

## CISG Advisory Council Opinion No. 5 [\[1\]](#)

### The buyer's right to avoid the contract in case of non-conforming goods or documents [\[2\]](#)

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Adopted by the CISG-AC on the 9<sup>th</sup> meeting held in Philadelphia with no dissent. Reproduction of this opinion is authorized.

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## Opinion

### *Article 49 CISG*

*(1) The buyer may declare the contract avoided:*

*(a) 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; or*

*(b) [...]*

**1. In determining whether there is a fundamental breach in case of non-conformity of the goods giving the buyer the right to avoid the contract according to Art 49(1)(a) CISG, regard is to be given to the terms of the contract.**

**2. If the contract does not make clear what amounts to a fundamental breach, regard is to be given in particular to the purpose for which the goods are bought.**

- 3. There is no fundamental breach where the non-conformity can be remedied either by the seller or the buyer without unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance.**
  - 4. Additional costs or inconvenience resulting from avoidance do not influence per se whether there is a fundamental breach.**
  - 5. The issue of avoidance in case of non-conforming accompanying documents such as insurance policies, certificates etc., must be decided by resorting to the criteria set forth in 1. to 4.**
  - 6. In the case of documentary sales, there is no fundamental breach if the seller can remedy the non-conformity of the documents consistently with the weight accorded to the time of performance.**
  - 7. In the commodity trade, in general, there is a fundamental breach if there is no timely delivery of conforming documents.**
  - 8. If the non-conformity does not amount to a fundamental breach, the buyer still has a right to withhold payment and to refuse to take delivery if reasonable under the circumstances.**
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## Comments [\[3\]](#)

### 1. Introduction

**1.1** Rules on avoidance of contract in case of non-conforming goods have to take into account three different interests:[\[4\]](#) The buyer is interested in a low threshold for avoidance, while the seller's interest is in a high threshold for avoidance. Economic reasons such as costs and risk of transportation or storage may also play a role. These conflicting interests have to be balanced.

**1.2** There have been great differences of opinion among domestic legal systems concerning the question of under which circumstances the buyer may avoid the contract in case of non-conforming goods or documents. Art 49(1)(a) CISG provides that avoidance is 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 Art 25 CISG, a breach is fundamental "if it results in such detriment to the [buyer] as substantially to deprive him of what he is entitled to expect under the contract, unless the [seller] did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

**1.3** Reference to case law shows that the interpretation of the notion of fundamental breach in cases of non-conforming goods by national courts and arbitration tribunals differs considerably even within one single legal system.

**1.4** Special problems arise with respect to non-conforming documents and the commodity trade in particular. Special rules have been established by the International Chamber of Commerce. Thus, the Incoterms 2000 [\[5\]](#) contain detailed rules governing the obligations of the seller to provide for documents,[\[6\]](#) and the buyer to accept them,[\[7\]](#) respectively. Such rules are widely incorporated into international contracts.[\[8\]](#)

## 2. Domestic Legal Systems

**2.1** Civil law systems were originally based upon the Roman sales law rule that, in the case of defects in the quality of the goods, the buyer had the right either to demand reduction of the purchase price (*actio quanti minoris*) or to avoid [9] the contract (*actio redhibitoria*). [10] However, modern statutes, such as the German Statute on Modernization of the Law of Obligations, [11] the Scandinavian Sales Laws [12] or the Netherlands Civil Code, [13] are oriented towards the CISG and apply the notion of fundamental breach or similar key concepts for the avoidance of the contract. The same is true for other international uniform law instruments, such as the UNIDROIT Principles [14] and the Principles of European Contract Law. [15]

**2.2** In contrast to this, common law sales law was based upon the idea that the buyer could only avoid (terminate) the contract if the non-conformity is sufficiently serious. [16] This restriction, however, only applies to accepted goods, [17] thus making "acceptance" or its revocation key notions. Before there has been acceptance, the so-called "perfect tender rule" [18] applies, giving the buyer the right to reject the goods if they do not conform to the contract in any respect. However, during the past decades the perfect tender rule itself has been subject to several restrictive modifications. Thus, s. 15A Sale of Goods Act, inserted by the Sale and Supply of Goods Act 1994, states that if the buyer does not deal as a consumer, the breach may not be treated as a breach of condition if the breach was so slight that it would be unreasonable for the buyer to reject the goods. Similarly, some US courts have limited the perfect tender rule by applying the good faith principle, [19] especially in cases of a rightful and effective cure [20] by the seller in accordance with § 2-508 UCC. [21]

## 3. Drafting History

**3.1** The basic concept of fundamental breach was already present in Art 10 ULIS [22] and was not questioned during the preparatory work for the CISG. The function of this concept in the case of tender or delivery of non-conforming goods was to avoid causing these goods to be returned, which would result in considerable economic detriment.

**3.2** Although the concept of fundamental breach itself was unquestioned, the preconditions for the breach being fundamental and the necessity to declare the contract avoided remained in dispute until the Vienna Conference. Ultimately, it was decided that the seriousness of the breach should be determined by reference to the interests of the promisee as actually laid down and circumscribed by the contract. [23] Concerning the avoidance of the contract, the CISG clearly deviates from ULIS. Under Art 44(2) ULIS, the buyer could fix an additional time to remedy any breach in cases, where the non-conformity of the goods or the delay in delivering *conforming* goods did not yet amount to a fundamental breach under Art 43 ULIS. The fruitless elapse of such a "*Nachfrist*" always enabled the buyer to avoid the contract, regardless of the fundamentality of the original defect in performance. Art 49(1)(b) CISG, in contrast, limits the possibility for the buyer to fix an additional period of time to cases of non-delivery, thus excluding this possibility for non-conforming goods. [24] Still, also under CISG the weight the contract accords to the time of performance always has to be kept in mind when defining a fundamental breach. [25]

**3.3** The history of the CISG clearly documents that there is no equivalent to the original perfect tender rule in Anglo-American law. Although its wording could be misunderstood, [26] Art 86 CISG in itself does not give the buyer a general right to reject any non-conforming tender. [27] Rather, under the CISG such a right is limited to certain situations: Art 52 CISG allows the buyer to refuse to take delivery only if the seller delivers the goods before the date fixed or if he delivers a quantity of goods greater than that provided for in the contract. In all other cases of non-conforming tender, the requirement for rejection is a fundamental breach.

## 4. Interpretation

### a) *General Remarks*

**4.1** A fundamental breach of contract giving the buyer the right to avoid the contract or to ask for substitute goods presupposes that the defect has a serious importance to the buyer. In considering avoidance, one has to take into account whether the buyer can be required to retain the goods because he can be adequately compensated by damages or a price reduction. The substantiality of the detriment to the buyer may be ascertained by having regard to the terms of the contract, the purpose for which the goods are bought and finally, by the question of whether it is possible to remedy the defect. In any case, the question of time has to be given due consideration.

### aa) **Terms of The Contract**

**4.2** First and foremost, it is up to the parties to stipulate what they consider to be of the essence of the contract.<sup>[28]</sup> Whether or not a contractual agreement is of the essence is a matter of interpretation under Art 8 CISG. In doing so, several courts held a breach to be fundamental where the parties had explicitly agreed on certain central features of the goods, such as unsweetened apple juice concentrate,<sup>[29]</sup> the thickness of a roll of aluminium <sup>[30]</sup> or soy protein products that have not been genetically modified.<sup>[31]</sup> If the parties act accordingly, there is also no room for the seller to argue that he did not foresee the detriment to the buyer, if the goods do not conform to such express terms.

### bb) **Purpose for Which Goods are Bought**

**4.3** If the contract itself does not make clear what amounts to a fundamental breach, one of the central questions is for what purpose the goods are bought. Where the buyer wants to use the goods himself, such as machinery for processing, globes for marketing purposes <sup>[32]</sup> or compressors for use in air-conditioners <sup>[33]</sup>, in the usual case it cannot be decisive whether the goods could be resold even at a discount price. Rather, the decisive factor is whether the goods are improper for the use intended by the buyer. However, regard is to be had to the question whether the buyer is able to make use of the goods or to process them differently without unreasonable expenditure.<sup>[34]</sup> Where the buyer himself is in the resale business, the issue of a potential resalability becomes relevant. There is also a fundamental breach here if the goods are not resalable at all, e.g., food not complying with national health regulations.<sup>[35]</sup> If the defect of the goods does not hinder their resalability, still, it cannot be said that there is never a fundamental breach. The question then is whether resale can reasonably be expected from the individual buyer in his normal course of business.<sup>[36]</sup> 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.<sup>[37]</sup> In determining the likelihood of this, regard is to be had to the retailer's specific target group of customers.<sup>[38]</sup> In all these cases, due regard should be had to the possibilities of the seller himself to dispose of the goods, thus balancing the possibilities and interests of the buyer and seller.

### cc) **Possibility of Repair or Replacement**

**4.4** 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 the non-conformity of the goods can be remedied by the seller - e.g., by repairing the goods <sup>[39]</sup> or delivering substitute or missing goods <sup>[40]</sup> -- without causing unreasonable delay or inconvenience to the buyer, there is not yet a fundamental breach.<sup>[41]</sup> Here, due regard is to be given to the purposes for which the buyer needs the goods. If timely delivery of conforming goods is of the essence of the contract,

repair or replacement usually will lead to unreasonable delay.<sup>[42]</sup> In finding such unreasonableness the same criteria have to be applied as in case of late delivery; namely whether exceeding a time limit - either a date or the end of a period of time - amounts to a fundamental breach. Furthermore, the buyer should not be expected to accept cure by the seller if the basis of trust for the contract has been destroyed, e.g., due to the seller's deceitful behaviour.<sup>[43]</sup> When the seller either refuses to remedy the defect,<sup>[44]</sup> simply fails to react, or if the defect cannot be remedied by a reasonable number of attempts within a reasonable time,<sup>[45]</sup> then a fundamental breach will also be deemed to have occurred.<sup>[46]</sup>

**4.5** If in a given case the buyer is in a better position than the seller to have the goods repaired himself or by a third party, to buy missing parts <sup>[47]</sup> or -- in case of a defect in quantity -- to buy the missing amount of goods, he is obliged to do so and may not declare the contract avoided for fundamental breach.

#### **dd) Additional Costs or Inconvenience Resulting from Avoidance**

**4.6** It may be questionable as to whether the fact that the goods are still on the premises of the seller -- e.g., in case of delivery EXW, or if the buyer realizes the non-conformity before the shipping of the goods -- or are stored in a warehouse affects the notion of fundamental breach because the goods do not have to be transported back to the seller in case of avoidance of the contract. The idea to prevent commercially unreasonable costs for the transport of the goods, might advocate lowering or raising the prerequisites for avoidance, respectively. However, even if the seller does not have to transport the goods back, he may face storage costs exceeding the costs for transportation.<sup>[48]</sup> Furthermore, in cases where the goods have already been shipped, they do not necessarily have to be transported back to the seller if the buyer avoids the contract; the seller may be able to redirect them to another buyer or sell them at the place where they are located. Thus it would be necessary to decide on an approach, independent from the location of the goods, in order to assess the costs that the avoidance of the contract would cause to the seller. This, however, would lead to unpredictable results.

#### **b) Non-conforming Documents**

**4.7** In the first place, one has to distinguish between two different situations: First, there are various documents that usually accompany a contract of sale, e.g., insurance policies, certificates of origin, certificates of inspections, custom clearance certificates, etc. Second, a contract of sale can require delivery by the handing over of documents of title, e.g., bills of lading. Other documents such as dock warrants, warehouse receipts or their respective electronic equivalents can also be required.

#### **aa) Accompanying Documents**

**4.8** In the case of accompanying documents, the question as to whether the buyer may avoid the contract must be decided by resorting to the general mechanisms of the Convention already established for determining a fundamental breach.<sup>[49]</sup>

**4.9** 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 using the goods according to his plans, e.g., to resell them. If they do not, a fundamental breach can never be assumed. If they do limit him, the seriousness of the defect depends upon whether the buyer can still use the goods in a reasonable way even with non-conforming documents, or -- if not -- whether the non-conformity of the documents can be remedied in time either by the seller or by the buyer himself.<sup>[50]</sup>

**4.10** 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 Art 49(1)(a) CISG; Art 49(1)(b) CISG is not applicable.

#### **bb) Documentary Sales**

**4.11** Nowadays, a majority of international sales contracts incorporate the Incoterms of the ICC. A number of courts and scholars already hold that they have become a usage in international trade within the meaning of Art 9(2) CISG, thereby complementing the rules of the Convention.<sup>[51]</sup> Except for EXW, all Incoterms 2000 clauses contain the seller's obligation to deliver or to assist the buyer to obtain certain documents of title.<sup>[52]</sup> Thus, in turn, all such contracts can be referred to as documentary sales contracts.

**4.12** According to Art 1(1) CISG, the Convention applies to contracts of sale of goods. However, there cannot be any doubt that documentary sales of goods shall be covered by the Convention as well, "though in some legal systems such sales may be characterized as sales of commercial paper."<sup>[53]</sup> This even holds true for so called "string transactions", i.e., when documents are sold and transferred several times until the final purchaser takes physical delivery of the goods.<sup>[54]</sup>

**4.13** In documentary sales contracts, the tender of "clean" documents is of the essence of the contract. Thus, B8 of all Incoterms 2000 clauses (except for EXW) provides that the buyer must accept the transport document and/or other evidence of delivery in accordance with the seller's obligation. This implies the buyer's right to reject any tender of non-conforming documents irrespective of the goods' actual conformity or non-conformity with the contract.<sup>[55]</sup>

**4.14** However, the seller may remedy any lack of conformity in the documents. If, for example, the bill of lading is "unclean" because it refers to damage to the goods or their packaging, the seller may tender a new bill of lading relating to other goods, which does not contain such a reservation. If the bill of lading indicates a late loading date, the seller may subsequently purchase goods "afloat" which were loaded on time and tender to the buyer the bill of lading issued for those goods. However, again, this is only possible if it does not cause unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance.<sup>[56]</sup>

**4.15** In a majority of international sales contracts, the parties stipulate that the purchase price is to be paid by means of documentary credit including standby letter of credit.<sup>[57]</sup> In this case, the UCP 500 <sup>[58]</sup> usually apply, either by express reference or, as is frequently held, as an international trade usage <sup>[59]</sup> within the meaning of Art 9(2) CISG.<sup>[60]</sup>

**4.16** Art 20 et seq. UCP 500 set out, in detail, under what circumstances the documents are to be accepted as clean, or may be rejected, respectively. However, this question concerns the relationship between the seller and the bank, which is not a subject of this Opinion. Suffice to say, that payment by means of documentary credit *as such* does not necessarily influence the possibility of the buyer to avoid the contract in case of non-conforming documents.

#### **c) Commodity Trade**

**4.17** In those parts of the commodity market, where string transactions prevail and/or prices are subject to considerable fluctuations,<sup>[61]</sup> special standards have to be applied in determining whether there is a fundamental breach. There, timely delivery by the handing over of clean documents -- that can be resold in the normal course of business -- is always of the essence of the

contract.<sup>[62]</sup> 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 Art 8(2), (3) CISG.<sup>[63]</sup> As a result, in practice, the seller's possibility to remedy a defect in the documents normally does not exist in the commodity trade. Thus, in this specific trade branch the solution under the CISG is quite similar to that under the perfect tender rule. However, the last buyer, who actually takes the goods, may not avoid the contract merely by relying on the non-conformity of the documents.

#### ***d) Buyer's Right to Withhold Performance***

**4.18** In non-documentary sales cases, if the non-conformity of the tendered goods does not amount to a fundamental breach, as a general rule, the buyer is obliged to accept the goods as a right to avoid the contract does not exist according to Art 49(1)(a) CISG. However, in this situation, a right to withhold performance can be advocated independent of the regular legal remedies. The buyer can at least temporarily refuse payment and even suspend his obligation to take delivery until he has decided on his next courses of action.<sup>[64]</sup>

**4.19** The CISG recognizes a right to withhold performance in several provisions. Art 58 CISG embodies the principle of "payment against delivery" as concurrent conditions. According to Art 71 CISG, a party may also suspend its own performance if performance by the other party is insecure. Further rights to withhold performance are contained in Arts 81(2) second sentence CISG, 85 second sentence and 86(1) second sentence CISG. The prevailing literature derives a general principle of a right to withhold performance according to Art 7(2) CISG from such provisions.<sup>[65]</sup>

**4.20** As an initial consequence of that general right, the buyer may withhold the payment of the purchase price; however, this right must be limited to the extent of the non-conformity and the expected detriment. If the extent of the non-conformity cannot be easily ascertained, the buyer should be given the right to withhold the whole purchase price for a reasonable time that is necessary to inspect the goods and to estimate the extent of the expected detriment.

**4.21** Besides the possibility to withhold the purchase price, the general right to withhold performance allows the buyer to suspend his obligation to accept delivery within the meaning of Arts 53, 60 CISG for a reasonable time.<sup>[66]</sup> This, however, does not mean that the buyer is not obliged to physically take possession of the goods and preserve them according to Art 86 CISG. The practical consequence of the buyer's right to refuse to take delivery is only important where the risk of loss has not yet passed pursuant to Arts 67 or 68 CISG. The risk then passes according to Art 69(1) CISG when the buyer takes over the goods, which implies an acceptance -- within the meaning of taking delivery -- by the buyer.

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## **FOOTNOTES**

1. The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, was elected Secretary. The CISG-AC has consisted of: Prof. Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of

Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, Professor of Private Law, University of Stockholm, Faculty of Law; Rector, Graduate School of Law, Riga, Latvia; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At its meeting in Rome in June 2003, the CISG-AC elected as additional members, Prof. Pilar Perales Viscasillas, Universidad Carlos III de Madrid, and Prof. Ingeborg Schwenzer, University of Basel. At its meeting in Madrid in October 2004, Professor Jan Ramberg was elected Chair of the CISG-AC for a three-year term.

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2. This opinion is a response to a request by the Chair of the International Sales Committee of the International Law and Practice Section of the New York State Bar Association. The question referred to the Council was:

"Under what circumstances may the buyer avoid the contract under Article 49 CISG in case of a non-conforming tender? If the parties to a contract do not derogate from or vary the effect of any of the provisions of the CISG, are there circumstances in which the CISG would permit avoidance if the goods or the tender of delivery fail in any respect to conform to the contract."

This opinion is focusing on the most important issues of non-conforming tender, namely non-conforming goods and documents.

3. The rapporteur gratefully acknowledges lic. iur. Benjamin K. Leisinger for his assistance in the preparation of this opinion.

4. Cf. SCHLECHTRIEM, Subsequent Performance and Delivery Deadlines -- Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods, at I. Avoiding a Contract on Account of Non-Conformity with Tendered Goods, p. 1 et seq., online at <<http://www.cisg-online.ch/cisg/Schlechtriem-PaceInt'ILRev.pdf>>.

5. See ICC- Publication No. 560 ED.

6. See A8 of the respective clauses.

7. See B8 of the respective clauses.

8. This may be done, firstly, by express reference. Furthermore, there is a tendency among courts and scholarly opinions that such rules amount to usages in international trade within the meaning of Art 9(2) CISG. See WITZ/SALGER/LORENZ/W. Witz, *International Einheitliches Kaufrecht*, Heidelberg 2000, Art 9 para 14; ITALY, *Marc Rich & Co. A.G. v. Iritecna S.p.A.*, Corte d'appello di Genova, 24 March 1995, CISG-online 315; ARGENTINA, *Elastar Sacifia v. Bettcher Industries, Inc.*, Juzgado Nacional de Primera Instancia en lo Comercial, 20 May 1991, CISG-online 461; UNITED STATES, *St. Paul Ins. Co. v. Neuromed Med. Sys.*, US District Court (S.D.N.Y.), 26 March 2002, CISG-online 615; UNITED STATES, *BP International, Ltd. and BP Exploration & Oil, Inc., Plaintiffs-Appellants v. Empresa Estatal Petroleos de Ecuador, et al., Defendants, Empresa Estatal Petroleos de Ecuador and Saybolt, Inc., Defendants-Appellees*, US Court of Appeals (5th Circuit), 11 June 2003, CISG-online 730. More differentiated: Bridge, *The International Sale of*

Goods, Oxford 1999, at 2.48 and 2.49; SCHLECHTRIEM/SCHWENZER/Schmidt-Kessel, Commentary on the UN Convention on the International Sale of Goods (CISG), 2<sup>nd</sup> ed., Oxford 2005, Art 9 para 26.

9. Domestic legal systems use many different notions, such as termination, nullification, repudiation, cancellation, rescission or avoidance. This opinion always uses the expression "avoidance" as this reflects the terminology of the CISG, *see*, e.g., in Arts 49, 75, 76(1) CISG.

10. *Cf.* Germany: former § 462 Bürgerliches Gesetzbuch (BGB) (in force until 31 December 2001); France: Art 1644 Code Civil; Switzerland: Art 205 Code of Obligations. But *see* Austria: Art 932 Allgemeines Bürgerliches Gesetzbuch (ABGB), only giving a right to avoid the contract in cases where repair is not feasible and a proper use is not possible. For details *see* Rabel, *Recht des Warenkaufs*, Volume 2, Tübingen 1958, p. 232 et seq.

11. SCHULDRECHTSMODERNISIERUNGSGESETZ of 26 November 2001, in force since 1 January 2002, § 323 BGB.

12. *See* Section 39 Norwegian Sale of Goods Act 1988 <<http://www.jus.uio.no/lm/norway.sog.act.1988/doc#116>>; Section 39 Finnish Sale of Goods Act 1987 <<http://www.finlex.fi/pdf/saadkaan/E9870355.PDF>>; Section 39 Swedish Sale of Goods Act 1990. For details *see* KJELLAND, *Das neue Recht der nordischen Länder im Vergleich mit dem Wiener Kaufrecht (CISG) und dem deutschen Kaufrecht*, Aachen 2000.

13. *See* Art 6:265 Burgerlijk Wetboek.

14. *See* Article 7.3.1 UNIDROIT Principles of International Commercial Contracts 2004.

15. *See* Article 4.303 Principles of European Contract Law.

16. Under English Law, avoidance depends upon the question whether there was a breach of condition or a mere breach of warranty. *See* for the distinction between "condition" and "warranty": *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. (The Hansa Nord)*, 1 Q.B. 44 (C. A.), 1976; *see* also s. 11, s. 14 and s. 15A of the Sale of Goods Act 1994. According to § 2-608(1) Uniform Commercial Code (UCC), the buyer may revoke acceptance if acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to the buyer if the buyer has accepted it. For an overview of the system of avoidance in common law systems in general *see* Treitel, *Remedies for Breach of Contract*, Oxford 1988, Sections 259, 260.

17. Under English law, in s. 35(1) Sale of Goods Act as amended by the Sale and Supply of Goods Act 1994, it is laid down that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. For details *see* Benjamin's Sale of Goods, 6<sup>th</sup> ed., London 2002, 12-044 et seq. In the UCC, *acceptance* is dealt with in § 2-606. *Acceptance* occurs in three different ways: according to § 2-606(1)(a) UCC, the first possibility is that the buyer, after a reasonable possibility to inspect the goods, signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity. Pursuant to § 2-606(1)(b) UCC, *acceptance* also occurs, if the buyer fails to make effective rejection after the buyer had a reasonable opportunity to inspect the goods. Finally, *acceptance* occurs if, according to § 2-606(1)(c) UCC, "the buyer does any act inconsistent with the seller's ownership". Here, the buyer's knowledge and behavior is decisive; for illustrations *see* WHITE/SUMMERS, *Uniform Commercial Code*, 5<sup>th</sup> ed., St. Paul 2000, § 8-2.

18. *See* § 2-601(a) UCC, s. 35 Sale of Goods Act 1994.

19. *See* § 1-203 UCC. *See* also Treitel who points out, "[t]his so-called perfect tender rule [particularly as recited in UCC 2-601] at first sight gives rise to a very wide power to terminate regardless of the seriousness of the nonconformity. But the appearance is deceptive as the requirement of seriousness is re-introduced by a number of other provisions which must be read together with UCC 2-601." Treitel, *op. cit.* (footnote 16) Section 269. For other relevant provisions of the UCC, *see* ALBERT H. KRITZER, *Guide to Practical Applications of the CISG*, Deventer/Boston 1990, Suppl. 4 (February 1993), p. 206.

20. Such a cure can be the delivery of conforming replacement goods, repair or even price adjustments sufficient to compensate the buyer and reduction in the price. *See* for replacement goods: *T.W. Oil, Inc. v. Consolidated Edison Co.*, US Court of Appeals (N.Y.), 15 December 1982, 1982 N.Y. LEXIS 3846; DEL DUCA/GUTTMAN/SQUILLANTE, *Problems and materials on sales under the Uniform Commercial Code and the Convention on International Sale of Goods*, Cincinnati 1993, p. 359; Calamari & Perillo, *Contracts*, 3rd ed., St. Paul 1988, § 11-20, p. 468. *See* for repair: *Wilson v. Scampoli*, US Court of Appeals (D.C.), 2 May 1967, 1967 D.C. App. LEXIS 156. For price adjustments and reduction: WHITE/SUMMERS, *op. cit.* (footnote 17), § 8-6, p. 338; *Oral-X Corp. v. Farnam Cos., Inc.*, US Court of Appeals (10<sup>th</sup> Circuit), 26 April 1991, 1991 U.S. App. LEXIS 7377.

21. In the course of the recent revision of the UCC there have also been discussions in the Study Group as to whether to replace the perfect tender rule with the requirement that would permit rejection only if a non-conformity "substantially impairs the value of the performance to the buyer", *see* the draft of § 2-501 UCC as of July 1996 <<http://www.law.upenn.edu/bll/ulc/ucc2/ucc2sale.pdf>>. However, ultimately a majority of the Study Group recommended that the perfect tender rule be maintained as the standard, *see* § 2-601 UCC Draft 2002. For the whole discussion *see*: Lawrence, *Symposium: The Revision of Article 2 of the Uniform Commercial Code: Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 *Wm and Mary L. Rev.* 1635, 1637 et seq. (1994).

22. Uniform Law on the International Sale of Goods, online at <<http://www.unidroit.org/english/conventions/c-ulis.htm>>.

23. *Cf.* O.R. p. 295 et seq., p. 300; SCHLECHTRIEM/SCHWENZER/Schlechtriem, *op. cit.* (footnote 8), Art 25 para 2.

24. During the drafting of the CISG, a number of attempts were made to reintroduce the "time element". *See* O.R., p. 354 et seq.

25. *Cf.* SCHLECHTRIEM, *op. cit.* (footnote 4), p. 6.

26. Art 86(1): "If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, [...]". Art 86(2): "If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, [...]".

27. *See* O.R., p. 399.

28. This would amount to a "condition" in English legal terminology. *See* also the notion of "Zusicherung" under former §§ 459(2), 463 BGB (in force until 31 December 2001) or the "*dicta et promissa*" in Roman sales law, *see* Rabel, *op. cit.* (footnote 10), p. 132 et seq.

29. *See* GERMANY, OLG Stuttgart, 12 March 2001, CISG-online 841.
30. *See* CIETAC (China International Economic and Trade Arbitration Commission), 30 October 1991, CISG-online 842.
31. *See* SWITZERLAND, Appellationsgericht Basel-Stadt, 22 August 2003, CISG-online 943.
32. *See* GERMANY, LG München, 27 February 2002, CISG-online 654.
33. *See* UNITED STATES, *Delchi Carrier, S.p.A. v. Rotorex Corp.*, US Court of Appeals (2nd Circuit), 6 December 1996, CISG-online 140.
34. *See* ICC International Court of Arbitration, 7754 of 1995, CISG-online 843; GERMANY, OLG Stuttgart, 12 March 2001, CISG-online 841. But *see*: GERMANY, LG München, 27 February 2002, CISG-online 654, globes still could be used for advertising even though they were not able to rotate.
35. *See* GERMANY, LG Ellwangen, 21 August 1995, CISG-online 279; ICC International Court of Arbitration, 8128 of 1995, CISG-online 526; SWITZERLAND, Appellationsgericht Basel-Stadt, 22 August 2003, CISG-online 943; GERMANY, BGH, 2 March 2005, CISG-online 999, in this case, however, avoidance was not declared, but the court granted a price reduction to zero. But *see*: GERMANY, BGH, 8 March 1995, CISG-online 144, mussels still good for consumption because there was no health risk.
36. *See* GERMANY, OLG Frankfurt a.M., 18 January 1994, CISG-online 123, the burden of proof that resale is not possible lies on the buyer; GERMANY, OLG Stuttgart, 12 March 2001, CISG-online 841.
37. *See* GERMANY, LG Landshut, 5 April 1995, CISG-online 193, clothes; GERMANY, Hans. OLG Hamburg, 26 November 1999, CISG-online 515, jeans; GERMANY, OLG Köln, 14 October 2002, CISG-online 709, designer clothes. *See also*: GERMANY, OLG Oldenburg, 1 February 1995, CISG-online 253, limited circle of interested sub-buyers would only buy the goods at a discount of 50%.
38. *See* GERMANY, OLG Köln, 14 October 2002, CISG-online 709, buyers of designer clothes have higher standards.
39. *See* SWITZERLAND, Handelsgericht des Kantons Aargau, 5 November 2002, CISG-online 715.
40. *See* GERMANY, LG Köln, 16 November 1995, CISG-online 265.
41. *Cf.* SCHLECHTRIEM/SCHWENZER/Schlechtriem, op. cit. (footnote 8), Art 25 para 20.
42. All Incoterms 2000 clauses in A4 call for delivery "on the date or within the period agreed for delivery". One German Court, Hans. OLG Hamburg, 28 February 1997, CISG-online 261, has argued that a C.I.F. contract has to be understood as a fixed term contract. But *see*: ICC International Court of Arbitration, 7645 of 1995, CISG-online 844, the Incoterms clauses C.F.R. do not, however, specify that abiding to the time limit is an obligation of especially essential importance.
43. *See obiter*, GERMANY, BGH, 3 April 1996, CISG-online 135, BGHZ 132, 290 et seq.
44. *See* GERMANY, LG Berlin, 15 September 1994, CISG-online 399.

45. See GERMANY, LG Oldenburg, 6 July 1994, CISG-online 274; UNITED STATES, *Delchi Carrier, S.p.A. v. Rotorex Corp.*, US Court of Appeals (2nd Circuit), 6 December 1996, CISG-online 140.
46. For a thorough discussion of the dogmatic controversy considering the relationship between Art 49(1)(a) CISG and Art 48(1) CISG see: SCHLECHTRIEM/SCHWENZER/Schlechtriem, op. cit. (footnote 8), Art 25 para 20; Fountoulakis, *Das Verhältnis von Nacherfüllungsrecht des Verkäufers und Vertragsaufhebungsrecht des Käufers im UN-Kaufrecht*, Internationales Handelsrecht (IHR) 2003, p. 160 et seq.
47. See GERMANY, LG Heidelberg, 3 July 1992, CISG-online 38.
48. See CIETAC (China International Economic and Trade Arbitration Commission), 6 June 1991, CISG-online 845, transport costs of US \$1,750 and storage costs for a period of three years approximately US \$17,000.
49. See GERMANY, BGH, 3 April 1996, CISG-online 135, BGHZ 132, 290 et seq.
50. See for example: GERMANY, BGH, 3 April 1996, CISG-online 135, BGHZ 132, 290 et seq. In this case, seller provided for a non-conforming certificate of origin and a non-conforming certificate of analysis. The court held that the seller could easily get a new certificate of origin from the local Chamber of Commerce and that the certificate made by buyer's expert was a valid new certificate of analysis.
51. For references see *supra* (footnote 8).
52. See the provision A8 of the respective clauses.
53. See SECRETARIAT COMMENTARY, O.R., p. 16, Art 2 para 8.
54. See the thorough discussion of this question by: SCHLECHTRIEM, Interpretation, gap-filling and further development of the UN Sales Convention, at <<http://www.cisg-online.ch/cisg/publications.html>>, text accompanying footnotes 15-24.
55. See *ibid*, at II.5.c)cc).
56. For a thorough discussion of this question, see above para. 4.4.
57. See SCHÜTZE, *Das Dokumentenakkreditiv im Internationalen Handelsverkehr*, 5<sup>th</sup> ed., Heidelberg 1999, p. 26; also see ICC Homepage: <[http://www.iccwbo.org/home/documentary\\_credits/documentary\\_credits.asp](http://www.iccwbo.org/home/documentary_credits/documentary_credits.asp)>.
58. Cf. 1993 Revision, ICC- Publication NO. 500.
59. See for a list of countries that have acknowledged collectively and banks in other countries which also have acknowledged them: Schütze, op. cit. (footnote 57), Appendix IV, p. 341 et seq.
60. See WITZ/SALGER/LORENZ/W. Witz, *International Einheitliches Kaufrecht*, Heidelberg 2000, Art 60 para 13, *ibid*, Art 54 para 3.
61. See for agricultural products: FUHRMANN/GIUCCI, *Warenterminbörsen in Deutschland*, Working Paper 9603, at 2.a., online at: <<http://www.uni-potsdam.de/u/makrooekonomie/docs/9603.htm>>. For iron molybdenum: GERMANY, Hans. OLG

Hamburg, 28 February 1997, CISG-online 261: price was 9,70 US \$/kg and changed to 30 US \$/kg. For commodity prices in general, *see*: MATTHIES/TIMM, World Commodity Prices 1999-2000, Association d'Instituts Européens de Conjoncture Economique - Working Group on Commodity Prices, 1999, online at: <<http://www.hwwa.de/Publikationen/Report/1999/Report191.pdf>>.

62. *Cf.* UNIDROIT Principles 2004, Art 7.3.1, Official Comment 3.b.; Bridge, The Sale of Goods, Oxford 1997, p. 155; Poole, Textbook on contract law, 7<sup>th</sup> ed., Oxford 2004, para 7.5.3.2; SCHLECHTRIEM, *op. cit.* (footnote 54), at I.1.; Mullis, Termination for Breach of Contract in C.I.F. Contracts Under the Vienna Convention and English Law; Is there a Substantial Difference?, in: LOMNICKA/MORSE (ed.), Contemporary Issues in Commercial Law (essays in honor of Prof. A.G. Guest), London 1997, p. 137-160, at: <<http://www.cisg.law.pace.edu/cisg/biblio/mullis.html>>.

63. *See* SCHLECHTRIEM, *op. cit.* (footnote 54), at I.1.

64. SCHLECHTRIEM, *op. cit.* (footnote 54), at II.5.a).

65. *See* for a thorough discussion: SCHLECHTRIEM, *op. cit.* 54, at II.5.; *idem*, Internationales UN-Kaufrecht, 2<sup>nd</sup> ed., Tübingen 2003, at: 42d, 205 et seq., 250; STAUDINGER/MAGNUS, Wiener UN-Kaufrecht (CISG), Berlin 2005, Art 4 para 74a; W. Witz, Zurückbehaltungsrechte im Internationalen Kauf -- Eine praxisorientierte Analyse zur Durchsetzung des Kaufpreisanspruchs im CISG, in: Schwenger/Hager (eds.), Festschrift für Peter Schlechtriem zum 70. Geburtstag, Tübingen 2003, p. 291, 293 et seq.; for case law *see* also GERMANY, AG Altona, 14 December 2000, CISG-online 692. The question was left open in GERMANY, OLG Düsseldorf, 24 April 1997, CISG-online 385. Section 42 of the Scandinavian Sale of Goods Acts (Finland, Norway and Sweden) also sets forth an explicit right to withhold; for comments *see* RAMBERG, Köplagen, Stockholm 1995, pp. 455-459. *See* also Art 7.1.3 UNIDROIT Principles 2004.

66. *See* SCHLECHTRIEM, *op. cit.* (footnote), at II.5.c)bb).