48’ (n74) 737.

⁸⁶ *Amtsgericht München* (Germany) 23 June 1995 (Unilex/Pace).

informed the seller accordingly. The buyer then proceeded to have the non-conformity of the goods cured in Germany at his own expense, as his sub-buyer could not resume production without the goods and deducted the relevant costs from the purchase price. The seller claimed the full price claiming that he would have cured the non-conformity of the goods at a much lower price in Italy. 'The court stated that under Article 48(1) CISG, the seller may remedy at its own expense any failure to perform its obligations if it can do so without unreasonable delay' and held that the seller's attempt to remedy the defects failed as the goods had not reached Italy on time.⁸⁷ It was further stated that any further delay to cure the non-conformity would have been unreasonable as the buyer's sub-buyer was forced to halt production during the time the non-conformity of the goods was being cured and this would have led to claims for damages from the buyer's sub-buyer.

Lastly, the seller must cure without causing the buyer 'uncertainty of reimbursement' of expenses advanced by the buyer. This reasonableness requirement becomes relevant in, what should be only exceptional,⁸⁸ instances where the seller requires the buyer's collaboration for effecting cure.⁸⁹ For example 'there may be costs involved in the buyer's arranging to return the goods, in some act of co-operation necessary in connection with remedying a defect.'⁹⁰ However, 'if there is well-founded doubt as to the seller's willingness or ability to reimburse the costs and those costs are reasonably significant, the seller has a right to cure after the date for delivery only if he provides security for those costs or an assurance that he will absorb those costs.'⁹¹

If the seller successfully effects cure, then, other than damages,⁹² 'all of the buyer's rights are eliminated.'⁹³ However, if he does not, the buyer is entitled to all of his remedies under Article 45(1) CISG 'that had previously been suspended.'⁹⁴

⁸⁷ Ibid.

⁸⁸ Muller-Chen, 'Article 48' (n74) 737.

⁸⁹ Huber, 'Article 48' (n73) 713.

⁹⁰ Muller-Chen, 'Article 48' (n74) 737.

⁹¹ Ibid 738.

⁹² The last sentence of Article 48(1) CISG reads: 'However, the buyer retains any right to claim damages as provided for in this Convention.' See *Cour d'Appel de Grenoble* (France) 26 April 1995 (Unilex/Pace) where 'the court, applying Article 48(1) CISG, according to which the buyer in case of repair at the expense of the seller retains any right to claim damages, granted the buyer damages representing 10% of the overall value of the sale, in consideration of the fact that the buyer had received the conforming goods with delay and that it had had to arrange for their transportation twice.'

⁹³ Muller-Chen, 'Article 48' (n74) 742.

⁹⁴ Ibid.

Limitations

The seller's right to cure any failure to perform his obligations is expressly stated in Article 48(1) to be 'subject to Article 49'. A literal reading of the provision therefore suggests that 'the buyer's right to avoid the contract is granted priority over the seller's right to remedy by subsequent performance'⁹⁵ or, put differently, avoidance of the contract 'excludes the seller's right to cure.'⁹⁶ However, the extent that the buyer's right to declare the contract avoided should override the seller's right to cure was a contentious issue from the beginning and the issue of lengthy deliberations at the Diplomatic Conference in Vienna.⁹⁷ The text of the 1978 draft version of Article 48(1) CISG,⁹⁸ essentially allowed the buyer to declare the contract avoided immediately (in the event of non-conformity amounting to a fundamental breach of contract) without giving the seller an opportunity to remedy his failure to perform, was considered as not providing a proper balance between the seller's interests and those of the buyer.⁹⁹ It was argued that 'if the seller delivered a machine on the date fixed and the machine, once it was installed, failed to work in a satisfactory manner, that should not be regarded as a fundamental breach of contract and the buyer should not be able to declare the contract avoided if the seller was prepared to remedy the fault within a reasonable time.'¹⁰⁰ It was therefore proposed that the opening phrase of the 1978 draft version of Article 48 be deleted¹⁰¹ and argued that the proposed amendment 'did not restrict the buyer's right to avoid, which was protected by Article [49], but was merely designed to specify more precisely the seller's right to remedy.'¹⁰² The real issue was essentially fundamental breach and in particular, 'whether the fact that the defect can be remedied within a reasonable period excludes or suspends the fundamental nature of the breach of

⁹⁵ Ibid 738.

⁹⁶ UNCITRAL Digest (n22) 233.

⁹⁷ Muller-Chen, 'Article 48' (n74) 738. See Summary Records of the First Committee, 20th Meeting (UN Doc A/CONF.97/C.1/SR.20) in *Official Records* (n10) 339, 341-344; Summary Records of the First Committee, 22nd Meeting (UN Doc A/CONF.97/C.1/SR.22) in *Official Records* (n10) 351-352.

⁹⁸ The 1978 draft version of Article 48(1) read: '*Unless the buyer has declared the contract avoided in accordance with article 45 [became CISG article 49], the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention (emphasis added).*'

⁹⁹ 20th First Committee Meeting in *Official Records* (n10) 341, paras 37-38.

¹⁰⁰ Ibid, para 38.

¹⁰¹ UN Doc A/CONF.97/C.1/L.140 (Federal Republic of Germany), UN Doc A/CONF.97/C.1/L.160 (Bulgaria), UN Doc A/CONF.97/C.1/L.164 (Japan) in *Official Records* (n10) 114.

¹⁰² 20th First Committee Meeting (n) in *Official Records* (n10) 341, para 50.

contract.’¹⁰³

After many deliberations and the constitution of an *ad hoc* working group, a new joint proposal resulting in the present construction of Article 48(1) CISG was submitted.¹⁰⁴ It was explained that this new amendment ‘was intended to guarantee the right of the seller to remedy a failure to perform while at the same time safeguarding the interests of the buyer, who must be assured that the contract will be executed.’¹⁰⁵ Nevertheless, there does not seem to be any material difference brought upon by the amendment,¹⁰⁶ since according to the literal meaning of the phrase ‘subject to Article 49’, ‘the buyer may exercise a right to avoid without restriction from the seller’s right to cure.’¹⁰⁷ Even so, ‘a growing body of commentary and cases (...) suggest that the seller’s right to cure under Article 48 supersedes the buyer’s right to avoid the contract under Article 49.’¹⁰⁸ As will be seen in Chapter 5, establishing fundamental breach,¹⁰⁹ other than such detriment to the buyer so as substantially to deprive him of what he is entitled to expect under the contract and foreseeability on behalf of the seller, requires ‘a consideration of all points of view in each individual case, which also includes the capacity and willingness of the seller to remedy the defect completely, by the type of subsequent performance appropriate to the individual case, without unreasonable delay and unreasonable inconveniences for the buyer.’¹¹⁰ Therefore, it suffices here to say that, except in cases where the non-conformity objectively satisfies the definition in Article 25 CISG and the buyer has a particular interest in avoiding the contract immediately, the buyer can only declare the contract avoided according to Article 49(1)(a) CISG if the seller fails to use his right to cure according to Article 48(1) CISG within a reasonable period after the notice of non-conformity, or if the non-conformity is not cured or cannot be cured according to Article 48(1) CISG.¹¹¹

¹⁰³ Muller-Chen, ‘Article 48’ (n74) 738-739. See section 2, Chapter 5.

¹⁰⁴ UN Doc A.CONF.97/C.1/L.213 (Joint proposal by Bulgaria, Canada, German Democratic Republic, Federal Republic of Germany, Netherlands, Norway and USA) in *Official Records* (n10) 115.

¹⁰⁵ 22nd First Committee Meeting in *Official Records* (n10) 351.

¹⁰⁶ Jacob Ziegel, ‘The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives’ in Galston and Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender 1984) 9-22.

¹⁰⁷ UNCITRAL, *Digest* (n22) 233.

¹⁰⁸ Deeb Gabriel, ‘General Provisions, Obligations of the Seller and Remedies for Breach of Contract by the Seller’ (n15) 356.

¹⁰⁹ See section 5.4.1.1, Chapter 5.

¹¹⁰ Muller-Chen, ‘Article 48’ (n74) 739.

¹¹¹ *Ibid.*

In a case involving a contract between a Dutch seller and a German buyer for the sale of different types of textiles, the court excluded the presence of a fundamental breach of contract, as the buyer had unjustifiably not accepted the seller's offer to remedy the non-conformity by delivering substituting goods, in accordance with Article 48 CISG.¹¹² It is further reported that 'this result was not precluded by the remark that, pursuant to Art. 48(1) CISG, the right to avoidance prevails over the seller's right to cure, since this prevalence is only effective in case of a fundamental breach of contract, an event which was excluded by the Court.'¹¹³

Articles 48(2) to (4) CISG

Muller-Chen explains that a seller who has not delivered the goods on time or who has just received a notice of non-conformity is 'in a state of uncertainty as to whether the buyer will still accept a subsequent delivery or remedy of defects, or whether he will declare the contract avoided due to a fundamental breach of contract.'¹¹⁴ It is argued that Article 48(2) CISG, by enabling the seller to request the buyer to make known whether he will accept performance within a specified period of time, gives 'the seller a means of clarifying the situation' which protects him from 'futile attempts' at cure.¹¹⁵ Therefore, if the seller intends to cure any failure to perform his obligations, he must send the buyer an appropriate notice informing him accordingly and request the buyer to make known whether the buyer will accept cure.¹¹⁶

According to Article 48(3) CISG, a notice by the seller of his intention to cure within a specified period of time is assumed to include a request under Article 48(2) CISG that the buyer will inform the seller accordingly. Therefore, 'it is not necessary for the seller expressly to request the buyer to make known whether he will accept performance.'¹¹⁷

However, in his notice the seller must specifically 'indicate the time period within which the proposed cure will be effected' otherwise, 'if there is no indication of this period but merely an offer to cure, the seller can draw no conclusions nor derive any

¹¹² *Oberlandesgericht Koblenz* (Germany) 31 January 1997 (Unilex).

¹¹³ *Ibid.*

¹¹⁴ Muller-Chen, 'Article 48' (n74) 742.

¹¹⁵ *Ibid.* See Bridge, *The International Sale of Goods* (n9) 587: 'On the whole, the best explanation of Article 48(2) CISG, coupled with Article 48(3) CISG, is that it lays down a protocol for implementing a cure in circumstances where the contracting parties may not be sure of each other and may even be mistrustful of each other.'

¹¹⁶ UNCITRAL, *Digest* (n22) 234.

¹¹⁷ Muller-Chen, 'Article 48' (n74) 744.

rights from a failure by the buyer to respond.’¹¹⁸ The reason why a period must be specified is so ‘that the buyer may decide whether to accept or decline the offer’ and, in case he never responds, ‘so that the period during which he is bound can be fixed.’¹¹⁹

If the buyer does not respond within a reasonable time, according to Article 48(2) CISG ‘the seller may perform within the time indicated in his request.’ If the buyer accepts the seller’s offer to cure, he will be bound to it but if the buyer rejects the seller’s offer within a reasonable time, the buyer may exercise his remedies according to Article 45(1) CISG.¹²⁰

Where the buyer has not responded to the seller’s request to cure, and where the buyer has accepted the seller’s offer to cure, according to Article 48(2) CISG ‘the buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.’

Article 48(4) CISG provides that a cure notice by the seller is not effective unless received by the buyer. Article 48(4) CISG therefore provides an exception to Article 27 CISG.¹²¹ Accordingly, ‘the seller bears the burden of proof that notice was given and that it reached the buyer.’¹²² However, Article 27 CISG ‘applies to the buyer’s reply, which is therefore effective whether or not received, provided it is dispatched by appropriate means.’¹²³

3.3.2 In English Sales Law

3.3.2.1 Before the due date for performance

Benjamin’s Sale of Goods confirms that ‘there is a certain amount of authority relating to commercial contracts containing specific time limits, and most of it concerned with tender of documents, that a seller who has made a false tender can withdraw it and substitute a conforming tender before the relevant date.’¹²⁴ It is then clarified that the

¹¹⁸ Secretariat Commentary, ‘Article [48]’ in *Official Records* (n10) 41.

¹¹⁹ Muller-Chen, ‘Article 48’ (n74) 743.

¹²⁰ Ibid.

¹²¹ Article 27 CISG reads: ‘Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.’

¹²² Muller-Chen, ‘Article 48’ (n74) 744.

¹²³ UNCITRAL, *Digest* (n22) 234.

¹²⁴ Michael Bridge and others (eds), *Benjamin’s Sale of Goods* (8th edition (Inc. Supp), Sweet & Maxwell 2010) para. 12-032.

seller's right to do so is 'subject to paying any special expenditure or loss incurred by the buyer in connection with examining and rejecting the first tender.'¹²⁵

Indeed, akin to Article 34 CISG, English sales law also entitles the seller to cure a defective tender by making another attempt at performance, provided this is completed within the time limit stipulated by the contract. Even though this particular case does not include a 'succinct statement' of a cure rule,¹²⁶ the seller's right to cure a defective tender before the due date for performance was essentially established in *Borrowman, Phillips & Co. v Free & Hollis*.¹²⁷ In this case the sellers tendered the cargo of the *Charles Platt* under a contract to supply the buyers with a specific quantity of maize. The buyers refused to accept the cargo on the basis that the shipping documents had not been tendered with it. When the sellers insisted that the buyers accept the cargo, the matter was referred to arbitration where it was held that the buyers were not bound to accept the tendered cargo. The sellers subsequently, but within the contractual deadline, tendered the cargo of the *Maria D* together with the necessary documents. The buyers refused to accept the cargo of the *Maria D* on the ground that the sellers could not offer substitute goods in place of those originally tendered. The Court of Appeal rejected the buyer's argument that the first tender irrevocably identified the contract goods and therefore substitute goods could not be offered by the sellers to the buyers and held that the buyers were obliged to accept the cargo of the *Maria D*, and that the sellers were entitled to damages for non-acceptance.

Borrowman was subsequently applied in *E.E. & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd*,¹²⁸ where, similarly to *Borrowman*, the due date for performance had not yet passed and an arbitrator found that the seller was allowed to re-tender a severely damaged cargo of peas. Branson J. said:

'It cannot be said that the seller becomes in breach the moment he tenders goods which, for some reason or other (it may be some purely formal reason with regard to the

¹²⁵ Ibid.

¹²⁶ Rex Ahdar, 'Seller Cure in the Sale of Goods' (1990) LMCLQ 364, 365.

¹²⁷ (1878) 4 Q.B.D. 500.

¹²⁸ [1939] 2 KB 302. See also *McDougall v Aeromarine of Emsworth Ltd* [1958] 3 All ER 431; *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.

documents), the buyer can say are not in fulfilment of the contract, and that the seller cannot put himself right by making a subsequent tender.’¹²⁹

The cure principle was finally clearly articulated in *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corp. of India (The Kanchenjunga)*¹³⁰ where Lord Goff stated:

‘If the time for delivery has not yet expired, the seller is still entitled to make a fresh tender which conforms with the contract, in which event the buyer is bound to accept the goods so tendered.’¹³¹

However, the aforementioned authorities ‘relate only to defective tenders, but not to defective deliveries’¹³² or, according to Bridge, ‘support cure only to the limited extent of correcting a defective tender, not a defective delivery.’¹³³ Nevertheless, as Mak argues, ‘the fact that the courts so far have only recognised cure with regard to defective tenders does not preclude the possibility that a similar right may be recognised where the buyer has taken delivery of the goods.’¹³⁴ This can be suggested on the basis that the right to reject defective goods and the right to terminate the contract operate independently of one another and therefore rejection ‘may not automatically be followed by termination where there is still time for the seller to perform.’¹³⁵ According to section 11(3) SGA 1979, a breach of condition *may* give rise to a right to treat the contract as repudiated and this can arguably be interpreted ‘as allowing scope for a right to cure.’¹³⁶ Apps explains that ‘if the time for performance has not expired, (...) rejection of goods will merely suspend the obligations under the contract, so that the seller will be given the opportunity to cure the defective performance, - in the absence, that is, of repudiatory conduct.’¹³⁷

¹²⁹ Ibid at 315.

¹³⁰ [1990] 1 Lloyd’s Rep 391.

¹³¹ Ibid at 399.

¹³² Vanessa Mak, ‘The Seller’s Right to Cure Defective Performance – A Reappraisal’ (2007) LMCLQ 409, 413.

¹³³ Michael Bridge, *The Sale of Goods* (3rd edition, OUP 2013) 579.

¹³⁴ Mak, ‘The Seller’s Right to Cure Defective Performance – A Reappraisal’ (n132) 414.

¹³⁵ Ibid 410, 422.

¹³⁶ Ibid; Bridge, *The Sale of Goods* (n133) 577-578.

¹³⁷ Antonia Apps, ‘The Right to Cure Defective Performance’ (1994) LMCLQ 525, 530.

In relation to a contract concerning the sale of unascertained or generic goods,¹³⁸ which are lawfully rejected by the buyer because they are defective, Goode argues that the seller may cure the defect of the goods ‘either by putting the rejected goods into the condition required by the contract or, by offering different goods which conform to the contract.’¹³⁹ In relation to a contract concerning the sale of specific goods, which are lawfully rejected by the buyer because they are defective, Goode argues that the seller ‘can repair the goods so as to put them into proper condition, but he cannot, without the buyer’s consent, tender other goods, for the contract itself identified the subject matter of the contract, and it is not open to the seller to change the contract goods by unilateral action.’¹⁴⁰ This reasoning can be gleaned from what Ackner L.J. said in *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA (The Playa Larga and Marble Islands)*:¹⁴¹

‘In a contract for specific goods the parties have agreed at the very outset of the bargain that the seller was bound to deliver a particular chattel. Accordingly, it makes good sense that the buyer can reject defective goods and sue for non-delivery at the same time. Why should not the buyer insist on receiving that which he had previously selected and in proper condition and nothing else? As the learned judge observed, under a contract for unascertained goods there is no prior choice. The buyer is content to accept whatever goods the seller may subsequently select, if they are in conformity with the contract. Provided that he offered satisfactory goods in due time, why should he be entitled to treat himself as freed from the obligation to take them merely because the seller has previously tendered goods which are not in accordance with the contract?’¹⁴²

It is evident that reaching a clear conclusion as to whether English sales law allows the seller to remedy *any* failure of performance before the due date of performance is not an easy task. While this seems to be the case on the basis of common law, ideally whether the seller is entitled to remedy any failure of performance before the due date for performance needs to be formally addressed as an issue requiring the attention of legislators and explicitly incorporated into the SGA for the sake of clarity and the avoidance of any doubt.

¹³⁸ ‘Unascertained goods’ are not defined by the SGA 1979 but goods are said to be ‘unascertained’ if they form part of an unidentifiable part of a larger stock of goods held by the seller.

¹³⁹ Ewan McKendrick (ed), *Goode on Commercial Law* (4th edition, Penguin 2010) 373.

¹⁴⁰ *Ibid.*

¹⁴¹ [1983] 2 Lloyd’s Rep 171.

¹⁴² *Ibid* at 186.

3.3.2.2 After the due date for performance

While English law seems to be recognising the seller's right to cure where the contractual time for performance has not yet expired, 'the position is much less clear' after the expiry of the contractual time for performance.¹⁴³ It would appear that English sales law does not lend support to the recognition of the seller's right to cure after the contractual time for performance has expired.¹⁴⁴ However, there is 'a limited time within which the right to cure may exist after the contract period and this where, even though a time stipulation is included in the contract, it is not of the essence.'¹⁴⁵

Indeed, 'a retender is not necessarily too late merely because the contract date for delivery has passed' since, according to English sales law, 'the buyer is entitled to reject late delivery only where time is of the essence or where a reasonable time has elapsed after the contract delivery date.'¹⁴⁶ It follows that if time is not of the essence, there is a reasonable window of opportunity after the contract period expires within which the seller can effect cure either by actually delivering the goods or replacing or repair a non-conforming delivery of goods. This can be argued on the basis that 'where time is not of the essence, a failure by the [seller] to perform by the specified date will not entitle [the buyer] to terminate the contract at that date, although [the buyer] will be entitled to damages for delay beyond the specified date.'¹⁴⁷ In ascertaining when the buyer can eventually terminate the contract in such an instance, Apps suggests the question turns to reasonableness and whether 'the delay amounts to a substantial failure in performance, or the delay goes to the root of the contract.'¹⁴⁸

A good example is the case of *McDougall v Aeromarine of Emsworth Ltd.*¹⁴⁹ involving a contract to build a yacht. According to the contract in this case, the seller would use 'their best endeavours to complete the construction and fitting out by May 1, 1957' but such a delivery date was not guaranteed.¹⁵⁰ When the yacht was launched in June 1957 the buyer noticed certain gaps in the seams of the yacht that made it unseaworthy. The seller undertook to remedy the defects but when the yacht was relaunched in July 1957, it was found that these defects had not been satisfactorily remedied. In September and

¹⁴³ Ahdar, 'Seller Cure in the Sale of Goods' (n126) 365.

¹⁴⁴ Mak, 'The Seller's Right to Cure Defective Performance – A Reappraisal' (n132) 422.

¹⁴⁵ Ibid 423.

¹⁴⁶ McKendrick, *Goode on Commercial Law* (n139) 373.

¹⁴⁷ Apps, 'The Right to Cure Defective Performance' (n137) 535.

¹⁴⁸ Ibid.

¹⁴⁹ [1958] 1 W.L.R. 1126.

¹⁵⁰ Ibid at 1127.

October 1957, the seller offered to effect certain repairs to the yacht on terms that constituted a variation of the original contract or, alternatively, give the buyer a discount. The buyer rejected both of these offers and claimed the price and extras paid under the contract as money paid for a consideration that had wholly failed, and also claimed damages for loss of the yacht's use and minor expenses. It was held 'that a stipulation as to the time of the delivery of a pleasure yacht did not differ from stipulations as to time in mercantile contracts, so that failure to deliver within a reasonable time was a breach of a condition entitling the buyer to repudiate the contract.'¹⁵¹ Moreover, it was held that the buyer's 'rejection of the offers of September and October, 1957, did not constitute a wrongful repudiation of the contract, because the offers were themselves variations of the contracts, and were made after a reasonable time for delivery had elapsed.'¹⁵² Indeed, 'on the facts, it is fair to say that the buyer terminated at a time when he could be said to have been deprived of substantially the whole benefit of the contract: the yacht was bought for the purpose of sailing during the yachting season, and by the time the defects could have been remedied (if at all) the yachting season would have been almost over.'¹⁵³

However, even if time is of the essence, the buyer can very well agree to accept a later delivery. In other words, the buyer can waive his right to prompt delivery in which case 'the seller can cure a defective performance within the extended time period, and the buyer is bound to accept the substitute performance.'¹⁵⁴ Nevertheless, in *J. & H. Ritchie Ltd v Lloyd*,¹⁵⁵ after the repair of the goods by the seller it was held that the buyer's ensuing rejection was justified.

During the Sale and Supply of Goods consultation process in the 1980s, a statutory cure regime was considered for both consumer and non-consumer transactions although eventually rejected for both. In particular, the Sale and Supply of Goods Consultation Document proposed three alternative remedial schemes for consumer sales which incorporated the notion of cure.¹⁵⁶ Out of the three schemes proposed, the Commissions

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Apps, 'The Right to Cure Defective Performance' (n137) 536.

¹⁵⁴ Ibid 538-539. See *Enrico Furst & Co. v. W.E. Fischer* [1960] 2 Lloyd's Rep. 340.

¹⁵⁵ [2007] 1 WLR 370. See Vanessa Mak, 'Repair and Loss of the Right to Reject – A Remedial Dilemma in Sale of Goods Law' (2006) LMCLQ 163.

¹⁵⁶ Law Commission and The Scottish Law Commission, *Sale and Supply of Goods Consultation Document* (Law Com No 85, Scot Law Com No 58, 1983).

provisionally favoured the second one.¹⁵⁷ Although they considered whether a similar scheme should be recommended for the non-consumer to non-consumer sales,¹⁵⁸ this was rejected immediately as ‘positively inappropriate in the case of non-consumer transactions’ for being too simple and not detailed enough ‘for the many problems which are likely to be of great importance to the parties to a commercial contract but which are not of substantial importance to consumers.’¹⁵⁹ Seeing the great majority of commercial transactions as extremely complicated, it was maintained that ‘a regime of “cure” for all non-consumer transactions would require a very detailed code and even such code would inevitably leave many problems unresolved.’¹⁶⁰ It was further argued that:

‘[A] mandatory “cure” regime may be quite inappropriate for many commercial transactions, yet the sums of money involved may be such that either sellers will feel they must do all they possible can to impose cure upon the buyer or buyer may seek cure for minor, but irremediable defects simply to have the opportunity of rejecting the goods because the market has changed. Furthermore, the practicability of cure in many non-consumer transactions may be doubtful. The seller may be thousands of miles away from the point of delivery where the defect is found and decisions as to whether to attempt cure or to accept cure may therefore be difficult to make. Other parties (such as those who provide the finance) may be vitally concerned in the outcome of any dispute and the making of the decision whether or not to attempt cure and the question whether repairs can satisfactorily be effected at all may depend upon detailed, time-consuming examination by experts and other parties.’¹⁶¹

For these reasons, in particular, it was not felt ‘that a statutory “cure” regime for non-consumers would be satisfactory.’¹⁶² But it was made clear that ‘there must be nothing to stop parties agreeing such a regime for themselves in their contracts if that is what they want’ and was explicitly acknowledged that such regimes ‘are already common in the case of many commercial contracts and in many other instances breaches of contract are cured by repair or replacement on a negotiated basis.’¹⁶³ It was then reiterated that nothing proposed ‘should prevent parties from continuing to act in sensible ways in

¹⁵⁷ Ibid para 4.43.

¹⁵⁸ Ibid para 5.52.

¹⁵⁹ Ibid paras 4.52-4.53.

¹⁶⁰ Ibid para 4.53.

¹⁶¹ Ibid, para 4.54.

¹⁶² Ibid para 4.55.

¹⁶³ Ibid.

order to resolve their differences.’¹⁶⁴ In the end though even the proposed cure regime for consumers was rejected on the basis that ‘it gave leverage to sellers against buyers and posed complex practical problems of implementation.’¹⁶⁵ In light of this making the case for recommending a cure regime for non-consumers even weaker than it was at the time the Commissions had made their recommendations, it was stated that they did ‘not wish to do anything to stop non-consumers from coming to their own agreement about “curing” defects and, indeed, cure provisions (sometimes very detailed) are common in many types of commercial contract.’¹⁶⁶

3.3.3 Comparison

Compared to the CISG, ‘English law seems reluctant to give second chances to sellers who fail to get it right the first time around.’¹⁶⁷ In fact, the SGA 1979 ‘does not formally recognize a seller’s right to cure.’¹⁶⁸ Nevertheless, and in light of the research and analysis in the abovementioned sections, this thesis endorses Ahdar’s claim that ‘the sporadic case law’ suggests that the seller does have a right to cure in English sales law ‘if the cure is attempted prior to the due date for performance’ and that he ‘may’ have such a right if the due date has passed.¹⁶⁹ Therefore, both the CISG and English sales law through common law arguably grant the seller the right to remedy a non-conforming tender of documents and goods before the time for performance expires. Articles 34 and 37 CISG therefore cannot be considered as having significant practical consequences. However, while the CISG explicitly grants the seller the right to cure any failure to perform his obligations even after the date for delivery, there appears to be great uncertainty in English sales law ‘as to the existence or extent of the seller’s right to repair or replace defective goods’ after the due date for performance.¹⁷⁰

Other than section 35(6)(a) SGA 1979, which implicitly acknowledges the seller’s right to offer repair,¹⁷¹ research revealed that the seller arguably has the right to cure any

¹⁶⁴ Ibid.

¹⁶⁵ Bridge, *The Sale of Goods* (n133) 576. See Law Commission and The Scottish Law Commission, *Sale and Supply of Goods Report* (Law Com No 160, Scot Law Com No 101, 1987) paras 4.9-4.15.

¹⁶⁶ *Sale and Supply of Goods Report* (n165) para 4.17.

¹⁶⁷ Mak, ‘The Seller’s Right to Cure Defective Performance – A Reappraisal’ (n134) 409.

¹⁶⁸ Bridge, *The Sale of Goods* (n133) 575.

¹⁶⁹ Ahdar, ‘Seller Cure in the Sale of Goods’ (n126) 381.

¹⁷⁰ *Sale and Supply of Goods Consultation Document* (n156) para 2.38.

¹⁷¹ See section 2.3.2, Chapter 2. See Mak, ‘The Seller’s Right to Cure Defective Performance – A Reappraisal’ (n134) 416-422, who argues that section 35 SGA, which seeks to encourage informal attempts at cure, does not give proper recognition to the seller’s right to cure and that a re-evaluation of the rule is called for.

failure to perform his obligations where time is not of the essence within a reasonable period of time. Similarly, Article 48(1) CISG allows the seller to ‘remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.’ Therefore, it can be safely assumed that where the CISG allows the seller to cure in instances where time is not of the essence, English sales law does as well.

However, according to English sales law, ‘where time is of the essence, strict compliance with time for performance is a condition of the contract, any breach of which will entitle the innocent party to elect to terminate the contract, no matter how trivial, or whether it causes any loss.’¹⁷² Similarly though in the CISG, where time is of the essence, any failure on behalf of the seller will usually be classed as a fundamental breach of contract (substantially depriving the buyer of what he was entitled to expect under the contract as per the definition in Article 25 CISG) allowing the buyer to declare the contract avoided according to Article 49(1)(a) CISG. It has to always be borne in mind that Article 48(1) CISG is explicitly subject to Article 49 CISG which governs the buyer’s right to declare the contract avoided despite the fact that (mostly German) courts have stretched the notion of fundamental breach to a point which makes avoidance of the contract seem impossible.¹⁷³

3.4 Conclusion

The CISG’s pro-contractual spirit (*favor contractus*) once again emerges through the two performance-oriented mechanisms examined herein. The CISG tangibly assists parties to cooperate by explicitly providing them with particular mechanisms by which to facilitate performance of the contract and consequently preserve it. Of course salvaging a breached contract always requires the parties’ cooperation and good will; if these are absent, even the strongest pro-contractual framework can be defeated. However, the fact that the buyer, or the seller, can confidently cite the CISG, or in other words, the applicable law to their contract, in their attempts to preserve the contract arguably can have a stronger impact on the other party than ‘friendly’ post-breach negotiations in the hope of a workable extrajudicial settlement of their differences with no clear legal rule to lean on to.

¹⁷² Apps, ‘The Right to Cure Defective Performance’ (n137) 535.

¹⁷³ See section 5.4.1.1, Chapter 5.

Although, the seller's right to cure defective performance arguably has 'a stronger basis in English law than is often assumed,'¹⁷⁴ there appears to be a *prima facie* distinction of considerable proportions between the CISG provisions and English sales law especially in relation to the seller's right to cure any failure to performance after the due date for performance. It is evident that the seller's rights under the CISG are clear and more extensive than the seller's rights under English sales law in relation to cure. As such merchants should expect significant practical consequences particularly in relation to Article 48 CISG. However, it must be noted that scholars have long been calling for the clear incorporation of the seller's right to cure in English sales law through reform of the SGA 1979¹⁷⁵ and this thesis makes the same call. Admittedly, as also pointed out during the Sale and Supply of Goods consultation process,¹⁷⁶ 'cure carries with it an inevitable degree of complexity, involving, as it does, the fine balancing of seller and buyer interests.'¹⁷⁷ While 'some of the problems can be addressed in a suitably drafted provision,' 'ultimately the workability of a cure regime will depend upon a sensitive treatment at the hands of the judiciary, coupled with an attitude of good faith by the parties.'¹⁷⁸ However, this thesis argues that by providing the seller with a second chance at performance, 'the right to cure furthers several of the objectives of contract law.'¹⁷⁹ It 'reduces the possibility of the buyer's escaping the contract for an ulterior motive, such as a fall in market prices' and 'minimizes the economic waste which would ensue if the contract were terminated.'¹⁸⁰ Indeed, a clarification of English sales law seems called for¹⁸¹ which might result in further alignment, or complete alignment, with the CISG in which case significant practical consequences for merchants cannot be avoided.

¹⁷⁴ Mak, 'The Seller's Right to Cure Defective Performance – A Reappraisal' (n134) 423.

¹⁷⁵ See generally Ahdar, 'Seller Cure in the Sale of Goods' (n126); Apps, 'The Right to Cure Defective Performance' (n137); Mak, 'The Seller's Right to Cure Defective Performance – A Reappraisal' (n134). Cf. W.C.H. Ervine, 'Cure and Retender Revisited' (2006) JBL 799.

¹⁷⁶ See section 3.3.2.2 above.

¹⁷⁷ Ahdar, 'Seller Cure in the Sale of Goods' (n126) 382.

¹⁷⁸ Ibid.

¹⁷⁹ Apps, 'The Right to Cure Defective Performance' (n137) 554.

¹⁸⁰ Ibid 554-555.

¹⁸¹ Mak, 'The Seller's Right to Cure Defective Performance – A Reappraisal' (n134) 424.

Chapter 4 The Buyer's Right to Reduce the Price

4.1 Introduction

According to Article 50 CISG, where non-conforming goods have been delivered, the buyer may elect to keep non-conforming goods delivered by the seller and reduce the price accordingly. The contract is adjusted just as if the subject matter of the contract had from the outset been the non-conforming goods actually delivered.¹ The effect of price reduction is to preserve the contract in alignment with the general pro-contractual spirit of the CISG.²

Price reduction originated in Roman law (*actio quanti minoris*) and is now included in relevant codifications of most civil legal systems,³ although 'the way in which it is exercised varies from one civil law country to another.'⁴ The remedy of price reduction was a tool designed to cope with the traditional civil law doctrine (eroded but not abandoned) that a seller is liable for "damages" caused by defective goods only when he is guilty of fault or fraud.⁵ However, as this doctrine was insufficient in relation to instances where the goods delivered were defective but the seller was not at fault, specific rules were developed.⁶ One of these rules was that the buyer in these cases was entitled to a reduction of the purchase price.⁷ The CISG's damages provisions though

¹ Markus Muller-Chen, 'Article 50' in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods* (3rd edition, OUP 2010) 770-771.

² Milena Djordjevic, 'Declaration of Price Reduction under the CISG: Much Ado about Nothing?' in Stefan Kroll and others (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 551, 553.

³ Michael Will, 'Article 50' in C.M. Bianca and M.J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 368; Ivo Bach, 'Article 50' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG); Commentary* (C.H. Beck, Hart and Nomos 2011) 749, fn 3 reports that the Austrian, French, German, Italian Civil Code as well as the Swiss Code of Obligations all include a codification of the remedy of price reduction. For example, section 437(2) of the German Civil Code BGB provides that the buyer 'may reduce the purchase price.' The buyer can opt for price reduction instead of termination if he intends to keep the defective thing or if the breach is not sufficiently serious to justify termination. Section 441 of the German Civil Code BGB then provides that 'the purchase price is to be reduced in the proportion in which the value of the thing free of defects would, at the time when the contract was entered into, have had to the actual value.' See Basil Markesinis, Hannes Unberath and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edition, Hart Publishing 2006) 509-10.

⁴ Djordjevic, 'Declaration of Price Reduction under the CISG' (n2) 552-553.

⁵ John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry Flechtner ed, 4th edition, Kluwer Law International) 449.

⁶ Peter Huber, 'Comparative Sales Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 937, 956.

⁷ *Ibid.*

‘do not include an element of fault, instead establishing a [non-fault] damages regime that mirrors the common law.’⁸ The CISG rather settled for a compromise and adopted a ‘hybrid solution’ between common and civil law: ‘the simultaneous availability of damages without fault and of the price reduction remedy.’⁹ ‘It is up to the buyer to decide which is more advantageous for him: price reduction, or damages, or price reduction and damages.’¹⁰

It is reported that throughout the preparatory work and drafting history of the provision on price reduction, ‘common law lawyers experienced great difficulty in understanding the nature of the remedy of price reduction and tended to confuse it with the remedy of damages.’¹¹ Indeed, given the unfamiliarity of common lawyers with the remedy of price reduction¹² and since damages in common law systems arguably ‘address the purposes served by price reduction without the need for a separate remedy’¹³ perhaps it is easy to confuse it with damages. However, and as will be explained herein in relation to English sales law, price reduction is a separate and distinct remedy from damages.

In light of the above, it should therefore not be surprising that there is no direct equivalent to the remedy of price reduction as provided by Article 50 CISG in English sales law. Nevertheless, while English sales law does not *per se* offer the buyer the right to reduce the price, this chapter argues that English sales law includes rules the rationale of which is parallel to what Article 50 CISG aims to achieve.

This Chapter first provides an expository report on Article 50 CISG. Given that there is no direct equivalent of the remedy price reduction in English sales law, the exposition of the relevant English sales law rules also incorporates the relevant comparative analysis and whether affording the buyer with the right to reduce the price will have significant practical consequences.

⁸ Bach, ‘Article 50’ (n3) 749.

⁹ Will, ‘Article 50’ (n3) 368.

¹⁰ Ibid 373.

¹¹ Eric Bergsten and Anthony Miller, ‘The Remedy of Reduction of Price’ (1979) 27 AJCL 255, 255: ‘...at several stages of the drafting history of the provision, Common law participants saw the provision as a type of set-off whereby the buyer was authorised to deduct damages from the price.’

¹² Honnold, *Uniform Law* (n5) 444; Bach, ‘Article 50’ (n3) 479. See Summary Records of the First Committee, 23rd Meeting (UN Doc A/CONF.97/C.1/SR.23) in UN, *United Nations Conference on Contracts for the International Sale of Goods; Official Records* (UN Doc A/CONF.97/19) 358, para 39: ‘Mr. Feltham (United Kingdom) explained that the remedy involved in the Article was not familiar to lawyers from common law countries.’ See Michael Bridge, *The International Sale of Goods* (3rd edition, OUP 2013) 603: ‘A striking provision from the point of view of a common lawyer is the price reduction action in Article 50 [CISG], the descendant of the Roman *actio quanti minoris*.’

¹³ Bach, ‘Article 50’ (n3) 749.

4.2 Under the CISG

4.2.1 General

Article 50 CISG provides:

If the goods do not conform to the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles, the buyer may not reduce the price.

As already mentioned, the buyer can elect to keep non-conforming goods delivered by the seller and unilaterally reduce the price just as if the subject matter of the contract had from the outset been the non-conforming goods actually delivered.¹⁴ By reducing the price, according to Article 45(2) CISG, the buyer is not deprived of any right he may have to claim damages by exercising his right to reduce the price.¹⁵ However, ‘where damages are claimed in combination with price reduction, damages can only be awarded for loss other than the reduced value of the goods since this loss is already reflected in the price reduction.’¹⁶

By allowing the buyer to adjust the contract accordingly, the contract can be consequently preserved. Price reduction embodies the CISG’s general principle of *favor contractus*, which requires that, ‘whenever possible, a solution should be adopted in favour of the valid existence of the contract and against its premature termination on the initiative of one of the parties.’¹⁷

The fact that Article 50 is subject to the seller’s right to cure any failure to perform his obligations is also reflective of the general principle of *favor contractus* and balances the rights of the buyer and the seller.¹⁸ If the seller can remedy any failure to perform

¹⁴ Muller-Chen, ‘Article 50’ (n1) 770-771.

¹⁵ *Schiedsgericht der Handelskammer* (Arbitral Award, Germany) 21 March 1996 (Unilex).

¹⁶ UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012 Edition) 243.

¹⁷ Michael Joachim Bonell, ‘Article 7’ in Bianca and Bonell (n3) 81.

¹⁸ Jarno Vanto, ‘Remedy of Reduction of Price: Remarks on the Manner in which the Principles of European Contract Law may be used to interpret or supplement Article 50 CISG’ in John Felemegas (ed), *An International Approach to the Interpretation of the UN Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 411.

his obligations without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer,¹⁹ then surely that is preferable than the buyer having to adjust the contract by reducing the price as he will surely not be receiving what he contracted for.

4.2.2 Article 50 CISG

4.2.2.1 The Buyer's Right to Reduce the Price

There is no time period for exercise of the right to price reduction²⁰ and the buyer can reduce the price 'whether the non-conformity constitutes a fundamental breach of contract or a simple breach of contract, whether or not the seller acted negligently, and whether or not the seller was exempted from liability under Article 79.'²¹ Especially, in cases where the seller is exempted from liability under Article 79 CISG, price reduction is indispensable to the buyer as it is 'the only one giving the buyer monetary relief.'²²

The buyer's right to reduce the purchase price is a unilateral right,²³ which should be exercised by means of an express declaration making it clear that the buyer wants a price reduction.²⁴ Provided that the seller accepts the price reduction, Enderlein and Maskow argue that 'a reduction of the price of goods is the simplest remedy where the least additional expenses occur and should, therefore, be facilitated.'²⁵ A 'well-advised buyer' though should pursue a damages action on a rising market and a price reduction on a falling market.²⁶ Indeed, if the market price of the goods has risen, the buyer can recover more in terms of monetary relief by choosing damages over price reduction, whereas if the market price of the goods has fallen he would be better off choosing price reduction over damages.²⁷ Bridge argues that, other than upsetting the equipoise within

¹⁹ Article 48(1) CISG.

²⁰ Bach, 'Article 50' (n3) 758.

²¹ UNCITRAL, *Digest* (n16) 243.

²² Will, 'Article 50' (n3) 373.

²³ 23rd First Committee Meeting in *Official Records* (n12) 360, para 61.

²⁴ Muller-Chen, 'Article 50' (n1) 772; Peter Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (Manz 1986) 79: 'In order to invoke the reduction, the buyer need only dispatch notice thereof.' See *Oberlandesgericht Munchen* (Germany) 2 March 1994 (Pace). In relation to the requirement for a declaration for price reduction see generally Chang-Sop Shin, 'Declaration of Price Reduction under the CISG Article 50: Price Reduction Remedy' (2005) 25 J. L. & Com. 349; Djordjevic, 'Declaration of Price Reduction under the CISG' (n2).

²⁵ Fritz Enderlein and Dietrich Maskow, *International Sales Law* (Oceana Publications 1992) 196.

²⁶ Bridge, *The International Sale of Goods* (n12) 605.

²⁷ Anette Gartner, 'Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law' in *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)* (Kluwer Law International 2000-2001) 59, Part II, section A(2)(b)(2).

Article 50 CISG, ‘there seems to be nothing to prevent the buyer maximizing his interest in this way.’²⁸

Whether or not the price has already been paid though does not affect or restrict the buyer’s right to reduce the price. In instances where the price has already been paid, ‘the buyer has a right to be reimbursed in the amount of the reduction.’²⁹ The seller must also pay interest on the amount payable back to the buyer from the date of receipt of the price.³⁰ If the buyer has yet to pay the price, he will reduce the price he will pay the seller accordingly or use his entitlement to price reduction as a defence against the seller’s action for the price.³¹

4.2.2.2 Calculation of Price Reduction

According to Article 50 CISG, the price is to be reduced ‘in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.’ A proportional or ‘relative’ calculation method is used, which ‘allows for the parties to keep in line with their good or bad bargain.’³² The formula that should be applied is the following:³³

$$\text{Reduced price} = \frac{\text{Value of the goods delivered} \times \text{Contract price}}{\text{Hypothetical value of conforming goods}}$$

The relevant time for estimating the relevant values is the time of delivery. However, in the 1978 Draft Convention, the time at which the value of non-conforming goods should be assessed was the time of the conclusion of the contract. A proposal which amended that to the time of delivery was adopted at the Diplomatic Conference in Vienna,³⁴ where it was argued that ‘the time of delivery would be preferable to that of the conclusion of the contract partly because the goods might not have existed at the latter time and partly because the value at the time of delivery would be a more

²⁸ Bridge, *The International Sale of Goods* (n12) 605.

²⁹ Enderlein and Maskow, *International Sales Law* (n25) 195; Muller-Chen, ‘Article 50’ (n1) 778. See *U.S. Bankruptcy Court for the District of Oregon* (USA) 29 March 2004 (Pace).

³⁰ Article 84(1) CISG provides that ‘if the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.’ See also Article 78 CISG.

³¹ Muller-Chen, ‘Article 50’ (n1) 778.

³² Will, ‘Article 50’ (n3) 370.

³³ Muller-Chen, ‘Article 50’ (n1) 774.

³⁴ UN Doc A/CONF.97/C.1/L.167 (Norway) and UN Doc A/CONF.97/C.1/L.170 (Finland) in *Official Records* (n12) 118.

adequate substitute for damages.’³⁵ The French delegate convincingly argued that ‘the time of delivery seemed a more realistic time to assess the value of the non-conforming goods’ on the basis that ‘the lack of conformity was a matter of performance and the time at which it was assessed should be that at which performance was completed.’³⁶

Delivery will occur when the seller has carried out the actions required under the contract or under Article 31 CISG.³⁷ For example, if the buyer collects the goods from the seller, the relevant time for calculating price reduction is the time at which the seller places the goods at the seller’s disposal (Articles 31(b) and (c) CISG) or, if the seller must bring the goods to the buyer, it is the time of handover of the goods to the buyer.³⁸ If the contract of sale involves carriage of the goods though and given that the economic value of the goods is generally determined according to their value at the time when the buyer takes the goods and can dispose of them, the prevailing view is that the relevant value is the value of the goods upon arrival at the destination rather than handover of the goods to the first carrier for transmission to the buyer (Article 31(a) CISG).³⁹

However, the place at which the value of the non-conforming goods is to be assessed is not explicitly stated in Article 50. During the Diplomatic Conference in Vienna, there was a proposal for the place at which the value of the non-conforming goods was to be assessed to be ‘the buyer’s place of business or habitual residence.’⁴⁰ It was argued that ‘the object of the joint proposal was to ensure that the reduction in price took into account of prevailing prices at or close to the buyer’s place of business or habitual residence so that he could realistically expect to be able to replace the defective goods.’⁴¹ While there was some support for this proposal, which ‘would fill an undesirable gap in the draft Convention,’⁴² others said ‘it would perhaps be better to omit any reference to the place of valuation, which was a complicated issue.’⁴³ Indeed, the joint proposal seemed to have been based ‘on the assumption that the buyer’s place of business or habitual residence was where he wished to have the goods available but

³⁵ 23rd First Committee Meeting in *Official Records* (n12) 357-358.

³⁶ *Ibid* 358.

³⁷ Muller-Chen, ‘Article 50’ (n1) 775.

³⁸ *Ibid*.

³⁹ *Ibid* 775-776. See *Pretore della giurisdizione di Locarno* (Switzerland) 27 April 1992 (Pace); *Oberlandesgericht Graz* (Austria) 9 November 1995 (Unilex); *Oberlandesgericht Koblenz* (Germany) 14 December 2006 (Pace).

⁴⁰ UN Doc A/CONF.97/C.1/L.168 (Argentina, Spain and Portugal) in *Official Records* (n12) 118.

⁴¹ 23rd First Committee Meeting in *Official Records* (n12) 359.

⁴² *Ibid*.

⁴³ *Ibid*.

he might have intended them for another destination, which might be changed again by a resale.’⁴⁴ The joint amendment proposal was eventually rejected leaving the question of the place of valuation open to be adapted in each individual case. Today, ‘due to the close connection between the time and the place of valuation, the general view held is that the place of delivery is also to be used as the place of valuation.’⁴⁵

4.2.2.3 Limitations

Non-Conforming Goods

Article 50 CISG only applies ‘if the goods do not conform to the contract.’ According to Article 35(1) CISG, goods do not conform with the contract, and are therefore subject to reduction of the price, unless they are of the quantity, quality and description required by the contract and are contained or packaged in the manner required by the contract, and meet the four specific requirements set out in Articles 35 (2)(a) to (d) CISG.⁴⁶ Accordingly, the remedy of price reduction ‘is not available if the breach of contract is based upon late delivery or the violation of any obligation of the seller other than the obligation to deliver conforming goods.’⁴⁷

The Secretariat Commentary explains that, ‘the remedy of reduction of the price also leads to results which are similar to those which would result from a partial avoidance of the contract under Article [51].’⁴⁸ Article 51(1) CISG provides that if the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 to 50 apply in respect of the part which is missing or which does not conform. As a result, if the seller delivers only a part of the goods, price reduction under Article 50 and partial avoidance under Article 51 ‘would lead to the same monetary relief for the buyer.’⁴⁹ Thus, if the seller fails to deliver 10% of the goods under the contract, the buyer can either reduce the price by 10% according to Article 50 CISG or he could declare 10% of the contract avoided.⁵⁰ Moreover, if the partial non-delivery amounts to fundamental breach of the contract, according to Article

⁴⁴ Ibid.

⁴⁵ Muller-Chen, ‘Article 50’ (n1) 776; UNCITRAL, *Digest* (n21) 244.

⁴⁶ Secretariat Commentary, ‘Article [50]’ in *Official Records* (n12) 42; UNCITRAL *Digest* (n21) 243. Cf. Harry Flechtner, ‘More U.S. Decisions on the UN Sales Convention: Scope, Parol Evidence, “Validity” and Reduction of Price under Article 50’ (1995) *J. L. & Com.* 153, 170-171; Muller-Chen, ‘Article 50’ (n1) 771; Bach, ‘Article 50’ (n3) 754-755.

⁴⁷ UNCITRAL, *Digest* (n21) 243. See *Landgericht Düsseldorf* (Germany) 5 March 1996 (Unilex).

⁴⁸ Ibid. The buyer’s right to partially avoid the contract according to Article 51 CISG is examined in greater detail in Chapter 5 which deals with avoidance.

⁴⁹ Bergsten and Miller, ‘The Remedy of Reduction of Price’ (n11) 259.

⁵⁰ Ibid 259-260.

51(2) CISG, the buyer can declare the contract avoided in its entirety ‘and, in effect, reduce the price by 100%.’⁵¹ For example, in a case where the seller who contracted to deliver 10 tons of No.1 corn at the market price of \$200 a ton for a total of \$2,000 only delivers 9 tons, according to Article 50 CISG, the buyer can accept the 9 tons and reduce the price by 10%, paying \$1,800.⁵² This would also be the practical result of an application of Article 51(1) CISG.⁵³ However, if the seller only delivers 2 tons instead of 10, such an extensive short delivery would constitute fundamental breach and allow the buyer to avoid the contract in its entirety (Article 51(2) CISG).⁵⁴

The Secretariat Commentary clarifies that, ‘goods may conform with the contract even though they are subject to the right or claim of a third party under Article [41] or [42].’⁵⁵ Just like in relation to Articles 46(2) and 46(3),⁵⁶ the notion of non-conforming goods under Article 50 does not include defects in title under Articles 41 and 42 CISG.⁵⁷ During the Diplomatic Conference in Vienna there were discussions as to whether non-conformity under Article 50 should include third-party claims after a relevant proposal by Norway to insert a new paragraph to that effect.⁵⁸ While there was some support for this proposal, after fears that it might give rise to problems for example by being inappropriate in certain cases, the Norwegian delegate withdrew his proposal ‘on the understanding that it would be up to the courts to decide whether and to what extent Article [50] was applicable to third party claims under Article [41].’⁵⁹ Therefore, ‘the dogmatic gap between non-conformity of goods, and third party rights or claims was not closed completely, and the right to reduction of the price was practically restricted to non-conformity.’⁶⁰ There do not appear to be any reported cases on this issue and Bach reports that ‘the majority of authors understand “non-conformity” as a technical term which has to be interpreted consistently throughout the Convention as not including defects in title.’⁶¹

⁵¹ Ibid 260.

⁵² UNCITRAL, Secretariat Commentary, ‘Article [50]’ in *Official Records* (n12) 42.

⁵³ See section 5.4.4.1, Chapter 5.

⁵⁴ UNCITRAL, Secretariat Commentary, ‘Article [50]’ in *Official Records* (n12) 42.

⁵⁵ Ibid.

⁵⁶ See section 2.3.1, Chapter 2.

⁵⁷ Muller-Chen, ‘Article 50’ (n1) 771.

⁵⁸ UN Doc A/CONF.97/C.1/L.167 (Norway) in *Official Records* (n12) 118.

⁵⁹ 23rd First Committee Meeting in *Official Records* (n12) 361, para 76.

⁶⁰ Enderlein and Maskow, *International Sales Law* (n25) 195.

⁶¹ Bach, ‘Article 50’ (n3) 753.

Notice of Non-Conformity

In order for the buyer to be entitled to price reduction, he must have given a timely notice of the non-conformity of the goods in accordance with Article 39 CISG, subject to Articles 40 and 44 CISG.⁶² It follows, that where the buyer does not make a timely ‘complaint’ about the non-conformity of the goods, he loses the right to claim a price reduction under Article 50 CISG.⁶³ In a case involving a contract between an Italian seller and a German buyer for the purchase of granite stone, a price reduction was not granted because of the inability of the buyer to prove that he had given notice of the asserted defects according to Article 39(1) CISG.⁶⁴ In another case, it was held that the buyer had lost his right to rely on the non-conformity of the goods (Article 39 CISG) as a justification for his reduction of the price since he had failed to have the goods examined when the lack of quality could have been discovered, i.e. at the moment of the arrival of the goods at destination (Article 38 CISG). As the buyer only had the goods examined three weeks after their arrival at destination, he was ordered to pay the remaining part of the price.⁶⁵

The Seller’s Right to Remedy Failure to Perform

Article 50 CISG provides that, ‘if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles, the buyer may not reduce the price.’⁶⁶ Therefore, the buyer’s right to reduce the price is subject to the seller’s right to cure, or, in other words, ‘the seller’s right to cure takes priority over the buyer’s right to a price reduction.’⁶⁷ This means that even if the buyer immediately declares a price reduction, i.e. without giving the seller the opportunity to remedy the defect, the right to a price reduction is subject to the seller’s offer of subsequent performance.⁶⁸ The Secretariat Commentary explains that, if the seller remedies his failure to perform

⁶² Muller-Chen, ‘Article 50’ (n1) 772.

⁶³ *Landgericht Darmstadt* (Germany) 29 May 2001 (Pace). See also *Rechtbank van Koophandel* (Belgium) 18 January 2002 (Unilex); *Vestre Landsret* (Denmark) 10 November 1999 (Unilex).

⁶⁴ *Landgericht Stendal* (Germany) 12 October 2000 (Pace).

⁶⁵ *ICC Court of Arbitration* (No. 8247) June 1996 (Unilex).

⁶⁶ See *Oberlandesgericht Koblenz* (Germany) 31 January 1997 (Pace), where the buyer refused the seller’s offer to deliver new goods and, among others, lost his right to reduce the price.

⁶⁷ Muller-Chen, ‘Article 50’ (n1) 773.

⁶⁸ *Ibid.*

or is not allowed by the buyer to remedy that failure, the ‘declaration of reduction of price is of no effect.’⁶⁹

4.3 In English Sales Law

English sales law does not entitle the commercial buyer to proportionally reduce the price of non-conforming goods he wishes to keep⁷⁰ except in certain specific instances as provided by section 30 SGA 1979.⁷¹ The remedy of price reduction can be compared with damages in terms of assessing the actual relief it would provide the buyer in a particular case,⁷² but it must not be equated with damages and in particular, set-off.⁷³

Benjamin’s Sale of Goods seems to be ignoring the availability of damages as a remedy in the CISG and equating price reduction in the CISG with damages under English sales law by virtue of price reduction being ‘a monetary award.’⁷⁴ While price reduction may lead to a monetary award different from what an award of damages would produce

⁶⁹ UNCITRAL, Secretariat Commentary, ‘Article [50]’ in *Official Records* (n12) 43.

⁷⁰ However, it must be noted that according to section 48B SGA 1979, a consumer may require the seller to reduce the purchase price of the goods in question by an appropriate amount. Just like the consumer’s right to require the seller to repair or replace the goods, the consumer’s right to require price reduction was added to the SGA 1979 by the Sale and Supply of Goods to Consumers Regulations 2002, which transposed Directive 1999/44/EC (25 May 1999) dealing with certain aspects of sale of consumer goods and associated guarantees into English law. However, when the Consumers Rights Act 2015 comes into force on 1 October, Part 5A which includes these remedies will be effectively removed from the SGA 1979. The consumer’s right to price reduction can be found in section 24 of the Consumers Rights Act 2015.

⁷¹ As already noted, Articles 50 and 51 CISG seem to be overlapping to a great extent in relation to partial or short delivery. Short delivery under English sales law as governed by section 30 SGA 1979 is therefore only examined in this chapter in relation to Article 50 CISG governing price reduction. It is then properly examined in Chapter 5 in relation to Article 51(1) CISG governing partial avoidance.

⁷² See generally Reza Beheshti, ‘A Comparative Analysis of Damages along with Set-Off under the SGA versus Price Reduction under the CISG and the CESL’ (2013) 5 (4) EJCL 81.

⁷³ Jacob Ziegel, ‘Article 50’ in Jacob Ziegel and Claude Samson, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981) available at <http://www.cisg.law.pace.edu/cisg/text/ziegel50.html> See Erika Sondahl, ‘Understanding the Remedy of Price Reduction – A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods’ (2003) 7 Vindobona J Int’l Com L Arb 255, Part A, section 2: ‘United States lawyers, as well as lawyers coming from other common law backgrounds, must be especially conscious not to confuse Article 50 with the damage remedy, set-off. Not only does set-off differ from a price reduction with respect to its capability of being asserted unilaterally, but a set-off also requires the parties to have reciprocal debts.’; Article 8.1 of the UNIDROIT Principles of International Commercial Contracts (UPICC): ‘(1) Where two parties owe each other money or other performances of the same kind, either of them (“the first party”) may set off its obligation against that of its obligee (“the other party”) if at the time of set-off, (a) the first party is entitled to perform its obligation; (b) the other party’s obligation is ascertained as to its existence and amount and performance is due. (2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.’

⁷⁴ Michael Bridge and others (eds), *Benjamin’s Sale of Goods* (8th edition (Inc. Supp), Sweet & Maxwell 2010) para 12-131: ‘There is further a special remedy of reduction of the price, deriving from the Roman *actio quanti minoris*, which may lead to a monetary award different from what an award of damages would produce.’

under English sales law, as also elaborated by Bridge using a falling and a rising market example,⁷⁵ price reduction under the CISG is not the equivalent of damages under English sales law. Damages in the CISG are the equivalent of damages under English sales law.⁷⁶ Price reduction and damages can be claimed together in the CISG⁷⁷ however, price reduction is a separate remedy whose aim and function is totally distinct to that of damages.⁷⁸

Just like in English sales law, the remedy of damages in the CISG aims to place the injured party in the same economic position he would have been in if the contract had been performed.⁷⁹ To be exact, damages in English sales law are primarily intended to give the buyer ‘the value of the promised performance of which the breach deprives him, which has been called the claimant’s “expectation interest,” e.g. his expectation of making a profit or receiving a benefit through the transaction.’⁸⁰ Price reduction puts the buyer in the position he would have been in had he purchased the goods actually delivered rather than the ones promised – assuming he would have made the same *relative* bargain for the delivered goods.⁸¹ It does not protect the ‘expectation interest’ nor is it designed to do so.⁸² Price reduction attempts to preserve the proportion of the buyer’s bargain as opposed to expectation damages that are designed to preserve the benefit of the buyer’s bargain.⁸³ However, as price reduction in the CISG exists alongside damages, which do just that – protect the buyer’s expectation interest – it should not be the cause of any concerns to merchants and lawyers in relation to the awarding of damages. Will explains that, ‘it is up to the buyer to decide which is more advantageous for him: price reduction, or damages, or price reduction and damages.’⁸⁴

It must be stressed that the position in English sales law in relation to an action for damages for breach of warranty, where the buyer elects (or is compelled) to affirm the contract and retain the goods (section 53 SGA 1979), is ‘only superficially similar’ to

⁷⁵ See Bridge, *The International Sale of Goods* (n12) 604-605.

⁷⁶ Articles 45(1)(b) and 74 to 77 CISG.

⁷⁷ Article 45(2) CISG.

⁷⁸ Will, ‘Article 50’ (n3) 372.

⁷⁹ UNCITRAL, Secretariat Commentary, ‘Article [74]’ in *Official Records* (n12) 59. See Article 74 CISG.

⁸⁰ *Benjamin’s Sale of Goods* (n74) para 16-031.

⁸¹ Flechtner, ‘CISG: U.S. Decisions’ (n46) 174.

⁸² *Ibid* 172.

⁸³ *Ibid* 174.

⁸⁴ Will, ‘Article 50’ (n3) 373.

price reduction.⁸⁵ At first sight, section 53(1)(a) SGA 1979 does appear to resemble the remedy of price reduction, however, it is a damages provision and as such does not provide the buyer with a genuine right to reduce the purchase price, but merely allows him to set up his warranty entitlement against a seller suing for the price.⁸⁶ It may well be that the awarding of a sum under section 53(1)(a) SGA 1979, in practice (by deducting it from the price), leads to an eventual reduction of the price, however, the buyer cannot unilaterally adjust the contract, as explained above in relation to price reduction according to Article 50 CISG, but instead has to resort to a court or negotiate a variation or a new contract.⁸⁷ Moreover, for damages to be awarded under section 53 SGA 1979 the buyer needs to have suffered a loss. According to section 53(2) SGA 1979, ‘the measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.’ There is no such requirement in relation to the buyer’s right to reduce the price in the CISG. Finally, it must be pointed that section 53(3) SGA 1979 is likely to have the same results as claiming damages according to the CISG rather than reducing the price.⁸⁸ Section 53(3) SGA 1979 provides that, ‘in the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.’ According to Article 74 CISG, where the seller delivers and the buyer retains non-conforming goods, ‘if the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract.’⁸⁹ The Secretariat Commentary explains that, since this formula is intended to restore the buyer to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages.⁹⁰

What is parallel in the two systems though in the context of price reduction, is the liberty granted to the buyer to elect to keep non-conforming goods. According to section 11(2) SGA 1979, ‘where a contract of sale is subject to a condition to be

⁸⁵ Bridge, *The International Sale of Goods* (n12) 604.

⁸⁶ Gartner, ‘Britain and the CISG’ (n27) 59, Part II, section A(3)(b).

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ UNCITRAL, Secretariat Commentary, ‘Article [74]’ in *Official Records* (n12) 59.

⁹⁰ Ibid.

fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.’ It follows that, ‘the buyer is not bound to exercise a right to reject for breach of condition; he can elect to treat the breach of the condition as a breach of warranty, in which case the contract will remain on foot and the buyer’s remedy will be damages for breach of warranty.’⁹¹ Regardless of how the parties’ obligations or expectations under the contract are regulated after a buyer elects to accept non-conforming goods, it can be argued that both systems have mechanisms in place to allow the buyer to preserve the contract despite a breach.

Moreover, the principle of Article 50 CISG, including that of Article 51(1) CISG, can be arguably seen as ‘implicit’ in section 30 SGA 1979.⁹² Article 30(1) SGA 1979 provides that the buyer can keep the lesser quantity of goods delivered by the seller, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. In *Oxendale v Wetherell*,⁹³ the seller contracted to deliver to the buyer 250 bushels of wheat. However, the seller only delivered 130. It was held that the seller was entitled to recover the value of the 130 bushels that had been delivered to and accepted by the buyer.

If the buyer has already paid the price, he can ‘recover such part of the price as has been paid for the undelivered balance.’⁹⁴ In *Behrend & Company, Limited v Produce Brokers Company, Limited*⁹⁵ only a portion of the seed the buyer bought from the seller was delivered into the buyers’ barges. The ship then left for Hull with the remainder of the seed on board in order to discharge other cargo. The ship returned in fourteen days and the balance of the seed was tendered to the buyers, but they refused to accept it. The buyers retained the portion which had been delivered and claimed repayment of the price paid for the rejected portion. It was held that when the delivery had begun, the buyers were entitled to receive the whole quantity before the ship left the port, and that in the circumstances the buyers were entitled to keep the part actually delivered, to reject the balance and to be repaid the price of the balance.

⁹¹ Ewan McKendrick (ed), *Goode on Commercial Law* (4th edition, Penguin Books 2010) 368.

⁹² Ziegel, ‘Article 50’ (n73). While Ziegel was referring to section 29 of the Ontario Sale of Goods Act (OSGA), section 29(1) OSGA is identical to section 30(1) SGA 1979.

⁹³ (1829) 9 B. & C. 386. See also *Richardson v Dunn* (1841) 2 QB 218: Had the 152 tons from 200 to 300 tons ‘arrived and been accepted by the buyer, no doubt he must have paid for them.’

⁹⁴ *Benjamin’s Sale of Goods* (n74) para 8-046.

⁹⁵ [1920] 3 KB 530.

By allowing the buyer to keep a quantity of goods less than the seller contracted to sell him, and pay for them at the contract rate, not only allows for the contract to remain on foot but functions in the exact same way as price reduction in the CISG. Piliounis argues that, ‘the reference to “contract rate is comparable to the “proportional” calculations made under Article 50 of the CISG.’⁹⁶ Indeed, ‘where there is a delivery of a lesser amount, section 30 of the SGA would likely reach the same result as Article 50.’⁹⁷ Looking at the example already used herein of the seller who contracted to deliver 10 tons of corn at a market price of \$200 but only delivered 9, whether the calculation is based on ‘contract rate’ or on a ‘proportional’ calculation, the result is the same.⁹⁸

Furthermore, just like in the CISG,⁹⁹ ‘by accepting the quantity delivered, the buyer does not give up his right to recover damages for non-delivery of the balance.’¹⁰⁰ In *Household Machines Limited v Cosmos Exporters Limited*,¹⁰¹ the sellers entered into a series of contracts for the supply of certain goods which were, to the sellers’ knowledge, intended for re-sale by the buyers to exporters. The sellers failed to deliver some of the goods and the buyers declined to make any payments for those goods which the sellers had delivered until the question of the undelivered items was settled. The seller then brought an action for the price of the goods delivered and the buyers counterclaimed for damages for non-delivery of part of the goods subject to the contracts and for a declaration of indemnity in respect of any damages which they might be liable to pay to exporters. It was held that the buyers were entitled to damages for breach of contract based on their loss of profit and to a declaration of indemnity limited to such damages as might be found to be legally due from the buyers to a subsequent purchaser as a result of the non-delivery by the sellers.

4.4 Conclusion

Although there is no direct equivalent of the remedy of price reduction for the commercial buyer in English sales law, parallels can be drawn between the two systems. The rule in section 30(1) SGA 1979, that ‘if the buyer accepts the goods so delivered he

⁹⁶ Peter Piliounis, ‘The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these Worthwhile Changes or Additions to English Sales Law?’ (2000) Pace Int’l L Rev 1, 37.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Article 45(2) CISG.

¹⁰⁰ *Benjamin’s Sale of Goods* (n74) para 8-046.

¹⁰¹ [1947] KB 217.

must pay for them at the contract rate' essentially represents a type of 'price reduction' equivalent to the remedy of price reduction under the CISG, which then allows for the argument to be made that price reduction is not foreign to English merchants and lawyers. Nevertheless, this only concerns short delivery and the fact is that, English sales law as far as commercial contracts are concerned does not provide a general buyer's remedy of price reduction. As such significant practical consequences should be expected which however will not alter other fundamental rights of the buyer such as the right to claim damages. If the UK accedes to the CISG, the remedy of price reduction will sit in a void space not previously occupied by an English sales law remedy. Accordingly, this thesis argues that price reduction should not be viewed by merchants and lawyers as a striking civil law remedy, since it also already exists in the consumer law setting, but rather as a useful instrument of remedial relief offering the international buyer the opportunity to salvage the proportion of his bargain and at the same time avoid costly and timely legal proceedings. As such, a call is hereby made for a possible reform of SGA 1979 to include the buyer's right to reduce the price on the basis of a legally enforceable formula.

Chapter 5 The Buyer's Right to Declare the Contract Avoided

5.1 Introduction

It has been colourfully said that terminating the contract is ‘the hardest sword that a party to a sales contract can draw if the other party has breached the contract.’¹ If one considers that ‘getting the promised performance is the only pure contractual interest,’² then avoidance, terminating the contract and releasing both parties from their obligations under it, (subject to any damages that may be due) certainly is that.³ Indeed, ‘no other remedy -claim for performance, price reduction, damages- has the same incisive effect.’⁴

Avoidance of the contract in the CISG is described as ‘a remedy of last resort (*ultima ratio*) that is available when the buyer can no longer be expected to continue the contract.’⁵ In light of the preceding Chapters, comparatively examining a number of provisions designed to facilitate performance after a breach of contract as a means of restraining the scope of avoidance and preserving the contract, this is certainly the case. In line with the CISG’s pro-contractual spirit (*favor contractus*), the buyer’s right to declare the contract avoided in the CISG is primarily determined by the existence of a fundamental breach as defined by Article 25 CISG. As Keller puts it whilst referring to the notion of fundamental breach, ‘only if the failure to perform destroys the core of the reciprocal exchange [can] it disrupt the contractual relation.’⁶

This Chapter will compare the buyer’s right to declare the contract avoided according to the CISG, as well as a number of relevant provisions, with the buyer’s right to terminate the contract in English sales law and equivalent relevant provisions. Given the number of provisions examined herein, each section of this chapter takes the basic format: an

¹ Ulrich Magnus, ‘The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases’ (2005-06) 25(1) J.L. & Com. 423, 423.

² Daniel Friedmann, ‘The Performance Interest in Contract Damages’ (1995) 111 L.Q.R. 628, 629.

³ Article 81(1) CISG.

⁴ Magnus, ‘The Remedy of Avoidance of Contract under CISG’ (n1) 423.

⁵ UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012 Edition) 236. See *Bundesgerichtshof* (Germany) 3 April 1996 (Unilex).

⁶ Bertram Keller, ‘Favor Contractus: Reading the CISG in Favour of the Contract’ in Camilla Andersen and Ulrich Schroeter (eds), *Sharing International Commercial Law across National Boundaries* (Wildy, Simmonds and Hill Publishing 2008) 247, 258.

exposition of the CISG provision, followed by an exposition of the equivalent English sales law rule followed by the comparison. This Chapter starts by comparatively examining the nature of the buyer's right to declare the contract avoided. Before comparatively examining the buyer's right to declare the contract avoided, this chapter will first comparatively examine the effects of avoidance 'so as to highlight the issues that are at stake in making avoidance available as a remedy for non-performance of the contract.'⁷ The effects of avoidance are then followed by comparatively examining the buyer's right to declare the contract avoided and when he loses his right to do so.

5.1.1 A Note on Terminology

The buyer's right to 'avoid' the contract under the CISG corresponds to the buyer's right to 'terminate' the contract under English law and as such 'avoidance' and 'termination' are used interchangeably. In English law, 'termination' is used to describe the remedy by which the injured party 'is released from his obligation to perform because of the other party's defective performance or non-performance,' i.e. breach.⁸ 'A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is expected of him under the contract, or performs defectively or incapacitates himself from performing.'⁹ The CISG 'speaks of avoidance for non-performance and mixes the language of breach and non-performance, instead of simply referring to breach.'¹⁰

Avoidance in the CISG, or termination in English law, should therefore be distinguished from avoidance (or rescission) in English law which 'is retrospective, cancelling the contract from the beginning, so that it is deemed never to have existed.'¹¹ The right to rescind in English law 'derives from some external act or event (such as misrepresentation, duress, undue influence) which precedes the contract and constitutes an improper inducement to enter into it, such that the law will allow the party affected to resile from the bargain and cancel it from the beginning.'¹² It is interesting to note that the UNIDROIT Principles of International Commercial Contracts (UPICC) also

⁷ Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59 I.C.L.Q. 911, 912.

⁸ G.H. Treitel, *The Law of Contract* (Edwin Peel (ed), 13th edition, Sweet & Maxwell 2011) 850.

⁹ Ibid 828.

¹⁰ Michael Bridge, *The International Sale of Goods* (3rd edition, OUP 2013) 566.

¹¹ Ewan McKendrick (ed), *Goode on Commercial Law* (4th edition, Penguin 2010) 86-87.

¹² Ibid 87.

reserve the term ‘avoidance’ for issues.¹³ Arguably, the use of the term ‘avoidance’ by the CISG is terminologically awkward and perhaps the term ‘termination’ would have been more appropriate.¹⁴ However, the CISG uses the term ‘termination’ in Article 29 CISG which is different from ‘avoidance’ according to Article 49 CISG. Article 29 CISG refers to ‘termination’ but this provision governs the termination of the contract by the mere agreement of the parties.¹⁵ Accordingly, ‘the termination of the contract by agreement in accordance with Article 29(1) needs to be strictly distinguished from a unilateral avoidance of the contract in accordance with Article 49(1).’¹⁶ While the latter is subject to strict requirements (as will be examined herein) these requirements do not apply to contract termination under Article 29(1) CISG, which, according to Article 29(2) CISG, merely requires the parties’ agreement.¹⁷ The CISG’s use of the term ‘avoidance’ for a unilateral termination can therefore be justified in wanting to distinguish it from termination of the contract by mere agreement between the parties.¹⁸

5.2 Declaration of Avoidance

5.2.1 Under the CISG

As provided by Article 26 CISG, the buyer must declare the contract avoided by means of a notice to the seller.¹⁹ In particular, Article 26 CISG, which is applicable to all of the CISG provisions on avoidance concerning the buyer (Articles 49, 51, 72 and 73 CISG) and contractually agreed grounds for avoidance,²⁰ provides that ‘a declaration of avoidance of the contract is effective only if made by notice to the other party.’ Since the right of avoidance ‘is made dependent on a declaration’ this means that ‘the entitled party can consciously decide to continue to claim performance of the contract, even when there are grounds for avoidance.’²¹

¹³ See Chapter 3 (Validity) of the UPICC (2010).

¹⁴ Bridge, *The International Sale of Goods* (n10) 565.

¹⁵ Article 29 CISG reads: ‘(1) A contract may be modified or terminated by the mere agreement of the parties. (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.’

¹⁶ Ulrich Schroeter, ‘Article 29’ in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods* (3rd edition, OUP 2010) 471, 479.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See *Kantonsgericht des Kantons Zug* (Switzerland) 30 August 2007 (CLOUT No. 938).

²⁰ Fritz Enderlein and Dietrich Maskow (eds), *International Sales Law* (Oceana Publications 1992) 117.

²¹ Ibid 116.

It follows that there is no automatic or *ipso facto* avoidance of the contract in the CISG, ‘an awkward and overbroad remedy,’²² conversely to the ULIS which provided for such a possibility ‘in certain circumstances in addition to avoidance by declaration of the buyer.’²³ According to the Secretariat Commentary, ‘automatic or *ipso facto* avoidance was deleted from the remedial system in [the CISG] because it led to uncertainty as to whether the contract was still in force or whether it has been *ipso facto* avoided.’²⁴ Article 26 is therefore viewed as marking ‘one of the significant advances of the [CISG] over the [ULIS].’²⁵

5.2.1.1 Form

On the basis of the principle of freedom from form requirements embodied in Article 11 CISG,²⁶ there is no particular form required for a notice declaring the contract avoided.²⁷ The CISG ‘is silent as to whether a proper notice must be communicated explicitly or whether it can be accomplished through implicit conduct.’²⁸ Nonetheless, courts and tribunals are often willing to accept any conduct which makes the buyer’s intention to distance himself from the contract clear.²⁹ Therefore, a notice declaring the contract avoided can be effected either by posting it, e-mailing it, faxing it etc. or even by way of oral communication.³⁰ In practice though, a tangible notice of avoidance in writing ‘is preferable to an oral communication (e.g. a telephone declaration) for evidentiary purposes.’³¹

²² John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Harry Flechtner (ed), 4th edition, Wolters Kluwer Law and Business 2009) 284.

²³ Secretariat Commentary, ‘Article [49]’ in UN, *United Nations Conference on Contracts for the International Sale of Goods; Official Records* (Vienna, 10 March – 11 April 1980) (UN Doc A/CONF.97/19) 41. See Michael Will, ‘Article 49’ in C.M. Bianca and M.J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987) 359, 360: ‘ULIS provided for two forms of avoiding the contract: an automatic or *ipso facto* avoidance in five specified cases and the usual form of avoidance by declaration. Only the latter survived.’

²⁴ Ibid. See further UNCITRAL, ‘*Ipso facto* avoidance’ in the Uniform Law on the International Sale of Goods (ULIS): Report of the Secretary-General (Working Group II, 3rd session, 17-28 January 1972) (UN Doc A/CN.9/WG.2/WP.9).

²⁵ Honnold, *Uniform Law* (n22) 283.

²⁶ Article 11 CISG reads: ‘A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.’

²⁷ If, however, a party’s principal place of business is in a State that has taken a reservation under Article 96 CISG, the notice may have to be in writing. See Article 96 CISG.

²⁸ Christopher Jacobs, ‘Notice of Avoidance under the CISG: A Practical Examination of Substance and Form Considerations, the Validity of Implicit Notice and the Question of Revocability’ (2002-03) 64 U Pitt L Rev 407, 407.

²⁹ Christiana Fountoulakis, ‘Article 26’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 438, 440-441.

³⁰ See *Cour d'appel de Rennes* (France) 27 May 2008 (CLOUT No. 1029) where it was held that ‘the notification by facsimile was in accordance with the requirements’ of Article 26 CISG.

³¹ Jacobs, ‘Notice of Avoidance under the CISG’ (n28) 411.

However, in cases where the contract, or if trade usages or practices established between the parties, provide for a specific form of declaration to be made, this form must be adhered to.³² In a case involving a contract for the sale of shoes between an Italian seller and a German buyer, the court held that the declaration of avoidance by the buyer was invalid because the declaration was not made in accordance with the provisions contained in the seller's general conditions of contract, which were printed on the back of the contract form, and which the court found to have been incorporated in the contract.³³

It is important that a declaration of avoidance, in any form, satisfies 'a high standard of clarity and certainty.'³⁴ The notice does not actually need to contain the word 'avoidance' but 'it must make clear that the injured party is no longer prepared to perform its duties under the contract as a result of the other party's breach.'³⁵ Any notice of avoidance 'should be interpreted in conformity with what a reasonable person would have understood in those same circumstances.'³⁶ Therefore, if a reasonable person would view a particular communication as a clear indication of avoidance, then a declaration of avoidance should be deemed to have been validly given. For example, a notice from the buyer informing the seller that the goods were 'immediately and totally' at his disposal, requesting a refund and refusing any further deliveries is and was held to be a valid declaration of avoidance.³⁷ On the other hand, in a case where the buyer, before taking legal action, asked the seller to choose between taking the goods back and allowing for a 50% discount, the declaration of avoidance was held to have been insufficient because of the ambiguity as to whether the contract should be terminated or upheld.³⁸

³² See Articles 6 and 9 CISG.

³³ *Amtsgericht Nordhorn* (Germany) 14 June 1994 (Unilex).

³⁴ Fountoulakis, 'Article 26' (n29) 440. See *ICC Court of Arbitration* (No. 9978) March 1999 (Unilex).

³⁵ Andrea Bjorklund, 'Article 26' in Stefan Kroll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG); Commentary* (C.H. Beck, Hart and Nomos 2011) 352, 353-354. See *Oberlandesgericht Frankfurt* (Germany) 17 September 1991 (Pace).

³⁶ *Ibid* 354.

³⁷ *Oberlandesgericht Köln* (Germany) 14 October 2002 (Pace).

³⁸ *Amtsgericht Zweibrücken* (Germany) 14 October 1992 (Pace). See also *Landgericht Frankfurt* (Germany) 16 September 1991 (Pace).

A declaration of avoidance can be combined with a notice of lack of conformity according to Article 39 CISG³⁹ or with the fixing of an additional period of time for performance by the seller of his obligations according to Article 47 CISG.⁴⁰

5.2.1.2 Dispatch Rule

Article 27 CISG provides that ‘unless otherwise expressly provided in [Part III (Sale of Goods) of the CISG], if any notice, request or other communication is given or made by a party in accordance with [that] Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.’ Article 27 CISG essentially provides that a delay, or error, in the transmission of the declaration of avoidance, or its failure to arrive, does not deprive the buyer of the right to rely on the declaration and avoid the contract since the risk of the safe transmission and receipt of the declaration is borne by the seller.

Accordingly, the buyer only has to prove actual dispatch of the declaration of avoidance and does not have to prove that the declaration reached the seller.⁴¹ Placing the risk on the addressee once the declaration has been dispatched, ‘is based on the idea that the party in breach must bear the risk of transmission of declarations of its contractual partner and reflects the Anglo-American dispatch theory.’⁴² The intention was to have, as far as possible, one rule governing the hazards of transmission as acceptance of a generalized receipt theory would have required that the CISG contain supporting procedural rules to establish whether a notice had in fact been received by the addressee, since legal systems which operated on the theory that notices were effective on dispatch often did not contain such supporting rules.⁴³ Nonetheless, Part III (Sale of Goods) of the CISG has exceptions to this rule in cases where it was considered that a communication ought to be received to be effective such as Articles 47(2), 48(4) and 79(4) among others.⁴⁴

³⁹ *Audiencia Provincial de Castellon* (Spain) 21 March 2006 (Pace); *Bundesgerichtshof* (Germany) 25 June 1997 (Pace).

⁴⁰ *Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry* 2 November 2004 (Pace).

⁴¹ *Oberster Gerichtshof* (Austria) 30 June 1998 (Unilex); *Oberlandesgericht Naumburg* (Germany) 27 April 1999 (Unilex); *Oberlandesgericht München* (Germany) 17 November 2006 (Pace).

⁴² Fountoulakis, ‘Article 26’ (n29) 442.

⁴³ Secretariat Commentary, ‘Article [27]’ in *Official Records* (n23) 27.

⁴⁴ *Ibid.*

However, the buyer has to dispatch the declaration using ‘means appropriate in the circumstances’ in order to benefit from the rule in Article 27 CISG. This is thought to be ‘a flexible, balancing-approach formula.’⁴⁵ One should examine ‘the actual circumstances surrounding the parties to the transaction before determining what means used by the party giving the notice can qualify as appropriate.’⁴⁶ In cases where there may be more than one means of communication which is appropriate in the circumstances, the buyer ‘may use the one which is the most convenient for him.’⁴⁷ In a case involving a contract for the sale of trees between an Italian seller and a Dutch buyer, the court ‘held that the means of communication used by the buyer to notify its complaints (fax messages and registered mails) were appropriate in the sense of Article 27 CISG.’⁴⁸ Nevertheless, where the buyer ‘uses an inappropriate means of transmission, the risk of delay, error or failure in transmission is generally on [the buyer], which may render the declaration ineffective.’⁴⁹

5.2.1.3 Instances Not Requiring a Declaration of Avoidance

In exceptional cases where it is sufficiently clear that performance will not take place because the seller has ‘seriously and ultimately’ refused performance, ‘requiring an express declaration of avoidance would amount to unjustified formalism’ and this requirement can therefore be dispensed with.⁵⁰ In a case concerning a contract for the supply of iron-molybdenum, the goods were never delivered to the buyer as the seller did not receive delivery of the goods from its supplier.⁵¹ According to the facts of the case as reported, ‘after expiry of an additional period of time for delivery, the buyer concluded a substitute transaction with a third party and sued the seller for the difference between the price paid and the price under the contract.’⁵² The court held that ‘an explicit declaration of avoidance was unnecessary once the seller refused to perform its delivery obligation and that to insist on such a declaration would be contrary to the principle of good faith (Article 7(1) CISG).’⁵³ ‘Such a declaration is dispensable as long

⁴⁵ Samuel Date Bah, ‘Article 27’ in Bianca and Bonell, *Commentary* (n23) 228.

⁴⁶ Ibid.

⁴⁷ Secretariat Commentary, ‘Article [27]’ in *Official Records* (n23) 27.

⁴⁸ *Rechtbank Arnhem* (The Netherlands) 11 February 2009 (Unilex).

⁴⁹ UNCITRAL, *Digest* (n5) 124.

⁵⁰ *Oberlandsgericht München* (Germany) 15 September 2004 (CLOUT No. 595).

⁵¹ *Oberlandesgericht Hamburg* (Germany) 28 February 1997 (CLOUT No. 277).

⁵² Ibid.

⁵³ Ibid.

as the avoidance of the contract is possible in principle and it is certain that the seller will not perform its obligations at the time the substitute purchase is made.’⁵⁴

5.2.1.4 Withdrawal

Whether a declaration of avoidance can be revoked or withdrawn, and another remedy be pursued is not addressed in the CISG. Nonetheless, it is argued that such a possibility does exist and depends ‘on the particular facts of the situation and the general principles of the Convention, including the promotion of good faith in international transactions and the protection of a party (even a breaching party) if it has reasonably relied on the declaration of avoidance.’⁵⁵ Drawing from Articles 29(2)⁵⁶ and 16(2)(b) CISG:⁵⁷ ‘if the addressee of a notice is not aware of the communication of avoidance (...), or has not relied and changed its position, he doesn’t need protection.’⁵⁸ In other words, where the seller is not aware of a declaration, for example because it has yet to reach him, or because he has received it but has not changed his position as a result, the buyer can withdraw it since the seller has not yet acquired any position worthy of protection.⁵⁹ Thus, a declaration of avoidance is revocable ‘as long as the addressee has not adjusted itself to it’ and acted accordingly.⁶⁰ However, caution should be taken in not phrasing this as a ‘hard and fast’ rule and disregarding the ‘particular features of a certain declaration and the circumstances of a given case.’⁶¹

5.2.1.5 Wrongful Declaration of Avoidance

The effect of a wrongful declaration of avoidance by the buyer ‘will depend on the reaction of the [seller], whether or not the goods and payment have passed, and whether

⁵⁴ Ibid.

⁵⁵ Honnold, *Uniform Law* (n22) 285. See *Højesteret* (Denmark) 3 May 2006 (Pace), where the buyer was entitled to revoke its avoidance, in accordance with CISG general principles, repair the machine and recover damages under Article 74 CISG when the seller unjustifiably refused to accept the buyer’s declaration of avoidance.

⁵⁶ Article 29(2) CISG reads: ‘A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.’

⁵⁷ Article 16(2) CISG reads: ‘However, an offer cannot be revoked: (a) [...] (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.’

⁵⁸ Harry Flechtner (ed), ‘Transcript of a Workshop on the Sales Convention: Leading CISG Scholars discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, *Nachfrist*, Contract Interpretation, Parol Evidence, Analogical Application, and much more’ (1999) 18 J.L. & Com. 191, 255.

⁵⁹ Ulrich Schroeter, ‘Article 27’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 457.

⁶⁰ Fountoulakis, ‘Article 26’ (n29) 444.

⁶¹ Peter Schlechtriem, ‘Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG’ (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods* 95, 114.

the [buyer] still wants to be bound by the contract.⁶² In particular, ‘where both parties have already completed performance of their obligations under the contract, a wrongful declaration of avoidance, without more, need not be of any legal consequence; only where the [buyer] who wrongfully declared the contract avoided starts to attempt restitution will legal consequences ensue.’⁶³ However, ‘where performance of the contract is still outstanding,’ the buyer’s wrongful declaration can be construed as an anticipatory breach and the seller will have to consider his legal remedies.⁶⁴

According to Dimsey, and on the basis of case law, ‘the issue of wrongful avoidance is not - and cannot be - addressed at the time it is made, but rather is the subject of *ex post* analysis in court or arbitral proceedings at a time when performance of the contract has long been abandoned.’⁶⁵ Therefore, ‘in practice, most cases of wrongful avoidance are resolved through damages: a declaration of wrongful avoidance is only as serious as the [seller] incurs quantifiable loss as a result of it.’⁶⁶

5.2.2 In English Sales Law

Just like in the CISG, a breach on behalf of the seller justifying termination of the contract ‘does not automatically determine the contract’ but only gives the buyer ‘the option either to terminate the contract or to affirm it and to claim further performance.’⁶⁷ The rationale behind this rule is to prevent a guilty party from relying on his own wrong ‘so as to obtain a benefit under the contract, or to excuse his own failure of further performance, or in some other way to prejudice the injured party’s legal position under the contract.’⁶⁸

‘On principle, the contract only comes to an end if [the buyer] accepts the breach.’⁶⁹ This, however, ‘requires a positive act’ for example, the buyer rejecting the goods and giving notice of his wish to terminate the contract to the seller⁷⁰ or to a third party if the

⁶² Mariel Dimsey, ‘Consequences of Avoidance under the CISG’ in Stefan Kroll and others (eds), *Liber Amicorum Eric Bergsten; International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 525, 540.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid 549.

⁶⁶ Ibid.

⁶⁷ Treitel, *The Law of Contract* (n8) 852.

⁶⁸ Ibid 853.

⁶⁹ Michael Bridge and others (eds), *Benjamin’s Sale of Goods* (8th edition (Inc. Supp), Sweet & Maxwell 2010) para. 12-027.

⁷⁰ Ibid; Treitel, *The Law of Contract* (n8) 857.

seller cannot be traced.⁷¹ At this point it must be clarified that a right to reject the goods is not merely a particular form of the right to terminate the contract.⁷² Bridge explains that ‘although termination entails rejection, it does not logically follow that a buyer entitled to reject goods is thereby entitled to or does terminate the contract.’⁷³ Where there is a breach of a condition, section 11(3) SGA 1979 merely states that it ‘may give rise to a right to treat the contract as repudiated’ but other than that unfortunately, ‘the link between termination and rejection is left obscure by the [SGA 1979].’⁷⁴

The primary requirement in effectively terminating a contract is that the behaviour of the buyer ‘must unequivocally indicate his intention to exercise the option to terminate the contract’⁷⁵ as ‘mere silence or inactivity’ may not suffice.⁷⁶ For example ‘a notice which purports to terminate the contract, but stipulates unilaterally that it shall continue to be performed on a without prejudice basis is not effective.’⁷⁷ Nevertheless, an unequivocal intention to terminate the contract could also include ‘inactivity’ which could suffice depending on the circumstances,⁷⁸ the entering of a substitute contract⁷⁹ or the commencement of proceedings brought on the contract.⁸⁰

Once the buyer has terminated, ‘he cannot later affirm and demand performance: this follows from the rule that termination releases the defaulting party from his primary obligation to perform.’⁸¹ However, where the buyer’s ‘original reaction to the breach is to press for performance,’ this does not release the seller from any obligation; ‘nor does [the buyer], by demanding performance after breach, necessarily waive his right to terminate, since such a demand is not of itself a “clear and unequivocal” representation that the right [to terminate the contract] will not be exercised.’⁸² Provided that ‘there are no other circumstances from which such a representation can be inferred, the [buyer]

⁷¹ *Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG* [2002] CLC 1246.

⁷² McKendrick, *Goode on Commercial Law* (n11) 370.

⁷³ Michael Bridge, *The Sale of Goods* (3rd edition, OUP 2013) 532.

⁷⁴ *Ibid* 533.

⁷⁵ Treitel, *The Law of Contract* (n8) 857.

⁷⁶ *State Trading Corp of India v M Golodetz Ltd* [1989] 2 Lloyd’s Rep. 277 at 286.

⁷⁷ Treitel, *The Law of Contract* (n8) 857.

⁷⁸ *Vitol SA v Norelf Ltd* [1996] A.C. 800.

⁷⁹ *Gunton v Richmond-upon-Thames LBC* [1981] Ch. 448.

⁸⁰ *Downing v Al Tameer Establishment* [2002] EWCA Civ 721.

⁸¹ Treitel, *The Law of Contract* (n8) 863-864.

⁸² *Ibid* 864.

can therefore still terminate the contract if the [seller] does not comply with the demand for performance.’⁸³

5.2.3 Comparison

While the CISG requires a specific declaration of avoidance mechanism by means of notice (Article 26 CISG), English sales law requires ‘a positive act’ on behalf of the buyer wishing to exercise the option to terminate the contract and that his behaviour ‘must unequivocally indicate his intention to exercise that option.’ Therefore, there is no automatic termination of contract in both systems. This means that in both systems the buyer can consciously decide to continue to claim performance of the contract even when there are grounds for avoidance. Accordingly, both systems award the buyer the opportunity to elect to terminate the contract or continue to pursue it depending on the particular circumstances of each case and the buyer’s interests.

If the buyer elects to terminate the contract, a valid declaration of avoidance by means of a notice allows parties, having regained their freedom of disposition among other effects,⁸⁴ to swiftly and confidently plan their next business moves. There should be no problems in identifying the date avoidance takes effect since Article 27 CISG makes a declaration of avoidance effective on dispatch.⁸⁵ The same applies for English sales law. If the buyer elects to continue to claim performance, ‘the rule also has the effect of preserving the contract and its specific performance.’⁸⁶ The fact that the CISG offers the buyer the opportunity to continue to claim performance of the contract even when there are grounds for avoidance is especially important in an international setting as it provides the buyer with a supportive framework in which to take decisions freely according to the particular circumstances of each case and relevant interests. English sales law does essentially the same.

Although the specific requirement in the CISG that the buyer must declare the contract avoided by means of notice might *prima facie* seem burdensome to an English merchant, who might consider the right to terminate the contract under English sales law as merely a question ‘of fact,’⁸⁷ in effect, both systems require the buyer to clearly and unambiguously communicate his decision to terminate the contract to the seller

⁸³ Ibid.

⁸⁴ The effects of avoidance are examined in section 5.3 below.

⁸⁵ See section 5.2.1.2 below.

⁸⁶ Enderlein and Maskow, *International Sales Law* (n20) 116.

⁸⁷ Ibid 857.

either explicitly or implicitly. On this basis, both systems eliminate any uncertainty as to whether the contract is still in force or whether it has been avoided.

In light of the above, and given the correspondence between the two systems in relation to the nature of the buyer's right to declare the contract avoided, the requirement according to the CISG that the buyer declares the contract avoided by means of a notice (Article 29 CISG) cannot be said to have significant practical consequences.

5.3 Effects of Avoidance

5.3.1 Under the CISG

According to Article 81(1) CISG, 'avoidance of the contract releases both parties from their primary performance obligations under it, subject to any damages which may be due.'⁸⁸ Both parties 'are no longer entitled to perform those obligations.'⁸⁹ Therefore, 'upon declaration of contract avoidance, any unperformed original contract obligation is cancelled;' i.e., the buyer's duty to pay or take delivery, which if it has yet to be performed, is cancelled.⁹⁰ The buyer is released from these obligations 'with immediate effect' and regains his 'freedom of disposition.'⁹¹

Moreover, Article 81(1) CISG clarifies that 'avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.' Consequently, jurisdiction and arbitration clauses, choice of law clauses, provisions for penalty and related payments, *force majeure* clauses, exclusion and limitation clauses and clauses making provision for the return of the goods, all survive avoidance of the contract.⁹²

The CISG 'does not deal with the effect that the contract may have on the property in the goods sold;' 'in the event of avoidance of the contract, the effect of a reservation of

⁸⁸ ICC Court of Arbitration (No. 9887) August 1999 (Unilex); *Oberlandesgericht Köln* (Germany) 19 May 2008 (Pace).

⁸⁹ CISG Advisory Council Opinion No.9, 'Consequences of Avoidance of the Contract' (2008) para 3.2, available at <http://www.cisgac.com/index.php>

⁹⁰ Christiana Fountoulakis, 'Article 81' in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 1100, 1101. See *Tribunal of International Commercial Arbitration at the Ukraine Chamber of Commerce and Trade*, (Ukraine) 5 July 2005 (Pace); *Bundesgerichtshof* (Germany) 25 June 1997 (Pace); *Tribunal Cantonal du Valais* (Switzerland) 21 February 2005 (Pace).

⁹¹ Ibid.

⁹² CISG Advisory Council Opinion No.9 (n89) para 3.3.

title clause is a matter for the applicable law governing proprietary matters and not for the [CISG].⁹³

5.3.1.1 Restitution

The CISG ‘at the point of avoidance introduces new rights and duties to give effect to avoidance by transforming the original contractual relationship into a winding-up or restitutionary relationship.’⁹⁴ Article 81(2) CISG provides that ‘a party who has performed the contract either wholly, or in part, may claim restitution from the other party of whatever the first party has supplied or paid under the contract.’ Restitution essentially means the return of the goods supplied and of the price paid, which according to the CISG Advisory Council’s Opinion, ‘should presumptively be’ in the currency of payment.⁹⁵

Restitution between the seller and the buyer must be ‘concurrent.’⁹⁶ This means that ‘each party has a type of security in not having to give credit to the other.’⁹⁷ For example, where the seller goes bankrupt, the buyer is protected by the concurrency rule from having to make restitution and return the goods.⁹⁸

The place of restitution in relation to the goods and in relation to the repayment of the purchase price ‘is not dealt with expressly’ by the CISG and ‘so is to be determined by the general principles on which the [CISG] is based.’⁹⁹ Accordingly, and on the basis of avoiding economic waste, depending on the circumstances of each case, restitution of the goods should take place at the buyer’s premises, or at the agreed place of delivery, or at the place where the buyer acting reasonably has warehoused the goods whereas restitution of the price should take place at the buyer’s premises or at a bank of the buyer’s choice.¹⁰⁰ Similarly, the CISG is silent in relation to the time of restitution ‘but performance within a reasonable time may be inferred as a general principle under Article 7(2), in the absence of an agreed time, upon or after avoidance of the contract.’¹⁰¹

⁹³ Ibid, para 3.6. See Article 4(b) CISG.

⁹⁴ Ibid, para 3.7.

⁹⁵ Ibid, para 3.8.

⁹⁶ Ibid, para 3.11.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid, paras 3.12 - 3.15.

¹⁰¹ Ibid, para 3.17.

Equalization of Benefits

Article 84 CISG is an important component of the rules on restitution as ‘it governs the parties’ duty to mutually account for all benefits which they have derived from the temporary exchange of performances.’¹⁰² The goal is for the parties ‘to be reinstated in the economic position in which they were before exchanging performances.’¹⁰³ This provision applies to both full and partial avoidance of a contract by the buyer.¹⁰⁴

If the contract has been avoided and the seller is bound to refund the price he received, according to Article 84(1) CISG, the buyer is entitled to receive interest on it, from the date on which the price was paid. This provision, in contrast to Article 78 CISG, which concerns the duty to pay interest on a sum that is in arrears, ‘is based on the idea of equalization of benefits: the seller must account for the benefits it has derived from receipt and use of the purchase price.’¹⁰⁵ Fountoulakis explains that ‘the decisive factor in Article 84(1) is that the seller received the purchase price and was then able to use it for further commercial operations’ when normally he would have needed to take out a loan.¹⁰⁶ As the possibility to use the money existed at the seller’s place of business, if the parties did not agree on a rate of interest, interest on the purchase price is usually determined by the commercial investment rate prevailing at the seller’s place of business.¹⁰⁷ It is applied from the date the seller received the price to the date that repayment is made to the buyer and should presumptively be in the currency of payment.¹⁰⁸

Article 84(2) CISG provides that the buyer ‘must account to the seller for all benefits which he has derived from the goods or part of them.’ The seller’s claim ‘is one for money’ which means that the buyer will ‘have to pay to the seller all benefits resulting from the leasing of goods, the sale of products of the goods, the grant of licences to third parties in return for remuneration, the grant of the right to copy or reproduce protected goods, etc.’¹⁰⁹ ‘These benefits should also be net benefits, after the cost of

¹⁰² Christiana Fountoulakis, ‘Article 84’ in Schwenger, *Schlechtriem and Schwenger Commentary* (n16) 1130, 1132.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* 1136.

¹⁰⁶ *Ibid* 1136-1137.

¹⁰⁷ *Ibid* 1137; CISG Advisory Council Opinion No.9 (n89) para 3.24-3.26.

¹⁰⁸ CISG Advisory Council Opinion No.9 (n89) para 3.24-3.26.

¹⁰⁹ Fountoulakis, ‘Article 84’ (n102) 1138-1139.

using or enjoying the goods has been taken into account.’¹¹⁰ ‘The burden of proof is on the seller to show that the buyer has obtained benefits.’¹¹¹

5.3.1.2 Preservation of the Goods

The CISG generally requires that the parties ‘take care of the goods if they are rejected or not taken over by the buyer.’¹¹² While Article 85 CISG concerns the seller, Article 86 CISG concerns the buyer and provides his obligation to preserve the goods. Articles 87 and 88 CISG lay down details in relation to both parties’ obligation to preserve the goods. If the buyer infringes one of his duties as provided in the aforementioned provisions, the seller in general is entitled to claim damages according to Articles 45 and 74 CISG.¹¹³

Article 86(1) CISG provides that, ‘if the buyer has received the goods and intends to exercise any right under the contract or [the CISG] to reject them, he must take such steps to preserve them as are reasonable in the circumstances’ and that ‘he is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.’ A condition of this provision is that the buyer must have received the goods and he is considered to have received the goods ‘if he has got possession of them.’¹¹⁴ ‘The second condition is that the buyer intends to exercise a right to reject the goods.’¹¹⁵ Such a right exists in cases where the contract is avoided in accordance with Articles 49, 51(2), 72 and 73 CISG or if the buyer requires delivery of substitute goods in accordance with Article 46(2) CISG.¹¹⁶ There may also be a right to reject goods that have either been delivered early or are of an excess quantity in accordance with Article 52 CISG.¹¹⁷

If the buyer is not yet in possession of goods but the goods have been placed at his disposal at their destination and he exercises the right to reject them, according to Article 86(2) CISG, he must take possession of them on behalf of the seller, as long as this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision will not however apply if the seller, or a person authorizes to take charge of the goods on his behalf, is present at the destination. The

¹¹⁰ CISG Advisory Council Opinion No.9 (n89) para 3.28.

¹¹¹ Ibid.

¹¹² Klaus Bacher, ‘Introduction to Articles 85-88’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 1146, 1146.

¹¹³ Ibid 1147.

¹¹⁴ Klaus Bacher, ‘Article 86’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 1154, 1155.

¹¹⁵ Ibid.

¹¹⁶ Ibid. See section 5.4 below.

¹¹⁷ Ibid.

rationale behind Article 86(2) CISG is the protection of the goods - ‘the party which is in a better position to gain control of the goods is obliged to care for them in case of conflict, until it is clear what will happen with the goods in the end.’¹¹⁸

According to Article 87 CISG, which applies by virtue of Article 86 CISG, if a buyer is bound to preserve the goods, he may deposit them in a warehouse of a third person at the expense of the seller, provided that the expense incurred is not unreasonable. It should be clarified that the buyer ‘is entitled, but not obliged, to deposit the goods in a third person’s warehouse.’¹¹⁹ Nevertheless, depositing the goods in a warehouse ‘is only admissible if the resulting costs are not unreasonable.’¹²⁰ ‘Provided these expenses are not unreasonable,’ the seller must reimburse the buyer the expenses resulting from the deposition of the goods to a warehouse.¹²¹

Article 88(1) CISG grants to a buyer who is under an obligation to preserve the goods the right to sell the goods in a so-called ‘self-help sale.’¹²² To be exact, according to Article 88(1) CISG, a buyer who is bound to preserve the goods in accordance with Article 86 CISG ‘may sell them by any appropriate means if there has been an unreasonable delay by the [seller] in taking possession of the goods or in taking them back or in paying the price or cost of preservation, provided that reasonable notice of the intention to sell has been given to the [seller].’ The purpose of such notice is to ultimately give the seller ‘the opportunity to fulfil his obligations, so as to avoid the sale’ of the goods.¹²³ If the seller ‘merely objects to the sale, this will have no legal effect.’¹²⁴ According to the dispatch rule as provided in Article 27 CISG, the notice does not have to reach the seller in order to be effective.¹²⁵

According to Article 88(2) CISG, ‘if the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a [buyer] who is bound to preserve the goods in accordance with [Article 86] must take reasonable measures to sell them’ in what would basically be an emergency sale.¹²⁶ To the extent possible the buyer must

¹¹⁸ Ibid 1156.

¹¹⁹ Klaus Bacher, ‘Article 87’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 1160, 1160.

¹²⁰ Ibid.

¹²¹ Ibid 1162.

¹²² Klaus Bacher, ‘Article 88’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 1163, 1163.

¹²³ Ibid 1165.

¹²⁴ Ibid.

¹²⁵ See section 5.2.1.2 above.

¹²⁶ Bacher, ‘Article 88’ (n122) 1163.

give notice to the seller of his intention to sell. In both cases of sale under Articles 88(1) and (2) CISG, ‘the purpose is to avoid unnecessary expense.’¹²⁷

Article 88(3) CISG, which applies to both Articles 88(1) and (2) CISG, provides that ‘a [buyer] selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them but must account to the [seller] for the balance.’

5.3.2 In English Sales Law

The effect of termination of the contract under English sales law is ‘to relieve both parties (guilty as well as innocent) of their primary duties of performance and their primary right to demand performance.’¹²⁸ Therefore, after termination, the buyer ‘is no longer bound to accept or pay for further performance.’¹²⁹ Essentially, ‘by the act of termination the [seller’s] duty to perform is converted into an obligation to pay damages, while the [buyer’s] right to demand performance and to earn further sums by reason of his own future performance is converted into a right to damages.’¹³⁰ The important thing to note here in relation to the effects of termination on the obligations of the two parties is that the seller comes, as a result of termination, under a secondary obligation to pay damages and that ‘his liability in damages may relate both to breaches committed before termination and to losses suffered by the [buyer] as a result of the non-performance of future obligations brought about by termination.’¹³¹

5.3.2.1 Restitution

Where a buyer justifiably rejects the goods and terminates the contract, he can sue for damages, where ‘any award will take into account, and may include, any part of the price paid.’¹³² Alternatively, he may ‘recover any money he has paid in restitution as upon total failure of consideration.’¹³³ To be exact, the buyer can ‘recover back money paid under a contract if there is a “total failure of consideration”, i.e. if no part of the performance for which he bargained has been rendered.’¹³⁴ This right of the buyer, only

¹²⁷ Ibid.

¹²⁸ McKendrick, *Goode on Commercial Law* (n11) 137.

¹²⁹ Treitel, *The Law of Contract* (n8) 858. See *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849.

¹³⁰ Ibid.

¹³¹ Ibid 860-861.

¹³² *Benjamin’s Sale of Goods* (n69) para 12-069.

¹³³ Ibid.

¹³⁴ Treitel, *The Law of Contract* (n8) 1131.

exercisable though where the buyer has terminated the contract, is expressly preserved by section 54 SGA 1979¹³⁵ which reads:

Nothing in this Act affects the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

On the basis that the buyer would not have to prove ‘loss nor to mitigate,’ it is argued that a claim of total failure of consideration ‘may be simpler than a claim for damages.’¹³⁶ Moreover, such a claim ‘may indeed yield more than a claim for damages would, especially on a falling market, though where other loss can be proved a claim for damages may be preferable.’¹³⁷ However, if the buyer affirms the transaction by accepting the goods, it will be ‘too late to sue upon a total failure of consideration.’¹³⁸ According to Devlin J. in *Kwei Tek Chao v British Traders and Shippers Ltd.*¹³⁹

‘If goods have been properly rejected, and the price has already been paid in advance, the proper way of recovering the money back is by action for money paid for a consideration which has totally failed, *i.e.* money had and received; but that form of action is governed by exactly the same rules with regard to affirming or avoiding the transaction as in any other case.’

In *Yeoman Credit Ltd v Apps*¹⁴⁰ the buyer entered into a hire-purchase agreement for a second-hand car. When the car proved seriously defective, to an extent, which the court held, would have entitled the buyer to reject it, although complaining for the car’s defects, he paid three monthly instalments and kept the car until it was reclaimed by the owner after six months. The court held that the buyer could not recover the money paid and confined him to a claim for damages.

Although the buyer must return the goods as they were in order to be able to sue upon a total failure of consideration,¹⁴¹ ‘this requirement does not apply where his inability to restore them is due to the very defect which has given rise to the right to reject.’¹⁴² This

¹³⁵ *Benjamin’s Sale of Goods* (n69) para 12-069.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ [1954] 2 QB 459 at 475.

¹⁴⁰ [1962] 2 QB 508.

¹⁴¹ *Benjamin’s Sale of Goods* (n69) para 12-070.

¹⁴² Treitel, *The Law of Contract* (n8) 1134.

will also be the case where restoration of the goods 'is made impossible by some external cause for which neither party was responsible.'¹⁴³

Nevertheless, even if the goods are returned, the buyer may have derived some benefit from them (as a result of using the goods), which cannot render the failure of consideration as total and as such possibly block the buyer's right to sue for total failure of consideration. Use for the sole purpose of testing it is disregarded and so does not impair the right of the buyer to get his money back.¹⁴⁴ But any further use may prevent the failure of consideration from being total and as such bar a claim of total failure of consideration.

According to *Hunt v Silk*,¹⁴⁵ if a party has received any part of the benefit that he contracted for, there cannot be a total failure of consideration. In *Rowland v Divall*¹⁴⁶ though, the buyer, who was a car dealer, recovered the whole of the price, even though he and his sub-buyer could use the car for months, after the court held that there had been a total failure of consideration. The reasoning was that the buyer had not 'received any portion of what he agreed to buy... He did not get what he paid for – namely a car to which he would have title.'¹⁴⁷ As the buyer was a car dealer Treitel argues that this is a reasonable view since the buyer did not want to use the car but simply resell it and make a profit which he did not in the end.¹⁴⁸ Nevertheless, *Rowland v Divall* has attracted criticism 'on the ground that the buyer recovered the *whole* price even though he and his sub-buyer had had the use of the car for some months.'¹⁴⁹ Treitel suggests that 'one way of meeting this criticism would be to reduce the buyer's claim for the return of the price by giving the seller the right to an allowance in respect of the benefit obtained by the buyer from his use of the subject-matter.'¹⁵⁰ The particular issues raised in *Rowland v Divall* concerning the remedies for breach of the implied terms as to title encumbrances and quiet possession and Treitel's suggestion were in fact considered

¹⁴³ Ibid.

¹⁴⁴ *Baldry v Marshall* [1925] 1 QB 260.

¹⁴⁵ (1804) 5 East 449.

¹⁴⁶ [1923] 2 KB 500.

¹⁴⁷ Ibid at 504.

¹⁴⁸ Treitel, *The Law of Contract* (n8) 1136.

¹⁴⁹ Ibid 1138.

¹⁵⁰ Ibid.

during the Sale and Supply of Goods consultation process¹⁵¹ but rejected on the basis of complexity.¹⁵²

5.3.2.2 Rejected Goods

Where the goods are rejected by the buyer, section 36 SGA 1979 provides that the buyer 'is not bound to return the goods to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.' Therefore, where the buyer rightfully rejects the goods, he may return them at the place of examination 'there and then at the hands of the seller,'¹⁵³ 'a rule which may cause hardship to the seller.'¹⁵⁴ This means the goods 'continue or become the property, and as such become at the risk and expense, of the seller.'¹⁵⁵ 'The buyer cannot exercise any lien over them in respect of repayment of the price,' and 'he is in principle, no longer entitled to deal with them except by the express or implied authority of the seller.'¹⁵⁶ In *Laurelgates Ltd v Lombard North Central Ltd*,¹⁵⁷ a buyer rejected a car but continued to use it and also allowed the manufacturer to try and repair it. It was held that this was with the implied authority of the seller and did not invalidate the buyer's rejection of the car.

The buyer can also deal with the goods in 'the rare cases where the doctrine of agency of necessity operates.'¹⁵⁸ On the doctrine of agency of necessity, *Benjamin's Sale of Goods* explains:¹⁵⁹

'In certain circumstances of emergency a power is conferred by law upon one person to act on behalf of another, either where no contract of agency exists, or where the authority already given to an agent is inadequate to meet the situation. Under this principle the master of a ship may sell a cargo in order to protect the ship or cargo, as may any carrier of perishable goods; and a carrier or bailee of animals may incur expense in maintaining them. The doctrine of agency of necessity will apply only where the property is in the possession of the agent as the result of an existing legal relationship, such as a contract of bailment, there is a real emergency (as distinct from

¹⁵¹ Law Commission and The Scottish Law Commission, *Sale and Supply of Goods Consultation Document* (Law Com No 85, Scot Law Com No 58, 1983) paras 6.1 – 6.23.

¹⁵² Law Commission and The Scottish Law Commission, *Sale and Supply of Goods Report* (Law Com No 160, Scot Law Com No 101, 1987) paras 6.1 – 6.5.

¹⁵³ *Heilbutt v Hickson* (1872) LR 7 CP 438 at 456.

¹⁵⁴ *Benjamin's Sale of Goods* (n69) para 12-067.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 12-067.

¹⁵⁷ (1983) 133 NLJ 720. See also *Public Utilities Commission of City of Waterloo v Burroughs Business Machines Ltd* (1974) 52 DLR (3d) 481.

¹⁵⁸ *Benjamin's Sale of Goods* (n69) para 12-067.

¹⁵⁹ *Ibid* para 3-006.

mere inconvenience), communication with the principal is impossible, and the action is undertaken in good faith and is reasonable, proportionate and in the interests of the principal.’

Even so, the buyer is ‘an involuntary, or at least a gratuitous bailee, and as such owes a duty of care in relation to the goods; and this may entitle him to reimbursement for expenses incurred.’¹⁶⁰ ‘Beyond this, however, the goods seem to be at the seller’s risk,’ except in cases where the contract provides that the buyer shall return goods that have been rejected.¹⁶¹

5.3.3 Comparison

Both systems provide for restitution of the price and goods upon the avoidance or termination of the contract. However, restitution in English sales law through a claim of total failure of consideration seems to be limited by the rule established in *Hunt v Silk*. Although such a view is ‘only maintainable’ provided that the right to reject is exercised fairly quickly, *Benjamin’s Sale of Goods* argues that ‘the mere fact that the buyer has had some enjoyment of the subject matter should not of itself bar a claim upon a total failure of consideration;’¹⁶² ‘strong views have been expressed that the requirement of total failure, on which there are notable difficult cases,¹⁶³ should be abandoned, and restitution granted subject to allowances for benefits received; but only statute or the House of Lord can achieve this.’¹⁶⁴ Or eventual accession to the CISG, at least in relation to the international sale of goods. Article 84 CISG is indeed a point of departure between the two systems, as English law ‘makes no provision for the return of benefit and interest’¹⁶⁵ as such will bring about significant practical consequences for the buyer. Nevertheless, given the difficulties encountered by the courts in having to fairly adjudicate disputes involving possible benefits obtained from the subject matter of a contract which has been terminated, and the calls for abandoning the requirement of total failure of consideration, this thesis maintains that there is certainly room for an equivalent rule in English sales law.

¹⁶⁰ Ibid para 12-067.

¹⁶¹ Ibid.

¹⁶² *Benjamin’s Sale of Goods* (n69) para 12-070.

¹⁶³ See *Butterworth v Kingsway Motors* [1954] 1 W.L.R. 1286; *Barber v NSW Bank* [1996] 1 W.L.R. 641; *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912; *D.O. Ferguson & Associates Ltd v Sohl* (1992) 62 B.L.R. 95.

¹⁶⁴ *Benjamin’s Sale of Goods* (n69) para 12-070.

¹⁶⁵ Ibid, fn 12.

Bridge rightly considers the effects of avoidance under the CISG, apart from releasing the parties from their contractual obligations, ‘complex’ and as such breeding expense.¹⁶⁶ Indeed, the unwinding of an international sales contract considering the preservation and return of the goods and price plus interest is definitely not a cheap or a burden-free undertaking with significant practical consequences.¹⁶⁷ As such, these obligations would justifiably be a source of hostility towards the CISG by English merchants given the added effort, time and money the effects of avoidance under the CISG entail.

5.4 The Right to Declare the Contract Avoided

5.4.1 Fundamental Breach

5.4.1.1 Under the CISG

According to Article 49(1)(a) CISG, ‘the buyer can declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or [the CISG] amounts to a fundamental breach of contract.’ It must be remembered that a fundamental breach of contract is also required under Article 46(2) CISG, which provides the buyer the right to require delivery of substitute goods. As already stated in the Introduction to this thesis, ‘the reason for limiting particularly drastic legal consequences to cases in which the breach of the contract is fundamental’ takes into account the international nature of the contract and lies in ensuring its performance and in avoiding ‘considerable unnecessary and unproductive costs, such as those associated with the return or storage of the goods’ back to another country.¹⁶⁸ This also limits ‘the number of cases in which the damaged party may take advantage of the defaulting party’s breach in order to revise an agreement based on a specific economic situation or to shift the risk of a change in the market conditions to the other party.’¹⁶⁹

¹⁶⁶ Bridge, ‘Avoidance for Fundamental Breach’ (n7) 913.

¹⁶⁷ Ibid.

¹⁶⁸ Franco Ferrari, ‘Fundamental Breach of Contract under the UN Sales Convention -25 Years of Article 25 CISG-’ (2005) 25 (1) J.L. & Com. 489, 490-491.

¹⁶⁹ Ibid 491; Clemens Pauly, ‘The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law’ (2000) 19 JLC 221, 225: The explanation for this high burden of proof lies in the international character of the transactions. In a CISG setting, goods are being shipped around the world, generating immense costs for shipping, insurance, storage, financing, etc. The goal of saving those deals thus not only reduces costs, but also promotes performance and assures that the parties can rely on their agreements; Honnold, *Uniform Law* (n22) 274: Given that claims that the goods are defective are often made only after expensive transport to the buyer’s place of business, avoidance for immaterial defects might needlessly lead to wasteful reshipment or redistribution of the goods in a foreign

Article 25 CISG

Article 25 CISG ‘establishes a single uniform concept of “fundamental breach of contract” for the purposes of the Convention and ‘applies with equal content in the context of all other provisions of the CISG which refer to a fundamental breach of contract.’¹⁷⁰ Article 25 CISG reads:

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

Article 25 CISG refers to ‘a breach of contract committed by one of the parties’ and in the context of the buyer’s remedies essentially requires that the seller has breached at least one of his obligations under the contract or the Convention.¹⁷¹ Additionally, and ‘since practices and usages form a binding part of the parties’ contract’ according to Article 9 CISG, ‘the breach of any practice established between the parties, or any applicable usage constitutes “a breach of contract” under Article 25.’¹⁷²

Substantial Detriment

According to Article 25 CISG, the buyer must suffer such detriment as substantially to deprive him of what he is entitled to expect under the contract. Although the term ‘detriment’ is not defined in the CISG the Secretariat Commentary explains that ‘the determination whether the injury is substantial must be made in light of the circumstances of each case, e.g. the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.’¹⁷³ It can also be interpreted as referring to ‘the importance of the interest which the contract and its individual obligations have for the promisee.’¹⁷⁴ Or asking whether ‘the impairment of the justified contractual expectations’ of the buyer is ‘so serious that it suppresses [his] interest in the performance of the contract or [he] can

country. Moreover, the power to avoid the contract for immaterial defects in performance may tempt the seller (after a price rise) or the buyer (after a price decline) to avoid the contract and thus reverse the allocation of the effect of price changes which the contract contemplated.

¹⁷⁰ Ulrich Schroeter, ‘Article 25’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 403.

¹⁷¹ See Articles 30 CISG *et seq.*

¹⁷² Schroeter, ‘Article 25’ (n170) 407.

¹⁷³ Secretariat Commentary, ‘Article [25]’ in *Official Records* (n23) 26.

¹⁷⁴ Schroeter, ‘Article 25’ (n170) 409.

no longer be expected to be satisfied' with a remedy other than avoidance.¹⁷⁵ All things considered '[a] breach of contract is fundamental when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, interest in the fulfilment of the contract ceases to exist as a consequence of the breach of contract.'¹⁷⁶

Foreseeability

Even if a breach of contract substantially deprives the buyer of what he was entitled to expect under the contract, it will not be a fundamental breach if the seller, according to Article 25 CISG, 'did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.' Ferrari explains that 'one must not only take into account the actual subjective knowledge of the defaulting party' but also 'inquire into whether an average party to the same kind of contract and in the same circumstances would have foreseen the result.'¹⁷⁷ In order to successfully claim unforeseeability though, the seller must prove that 'he himself in no way anticipated the substantial detriment caused' to the buyer and that 'no reasonable person in his place would have done so.'¹⁷⁸ Whether or not the breaching seller 'actually failed to foresee that result will have to be evaluated like in the context of Article 74 CISG, "in the light of the facts and matters of which he then knew."¹⁷⁹ Thus, successfully proving unforeseeability depends on the breaching seller's 'knowledge of relevant circumstances.'¹⁸⁰ Yet, 'whatever the reason, whoever the culprit,' the seller might claim that 'he simply did not know, that he did not foresee.'¹⁸¹ Therefore, and as this assertion alone would not have sufficed given its subjective basis, 'an additional, more objective, test' had to be incorporated.¹⁸² Accordingly, not only is the seller required to not have foreseen such detriment to the buyer as to substantially deprive him of what he is entitled to expect under the contract, but also 'a reasonable person of the same kind in the same circumstances' must not have foreseen the same result. This part of the foreseeability test was added to the provision at the Diplomatic Conference in Vienna as a result of a relevant proposal, which was orally amended and subsequently adopted.¹⁸³

¹⁷⁵ Ferrari, 'Fundamental Breach of Contract' (n168) 495-496.

¹⁷⁶ *Oberlandesgericht Frankfurt* (Germany) 17 September 1991 (Pace).

¹⁷⁷ Ferrari, 'Fundamental Breach of Contract' (n168) 499.

¹⁷⁸ Michael Will, 'Article 25' in Bianca and Bonell, *Commentary* (n23) 216.

¹⁷⁹ *Ibid* 217.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid*.

¹⁸² *Ibid*.

¹⁸³ UN Doc A/CONF.97/C.1/L.106 (Egypt) in *Official Records* (n23) 99. See Summary Records of the First Committee, 12th Meeting (UN Doc A/CONF.97/C.1/SR.12) in *Official Records* (n23) 295-301.

‘By proving that the fictitious merchant, too, would not have foreseen the detrimental result of the breach in question, the [seller] removes possible doubts that his own foresight might have been beclouded – a risk which the [buyer] need not bear under the Convention.’¹⁸⁴

The CISG does not specify the moment in time when foreseeability should be present and this issue did come up during discussions at the Diplomatic Conference in Vienna after a relevant proposal to clarify that the time for ascertaining foreseeability should be explicitly referred to in the provision as ‘the time when the contract was concluded.’¹⁸⁵ Although this proposal was withdrawn after arguments that the wording should be flexible,¹⁸⁶ the prevailing view today is that foreseeability needs to be present at the time of the conclusion of the contract.¹⁸⁷ Since ‘the fundamental character of the breach relates to the legitimate expectations’ set forth in the contract, the time of the conclusion of that contract should be the relevant moment in time where foreseeability should be present.¹⁸⁸ If communications made after the conclusion of the contract were to be allowed to become relevant, according to Ferrari that would permit ‘a unilateral modification of the balance of the parties’ interests as laid out in the contract, which is hardly appropriate.’¹⁸⁹

Establishing Fundamental Breach

Admittedly, establishing fundamental breach is not easy given the two-fold exercise requiring ‘substantial detriment’ and ‘foreseeability’. However, it is upon parties to clarify the level of importance that is ‘to be attached to each obligation and to the corresponding interest of the promisee.’¹⁹⁰ Accordingly, the buyer can iron-clad a finding of fundamental breach by making it clear in the contract that certain obligations

¹⁸⁴ Will, ‘Article 25’ (n178) 219-220.

¹⁸⁵ UN Doc A/CONF.97/C.1/L.104 (UK) in *Official Records* (n23) 99.

¹⁸⁶ Summary Records of the First Committee, 13th Meeting (UN Doc A/CONF.97/C.1/SR.13) in *Official Records* (n23) 302.

¹⁸⁷ Schroeter, ‘Article 25’ (n170) 414-415; Ferrari, ‘Fundamental Breach of Contract’ (n168) 499-500; Ulrich Magnus, ‘Beyond the Digest: Part III (Articles 25-34, 45-52)’ in Franco Ferrari, Harry Flechtner and Ronald Brand (eds), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (Sellier 2004) 319, 324; Henry Deeb Gabriel, ‘General provisions, obligations of the seller and remedies for breach of contract by the seller’ in Ferrari, Flechtner and Brand *The Draft UNCITRAL Digest and Beyond* (Sellier 2004) 336, 337; Bridge, *The International Sale of Goods* (n10) 572; Peter Huber and Alastair Mullis, *The CISG* (Sellier 2007) 216.

¹⁸⁸ Ferrari, ‘Fundamental Breach of Contract’ (n168) 500.

¹⁸⁹ *Ibid.*

¹⁹⁰ Schroeter, ‘Article 25’ (n170) 409. See *Oberster Gerichtshof* (Austria) 21 June 2005 (Unilex): ‘The court, observing that a breach is fundamental if it substantially deprives the other party of what it was entitled to expect under the contract, held that this is to be determined first of all by looking at the parties’ agreement and at their evaluation on the importance of the performance.’

or methods of performing them are of vital importance for him.¹⁹¹ There will then be no room for a finding other than fundamental breach since the seller could not possibly argue that he did not foresee any substantial detriment to the buyer.¹⁹² For example a minor deviation from the contractual specification in the thickness of roll aluminium delivered was held to constitute fundamental breach because a relevant term as to its significance was incorporated in the contract.¹⁹³ Another example of fundamental breach is vegetarian schnitzel found to contain DNA from genetically modified soy contrary to a contractual warranty.¹⁹⁴

A clear case involving a fundamental breach concerned a contract for the sale of seasonal women's clothes concluded between an Italian seller and a German buyer.¹⁹⁵ The facts as reported in *Unilex* are as follows. A large number of the clothes forming part of the first delivery were of a bad fit and the clothes sizes deviated up to three numbers from the regular scale which made most of them unsalable. The buyer immediately complained about the non-conformity of the goods and at the same time informed the seller that he was no longer interested in further deliveries and requested the refunding of the partial payment already made. The seller filed a claim to recover full payment.

According to the case report, 'the court held that the buyer had validly avoided the contract in accordance with Article 49(1)(a) CISG and was entitled to a refund of the partial payment made in accordance with Article 81(2) CISG plus interest at the rate determined according to the otherwise applicable law.'¹⁹⁶ The court reasoned that 'the buyer had given timely notice of the non-conformity of the goods and provided an expert opinion confirming the seriousness of the defects of the delivered clothes which made them entirely unsalable.'¹⁹⁷ Moreover, it was found that 'the buyer was not obliged to accept the seller's offer to remedy the defects as it did not sufficiently specify the time and the manner of the cure and covered only a part of the defective delivery.'¹⁹⁸ On this note however the court explained that 'if the seller is willing to cure, and by

¹⁹¹ Schroeter, 'Article 25' (n170) 412.

¹⁹² *Ibid.*

¹⁹³ CIETAC (China) 30 October 1991 (Pace).

¹⁹⁴ *Appellationsgericht Basel-Stadt* (Switzerland) 22 August 2003 (Pace).

¹⁹⁵ *Oberlandesgericht Köln* (Germany) 14 October 2002 (*Unilex*).

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

doing so would not cause unreasonable inconveniences to the buyer, then a finding of fundamental breach is averted.’¹⁹⁹

Another case with a clear finding of fundamental breach is a case involved a contract between an Italian buyer and an American seller for the sale of 10,800 compressors to be delivered in three instalments.²⁰⁰ The facts as reported in *Unilex* are as follows. Prior to executing the contract, the seller sent the buyer a sample compressor and accompanying written performance specifications. The seller sent a first shipment of compressors and received the related payment. While the second shipment of compressors was en route to Italy, the buyer discovered that the compressors from the first lot were non-conforming therefore rejected the compressors and cancelled the contract. The buyer commenced legal action to recover damages suffered because of the seller's breach.

In granting summary judgment, the District Court held that ‘[t]here appears to be no question that [the buyer] did not substantially receive that which [it] was entitled to expect’ and that ‘any reasonable person could foresee that shipping nonconforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive.’ In the appeal, the District Court's conclusion that the seller was liable for a fundamental breach of contract under the Convention was found to be correct because it was held that the cooling power and energy consumption of an air conditioner compressor were important determinants of the product's value.

‘Reasonable use’ and the seller’s right to cure

In cases where the buyer does not contractually cement his interests and in light of ‘the principal line of cases arising under Article 25’ where fundamental breach has been defined ‘in a very restrictive way,’ it is likely that a court might reject a finding of fundamental breach on the basis that the buyer can make some other reasonable use of the non-conforming goods delivered.²⁰¹ This reasoning is sometimes referred to as the ‘reasonable use doctrine.’²⁰² Moreover, both case law and academic literature take the

¹⁹⁹ Ibid.

²⁰⁰ *U.S. Court of Appeals, 2nd Circuit* (U.S.A.) 6 December 1995.

²⁰¹ Bridge, *The International Sale of Goods* (n10) 568.

²⁰² Peter Huber, ‘Typically German? – Two Contentious German Contributions to the CISG’ (2011) 3 *Belgrade Law Review* 150, 155-158. See *Bundesgerichtshof* (Germany) 3 April 1996 (*Unilex*); *Schweizerisches Bundesgericht* (Switzerland) 28 October 1998 (*Unilex*). See also *Oberlandesgericht Dusseldorf* (Germany) 23 January 2004 (*Pace*); *Oberlandesgericht Frankfurt* (Germany) 18 January 1994

view that the curability of the breach (Article 48 CISG) should be taken into account when deciding whether the breach is fundamental,²⁰³ ‘unless the buyer has a particular and legitimate interest in being allowed to avoid the contract immediately.’²⁰⁴ However, concurring with Bridge, ‘the strict approach to fundamental breach evidenced [in the case law] may be criticized on the ground that it pays scant regard to the wording of Article 25 and is an exercise of unconstrained judicial creativity.’²⁰⁵ Article 25 CISG was not drafted to “trap” buyers in problematic contractual relationships but rather to protect international sales contracts from avoidance on the basis of minor breaches or capricious behaviour. Yes avoidance should be an *ultima ratio* remedy bearing in mind the international nature of the transaction involved, and the consequences of unwinding it, however caution should be exercised in not unfairly prejudicing the buyer in the name of pro-contractuality. However, this is not arguing against restricting a finding of fundamental breach where the non-conformity can be easily cured by the seller but rather arguing for a cautious application of such reasoning. The Secretariat Commentary offers invaluable insight on the envisaged interplay between fundamental breach and the buyer’s right to declare the contract avoided with the seller’s right to cure:

‘If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under Article [48]. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time.’

A good example in relation to this point is a case involving a contract between a German buyer, organising a racing event, and a Swiss seller for the sale of three inflatable advertising arches.²⁰⁶ On the first day of the races one of the three arches collapsed. On the same day, the buyer gave notice of the non-conformity to the seller and insisted that all three arches be taken down. About two weeks later the buyer declared the contract avoided. The court awarded the seller the full sale price that was

(Pace); *Oberlandesgericht Köln* (Germany) 14 October 2002 (Pace); *Oberlandesgericht Hamburg* (Germany) 25 January 2008 (Germany) (Pace).

²⁰³ See *Cour d'Appel de Grenoble* (France) 26 April 1995 (Unilex); *Handelsgericht des Kantons Aargau* (Switzerland) 5 November 2002 (CLOUT).

²⁰⁴ Peter Huber, ‘Article 49’ in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n35) 727.

²⁰⁵ Bridge, *The International Sale of Goods* (n10) 569.

²⁰⁶ *Handelsgericht des Kantons Aargau* (Switzerland) 5 November 2002 (CLOUT).

agreed, together with interest on arrears as from the due date of payment and held that the buyer was not entitled to declare the contract avoided since, for that purpose, Article 49(1)(a) CISG required a fundamental breach of contract. No such fundamental breach was, however, established in the particular case since it would have been possible to remedy the defect, which would have permitted the use of the arches at subsequent races.²⁰⁷

In light of the above, it is obvious that a finding of fundamental breach has to overcome a number of hurdles embedded in the CISG itself and relevant case law.

5.4.1.2 In English Sales Law

Under English sales law, if the seller breaches a condition or innominate term, which deprives the buyer of substantially the whole benefit of the contract, the buyer can terminate the contract. A breach of warranty by the seller, on the other hand, does not entitle the buyer to terminate the contract but only entitles him to a claim in damages.²⁰⁸

The draftsman of the SGA ‘used the word “condition” as a synonym for a major term of the contract.’²⁰⁹ Nevertheless, he did not define it but only referred to its legal effect.²¹⁰ Section 11(3) SGA 1979 provides that:

Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

So, for the purposes of defining a condition one has to turn to case law. In *Bettini v Gye*,²¹¹ Blackburn J. stated that the test for ascertaining if a term is a condition is to

²⁰⁷ See also *Oberlandesgericht Koblenz* (Germany) 31 January 1997 (Unilex): ‘In order to determine the occurrence of a fundamental breach regard is to be had not only to the nature of the lack of conformity but also to the readiness of the seller to remedy the non-conformity without unreasonable delay and unreasonable inconvenience to the buyer (Article 48 CISG). In the case at hand, the Court excluded the presence of a fundamental breach of contract as the buyer had unjustifiably not accepted the seller's offer to remedy the non-conformity by delivering substituting goods, in accordance with Article 48 CISG. This result was not precluded by the remark that, pursuant to Article 48(1) CISG, the right to avoidance prevails over the seller's right to cure, since this prevalence is only effective in case of a fundamental breach of contract, an event which was excluded by the Court.’

²⁰⁸ According to section 61(1) SGA 1979 warranty ‘means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such a contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.’

²⁰⁹ McKendrick, *Goode on Commercial Law* (n11) 308.

²¹⁰ John Adams and Hector MacQueen, *Atiyah's Sale of Goods* (12th edition, Pearson 2010) 86.

examine ‘(...) whether the particular stipulation goes to the root of the matter, so that failure to perform it would render the performance of the rest of the contract a thing different in substance from what the defendant had stipulated for.’ Put differently, and according to Fletcher Moulton J. (dissenting) in *Wallis Son & Wells v Pratt & Haynes*,²¹² conditions ‘(...) go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.’

Out of the seven statutory implied terms in sections 12-15 SGA 1979, five (title, correspondence with description, quality, fitness for purpose and correspondence with sample) are classified as conditions, while the remaining two (freedom from charges or encumbrances, and quiet possession) are classified as warranties.²¹³ It follows that former are terms the breach of which entitles the buyer to reject the goods and terminate the contract, while the latter are terms of less importance, the breach of which entitles the buyer to damages only, ‘except where the circumstances are such as to evince a repudiation by the seller of his obligations under the contract.’²¹⁴

Until *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,²¹⁵ the distinction between conditions and warranties was considered exhaustive. As such, and since the distinction related to the terms of the contract and needed to be applied at the date the contract was made, there was a tendency for many terms to be treated as conditions, even though their breach only caused minor inconvenience or loss, or even nothing at all.²¹⁶ However, this allowed the actual consequences of a breach of contract to be treated as irrelevant and contracts to be terminated for minor and insignificant breaches.²¹⁷ While this might have served the nineteenth century well given the needs of commerce back then, ‘it began to seem increasingly unjust to lawyers that this should be permitted.’²¹⁸ Chitty on Contracts explains:

‘The advantage that arises from the classification of a particular term as a condition is that of certainty: the party affected by the breach of such a term

²¹¹ (1876) 1 QBD 183.

²¹² [1910] 2 K.B. 1003 at 1012.

²¹³ McKendrick, *Goode on Commercial Law* (n11) 308.

²¹⁴ *Ibid.*

²¹⁵ [1962] 2 QB 26.

²¹⁶ *Atiyah's Sale of Goods* (n210) 86-87.

²¹⁷ *Ibid.*

²¹⁸ *Ibid* 87.

knows at once where he stands, i.e. that he is immediately and unequivocally entitled to treat the contract as repudiated and, for example in a contract of sale of goods, to reject the goods. On the other hand, since any breach of condition gives rise to this right, it may be exercised irrespective of the gravity of the breach or of the consequences resulting from the breach. The innocent party may have suffered no, or only trifling, loss or damage by reason of the breach, but is nevertheless entitled to refuse further performance of the contract. The courts have therefore curtailed the right of discharge which follows from the classification of a term as a condition by the creation of another category of [innominate or intermediate] terms, adopting a more flexible approach to the consequences of breach and tending to encourage, rather than discourage, performance of the contract.’²¹⁹

In *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,²²⁰ the Court of Appeal refused to assign the shipowner's obligation to deliver a seaworthy vessel the character of a condition, and Diplock L.J. said:²²¹

‘There are, however, many contractual undertakings of a more complex character which cannot be categorised as being “conditions” or “warranties” (...) Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking, as a “condition” or a “warranty.”’

Breach of such terms ‘may or may not entitle the aggrieved party to treat himself as discharged depending on the nature and consequences of the breach.’²²² Indeed, some contractual undertakings ‘are too complex to be fitted’ into the condition-warranty dichotomy and the legal consequences of breach of such an undertaking, unless provided for expressly in the contract, ‘depend not upon any prior classification of the

²¹⁹ Beale, H. and others (eds), *Chitty on Contracts* (31st edition, Sweet & Maxwell 2012) para 12-034.

²²⁰ [1962] 2 QB 26.

²²¹ *Ibid*, at 66 per Diplock L.J.

²²² *Chitty on Contracts* (n219) para 12-020.

undertaking as a condition or warranty but upon the effect of the breach.’²²³ Accordingly, ‘this “wait-and-see” approach achieves greater justice between the parties than is possible by an a priori classification.’²²⁴

The *Hong Kong Fir* reasoning was extended to sale of goods in *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)*²²⁵ where it was held that the SGA 1979 did not exhaustively divide all terms into conditions and warranties. Although section 11 SGA 1979 only talks of these two possibilities, section 62(2) SGA 1979 preserves the effect of common law rules save insofar as they are inconsistent with the SGA 1979. Atiyah explains that in *The Hansa Nord* ‘the court took the *Hong Kong Fir* case as correctly laying down the common law rules and as demonstrating the existence of the “innominate term”, breach of which may discharge the other party, but only if the nature and consequences are sufficiently serious to justify this result.’²²⁶ Moreover, in *Reardon Smith Lines Ltd v Hansen Tangen*,²²⁷ Lord Wilberforce’s preference to treat the results of a breach of contract as something to be settled *after* the breach occurred was clear.

The mere fact that English courts in the *Hong Kong Fir*, and later in *The Hansa Nord*, acknowledged the significance of assessing the actual consequences of a breach of contract in some instances arguably evidences some hostility to rejection, leading to termination, as a remedy.²²⁸ The statutory modification of the right to reject for breach of condition in commercial sales, effected by insertion of section 15A SGA 1979 by the Sale and Supply of Goods Act 1994, as well as the insertion of section 30(2A) SGA 1979 by the same Act, is arguably a further manifestation of such hostility.

Section 15A SGA 1979

Section 15A SGA 1979 essentially seeks ‘to prevent what are completely technical rejections in commercial contracts, which may be motivated by caprice or (more likely) adverse movements in the market which lead a buyer to seek escape from a contract.’²²⁹ Recognising that ‘the terms implied by sections 13 to 15 of the 1979 Act are capable of being broken in ways some of which may be very serious but some of which may be

²²³ Halsbury’s Laws of England, *Contract* (Vol 22) (5th edition, 2012) para 558.

²²⁴ *Ibid.*

²²⁵ [1976] QB 44.

²²⁶ Atiyah’s *Sale of Goods* (n210) 88.

²²⁷ [1976] 1 WLR 989.

²²⁸ Benjamin’s *Sale of Goods* (n69) para 10-030; 12-023.

²²⁹ Benjamin’s *Sale of Goods* (n69) para 12-026.

very slight,²³⁰ the Sale and Supply of Goods report recommended that ‘the [SGA 1979] should provide that where the breach is so slight that it would be unreasonable for the buyer to reject the goods [and as such be allowed to terminate the contract claiming breach of a condition], the breach is not to be treated as a breach of a condition [allowing the buyer to terminate] but may be treated as a breach of warranty.’²³¹

Section 15A(1) SGA 1979 provides that where the buyer would have the right to reject goods by reason of a breach on the part of the seller of a term implied by sections 13 to 15 SGA 1979, but the breach is so slight that it would be unreasonable for him to reject them, then the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.²³² This section ‘mixes the right to reject with that to treat the contract as discharged’²³³ just like the Sale and Supply of Goods Report.²³⁴ The issue however was to tackle the instance of the buyer being allowed to reject the goods *and* terminate the contract for slight or technical breaches which seemed ‘unjust on the seller whose loss might far exceed the cost of remedying the defect.’²³⁵ It is important to note the acknowledgment, once again,²³⁶ of the seller’s possibility and/or right to cure a failure to perform his obligations.

However, it must be clarified that section 15A SGA 1979 only applies to breaches of the implied terms as to description, quality, fitness for purpose and conformity with sample laid down in sections 13, 14 and 15 of the SGA 1979 as explicitly stated in the provision itself. As such it follows that it does not apply to other terms such as that implied by section 12(1) SGA 1979 or to express terms such as a stipulation as to time, or any other express term of the contract which is classified as a condition.²³⁷ A ‘time of the essence’ clause in a sales contract will ordinarily be interpreted to mean that the buyer’s duty to pay is conditioned upon the seller’s timely performance. The Court of Appeal interpreted a clause requiring seller to specify loading port by 14 November ‘at

²³⁰ *Sale and Supply of Goods Report* (n152) para 4.1.

²³¹ *Ibid* para 4.21.

²³² According to sections 15A (2) and (3) SGA 1979, section 15A(1) SGA 1979 applies unless a contrary intention appears in, or is to be implied from, the contract and it is for the seller to show that a breach is so slight that it would be unreasonable for the buyer to reject the goods.

²³³ *Benjamin’s Sale of Goods* (n69) para 12-025.

²³⁴ See *Sale and Supply of Goods Report* (n152) Part 4.

²³⁵ *Ibid* para 4.1.

²³⁶ See section 3.3.2.2, Chapter 3.

²³⁷ *Benjamin’s Sale of Goods* (n69) para 12-025.

latest' as an express condition giving buyer right to terminate when seller gave such notice 5 days late.²³⁸

Section 30(2A) SGA 1979

According to section 30(1) SGA 1979, where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. According to section 30(2) SGA, where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. However, section 30(2A) SGA 1979 puts a qualification on these sections: where the seller delivers a quantity of goods larger or less than he contracted to sell, the buyer may not reject the goods if the shortfall or excess is so slight that it would be unreasonable for him to do so. The reasoning is that where the buyer receives delivery 'of a wrong quantity of goods, and the shortfall or excess is so slight that it would be unreasonable to reject the whole, then he should be barred from so doing.'²³⁹

Both sections 15A and 30(2A) SGA 1979 in effect restrain the buyer's right to terminate the contract for slight breaches and as such acknowledge the need to protect the preservation of the contract from technical or capricious termination grounds.

5.4.1.3 Comparison

Starting with the similarities between the two systems, under both the CISG and English sales law, the buyer cannot terminate the contract for trivial breaches. The relevant amendments to the SGA 1979, in the form of section 15A SGA 1979, effected by the Sale and Supply of Goods Act 1994, by qualifying the buyer's right to reject the goods and terminate the contract, arguably brought English sales law closer to the CISG.

Moving on to the differences between the two systems, in order to trigger the buyer's remedies, English sales law classifies the terms of the contract (conditions, warranties, innominate terms) whereas the CISG classifies the nature of the breach (fundamental, non-fundamental). English law allows the buyer to terminate the contract after a breach by the seller which goes to the root of the contract or deprives him substantially the whole benefit which he was expecting to obtain from the contract. The CISG allows the

²³⁸ *Gill v Duffus S.A. v Societe pour L'exportation des Sucres S.A.* [1986] 1 Lloyd's Rep. 322.

²³⁹ *Sale and Supply of Goods Report* (n152) para 6.20.

buyer to avoid the contract where a breach by the seller results in such detriment to him as substantially to deprive him of what he was entitled to expect under the contract. In order to allow the buyer to terminate the contract, both systems generally require substantial detriment to the buyer brought upon by the seller's failure to fulfil his obligations under the contract. Bridge even acknowledges that the substantial deprivation of benefit required by Article 25 CISG does bear 'some resemblance to the test for a discharging breach of an intermediate stipulation in English law.'²⁴⁰ As such, one might argue here that the rationale, in relation to the instances where termination of the contract is allowed in both systems, is more or less the same. Nevertheless, this argument can justifiably be considered as superficial given the general pro-contractual spirit of the CISG and the relevant case law cited and discussed above which indicates that, under the CISG a stricter approach is generally taken, allowing less decision-making leeway to the buyer.

In particular, an English merchant or lawyer, on the basis of fundamental breach requiring foreseeability on behalf of the seller, can criticise the test in Article 25 CISG as 'too severe' and that it makes it very difficult for a buyer to terminate the contract because of defective performance by the seller.²⁴¹ However, given the nature of concluding contracts after legal advice or just through email correspondence, this requirement does not prove hard to satisfy in practice. What could be hard for a buyer though, on the basis of stringent case law on the matter, is to convince a court that he could not have otherwise reasonably used the non-conforming goods the seller delivered.

For English lawyers in particular,²⁴² the CISG is open to criticism on the ground that it is likely to lead to uncertainty because of 'the open textured nature of the definition in Article 25' which makes it hard to predict just when a breach will be regarded as

²⁴⁰ Bridge, *The International Sale of Goods* (n10) 568.

²⁴¹ Jacob Ziegel, 'Article 25' in Jacob Ziegel and Claude Samson, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981) available at <http://www.cisg.law.pace.edu/cisg/text/ziegel25.html>

²⁴² See F.M.B. Reynolds, 'A Note of Caution' in P.B.H. Birks (ed), *The Frontiers of Liability (Volume 2)* (OUP 1994) 18, 23: 'The notion of "fundamental breach" seems likely to create situations of great uncertainty...'; *Halsbury's Laws of England* (n223) para 556: 'such a priori classification has the merit of encouraging certainty, since from the moment the contract is made the parties know what will be the effect of any breach of the term so classified.'; *Chitty on Contracts* (n222) para 12-034: 'the advantage that arises from the classification of a particular term as a condition is that of certainty: the party affected by the breach of such a term knows at once where he stands, i.e. that he is immediately and unequivocally entitled to treat the contract as repudiated and, for example in a contract of sale of goods, to reject the goods.'

fundamental especially for a buyer and his advisers.²⁴³ Throughout the years, Article 25 CISG has been the subject of general criticism in relation to its ‘convoluted’²⁴⁴ and ‘to some extent redundant language’²⁴⁵ which ‘employs many vague legal terms like “fundamental”, “substantial” and “reasonable”.’²⁴⁶ However, ‘in the drafting of an international convention studied ambiguity is a standard technique employed to achieve a consensus.’²⁴⁷ Moreover, Article 25 CISG ‘had to be drafted in general terms and could not specify all the circumstances that may be relevant in determining whether a breach will “substantially” deprive a party “of what he is entitled to expect under the contract...”’²⁴⁸ Arguably, the definition of fundamental breach is specific enough to guide parties and at the same time flexible enough to allow parties, courts and arbitral tribunals to effectively ascertain a fundamental breach in many different factual scenarios.²⁴⁹

Nevertheless, and as already explained, on the whole, it seems to be harder for a buyer to avoid the contract under the CISG than to terminate the contract under English sales law and this conclusion must not be glossed over. The underlying difference in attitude towards the preservation of the contract between the two systems will surely result in significant consequences for merchants in practice. However, in light of the nature of an international sale of goods contract, where distance and other practical difficulties make its avoidance more cumbersome than the termination of a domestic sales of goods contract, merchants and lawyers should appreciate the reasons why the CISG does not easily allow the avoidance of a contract.

²⁴³ Alastair Mullis, ‘Avoidance for Breach under the Vienna Convention; A critical analysis of some of the early cases’ in Mads Andenas and Nils Jareborg, (eds) *Anglo-Swedish Studies in Law* (Lustus Forlag, 1999) 339.

²⁴⁴ Eduardo Grebler, ‘Fundamental Breach of Contract under the CISG: A Controversial Rule’ (2007) 101 ASIL PROC 407, 407.

²⁴⁵ Magnus, ‘Beyond the Digest: Part III (Articles 25-34, 45-52)’ (n187) 321.

²⁴⁶ Ibid; Michael Joachim Bonell, ‘The UNIDROIT Principles of International Commercial Contracts and the CISG – Alternatives or Complementary Instruments?’ (1996) 26 ULR 26, 29.

²⁴⁷ Johan Steyn, ‘A Kind of Esperanto?’ in P.B.H. Birks (ed), *The Frontiers of Liability (Volume 2)* (OUP 1994) 11, 13.

²⁴⁸ Honnold, *Uniform Law* (n22) 275.

²⁴⁹ See Ingeborg Schwenzer and Pascal Hachem, ‘The CISG – Successes and Pitfalls’ (2009) 57 Am. J. Comp. L. 462, 469 who argue that, ‘if a law is intended to be flexible enough to adapt to new factual and legal developments in decades to come, it has to leave room for interpretation.’

5.4.2 Anticipatory Fundamental Breach

5.4.2.1 Under the CISG

It is indeed ‘undesirable that the contract should have to remain in force when it is clear that a fundamental breach is going to occur.’²⁵⁰ Article 72 CISG enables the contract to be avoided in such circumstances. According to Fountoulakis, ‘the possibility of anticipatory avoidance of the contract reflects the idea of efficiency by allowing an early reaction to impending impediments to performance’ but it also ‘arranges for a balanced protection of both parties’ interests: it respects the [buyer’s] need to regain its freedom of disposition swiftly, though not without giving the [seller] a chance to demonstrate its readiness to perform.’²⁵¹ Arguably, this rule is ‘to the benefit of both parties’ as the losses for which the seller will have to provide for anticipatory fundamental breach will undoubtedly be less than fundamental breach.²⁵²

Article 72 CISG originates in Anglo-American law from where it was adopted ‘as a valuable addition to the general rules governing breaches of contract in unified sales law.’²⁵³ According to Article 72(1) CISG, if prior to the date for performance of the contract it is clear that the seller will commit a fundamental breach of contract, the buyer may declare the contract avoided. Article 25 CISG applies in establishing whether a breach is fundamental. Accordingly, the future breach must be of such a serious nature as to substantially deprive the buyer of what he was entitled to expect under the contract and must have been foreseeable by the seller. Essentially, there must be a threat of a breach, which if it occurred, would allow the buyer to avoid the contract under Article 49(1)(a) CISG. As will be examined below, ‘anticipatory breaches that are not fundamental in character may give rise to the right of suspension in Article 71, since that provision is not dependent upon the fundamental breach test.’²⁵⁴

According to Article 72(2) CISG, if time allows, the buyer must give reasonable notice to the seller in order to permit him to provide the buyer with adequate assurance of his performance. This notice requirement ‘is a precondition for an effective avoidance of

²⁵⁰ Trevor Bennett, ‘Article 72’ in Bianca and Bonell, *Commentary* (n23) 527.

²⁵¹ Christiana Fountoulakis, ‘Article 72’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 968, 969-970.

²⁵² Michele Vanwijck-Alexandre, ‘Anticipatory Breach and Instalment Contracts in the CISG’ (2001) 3-4 IBLJ 353, 365.

²⁵³ Fountoulakis, ‘Article 72’ (n251) 970. See Vanwijck-Alexandre, ‘Anticipatory Breach and Instalment Contracts in the CISG’ (n252) 355.

²⁵⁴ Bridge, *The International Sale of Goods* (n10) 580-581. See section 0 below.

the contract,’ so ‘if no notice is given, even though time would have allowed it under the circumstances,’ a declaration of avoidance under Article 72(1) CISG will be ineffective.²⁵⁵ It must be pointed out that is only in the buyer’s interests if he clarifies the situation as soon as possible by fixing a time period within which the seller is to provide assurance.²⁵⁶ However, during the time period fixed in the notice, the buyer’s right to avoid the contract is suspended.²⁵⁷

A notice according to Article 72(2) CISG is only required ‘if time allows’ though. It is argued though that ‘it is not clear what the words “if time allows” mean.’²⁵⁸ Fountoulakis however, explains that this time requirement must be read in conjunction with the requirement that the notice be ‘reasonable (...) in order to permit [the seller] to provide adequate assurance of [his] performance.’²⁵⁹ For example a notice cannot serve its purpose, and will therefore not be reasonable, in cases ‘where it seems useless as a warning because relief or provision of assurance cannot be expected (in due time), for instance, in case of particularly short periods of delivery or rapid alteration of prices.’²⁶⁰ In other words, in instances where a notice will be pointless because of the circumstances, the duty to give notice according to Article 72(2) CISG can be dispensed with.²⁶¹

In instances where the seller is able to then provide adequate assurance of his performance, ‘the [buyer] must accept it, and [his] right to avoid the contract ceases to exist.’²⁶² Although the CISG is criticised for leaving the type of assurance required by Article 72(2) to the imagination,²⁶³ it will not have been possible to list types of assurance for every set of circumstances that might occur. Accordingly, the type acceptable assurance in each case will depend on the circumstances of the case. There is a wide range of measures that may provide adequate assurance as long as they

²⁵⁵ Fountoulakis, ‘Article 72’ (n251) 974.

²⁵⁶ Ibid 977.

²⁵⁷ Ibid.

²⁵⁸ Bridge, *The International Sale of Goods* (n10) 582.

²⁵⁹ Fountoulakis, ‘Article 72’ (n251) 976.

²⁶⁰ Ibid.

²⁶¹ Peter Schlechtriem, *Uniform Sales Law; The UN Convention on Contracts for the International Sale of Goods* (Manz 1986) 95: ‘In those cases where there is no time to notify, where the delivery date is so near that assurances could not be procured in time, there is again no need to notify the other party. The notice requirement must also be “reasonable” in other respects as well. Where there is little chance that the other party can still provide security – for example, where a delivery cannot be made because of war – notice will often be unnecessary.’

²⁶² Fountoulakis, ‘Article 72’ (n251) 978.

²⁶³ Bridge, *The International Sale of Goods* (n10) 582.

adequately safeguard the buyer's interests and encompass 'the economic gap which would be caused by the failure to perform properly, but it need not cover any additional losses that might occur due to the breach.'²⁶⁴

The requirement of notice and adequate assurance features in Article 72(2) CISG (and Article 71(3) CISG, see below) as a result of the desire expressed by the developing countries participating in the Diplomatic Conference in Vienna to permit the party whose breach is presumed to provide assurances and thereby to prevent avoidance.²⁶⁵ It was argued that it was 'extremely dangerous to empower the parties to withdraw from their obligations solely on the basis of such a purely subjective assessment of the situation and without any supervision by the courts. (...) It would be greatly preferable to provide an opportunity for the party in default to re-establish himself.'²⁶⁶

However, it must be noted here that a requirement of adequate assurance also exists in the UCC. According to section 2-609(4), if the party from whom adequate assurance is sought, fails or refuses to provide it 'within a reasonable time not exceeding thirty days,' he is to be held thereby to have unlawfully repudiated the contract. The CISG does not go as far as the American law and is therefore thought to be missing 'a real edge to it' as 'the only sanction flowing from the absence of adequate assurance under Article 72 would seem to be that a court might infer therefrom that indeed it was "clear" that a fundamental breach would be committed in the future.'²⁶⁷ Indeed it would appear that Article 72(2) CISG lacks bite compared to American law however, its significance must not be questioned as capable of preserving the contract in line with the general principle of *favor contractus* underlying the CISG. While the Article 72 CISG does not go as far as the UCC, the duty to give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance according to Article 72(2) CISG is a useful supplementary mechanism to the rules on anticipatory breach. If the seller is informed of the buyer's intention to declare the contract avoided, the seller then has 'the opportunity to dispel any doubts about his contract loyalty by issuing adequate assurance.'²⁶⁸ Article 72(2) CISG should therefore be viewed as 'an instrument of "forced communication"' which 'establishes clarity and prevents the [buyer] from

²⁶⁴ Fountoulakis, 'Article 72' (n251) 978.

²⁶⁵ Schlechtriem, *Uniform Sales Law* (n261) 95. See UN Doc A/CONF.97/C.1/L.250 (Egypt) in *Official Records* (n23) 130-131.

²⁶⁶ Summary Records of the First Committee, 34th Meeting in *Official Records* (n23) 419-420.

²⁶⁷ Bridge, *The International Sale of Goods* (n10) 582.

²⁶⁸ Fountoulakis, 'Article 72' (n251) 974.

prematurely dissociating himself from the contract.²⁶⁹ It is aimed at preserving the contract by giving it the chance to take one last breath, if possible, before avoidance.

However, if the seller has declared that he will not perform his obligations, according to Article 72(3) CISG, the buyer need not give him reasonable notice in order to permit the seller to provide adequate assurance of his performance. This is because a seller who ‘seriously, expressly, and unambiguously denies or declines to perform its contractual obligations’ does not deserve a second chance since ‘refusal to perform is arguably the purest form of contractual breach, and it deprives the contract of its very basis.’²⁷⁰

If the requirements of Article 72(1) CISG are met and the seller has not provided adequate assurance, or if the seller refuses to perform his obligations (Article 72(3) CISG), the buyer may declare the contract avoided by means of a notice (Article 26 CISG). Upon such avoidance, ‘the future obligations under the contract cease to exist’ and restitution under Article 81 CISG *et seq* will only take place in those exceptional cases where advance performance has taken place, for example, where the buyer has made a partial payment.²⁷¹

If the buyer declares the contract avoided on the basis of anticipatory fundamental breach, he is entitled to damages to the extent the seller’s anticipatory breach caused him any kind of loss.²⁷² The calculation of damages is governed by Article 74 *et seq.* but if the buyer did not give notice in accordance with Article 72(2) CISG or if he did not declare the contract avoided within a reasonable period of time, or if he otherwise did not comply with the duty to mitigate loss as provided by Article 77 CISG, his damages will be reduced accordingly.²⁷³

However, the buyer may elect if he wishes to declare the contract avoided for anticipatory fundamental breach; he may prefer to merely suspend his performance according to Article 71 CISG or wait for the due date for performance and then exercise his rights according to Article 45 CISG.²⁷⁴

²⁶⁹ Ibid.

²⁷⁰ Ibid 979.

²⁷¹ Ibid 982.

²⁷² Ibid.

²⁷³ Ibid 982.

²⁷⁴ Ibid. See *Bundesgerichtshof* (Germany) 15 February 1995 (Unilex).

Article 71 CISG: Suspension of Performance

Just like Article 72 CISG, Article 71 CISG restricts the right of suspension to instances where performance has yet to become due.²⁷⁵ However, the UNCITRAL Digest clarifies that ‘the right of an aggrieved [buyer] to avoid the contract under Article 72 is to be distinguished from the right to suspend [his] obligations under Article 71.’²⁷⁶ Although both provisions are concerned with predicting whether there will be a breach, the preconditions for the more drastic remedy of declaring the contract avoided under Article 72 CISG are more stringent than those provided by Article 71 CISG for suspending performance, ‘both as to the seriousness of the predicted breach and the probability that the breach will occur.’²⁷⁷

The right of suspension is a valuable self-help remedy for breach of contract; by entitling the buyer to suspend his performance in circumstances where the fulfilment of a substantial part of the seller’s obligations is uncertain, the buyer is protected from knowingly exposing himself to the risk of not receiving anything in return for what he has performed.²⁷⁸ Additionally, Article 71 CISG ‘enhances cooperation between the parties and may thus save the contract and increase the chance of its performance.’²⁷⁹ It ‘reflects the idea that the parties will return to the original contract program once the risk of a breach ceases to exist or is neutralised by providing assurance according to Article 71(3).’²⁸⁰

With the exception of Article 71(2) CISG, which only applies to the seller, Article 71 CISG, just like Article 72 CISG, applies to both the seller and the buyer. According to Article 71(1) CISG, the buyer may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the seller will not perform a substantial part of his obligations as a result of (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract.

²⁷⁵ See Alexander von Ziegler, ‘The Right of Suspension and Stoppage in Transit (And Notification Thereof)’ (2005) 25 (1) JLC 353.

²⁷⁶ UNCITRAL, *Digest* (n5) 332.

²⁷⁷ *Ibid.*

²⁷⁸ Christiana Fountoulakis, ‘Article 72’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 948, 950.

²⁷⁹ *Ibid* 950.

²⁸⁰ *Ibid* 953.

The rationale behind this provision is that ‘a party should not be obliged to perform if it is sufficiently obvious that the promised counter-performance will not be rendered or not be conforming to the contract.’²⁸¹ It is colourfully put that ‘Article 71 can only be used as a sword, not as a shield: the creditor will be able to prevent performance of the contract by way of suspension but has no possibility to refuse its own performance if it has received defective performance.’²⁸²

According to Article 71(1) CISG, the buyer may only suspend his performance if it (a) becomes apparent after the conclusion of the contract that, (b) it is highly probable, that (c) a substantial part of the seller’s contractual duties (d) will not be performed (e) for the reasons mentioned in Articles 71(1)(a) and (b).²⁸³ Because of the (preliminary) nature of the remedy, the threshold required to satisfy the requirement of breach of a substantial part of the seller’s obligations in light of the entire contract in Article 71 CISG is much lower than the threshold required by Article 72 CISG for a finding of fundamental breach according to Article 25 CISG.²⁸⁴ Therefore, and as already mentioned, suspension of performance is subject to less strict conditions than avoidance of the contract. The reasons are easily understood since suspension of performance does not terminate the contract and provides for what is considered, in principle, to be a temporary situation.²⁸⁵ It follows that a buyer who exercises the right to suspend his performance is not released from his contractual obligations and may not enter into another contract with another party to the detriment of the seller.²⁸⁶

According to Article 71(3) CISG, a buyer suspending performance, whether before or after dispatch of the goods, must ‘immediately’ give notice of the suspension to the seller and must continue with performance if the seller provides adequate assurance of his performance. In other words, the buyer must inform the seller of the suspension without any avoidable delay as soon as he ceases to fulfil his duties.²⁸⁷ The form and transmission of such notice are governed by Article 27 CISG, i.e. the risk of a delay or error in the transmission of the notice or its failure to arrive will be borne by the seller if

²⁸¹ Fountoulakis, ‘Article 72’ (n277) 950.

²⁸² Ibid 952.

²⁸³ Ibid 954.

²⁸⁴ Ibid.

²⁸⁵ Vanwijck-Alexandre, ‘Anticipatory Breach and Instalment Contracts in the CISG’ (n252) 358. See *Landgericht Berlin* (Germany) 15 September 1994 (Unilex): ‘In the court’s opinion, non-performance as provided for in Article 71(1) CISG need not necessarily amount to a fundamental breach of contract.’

²⁸⁶ Ibid 361.

²⁸⁷ Fountoulakis, ‘Article 72’ (n277) 959.

the notice was made ‘by appropriate means in the circumstances.’ Although the consequences of a failure to give notice are unclear, the predominant opinion in literature is that a breach of the duty to immediately give notice of suspension leads only to a claim for damages.²⁸⁸

The CISG ‘discusses neither the assurance itself nor the period allowed [for the seller] to provide such assurance;’ therefore, this needs to be ‘determined on a case-by-case basis according to the circumstances and especially according to the aim of the contract or possibly the reputation of the parties.’²⁸⁹

The buyer’s right to suspend his performance ‘terminates where the grounds which triggered that right cease to exist,’ i.e. an adequate assurance of performance is provided by the seller, or the contract is avoided according to Article 72 CISG.²⁹⁰

5.4.2.2 In English Sales Law

‘Article 72 lays down rules that are the equivalent of anticipatory repudiation in English law.’²⁹¹ English sales law provides that, if at any time before the due date for performance the seller ‘signifies his intention not to perform the contract in some essential respect,’ or becomes unable to perform at the due date, the buyer is entitled to accept the seller’s breach, ‘that is, treat the contract as immediately at an end without awaiting for the performance due date’ and claim damages straightaway or affirm the contract and hold it open for performance.²⁹² The seller’s words or conduct ‘must not only evince an intention not to perform’ but the buyer ‘must subjectively believe this to be the case.’²⁹³ If the buyer adopts the former course, i.e. treats the contract as at an end without waiting for the performance due date, he comes under a duty to mitigate his losses as soon as he accepts the seller’s anticipatory breach. Damages will be assessed ‘with reference to the time at which the contract ought to have been performed, subject to the buyer’s duty to mitigate damages.’²⁹⁴ If the buyer adopts the latter course, i.e. hold the contract open for performance the duty to mitigate is deferred accordingly. However, this latter option ‘is not without risk for the continuance of the contract ensure

²⁸⁸ Ibid 959-960.

²⁸⁹ Vanwijck-Alexandre, ‘Anticipatory Breach and Instalment Contracts in the CISG’ (n252) 363.

²⁹⁰ Djakhongir Saidov, ‘Article 71’ in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n35) 945.

²⁹¹ Bridge, *The International Sale of Goods* (n10) 580.

²⁹² McKendrick, *Goode on Commercial Law* (n11) 139-140; *Benjamin’s Sale of Goods* (n69) para 12-021.

²⁹³ *Benjamin’s Sale of Goods* (n69) para 12-021.

²⁹⁴ Ibid.

for the benefit of both parties, and the [seller] is thus just as much entitled as the [buyer] to rely on some intervening frustrating event as discharging the contract.’²⁹⁵ However, it is also the case that the seller ‘might repent and tender performance.’²⁹⁶

The concept of anticipatory breach was established in *Hochster v de la Tour*,²⁹⁷ a case which concerned the repudiation of an employment contract by the employer before the time agreed for its performance.²⁹⁸ This decision was ‘innovative in that it allowed the obligee to exercise immediately the rights or certain rights normally reserved for the effective non-performance of obligations.’²⁹⁹ However, American law, ‘proving itself to be more flexible and more realistic’ than English law, supplemented the doctrine of anticipatory breach with the right of the obligee to ask for adequate assurance that the contractual obligations will be performed.³⁰⁰

5.4.2.3 Comparison

Other than the notice duty and adequate assurance requirement found in Article 72(2) CISG, the Convention’s rules on anticipatory fundamental breach, originating from English law, essentially restate the doctrine of anticipatory breach as found in English law. While one could argue that Article 72(2) CISG is not particularly difficult for English merchants and lawyers to accept since it will merely be an expansion of their existing rules, it represents an importance difference between the two systems and can easily be seen as weakening the buyer's position compared to English law. Admittedly, Article 72(2) CISG will have significant practical consequences to a buyer who, if time allows, will have to give reasonable notice to the seller in order to permit him to provide adequate assurance of his performance unless of course the seller has declared that he will not perform his obligations (Article 72(3) CISG). Requiring the buyer to give the seller reasonable notice puts the buyer in uncertainty as to the status of the contract and might interfere with the buyer's ability to satisfy his sub-buyers or own business needs which are usually pressing. Article 72(2) CISG, as already explained, is another example of a provision dowsed with the CISG's pro-contractual rationale aimed at

²⁹⁵ McKendrick, *Goode on Commercial Law* (n11) 140.

²⁹⁶ *Benjamin's Sale of Goods* (n69) para 12-021.

²⁹⁷ (1853) 118 Eng. Rep. 922.

²⁹⁸ See M. Gilbey Strub, ‘The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries’ (1989) 38 (3) ICLQ 475, 478-484.

²⁹⁹ Vanwijck-Alexandre, ‘Anticipatory Breach and Instalment Contracts in the CISG’ (n252) 355.

³⁰⁰ *Ibid.*

restricting the buyer's right to avoid the contract and the preservation of international sale contracts.

Withholding Performance

In English law, according to Bridge there is 'no formally recognized right of suspension' although it can be argued that a form of suspension does occur 'where one party fails to perform a condition that is either precedent to or concurrent with another's obligation and the latter declines to proceed further with performance until that obligation is fulfilled.'³⁰¹ Beale, however, is more forthcoming by clearly recognising the remedy of withholding performance, which can be used while the contract is still 'on foot' and before any breach has occurred.³⁰² He acknowledges withholding performance as a 'self-help' remedy which 'can be done, and at a guess frequently is done, without any legal right to do it: in breach of contract, A refuses to make a payment due to B as a way of coercing B into performing some other contractual obligation.'³⁰³ Beale further argues that 'the right to withhold performance can be created by the simple device of making the obligation to perform conditional upon the occurrence of a particular event, so that A has the protection of being able to refuse to perform until the event occurs.'³⁰⁴ In relation to this he explains:³⁰⁵

'When occurrence of the event is outside the control of the parties, providing this protection is the chief function of the condition, but when the occurrence of the event is within the control of the other party the condition also provides an incentive to the other party to bring it about.'

Treitel, referring to the 'defence of refusal to perform', is even more forthcoming than Beale in saying that 'one of the most effective remedies of the aggrieved party is simply to refuse to perform his own part of the contract.'³⁰⁶ He concurs with Beale that it 'amounts to a sort of self-help, no recourse to legal proceedings by the aggrieved party

³⁰¹ Bridge, *The International Sale of Goods* (n10) 580; Honnold, *Uniform Law* (n22) 430: The only formally recognized right of suspension in English law might be inferred from section 41(1) SGA 1979 which provides that 'the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price ... (c) where the buyer becomes insolvent.' This, in effect, authorizes suspension of performance because of prospective non-performance by the other party. Still, the right to suspend is given only to the seller and arises only in one narrowly-defined circumstance.

³⁰² Hugh Beale, *Remedies for Breach of Contract* (Sweet & Maxwell 1980) 3.

³⁰³ *Ibid* 16.

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid*.

³⁰⁶ G.H. Treitel, *Remedies for Breach of Contract* (OUP 1988) 245.

being required' which is why it is effective and argues that sometimes, withholding performance will merely be a part of, or a step towards, the remedy of termination.³⁰⁷ However, and while this remedy might be connected to termination, it does not produce the effects of termination. It only gives rise to a 'waiting position';³⁰⁸ 'it is a "dilatory plea" which does not terminate the contract but merely entitles the injured party for the time being to refuse to perform his part.'³⁰⁹ For the aggrieved party to secure a complete release from his obligations under the contract, it is necessary for him to resort to the further remedy of termination.³¹⁰

Merchants should not expect significant practical consequences in relation to Article 71 CISG on the basis that the remedy of withholding performance is arguably found in English sales law as well.

5.4.3 Fixing an Additional Period of Time for Performance

5.4.3.1 Under the CISG

According to Article 49(1)(b) CISG, the buyer, may declare the contract avoided if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with Article 47(1) CISG or declares that he will not deliver the goods within the period so fixed. However, this only applies to cases of non-delivery.

Limiting the availability of avoidance using Article 47(1) CISG only to cases of non-delivery was a conscious decision of the CISG's drafters, despite the fact that the ULIS allowed the use of this procedure for avoidance in cases of non-conformity. Despite the fact that there are exceptions to this rule,³¹¹ Schlechtriem argued that 'you cannot reach avoidance of the contract in the case of non-conforming goods where the non-conformity itself does not constitute a fundamental breach, by blowing up minor non-conformities through the process of setting an additional period of time to have them repaired' because then you could avoid all contracts which should not be the case in international dealings.³¹²

³⁰⁷ Ibid.

³⁰⁸ Mazeaud as quoted by Treitel, *Remedies for Breach of Contract* (n306) 310.

³⁰⁹ Treitel, *Remedies for Breach of Contract* (n306) 310.

³¹⁰ Ibid 318.

³¹¹ See Markus Muller-Chen, 'Article 49' in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 746, 754-756.

³¹² Flechtner, 'Transcript of a Workshop on the Sales Convention' (n58) 211.

The buyer should fix an additional period of time of reasonable length for performance by the seller of his obligations in accordance with Article 49(1)(b) CISG when he is in doubt as to whether the seller's non-delivery constitutes a fundamental breach.³¹³ Such doubt arises in relation to contracts which are silent on the matter of time as opposed to contracts which clearly make time of the essence (in which case non-delivery would constitute a fundamental breach allowing the buyer to avoid the contract under Article 49(1)(a) CISG). If time is not of the essence, a non-delivery only gives the buyer the right to declare the contract avoided if the lapse of the additional period of time occurs without performance by the seller, or if within the additional period of time granted the seller declares that he will not perform.

Nevertheless, in any of these situations, the buyer is allowed to give a second or even a third additional period of time to the seller for performance before declaring the contract avoided by means of a notice (Article 26 CISG). Even in cases where time was considered to be of the essence, the buyer might still be interested in the seller's performance even if it is a later performance. The buyer is not obliged to declare the contract avoided after the lapse of an additional period of time unless he wants to.

5.4.3.2 In English Sales Law

According to section 10(2) SGA 1979, whether a stipulation as to the time of performance is or is not of the essence of the contract depends on the terms of the contract although 'in commercial contracts, they are frequently so construed, even though this is not expressly stated in the words of the contract.'³¹⁴ Accordingly, if time is of the essence and the seller fails to deliver the goods within the time agreed for delivery, there is a breach of condition and the buyer is entitled to reject the goods and terminate the contract.³¹⁵ However, a stipulation regarding the time for delivery 'may on its true construction' simply be an innominate term entitling the buyer to terminate the contract 'only if the delay in delivery is so prolonged as to deprive him of substantially

³¹³ Pilar Perales Viscasillas, 'The Nachfrist Remedy' in Collated Papers of the UNCITRAL and Singapore International Arbitration Centre Conference (SIAC) (22-23 September 2005, Singapore), *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* 89, 91; available at <http://www.cisg.law.pace.edu/cisg/biblio/perales6.html>

³¹⁴ *Benjamin's Sale of Goods* (n69) para 8-025.

³¹⁵ *Ibid.*

the whole benefit which it was intended he should receive from the contract.’³¹⁶ However, ‘the disadvantage of this approach is its uncertainty.’³¹⁷

The rule that time can, by notice, be made of the essence of the contract, when it was not to begin with, is ‘an equitable innovation.’³¹⁸ Indeed, traditionally a notice making time of the essence was allowed by Equity in contracts for the sale of land, or put otherwise, in contracts where specific performance would be granted.³¹⁹ However, *Benjamin’s Sale of Goods* submits ‘that these equitable rules have only a very limited application to contracts of sale of goods, since equity would not ordinarily intervene to relieve a party from the consequences at common law of a breach of a time stipulation in such a contract.’³²⁰ Bridge seems to concur by arguing that ‘the process, explicable in sale of land agreements where it was difficult to make title, is hardly fitted to commercial contracts, especially those involving goods.’³²¹ The argument is that ‘if the stipulation is not a condition but an intermediate term, then a notice purporting to make time of the essence will not automatically make a failure of performance a repudiatory breach, for one party cannot unilaterally vary the terms of a contract by turning what was previously a nonessential term of the contract into an essential term.’³²² It is maintained that, ‘should such a notice be served, the failure to deliver within the time fixed by the notice will not, in itself, constitute a repudiation irrespective of the consequences of the breach.’ Bridge on the other hand states that ‘the serving of a notice making time of the essence would therefore seem to serve no purpose other than to inform the recipient either that a failure to perform by the stated date may amount to a discharging breach of the contract or that he is being given a second chance to perform and should duly do so or face the consequences.’³²³

5.4.3.3 Comparison

The *a priori* classification of terms in English sales law and the remedial approach of the CISG based on the evaluation of the consequences of the breach render Article

³¹⁶ Ibid.

³¹⁷ John Stannard, ‘In the Contractual Last Chance Saloon: Notices Making Time of the Essence’ (2004) LQR 137, 137.

³¹⁸ Bridge, *The Sale of Goods* (n73) 285.

³¹⁹ Stannard, ‘In the Contractual Last Chance Saloon’ 139.

³²⁰ *Benjamin’s Sale of Goods* (n69) para 8-026.

³²¹ Bridge, *The Sale of Goods* (n73) 285.

³²² *Benjamin’s Sale of Goods* (n69) para 8-026; Bridge, *The Sale of Goods* (n73) 285.

³²³ Bridge, *The Sale of Goods* (n73) 286.

49(1)(b) CISG a provision which will have significant practical consequences.³²⁴ Bridge explains that ‘the absence of promissory conditions in the CISG necessitates machinery to enable a party to bring matters to a head when faced with delayed performance by the other party.’³²⁵ He further explains that ‘since the time of delivery and delivery-related obligations is so commonly of the essence of commercial and particularly of international sales of goods (...), making time of the essence should rarely arise.’³²⁶ Therefore, while Article 49(1)(b) CISG in theory can have significant practical consequences to a merchant, in practice, these consequences might not be felt given the fact that usually time is of the essence.

5.4.4 Partial Performance

5.4.4.1 Under the CISG

Article 51 CISG ‘contains supplementary rules’ that clarify the buyer’s position in terms of available remedies where the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract.³²⁷ It reads:

- (1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 to 50 apply in respect of the part which is missing or which does not conform.
- (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract.

Article 51 CISG can be seen as establishing four points, namely that ‘generally the buyer’s remedies in relevant circumstances are restricted to the missing part; that the contract may also be avoided only in part; that the contract may be avoided in its entirety only if the partial failure to perform amounts to a fundamental breach of contract in relation to the contract in its entirety; and that the buyer may claim compensation according to Article 45(1)(b) for every loss suffered due to the partial non-performance.’³²⁸ Also, Article 51 CISG ‘presupposes that the goods are capable of

³²⁴ See Jacob Ziegel, ‘Article 49’ in Jacob Ziegel and Claude Samson, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods (July 1981) available at <http://www.cisg.law.pace.edu/cisg/text/ziegel49.html>

³²⁵ Bridge, *The International Sale of Goods* (n10) 575.

³²⁶ Ibid 577.

³²⁷ Markus Muller-Chen, ‘Article 51’ in Schwenger, *Schlechtriem and Schwenger Commentary* (n16) 781.

³²⁸ Ibid 781-782.

being delivered in parts' which in turn means that 'the contract of sale must therefore be a single contract covering a number of separate items.'³²⁹ However, in the case of instalment contracts, Article 73 CISG applies.

If the seller delivers only a part of the goods

If there is a short delivery, i.e. the seller delivers less than what he contractually agreed to deliver, 'the buyer can initially demand delivery of the missing part pursuant to Articles 51(1) and 46(1).'³³⁰ Short delivery, because of a discrepancy in quantity, is non-conformity according to Article 35 CISG, 'however, with regard to "the part which is missing", this is simply non-delivery pursuant to Article 46(1).'³³¹ The buyer can fix an additional period of time for performance by the seller according to Article 47 CISG, and if the seller does not perform within that additional period of time, the buyer would be able to declare the contract avoided 'with regard to the missing part pursuant to Article 49(2)(b)(ii) in conjunction with Article 51(1).'³³² The consequence of the buyer partially avoiding the contract is that 'the price is reduced by the same percentage as is obtained by dividing the goods actually delivered by the total amount of the goods to be delivered.'³³³ Nevertheless, 'the seller remains entitled to subsequently deliver the missing part' in accordance with Article 48 CISG.³³⁴

If on the other hand, the seller delivers a quantity of goods greater than that provided for in the contract, according to Article 52(2) CISG, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity however he must pay for it at the contract rate as provided by provision itself.

If only a part of the goods delivered is in conformity with the contract

'If only part of the goods delivered is in conformity with the contract, the buyer may exercise his rights under Article 46 *et seq.* in respect of the defective part.'³³⁵ If the non-conformity of part of the goods amounts to a fundamental breach of contract, the buyer may, after giving appropriate notice of lack of conformity in accordance with Article 39 CISG, claim delivery of substitute goods according to Article 46(2) CISG or declare the

³²⁹ Ibid 782.

³³⁰ Muller-Chen, 'Article 51' (n327) 783.

³³¹ Ibid.

³³² Ibid 784.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Ibid.

contract avoided in respect of the non-conforming goods and reduce the purchase price accordingly under Articles 49(1)(a) and 51(1) CISG.³³⁶ Of course the buyer may also choose to keep all of the delivered goods and claim damages under Article 45(1)(b) CISG or a price reduction under Article 50 CISG in respect of the non-conforming goods.³³⁷ However, it must be clarified that in each instance the seller retains an unreduced claim to the originally agreed price for the conforming goods that were delivered.³³⁸

It is argued that isolating the remedies on the missing or non-conforming portion of the seller's performance benefits both parties and in particular the buyer who 'retains mechanisms that provide him with the full benefit he bargained for.'³³⁹ Article 51 CISG has been viewed 'as creating a "*de facto* division" in the contract.'³⁴⁰ As Kee argues, 'this artificial dichotomy was created to promote one of the fundamental tenets of the CISG - to keep contracts "on foot."'³⁴¹ Nevertheless, 'an unintended consequence' for Article 51 CISG has been competition with Article 73 CISG.³⁴² From a buyer's perspective though, Article 51 CISG 'offers a considerably more certain method of avoiding the offending part of the contract.'³⁴³

Article 73 CISG

Where performance of an instalment contract is disturbed, Article 73 CISG 'provides for special rules of contract avoidance.'³⁴⁴ The CISG does not define what is meant by a contract for instalment delivery however, 'any contract under which the seller is bound to make two or more deliveries should be an instalment contract, whether these are to be separately paid for or not.'³⁴⁵

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ivo Bach, 'Article 51' in Kroll, Mistelis and Perales Viscasillas, *Commentary* (n35) 769.

³⁴⁰ Leser as quoted by Christopher Kee, 'Remedies for Breach of Contract where only Part of the Contract has been Performed: Comparison between Provisions of CISG (Articles 51, 73) and Counterpart Provisions of the Principles of European Contract Law' (2002) *Vindobona J Int'l Com L & Arb* 281, 282.

³⁴¹ Kee, 'Remedies for Breach of Contract' (n340) 282.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Christiana Fountoulakis, 'Article 73' in Schwenger, *Schlechtriem and Schwenger Commentary* (n16) 983, 984.

³⁴⁵ Bridge, *The International Sale of Goods* (10) 578; Fountoulakis, 'Article 73' (n344) 986: 'An instalment contract consists of at least two successive deliveries.'

Usually Articles 51 and 73 CISG are ‘considered concurrently as they both deal with the scenario where only part of a contract has been performed.’³⁴⁶ However, it must be clarified that Article 51 CISG ‘applies where there has been a failure to deliver part of a contract intended to be delivered as a whole’ whereas Article 73 CISG ‘applies to instalment contracts and the failure to perform an obligation in respect to an instalment.’³⁴⁷ Although in both situations ‘the buyer may ultimately obtain the same remedy, the two articles follow different paths to that result.’³⁴⁸

According to Article 73(1) CISG, if the failure of the seller to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the buyer may declare the contract avoided with respect to the instalment. As Bridge succinctly puts it, ‘the CISG applies a scaled-down version of the fundamental breach doctrine to the individual instalment.’³⁴⁹ It is argued that Article 73(1) CISG expresses the general idea underlying the CISG ‘that contract avoidance is an *ultima ratio* remedy which, if exercised, should be limited to the part of the contract affected by the breach.’³⁵⁰

According to Article 73(2) CISG, if the seller’s failure to perform any of his obligations in respect of any instalment gives the buyer grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, the buyer may declare the contract avoided for the future, provided that he does so within a reasonable time.³⁵¹ Bridge explains that ‘the avoidance of the contract under Article 73(2) CISG is a type of avoidance for anticipatory repudiation since it is based on an apprehension of future non-performance.’³⁵²

Furthermore, and according to Article 73(3) CISG, a buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or future deliveries if, by reason of their interdependences,

³⁴⁶ Kee, ‘Remedies for Breach of Contract’ (n340) 281.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Bridge, *The International Sale of Goods* (n10) 578.

³⁵⁰ Fountoulakis, ‘Article 73’ (n344) 984.

³⁵¹ See *Landgericht Ellwangen* (Germany) 21 August 1995 (Unilex): ‘The seller’s breach gave the buyer good grounds to conclude that a fundamental breach of contract would occur with respect to future instalments, in particular because it was not possible to establish if and when the seller would be able to supply goods conforming with German law on food. This deprived the buyer of what it was entitled to expect under the contract.’; *Schiedsgericht Hamburger Freundschaftliche Arbitrage* (Arbitral Award) 29 December 1998 (Unilex); *Handelsgericht Zürich* (Switzerland) 5 February 1997 (Unilex).

³⁵² Bridge, *The International Sale of Goods* (n10) 579, fn 106.

those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract. In other words, ‘if, due to the interdependence of the instalments, the defective or failed performance makes past or future instalments worthless, those instalments can be avoided as well’ but ‘this is true only if the purpose of the entire contract was clear to both parties at the conclusion of the contract.’³⁵³

Article 51(2) CISG

According to Article 51(2) CISG, a buyer is entitled to avoid the contract in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to fundamental breach.³⁵⁴ Bach points out that, ‘as a remedy, Article 51(2) is duplicative: Article 49(1)(a) independently provides buyers the right to avoid for any fundamental breach, including partial non-delivery’ but was included in the CISG fearing ‘diverging national interpretations of buyer’s rights in cases of partial performance.’³⁵⁵ As such, although case law ‘remains rare,’³⁵⁶ courts have established the same highly restrictive standard for finding a fundamental breach under Article 51(2) CISG; ‘only when the buyer has been deprived of all value in the remaining goods, i.e. can neither use nor resell the goods in a reasonable manner, may the buyer claim an Article 51(2) fundamental breach.’³⁵⁷ A clear example of a case falling under Article 51(2) CISG would be where items of a different nature are sold as belonging together (e.g. co-ordinated furniture forming a complete bespoke decoration of a room) and the buyer has no interest in retaining the partial delivery or the conforming part without the non-conforming part.³⁵⁸

5.4.4.2 In English Sales Law

Delivery of the agreed quantity

Section 30(1) SGA1979 corresponds to a part of Article 51 CISG (‘if the seller delivers only a part of the goods’). According to section 30(1) SGA 1979 ‘where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.’ The buyer in such an instance is faced with two alternatives. First, ‘he

³⁵³ Schlechtriem, *Uniform Sales Law* (n261) 96.

³⁵⁴ See *Landgericht Heidelberg* (Germany) 3 July 1992 (Unilex).

³⁵⁵ Bach, ‘Article 51’ (n339) 769.

³⁵⁶ See *Cour d'Appel de Paris* (France) 4 June 2004 (Unilex); *Shanghai First Intermediate People's Court* (China) 25 December 2008 (Pace); *Oberlandesgericht Koblenz* (Germany) 21 November 2007 (Pace).

³⁵⁷ Bach, ‘Article 51’ (n339) 779.

³⁵⁸ Muller-Chen, ‘Article 51’ (n327) 785.

can reject the insufficient quantity delivered and sue for any loss occasioned by the seller's breach.³⁵⁹ Alternatively, the buyer 'can –if he so chooses– retain the quantity delivered, paying for this at the contract rate, and recover such part of the price as has been paid for the undelivered balance.'³⁶⁰ The buyer can also claim damages for breach because 'by accepting the quantity delivered, the buyer does not give up his right to recover damages for non-delivery of the balance.'³⁶¹ The buyer though cannot, without the consent of the seller, only accept a part of the goods delivered and reject the rest: 'he must accept the whole of the insufficient delivery, or reject the whole of it.'³⁶²

According to section 30(2) SGA 1979, 'where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. According to section 30(3) SGA 1979, 'where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at contract rate.'

However, 'at common law, a shortfall or excess in quantity which is "microscopic" and which is not capable of influencing the mind of the buyer will not entitle him to reject the goods, for *de minimis non curat lex*.'³⁶³ Moreover, according to section 30(2A)(a) SGA 1979, where the seller delivers a quantity less than he contracted to sell, the buyer may not reject the goods if the shortfall is so slight that it would be unreasonable for him to do so. It must be clarified though that the aforementioned section 'is not merely a restatement in statutory terms of the *de minimis* rule, despite the reference to the shortfall or excess being "slight".'³⁶⁴

In instances where the seller delivers an insufficient or excessive quantity of goods and the goods are rejected by the buyer, *Benjamin's Sale of Goods* submits that, 'in principle, the seller could subsequently make delivery of the correct quantity, which the

³⁵⁹ *Benjamin's Sale of Goods* (n69) para 8-046.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Ibid* para 8-050.

³⁶⁴ *Ibid* para 8-051.

buyer would then be able to accept,' or in other words cure the insufficient or excessive quantity delivered.³⁶⁵

Partial rejection

The English sales law rules governing partial rejection add to the rules about delivery of the wrong quantity of goods.³⁶⁶ According to section 35A SGA 1979, corresponding to a part of Article 51 CISG ('or if only a part of the goods delivered is in conformity with the contract'), if the buyer has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them, but accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods, he does not by accepting them lose his right to reject the rest. This section was inserted in the SGA 1979 by the Sale and Supply of Goods Act after the Law Commission recommended that 'there should be a general right of partial rejection in cases where some of the goods delivered to the buyer do not conform with the contract requirements;' 'it seemed reasonable for a buyer to be able to retain satisfactory goods and reject defective goods.'³⁶⁷

Instalments

According to section 31(2) SGA 1979, where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated. Nonetheless, a contract falling outside this statutory requirement will still be treated as an instalment contract, 'if it amounts to a severable (or divisible) contract, signifying a contractual intention in favour of non-entire performance.'³⁶⁸

While the buyer's right to reject individual instalments while keeping the contract on foot is explicitly recognized by the CISG, section 31 SGA 1979 does not expressly deal with the rejection of individual instalments and under English law this right is only recognised 'by implication' of section 35A(2) SGA 1979, which permits the buyer to

³⁶⁵ Ibid. See Sean Thomas, 'The Right to Reject for Short Delivery and Termination' (2012) 11(1) JITLP 44.

³⁶⁶ *Sale and Supply of Goods Report* (n152) para 6.9.

³⁶⁷ Ibid paras 6.8-6.9.

³⁶⁸ Bridge, *The International Sale of Goods* (n10) 578, fn 102.

accept only a part of a non-conforming instalment and reject the rest.³⁶⁹ Since section 31(2) SGA 1979 does not explicitly apply to the rejection of individual instalments, it must mean that rejection depends upon the application of the normal principles relating to conditions, warranties and innominate terms.

According to Article 73(2) CISG the buyer may declare the contract avoided for the future, provided that he does so within a reasonable time. Here, 'the CISG departs in formal terms from English law by applying the notion of anticipatory breach to future instalments.'³⁷⁰ The fundamentality of the breach has to be assessed in the light of the entire duration of the contract. Bridge argues that this more logical than English law which asks whether the breach has gone to the root of the contract.³⁷¹ Despite this, 'the results are likely to be similar under the CISG and in English law.'³⁷² Indeed this seems to be the case as illustrated by the following examples.

In *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd*,³⁷³ the claimants contracted to sell 100 tons of rag flock to the defendants, delivery to be at the rate of three weekly instalments of one and a half tons each, as required, and the flock to conform to government standards. A breach occurred a quarter of the way through the delivery schedule and affected only one instalment out of about sixty-five. It could be considered as a freak occurrence given the consequent delivery of conforming instalments. Considering the ratio (quantitatively) which the breach bore to the contract as a whole and the degree of probability, or improbability, that such a breach will be repeated, the Court of Appeal held that the defendants were not entitled to repudiate the contract as the breach only affected one and a half tons out of the flock already delivered and it was most improbable that it would recur. Conversely, in *R A Munro & Co Ltd v Meyer*³⁷⁴ Wright J. held that 'where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated.'³⁷⁵ In that case, the buyer agreed to buy 1,500 tons of meat and bone meal from the seller to be delivered at the

³⁶⁹ Bridge, *The International Sale of Goods* (n10) 578.

³⁷⁰ Bridge, *The International Sale of Goods* (n10) 578-579.

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ [1934] 1 KB 148.

³⁷⁴ [1930] 2 KB 312.

³⁷⁵ *Ibid* at 331.

rate of 125 tons a month. After more than half of the total quantity had been delivered and discovered to be seriously defective, the buyer sought to repudiate the contract.

Under the CISG, the buyer may retain instalments previously delivered.³⁷⁶ Section 31(2) SGA 1979 says nothing about the rejection of delivery instalments already accepted, which according to severable contract analysis must be retained by the buyer.³⁷⁷

5.5 Loss of the Right to Avoid the Contract

5.5.1 Under the CISG

5.5.1.1 Article 49(2) CISG

Article 49(2) CISG limits the right of the buyer to avoid the contract if he does not do so within a reasonable time. ‘The reasoning behind the time limit is that too much time may allow abuse by the party considering avoidance: they may speculate on the price in a volatile market or cause unnecessary expense.’³⁷⁸ Article 49(2) CISG reads:

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Under Article 49(2) CISG, the buyer loses the right to avoid the contract independently of the question of its fundamental nature in specific cases if he does not declare

³⁷⁶ *Audiencia Provincial de Barcelona* (Spain) 3 November 1997.

³⁷⁷ Bridge, *The Sale of Goods* 646; *Atiyah's Sale of Goods* 503.

³⁷⁸ Alejandro Osuna, ‘Dealing with Avoidance and its Consequences: Articles 49(2), 64(2) and 81 through 88’ in H.Flechtner, R.Brand and M.Walter (eds), *Drafting Contracts under the CISG* (OUP 2008) 481, 486.

avoidance within a reasonable period. Article 49(2) CISG is criticised for being ‘unnecessarily refined and detailed’ when a general rule that, avoidance must be declared within a reasonable time after the buyer knew or should have known of the breach, would not have been less clear or more difficult to apply than the present text.³⁷⁹ However, and as already mentioned, these ‘very diverse’ and ‘complicated’ time limits are imposed in order ‘to clarify the fate of the contract and the mutual obligations of the parties’ as soon as possible in order ‘to prevent a buyer from speculatively delaying avoidance of the contract after the goods are delivered.’³⁸⁰ While avoidance is a last resort remedy, when it should happen, it should not, along with the reversal of contract, be delayed unreasonably.³⁸¹

Article 49(2) CISG makes a distinction between late delivery and other breaches of contract. According to Article 49(2)(a) CISG, in case of later delivery the reasonable period of time for declaring the contract avoided starts when the buyer has become aware that delivery has been made. According to Article 49(2)(b) CISG, in cases of any other breaches, the said period starts when the buyer became aware of the breach or ought to have been aware of the breach, or after a period fixed in accordance with Article 47(1) CISG or Article 48(2) CISG has expired.

Unfortunately, the only discernible pattern in case law as to what constitutes a reasonable period of time is that ‘longer is more unreasonable than shorter.’³⁸² However, because of the fact-specific nature of the cases involved, there will never be a definite conception of what constitutes a reasonable period of time for declaring the contract avoided. Nonetheless a considerable body of case law can offer a great deal of guidance in determining such a period.³⁸³ One case is particularly illustrative though. The facts as reported in *Unilex* are as follows. A Swiss seller and a German buyer concluded a contract for the sale and installation of a fitness isolation tank containing water with high salt concentration.³⁸⁴ The tank was delivered and installed,

³⁷⁹ Magnus, ‘Beyond the Digest: Part III (Articles 25-34, 45-52)’ (n187) 334.

³⁸⁰ Muller-Chen, ‘Article 49’ (311) 748.

³⁸¹ Ibid.

³⁸² Gabriel, ‘General Provisions, Obligations of the Seller, and Remedies for Breach of Contract by the Seller’ (n187) 357-358.

³⁸³ See *Bundesgerichtshof* (Germany) 15 February 1995; *Oberlandesgericht München* (Germany) 2 March 1994; *Oberlandesgericht Koblenz* (Germany) 31 January 1997; *Oberlandesgericht Oldenburg* (Germany) 1 February 1995; *Oberlandesgericht Hamburg* (Germany) 26 November 1999; *Audiencia Provincial de Barcelona* (Spain) 3 November 1997.

³⁸⁴ *Handelsgericht Zürich* (Switzerland) 26 April 1995.

and the buyer paid two instalments of the price. Four weeks after delivery the buyer discovered that water leaked out of the tank. Another four weeks after discovery of the defect the buyer gave notice of lack of conformity, and declared the contract avoided. The court held that the contract had not been validly avoided as the buyer should have made the declaration within a reasonable time after it knew or ought to have known of the breach (Article 49(2)(b)(ii) CISG). The Court observed that if the buyer wishes to declare the contract avoided, it must do so within the same time requested to give due notice of the lack of conformity under Article 39(1) CISG.

5.5.1.2 Article 48 CISG

If the argument that fundamentality of breach under Article 49(1)(a) CISG must be decided in light of all the surrounding circumstances, including the seller's offer to cure, then the buyer's right to avoid the contract is initially suspended in cases where the seller offers to cure and eventually lost if the seller does cure.³⁸⁵

5.5.1.3 Article 39 CISG

According to Article 39(1) CISG, the buyer must give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it³⁸⁶ otherwise he loses the right to rely on a lack of conformity of the goods. Such notice of non-conformity must indicate the buyer's objection and 'exactly specify the nature of the lack of conformity' so that the seller is put in a position to 'understand the lack of conformity and take the appropriate steps, such as sending a representative to examine the goods, securing necessary evidence regarding the conformity of the goods for any eventual dispute, preparing for delivery of additional or substitute goods or fore repair, or taking recourse against his supplier.'³⁸⁷

When determining reasonable time, not only the nature of the goods but 'all the circumstances of the specific case must be taken into account, including any trade usages and practices between the parties.'³⁸⁸ In relation to perishable or seasonal goods, usually the very nature of the goods dictates the shortest possible notice.³⁸⁹ For example

³⁸⁵ Darren Peacock, 'Avoidance and the Notion of Fundamental Breach under the CISG: An English Perspective' (2003) 8 ITBL 95, 119.

³⁸⁶ See Article 38 CISG.

³⁸⁷ Ingeborg Schwenzer, 'Article 39' in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 624-625.

³⁸⁸ Ibid 630.

³⁸⁹ Ibid.

in a case involving a contract for the sale of live cattle the court held that that examination had to be done immediately on delivery or on the very next day and that the notice had to be given shortly thereafter.³⁹⁰ However, what constitutes reasonable time in relation to non-perishable, durable or manufactured goods is not as easy to ascertain although comparative research of relevant case law does suggest that a period of approximately one month should be satisfactory.³⁹¹

If the buyer fails or does not correctly give notice of non-conformity, the goods will be deemed approved and he would therefore be liable to pay the contractually agreed price; he loses the right to rely on the non-conformity of the goods and consequently all the remedies he would be entitled to.³⁹²

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

5.5.1.4 Article 43 CISG

Article 43 CISG, just like Article 39 CISG, provides that the buyer who has received goods which are not free from third party claims must notify the seller within a reasonable time after he has, or ought to have, become aware of such claims otherwise he loses the right to rely on Articles 41 or 42 CISG is lost. Consequently, if the nature and extent of third party rights or claims amounted to a fundamental breach, the right of avoidance according to Article 49(1)(a) CISG is also lost.

5.5.1.5 Article 82 CISG

‘Article 82 CISG, unlike the preceding Articles 39 and 43 CISG, adds an independent rule applying to anyone of the different hypotheses of avoidance: the right of avoidance is lost when the buyer is unable to reconstitute the goods substantially in the condition in which he received them and cannot rely on the three exceptions provided.’³⁹³

³⁹⁰ *Oberlandesgericht Schleswig* (Germany) 22 August 2008 (Unilex).

³⁹¹ Schwenzer, ‘Article 39’ (n387) 624-625. See Camilla Andersen, ‘Article 39 of the CISG and its “Noble Month” for Notice-Giving; A (Gracefully) Ageing Doctrine?’ (2012) 30 J. L. & Com 185.

³⁹² *Ibid* 638-639.

³⁹³ Will, ‘Article 49’ (n23) 366.

If it is impossible for the buyer to make restitution of the goods substantially in the position in which he received them, according to Article 82(1), he loses the right to declare the contract avoided or to require the seller to deliver substitute goods. This provision refers to restitution of goods ‘received’. Accordingly, restitution with different goods of the same kind is precluded.³⁹⁴ However, given that the buyer must only make restitution of the goods ‘substantially’ in the condition in which he received them, ‘insubstantial changes, even insubstantial deterioration in the condition of the goods, do not affect the buyer’s right to avoid the contract.’³⁹⁵ Furthermore, Article 82(1) CISG ‘is extensively modified by the exceptions found in Article 82(2) and the rules on the equalization of benefits in Article 84.’³⁹⁶ Accordingly, Article 82(1) does not apply if (a) the impossibility of making restitution of the goods or of making restitution substantially in the condition in which the buyer received them is not due to his act or omission, (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in Article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

If, subject to insubstantial changes, the goods cannot be returned in an unimpaired condition and if none of the exceptions provided by Article 82(2) applies, the buyer is barred from avoiding the contract. However, Article 83, supplementing Article 82, provides that in such an instance the buyer retains all of his other remedies under the contract and the CISG.

5.5.2 In English Sales Law

5.5.2.1 Waiver

Waiver amounts to a complete excusing of the breach: the buyer says he has not objection to the goods as they are and will not even ask for damages. In this instance ‘waiver’ is used to refer to total waiver, ‘i.e. an abandonment by the buyer of his rights to terminate and to claim damages.’³⁹⁷ This is thought to be comparatively rare in the

³⁹⁴ Fountoulakis, ‘Article 82’ in Schwenzer, *Schlechtriem and Schwenzer Commentary* (n16) 1116.

³⁹⁵ Ibid. See *Oberlandesgericht Oldenburg* (Germany) 1 February 1995.

³⁹⁶ Fountoulakis, ‘Article 81’ (n90) 1107.

³⁹⁷ Treitel, *The Law of Contract* (n8) 904-905.

case of defective goods though a waiver as to late delivery may more easily occur.³⁹⁸ Unless supported by consideration, it can be retracted at any time with reasonable notice.³⁹⁹ However, according to *Hughes v Metropolitan Railway Co*,⁴⁰⁰ the buyer cannot retract it where it would be inequitable to do so. A clear example is ‘where the seller, in reliance on the buyer’s assurances that there was not objection to the goods supplied, has so conducted himself as to prevent himself from making a further, conforming tender, which he could have originally done; or where for that reason loses an opportunity to tender the goods elsewhere.’⁴⁰¹

5.5.2.2 Affirmation

Election or affirmation of the contract ‘refers to waiver in the sense of election, i.e. to the buyer’s abandonment of the right to terminate, while keeping alive his right to damages.’⁴⁰² An ‘affirmation is irrevocable and, in that sense, final; once the buyer’s decision to affirm the contract has been communicated to the seller, the buyer cannot then change his mind and terminate the contract.’⁴⁰³ Section 11(2) SGA 1979 recognises both waiver and affirmation in providing that ‘where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated.’

5.5.2.3 Acceptance

The SGA 1979 provides that if the buyer is deemed to have accepted the goods this ‘shall in effect constitute an implied affirmation, in the sense that the buyer is deemed to have affirmed the contract and is thus restricted to a claim for damages, whether or not he has discovered the defect.’⁴⁰⁴ According to section 11(4) SGA 1979:

‘Subject to section 35A below, where a contract of sale is not severable, and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and

³⁹⁸ *Benjamin’s Sale of Goods* (n69) para 12-036. See *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473; *Hartley v Hymans* [1920] 3 KB 475; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616.

³⁹⁹ *Ibid* para 12-037.

⁴⁰⁰ (1877) 2 App.Cas. 439.

⁴⁰¹ *Benjamin’s Sale of Goods* (n69) para 12-037. See *Toepfer v Warinco AG* [1978] 2 Lloyd’s Rep. 569 at 576; *Societe Italo-Belge pour le Commerce et l’Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1982] 1 All ER 19 at 26.

⁴⁰² Treitel, *The Law of Contract* (n8) 905.

⁴⁰³ Treitel, *The Law of Contract* (n8) 905-906; see also *Benjamin’s Sale of Goods* (n69) para 12-039.

⁴⁰⁴ *Benjamin’s Sale of Goods* (n69) para 12-040.

treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.’

However, a seller who wishes to take the goods back can do so and sue for damages for non-acceptance.⁴⁰⁵ The loss of the right to reject, where there has been no express affirmation therefore, depends on whether the goods have been accepted in accordance with section 35 SGA 1979. According to section 35(1) SGA 1979, ‘the buyer is deemed to have accepted the goods (a) when he intimates to the seller that he has accepted them, or (b) 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.’ This section however is subject to section 35(2) which provides:

‘Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose

- (a) of ascertaining whether they are in conformity with the contract, and
- (b) in the case of a contract for sale by sample, of comparing the bulk with the sample.’

The buyer’s right to examine the goods is governed by section 34 SGA 1979, which reads:

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

Moreover, according to section 35(4) SGA 1979, the buyer is deemed to have accepted the goods when after the lapse of reasonable time he retains the goods without intimating to the seller that he has rejected them.

5.5.3 Comparison

A major variance between the two systems is that while English sales law draws a difference between rejection of the goods and termination of the contract, the CISG does not draw the ‘largely analytical, difference between rejection and termination.’⁴⁰⁶ In English sales law, the buyer loses his right to reject the goods and terminate the

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid 590.

contract by the passage of time. Under the CISG, the buyer loses the right to declare the contract avoided ‘in two cases: by the passage of time, and by an inability to make restitution of the goods to the seller.’⁴⁰⁷ While in both systems the buyer loses the right to avoid or terminate the contract by the passage of time, the fact that under the CISG the buyer loses this right if he is unable to make restitution of the goods to the seller will have significant practical consequences for merchants. It is therefore highly likely that the CISG will not be looked at favourably by merchants as a result of its rules on the loss of the right to avoid the contract.

5.6 Conclusion

As this Chapter has had to examine a great number of provisions falling within the umbrella of avoidance under the CISG, the goal, in light of this thesis’ word restrictions, was to symmetrically and succinctly examine all relevant rules against each other. In particular, this Chapter found that, the effects of avoidance, and in particular the equalization of benefits (Article 84 CISG) and the preservation of goods requirements (Article 86 CISG), the stringent qualifications in place before a buyer can avoid a contract (Article 49 CISG), the notice requirement in order to avoid the contract for anticipatory fundamental breach (Article 72(2) CISG) and the CISG rules on the loss of the right to avoid the contract are the ones which will have significant practical consequences for merchants and are capable of attracting hostility for the CISG from both the business and legal community.

⁴⁰⁷ Bridge, *The International Sale of Goods* (n10) 591.

Chapter 6 Conclusion

The aim of this thesis was to identify the differences between the CISG and English sales law in order to determine whether these differences will have significant practical consequences for merchants in the eventuality the UK accedes to the CISG AND THE Convention becomes the country's legal regime for contracts for the international sale of goods. This was achieved by examining the relevant “unfamiliar” CISG provisions against the equivalent “familiar” English sales law rules. By considering and comparing unfamiliar CISG provisions against established English sales knowledge, this thesis also aimed to make the CISG more intelligible and digestible to English lawyers in light of its significance as the international sale of goods law of 83 countries.

Accordingly this thesis posed the following research questions: What are the differences between the buyer’s remedies in the CISG and English sales law? Will these differences have significant practical consequences for merchants in the eventuality the UK accedes to the CISG? In other words, do the CISG provisions under examination bring about a different practical outcome than English sales law does so as to justify possible concerns of merchants and lawyers about the impact of incorporating the CISG?

This thesis first comparatively examined Article 46 CISG, which provides the buyer’s right to require performance by the seller of his obligations against specific performance in English sales law. The approaches of the two systems towards specific performance of the contract as a remedy after a breach of contract by the seller and its availability to an innocent buyer are indeed diametrically different to a point where differences would have significant practical consequences in the eventuality the UK accedes to the CISG. While the CISG grants the remedy to the buyer as of right, English sales law considers it as an exceptional and discretionary remedy only granted by the court after the buyer specifically requests it. However, Article 28 CISG extinguishes any concerns about a difference practical outcome by allowing a court to not 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 the CISG. As such Article 46 CISG should not be a cause of concern or hostility affecting support for the UK's accession to the CISG.

This thesis then proceeded to examine Article 47 CISG, which provides the buyer’s right to fix an additional period of time for performance by the seller of his obligations

and Article 48 CISG, which provides the seller's right to cure any failure to perform his obligations. The first conclusion reached is that Article 47 CISG will not have significant practical consequences for merchants given its use in practice under English sales law. This thesis then concluded that the seller's rights to cure under the CISG are more extensive than the seller's right to cure under English sales law as a result of the different attitude between the two systems as to how the law should respond to breach of contract. As such, there would be significant practical consequences for merchants in the eventuality the UK were to accede to the CISG. Nevertheless, as explained in Chapter 3, there have been many calls for incorporating such rights into English sales law, which this thesis endorses. Therefore, if English sales law is in fact reformed to include the seller's right to cure any failure to perform his obligations then merchants should expect and prepare for significant practical consequences anyway.

After comparatively examining Articles 47 and 48 CISG with English sales law, this thesis proceeded to comparatively examine Article 50 CISG, which provides the buyer's right to reduce the price. Although there is no direct equivalent of the remedy of price reduction for the commercial buyer in English sales law, parallels can be drawn. Nevertheless, such parallels only concern short delivery and the fact is that, English sales law, as far as commercial contracts are concerned, does not provide a general buyer's remedy of price reduction. As such significant practical consequences should be expected which however will not alter other fundamental rights of the buyer such as the right to claim damages.

Finally, this thesis comparatively examined the buyer's right to declare the contract avoided under the CISG, alongside a number of relevant provisions, with the buyer's right to terminate the contract in English sales law and equivalent relevant provisions. This thesis identified that the effects of avoidance, and in particular the equalization of benefits (Article 84 CISG) and the preservation of goods requirements (Article 86 CISG), the stringent qualifications that need to be in place before a buyer can avoid a contract (Article 49 CISG), the notice requirement in order to avoid the contract for anticipatory fundamental breach (Article 72(2) CISG) and the CISG rules on the loss of the right to avoid the contract are the ones which will have significant practical consequences for merchants. As a result of bringing about a different practical outcome than English sales law they are capable of attracting hostility for the CISG from both the business and legal community.

While this thesis found differences between the two systems, which would not have significant noteworthy practical consequences, the majority of the differences identified would. In other words, the application of most of the CISG provisions under consideration herein would bring about a different practical outcome than English sales law which is what merchants are mostly interested in. However, given the international nature of the contracts involved, this thesis submits that, the differences between the two systems, which do lead to different practical outcomes, in light of the international nature of the contracts involved should nevertheless be embraced by merchants and lawyers alike in the name of the promotion of commerce. This thesis endorses Goode's argument that 'the time has long passed when domestic legislation shaped for international trade can provide sensible solutions to the problems of international commerce.'¹ Bridge agrees with Goode and, other than arguing that the UK needs a new Sale of Goods Act (SGA), or in the opinion of Goode, a commercial code,² maintains that the UK should accede to the CISG reasoning that 'the Convention does not harm the commodities trade' on the basis of Article 6 CISG³ and 'can, among other things, usefully stand in for a battle over the applicable law and thus assist in the reduction of transaction costs.'⁴

6.1 Further Research

Although damages under the CISG have been the subject of a great deal of literature, and do not really differ from damages under English sales law, for the sake of completion, they fall within the author's further research plans which would also include frustration. In the event the UK accedes to the CISG, arguably such research will be most welcome by practitioners and the Government alike given the 'start up'

¹ Roy Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 (4) *International and Comparative Law Quarterly* 751, 752.

² Roy Goode, *Commercial Law in the Next Millennium* (Sweet and Maxwell 1998) 101-102.

³ Michael Bridge, *The International Sale of Goods*, (OUP, 3rd edition 2013) 5, reports that, 'even though the CISG has not been brought into force in England, it has long been the practice explicitly to exclude the operation of the CISG, along with a number of other international conventions, in the standard contract forms promulgated by commodity associations, such as the Grain and Feed Trade Association (GAFTA) or the Federation of Oils, Seeds and Fats Association (FOSFA), which provide for arbitration in England and for the application of English law as the applicable law' before arguing that one may expect the practice of exclusion in the commodities to continue. However, this does not mean that the CISG is not suitable for the sale of commodities. See Katrina Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' (2010) 14 *Vindobona J Int'l Com L & Arb* 83; Djakhongir Saidov, 'Remedies for a Documentary Breach: English Law and the CISG' in Larry DiMatteo, Qi Zhou, Severine Saintier and Keith Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013) 434. Cf. Michael Bridge, 'A Law for International Sale of Goods' (2007) 37 *Hong Kong L J* 17.

⁴ Michael Bridge, 'Do we need a New Sale of Goods Act?' in John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (Lexis Nexis Butterworths 2006) 15.

costs including time and effort required for English lawyers and commercial actors to become familiar with the CISG.⁵ In fact there seems to be evidence to suggest that ‘the costs of becoming familiar with the CISG, or learning costs, are significant in lawyers’ choices of law.’⁶

6.2 Recent Developments

UNCITRAL has been recently called upon ‘to discuss and assess whether the practical needs of today’s and tomorrow’s international business communities might not be better served by uniform rules covering the full array of legal issues that arise in a contractual business-to-business (b2b) relationship.’⁷ The reasons behind this proposal (hereinafter ‘Swiss proposal’) are identified as the exclusion of some areas from the CISG which were left to applicable domestic law,⁸ the fact that some particular issues were left open during drafting⁹ and that some areas covered by the CISG have now proven to need more detailed attention.¹⁰ The surge of regional unification instruments or attempts, which seem to be more comprehensive than the CISG,¹¹ is also one of the reasons behind this proposal.

The CISG Advisory Council endorses this proposal and points out that ‘if energy in the area of sales law were drained away from the CISG by competing regional initiatives,

⁵ See Flechtner as quoted in Lisa Spagnolo, ‘A Glimpse through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)’ (2009) 13 (1) *Vindobona J Int’l Com L & Arb* 135, 140.

⁶ Spagnolo, ‘A Glimpse through the Kaleidoscope’ (n5) 140. See Martin Koehler, ‘Survey Regarding the Relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application’ (October 2006) available at

<http://www.cisg.law.pace.edu/cisg/biblio/koehler.html>; Peter Fitzgerald, ‘The International Contracting Practices Survey Project: An Empirical Study of Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States’ (2008) *J L & Com* 1.

⁷ Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law, 8 May 2012 (UN Doc A/CN.9/758). See Michael Joachim Bonell, ‘The UNIDROIT Initiative for the Progressive Codification of International Trade Law’ (1978) 27 *Int’l & Comp L Q* 413; Michael Joachim Bonell, ‘Do we need a Global Commercial Code?’ (2001) 106 *Dickinson L Rev* 87; Ingeborg Schwenzer, ‘Who needs a Uniform Contract Law, and Why?’ (2014) *Comp L J Pacific* 9. See also Luca Castellani [Legal Officer, UNCITRAL Secretariat (Vienna)], ‘The Role of Uniform Law in the Circulation of Legal Models: The Case of the CISG’ (2014) *Comp L J Pacific* 5, 6: ‘It is too early to assess the actual impact of that proposal (...) In any case, that proposal had the merit of opening a broader debate on whether further work on uniform contract law is useful and feasible, and, in the affirmative, on whether UNCITRAL would be the right forum for that venue.’

⁸ E.g. agency, validity questions such as mistake, fraud, duress, gross disparity, illegality, and control of unfair terms, third party rights, conditions, set-off, assignment of rights, transfer of obligations, assignments of contracts, and plurality of obligors and obligees.

⁹ E.g. the problem of battle of the forms, specific performance and applicable interest rate.

¹⁰ E.g. the rules on unwinding of contracts.

¹¹ Such as the Common European Sales Law (CESL) although this has now been withdrawn, the Organization for the Harmonization of Business Law in Africa (OHADA) Uniform Act on General Commercial Law, the Principles of Asian Contract Law (PACL).

there would be the risk that the influence of certain States in the continuing development of the CISG through judicial interpretation would be lessened.¹² Furthermore, there is a danger that ‘the attractions of the CISG to States that are not yet Contracting States would also be lessened to the extent that its universality were compromised.’¹³

6.3 Concluding Remarks

The elusiveness of applied uniformity of the CISG in conjunction with the fact that it has to be interpreted and applied by different national courts and arbitral tribunals in the absence of an International Commercial Court or other similar mechanism is acknowledged. The difficulties in application caused by fact that the CISG excludes areas for which a general consensus was difficult to achieve are also acknowledged. However, that does not stop the CISG being the international sale of goods law of 83 countries including most of the world’s largest economies. Arguably, no country can be ‘immune from the need to craft solutions of an international nature to govern its interactions with others.’¹⁴

Other than unfamiliarity of the CISG and fear of its application, it is certainly hard to discern any rational objection to the UK’s accession since the CISG is permissive; almost all of it can be modified or excluded by the parties to suit their needs.¹⁵ Goode warns that the state of the country’s commercial law and attitude towards the implementation of the CISG, including the fact that the country’s courts are largely deprived of the opportunity to contribute rulings on the interpretation of the CISG, which would be viewed with respect in other jurisdictions, has contributed to the UK steadily losing influence at the international trade scene.¹⁶ Elsewhere he notes that, while the UK makes a ‘major input into the fashioning of international instruments of different kinds’ including the CISG, all too often ‘walks away’ from the finished product, so that if the country adopts the instrument at all it comes in very much later

¹² CISG Advisory Council Declaration No. 1, ‘The CISG and Regional Harmonization’ (August 2012) available at <http://www.cisgac.com/index.php>

¹³ Ibid.

¹⁴ Sandeep Gopalan, ‘Transnational Commercial Law: The Way Forward’ (2003) 18 (4) Am U Int’l L Rev 803, 803.

¹⁵ Goode, *Commercial Law in the Next Millennium* (n2) 95. See Article 6 CISG which provides that the parties may exclude the application of the CISG or, subject to Article 12, derogate from or vary the effect of any of its provisions. See also Article 9(1) CISG which provides that the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

¹⁶ Ibid 94.

than its major competitors and loses the opportunity to give leadership to the international community and to gain the influence which that leadership would bring in its train.¹⁷ It is indeed, regrettable that the UK's relationship with the CISG is an example of what Goode describes although it does remain to be seen whether the UK will eventually accede to the CISG.

¹⁷ Goode, 'Insularity or Leadership?' (n1) 751.

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