

# 5 THE CISG – A FAIR BALANCE OF THE INTERESTS OF THE SELLER AND THE BUYER

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## 5.1 INTRODUCTION

In domestic legal systems, one may assume that in B2B relationships the parties usually are of similar bargaining power and have the same knowledge or at least the same access to knowledge, however things are different when it comes to cross border transactions especially on the global scale. Parties from developed countries may contract with parties from transitioning or developing countries. Inequality of bargaining power, difference in sophistication, unequal access to knowledge are to be taken into account and pose real challenges for drafting a sales law that strikes a fair balance for sellers and buyers coming from such different backgrounds.

In Brazil, the CISG entered into force on 1 April 2014.<sup>1</sup> Today it has 83 member states.<sup>2</sup> Thus the CISG potentially covers more than 80% of world trade.<sup>3</sup> If we were to group the member states into the three categories of developed, transitioning and developing countries we find that each category roughly accounts for one third of the whole number of member states. This in itself suggests that the CISG has been able to accommodate the interests of all parties from countries around the globe without privileging one or the other.

In my presentation I will show how, indeed, the CISG has succeeded in fairly balancing the interests of sellers and buyers come they from developed, transitioning or developing countries. As an example, I will focus on the rules on conformity of the goods and on the possible remedies following a breach of contract, two core areas of any sales law.

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1 <[www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html)>.

2 *Id.*

3 I. Schwenzer, 'Diverging Interpretations: Reasons and Solutions', in L. DiMatteo (ed.), *International Sales Law – A Global Challenge* (Cambridge University Press, New York, 2014) p. 103.

## 5.2 CONFORMITY OF THE GOODS

### 5.2.1 *Historical Development in Different Legal Systems*

Let me briefly recall how different domestic legal systems approach the question of conformity of the goods.

Most civil law legal systems are still very much influenced by Roman law that was firmly based on the principle of *caveat emptor i.e.* let the buyer beware.<sup>4</sup> Seller's liability depended on whether it had given a special promise, a *stipulatio*, or whether it had acted fraudulently, with *dolus*.<sup>5</sup> This clearly privileges the seller. Though, the maxim of *caveat emptor* could also be found in the old English Common law.<sup>6</sup>

Domestic legal systems are further highly complicated as many of them distinguish between cases of non-conformity and cases of non-delivery.<sup>7</sup> If the goods do not possess the features called under the contract this may be treated as a so-called *aliud* which triggers the rules of non-delivery and not as a *peius* which entails the rules on non-conformity.<sup>8</sup> Defects in quantity likewise are treated as partial non-delivery.<sup>9</sup> In mixed contracts where service obligations accompany the delivery of the goods, it must be exactly determined whether the breach of contract relates to the quality of the goods or to a breach of the service obligation.<sup>10</sup>

Furthermore, extremely seller-friendly rules are found in many Commercial Codes of Civil law legal systems.<sup>11</sup> The buyer is obliged to examine the goods and to inform the seller about any defect in quality or quantity.<sup>12</sup> Failure to give notice regularly engenders the loss of any right and action relating to the non-conformity.<sup>13</sup>

To sum up, most notably Civil law legal systems tend to be seller friendly and disregard the buyer's legitimate interests in case of goods not conforming to the contract. Whereas this may be appropriate in the domestic context, it may yield highly unsatisfactory results on the international level where for instance complex machinery is sold by a seller from a developed country to a buyer in a transitioning country.

4 Cf. I. Schwenger, P. Hachem & C. Kee, *Global Sales and Contract Law* (Oxford University Press, New York 2012) p. 362, para. 31.06.

5 Schwenger, Hachem & Kee, *supra* note 4, p. 367, para. 31.26.

6 L. Charlesworth, 'Consumer Protection in the Sale of Goods Agreements: An Ancient Right in Modern Guise?' (1994) 16 *Liverpool Law Review* p. 177.

7 Cf. Schwenger, Hachem & Kee, *supra* note 4, p. 363, para. 31.09.

8 Schwenger, Hachem & Kee, *supra* note 4, pp. 365 *et seq.*, para. 31.22.

9 Schwenger, Hachem & Kee, *supra* note 4, p. 374, para. 31.59.

10 Cf. Schwenger, Hachem & Kee, *supra* note 4, p. 385, para. 31.104.

11 E.g. German, Swiss and French Law, I. Schwenger, P. Hachem & C. Kee, *supra* note 4, pp. 367 *et seq.*, paras. 31.26 *et seq.*

12 Schwenger, Hachem & Kee, *supra* note 4, p. 366, para. 31.23.

13 Schwenger, Hachem & Kee, *supra* note 4, p. 440, para. 34.76.

5.2.2 *Non-Conformity under the CISG*

The CISG not only simplifies the very structure of the rules on non-conformity, it is also flexible enough to accommodate all kinds of transactions and parties in international commerce and trade.

First of all, the CISG adopts a very broad notion of conformity.<sup>14</sup> The key concept laid down in Article 35 of the CISG treats any defect in quality, quantity and type as well as packaging alike.<sup>15</sup> Thus all the distinctions known from Civil law jurisdictions such as *peius v. aliud*, partial non-delivery or breach of ancillary obligations become superfluous.<sup>16</sup> The same applies with regard to distinctions between guarantees and simple defects, obvious defects (*vice apparent*) and hidden defects (*vice caché*), conditions, warranties and intermediate terms or express and implied warranties as they are found in Common law jurisdictions.<sup>17</sup> This very simplification significantly ameliorates the situation of the aggrieved buyer. In any case of a non-conformity, the buyer must just prove that the contractual expectations are not met. There is no need to prove the exact cause of the non-conformity. Let me give you one example. Where a seller has to deliver a paper mill and undertakes to instruct and supervise the personnel of the buyer in setting up the machinery and starting to operate it, the seller is liable if the mill does not function properly, no matter whether the delivered machinery is defective or incomplete due to its own features or to a lack of adequate packaging or whether the seller has breached any of its service obligations.

The starting point to determine the conformity of the goods is the contract itself.<sup>18</sup> It is up to the parties to clearly specify the standard that the goods have to live up to. Thus these days within many sales contracts we may find specifications as to the origin of the goods as well as to manufacturing practices. Such specifications make the expectations of both parties very predictable.

If the parties have not agreed to specific features in their contract, the CISG provides for a well-balanced default system based on objective criteria.<sup>19</sup> First of all, the goods must be fit for any particular purpose the buyer wants them for.<sup>20</sup> Again however, this provision weighs the interests of the buyer as well as the seller. First, the particular purpose for which the goods are bought must be expressly or impliedly made known to the seller at the time

14 Schwenger, Hachem & Kee, *supra* note 4, p. 369, para. 31.38.

15 I. Schwenger, in I. Schwenger (Ed.), *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn., Oxford University Press, New York, 2010) Art. 35, para. 4.

16 Schwenger, Hachem & Kee, *supra* note 4, p. 369, para. 31.39.

17 Schwenger, *supra* note 15, Art. 35, para. 4.

18 Schwenger, *supra* note 15, Art. 35, para. 6.

19 Schwenger, *supra* note 15, Art. 35, para. 12.

20 Cf. in that regard P. Schlechtriem, 'Die Pflichten des Verkäufers und die Folgen ihrer Verletzung, insbesondere bezüglich der Beschaffenheit der Ware', in E. Bucher (ed.), *Wiener Kaufrecht* (Stämpfli, Bern, 1991) pp. 116-117 with numerous instructive examples.

of the conclusion of the contract.<sup>21</sup> This leaves ample room to consider the individual facts of each case and to adequately balance the interests of the buyer and the seller. If the buyer does not explicitly mention the particular purpose for which it intends the goods – for example use under unusual climatic conditions or special public law requirements in the country of use – it is decisive if a reasonable person in the shoes of the seller could have recognized the particular purpose from the circumstances.<sup>22</sup> In answering this question much will depend on the situation of the seller, its standing in the market, its knowledge and experience in international trade. Furthermore, the buyer must have reasonably relied on the seller's skill and judgement.<sup>23</sup> As a rule, there will be such reliance if the seller is a specialist or expert in the manufacture or procurement of goods for the particular purpose intended by the buyer or in any event holds itself out to be such a specialist.<sup>24</sup> This formula leaves ample leeway to accommodate the interests of both parties and is flexible enough to take into account if the parties come from different parts of the world.

If neither special contractual features nor a particular use can be established, the seller must deliver goods that are fit for the purpose for which goods of the same description are ordinarily used, *i.e.* they must be fit for the ordinary use.<sup>25</sup> Again, in determining whether the goods conform to this requirement, much emphasis is to be laid on the relative standing and situation of the respective parties.<sup>26</sup> If the buyer is in the resale business, the goods must be resalable.<sup>27</sup> The possibility to resell goods in a specific market depends to an increasing degree on compliance with certain manufacturing standards and practices.<sup>28</sup> The same applies with regard to public law requirements, namely, provisions under domestic public law for the protection of consumers, workers or the environment, such as product safety provisions but also provisions that refer to the origin of the goods on the basis of their ability to be exported to a certain country.<sup>29</sup> In international practice it is highly disputed whether in such a case the standards of the seller or those of the buyer apply. Notably, the German<sup>30</sup> but also the Austrian<sup>31</sup> Supreme Courts generally advocate reference to the situation in the seller's state, arguing that the seller cannot be expected to

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21 Art. 35(2)(b) CISG.

22 Schwenger, *supra* note 15, Art. 35, para. 22, with further references in n. 126.

23 Art. 35(2)(b) CISG.

24 Schwenger, *supra* note 15, Art. 35, para. 24.

25 See Art. 35(2)(a) CISG.

26 Cf. Schwenger, *supra* note 15, Art. 35, para. 14.

27 Cf. Schwenger, *supra* note 15, Art. 35, para. 14.

28 Schwenger, *supra* note 15, Art. 35, para. 14.

29 Schwenger, *supra* note 15, Art. 35, para. 17.

30 BGH, 8 March 1995, CISG-online 144, BGHZ 129, 75, 81; BGH, 2 March 2005, CISG-online 999, NJW-RR 2005, 1218.

31 OGH, 12 April 2000, CISG-online 576, IHR 2001, 117, 120; OGH, 27 February 2003, CISG-online 794, IHR 2004, 25, 28; OGH, 25 January 2006, CISG-online 1223; last affirmed by OGH, 19 April 2007, CISG-online 1495.

be aware of the particular requirements in the buyer's state or in the state where the goods will be used. Other courts, however, applied the standards in the buyer's state.<sup>32</sup> Thus, if a seller sells a medical device to a buyer in the US it clearly must comply with the requirements set up by the US FDA.<sup>33</sup> Although, these approaches seem to be irreconcilable, in my view a sensible solution for international trade can be achieved on a case by case basis. Thus, if a Brazilian farmer exports crops it might not be expected to know about detailed public law requirements in the country of use. Here indeed, the buyer is in a better position to draw the attention of the seller to such regulations. However, where a global player of canned foodstuff sells to a Brazilian chain of supermarkets, it is in a far better position to ascertain the relevant public law requirements that exist for marketing the products in Brazil. In this field, too, is it very possible to reach results that strike a fair balance between the seller and the buyer.

### 5.2.3 Examination and Notice Requirement

Like many legal systems influenced by Germanic legal thinking,<sup>34</sup> and especially also many Ibero-American Codes of Commerce,<sup>35</sup> the CISG imposes on the buyer a duty to examine the goods and to notify the seller of any non-conformity.<sup>36</sup> If the buyer fails to do so it is, in principle, deprived of any possibility to rely on the lack of conformity.<sup>37</sup>

The provisions on examination and notice belonged to the mostly debated issues already during the Vienna Conference.<sup>38</sup> First of all, representatives from so-called developing countries stressed the unacceptable consequences of a rigid notice regime for buyers from

32 *Medical Marketing International Inc v. Internazionale Medico Scientifica, S.R.L.*, 17 May 1999, U.S. Dist. Ct. (Eastern District of Louisiana), CISG-online 387; CA Grenoble, 13 September 1995, CISG-online 157, JCP 1996, IV, 712; LG Ellwangen, 21 August 1995, CISG-online 279; RB Rotterdam, 15 October 2008, CISG-online 1899, note z.6.

33 *Medical Marketing International Inc v. Internazionale Medico Scientifica, S.R.L.*, 17 May 1999, U.S. Dist. Ct. (Eastern District of Louisiana), CISG-online 387.

34 Cf. German (§ 377 HGB), Austrian (§§ 377, 378 HGB) and Swiss Law (Art. 201 OR).

35 E. Muñoz, 'Modern Law of Contracts and Sales in Latin America, Spain and Portugal', in I. Schwenzer (ed.), *International Commerce and Arbitration*, Vol. 6 (Eleven International Publishing, The Hague, 2011) p. 323.

36 See Arts. 38, 39 CISG.

37 Schwenzer, Hachem & Kee, *supra* note 4, p. 422, para. 34.02.

38 I. Schwenzer, 'The Noble Month (Articles 38 & 39)' (2006) VII(3/4) *European Journal of Law Reform* p. 356; K. Sono, in C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law* (Giuffrè, Milano 1987) Art. 44, para. 1.2: 'probably the most heatedly debated among all the provisions in the Vienna Convention'; P. Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* (Manz, Vienna, 1986) p. 69; J.O. Honnold, in H. Flechtner (ed.), *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn., Kluwer Law International, Netherlands, 2009) p. 365, para. 254.1.

such countries.<sup>39</sup> But they did not stand alone; they were joined by representatives from countries whose domestic legal systems did not provide for any notice requirement.<sup>40</sup> They also feared that their traders might be unduly penalized, since they were unlikely to be aware of the requirements until too late.<sup>41</sup> However, a suggestion to delete the notice requirement entirely was not successful.<sup>42</sup> Instead, a compromise could be reached.<sup>43</sup>

First and foremost, by the very wording of the respective articles in the CISG, the timeframes for examination and notice are much more liberal than under many domestic legal systems.<sup>44</sup> Whereas many commercial codes call for prompt examination and notice,<sup>45</sup> the CISG contends itself with an examination “within as short a period as is practicable under the circumstances”<sup>46</sup> and a notice “within a reasonable time” after discovery of the non-conformity by the buyer.<sup>47</sup> If the seller knew or could not have been unaware of the lack of conformity it may not rely on the failure by the buyer to give timely notice of the non-conformity.<sup>48</sup> Most of all, the CISG has introduced a provision that is unknown to any legal system containing a notice requirement.<sup>49</sup> If the buyer has a reasonable excuse for its failure to comply with the examination and notice requirement, it may still reduce the purchase price or claim damages – except for loss of profit.<sup>50</sup> Thus the buyer is granted at least minimum remedies to make up for the non-conformity of the goods.

Analysing the provisions on examination and notice neatly reveals the CISG’s quest for fairly balancing the opposing interests of seller and buyer. Establishing an examination and notice requirement in the first place clearly is in the interest of the seller. It places the seller in a position to possibly remedy the lack of conformity by delivering missing or substitute goods, by repair, or by reducing the buyer’s loss in some other way. It also enables the seller to prepare for any negotiations or dispute with the buyer and to take the necessary steps, for example by securing evidence. Furthermore, the seller may need to prepare a claim against its own supplier who may be responsible for the non-conformity. However, if the seller does not deserve such a protection the scale tips towards the buyer. And if the

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39 H. Flechtner, ‘Buyer’s Obligation to Give Notice of Lack of Conformity (Articles 38, 39, 40 and 44)’, in R.A. Brand, F. Ferrari & H. Flechtner (eds.), *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention* (Sellier, München, 2004) p. 378.

40 Schwenger, *supra* note 38, *European Journal of Law Reform*, p. 356.

41 Official Records (A/Conf.97/19), Summary Records, First Committee, 16th Meeting, para. 32.

42 I. Schwenger, in I. Schwenger (ed.), *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn., Oxford University Press, New York, 2010) Art. 39, para. 2.

43 *Id.*

44 *Cf.* Schwenger, Hachem & Kee, *supra* note 4, p. 431, para. 34.41.

45 *Cf.* The Commercial Codes of Germany, Austria and Switzerland, *supra* note 34.

46 Art. 38 CISG.

47 Art. 39 CISG.

48 Art. 40 CISG.

49 Schwenger, *supra* note 38, *European Journal of Law Reform*, p. 356.

50 Art. 44 CISG.

buyer itself is not blameworthy for not giving notice, the loss that has ultimately been caused by the seller's breach of contract is distributed between both parties.

It was not always easy for domestic courts to adequately interpret these CISG provisions on examination and notice. All too often they have been tempted to interpret these rules against their well-known domestic background.<sup>51</sup> Thus, it does not come as a big surprise that courts from a Germanic legal background interpreted the provisions on examination and notice in a rather strict way.<sup>52</sup> In contrast, in case law from countries that do not have any examination and notice requirement in their domestic legal system, very often the issue is not even touched upon. Probably, neither the courts, nor the parties or their counsel are even aware of this possibly powerful weapon.<sup>53</sup> With the development of the CISG, however, there seems to be at least some convergence which not only benefits the uniform interpretation of the CISG but mostly the parties of an international sales dispute.

### 5.3 REMEDIES UPON BREACH OF CONTRACT

Let me highlight the CISG's approach in another very central area; the field of remedies upon breach of contract by one of the parties.

#### 5.3.1 *Structure of Remedies*

Naturally, the way in which remedies for breach of contract have been established and structured, their relationship to each other, and finally their operation are strongly influenced by the legal traditions and general principles of the individual legal systems.<sup>54</sup> The variety of solutions offered by legal systems can be broadly categorized by two general approaches, namely the "cause-oriented approach" and the "breach-of-contract approach".<sup>55</sup> Under the first approach, specific breaches trigger specific remedies.<sup>56</sup> In other words, it must first be determined what type of disturbance in the performance occurs to determine the available remedies.<sup>57</sup> Under the second approach the same set of remedies is triggered

51 This is illustrated most clearly in the appendix to CISG-AC Opinion No. 2, available at: <[www.cisg.law.pace.edu/cisg/CISG-AC-op2.html](http://www.cisg.law.pace.edu/cisg/CISG-AC-op2.html)>; also C.B. Andersen, 'Reasonable time in the CISG – Is Article 39(1) Truly a Uniform Provision?', in *Pace Review of the CISG 1998* (Kluwer Law International, Netherlands, 1999) pp. 63-177.

52 E.g. LG Stuttgart, 31 August 1989, CISG-online 11; OLG Düsseldorf, 8 January 1993, CISG-online 76; LG Frankfurt a.M. 11 April 2005, CISG-online 1014; Tribunale civile di Cuneo, 31 January 1996, CISG-online 268; OGH, 27 August 1999, CISG-online 485; OGH, 14 January 2002, CISG-online 643.

53 Cf. Schwenzer, *supra* note 38, *European Journal of Law Reform*, p. 362.

54 Schwenzer, Hachem & Kee, *supra* note 4, p. 533, para. 41.01.

55 Schwenzer, Hachem & Kee, *supra* note 4, p. 533, para. 41.03.

56 *Id.*

57 *Id.*

by all types of breach of contract.<sup>58</sup> In other words, it does not matter in which way the performance of the contract was disturbed, the remedial response is always the same.<sup>59</sup>

The cause-oriented approach is predominantly followed by traditionally structured civil law legal systems,<sup>60</sup> especially also in Ibero-American countries.<sup>61</sup> Impossibility, delay, non-conformity and breaches of ancillary obligations must be neatly distinguished as they have different prerequisites and trigger different consequences. It goes without saying that this approach is highly complicated. More often than not it is hard for the aggrieved party to predict which remedy will apply and to react accordingly, for instance to give adequate notice which is only necessary in cases of a defect but not in cases of a partial non-performance or breach of an ancillary duty. The cause-oriented approach in case of doubt favours the party in breach to the detriment of the aggrieved party.

The breach-of-contract approach is traditionally followed by common law jurisdictions.<sup>62</sup> The outcomes under this approach are much more predictable as the remedies do not depend on the specific cause of a breach but rather on its intensity. Therefore, the CISG rightly followed this approach. In the meantime, its superiority has been proven by the fact that many legislators in civil law countries have replaced the cause-oriented approach by the breach-of-contract approach when recently updating their civil codes.<sup>63</sup>

Another advantage of the CISG is the sheer structure of the remedies. The remedies of an aggrieved party as a consequence of a possible breach by the other party systematically follow the enumeration of the breaching party's obligations. This in itself makes the CISG easily understandable for any lawyer who is not extraordinarily sophisticated as would be necessary to comprehend for example the intricacies of English, French or German domestic law.

Let me now turn to briefly discuss the two most important remedies, namely damages as well as avoidance of the contract.

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58 *Id.*

59 *Id.*

60 Schwenger, Hachem & Kee, *supra* note 4, p. 534, para. 41.05.

61 Muñoz, *supra* note 35, p. 381.

62 Schwenger, Hachem & Kee, *supra* note 4, p. 540, para. 41.34.

63 For China and modern East Asia codifications see S.J. Yang, *The Modern Sales Contract in Asia*, University of Basel, Doctoral Thesis Basel, 2011, pp. 8 *et seq.*, paras. 2.13 *et seq.*; M. Käerdi, 'Die Neukodifikation des Privatrechts der baltischen Staaten in vergleichender Sicht', in H. Heiss (ed.), *Zivilrechtsreform im Baltikum* (Mohr Siebeck, Tübingen 2006) p. 25; P. Varul, 'The New Estonian Civil Code', in Heiss (ed.), *Zivilrechtsreform im Baltikum* (Mohr Siebeck, Tübingen 2006) p. 52; V. Mikelenas, 'Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience' (2000) *UnifL Rev.* pp. 243 *et seq.*; H. Sono, 'Japan's Accession to and Implementation of the United Nations Convention on the International Sale of Goods (CISG)', (2010) 53 *Japanese Yearbook of International Law* pp. 410-437.



## 5.3.2 Damages

With regard to damages, a comparative overview reveals significant differences between domestic legal systems.

Civil law legal systems, in general, tend to favour the contract breacher to the detriment of the aggrieved party. This is the result of a number of features adding up. First, under civil law legal systems fault is required as a prerequisite for damages.<sup>64</sup> In case of non-conformity of the goods a considerable number of civil law legal systems allow for damages of the buyer only if the seller knew or should have known the defects.<sup>65</sup> Otherwise, the buyer is restricted to the classical Roman remedies of avoidance (*actio redhibitoria*) or reduction of the purchase price (*actio quanti minoris*).<sup>66</sup> Furthermore, recoverable losses very often are limited; a strict principle of prohibiting overcompensation is applied.<sup>67</sup> In case of doubt, the case is decided in favour of the contract breacher.

In contrast, common law legal systems started from the opposing pole. Any breach of contract entails a damages claim. Additionally, these systems originally took a very hard line in that there was no excuse from liability where the breach was caused by something beyond the control of the breaching party, which was only softened in the nineteenth century.<sup>68</sup> However, a limiting effect was found in the so-called contemplation rule, insofar as recovery was restricted to losses that were within the contemplation of the parties at the time of the conclusion of the contract.<sup>69</sup>

Against this background, the CISG achieved a compromise that balances the interests of both, the aggrieved party and the party in breach. Like the common law, the CISG is based on the principle of strict liability.<sup>70</sup> Damages may be awarded without any fault on the part of the contract breacher.<sup>71</sup> Thus it offers a much better protection of the aggrieved party than under civil law. However, more generously than under common law, the breaching party may be exempt from paying damages if the failure to perform was due to an impediment beyond its control that was neither foreseeable nor avoidable.<sup>72</sup> This covers

64 Schwenger, Hachem & Kee, *supra* note 4, p. 592, para. 44.63.

65 Cf. Schwenger, Hachem & Kee, *supra* note 4, p. 594, para. 44.79.

66 Schwenger, Hachem & Kee, *supra* note 4, p. 594, paras. 44.77, 44.78.

67 General non-recoverability of non-pecuniary damages, see Germany, §253(1) CC; The Netherlands Art. 6.95 CC; references in 2008 Draft Common Frame of Reference prepared by the Study Group on a European Civil Code, p. 921, para. 13.

68 See *Taylor v. Caldwell*, 3 B & S. 826 (1863).

69 Cf. Schwenger, Hachem & Kee, *supra* note 4, p. 596, para. 44.87 & p. 600, para. 44.104. See *Hadley v. Baxendale*, 9 Ex 341 (1854). A commendable and instructive overview of the proceedings and their perception at the time and subsequently is provided by F. Faust, 'Hadley v. Baxendale – an Understandable Miscarriage of Justice' (1994) 15 *Journal of Legal History* pp. 41-77.

70 Schwenger, Hachem & Kee, *supra* note 4, p. 650, para. 45.06.

71 I. Schwenger, in I. Schwenger (ed.), *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn., Oxford University Press, New York, 2010) Art. 74, para. 3.

72 See Art. 79(1) CISG.

not only cases classically known as *force majeure* situations but – as is today almost unanimously held – also cases of hardship where the equilibrium of the contract has been fundamentally altered; in other words performance of the contract has become excessively onerous for the obligor.<sup>73</sup> Furthermore, again as under common law legal systems, the breaching party is only liable for losses that it foresaw or ought to have foreseen at the time of the conclusion of the contract.<sup>74</sup> For the rest, the principle of full compensation applies; that means any and all losses are recoverable.<sup>75</sup> This system again is flexible enough to yield just and equitable results in a large variety of international settings.

### 5.3.3 *Avoidance*

There is hardly any agreement between different legal systems as to when a party may avoid the contract because its performance has been disturbed.<sup>76</sup> Not only do they adopt divergent views on the means by which a contract may be avoided – *ipso iure*, by court decision or by the aggrieved party's simple declaration<sup>77</sup> – but in particular, different approaches can be found as regards the preconditions for avoidance. Many legal systems of all civil law as well as of common law origin still follow the cause-oriented approach as regards avoidance and distinguish between impossibility, delay and defective performance, especially in the form of non-conformity of the goods.<sup>78</sup> Furthermore, in quite a few civil law legal systems not only the remedy of damages but also avoidance may only be granted where the breaching party has been at fault.<sup>79</sup> Thus, avoidance can easily turn out as a booby trap, if for example, the aggrieved party did not declare avoidance in time relying on facts that indicated a case of *ipso iure* avoidance that later proved to be false.

The CISG has considerably simplified the remedy of avoidance not only as regards the means by which the contract is avoided but especially in relation to the prerequisites for exercising this important remedy. Avoidance is the harshest of all remedies as it deprives

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73 I. Schwenger, 'Force Majeure and Hardship in International Sales Contracts' (2009) 39 *Victoria University of Wellington Law Review* pp. 713-714, with further references in nn. 23-24, 31-32. I. Schwenger in I. Schwenger (ed.), *Schlechtriem & Schwenger Commentary on the UN Convention on the International Sale of Goods (CISG)*, (3rd edn., Oxford University Press, New York, 2010) Art. 79, para. 30, with further references in n. 95; CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, 12 October 2007, Rapporteur: Professor Alejandro M. Garro, Wuhan (China), para. 3.1.

74 See Art. 74 CISG.

75 I. Schwenger, *supra* note 71, Art. 74, para. 3; CISG-AC Opinion No. 6: Calculation of Damages under Article 74, Spring 2006, Rapporteur: Professor John Y. Gotanda, Stockholm (Sweden), para. 1.1.

76 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 Schwenger, Badenweiler (Germany), para. 1.2.

77 Schwenger, Hachem & Kee, *supra* note 4, pp. 753 *et seq.*, para. 47.180.

78 Schwenger, Hachem & Kee, *supra* note 4, pp. 714 *et seq.*, paras. 47.26 *et seq.*

79 For delay Germany § 286(4) CC. Probably also Taiwan Art. 230 CC.

the breaching party of all benefits of the contract. Furthermore, in an international context it may entail the necessity of transporting back the goods already shipped from their place of destination to their place of origin or another place which usually involves additional considerable transportation costs.<sup>80</sup> Therefore, under the CISG avoidance is regarded as a remedy of last resort, an *ultima ratio* remedy.<sup>81</sup> Only if the aggrieved party cannot be adequately compensated especially by damages it may claim avoidance.<sup>82</sup> In principle, avoidance can only be asked for if the breach has certain gravity, if it constitutes a so-called fundamental breach.<sup>83</sup> Under certain circumstances, the aggrieved party may avoid the contract after having given the other party an additional period of time for performing its obligations.<sup>84</sup>

Under the CISG, a breach 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”.<sup>85</sup> All kinds of contractual obligations – especially main and additional obligations, synallagmatic and non-synallagmatic obligations, obligations to perform or to refrain from doing something etc. – are treated alike.<sup>86</sup> The obligation may be expressly provided for in the CISG, such as delivery of conforming goods and documents at the right time, at the right place etc., but it may also be a *sui generis* obligation agreed upon by the parties, such as information, training of employees, refraining from reimport, non-competition etc.<sup>87</sup>

Whether the breaching party was at fault is not decisive in establishing a fundamental breach, although some authors argue that an intentional breach should always be regarded as being fundamental.<sup>88</sup>

The aggrieved party must be substantially deprived of what it was entitled to expect. Insofar the importance of the interest which the contract creates for the promisee is crucial.<sup>89</sup> It is the contract itself that not only creates obligations but also defines their respective importance for the parties.<sup>90</sup> Thus, if delivery by a fixed date is required, the interest in

80 J.O. Honnold & H.M. Flechtner, *Uniform Law for International Sales Under the 1980 United Nations Convention* (4th edn., Kluwer, Netherlands, 2009) Art. 25, para. 181.2.

81 M. Müller-Chen, in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn., Oxford University Press, New York, 2010) Art. 49, para. 2; e.g. Bundesgerichtshof, 3 April 1996, CISG-online 135; Oberster Gerichtshof, 7 September 2000, CISG-online 642; Landgericht München, 27 February 2002, CISG-online 654.

82 I. Schwenzer, ‘The Right to Avoid the Contract’ (2012) *Belgrade Law Journal*, p. 207.

83 Cf. Müller-Chen, *supra* note 81, Art. 49, para. 2.

84 See Arts. 49(1)(b) CISG and 64(1)(b) CISG.

85 Art. 25 CISG.

86 Cf. U. Schroeter in I. Schwenzer (ed.), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn., Oxford University Press, New York, 2010) Art. 25, para. 15.

87 *Id.*

88 Schroeter, *supra* note 86, Art. 25, para. 19; U. Magnus, ‘The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases’ (2006) 25 *The Journal of Law and Commerce* p. 426.

89 I. Schwenzer, ‘The Right to Avoid the Contract’ (2012) *Belgrade Law Journal*, p. 209.

90 P. Huber & A. Mullis, *The CISG – A New Textbook for Students and Practitioners* (Sellier, München, 2007) p. 214.

taking delivery on that very date is so fundamental that the buyer may avoid the contract regardless of the actual loss suffered due to the delay in delivery.<sup>91</sup> Likewise, in the commodity trade where string transactions prevail and/or markets are highly volatile, timely delivery of clean documents is always of the essence.<sup>92</sup>

Finally, the CISG provides for an element of foreseeability. A breach cannot be deemed fundamental if the breaching party “did not foresee and a reasonable person of the same kind and in the same circumstances would not have foreseen such a result”.<sup>93</sup> Some authors opine that lack of foreseeability and knowledge is a kind of subjective ground for excusing the party in breach.<sup>94</sup> However, knowledge and foreseeability are instead relevant only when interpreting the contract and ascertaining the importance of an obligation.<sup>95</sup> The parties themselves can clarify the special weight given to an obligation; in English legal terminology this would be a “condition”.<sup>96</sup> The importance may also be manifested by relying on trade practice and usage.<sup>97</sup> A reasonable person would have foreseen this. Once the importance of an obligation to the promisee under the contract has been established, the promisor will not be heard when alleging that it did not or should not have foreseen the fundamentality of the breach of this obligation.<sup>98</sup>

As it all amounts to simple questions of contract interpretation, it is clear that the decisive point in time to establish the importance of the obligation is the time of the conclusion of the contract.<sup>99</sup> Later developments cannot upgrade a former minor obligation to an important one even if the obligor is aware of this fact.<sup>100</sup>

In cases of non-delivery by the seller, non-payment or failure to take delivery by the buyer – but only in these cases – the aggrieved party may fix an additional period of time for performance and after the lapse of that time declare the contract avoided.<sup>101</sup> This concept

91 Schroeter *supra* note 86, Art. 25, para. 23.

92 I. Schwenger, ‘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’ (2005) 34(4) *Victoria University of Wellington Law Review*, p. 806; 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 Schwenger, Badenweiler (Germany), para. 1.2, with further references in n. 62.

93 Art. 25 CISG.

94 E.g. W.A. Achilles, *Kommentar zum UN-Kaufrechtsüberkeinkommen (CISG)* (Luchterhand, Neuwied, 2000) Art. 25, para. 13: ‘Verschuldenskorrektiv’ (‘fault corrective’); M. Will, in C.M. Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law* (Giuffrè, Milano, 1987) Art. 25 n. 2.2. *et passim*; F. Enderlein & D. Maskow, *International Sales Law* (Oceana, New York, 1992) Art. 25, n. 4.1.

95 Schroeter *supra* note 86, Art. 25, para. 27.

96 Schwenger, *supra* note 92, *Victoria University of Wellington Law Review*, p. 796; *see* Sale of Goods Act 1979 (UK), S 11.

97 Schwenger, *supra* note 89, *Belgrade Law Journal*, p. 209.

98 *See* Appellationsgericht Basel-Stadt, 22 August 2003, CISG-online 943.

99 Schroeter *supra* note 86, Art. 25, paras. 32 *et seq.*, with further references in n. 118; Oberlandesgericht Düsseldorf, 24 April 1997, CISG-online 385.

100 Schwenger *supra* note 92, *Victoria University of Wellington Law Review*, p. 210.

101 *See* Arts. 49(1)(b) CISG and 64(1)(b) CISG.

has been borrowed from German law and is known as the *Nachfrist*-principle.<sup>102</sup> If, however, non-conformity of the goods does not in itself amount to a fundamental breach of contract, the possibility to transform a simple breach of contract into a fundamental breach of contract by setting a *Nachfrist* does not exist.

In any case of breach of contract avoidance can only be effected by way of declaration.<sup>103</sup> No *ipso iure* avoidance exists under the CISG – even in cases of initial or subsequent impossibility.<sup>104</sup> This contributes much to legal certainty, clarity and predictability.

#### 5.4 CONCLUSION

It has been said that the CISG may be called a true story of worldwide success which is not only proven by the ever increasing number of member states around the world but also by the fact that during the last 20 years the CISG has served as the decisive role model for law-making in the area of contract law on the international as well as on the domestic level. It is most of all its remedy mechanism that makes the CISG so attractive. As has been shown, the rules of the CISG are flexible enough to accommodate the interests of the seller as well as the interests of the buyer, or, more generally, the interests of the obligor and the interests of the obligee. One of its core principles being “reasonableness” there is no need to resort to domestic concepts such as good faith. The CISG itself strikes a fair balance between the interests of the parties and will yield fair and just results.

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102 Schwenzer, Hachem & Kee, *supra* note 4, p. 737, para. 47.112.

103 *Cf.* Art. 26 CISG; Müller-Chen, *supra* note 81, Art. 49, para. 23.

104 *Cf.* Müller-Chen, *supra* note 81, Art. 49, para. 23; OGH, 6 February 1996, CISG-online 224.

