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# A LAW FOR INTERNATIONAL SALE OF GOODS: A REPLY TO MICHAEL BRIDGE

Lachmi Singh\* and Benjamin Leisinger\*\*

## I. INTRODUCTION

There has been a large volume of material published on the United Nations Convention on Contracts for the International Sale of Goods,<sup>1</sup> with both supporters and opponents of the Convention arguing the advantages and inadequacies of the treaty as a means of furthering international sales transactions. There are those who argue that the Convention is not suited to the complex world of international commercial transactions, instead they advocate the use of national laws as these systems are more experienced and can lend certainty to these transactions.<sup>2</sup> For this reason it is still common practice for many business people and their legal advisors to automatically opt out of the Convention.<sup>3</sup> Interestingly enough, some lawyers even opt out of the CISG in contracts that would not be governed by the CISG in the first place.

Unfortunately, many business people do not fully understand the often crucial effects of opting out of the CISG; some of these effects will be explained in some detail later on. In his article, "A Law for International Sale of Goods," Professor

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<sup>1</sup> United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671 (hereinafter "Convention" or "CISG").

<sup>2</sup> A.G. GUEST & GUENTER H. TREITEL, *Benjamin on Sales*, at 18-004 (5th ed. 1997).

<sup>3</sup> This, however, is not true in all jurisdictions. For example, in China it has not been unusual for parties or tribunals to opt into the CISG in instances in which it would not otherwise apply. See Yang Fan, *The Application of the CISG in the Current PRC Law and CIETAC Arbitration Practice* (2006), available at <http://cisgw3.law.pace.edu/cisg/biblio/yang2.html>.

Michael Bridge addresses the pros and cons of using the CISG and compares them to other national legislation, for example, the United Kingdom Sale of Goods Act 1979. He reaches the conclusion that the United Nations Convention would be better suited to contracts for the sale of manufactured goods, whereas the Sale of Goods Act would be more suitable for commodity sales.<sup>4</sup> He furthers this argument by citing the need for certainty in commercial transactions, however other legal scholars have argued that, "this line of criticism is somewhat overstated" stating that "[t]he CISG can, properly interpreted, accommodate those cases without endangering the principle of legal certainty."<sup>5</sup> The authors of this article concur with the latter point of view.

## II. PROFESSOR BRIDGE'S THESES

In his article, Professor Bridge, states the following to which the authors would like to respond:

He states that the CISG is a sales instrument that makes it difficult to avoid the contract.

He argues that the CISG is better equipped to deal with market-insensitive items—e.g., heavy machinery—than with market sensitive goods such as commodities.

He takes the view that it is difficult to apply the CISG alongside existing contract law. The difficult point of intersection between national law and the CISG, in his opinion, concerns a misrepresentation with some inducing effect on the making of the contract of sale which also becomes a, maybe implied, term of the contract. Under Swiss national law, for example, a party could avoid the contract because of misrepresentation instead of being restricted to his or her "sales

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<sup>4</sup> Michael Bridge, *A Law for International Sale of Goods*, 37 HONG KONG L.J. 17, 17-40 (2007), available at <http://cisgw3.law.pace.edu/cisg/biblio/bridge3.html>.

<sup>5</sup> Peter Huber, *CISG - The Structure of Remedies*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 13, 31 (2007), available at <http://cisgw3.law.pace.edu/cisg/biblio/huber1.html> (citing CISG-AC Opinion no 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, (May 7, 2005), available at [http://www.cisg-online.ch/cisg/docs/CISG-AC\\_Op\\_no\\_5.pdf](http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_5.pdf)). The reasonable use doctrine is flexible enough to accommodate different factual settings, for instance, a distinction according to whether the buyer needs the goods for his own use (e.g., in production) or whether he is in the resale business. See, e.g., PETER HUBER & ALASTAIR MULLIS, *THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS* 233-34 (2007).

law remedies.” By doing this, the requirements of giving notice, *inter alia*, can be circumvented.

He expresses the opinion that different interpretations of certain “blanket clauses,” such as, for example, Article 25 CISG or Article 39(1) CISG, by courts or tribunals in different countries constitute a major problem, or, as he puts it, a “seriously deficient feature” of the CISG.

He argues that the CISG also does not sufficiently deal with documentary duties in connection with the delivery of goods.

He criticises the CISG’s regulation regarding the relationship between cure and avoidance. Article 48(1) CISG, namely, states that “[s]ubject to Article 49, the seller may . . . remedy at his own expense any failure to perform his obligations . . . .”

He points out that the CISG’s possibility to cure defective documents set forth in Article 34 CISG could have a problematic effect on the duty to provide “clean” documents. Pursuant to this article, if the seller has handed over documents before the time required by the contract, the seller 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.

He argues that the CISG is incompatible with INCOTERMS which, *inter alia*, allocate risk.

We will proceed by examining each of the theses listed above.

### III. THE CISG’S REQUIREMENT OF A “FUNDAMENTAL BREACH OF CONTRACT”

Pursuant to Article 49(1) CISG, the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or the Convention amounts to a fundamental breach of contract. Article 64(1) CISG contains counterpart language on the seller’s right to declare the contract avoided.

Some scholars have argued “that the fundamental breach doctrine is unsatisfactory because it creates uncertainty in circumstances where the commercial background of the transaction requires the parties to be able to make certain and swift

decisions on whether to terminate the contract or not.”<sup>6</sup> Examples cited include documentary sales or those contracts for which time is deemed of the essence.

Article 25 of the CISG defines the term “fundamental breach” contained in Articles 49 and 64 CISG. It states that 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.

Alternatives to this language are stipulations by the parties.

#### a) *Stipulations by the parties*

Under the CISG, the parties are free to stipulate their own threshold for the substantial deprivation required by the text of Article 25 of the CISG. This principle is set forth in Article 6 of the CISG, which states that the parties may derogate from or vary the effect of any of the CISG’s provisions. It logically follows from this that the parties are free to tailor specific provisions of the CISG to their needs.<sup>7</sup> Freedom of contract or party

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<sup>6</sup> See GUEST, *supra* note 2, at 18-004. See also Michael Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 PACE INT’L L. REV. 55 (2003).

<sup>7</sup> René Lichtsteiner, *Übereinkommen der Vereinten Nationen ueber Verträge ueber den Internationalen Warenkauf – Einfuehrung und Vergleich mit dem Schweizerischen Recht*, ASEA BROWN BOVERI 27 (1989); Nina Freiburg, *Das Recht auf Vertragsaufhebung im UN-Kaufrecht – Unter Besonderer Beruecksichtigung der Ausschlussgruende*, DUNCKER UND HUMBLLOT 52 (2001); Martin Paiva, *Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods* at 2.1.3 (1980), available at <http://www.cisg.law.pace.edu/cisg/biblio/paiva.html>; Franco Ferrari, *Wesentliche Vertragsverletzung nach UN-Kaufrecht - 25 Jahre Artikel 25 CISG*, INTERNATIONALES HANDELSRECHT (2005) 1, 5, available at [25.cisg.info/content/publikation.php?id=4](http://25.cisg.info/content/publikation.php?id=4); MARTIN KAROLLUS, KOMMENTAR ZUM UN-KAUFRECHT: ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF (CISG), art. 25, para 22 (Heinrich Honsell ed., Springer 1997); Gerhard Lubbe, *Fundamental Breach under the CISG: A source of fundamentally divergent results*, 68 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 444, 461 (2004); Lachmi Singh, *United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An examination of the buyer’s right to avoid the contract and its effect on different sectors of the (product) market*, at 2.2 (b), available at <http://www.cisg.law.pace.edu/cisg/biblio/singh.html>; Ingeborg Schwenzer, *The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the*

autonomy is one of the fundamental ideas underlying the CISG.<sup>8</sup> Such stipulations are in no way uncommon and, hence, are regularly found in commercial contracts.<sup>9</sup> Courts have ruled that where a party has explicitly ordered unsweetened apple juice concentrate and the other party delivers sweetened apple juice concentrate, a fundamental breach can, in general, be assumed.<sup>10</sup> There are further examples where the courts respected the parties' contractual definition of a substantial detriment by means of specific requirements and clear wording of their importance.<sup>11</sup> It is up to the parties to make it sufficiently clear in their contract that the agreed features of the goods are so important to them that non-conformity would amount to a fundamental breach, entitling the innocent party to avoid. Parties can implement mechanisms similar to the so-called "perfect tender rule"<sup>12</sup> under U.S. law, whereby even a slight deviation from the agreement grants the buyer the right to avoid the contract.<sup>13</sup> In regards to the United Kingdom Sale of Goods Act 1979, parties can establish their own "conditions" or terms which if broken can give rise to termination of the contract.

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*CISG – The Question of Avoidance in the Case of Non-Conforming Goods and Documents*, 36 VICTORIA U. WELLINGTON L. REV. 795, 801 (2005), available at [www.vuw.ac.nz/vuw/fca/law/files/09%20CISG%20Schwenzer.pdf](http://www.vuw.ac.nz/vuw/fca/law/files/09%20CISG%20Schwenzer.pdf).

<sup>8</sup> Richard D. Kearney, *Developments in Private International Law*, 81 AM. J. OF INT'L L. 724, 728 (1987).

<sup>9</sup> Chengwei Liu, *The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and Case Law*, 3.2 (May 2005), available at <http://www.cisg.law.pace.edu/cisg/biblio/liu8.html>.

<sup>10</sup> See Oberlandesgericht Stuttgart [OLG] [Provincial Court of Appeal] 841 (F.R.G.) (2001), available at <http://cisgw3.law.pace.edu/cases/010312g1.html>.

<sup>11</sup> See, e.g., Zivilgericht Basel-Stadt (Civil Court) (Switz.), Mar. 1, 2002, P 1997/482, available at <http://www.cisg-online.ch/cisg/urteile/729.htm> (English translation available at <http://cisgw3.law.pace.edu/cases/020301s1.html>); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (Russ.), 21 June 2004, CISG-online 1213.

<sup>12</sup> The rule allows the buyer to reject a tender under a single delivery contract that does not correspond to the contract UCC § 2-601.

<sup>13</sup> CISG-AC Opinion no 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, 7 May 2005, Badenweiler (F.R.G.). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel, para. 4.17, available at [http://www.cisg-online.ch/cisg/docs/CISG-AC\\_Op\\_no\\_5.pdf](http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_5.pdf) or <http://cisgw3.law.pace.edu/cisg/CISG-AC-op5.html#1>.

b) *Absence of stipulations regarding the individual contract*

Additionally, even without the parties' stipulating what breaches are considered fundamental in the individual case, the ability to avoid a contract can turn on industry practices. Admittedly, in many cases, the parties refrain from lengthy negotiations because they only address certain issues expressly in their contract if the actual cost of negotiating does not exceed the likely cost of filling a gap in the contract later.<sup>14</sup> This is the reason why in most cases, the parties formulate or adopt general terms and conditions and make, or at least try to make, them part of their contract. As Professor Bridge states, most commodity trades are performed on the basis of such general conditions or standard form contracts that were phrased by the exchanges on which the respective commodity is traded.<sup>15</sup> Additionally, even if the parties' reference to general terms and conditions is not successful, for example because of conflicting provisions in the general terms and conditions submitted by each party,<sup>16</sup> the CISG provides for other solutions. If the parties have in the past stipulated a certain (strict) standard for conformity of the goods and the buyer's entitlement to avoid the contract in case of non-conformity in their contract, or they repeatedly agreed to usages setting forth such strict standard or they repeatedly behaved in a certain way, this constitutes an established practice within the meaning of Article 9(1) of the CISG.<sup>17</sup> Moreover, through Article 9(2) of the CISG, trade usages are incorporated in the contract, unless otherwise agreed,

<sup>14</sup> ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 212 (4th ed. 2004) (such costs include the risk of potential disputes in front of a court).

<sup>15</sup> He mentions the Grain and Feed Trade Association. *See generally* Gafta, <http://www.gafta.com/>.

<sup>16</sup> *See* Peter Schlechtriem, in PETER SCHLECHTRIEM & INGEBOURG SCHWENZER, *KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT - CISG Art. 19 N 19 et seq.* (4th ed. 2004), for an excellent discussion of the problem of conflicting general terms and conditions and the unfortunate absence of a solution in the text of the CISG.

<sup>17</sup> Oberster Gerichtshof [OGH] [Supreme Court] Aug. 31, 2005, 7 Ob 175/05v (Austria), available at <http://ris.bka.gv.at/taweb-cgi/taweb?x=d&o=d&v=jus&d=JUST&i=82553&p=1&q=und%2819000101%3C%3DDATUM%20und%2020051108%3E%3DDATUM%29%20%20%20%20und%20%28CISG%29>, (English translation available at <http://cisgw3.law.pace.edu/cases/050831a3.html>); Duisburg Amtsgericht [Duisburg AG] [Duisburg Petty Court] Apr. 13, 2000, 49 C 502/00, available at <http://www.cisg.law.pace.edu/cisg/text/000413g1german.html>, (English translation available at <http://cisg.w3.law.pace.edu/cases/000413g1.html>); Zivilgericht Basel-Stadt [Basel Civil Court], Dec. 3, 1997, P4 1996/00448 (Switz.),

if two prerequisites are met. First, the parties at least ought to have known of this usage. Second, it must be widely known and regularly observed by parties to contracts of the type involved the international trade of the particular trade sector concerned. If these requirements are met, even strict standards<sup>18</sup> are incorporated into the contract and allow avoidance if the standard is not met. The Convention has other mechanisms in place to ensure that the intentions of the parties are respected even if they are not expressly stipulated in the contractual terms. The provisions of Article 8 of the CISG stipulate that regard is to be given to the intent of the parties; this can be discerned by examining statements, conduct and all relevant circumstances according to the understanding that a reasonable person of the same kind would have had in the same circumstances. These circumstances that are to be taken into account include the type of contract at hand, which in the case of a commodities contract has peculiar considerations, for example, issues of time being of the essence in the string transactions for which such contracts are commonly designed.

These examples are just a selection. However, as far as international trade between professional traders is concerned—and this is the subject-matter covered by the CISG—they probably cover most of the cases which, perhaps because of the rules of incorporation, never make it to the courts.

Under the Convention, parties have at their disposal several different provisions which can incorporate their intent. If it can be determined from the terms of the contract or the intent of the parties that time of delivery or quality of the goods were of the essence, then any breach of these requirements will be fundamental from the outset.

#### IV. THE CISG AND MARKET SENSITIVE GOODS

There are those scholars who argue that the Convention is not well-suited to the realm of the commodities trade market as this area can be quite volatile with rapidly fluctuating prices

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available at <http://www.cisg-online.ch/cisg/urteile/346.pdf>, (English translation available at <http://cisgw3.law.pace.edu/cases/971203s2.html>).

<sup>18</sup> For means of incorporating strict standards in the commodity trade, see BENJAMIN LEISINGER, FUNDAMENTAL BREACH CONSIDERING NON-CONFORMITY OF THE GOODS 133 et. seq., (2007).



and the need for speedy avoidance.<sup>19</sup> Some commodity goods are perishable, bananas for example, which may become unfit for consumption and thus a speedy avoidance would be imperative especially if the situation required resale or procuring replacement goods on a fluctuating market. These critics put forth the notion that the threshold for avoidance under the CISG is relatively harder to establish as opposed to the Sale of Goods Act 1979 and that the Convention should be relegated to sale of market insensitive goods and leave the market sensitive goods to more experienced legal regimes. An example of these criticisms can be seen in regard to Professor Mullis' views on one CISG decision by the German courts. In that decision the buyer asked for Cobalt sulphide of British origin and received instead goods of South African origin, the reasoning of the court was that he was not permitted to avoid the contract as he could still make use of the goods.<sup>20</sup> Professor Mullis argues that under English law the buyer would have been able to terminate the contract. The authors do agree with Professors Bridge and Mullis that the threshold for avoidance under the Convention is higher than that of English law. We can see this first hand if one examines the foundations upon which the Convention was founded, for example, the co-operation and reasonableness of parties to ensure each party achieves their contractual expectations.<sup>21</sup> In addition to this is also the principle of facilitating the completion of the contract even in the event that something occurs to breach the contractual terms.<sup>22</sup> Perhaps the most fundamental principle of the CISG is its attention to market efficiencies and the business realities of international trade. Let us take a practical example:

A buyer in the United States purchases 200 tonnes of soya bean from a seller in China; the soya bean was to be a quality

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<sup>19</sup> Alastair Mullis, *Twenty-Five Years On — The United Kingdom, Damages and the Vienna Sales Convention*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 35-51 (2007), available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis2.html>.

<sup>20</sup> Bundesgerichtshof [BGH] [Federal Supreme Court] Apr. 3, 1995, VIII ZR 51/95 (F.R.G.), (English translation available at <http://cisgw3.law.pace.edu/cases/960403g1.html>).

<sup>21</sup> See CISG, *supra* note 1, at art. 60(a).

<sup>22</sup> CISG, *supra* note 1, at arts. 19(2), 39(1), 48(2), 68, 71 (this is only the case where the breach is not of a fundamental nature). See CISG, *supra* note 1, at art. 25.

suitable for top-end health food stores, instead when the goods arrive at the port of destination they are found to be of a poorer quality and can only be resold for use in breakfast cereals.

Under the principles that we have just examined, the Convention would not automatically permit avoidance for breach of contract. Instead one would have to look at various factors; for example, is the buyer in a position to resell the goods? The CISG Advisory Council states that where the buyer himself is in the resale business, the issue of a potential resale becomes relevant.<sup>23</sup> Also one would have to examine the purpose for which the goods are purchased if they cannot be used for the purpose intended by the buyer can he make use of them in a way which does not cause unreasonable expenditure? If these questions are answered in the affirmative then the cost or inconvenience of avoidance would have to be weighed in the balance of factors. For instance, we would have to consider the cost of transporting the goods back to the seller amongst other factors. If the buyer can resell or make use of the goods can reclaim damages for his losses then avoidance should not be allowed.

a) *In general*

There are several other mechanisms within the Convention which serve to facilitate in keeping with market efficiencies and the realities of international trade. These include the provisions on granting additional time for performance,<sup>24</sup> requesting a substitute delivery or repair of the goods,<sup>25</sup> and the right to cure defects in the goods.<sup>26</sup> The Convention also stipulates that parties relying on a breach should take reasonable steps to mitigate their losses.<sup>27</sup> These measures can include reselling the goods to another buyer or procuring goods from another supplier in the market so as to minimise losses. In addition to this it is specifically stated that a party cannot rely on another's fail-

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<sup>23</sup> CISG-AC Opinion no 5, The Buyer's Right to Avoid the Contract in Case of Non-conforming Goods or Documents, 7 May 2005, Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel [hereinafter *Opinion no. 5*].

<sup>24</sup> CISG, *supra* note 1, art. 47, available at <http://cisgw3.law.pace.edu>.

<sup>25</sup> CISG, *supra* note 1, arts. 46(2)-(3), available at <http://cisgw3.law.pace.edu>.

<sup>26</sup> CISG, *supra* note 1, arts. 39, 48, available at <http://cisgw3.law.pace.edu>.

<sup>27</sup> CISG, *supra* note 1, art. 77, available at <http://cisgw3.law.pace.edu>.

ure to perform if such failure is a result of one's own actions.<sup>28</sup> This principle can be seen in the provisions of Article 34 where the seller is bound to hand over documents relating to the goods at the time and place required by the contract, this is so that the buyer in turn can perform his obligations under the contract. For example, in a CIF contract if payment is to be made against the documents, which must be in conformity to the contract, any failure on the seller's part to provide such documents would be a breach and would render the buyer unable to perform.

b) *In the context of avoidance*

Having considered the general principles upon which the Convention is founded, as well as some of its specific provisions, it is reasonable to assert that if the situation arises where the buyer receives non-conforming goods and is in a better position to resell them and reclaim damages then the remedy of avoidance will be more difficult to achieve than that of English law. This view coincides with that of Professor Mullis with respect to the *Cobalt sulphide* case. He rightly points out that an English court would not have taken into consideration that the goods could have been marketed under a different description in Germany. The very fact that the buyer asked for goods of British origin and received South African would have entitled him to reject them even if he could still make use of them.<sup>29</sup> In this case the courts considered all the relevant surrounding factors before arriving at their decision, specifically no fundamental breach was found to exist because, "the buyer had not been essentially deprived of what he was entitled to expect under the contract."<sup>30</sup> In the decision it was considered relevant that the buyer could obtain his own certificate of origin and also a certificate of origin may not be necessary for a contract of resale, therefore the buyer had not been substantially deprived of his interest under the contract as is the requirement under Article

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<sup>28</sup> CISG, *supra* note 1, art. 80, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at <http://cisgw3.law.pace.edu>.

<sup>29</sup> Alastair Mullis, *Twenty-Five Years On — The United Kingdom, Damages and the Vienna Sales Convention*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 35-51 (2007), available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis2.html>.

<sup>30</sup> *Id.* at 37.

25. The court's solution also makes sense from an economic perspective. If the buyer would have indeed be able to resell the non-conforming goods within his normal course of business, which he did not even try according to the court, the goods could have one more time been transferred from one party valuing it less (i.e. the seller) to a party valuing it more (i.e. the buyer)<sup>31</sup>—thereby creating additional economic value and, at least, mitigating damages. Lookofsky further elaborates this point when he states:

“In [some] situations, a seller's breach may be clearly ‘fundamental’, e.g., when goods when goods delivered fall far short of their contractual description, when they prove too dangerous to use, or where they (otherwise) fall so far below ‘ordinary’ standards that they are unfit for resale (anywhere).”<sup>32</sup>

Consider the situation where a French seller contracts with a U.S. buyer for the supply of handbags. It is made known to the seller that the buyer intends to resell the bags in his stores which only carry high end designer goods. When the bags are delivered by Seller they are of such poor quality that they cannot be used for Buyer's purpose.

In this case, we can see that the seller has committed a serious breach of his contractual obligations as he was aware of the buyer's use for the goods at the time of contracting. Therefore if the buyer required notice of the non-conformity in compliance with Article 39 emphasizing the serious nature of this breach, the buyer should be permitted to avoid the contract. In this circumstance, it would also be relevant to note that Buyer is not a wholesaler with the means of reselling on the goods rather he is a retailer of high end products, therefore such a breach could seriously harm his business and as a result his reputation.

In a case decided by the French Court of Appeal, it was held that the buyer could avoid a contract for the sale of pressure cookers when it was discovered some of these items contained

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<sup>31</sup> The necessary economic prerequisite for a sale to take place. If the buyer does not value the goods more than the seller, the reasonable seller does not sell them.

<sup>32</sup> JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN EUROPE* §6.8 (3rd ed. 2008).

defects which made them dangerous to use.<sup>33</sup> When the seller tried to argue that not all the goods were defective the courts rejected this argument on the grounds that such a large number<sup>34</sup> were non-conforming that the breach was deemed fundamental. In another case for the sale of machinery, the courts decided that after the buyer had granted the seller additional time in which to remedy the defects and having failed to do so, the buyer was entitled to avoid the contract.<sup>35</sup>

However, in a decision similar to that of the *Cobalt sulphate* case, a Swiss court held that a contract for the sale of meat which was subsequently discovered to be non-conforming did not entitle the buyer to avoid the contract.<sup>36</sup> The court stated that the CISG operates from the principle that the contract shall be avoided only in exceptional circumstances and that the right to declare a contract avoided is the buyer's most serious remedy. Whether or not this remedy is justified has to be determined by taking into account all the relevant circumstances of the particular case. Such factors include the buyer's ability to otherwise process the goods or to sell them, even at a lower price. The court confirmed the lower court's finding that the buyer had had such alternatives and therefore denied the buyer the right to declare the contract avoided.

Thus while the English lawyer would find it hard to reconcile the decision of the *Cobalt sulphate* case, the approach of the CISG would perhaps be more clear if we draw an analogy between the CISG approach to avoidance and the Common law approach to specific performance. It is a well accepted notion in common law jurisdictions that specific performance should be an exceptional remedy where market efficiencies and business realities indicate that damages could *not* suffice. If however damages *could* suffice to remedy the breach then specific per-

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<sup>33</sup> Cour d'appel [CA] [Regional Court of Appeal] Paris, June 4, 2004, JCP 2004 (Fr.), available at <http://cisgw3.law.pace.edu/cases/040604f1.html>.

<sup>34</sup> The large number of the goods delivered can even render it unreasonable to examine all of them. See COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 38 para. 14 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004).

<sup>35</sup> Cour d'appel [CA] [Regional Court of Appeal] Versailles, Jan. 29, 1998, JCP 1998 (Fr.), available at <http://cisgw3.law.pace.edu/cases/980129f1.html>.

<sup>36</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 3, 1996, 132 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 290 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960403g1.html>.

formance would not be granted. The same is true for the CISG where market efficiencies and business realities indicate that damages ought to suffice then avoidance will not be granted.

c) *Market sensitive goods*

In light of the decisions and considerations presented above, the authors maintain that if the Convention is used efficiently and effectively by those who draft such contracts then it can be used in all markets types for which it was designed. Such efficient and effective usage can only come about with greater understanding and knowledge of the Convention. However, as Professor Bridge notes, it might be arrogant and unjustifiable to assume this would be the case and traders may continue to use English law because of the certainty over a hundred years of experience can provide.<sup>37</sup>

Commodities can cover a wide range of goods, for example: oil, wheat, cotton, lumber, gold, etc. The common characteristics shared by these products are that they are produced in large quantities by many different producers; they are not unique goods and can be substituted if the need arises.<sup>38</sup>

Given the peculiarities of commodity markets, namely, the rapid price fluctuations, when prices are rising the seller would want to ensure a speedy avoidance of the contract so that he can resell the goods at a higher price. The same, for example, the interest to get out of the contract, is true of a buyer on a falling market.

If we take, for example, the breach of non-conforming goods, we know that English law classifies breaches of quality, fitness, sample and description as conditions under the Sale of Goods Act which would give rise to automatic termination of the contract.<sup>39</sup> As these terms are implied into the contract, even a slight breach with no serious consequences give rise to termination.<sup>40</sup> This is now subject to Section 15A of the Sale of Goods

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<sup>37</sup> Michael Bridge, *Uniformity and Diversity in the Law of International Sale*, 15 PACE INT'L. L. REV. 55-89 (2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/bridge.html>.

<sup>38</sup> BENJAMIN LEISINGER, FUNDAMENTAL BREACH CONSIDERING NON-CONFORMITY OF THE GOODS 116 (2007).

<sup>39</sup> Sale of Goods Act of 1979 § 13-15 (U.K.).

<sup>40</sup> *Arcos Ltd. v. Ronaasen*, (1933) A.C. 470 (H.L.) (U.K.).

Act which states that the buyer who does not deal as a consumer is prevented from rejecting for breach of the terms implied by Sections 13, 14 and 15 of the 1979 Act, "[i]f the breach is so slight that it would be unreasonable to allow him to do so." However, the exercise of this provision is limited only to Sections 13-15 of the Act and not to areas such as time and documentary obligations. In fact, we see that the English courts are quite strict in upholding commercial certainty with regard to these issues, see for example *Bowes v. Shand*.<sup>41</sup> In Swiss sales law, Article 205 of the Swiss Code of Obligations (CO) gives the buyer of defective goods the choice to either elect to sue for rescission of the purchase contract, or to sue for reduction of the purchase price, in order to be compensated for the reduction in value of the object of the purchase. However, even if an action for rescission has been initiated, the judge is free to adjudge compensation for the reduction in value only, provided that the circumstances do not justify a rescission of the purchase contract.

Returning to the issue of avoiding the contract, under the Convention one would first have to examine the provisions of the CISG to determine if it would be more difficult to avoid the contract under this regime as opposed to the Sale of Goods Act, thus making it unacceptable for the commodities market. Article 35 of the CISG deals with non-conforming goods, it states in paragraph 1 "[t]he 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." Furthermore, unless the parties agree to the contrary, paragraph 2 states goods will not conform to the contract "unless they are fit for the purposes for which goods of the same description would ordinarily be used or alternatively fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement."

With these criteria in mind, it can be argued that for a party to avoid the contract under the Convention, it would need

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<sup>41</sup> *Bowes & Co. v. Shand & Co.*, (1877) 2 App. Cas. 455 (H.L.) (U.K.).

to establish that the non-conformity amounts to a fundamental breach of contract. The authors once again draw attention to the provisions of Article 6 of the CISG; parties are free to derogate from or exclude the provisions of the CISG if necessary. Therefore, parties can themselves decide what standards of conformity are required under the contract. This is usually the case in contracts for market sensitive goods such as commodities which are for the most part traded using standard form contracts which contain detailed provisions for the obligations of the parties.<sup>42</sup> For example the GAFTA standard form contracts contain clauses that cover issues ranging from quality and condition of the goods, shipping documents and appropriation, to rules for payment. In the absence of such stipulations, if one looks at the wording of Article 35(2), goods must be fit for their ordinary purpose, the wording of this provisions is not dissimilar to that of Section 14(2B)(a) of the Sale of Goods Act which states that goods must be fit for all the purposes for which goods of the kind in question are commonly supplied. Also, in examining Section 14(3), the Act states that the buyer can make known to the seller the purpose for which he wants to procure the goods and that those goods supplied under the contract must be reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment.

It is the opinion of the authors, therefore, that the two provisions in their measure of non-conformity are not so different as to make a judgment that one would be suitable for market sensitive goods where as the other would only be suitable for manufactured products. The same holds true for Switzerland's Article 197 CO which states that the seller is liable to the buyer both for express representations made and that the object of the purchase has no physical or legal defects "which eliminate or substantially reduce its value or its fitness for the intended use." In addition, it is worth reiterating that parties also have the provisions of Article 9 of the CISG whereby usages either implied or express could be used to judge whether the non-conformity amounts to a fundamental breach giving rise to avoid-

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<sup>42</sup> In his article Professor Bridge cites the Grain and Feed Association, see generally <http://www.gafta.com/>.



ance. For example, if the buyer has purchased 2,000 bales of cotton for the manufacturing of t-shirts, and there is a recognized usage developed by the International Cotton Association that all such cotton shall be tested and graded for their particular purpose. In this case, the cotton is found not to be in conformity with the standards of the Cotton Association, then using the provisions of Article 9(2) of the CISG the buyer would have a good case for avoidance under the CISG in proving that the breach is fundamental.

At this stage, it would be useful to address the provisions under the Convention on the seller's right to cure defects in the goods, this discussion is furthered below. Article 48 of the CISG states, "[s]ubject 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." This provision has been the subject of much controversy as in some cases a breach may be prevented from being deemed fundamental if cure is possible in the circumstances. The CISG Advisory Council in addressing the issue of the seller's right to cure recommends that regard is first to be had to the terms of the contract. However, where those terms are not expressly or impliedly evident, then if repair or delivery of substitute or missing goods is possible without causing unreasonable delay or inconvenience to the buyer, there can be no fundamental breach.<sup>43</sup>

In deciding whether the breach is fundamental or not, the purpose for which the goods were bought must be examined. The CISG Advisory Council further recommends that if the buyer is in a better position to have the goods repaired or replenished he should be under an obligation to do so and may not declare the contract avoided for fundamental breach. However, where the basis of trust for the contract has been destroyed the buyer should not be expected to accept a cure by the seller. In examining the recommendations of the Advisory Council, super-

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<sup>43</sup> See CISG-AC Opinion no. 5, *The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents*, 7 May 2005, Badenweiler (F.R.G.). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, Univ. of Basel, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op5.html>.

ficially one can potentially argue that the right to cure would not be conducive to the peculiarities of the commodity trade as buyers and sellers would prefer speedy avoidance depending on the price of the goods in the market. However, upon closer examination one can see that parties can stipulate their own contractual terms which would exclude the right to cure defects.

In order to determine if these stipulations are essential to the contract, the courts would look to Article 8 of the CISG in order to determine the intent of the parties and the circumstances surrounding the contract. For example, in one case the courts upheld the terms stipulated by the parties that all soy protein ingredients be free from genetically modified soy, a breach of which allowed for avoidance without the possibility of cure.<sup>44</sup> It is also important to acknowledge that Article 48 only allows for cure by the seller if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience.

In one case, an Italian seller and a German buyer concluded a contract for the sale of a chemical substance with a certain quality for the production of pharmaceuticals.<sup>45</sup> After delivery, the buyer sent the goods on to its customer. The customer complained that the goods were not of sufficient quality to commence the production of pharmaceutical products. The parties agreed that the seller should remedy the defective goods in Italy. The goods were to be returned to Italy by a German carrier chosen by the seller and delivered to the seller at his own expense. Upon calling the German carrier, the buyer found out that the goods had not yet been returned to Italy and subsequently informed the seller. The buyer then proceeded to have the defects remedied in Germany at his own expense, claiming that treatment had to be done immediately as the customer could not resume production of the pharmaceuticals without the goods. The buyer then deducted the treatment costs from the purchase price. The seller claimed payment of the whole price

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<sup>44</sup> Appellationsgericht Basel-Stadt [Appellate Court] No. 33/2002/SAS/so, Aug. 11, 2003 (Switz.), *available at* <http://cisgw3.law.pace.edu/cases/030822s1.html>.

<sup>45</sup> Amtsgericht München (F.R.G.), June 25, 1995, CISG-online 368, *available at* <http://cisgw3.law.pace.edu/cases/950623g1.html>.

alleging that it would have treated the goods at a much lower price in Italy, had the goods arrived on time to Italy.

The Court stated that under Article 48(1), the seller may remedy at its own expense any failure to perform its obligations if it can do so without unreasonable delay. The Court held that the seller's attempt to remedy the defects failed as the goods had not reached Italy on time. Any further delay of treatment would have been unreasonable as the buyer's customer had to stop production during the time the goods underwent treatment and this would have led to claims for damages on the part of the buyer's customer. Therefore, we can see that the courts do take into consideration the circumstances of an individual case before allowing the right to cure, however the parties should stipulate the essential terms of the contract in order to ensure the desired outcome.

#### V. APPLYING THE CISG ALONGSIDE EXISTING CONTRACT LAW

The difficult point of intersection between national law and the CISG, in Professor Bridge's opinion, concerns a misrepresentation with some inducing effect on the making of the contract of sale, which also becomes a, maybe implied, term of the contract. First of all, this is not only a problem that concerns the CISG. Even within national laws, the law of misrepresentation and sales law can overlap and lead to different results.

In Switzerland, for example, mistakes regarding fundamental features of the goods can also lead to the buyer's right to contest the validity of the contract pursuant to Article 23 and the following of the Swiss Code of Obligations (CO). If the features of the goods also constitute non-conformity within the meaning of Article 197 CO, then overlap is at hand. While avoidance of the contract because of non-conformity of the goods in sales contracts - as well as the other remedies available to the buyer - is subject to additional requirements, relying on mistake is not. Pursuant to Article 201 CO, for example, the buyer must notify the non-conformity to the seller and describe the defect in a substantiated way.<sup>46</sup> Moreover, according to Article 210 CO, the buyer's right to rely on any non-conformity of

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<sup>46</sup> Schweizerisches Obligationenrecht [OR], Code des obligations [Co], Codice delle obbligazioni [Co], [Code of Obligations], CO art. 201 (Switz.), stating "The buyer shall examine the quality of the object of the purchase received as soon as it

the purchased good is limited to one year after the delivery of the goods.<sup>47</sup> According to the Swiss Federal Supreme Court, however, the buyer must not adhere to the requirements of Article 201 and Article 210 CO in cases where he can rely on mistake.<sup>48</sup>

Moreover, as far as the CISG is concerned, the conflict between contesting the contract because of misrepresentation and the remedies due to non-conformity of the goods no longer exist in such a dramatic way. While, admittedly, there was some confusion and dispute in the beginning, because some judges and arbitrators simply transferred their national notions to the CISG; today, exclusivity of the CISG's remedies in case of avoidance is prevailing.<sup>49</sup> This also is the conclusion reached by the courts deciding on this issue.<sup>50</sup> The main reason for this is that, otherwise, the intention underlying the international convention would be circumvented.<sup>51</sup> There are some CISG commentators who disagree with the notion of applying the laws in favour of the Convention, Lookofsky and Bernstein argue that if there are doubts regarding the CISG's application then maybe the dispute should be resolved vis à vis the domestic laws.<sup>52</sup>

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is customary in accordance with usual business practice, and shall immediately notify the seller in the event that defects exist for which the seller must warrant."

<sup>47</sup> Schweizerisches Obligationenrecht [OR], Code des obligations [Co], Codice delle obbligazioni [Co], [Code of Obligations], CO art. 210 (Switz.), stating "Actions based on a warranty for defects in the object of the purchase shall be barred at the end of one year after delivery to the buyer of the object sold, even if the defect was only discovered by the buyer at a later date, unless the seller has assumed liability for a longer period."

<sup>48</sup> Decision of the Swiss Federal Supreme Court (DFC), DFC 114 II 131, p. 134. See also INGEBORG SCHWENZER, SCHWEIZERISCHES OBLIGATIONENRECHT ALLGEMEINER TEIL (4th ed., 2006).

<sup>49</sup> See PETER SCHLECHTRIEM & INGEBORG SCHWENZER, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT, (4th ed., 2004) (making this observation in regard to mistake as to quality of goods).

<sup>50</sup> E.g., Oberster Gerichtshof [OGH] [Supreme Court] April 13, 2000, 2 Ob 100/00w (Austria), available at [http://cisgw3.law.pace.edu/cases/000413\\_a3.html](http://cisgw3.law.pace.edu/cases/000413_a3.html).

<sup>51</sup> F. Niggemann, *Erreur sur une qualité substantielle de la chose et application de la C.V.I.M.*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 397-415, 412 (1994); Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law: The Interpretative Challenge of Mistake and the Validity Loophole*, available at <http://www.cisg.law.pace.edu/cisg/biblio/leyens.html>.

<sup>52</sup> Joseph Lookofsky, *In Dubio Pro Conventione? Some Thoughts About Opt-Outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention (CISG)*, 13 DUKE J. COMP. & INT'L L. 263 (2003).

## VI. DIFFERENT INTERPRETATIONS OF BLANKET CLAUSES BY COURTS OR TRIBUNALS IN DIFFERENT COUNTRIES

With regard to the problem of different interpretation of certain blanket clauses by courts or tribunals in different countries, it must be noted that this is not only a CISG-specific problem. Most national laws also know similar provisions. Article 201 CO, for example, that has been mentioned earlier states that the buyer shall examine the quality of the object of the purchase received, "as soon as it is customary in accordance with usual business practice." Also the UNIDROIT Principles of International Commercial Contracts know similar open clauses. Article 2.1.7, for example, which deals with the time of acceptance of an offer, provides that an offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a "reasonable time having regard to the circumstances," including the rapidity of the means of communication employed by the offeror. While it is a matter of fact that blanket clauses do not really promote legal certainty, they, however, allow the judge or arbitrator deciding on the individual case to find and justify the most appropriate solution.

Moreover, the CISG must be interpreted autonomously. Hence, despite the courts or tribunals being located in different countries, they must respect the ideas of the Convention without reference to their national understanding.<sup>53</sup> Furthermore, databases such as, for example, the "Electronic Library on International Commercial Law and the CISG"<sup>54</sup> at Pace University in New York or CISG-online<sup>55</sup> contribute substantially to a uniform application of the CISG. While there is no such a thing as "*stare decisis*" with regard to interpretations of provisions of the CISG by courts or tribunals in other countries - and there

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<sup>53</sup> Franco Ferrari, in: Peter Schlechtriem & Ingeborg Schwenzer (eds.), *Kommentar zum einheitlichen UN-Kaufrecht - CISG*, art. 7, ¶ 9 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed., 2004); Lubbe, *supra* note 7, at 446; Leonardo Graffi, *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*, INT'L BUS. L.J. 338, 338 (2003), available at [www.cisg.law.pace.edu/cisg/biblio/graffi.html#eco](http://www.cisg.law.pace.edu/cisg/biblio/graffi.html#eco); ULRICH SCHRÖTER, UN-KAUFRECHT UND EUROPÄISCHES GEMEINSCHAFTSRECHT 257 (2005). See also CISG-AC Opinion no 5, The buyer's right to avoid the contract in case of non-conforming goods or documents, available at <http://cisgw3.law.pace.edu/cisg/CISG-AC-op5.html>.

<sup>54</sup> Electronic Library on International Commercial Law and the CISG, <http://cisgw3.law.pace.edu>.

<sup>55</sup> CISG-online, <http://www.cisg-online.ch>.

are good reasons<sup>56</sup> to refrain from this<sup>57</sup>—the power of the better argument still has some influence. By publishing decisions of national courts and tribunals applying the CISG, these databases create a certain peer pressure and—at least—contribute to achieving uniform application. As the CISG is applicable in 70 countries, lawyers in each of these jurisdictions can evaluate the reasoning of the individual court and—if necessary—criticize the decision.

Additionally, the CISG has been the subject-matter of many different legal writings. The more the merrier it is possible to recognize accepted principles and a common understanding of certain expressions in blanket clauses. The academic contributions from all over the world—civil and common law countries—together with the ready availability of case law via databases at least make up some of the original deficiencies of the CISG.

## VII. THE CISG AND DOCUMENTARY DUTIES

Most often, international sales contracts are not primarily concerned with the goods themselves but rather the documents which represent these goods. An example of this is seen in CIF and FOB contracts whereby the need to tender documents which conform to the contract is paramount. In his article, Professor Bridge states, “[a]s for the CISG and its treatment of documentary duties, we are looking at a blank page.”<sup>58</sup> This assertion is not entirely accurate as there have been numerous materials published on this subject.<sup>59</sup> As the English law relat-

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<sup>56</sup> See Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, <http://cisgw3.law.pace.edu/cisg/biblio/ferrari3.html>, (“If the knowledge of foreign case law was actually sufficient to create uniformity in the CISG’s application, this would mean, if taken to an extreme, that the first position taken on a specific issue by any court would be the one shaping all the successive case law”).

<sup>57</sup> Peter Schlechtriem, *Interpretation, gap-filling and further development of the UN Sales Convention*, May 11, 2004, available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html> (address at a symposium in honor of Professor Dr. Dr. h.c. Frank Vischer in Basel).

<sup>58</sup> Bridge, *supra* note 4, at n.51.

<sup>59</sup> Alastair Mullis, *Twenty-Five Years On — The United Kingdom, Damages and the Vienna Sales Convention*. 71 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 35, 35-51 (2007); Peter Schlechtriem, *Interpretation, gap-filling and further development of the UN Sales Convention*, May 11, 2004, available at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html> (address at a symposium in honor of Professor Dr. Dr. h.c. Frank Vischer in Basel);

ing to international commodities sales has largely grown outside the Sales of Goods Act framework, the 'blank page' comment could equally apply if one looks to the bare legislative bones in England too.

It has been questioned by some whether or not the Convention can govern documentary sales. In response to this, we turn to the legislative history of the CISG. The UNCITRAL Secretariat which prepared the reports leading up to the implementation of the Convention states, "documentary sales of goods shall be covered by the Convention, though in some legal systems such sales may be characterized as sales of commercial paper."<sup>60</sup> The applicability of the CISG to documentary sales is extended to include string sales whereby the documents are subsequently sold to sub buyers in the string until this result in the ultimate buyer taking physical possession of the goods. Article 30 of the CISG states that, "[t]he seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention." The nature of these documents can be divided into three categories: Accompanying documents, documentary sales, and documentary credits.<sup>61</sup>

#### a) *Accompanying documents*

These groupings of documents include things such as: certificates of quality, invoices, insurance, and customs documents. Professor Schwenzer and many courts put forth the viewpoint that any non-conforming or missing documents of this kind should be treated as a defect of quality and therefore in order to determine if the buyer should be entitled to avoid the contract the requirements of fundamental breach would have to be met.<sup>62</sup> In determining whether the breach is fundamental the

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Ingeborg Schwenzer, *The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Nonconforming and Documents*, 36 VICTORIA U. WELLINGTON L. REV. 795, 795 (2005).

<sup>60</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods, *Commentary on Article 2* at 13, ¶ 8, U.N. Doc. A/CONF.97/5, (March 14, 1979) (prepared by the Secretariat) (exclusions from Convention).

<sup>61</sup> Schwenzer, *supra* note 59.

<sup>62</sup> *Id.* See also Bundesgerichtshof [BGH] [Federal Supreme Court], Apr. 3, 1996, VII ZR 51/95 (F.R.G.), available at <http://www.cisg-online.ch/cisg/urteile/>

CISG Advisory Council suggests that courts look at the seriousness of the breach and whether the buyer can still use the goods with the non-conforming documents or alternatively if he can remedy them himself.<sup>63</sup>

In one case where the seller had tendered a non-conforming certificate of origin and a non-conforming certificate of analysis, the courts held that that the certificate made by buyer's expert was a valid new certificate of analysis.<sup>64</sup>

#### b) *Documentary sales*

These documents are those which represent ownership in the goods and are transferable. This can include bills of lading, warehouse receipts, and dock warrants. Most international sales contracts incorporate INCOTERMS, which are a body of trade terms developed by the International Chamber of Commerce. These terms such as FOB and CIF amongst others stipulate the seller's obligation to provide documents of title to the buyer. Incoterms 2000 Section A8 sets out the seller's duty to provide proof of delivery and the transport documents. The buyer's obligation to accept 'clean' documents are set out in Section B8, which consists of accepting documents which on their face conform to the contract regardless of whether the goods themselves are conforming. INCOTERMS have been accepted by scholars and the courts as usages under the provisions of Article 9(2) of the CISG, as they meet the requirements of usages which are, "in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."<sup>65</sup> Therefore in these situations the provisions of the CISG would be read in conjunction with the ICC Incoterms 2000, these terms need not be expressly stated by the parties, as they can be implied into the contract by means of Article 9(2) of the CISG.

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135.htm, (English translation available at <http://cisgw3.law.pace.edu/cases/960403g1.html>).

<sup>63</sup> Schwenzer, *supra* note 13.

<sup>64</sup> See VII ZR 51/95, *supra* note 62.

<sup>65</sup> Corte app., Mar. 24, 1995, n. 211, available at <http://www.cisg-online.ch/cisg/urteile/315.htm>; English translation available at <http://cisgw3.law.pace.edu/cases/950324i3.html>.



c) *Documentary credits*

In most international sales of goods contracts, parties will require that the contract price be paid either by a documentary letter of credit or a standby letter of credit. The reason for this is that most buyers and sellers are likely to be unknown to each other and given that they are located in different countries, a letter of credit will make the transaction more secure. Letters of credit are also useful when one party does not have sufficient financial history, assets, or credit to support good faith credit terms. In these cases the rules of the International Chamber of Commerce (UCP 600) will apply, these rules provide strict standards of compliance as to what may be deemed conforming or 'clean' documents. The UCP rules have been accepted as an international trade usage within the meaning of Article 9(2) CISG.<sup>66</sup> However these rules are independent of the sales contract and only concern the relationship between the seller and the bank. The existence of a non-conforming letter of credit will not necessarily give rise to avoidance.<sup>67</sup> Yet, where the parties are aware of the strict requirements on clean documents in connection with letters of credit—which parties dealing goods internationally maybe could assumed to be—one could argue that an agreement on such means of payment emphasizes the need to get conforming documents at a certain point in time (e.g., the lapse of the letter of credit) and, hence, failure to do so amounts to a fundamental breach allowing the buyer to avoid.

### VIII. CURE AND AVOIDANCE

As Professor Bridge correctly states, it is almost undisputed that the buyer's right to avoid the contract, once the prerequisites are met, takes priority over the seller's right to cure.<sup>68</sup> Art 48(1) of the CISG expressly states that this right is

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<sup>66</sup> Schewnzer, *supra* note 59.

<sup>67</sup> For a discussion on this see Lachmi Singh, CAVEAT EMPTOR: ARE DECISIONS MORE FAVOURABLE TO THE SELLER ON MATTERS RELATING TO LETTERS OF CREDIT?, 2 Nordic Journal of Commercial Law (2006), available at [http://www.njcl.fi/2\\_2006/article2.pdf](http://www.njcl.fi/2_2006/article2.pdf).

<sup>68</sup> MARKUS MÜLLER-CHEN, ART. 58 PARA. 17, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), 2ND (ENGLISH) ED. (Peter Schlechtriem & Ingeborg Schwenzer eds, Oxford 2005); GUENTER H. TREITEL, Remedies for Breach of Contract – A Comparative Account, 373 (Oxford 1989); DIETRICH MASKOW, INTERNATIONALES KAUFRECHT: KAUFRECHTSKONVENTION,

subject to Article 49 of the CISG. Article 49(2)(b)(i) through (iii) of the CISG even recognizes the buyer's refusal to accept the seller's attempt to cure under certain circumstances.

However, when determining whether there is a fundamental breach or not, all relevant circumstances have to be taken into account,<sup>69</sup> as well as the principles<sup>70</sup> underlying the whole Convention. One of the principles underlying Article 25 of the CISG is the one of proportionality,<sup>71</sup> while avoidance is deemed to be an *ultima ratio* remedy.<sup>72</sup> It would not make sense to allow the buyer to avoid the contract without more, i.e., despite the fact that the defect could be cured, if the seller delivered non-conforming goods, while in cases where the seller has not delivered at all – and time is not of the essence – the buyer would have to set an additional time for performance under Article 47 of the CISG before being entitled to avoid the contract pursuant to Article 49(1)(a) of the CISG. Hence, if the seller can cure the non-conformity if the seller has delivered goods before the date for delivery without causing the buyer unreasonable inconvenience or unreasonable expense, Article 37 of the CISG,

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VERJÄHRUNGSKONVENTION, VERTRE- TUNGSKONVENTION, RECHTSANWENDUNGSKONVENTION 1ST. ED., Art. 25 para. 3.4 (Fritz Enderlein et. al., ed., Berlin 1991); Leonardo Graffi, *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*, INT'L BUS. L.J. 338-49, 343 (2003); JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS, 3RD ED, 125 (Stockholm 2004). See also Oberlandesgericht Frankfurt [OLG Frankfurt] [Frankfurt Provincial Court of Appeal] Sept. 17, 1991, 5 U 164/90 (F.R.G. available at <http://www.cisg-online.ch/cisg/urteile/28.htm>), (English translation available at <http://cisgw3.law.pace.edu/cases/910917g1.html>); Oberlandesgericht Oldenburg [OLG Oldenburg] [Oldenburg Provincial Court of Appeal] Feb. 1, 1995, 11 U 6/94 (F.R.G.), available at <http://www.cisg-online.ch/cisg/urteile/253.htm>, English translation available at <http://cisgw3.law.pace.edu/cases/950201g1.html>; Pret. Parma, sez. di Fidenza, Nov. 24, 1989, n. 77/89, available at <http://www.cisg-online.ch/cisg/urteile/316.htm>, (English translation available at <http://cisgw3.law.pace.edu/cases/891124i3.html>.)

<sup>69</sup> Leonardo Graffi, *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*, in: INT'L BUS. L.J. 338-49, 343 (2003); Karl H. Neumayer, *Offene Fragen zur Anwendung des Abkommens der Vereinten Nationen ueber den internationalen Warenkauf*, RIW 99-109, 106 (1994).

<sup>70</sup> Article 7(2) of the CISG states that questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.

<sup>71</sup> Martin Paiva, FUNDAMENTAL BREACH UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.1.3 (1980), available at <http://www.cisg.law.pace.edu/cisg/biblio/paiva.html>.

<sup>72</sup> München No. 5 HKO 3936/00, 27 Feb. 2002 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/020227g1.html>.

or after the date for delivery without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer, Article 48 para. 1 of the CISG, there is no fundamental breach of the contract. There simply is not yet a substantial deprivation of the buyer's expectations under the contract.<sup>73</sup> The buyer finally gets what it expected under the contract if cure can be successfully accomplished - by any means<sup>74</sup> - before the delay constituted unreasonable delay and/or caused the buyer unreasonable inconvenience.

Professor Bridge admits that most of the problem of the relationship between cure and avoidance would go away if one interpreted the substantial deprivation of the contractual expectations in light of the seller's willingness and the availability—and commercial reasonableness<sup>75</sup>—of a cure.

## IX. THE DUTY TO PROVIDE CLEAN DOCUMENTS

The duty to provide clean documents is instrumental to the world of international sales contracts. In many cases, there will be numerous buyers and sellers in the string sale, and therefore documents have to be in transferable order. Article 34 of the CISG states, "[i]f 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

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<sup>73</sup> LG District Court Köln, 13 Sep. 2001 (F.R.G.), *aff'd* OLG Köln No. 16 U 77/01, 14 Oct. 2002 (F.R.G.); LG München No. 5HK O 3936/00, 27 Feb. 2002 (F.R.G.); HG Zürich No. HG 920670, 26 Apr. 1995 (Switz.); CA Grenoble No. 93/4879, 26 Apr. 1995 (Fr.); OLG Koblenz No. 31 Jan. 1997 (F.R.G.). For literature, see Hanns-Christian Salger, INTERNATIONAL EINHEITLICHES KAUFRECHT: PRAKTIKER-KOMMENTAR UND VERTRAGSGESTALTUNG ZUM CISG art. 48 para. 2 (2000); Christoph Brunner, UN-KAUFRECHT – CISG, KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN UEBER VERTRÄGE UEBER DEN INTERNATIONALEN WARENKAUF VON 1980 – UNTER BERUECKSICHTIGUNG DER SCHNITTSTELLEN ZUM INTERNEN SCHWEIZER RECHT art. 25 para. 14 (2004). *See also Opinion no. 5*, *supra* note 23.

<sup>74</sup> For an outline of arguments as regards the different means of cure, see Benjamin Leisinger, FUNDAMENTAL BREACH CONSIDERING NON-CONFORMITY OF THE GOODS 62 (2007).

<sup>75</sup> For arguments in favor of avoidance in cases where the damages without avoidance of the contract – e.g. costs of cure, lower reselling price, lost profits (minus the profits that could be generated with the non-conforming goods), loss of reputation, etc. – exceed the damages incurred were the buyer to avoid the contract – e.g. transaction costs such as transport costs, higher purchase price to be paid by the buyer for goods in replacement etc. *See id.* at 81.

buyer unreasonable inconvenience or unreasonable expense.” In his article,<sup>76</sup> Professor Bridge gives the following example:

Suppose that a bill of lading is for carriage to one or more north European ports when the contract of sale itself calls for discharge in Hamburg. The seller takes the bill of lading back to the ship’s master or agent who strikes out the reference to north European ports and substitutes with accompanying initials Hamburg. Under English law, the buyer need not accept an unclean bill of lading of this sort<sup>77</sup> because it creates difficulties when it comes to transferring or pledging the bill at a later date. But will a CISG tribunal take the same view?

The answer to this question would lie in the wording of the provisions of Article 34 of the CISG. Specifically, would permitting a seller in this situation to cure a defect in the document cause the buyer unreasonable inconvenience? If so, then cure would not be allowed under the provisions of the Convention. Other examples of inconvenience can occur where the buyer has already passed on the documents and cannot obtain them again.

## X. CISG AND INCOTERMS

In his article Professor Bridge argues that the CISG provisions on risk as embodied in Articles 66-70 are not suited to deal with commodities trade. In particular he cites Article 67, which states if the goods are to be handed over to a carrier at a particular place, the risk will pass when they are handed over to the carrier at that place. He argues that this provision is incompatible with the INCOTERMS<sup>78</sup> rules on FOB contracts for the passing of risk, namely that risk will pass when goods pass the ship’s rail. Furthermore, he argues that the rule is also incompatible with CIF contracts because such contracts do not always list a particular port rather they can cover a range of ports thus leading to confusion as to the parties expectations if the CISG were used as the instrument of choice.

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<sup>76</sup> Michael Bridge, *A Law for International Sale of Goods*, 37 HONG KONG L. J. 1-16 n. 65 (2007).

<sup>77</sup> *SIAT di del Ferro v Tradax Overseas SA*, 1 Lloyd’s Rep 53 (1980).

<sup>78</sup> See International Chamber of Commerce, available at <http://www.iccwbo.org/>.

The authors raise issue with these contentions because the case generated under the CISG show that when parties have expressly cited INCOTERMS within their contract courts have given effect to such terms under the provisions of Article 9(1). In fact, even in a case where the parties had not designated the INCOTERMS meaning to the term 'CIF New York Seaport' the U.S. courts held that it was to be construed under the INCOTERMS definition of CIF which would mean that the seller is responsible for paying the cost, freight, and insurance coverage necessary to bring the goods to the named port of destination, yet the risk of loss passes to buyer at the port of shipment.<sup>79</sup> The courts stated that even though reference to INCOTERMS was not explicit the terms were widely known and observed in international trade as standard definitions for delivery terms so that the reference to CIF was to be interpreted in accordance with the INCOTERMS under the provisions of Article 9(2).<sup>80</sup>

Professor Bridge also states that, "[s]ince shipping terms are employed in the great majority of cases, it makes the extensive treatment of risk in the CISG a rather pointless business if the rules in question are to be applied only in a small minority of cases. The architects of the CISG could not have intended their labours to be so futile."<sup>81</sup> However if one examines the Secretariat Commentary on this issue it appears that the drafters were aware of the small number of cases to which these rules would apply. However, they decided it was nevertheless important to make an express provision for it in the Convention.<sup>82</sup>

## XI. CONCLUSIONS

The authors of this article hope that it has achieved its purpose, specifically that the CISG cannot be deemed inappropriate for market sensitive goods without presenting a well-

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<sup>79</sup> *St. Paul Guardian Insurance Company v. Neuromed Medical Systems & Support*, No. 00 CIV. 9344(SHS), 2002 WL 465312 (S.D.N.Y. 2002), available at <http://ciscgw3.law.pace.edu/cases/020326u1.html>.

<sup>80</sup> *Id.*

<sup>81</sup> Michael Bridge, *A Law for International Sales*, 37 HONG KONG L. J. 17 (2007), available at <http://www.cisg.law.pace.edu/cisg/biblio/bridge3.html>.

<sup>82</sup> See Guide to CISG Article 17, available at <http://ciscgw3.law.pace.edu/cisg/text/secomm/secomm-67.html>.

rounded argument using all of the relevant provisions. The fact is that most traders and their legal advisors who choose to opt out of the Convention do so not because it is advantageous to their contract but rather because they are unaware as to what the provisions of the Convention actually entail. If one were to delve into the substance of the Convention, and the tools available to business people, for example, Article 6, Article 8 and Article 9 CISG they would come to the same conclusion as the authors that the Convention is not unsuitable for certain product markets, rather it just needs to be used effectively to achieve its full potential. To reach this understanding, scholarly material and case law must be examined, it only stands to reason that with 70 countries signed on to the CISG it will affect a vast number of business people and thus cannot be avoided. In regard to the position of the Convention in relation to that of English law, it can be said that the perception that the philosophy underlying the Convention is wholly inconsistent with that of English law thus making it unsuitable for market sensitive goods is incorrect and will take time to change.<sup>83</sup>

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<sup>83</sup> Alastair Mullis, *Twenty-Five Years On - The United Kingdom, Damages and the Vienna Sales Convention*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 35-51 (2007), available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis2.html>.