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

Ingeborg Schwenzer*

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

1 FRAMEWORK OF DISCUSSION

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

if the failure by the seller to perform any of his obligations under the contract or this convention amounts to a fundamental breach of contract.

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

* Dr jur (Freiburg im Breisgau), LLM (UC Berkeley), Professor of Private Law, University of Basel, Switzerland. The author gratefully acknowledges Mariel Dimsey, LLB (Hons), BA (UQ) for her assistance in the preparation of this presentation.

II  DOMESTIC LEGAL SYSTEMS

A Continental Legal Systems

There have been great differences of opinion among domestic legal systems concerning the circumstances in which the buyer may avoid the contract in case of any non-conforming tender. In continental legal systems, which were originally based upon Roman sales law principles, in the case of defects in the quality of the goods, the buyer always had the right either to demand reduction of the purchase price (actio quanti minoris) or to avoid the contract (actio redhibitoria).2 However, this has changed with the enactment of modern statutes, such as the German Statute on Modernisation of the Law of Obligations,3 the Scandinavian Sales Laws,4 or the Netherlands Wetboek,5 which apply the notion of fundamental breach or similar key concepts within the framework for avoidance or cancellation of the contract. The same is true for ongoing projects for the unification of the law, such as the International Institute for the Unification of Private Law (UNIDROIT) Principles6 and the Principles of European Contract Law.7

B The Traditional English Approach

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

C The New Zealand Legal System and Recent English Developments

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

D The United States Legal System

The sales law of the United States was traditionally based upon the idea that the buyer can only avoid the contract if the non-conformity amounted to a fundamental breach, or "substantial impairment."10 The requirement that the breach be fundamental, however, only applies to avoidance...
The Legislative History of Article 49(1)(a) of the CISG

Article 49(1)(a) of the CISG. This provision, which is based on article 43 of the Uniform Law on the International Sale of Goods (ULIS), and derives itself from the notion of fundamental breach. The basic concept of fundamental breach was already present in article 10 of the ULIS and articles 48 and 49 of the Uniform Law on Sales (ULS). 11

In the course of the most recent revision of the UCC, there was great discussion as to whether the perfect tender rule should be replaced with a requirement that would permit rejection only if a non-conformity "substantially impairs the value of the performance to the buyer". Ultimately, a majority of the Study Group recommended that the perfect tender rule remain the standard, 12 the general law concept of "material breach" has not been adopted.

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

According to § 2-606(1)(c) UCC, "the buyer does any act inconsistent with the seller's ownership". Here, the buyer's knowledge and behavior are decisive. James White and Robert Summers Uniform Commercial Code (5 ed, St Paul, Minnesota, 2000) § 8-2.


For brevity, the subsequent discussion will continue with the ULIS and ULCS, as the UCC has not yet been adopted. In the UCC (US), acceptance is dealt with in § 2-606. Acceptance occurs in three different ways: according to § 2-606(1)(a), the first possibility is that the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods conform or that he will take or retain them in spite of their non-conformity. Pursuant to § 2-606(1)(b) UCC, acceptance also occurs if the buyer fails to make effective rejection after the buyer had a reasonable opportunity to inspect the goods. Finally, acceptance occurs if, according to § 2-606(1)(c) UCC, "the buyer does any act inconsistent with the owner's ownership". Here, the buyer's knowledge and behavior are decisive.


15 Concerning the avoidance of the contract, the CISG clearly deviates from ULIS, as only in cases of non-delivery does the fixing of an additional period of time "elevate" an otherwise potentially non-fundamental breach to a fundamental one, thus giving the buyer the right to avoid the contract. This right to avoid the contract because of expiry of an additional period can only be
asserted in cases of non-delivery, and not, as under ULIS, in any other situations of breach, such as the
delivery of non-conforming goods.17

IV INTERACTION BETWEEN DOMESTIC SYSTEMS AND THE CISG

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

INTERPRETATION

A General Remarks

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

B Express Stipulations

With regard to express stipulations, it is up to the parties to stipulate what they consider to
equivalent to the original perfect
tender rule found in Anglo-American law. The CISG approach is somewhat different in its

V APPLICATION OF THE CISG TO COMMODITIES

A Critique

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

B Response

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

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

17 Markus Müller-Chen in Schlechtriem and Schweizer, above n 16, para 15, 16; Tobias Plate "The


19 CISG, above n 1, arts 47(1) and 48(1).
A V O I D A N C E I N T H E C A S E O F N O N - C O N F O R M I N G G O O D S A N D D O C U M E N T

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

D Seller’s Possibility to Cure

An important limitation on avoidance under the CISG is the seller’s possibility to cure. Though the objective essential nature of the defect is always a necessary condition to establish a fundamental breach of contract, it will not always be sufficient. In cases where cure by the seller – for example by repairing the goods or delivering substitute or missing goods – is still possible without causing unreasonable delay or inconvenience to the buyer, there is not yet a fundamental breach. Here, due regard is to be given to the purposes for which the buyer needs the goods. If timely delivery is of the essence of the contract, repair or replacement by the seller will usually lead to unreasonable delay within the meaning of article 48(1) of the CISG. Furthermore, the buyer should not be expected to accept cure by the seller if the basis of trust for the contract has been destroyed, for example, due to the seller’s deceitful behaviour. When the seller either refuses to cure the defect, simply fails to react, or if the defect cannot be cured by a reasonable number of attempts within a reasonable time, then a fundamental breach will also be deemed to have occurred.

E Documents and “Avoidance”

With respect to international sales contracts involving documents, special uniform rules have been established by the International Chamber of Commerce. The Incoterms 2000 contain detailed rules governing the obligations of the seller to provide documents; the buyer to accept them, respectively, whereas the Uniform Customs and Practice for Documentary Credits of the ICC (UCP 500) lay down special rules for cases where payment may be made by means of documentary credit, including standby letters of credit. Both sets of rules are widely incorporated into international sales contracts, either by express reference or – accord the prevailing view, especially in court decisions – as a usage in international trade with meaning of article 9(2) of the CISG.

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


28 Honnold, above n 15, 327-352.

29 All Incoterms 2000 clauses (International Chamber of Commerce Incoterms 2000 (ICC Books World SA, 2000)) in A4 call for delivery "on the date or within the period agreed for delivery". One German OLG Hamburg, 28 February 1997 (CISG-online no 261 <www.cisg-online.ch> (last accessed 19 June 2005), has argued that a CIF contract has to be understood as a fixed term contract. But see International Court of Arbitration, 7645 of 1993 CISG-online no 844 <www.cisg-online.ch> (last accessed 19 June 2005), the Incoterms clauses CIF do not, however, specify that staying within the time limit obligation of especially essential importance.

30 Incoterms 2000, above n 29.

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

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

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

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

1 Accompanying documents

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

2 Documentary sales

Nowadays, the vast majority of international sales contracts incorporate the Incoterms of the International Chamber of Commerce. They have become a usage in international trade within the meaning of article 9(2) of the CISG,37 thereby complementing the rules of the Convention. Except for EXW, all Incoterms 2000 clauses contain the seller’s obligation to deliver cert titles.38 Thus, in turn, all such contracts can be referred to as documentary sales contracts.

According to article 1(1) of the CISG, the Convention applies to contracts of sale, provided that both parties are domiciled in a State which is a party to the Convention. However, there cannot be any doubt that documentary sales of goods are covered by the Convention as well, “though in some legal systems such sales may be characterized as sale by presentation”.39 This even holds true for so-called “string transactions”, where documents are transferred several times until the final purchaser takes physical delivery of the goods.

In documentary sales contracts, the tender of clean documents is of the essence. Thus, B8 of all Incoterms 2000 clauses (except for EXW) provides that the buyer may only reject the tender of non-conforming documents irrespectively of actual conformity or non-conformity with the contract.

However, the seller may cure any lack of conformity in the documents. If, for example, the documents are "unclean" because it refers to damage to the goods or their packaging, the seller may subsequently perform within the time allowed for the performance of the obligation to deliver. This includes, for example, the sale of goods with an incorrect certificate of origin or with a certificate of analysis that is not in the time limit. The court may also reject the tender of non-conforming documents if the seller handed over the "unclean" documents before the time contract. After this date, cure is only possible under the prerequisites of article 48. That means that the seller may only remedy the failure if he can do so without an undue delay and without prejudice to the rights of the buyer. Special regard is to be had to the stipulations of the contract and the circumstances of the case that may make timely performance of central importance.41

3 Documentary credits

In the majority of international sales contracts, the parties stipulate that the purchase price be paid by means of documentary credit or standby letter of credit.42 In this case, the documents do limit the buyer in reselling the goods, or using them according to its plans. Thus, whether the documents are missing or are insufficient must be decided by resorting to the general mechanisms of the Convention already established for determining a fundamental breach. If the documents are delivered but do not conform to the contract description, this is to be treated like a defect in quality. Thus, initially, what is decisive is whether the defective documents limit the buyer in reselling the goods or using them according to its plans. If they do not, a fundamental breach can never be assumed. If the documents do limit the buyer in reselling the goods, the seriousness of the defect depends upon whether the buyer can still use the goods in a reasonable way even with unclean documents, or — if not — whether it can easily acquire clean documents independently. The case of missing accompanying documents is to be treated like a defect in quantity and not as an equivalent to non-delivery of the goods. That means that also in this case, a fundamental breach of contract has to be established on the individual facts of the case, thus enabling the buyer to avoid the contract only in accordance with article 49(1)(a) of the CISG; article 49(1)(b) is not applicable.

38 See Inco terms 2000, above n 29, A8 of the respective clauses.
40 See the thorough discussion of this question in Peter Schlechtriem "Interpretation, Gap-Development of the UN Sales Convention" <http://www.cisg-explanatory.org> (last accessed to footnotes 15-24).
41 For commodities see Part VI Interpretation.
42 Rolf Schütze Das Dokumentenakkreditiv im Internationalen Handelsverkehr (5 ed, He see also ICC Homepage <http://www.iccwbo.org> (last accessed 19 June 2005).
usually apply, either by express reference or as an international trade usage.\textsuperscript{43} within the meaning of article 9(2) of the CISG. Even if the UCP 500, as such, are not considered to be international trade usages, they at least offer some useful guidelines as to what reasonable parties would regard to be a fundamental breach of contract within the context of the CISG.

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

4 Commodity trade

With regard to commodities, special standards have to be applied in determining whether there is a fundamental breach. In the commodity market, string transactions prevail and prices are subject to considerable fluctuations.\textsuperscript{45} Therefore, timely delivery by the handing over of clean documents – that can be resolved in the normal course of business – is always of the essence of the contract.\textsuperscript{46} If the parties do not stipulate this importance by respective clauses, this can be derived from the circumstances by an interpretation of the contract pursuant to article 8(2) and (3) of the CISG.\textsuperscript{47} As a result, in practice, possibility for the seller to cure any defect in the documents according to article 48(1) of the CISG does not exist in the commodity trade.\textsuperscript{48} Thus, in this specific trade branch, the solution under the CISG is quite similar to that under the perfect tender rule in other jurisdictions.\textsuperscript{49}

VII FINAL REMARKS: THE CISG AS AN EFFECTIVE SOLUTION

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

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

\textsuperscript{44} See also UNIDROIT Principles 2004, above n 6, art 7.3.1, 3b.


\textsuperscript{47} Schlechtriem, above n 40, I.1.

\textsuperscript{48} Schlechtriem, above n 40, 4.

\textsuperscript{49} Schlechtriem, above n 40, II.