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

Ingeborg Schwenzer*

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

I FRAMEWORK OF DISCUSSION

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

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

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

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

II DOMESTIC LEGAL SYSTEMS

A Continental Legal Systems

There have been great differences of opinion among domestic legal systems concerning the circumstances in which the buyer may avoid the contract in case of non-conforming goods. In continental legal systems, which were originally based upon Roman sales law principles, in the case of defects in the quality of the goods, the buyer always had the right either to demand reduction of the purchase price (actio quanti minoris) or to avoid the contract (actio redhibitoria). However, this has changed with the enactment of modern statutes, such as the German Statute on Modernisation of the Law of Obligations, the Scandinavian Sales Law, or the Netherlands Civil Code, which apply the notion of fundamental breach or similar key concepts in the same circumstances would not have foreseen such a result.

Reference to case law shows that the interpretation by national courts of the notion of fundamental breach in cases of non-conforming goods differs considerably even within one single legal system. The topic of today's discussion is concerned with how the systematic approach under article 49 of the CISG, which stands in contrast to domestic legal systems, can nonetheless be used as a true uniform sales law solution regarding the requirements for avoidance of contract due to lack of conformity.

B The Traditional English Approach

In contrast to the "continental" approach, the common law legal systems are based upon different legal principles. In the United Kingdom, the initial state of the law was that the remedies available for lack of conformity depended on whether the non-conformity could be classified as breach of a "condition" or breach of a "warranty". The interpretation of these terms requires examination of both the statute and case law on this area. Under the Sale of Goods Act 1979 (SGA) of this country, breach of a condition gives rise to the right to reject the goods and treat the contract as repudiated whereas breach of a warranty can only give rise to a right to claim for damages. An intere limitation of these principles is found in the context of acceptance. Under section 11(4) of the Act, once the buyer has accepted the goods, even a breach of a condition will only give rise to the buyer's right to reject the goods. Therefore, any right the buyer may have to reject for "lack of conformity" depend on whether such lack of conformity is classifiable as a breach of condition or breach of warranty. Under section 13(2) of the Act, such classification will depend on whether such lack of conformity is classifiable as a breach of condition or breach of warranty. Under section 13(3) of the Act, such classification will depend on the construction of contract. A limitation on this is that, as with the United Kingdom system, the acceptance of goods automatically "reduces" the nature of the breach to that of a breach of warranty (see 13(3)). Under the law of the United Kingdom, the legislature has recently, in 1994, gone one step further with section 15A of the Sale of Goods Act 1979 (UK), which states that, with respect implied conditions, if the buyer does not deal as a consumer, the breach may not be treated as breach of condition if the breach was so slight that it would be unreasonable for the buyer to reject the goods.

D The United States Legal System

The sales law of the United States was traditionally based upon the idea that the buyer only avoid the contract if the non-conformity amounted to a fundamental breach, or "substantial impairment". The requirement that the breach be fundamental, however, only applies to acceptance of the goods.
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 consequences. Here, the differentiation needed to be made between "non-fundamental" breaches, which merely gave rise to a claim for damages, and fundamental breaches, which in turn entitled the non-breaching party to declare the contract avoided. In light of the requirements of international trade, upon which basis the CISG was drafted, the avoidance of the contract was to be regarded as the "ultima ratio" remedy, the remedy of last resort. Not only article 49(1)(a) but also many other provisions confirm that the CISG will allow contract avoidance only under narrow conditions and only as a last resort. If possible, an economically "expensive" cancellation of the sale is to be avoided. Only in cases where the gravity of the breach is unacceptable should the aggrieved party be able to get out of the contract.

Although in drafting of the CISG the concept of fundamental breach itself was unquestioned, the preconditions for the breach being fundamental and the requirements for declaring the contract avoided remained in dispute until the Vienna Conference. Firstly, the issue of whether "fundamentality" was to be interpreted subjectively or objectively was in dispute right from the stage of discussions on ULIS. A further concern was whether the sole decisive factor for determining the "fundamentality" of a breach of contract should be "substantial detriment". Ultimately, it was decided that the seriousness of the breach should be determined by reference to the interests of the promisee, in this case the buyer, as actually laid down and circumscribed by the contract. Concerning the avoidance of the contract, the CISG clearly deviates from ULIS, as only in cases of non-delivery does the fixing of an additional period of time "elevate" an otherwise potentially non-fundamental breach to a fundamental one, thus giving the buyer the right to avoid the contract. This right to avoid the contract because of expiry of an additional period can only be

11 In the UCC (US), acceptance is dealt with in § 2-606. Acceptance occurs in three different ways: according to § 2-606(1)(a), the first possibility is that the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods conform or that he will take or retain them in spite of their non-conformity. Pursuant to § 2-606(1)(b) UCC, acceptance also occurs if the buyer fails to make effective rejection after the buyer had a reasonable opportunity to inspect the goods. Finally, acceptance occurs if, according to § 2-606(1)(c) UCC, "the buyer does any act inconsistent with the seller's ownership". Here, the buyer's knowledge and behaviour is decisive. James White and Robert Summers Uniform Commercial Code (5 ed, St Paul, Minnesota, 2000) § 8-2.


13 See the unofficial draft of UCC, § 2-501 as of July 1996, which was later deleted as inconsistent with the decision to retain the perfect tender rule, University of Pennsylvania Law School <www.law.upenn.edu> (last accessed 18 June 2005).


asserted in cases of non-delivery, and not, as under ULIS, in any other situations of breach, such as the delivery of non-conforming goods.17

IV INTERACTION BETWEEN DOMESTIC SYSTEMS AND THE CISG

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

V APPLICATION OF THE CISG TO COMMODITIES

A Critique

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

B Response

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

VI INTERPRETATION

A General Remarks

A fundamental breach of contract giving the buyer the right to avoid the contract presupposes that the defect has a certain objective importance. Therefore, the lack of conformity must be serious that the buyer cannot be required to retain the goods and could not benefit from compensation for damages or a price reduction. The substantiality of the detriment to the buyer can be ascertained by having regard to the express stipulations of the party, the purpose for which goods are bought and finally, to the question of whether it is possible to cure the defect.

B Express Stipulations

With regard to express stipulations, it is up to the parties to stipulate what they consider to be the essence of the contract. If the seller then fails to deliver in accordance with the express stipulation given, he cannot argue that he did not foresee any detriment that occurs to the buyer. Conseguently it is not surprising that courts have found a fundamental breach of contract to exist where the conditions of the contract were not met.20 Rather, the decisive factor is whether the goods are totally improper for the use intended by the buyer, to the extent that the buyer is not able to make use of or to process the goods differently without unreasonable expenditure.22 Where, however, the buyer is in the resale business, the issue of potential loss to "on-sell" the goods becomes relevant. A fundamental breach will exist if the goods cann...
resold at all, for example food not complying with national health regulations. In other cases, the question is whether resale of non-conforming goods can reasonably be expected from the individual buyer in his normal course of business. A wholesaler with broader access to markets in the business concerned has more opportunities to resell the goods than a retailer. A retailer cannot be expected to resell the goods at a discount price if, by doing so, he would be likely to damage his own reputation. In determining the likelihood of this, regard is to be had to the retailer’s specific target group of customers.

D Seller’s Possibility to Cure

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

E Documents and “Avoidance”

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

In international sales contracts involving documents, a distinction needs to be made between the three different situations: First, there are various documents that usually accompany...
for EXW, all Incoterms 2000 clauses contain the seller’s obligation to deliver cert
The avoidance of the case of non-conforming goods and document

Avoidance in the case of non-conforming goods and document

The declarations of intention (such as that to sell) are made in a transaction, when

In documentary sales contracts, the tender of clean documents is of the essen
Then, B8 of all Incoterms 2000 clauses (except for EXW) provides that the buye
However, the seller may cure any lack of conformity in the documents. If, for
of the seller handed over the "unclean" documents before the time contrac
That means that the seller may only remedy the failure if he can do so without un
Special regard is to be had to the stipulations of the contract and the circumstances
case that may make timely performance of central importance.41

In documentary sales contracts, the parties stipulate that the pu
tender a new bill of lading relating to other goods, which does not contain such a
bill of lading indicates a late loading date, the seller may subsequently purch
which were loaded on time and tender to the buyer the bill of lading issued
According to the second sentence of article 34 of the CISG, this is possible wit
restrictions if the seller handed over the "unclean" documents before the time contrac
After this date, cure is only possible under the prerequisites of article 41
That means that the seller may only remedy the failure if he can do so without un

For commodities see Part VI Interpretation.

Rolf Schütze *Das Dokumentenakkreditiv im Internationalen Handelsverkehr* (5 ed, He


For example BGH, 3 April 1996 CISG-online no 135 <www.cisg-online.ch> (last accessed 19 June 2005).

See *BGH, 3 April 1996 CISG-online no 135 <www.cisg-online.ch> (last accessed 19 June 2005).*

However, there cannot be any doubt that documentary sales of goods are covered t
as well, "though in some legal systems such sales may be characterized as sales paper".39 This even holds true for so-called "string transactions", when docum
American sales contracts (UCP, Incoterms) and international sales contracts (CISG, UN Sales Convention) provide for documentary sales. In the first case, 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 seriousness of the defect depends upon whether the buyer can still use the goods in a reasonable way even with unclean documents, or - if not - whether it can easily acquire clean documents independently.36 The case of missing accompanying documents is to be treated like a defect in quantity and not as an equivalent to non-delivery of the goods. That means that also in this case, a fundamental breach has to be established on the individual facts of the case, thus enabling the buyer to avoid the contract only in accordance with article 49(1)(a) of the CISG; article 49(1)(b) is not applicable.

Documentary sales

Nowadays, the vast majority of international sales contracts incorporate the Incoterms of the International Chamber of Commerce. They have become a usage in international trade within the meaning of article 9(2) of the CISG, thereby complementing the rules of the Convention. Except


36 For example BGH, 3 April 1996 CISG-online no 135 <www.cisg-online.ch> (last accessed 19 June 2005).


38 See *Incoterms 2000, above n 29, A8 of the respective clauses.*

39 See *Secretariat Commentary in United Nations Conference on Contracts for the Internati above n 16, art 2 para 8.*

40 See the thorough discussion of this question in Peter Schlechtriem "Interpretation, Gap-Development of the UN Sales Convention" <http://www.cisg-online.ch> (last accessed to footnotes 15-24.

41 For commodities see Part VI Interpretation.

42 Rolf Schütze *Das Dokumentenakkreditiv im Internationalen Handelsverkehr* (5 ed, He
usually apply, either by express reference or as an international trade usage, within the meaning of article 9(2) of the CISG. Even if the UCP 500, as such, are not considered to be international trade usages, they at least offer some useful guidelines as to what reasonable parties would regard to be a fundamental breach of contract within the context of the CISG.

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

4 Commodity trade

With regard to commodities, special standards have to be applied in determining whether there is a fundamental breach. In the commodity market, string transactions prevail and prices are subject to considerable fluctuations. Therefore, 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. As a result, in practice, possibility for the seller to cure any defect in the documents according to article 48(1) of the CISG does not exist in the commodity trade. Thus, in this specific trade branch, the concept of the essential nature of a breach being the decisive consideration of a contract provides an effective system of remedies at both national and international level. The CISG concept of avoidance receives support not only due to its reflection of real business practice and the case law on the area. Importantly, as shown in discussion today, the CISG, used in conjunction with the INCOTERMS and the UCP 500, provides a workable solution for the scope of issues and potential problems in the area of commodity sales law. Rather than working against the pressures of time and efficiency, such transactions, the CISG instead plays a supplementary role. Consequently, the fears about the use of the CISG in documentary and commodity sales law have proven to be unjust and can be laid to rest. In this way, despite the continuing presence of pre-conceived domestic CISG will define its position as the true international sales law instrument, which may be palatable to the United Kingdom—one day!

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

44 See also UNIDROIT Principles 2004, above n 6, art 7.3.1, 3b.


47 Schlechtriem, above n 40, I.1.

48 Schlechtriem, above n 40, 4.

49 Schlechtriem, above n 40, II.