Avoidance and the Notion of Fundamental Breach Under the CISG: An English Perspective

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Introduction

In an era of globalisation, harmonisation of international sales law represents both an uncertainty and an opportunity for states. Domestic jurists are often wary of unfamiliar concepts in international documents. They may rightly fear that the originality of the concepts will lead to divergent interpretations in domestic courts. They may have difficulty in identifying the exact content of the law due to its newness and lack of interpretation. Nonetheless, harmonised and internationalised rules for resolving conflict can also expedite the flow of trade across state borders, thereby strengthening the economic power of the states which take part.

The debate surrounding the UK's failure to ratify the United Nations Convention on Contracts for the International Sale of Goods (CISG or the Convention)[2] is reflective of this dilemma. This paper does not propose to interpret the Convention through the lens of English sales law. Nor will it distort the Convention into 'either a mere image of the known or a menacing shadow of change'. Rather, it will examine one aspect of the two bodies of law side by side, noting the departures and similarities, with a view to demystifying the Convention to the extent possible in such a brief review. In so doing, this paper will focus on one of the more contentious areas of the Convention, and sales law in general: the circumstances under which an injured party should be entitled to terminate, or 'avoid', the contract for breach of a contractual obligation.

It will begin by considering some of the issues associated with the UK's failure to ratify the Convention. It will then discuss the notion of 'fundamental breach', which is the Convention's threshold test for avoidance. Although this test may at first seem unfamiliar to English lawyers, an examination of the trends in England's own law on avoidance indicates that the fundamental breach test is, in fact, not so far-removed. The paper will conclude with a comparative review of the operation of the avoidance mechanisms under the

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1 The University of Cambridge, BCom and LLB, University of Queensland.

2 *United Nations Treaty Series*, vol 1489, p 58.

CISG and English Sale of Goods Act 1979 (SGA) as applied to both buyer and seller.

The UK stand-off

> What distinguishes the English judges from their colleagues in other countries is that they even go so far as to justify their egocentric attitude by the alleged superiority, at least in the area of international trade law, of their own law and the way it is administered.[3]

As this quote indicates, England's failure to ratify the CISG came as a blow to advocates of harmonisation. Nevertheless, it was not entirely unexpected. The UK had played a leading role in negotiations leading up to the adoption of CISG and had previously been quick to adopt the two Hague Conventions on the Uniform Laws on International Sales of 1964 (ULIS).[4] However, the English had rendered the latter instrument's ratification virtually meaningless through the reservation that the ULIS would only apply where parties chose it as die law of the contract. As for English traders, there is no evidence of recourse to the ULIS in British commerce.[5]

Within the English legal fraternity, a number of objections to ratification have been raised. According to the Law Society of England and Wales (the Law Society), the Convention would result in a reduced role for English law in international trade.[6] Moreover, the Law Society was concerned that sophisticated commercial traders would easily circumvent the Convention, and that Art 6, which allows parties to exclude it,[7] may lead the Convention to apply by default[8] more often than by choice. The Law Society and the UK Department of Trade and Industry (DTI),[9] consequently or but feared that the Convention would not achieve uniformity because of differing interpretations in national courts. Yet other commentators have criticised the CISG for an alleged lack of certainty.[10]

Nonetheless, support for ratification within the UK is growing. In a position paper released in February 1999, the DTI modified its position against ratification by stating that the Convention 'should' be brought into national law 'when there is time available in the legislative programme'.[11]

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3 Bonell (1993), p116.
4 The Uniform Laws on International Sales Act 1967 introduced the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) into English law.
5 Ziegel (2000), pp 336–37; Bridge (1999), p 41; Nicholas (1989), p 202.
6 Law Reform Committee of the Council (1981), noted in Lee (1993), p 132.
7 Article 6 provides that the parties may exclude the application of the Convention.
8 Pursuant to Art 1(1).
9 DTI Consultation Document (1997), pp 3 and 27.
10 Hobhouse (1990); Wheatley (1990), p 37; and note the reply: Goode, (1990), p 31.
11 DTI Position Paper (1999).

Indeed, there are at least four compelling reasons why the UK should hesitate no longer.

First, as Goode points out, 'for every international sales contract governed by English law there will be another [contract] governed by a foreign law with which the English party may not be familiar and which may be in a language he does not understand'.[12] In these cases, it is beneficial to have recourse to a set of principles common to all nations and available in several languages.

Secondly, England's failure to ratify does not necessarily immunise English merchants against the CISG. The Convention applies to commercial[13] contracts for the sale of goods between parties whose places of business are in different contracting states, or when the rules of private international law lead to the application of the law of a contracting state.[14] Thus, English parties may find themselves subject to the CISG when the proper law of the contract invokes the CISG. Additionally, the CISG may apply as the general law of international sales contracts. Parties to international transactions often exclude the operation of domestic law over their contracts by designating 'general principles of law', or the *lex mercatoria*, as the proper law of the contract. Still others appoint arbitrators to decide the dispute *ex aequo et bono*.[15] Recently, the Iran-US Claims Tribunal found that the CISG applied to a contract governed by either US or Iranian law because that convention represented the 'recognised international law of commercial contracts'.[16] Further, an International Chamber of Commerce (ICC) tribunal, when faced with a contract silent as to the applicable law, based its decision on the CISG, *even though the contract was between parties whose places of business were located in non-contracting states.*[17] Thus, English parties may find themselves subject to the Convention despite the UK failure to ratify.

Thirdly, even if British Parliament were to proceed with ratification, contracting parties may still provide for English law to govern their contracts. Under Art 6,[18] CISG parties may *vary* or *completely exclude* most of the provisions of the Convention.[19] Thus, the Convention will apply only where,

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12 Goode (1995), p 926.
13 Article 2(a).
14 Article 1(1).
15 UK Arbitration Act 1996, s 46(1) provides that the arbitral tribunal shall decide the dispute '(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b) if the parties so agree, in accordance with *such other considerations* as are agreed by them or determined by the tribunal' (emphasis added).
16 *Watkins-Johnson Co & Watkins- Johnson Ltd v The Islamic Republic of Iran & Bank Saderat Iran* (1990) XV Yearbook of Commercial Arbitration 220 (Iran-US Claims Tribunal, No 370 (429–370–1), 28 July 1989; (1989–11) 22 Iran-US Claims Tribunal Reports 218.
17 ICC Court of Arbitration, No 5713/1989 (1990) XV Yearbook of Commercial Arbitration 70.
18 See Art 6.
19 Article 6 provides: 'The parties may exclude the application of this Convention or, subject to Art 12, derogate from or vary the effect of any of its provisions.'

and to the extent that, the parties have failed to reach agreement on a particular matter in their contract.[20]

Finally, it is argued that the Convention should itself prevent parochial interpretation, since Art 7(1) of the CISG provides that in interpretation of the CISG, regard must be had to that document's 'international character' and 'to the need to promote uniformity in its application'. Moreover, should national courts or international tribunals fail to implement the Convention in accordance with the provisions of the CISG, a large body of international legal scholars will ensure that misapplications do not become precedents.

Avoidance under the CISG: the concept of fundamental breach

One of the most important—and the most controversial—provisions of the CISG is that of fundamental breach under Art 25 of the CISG. Fundamental breach is essential to the contractual system established by the CISG, since it is the primary mechanism for avoidance by either party.[21] However, it has been widely criticised for its generality and the resultant potential for multifarious interpretations. A brief survey of the legislative history of Art 25 of the CISG may reveal the source of the confusion.

Brief history of Art 25

Throughout the unification process, the avoidance mechanism proved to be one of the most problematic issues under debate. It has been the subject of countless proposals, and has undergone substantial overhauls on several occasions. The first draft document to be produced, the 1939 Text of Rome, did not contain the sweeping notions of breach of contract engendered by fundamental breach. Rather, it took a 'fragmented approach',[22] reminiscent of the traditional English approach to avoidance. Contractual obligations were categorised according to their relative import, only breaches of 'essential conditions' of the seller justifying avoidance by the buyer.[23]

In 1951, the ULIS Working Group in The Hague identified two primary flaws with this formulation. First, the rights of the buyer were given precedence over the rights of the seller. Secondly, it was perceived that the ULIS provision did not further the higher aim of saving the contract, since it

20 For an earlier analysis of party autonomy and termination rights, see Carter (1993).
21 See Arts 49(1)(a), 51(2), 64(1)(a), 72(1), 73(1), and 73(2).
22 Will in Bianca and Bonell (1987), p 206.
23 Article 55 of the Text of Rome stated, 'An obligation of the seller is an essential condition of the contract where it appears from the circumstances that the buyer would not have concluded the contract without such an undertaking'.

entitled a party to avoid the contract for breaches of an essential condition, even in circumstances where the breach caused relatively minimal harm. In response to these criticisms, the Danish representative proposed that the notion of breach of contract be extended to *any* violation by *any* party to the contract of *any* obligation under the contract, and that the notion of 'breach of a fundamental obligation' be replaced by 'fundamental breach of an obligation'.[24] This proposal carried the day and was incorporated into Art 15 of the 1956 draft Uniform Law on Sale.[25]

However, Art 15 was also extensively criticised, in particular for its subjectivity.[26] Mr Davies, of the UK, expressed fears that 'if the Court attempted to discover the intention of the parties, Art 15 would result in different interpretations in different countries'.[27] Amid these criticisms, the UK proposed a substitute for draft Art 15 which resembled the defunct English concept of fundamental breach:

> A breach of contract shall be deemed to be fundamental wherever the performance of the contract is by reason of the breach rendered radically different from that for which the parties contracted.[28]

This proposal was not supported. After considerable drafting and redrafting, the revised Art 10 of the ULIS appeared as follows:

> For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

Later, at the Vienna Conference, further proposals were made for review of the 'agonisingly hypothetical'[29] ULIS test for fundamental breach, in the interests of greater precision and objectivity.[30] In fact, it was proposed by some that a definition of fundamental breach should be omitted altogether.[31] According to

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24 Will in Bianca and Bonell (1987), p 206.

25 Article 15 of the draft Uniform Law on Sale (1956) stated, 'A breach of the contract shall be deemed to be fundamental wherever the party knew or ought to have known, at the time the contract was made, that the other party would not have contracted had he foreseen that such breach would occur'.

26 See Records of the 3rd meeting Committee on Sale, reproduced in Ministry of Justice of the Netherlands (1966), Vol I, pp 35 and 36.

27 Ministry of Justice for the Netherlands (1966).

28 Ministry of Justice for the Netherlands (1966), Vol II, p 274, Doc./V/Prep/16.

29 Ziegel (1984), pp 9–15.

30 There was no reappearance of England's 1964 proposal in The Hague to substitute the English concept of fundamental breach 'and rightly so': Will in Bianca and Bonell (1987), p 209. However, a Pakistani proposal suggesting a return to the 1939 Text of Rome formulation which focussed on the categorization of the conditions of the contract rather than the gravity of the breach, did not receive support: Eörsi (1983), p 340.

31 There were repeated proposals throughout the negotiation process that a definition of the threshold for avoidance should be omitted. 'The fault is not in the definition but in striving for a definition': Eörsi (1983), pp 336–37. See also Schlechtriem (1998), p 176.

Gyula Eörsi, the notion of fundamental breach would only develop through years of interpretation and application.[32] In practice, a judge will form an opinion instinctively as to whether the gravity of the breach of contract justifies avoidance. However, Eörsi reluctantly acknowledges that failure to adopt a definition, imperfect as it may be, would have resulted in criticism of the delegations by generations of practising lawyers and judges for failing to provide practical guidance on such a vital concept. Further, 'a definition is necessary to give legal expression for one's already formed conclusion', despite the fact that 'in order to come to a conclusion, one does not need a definition'.[33] Furthermore, failure to incorporate a definition, no matter how general and imprecise, could only lead to even greater divergence of interpretation influence by national laws.[34]

So it was that, after considerable drafting gymnastics,[35] the current version of Art 25 of the CISG was born. Article 25 of the CISG provides:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Analysis of Art 25

'Fundamental breach', as it finally emerged in Art 25 of the CISG, is comprised by three elements: (1) 'breach' (2) 'detriment' and (3) 'foreseeability'. This paper will address each in turn as well as the general principle of *favour contractas* that underlies them all.

Breach

It is axiomatic that before there can be a fundamental breach of contract, there must first be a *breach*. Although the word 'breach' is not defined in the CISG, Art 79 indicates that breach extends beyond the English formulation of a failure to perform not amounting to frustration.

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32 'A general concept can only be defined exactly if the cases of application can be listed one by one': Eörsi (1983), p 337. Generalities are by definition unable to be exhaustively defined and any attempt to do so is futile: '…any abstract definition must expect criticism, if it (wrongly) regards the question not as a matter to be assessed according to the circumstances, but by applying a formula under which the facts can be neatly subsumed': Schlechtriem (1998), p 176.

33 Eörsi (1983), p 336.

34 See drafting history above, and in particular the Danish proposal that the notion of 'breach of a fundamental obligation' be replaced by 'fundamental breach of an obligation' which turned the title away from the fragmented approach of the Text of Rome resembling the English condition/warranty approach.

35 Eörsi (1983), pp 340–41.

Under English law, a frustration dissolves the parties' rights under the contract, and thus any claim to breach and damages.[36] By contrast, Art 79 of the CISG, which deals with impediments to performance beyond the parties' control, neither strips the innocent party of his rights to a remedy, nor automatically results in avoidance. Nothing in Art 79 of the CISG 'prevents either party from exercising any right other than to claim damages under this Convention'.[37] Thus, the injured party may still exercise any of the rights set out in Arts 45(1)(a) or 61(l)(a) of the CISG, such as the right to substitute goods under Art 46 of the CISG.[38] Further, if the impediment results in a fundamental breach of contract, the contract will only come to an end at the election of the innocent party, and not automatically as under English law.[39] The innocent party must first declare his avoidance, or set an additional period *(Nachfrisf)*[40] after the expiry of which he may avoid if performance remains outstanding. Thus, while the English law conception of breach is an 'unexcused failure in performance',[41] the CISG conception of breach seems to encompass those failures to perform which are in fact excused by an impediment beyond the parties' control.[42]

Detriment

The second element of fundamental breach is also not defined in the CISG. Thus its meaning must be deduced indirectly from the legislative history of Art 25 of the CISG as well as from its apparent role in fundamental breach. The concept of substantial detriment was first incorporated into the definition of fundamental breach at the United nations Commissions on International Trade Law Conference. This initial formulation read:

> A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.[43]

In response to complaints that this test was too subjective, the definition was overhauled at the Vienna Conference in 1980, to emerge in its present form. Now, pursuant to Art 25 of the CISG, a breach is fundamental where it results in 'such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract'. However, Art 25 of the CISG has been

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36 Goode (1995), p 937.
37 Article 79(5).
38 Orders for specific performance are issued in accordance with domestic law pursuant to Art 28, and it is most unlikely that an English court would order specific performance where the impediment rendered performance impossible.
39 Treitel (1994), p 278.
40 *Nachfrist* is discussed below.
41 Treitel (1994), p 932. See the definition of 'frustration' in Garner (1999), p 679.
42 See further, Goode (1995), pp 936–37; Treitel (1994), pp 535–37.
43 1977 Draft Convention, Art 23.

criticised for setting a higher threshold test for fundamental breach than was originally intended. It is argued that failure to deliver, for example, 10% of the goods would constitute a 'substantial detriment' to the buyer under Art 25 of the CISG, even though, in all probability, the buyer would not be 'substantially deprived' of his legitimate contractual expectations.[44] Furthermore, Art 25 of the CISG is said to present an *idem per idem* definition of fundamental breach, on the basis that 'fundamental' and 'substantial' are tautological descriptors.[45] However, this latter point is of little merit, as 'fundamental' denotes the very essence of a thing, whilst 'substantial' is of lesser import, meaning 'of considerable amount or intensity'.[46]

In any case, it is clear that detriment cannot merely be determined by identifying the quantum of damage, especially of monetary damage, in relation to the entire contractual expectation.[47] Indeed, if damages would serve as an adequate remedy there is arguably no detriment within the meaning of the Art 25.[48] According to Michael Will, detriment is a much broader concept which must be interpreted from a teleological perspective:[49]

> Detriment, without qualifying language, fills the modest function of filtering out certain cases, as for example where breach of a fundamental obligation has occurred but not caused injury; the seller disregarded his duty to package or insure the goods, but they arrived safely nevertheless; if, however, the buyer would lose a resale possibility or a customer, there would be detriment.[50]

This interpretation of detriment also emerges from the change in wording from 'substantial detriment' to 'detriment' which 'substantialy deprives' the innocent party of his contractual expectation. Arguably, this amendment shifted the emphasis in fundamental breach from the amount of the damage suffered, to the importance of the damage to the injured party's contractual expectations.[51] Practically, this means that while extent of damage is certainly relevant to the determination of the injured party's contractual expectations, it is not always necessary that such damage be calculated and proved.[52] The present test of detriment emphasises the qualitative importance of the injured

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44 Ziegel (1984), pp 9–15 to 9–16. Given the seemingly inherent quantitative aspect of the present test for detriment, it could be argued that the buyer must be deprived of at least fifty per cent of what he was entitled to receive, although this result is not etymologically justified. See also Will in Bianca and Bonell (1987), p 214.

45 Eörsi (1983), pp 336–37; Enderlein and Maskow (1992), p 113; Will in Bianca and Bonell (1987), p 212.

46 *The Oxford Popular Dictionary & Thesaurus*, 2000 Oxford: OUR

47 *Ibid.*

48 Enderlein and Maskow (1992), p 113. A UK proposal (A/CONF.97/C1/L104, OR, p 99) that a sentence to that effect be incorporated into the definition of fundamental breach was withdrawn (First Committee Deliberations, OR, p 304).

49 Will in Bianca and Bonell (1987), pp 211–12.

50 Will in Bianca and Bonell (1987), pp 211–12.

51 Schlechtriem (1998), pp 175 and 177.

52 Schlechtriem (1998), pp 175 and 177.

party's lost or compromised interest as determined under the contract, not the quantum of the loss. Moreover, as detriment is not a static element, the plaintiff may be required to establish the point at which a continuing breach satisfies the requisite degree of substantiality to justify avoidance.[53]

Given the importance of the parties' expectations to a determination of detriment, it is essential that those expectations be discernible from the terms of contract.[54] To this end, it is 'principally for the parties themselves to make clear what importance is to be attached to each obligation and to the corresponding interest of the promisee'.[55] Notably, however, a party may not simply stipulate that all obligations contained in his contract are of fundamental importance, so that any breach, no matter how trivial, founds an avoidance. In determining detriment, the overall impact of the breach will always be decisive rather than the technical non-fulfillment of a contractual term.[56] Further, Art 7 of the CISG provides that in interpreting the Convention, due regard must be afforded to the underlying principle of good faith.[57] Clearly, any attempt by a party to insert such a clause would violate this overarching principle.

Finally, English lawyers should resist the temptation to find parallels to the concept of detriment under the CISG to English law. As a technical term,[58] detriment does not equate to the English concepts of 'damage', 'loss' or 'injury'. Indeed, the detriment test has been compared with s 325/326 of the German Civil Code Burgerliches Gesetzbuch (BGB), which asks whether the injured party has lost interest in performing the contract.[59] Of greater interest to English lawyers is the comment by Will:[60] that the formula for fundamental breach in Art 25 of the CISG was inspired by Lord Diplock's common law innominate term test set out in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (Hongkong Fir),[61] and subsequently applied to contracts for the sale of goods in *Cehave NV v Bremer Handelsgesellschaft mbH* (The Hansa Nord):[62]

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53 Enderlein and Maskow (1992), p 113.
54 Enderlein and Maskow (1992), p 113. The expectations of the injured party are not to be discerned from that party's 'inner feelings', but should be tied to the terms of and circumscribed by the contract, although the ever changing circumstances surrounding the contractual relationship must also be taken into account: Will in Bianca and Bonell (1987), p 215.
55 Schlechtriem (1998), p 177.
56 Enderlein and Maskow (1992), pp 113–14: 'not every ambitious expectation is protected'.
57 Babiak (1992), p 142.
58 Will in Bianca and Bonell (1987), p 210. For an American perspective, see Kritzer (1989), pp 205–07.
59 Schlechtriem (1998), p 176; Nicholas (1989), p 218. 'Detriment basically means that the *purpose* the aggrieved party pursued with the contract *was foiled* and, therefore, led to his losing interest in the performance of the contract': Enderlein and Maskow (1992), p 113.
60 Will in Bianca and Bonell (1987), p 213.
61 [1962] 2 QB 26.
62 [1976] QB 44.

> …does the occurrence of the event deprive the party…of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain…?[63]

Foreseeability component

The final conceptual component of fundamental breach under Art 25 of the CISG, that of foreseeability, is also unique to the CISG. It prevents a finding of fundamental breach where the breaching party can establish that the negative outcome of the breach *was not* foreseen by him, and that a reasonable person in his position *would not have* foreseen such an outcome.[64] The notion of foreseeability was born from the widely held belief that, in abnormal circumstances, there should be an equitable balancing of both parties' interests.[65] Nonetheless, it has been widely criticised as providing an 'easy way out' for parties who claim ignorance. In practical terms, the presence of the foreseeability component is additional reason for parties contracting under the CISG to draw attention to the importance of their contractual expectations in the contract itself.

The foreseeability component of fundamental breach was also subject to several modifications. Article 10 of the ULIS originally provided that a fundamental breach would only arise where the breaching party:

> …knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

The first shift in meaning was brought about by the inclusion of the word 'unless'. Arguably, this amendment shifted the onus of proof from the party setting up fundamental breach to the party in breach of contract. According to Will, the proposal was intended to '[relieve] the aggrieved party from the unfair burden of a most difficult proof'.[66] Indeed, an Egyptian proposal to include the words 'unless *the party in breach proves that he did not foresee*' was thought superfluous since 'unless' is a term of art which 'clearly shifts the burden of proof to the party in breach, when that party invokes unforeseeability'.[67]

The second amendment to the ULIS foreseeability component was the inclusion of an objective test to assess the breaching party's knowledge of the detriment arising from the breach. If the breaching party is to avoid a verdict of fundamental breach, he must prove that the detriment *was not* foresee by

63 [1962] 2 QB 26, 66.
64 Article 25; Will in Bianca and Bonell (1987), p 215; Kritzer (1989), pp 207–08.
65 Will in Bianca and Bonell (1987), p 215.
66 Will in Bianca and Bonell (1987), p 216.
67 Will in Bianca and Bonell (1987).

him and the detriment *could not have been* foreseen by a 'reasonable person of the same kind in the same circumstances'.[68] '[O]f the same kind' implies that the benchmark will be that of a hypothetical merchant 'engaged in the same line of trade, exercising the same function'.[69] However, 'in the same circumstances' authorises adjudicators to consider the background and present context of the transaction, as well as 'the conditions on world and regional markets…legislation, politics and climate…prior contacts and dealings and to other factors'.[70] Will concludes that it 'simply serves to eliminate unreasonable persons, that is, those who are to be considered intellectually, professionally or morally sub-standard in international trade', from consideration.[71] Thus, according to Michael Bridge, the practical effect of this element is doubtful, for 'it would be a strangely unimaginative contract breaker who failed to foresee effects of such magnitude'.[72]

Thirdly, due to the inability to reach agreement in Vienna, a provision as to the relevant time of foreseeability was omitted from the Convention test. While ULIS opted unequivocally for 'the time of the conclusion of the contract',[73] a UK proposal in Vienna to maintain this as the relevant time in the Convention was withdrawn for lack of support.[74] Accordingly, the weight of opinion seems to be that the time of conclusion of the contract is relevant, but that, in exceptional circumstances, facts emerging after conclusion of the contract but before the time of breach may be taken into account.[75] The ultimate decision is left to the discretion of the courts on a case by case basis.[76]

Finally, it should be noted that the foreseeability component represents a major departure from English law which does not require the breaching party to foresee substantial deprivation of the other party's interests under the contract. However, should the parties express particular obligations to be 'conditions', that is, of essential importance to the promisee under the contract, a breaching party cannot prevent avoidance by arguing the detriment was not foreseeable.[77]

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68 CISG, Art 25.
69 Will in Bianca and Bonell (1987), p 219: It is even suggested that 'not only must business practices be taken into account, but the whole socio-economic background as well, including religion, language, average professional standard'.
70 Will in Bianca and Bonell (1987), p 219.
71 *Ibid.*
72 Bridge (1999), p 86.
73 ULIS, Art 10.
74 Pre-Conference Proposals (A/CONF.97.9, OR, p 76); Nicholas (1989), p 219; Ziegel (1984), pp 9–19.
75 Enderlein and Maskow (1992), p 116; Will in Bianca and Bonell (1987), p221; Feltham (1981), p 353; compare Schlechtriem (1998), p 180.
76 Will in Bianca and Bonell (1987), p 220; Ziegel (1984), pp 9–19.
77 Schlechtriem (1998), p 178.

Principles underlying fundamental breach

The precise scope of fundamental breach under Art 25 of the CISG will only emerge through the application of the CISG over time. However, in interpreting this term, adjudicators are required under Art 7 of the CISG to have regard to the Convention's underlying principle of *favor contractas*, or preservation of the original agreement, in spite of breach wherever possible.[78]

The presence of *favor contractas* within the CISG is evidenced by the relative availability to the parties of damages,[79] specific performance,[80] and price reduction where a breach is not fundamental.[81] Its presence is also demonstrated by the very high threshold test for the avoidance under Art 25 of the CISG itself. Indeed, the mere fact that the breach must be 'fundamental' highlights the reticence of drafters to allow avoidance in anything but the most drastic circumstances.

Moreover, *favor contractas* is an essential to contractual certainty, since the particular circumstances of international trade make avoidance both attractive and costly. The potential for enormous swings in world commodity and financial markets will often create incentives for the disadvantaged party to search for an escape route to the contract.[82] Likewise, the financial burden of avoidance is particularly great in international sales contracts, due to storage and reshipment expense. Were the standard for avoidance set too low, a party may find it more cost-effective to terminate the contract rather than to fulfill their obligations. Thus, when interpreting any of the concepts in fundamental breach it should be borne in mind that, in striking a balance between the interests of buyer and seller, the CISG avoidance mechanism seeks to preclude avoidance on trivial grounds.

Avoidance under English law: fundamental breach in disguise?

Ultimately, both the CISG and English laws on avoidance are concerned with the question of whether the breach is of sufficient seriousness to justify avoidance. Nonetheless, 'there can be a great practical difference between the criteria in the two systems for determining whether the buyer can avoid the contract…particularly as a result of the fixed categorisation by the Sale of Goods Act of certain terms as conditions and the treatment by the courts of even a small breach of such conditions as ground for treating the contract as repudiated'.[83] The following examination of the English approach to avoidance

78 Also an embodiment of the principle of *pacta sunt servanda.*
79 Articles 74–77.
80 Articles 46 and 62.
81 Article 50.
82 Michida (1979), p 279.
83 Nicholas (1989), p 228.

of the contract will outline some points of departure as well as similarities to the provisions of the CISG.[84]

Parallels to fundamental breach in English law

At the outset, it should be noted that the concept of fundamental breach under the CISG is in no way related to the defunct English concept of the same name.[85] The English doctrine of fundamental breach was developed gradually during the 30 years from around 1950, primarily to deal with unreasonably extensive exemption clauses.[86] The courts began to recognise that a contractual term was even more important than a condition—the so-called 'fundamental term' which went to the core or root of the contract, breach of which amounted to nothing less than a complete non-performance of the contract.[87] A rule[88] emerged which held that a fundamental breach could not be excluded by any exemption clause, no matter how widely drafted.[89] After a chequered career,[90] the doctrine of fundamental breach was finally 'forcibly evicted by the front [door]'[91] by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd*.[92]

In fact, the primary source of the law in England on the international sale of goods, the Sale of Goods Act 1979 (SGA or the Act),[93] contains no direct counterpart to fundamental breach at all. Its regime for avoidance hinges on the so-called condition/warranty dichotomy,[94] according to which all

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84 For a very detailed analysis of the history and application of the CISG concept of fundamental breach, see Koch (1999).

85 Will in Bianca and Bonell (1987), p 209; Ziegel (1984), pp 9–15; Schlechtriem (1998), p 174, n 5.

86 For discussions of the English doctrine of fundamental breach, see Melville (1980); Beatson (1998), pp 170ff; Atiyah (2001), pp 75ff; and Reynolds in Guest (1997), paras 13–039ff.

87 The classic example given by Lord Abinger was that if a buyer contracted to buy peas and the seller supplied beans, the seller had effectively not performed the contract: *Chanter v Hopkins* (1838) 4 M & W 399 at 404.

88 See Reynolds in Guest (1997), para 13–042.

89 See *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co* [1953] 1 WLR 1468 1470.

90 In *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 it was confirmed that the doctrine of fundamental breach had been demoted from its status as a 'rule of law' to a mere matter of construction or interpretation by the House of Lords.

91 *George Mitchell(Chesterhall) Ltd vFinney Lock Seeds Ltd* [1983] 2 AC 803 at 813, *per* Lord Bridge, affirming the decision in the *Photo Production* case.

92 [1980] AC 827.

93 The SGA consolidates the original Sale of Goods Act of 1893 with amendments made up to 1979. The SGA has since been further amended by the Sale and Supply of Goods Act 1994 and the Sale of Goods (Amendment) Act 1995. From its inception, the SGA was intended to codify the law relating to sale of goods. However, the SGA specifies that it may be interpreted in the light of, and supplemented by, general principles of contract law: s 62(2). Note that discussion of the effects of fraud, misrepresentation, mistake, duress and coercion on the contract is beyond the scope of this paper.

94 The condition/warranty dichotomy was originally a common law principle first elucidated by Bowen LJ in *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at 281. See also Lord Denning MR in *The Hansa Nord* [1976] QB 44 at 59; Sellers LJ in *Hongkong Fir* [1962] 2 QB 26 at 60; Reynolds in Guest (1997), para 10–027. The predecessor legislation to the SGA enacted in 1893 'endeavoured to reproduce

contractual terms are classifiable as conditions or warranties.[95] Under s 61(1) of the SGA, warranties are terms 'collateral to the main purpose' of the contract, whilst, by necessary inference, conditions are those terms 'integral to the main purpose' of the contract.[96] In recent times, this two-tier division has been supplemented by the 'innominate' or 'intermediate' term.

Prima facie, breach of a condition will *always* give rise to an entitlement to avoid the contract, whereas breach of a warranty would *never* give rise to such an entitlement.[97] Before the enunciation of the intermediate term, the strict application of the condition/warranty dichotomy meant that 'any terms whose breach *could possibly* take a serious form naturally tended to be treated as… condition[s]' even though 'their breach caused only minor inconvenience or loss, or even none at all'.[98] Accordingly, the consequences flowing from the breach and their impact on the injured party were historically irrelevant to determination of the right to avoid the contract.

Although this strict, and rather simplistic, classification was intended to foster certainty in the law,[99] it has proved too inflexible to deal adequately with modern commercial transactions. As a result, the dichotomy has undergone substantial renovation, beginning with the landmark decision of the Court of Appeal in 1962, in *Hongkong* Fir.[100] In that case, the Court promulgated a third type of contractual term which has come to be known as the 'innominate' or 'intermediate' term. According to Lord Diplock:

> …all that can be predicated [of intermediate terms] is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.[101]

The foundation of *Hongkong Fir* was the conception that avoidance rights should not necessarily depend upon the status or characterisation of the term breached, but rather upon the impact of events flowing from the breach on the

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as exactly as possible the existing law' Mark (1975), p viii, 'Introduction to the first edition (1894)'. Thus avoidance under the SGA must be predicated on the characterization of the terms of the contract as 'conditions' or 'warranties'.

95 Treitel (1999), pp 702–65; Beatson (1998), pp 535–51.

96 Bridge (1997), pp 151 and 152.

97 Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 829; Reynolds in Guest (1997), paras 10–027–10–028.

98 Atiyah (2001), p 79.

99 Bridge (1997), p 151.

100 [1962] 2 QB 26.

101 *Ibid* at p 70.

injured party's contractual expectations. This approach can be traced to the court's equitable conviction that a party should not be allowed to escape his contractual obligations by asserting a mere technical claim, even at the expense of certainty and predictability. Indeed, there is a long standing common law principle that 'unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages'.[102]

The concept of the intermediate term was first applied to sale of goods by Lord Denning MR in *The Hansa Nord.*[103] In that case, the buyer sought to avoid the contract for delivery of goods which were only slightly damaged. His Lordship opined that Parliament, in enacting the SGA in 1893, could not have intended to exclude the application of the intermediate term,[104] since s 62(2) of the SGA preserves the rules of common law, except insofar as they are inconsistent with the Act.[105] However, in finding for the seller, the Court was forced to hold that the implied condition of merchantability[106] under s 14(2) of the SGA was not breached,[107] and likewise, that the express term under the contract that goods be shipped 'in good condition' was not a condition, but an intermediate term.[108]

As a result of *The Hansa Nord,* it seemed that an implied term of merchantability under the SGA was to be treated differently to an express term in the contract. According to Atiyah, 'if it is express, it may or may not be a condition in the strict sense, but if it is implied under the Act, then it must be (because the Act says it is) a condition—and it was assumed that this means a condition in the strict sense'.[109] Effectively, the court held express contractual conditions to be subject to the general law, whereas the particular rules set out in the SGA would continue to regulate implied conditions. This produced the contradictory result that the goods were 'merchantable' under the Act, but not 'in good condition' under the contract.

Following *The Hansa Nord,* courts increasingly expressed a desire to move away from the strict condition/warranty dichotomy, but have been unable to do so without contradicting the express words of the SGA.[110] Courts have

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102 Lord Ellenborough CJ in *Davidson v Gwyrtne* 12 East 380 at 389, cited by Upjohn LJ in *ibid* at 63. See also *Boone v Eyre* 1 HB1 273 of 1773; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 AC 434 and Lord Denning MR in *The Hansa Nord* [1976] QB 44 at 59–60.

103 [1976] QB 44.

104 *Ibid* at p 60.

105 *Ibid.*

106 Now the implied condition of satisfactory quality.

107 Lord Denning MR, p 63; Roskill LJ, pp 77–78; Ormrod LJ, p 79.

108 Lord Denning MR, p 61; Roskill LJ, p 73; Ormrod LJ, p 84.

109 (2001), p 81, commenting on the case.

110 See also *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989; *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711.

afforded greater priority to the principle of *favor contractas*, and have expressed a preference for the more flexible rules of the common law in circumstances where the strict rules of the SGA would lead to inequity. In *The Hansa Nord*, Roskill J stated that:

> …[I]n principle contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is a free choice between two possible constructions I think the court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations.[111]

Moreover, Lord Wilberforce, in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*, expressed his predilection for this 'modern doctrine' as follows:

> The general law of contract has developed along much more rational lines in attending to the nature and gravity of a breach or departure rather than in accepting rigid categories which do or do not automatically give a right to rescind…[112]

From this new judicial ethos emerged three possible formulations for the law of avoidance.[113] The first formulation recognises three categories of contractual term in accordance with *Hongkong Fir:* if the term is neither a condition nor warranty, then it is simply deemed intermediate. Under the second formulation, all terms which are not conditions are 'other terms', for which the remedy will be determined by the nature and consequence of the breach.[114] The final formulation for avoidance is proposed by Treitel, who suggests that remedies should be determined by the seriousness of the breach except where the term breached is a condition.[115]

Although commentators have hailed the second formulation[116] as simpler and more flexible,[117] it appears that the first, now more traditional, formulation will continue to dominate.[118] Moreover, the prospects for the last formulation seem limited so long as the courts are constrained by the iron (albeit malleable) shackles of the SGA.

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111 *The Hansa Nord* [1976] QB 44 at 71.
112 [1976] 1 WLR 989 at 998.
113 Reynolds in Guest (1997), para 10–033; Treitel (1999), p 739.
114 This latter approach was endorsed in *The Hansa Nord* [1976] QB 44 by Lord Denning at 60 and Ormrod U at 82–84, in the *Photo Production* case by Lord Diplock [1980] AC 827 at 849 and in *Lombard North Central plc v Butterworth* [1987] QB 527 at 535 by Mustill LJ.
115 Treitel (1999), pp 734 and 742–43.
116 Reynolds in Guest (1997), paras 10–033–10–035; Treitel (1999), pp 734 and 739.
117 Reynolds in Guest (1997), para 10–033.
118 Reynolds in Guest (1997), para 10–033; Treitel (1999), p 739.

Legislative developments

The apparent desire of the English courts to move away from the traditional understanding of the condition/warranty dichotomy has been perceived by legislators. Recently, the traditional condition/warranty distinction under the SGA has been modified by the introduction of s 15A into the SGA. Section 15A(1) provides:

> (1) Where in the case of a contract of sale-
>
> (a) the buyer would, apart from this sub-section, have the right to reject goods by reason of a breach on the part of the seller of a term implied by ss 13, 14 or 15 above, but
>
> (b) the breach is so slight that it would be unreasonable for him to reject them,
>
> then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

Section 15 A of the SGA does not recognise the intermediate terms so much as modify the concept of the condition to accommodate modern commercial transactions. As such, s 15A represents an attempt to replace the condition/ warranty dichotomy with a more flexible approach to avoidance. However, as Treitel has remarked, the section may have 'sacrificed certainty without attaining justice'.[119]

According to commentators such as Treitel, s 15 A of the SGA merely adds to the complexity of the existing system of classification.[120] First, this section only applies to breaches of contract by the seller, leaving breaches of contract by the buyer unaffected. Secondly, s 15A is limited to conditions implied by ss 13, 14 and 15 of the SGA. The buyer's right to avoid the contract for a breach of any other condition, whether express, implied at common law, or implied elsewhere under the Act, is likewise unchanged. Thirdly, the difficulties in the SGA which led to the development of the intermediate term are not resolved by s 15A of the SGA. It does not prevent the buyer from avoiding in circumstances where the seller's breach is too serious to be considered 'slight', and yet not serious enough to deprive the buyer of 'substantially the whole benefit the parties intended by the contract that he should obtain'.[121] Section 15A of the SGA thereby allows a disproportionate loss by the seller under the same contract.

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119 Treitel (1999), p 745.
120 Treitel (1999), pp 743–44.
121 Lord Diplock's intermediate term test.

Future trends

English law makers have not ignored the problems associated with the condition/warranty dichotomy under the SGA. Rather, they have interpreted the SGA so as to allow avoidance in circumstances where there is sufficient detriment to the injured party. The result is a test for avoidance under English law which parallels the fundamental breach provisions of the CISG. In some respects, it could even be said that the condition/warranty dichotomy is a test of seriousness of breach, albeit with a different name.

The restrictions of statute and precedent have, however, forced English jurists to adopt highly technical justifications for utilising substantial detriment tests under the SGA. This led the New Zealand High Court, in *Crump v Wala*,[122] to suggest that the much simpler CISG provisions should serve as a model for reform.[123] Moreover, there is a notable international trend towards the CISG's detriment-oriented test and away from the classification of terms native to English law.[124]

Whether England adopts a universal test for avoidance similar to that under Art 25 of the CISG is as yet unclear. On the one hand, recent cases, law reforms and international trends look to the detriment to the injured party's interests rather than the class of term violated. On the other hand, English law makers are still constrained by the SGA, centuries of precedent and a legal culture which favours certainty over flexibility. However, the current system for avoidance is so complex that it only undermines the certainty which classification of terms was intended to achieve. Accordingly, English law makers would be well advised to acknowledge that avoidance is determined by detriment and not by the classification of terms.

The CISG avoidance mechanism: a comparative perspective

Having examined the respective tests for avoidance under the CISG and under English law, this paper will consider the application of the CISG provisions using English law to highlight points of departure. The focus will be on

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122 [1994] 2 NZLR 331 at 338. This was a decision of the New Zealand High Court on the New Zealand version of the SGA.

123 The American Uniform Commercial Code (UCC), Sections 2–608, 2–612 and 2–504 and ULIS were also suggested. See Michida (1979), pp 280–81; Flechtner (1988), p 63.

124 See the Scandinavian states' Sale of Goods Acts. Lando and Beale (2000), p 367; the Netherlands *Burgerlik Wetboek*, Art 6:82–83 and 6:265: Schlechtriem (1998), p 174; UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), Art 7.3.1. See Bonell (1997); the Principles of European Contract Law (PECL), Art 8:103. See Lando and Beale (2000), p 364; Bonell (1996). The EC Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Directive (99/44/EC) (OJ 1999 L 171, 7 July 1999) also derives its remedial scheme from the CISG: Atiyah (2001), pp 214–20.

circumstances in which a party attains, and subsequently loses, the right to avoid.[125]

Avoidance of the contract by the buyer

In contrast to the SGA, one of the Convention's great virtues is that it attempts to maintain symmetry between the rights of buyer and the rights of the seller. To demonstrate this symmetry, the rights of the buyer and seller to avoid will be examined separately.

When is the buyer entitled to avoid?

The position under the CISG

Chapter II of the CISG governs the obligations of the seller. Within Chapter II, Section III deals with remedies for breach of contract by the seller. Specifically, Art 45 of the CISG provides the buyer with remedial rights upon the seller's failure to perform a contractual obligation. The buyer acquires the right to claim damages under Arts 74–77 of the CISG, to require specific performance under Art 46 of the CISG, to claim a price reduction under Art 50 CISG, or to avoid the contract under Art 49 of the CISG. According to Art 49 of the 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) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Art 47 or declares that he will not deliver within the period so fixed.

Even though it only features in sub-para (a), the central element of Art 49(1) of the CISG is fundamental breach.[126] Sub-paragraph (b) effectively provides an exception to the requirement of a fundamental breach, however, only in one very specific and limited circumstance.

(1) Article 49(1)(a)—fundamental breach by the seller

Article 49(1)(a) of the CISG represents the buyer's central avoidance mechanism under the Convention. It consists of two elements. First, the buyer must establish that the seller has failed to perform an obligation. Secondly, he

125 There is a distinction under both English law and the CISG between rejection of the goods and avoidance of the contract: Atiyah (2001), p 501. This paper will focus primarily on the provisions dealing with the latter.

126 Will in Bianca and Bonell (1987), p 362. For a comparitive analysis of Art 49 from an American perspective, see Kritzer (1989), pp 366–72.

must establish that the failure to perform amounts to a fundamental breach of contract within the meaning of Art 25 of the CISG.

In relation to the first element of Art 49(1)(a) of the CISG, the failure to perform may be of any obligation of the seller contained in either the contract or the Convention. These are set out in Sections I and II of Chapter II of the Convention. Thus the seller will *prima facie* fail to perform an obligation if he:

- fails to transfer property in the goods in accordance with Art 30 CISG;
- does not deliver the goods in accordance with Arts 30 and 31 CISG, or does not deliver within the period determinable under Art 33 CISG;
- does not enter appropriate contracts of carriage or provide consignment or insurance information to the buyer as required by Art 32;
- does not hand over documents relating to the goods as required by Arts 30 and 34;
- delivers non-conforming goods within the meaning of Art 35;
- delivers goods which are subject to any industrial or intellectual property right of a third party, or subject to any other right or claim of a third party in violation of Arts 42 or 41 of the CISG respectively.

Failure to perform must be interpreted very broadly[127] and will, therefore, also include failure to preserve goods when the buyer delays in taking delivery pursuant to Art 85 of the CISG, and failure to take reasonable measures to sell perishable goods pursuant to Art 88(2) of the CISG.[128] Additionally, the principle of party autonomy[129] under the CISG means that failure by the seller to comply with contractual stipulations relating to any of the above matters will also constitute a failure to perform under Art 45 of the CISG.[130]

The second element of Art 49(1)(a) of the CISG requires the buyer, before exercising the right to avoid, to be satisfied that the seller's failure to perform amounts to a fundamental breach of the contract. Whether the breach is fundamental is a question of fact and degree, determined in the light of all the circumstances in each case.[131]

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127 Huber in Schlechtriem (1998), p 357.
128 Huber in Schlechtriem (1998), p 357.
129 This is in part evidenced by Art 6 of the CISG which enables the parties to contract out of, or vary, the provisions of the Convention.
130 Huber in Schlechtriem (1998), p 357. This may include failure to comply with contractual obligations to refrain from an act (for example, where the seller acts inconsistently with a contractual confidentiality or exclusivity clause), or to 'protect, warn or inform' the buyer.
131 Contrast the situation of ordinary chickens delivered one week late with Christmas turkeys delivered one week late: Michida (1979), pp 282–83; Huber in Schlechtriem (1998), p 417. For more information please see above.

(2) Article 49(1)(b)—seller's failure to comply with a Nachfrist ultimatum

Article 49(1)(b) of the CISG allows the buyer to avoid the contract for a non-fundamental failure to deliver the goods. Under Art 49(1)(b) of the CISG, the buyer may fix an additional period for performance, or *Nachfrist*, the requirements for which are set out in Art 47(1) of the CISG.[132] During this period, the buyer may not resort to any remedy for breach of contract unless the seller notifies the buyer that he will not perform within the additional period.[133] If the seller does not perform within this period, the buyer has the right to avoid the contract no matter how trivial the original breach.[134]

Articles 47 and 49(1)(b) of the CISG off-set the particular importance of timely delivery to the buyer against the actual severity of the seller's breach. On the one hand, where the seller is in breach of any obligation other than non-delivery of the goods, the buyer may only avoid where that breach is fundamental. On the other hand, under Art 49(1)(b) of the CISG the buyer may avoid for a non-fundamental breach of the delivery obligations, providing the buyer complies with the *Nachfrist* requirements under Art 47 of the CISG. Article 49(1)(b) of the CISG therefore confers increased powers of avoidance on the buyer where the seller has failed to deliver the goods, although only in circumstances where the seller has failed to comply with the *Nachfrist* provisions of Art 47 of the CISG. The seller is given a second opportunity to deliver the goods,[135] thereby balancing the potentially serious consequences of non-delivery for the buyer against the seller's right to perform the contract where his breach is minor.

If the seller's initial failure to deliver the goods *does* constitute a fundamental breach under Art 25 CISG, the buyer may avoid immediately under Art 49(1)(a) of the CISG without resort to the *Nachfrist* procedure. Thus, Art 49(1)(b) of the CISG does not preclude non-deliveries from giving rise to a fundamental breach and founding an immediate right to avoidance. Nonetheless, even where the seller's breach of the delivery obligation is fundamental, the buyer is often well advised to avoid through the *Nachfrist* procedure of Art 49(1)(b) of the CISG. The broad terms of Art 25 of the

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132 CISG, 47(1), states: 'The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.'

133 *Ibid*, Art 47(2).

134 It is irrelevant whether the failure to deliver constitutes a fundamental breach of contract. This results from the perception that delivery is 'such a fundamental obligation that its breach, even though not fundamental, opens the Nachfrist-avoidance-mechamsm': Huber in Schlechtriem (1998), p 394; Will in Bianca and Bonell (1987), p 363. Reading 49(1)(a) and (b) together, it would seem that 49(1)(b) permits the buyer to avoid for any failure by the seller's to deliver the goods so long as the additional period set under 47(1) of CISG has expired. Additionally, Will has argued that delivery is 'such a fundamental obligation that its breach, even though not fundamental, opens the Nachfrist-avoidance-mechanism': Huber in Schlechtriem (1998), p 394. Article 326 of the German Civil Code; Honnold (1999), p 316.

135 Honnold (1999), p 343; Secretariat Commentary, OR, p 39; Kritzer (1989), pp 354–55.

CISG may create conjecture as to whether delay in delivery has amounted to a fundamental breach, and the point at which the breach became fundamental.

Thus where the goods have not yet been delivered, the *Nachfrist* ultimatum serves a vital role in the scheme of the buyer's remedies. By fixing an additional period of time for delivery, the buyer circumvents the potentially onerous task of establishing whether the seller's failure to deliver constitutes a fundamental breach.[136]

(3) Partial avoidance, instalment contracts and anticipatory breach

Article 51(1) of the CISG allows the buyer to avoid the contract where a partial delivery or partial non-conformance of the goods amounts to a fundamental breach of the delivery or performance obligations respectively.[137] However, where the contract is for delivery of goods by instalment, the special provisions of Art 73 of the CISG will apply. Under Art 73(1) of the CISG, failure by the seller to perform his obligations in regard to any instalment, will allow avoidance for that instalment only.[138] Under Art 73(2) of the CISG, the buyer may only declare the contract avoided for the future if the seller's breach in regardsto an instalment gives the buyer 'good grounds' to conclude that a fundamental breach will occur with respect to future instalments.[139] Finally, under Art 73 of the CISG, the buyer may only declare the contract avoided in respect of past *or* future deliveries 'if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract'.[140]

Article 71 of the CISG governs anticipatory breach. It confers the right to suspend performance by one party if 'it becomes apparent that the other party will not perform a substantial part of his obligations'. Pursuant to Art 72(1) of the CISG, the buyer may declare a contract avoided if, prior to the date for performance, it is clear that the seller will commit a fundamental breach of contract. Unless the seller has declared that he will not perform his obligations,[141] Art 72(2) of the CISG provides that the buyer must give

136 This is subject to the limitation in An 47 that the additional period of time so fixed must be of 'reasonable' length. What is reasonable must be determined in the light of all circumstances surrounding the transaction: Huber in Schlechtriem (1998), pp 396–97. The elements to be taken into account include 'the nature, extent and consequences of the delay, the seller's possibilities of and time needed for delivery, and the buyer's special interest in speedy performance': Will in Bianca and Bonell (1987), p 345.

137 Article 51(2). See further Huber in Schlechtriem (1998), pp 445–48.

138 Article 73(1) states: 'In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.'

139 The right to avoid under Art 73(2) is also subject to the requirement that the buyer declare avoidance within a reasonable time.

140 Article 73(3). See further Leser in Schlechtriem (1998), pp 542–51.

141 Article 72(3).

reasonable notice of avoidance in order to permit the seller to provide adequate assurance of his performance.[142]

The position under English law

A comparative analysis of avoidance under English law reveals the sheer complexity and the entangled interaction of the SGA and the common law. Unlike the CISG, the buyer's right to avoid the contract under English law depends upon the seller either breaching a condition, or seriously breaching an intermediate term. The CISG's *Nachfrist* avoidance mechanism has no direct equivalent in English sales law, but was, in fact, borrowed from German law.[143]

Three sources of contractual condition may be identified at English law. First, the SGA implies into contracts a number of conditions, any breach of which confers on the buyer a *prima facie* right of avoidance pursuant to s 11(3) of the SGA.[144] However, if 'the breach is so slight that it would be unreasonable' for the buyer to reject the goods pursuant to s 15A of the SGA, these conditions are to be treated as warranties. Secondly, international sales contracts contain a number of conditions implied at common law.[145] None of these conditions are covered by s 15A of the SGA, and their breach, no matter how trifling, will render the contract voidable at the option of the buyer. Finally, the parties may express certain terms of their contract to be conditions. The courts are not bound to construe them as such, but should they, such conditions also fall outside the scope of s 15A of the SGA.

Once conditions have been identified, the process of classification becomes much more difficult. All remaining terms of the contract will either be intermediate terms, a serious breach of which will entitle the buyer to avoid the contract, or warranties, breach of which will never found avoidance. However, the SGA makes no attempt to clarify which terms will be warranties, and further, since the intermediate term is a judicial creation, there is no statutory guidance as to its definition. The need for classification is circumvented by the CISG, which looks to the gravity of the breach to determine the right to avoidance regardless of the nature of the obligation.

Historically, English law has also differed from the CISG in its treatment of avoidance of the contract in part, or avoidance of instalment contracts. In

142 See further Leser in Schlechtriem (1998), pp 532–41.

143 Article 326 of the German Civil Code; Honnold (1999), p 316.

144 Section 13(1): where there is a contract for the sale of goods by description, the goods must correspond with the description (deemed a condition by virtue of s 13(1 A)); s 14(2) and 14(6) the goods must be of satisfactory quality; s 14(3) and 14(6) the goods must be fit for any particular purpose made known to the seller; s 15(2) and 15(3) in the case of a contract for sale by sample, the goods must correspond with the sample in quality, and must be free from any defect which would not be apparent on reasonable examination of the sample.

145 These include conditions as to time: *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711; the port of loading in an FOB contract, the name and type of vessel if agreed between the parties, or if not agreed, a vessel which is commonly used in the trade to carry the goods in question: D'Arcy (2000), p 86.

many ways, English law has lacked the clarity of the CISG. The introduction of s 35A of the SGA has, however, brought the SGA more into line with the CISG in these areas. It now seems from ss 35A and 35(7) of the SGA that the buyer has a right of partial rejection unless the defective goods form part of one commercial unit with goods that have already been accepted.[146] Furthermore, although s 31(2) of the SGA only seems to allow the buyer to avoid the entire contract for a defective instalment, or claim damages for such an instalment, it is likely that, by implication, a buyer may reject the defective instalment without repudiating the contract as a whole.[147] However, in contrast to the CISG, it is still unclear whether a right of rejection applies to prior or future instalments.[148] Also, courts are given negligible guidance as to the basis for repudiation under s 31(2) of the SGA.

The law on anticipatory breach is not codified in the SGA, but is governed by the common law. With two notable exceptions, the common law's approach to anticipatory breach is similar to that of the CISG. First, English law does not formally recognise the buyer's right to suspend performance, although in practice the buyer may withhold payment while the seller fails to deliver under s 28 of the SGA.[149] Secondly, there is no requirement to seek adequate assurance,[150] although in practice the impact of this departure would seem to be minimal.[151]

Despite some legislative reforms, the English law on avoidance remains convoluted and uncertain when compared to that of the CISG. Under English law, the line is blurred vis à vis the application of the common law and the SGA, and between the historical emphasis on certainty and predicability and more recent attempts to modernise the law by introducing greater flexibility.

When does the buyer lose the right to avoid?

The position under the CISG

Under the CISG, there are five broad circumstances in which the buyer will lose the right to avoid the contract. The first, and most controversial, arises from the seller's right to cure. Under Art 48 of the CISG, the seller may cure any defect in goods after the date for delivery.[152] Article 48(1) of the CISG provides that:

146 Atiyah (2001), pp 527–28.
147 This right is, however, subject to the rules governing partial acceptance contained in s 35A(2): Atiyah (2001), p 506.
148 Atiyah (2001), p 507; Bridge (1999), p 89.
149 Goode (1995), p 424.
150 A requirement also contained in UCC, s 2–609.
151 Bridge (1999), p 91.
152 Article 37 permits the seller to cure defects in goods delivered early, up to the date for delivery.

> Subject to Art 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

At issue is the question of whether the buyer's right to avoid the contract is subject to any right of the seller to cure the breach. The fact that Art 48(1) of the CISG is expressed to be 'subject to Art 49' has led some commentators to conclude that this right is always subordinate to the buyer's right to avoid the contract. These commentators argue that the fundamentality of breach should be determined objectively without regard to whether the defect is capable of being remedied.[153] On this view, the right to cure after the date for delivery is restricted to minor defects, rendering Art 48(1) of the CISG practically insignificant.[154]

However, others would argue that fundamentality of breach within the meaning of Art 49(1)(a) CISG must be decided in the light of *all* the circumstances, *including the seller's offer to cure.*[155] This view appreciates that the very ability of the seller to rectify a defect speedily, without causing unreasonable inconvenience to the buyer, itself ameliorates the otherwise fundamental character of the breach.[156]

Thus, where cure is feasible, the buyer should be wary about hastily avoiding the contract without first determining whether the seller will cure the defect. If it is clear, according to the buyer's actual knowledge,[157] that the seller will cure, the buyer's right to avoid will be suspended until any delay or inconvenience associated with the cure itself amounts to a fundamental breach. Conversely, where the defects are incurable, or any attempt to cure will clearly result in unreasonable delay, inconvenience or uncertainty and the failure to perform would constitute a fundamental breach. In such circumstances, the buyer may declare the contract avoided immediately. Crucially, 'the right to avoid the contract is not excluded by the seller's right to cure after the date for delivery'. Rather, 'there is an indirect exclusion of that right only inasmuch as a fundamental breach of contract (Arts 25, 49(1)(a) CISG) will

153 See Huber in Schlechtriem (1998), p 409; Ziegel (1984), pp 9–22.

154 Honnold (1999), p 210.

155 Hannold (1999), pp 320–21; Enderlein and Maskow (1992), p 185; Kritzer (1989), p 363. This view was supported by suggestions at UNCTTRAL's 1977 review of the draft Convention on Sales that Art 25 should be amended to subject determination of a fundamental breach to consideration of 'all the circumstances, including reasonable offer to cure'. Such an amendment was considered 'unnecessary' and 'superfluous': UNCITRAL, *VIII Yearbook* (New York 1977), A/32/17, Annex I, p 31, in Honnold (1999), p 210.

156 Huber in Schlechtriem (1998), pp 408–10; Honnold (1999), p 210.

157 This may include 'good experience with the seller, an *ad hoc* commitment, the underlying conditions of sale' or a prompt and reasonable offer to cure which satisfies the requirements of Art 48(1): Will in Bianca and Bonell (1987), p 351.

generally not exist so long as the seller fulfils the requirements of Art 48(1)'.[158]

The second situation in which the buyer will lose the right to avoid arises under Art 48(2) of the CISG, where 'the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time'. Thus, even when the circumstances for the exercise of a *right* to cure under Art 48(1) of the CISG are not met, the buyer who, having received the offer to cure,[159] does not respond to the offer within a reasonable time may be bound to accept the cure. The seller may perform within the period indicated in his offer to cure, and during that time the buyer's right to avoid, or to take any other remedial action inconsistent with performance, is suspended.

Thirdly, pursuant to Art 39 of the CISG, the buyer loses the right to rely on a lack of conformity of the goods, and consequently the right to avoid the contract, if 'he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it'. Similarly, under Art 43 of the CISG, the buyer loses the right to avoid the contract if he fails to give notice to the seller specifying the nature of a third party right or claim.

Fourthly, the buyer may lose the right to avoid under Art 49(2) of the CISG if he does not do so within a reasonable time after delivery, or in the case of a breach other than late delivery, within a reasonable time after he knew or ought to have known of the breach, or after the expiration of any *Nachfnst* period which may have been granted, or after the period of time for cure indicated by the seller pursuant to Art 48(2) of the CISG. The time limits set in Arts 39 and 43 of the CISG prevail over that set out in Art 49(2) of the CISG. Therefore, if the fundamental breach involves a non-conformity or third party claim and the buyer has not notified the seller in accordance with Arts 39 or 43 of the CISG, the right to avoid is already lost.[160] In this respect, Art 43 of the CISG is more generous to the buyer than Art 39 of the CISG, in that the latter provision stipulates an outside limit of two years for notification.[161] Otherwise, what is reasonable must be determined on a case by case basis. According to Fritz Enderlein and Dietrich Maskow, 'a *reasonable time* in this case more or less means *immediately*'[162] in order to avoid the possibility of increased expense and risk associated with care and redisposition of unwanted goods.[163]

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158 Huber in Schlechtriem (1998), p 410.
159 Article 48(4).
160 Will in Bianca and Bonell (1987), pp 365–66.
161 Will in Bianca and Bonell (1987), pp 365–66. While two years may seem excessive to English lawyers, it was the result of compromise at the instigation of developing countries: Eörsi (1983), p 350.
162 Enderlein and Maskow (1992), p 193.
163 Honnold (1999), p 330.

Finally, Art 82(1) of the CISG excludes the buyer's right to declare the contract avoided 'if it is impossible for him to make restitution of the goods substantially in the condition in which he received them'. Pursuant to the exceptions in Art 82(2) of the CISG, the buyer retains the right to avoid where the impossibility of restitution is not due to the buyer's act or omission, where the goods have perished as a result of examination required by Art 38 of the CISG, or where the goods have been sold or consumed in the normal course of business. In the latter case, it is a condition of avoidance that the buyer account to the seller for any benefits received under Art 84(2) of the CISG.

The position under English law

The circumstances in which avoidance will be precluded differ vastly under the CISG and under English law. The seller's right to cure under the SGA is not expressly provided for, as it is under the CISG, but hangs on nuance and implication. Moreover, the SGA allows the seller to preclude avoidance in circumstances not countenanced in the CISG.

It would seem that the seller's right to cure is, at the very least, limited under the SGA. First, the ability of the seller under Art 48(2) of the CISG to suspend the buyer's right of avoidance in circumstances in which the buyer fails to respond to the seller's offer to cure has no counterpart in English law.[164] The Law Commission has observed that 'there is great uncertainty…as to the existence or extent of the seller's right to repair or replace defective goods', although they declined to introduce cure provisions into commercial sales contracts due to the complexity of such contracts and the consequent impracticability of cure.[165] Roy Goode expresses regret that 'opportunity has not been taken to modernise the Sale of Goods Act by including express provisions as to the right of cure, a right which mitigates the impact of an improperly motivated rejection by the buyer while at the same time tending to avoid economic waste'.[166]

Secondly, avoidance under the SGA is even less certain where the seller's offer to cure comes after the date for delivery. While Art 48(1) of the CISG subordinates the buyer's right to avoid to the seller's right to cure, under the SGA a term's status as a condition, warranty or intermediate term is apparently unaffected by the ability of the seller to cure a breach.[167] English law does not recognise a superior, or indeed any, right in the seller to cure defects after the

164 See s 35(6)(a).

165 Bridge (1997), p 197, citing Consultative Document No 58, para 2.38.

166 Goode (1995), p 364.

167 Although it is conceivable that the ability of the seller to cure may influence a court to exercise its discretion with respect to the effect of breach of an intermediate term in favour of the seller. It will also be interesting to see whether s 15A may be used by courts to introduce a right to cure—for instance, if a breach of condition is objectively serious, but the seller could remedy the defect the next day at no cost to the buyer, could a court invoke s 15A to assert that 'the breach is so slight that it would be unreasonable for [the buyer] to reject [the goods]'?

delivery date.[168] In practice, the seller will rarely be entitled to redeliver after the date for performance, as time of delivery is *prima facie* of the essence in commercial contracts.[169] Finally, although there is some common law recognition for the proposition that, in certain circumstances in commercial contracts, the seller may be entitled to cure a defective tender prior to the contractual delivery date,[170] it generally seems that a defective delivery in itself will amount to a breach of contract justifying avoidance by the buyer.[171]

However, despite the absence of any clear right to cure in English law, cure is 'common enough in countless unlitigated examples of contracting parties settling their differences'.[172] Moreover, it is clear that the CISG approach reflects modern commercial practice, as the UCC,[173] the UNIDROIT Principles[174] and the Principles of European Contract Law (PECL)[175] all contain overriding right-to-cure provisions. Hence, it is also arguable on this basis that the seller's right to cure would represent a meaningful addition to English sales law.

Unlike the CISG, the SGA contains provisions which preclude the buyer from avoiding the contract if he is deemed to have accepted the goods. The general principle under the SGA is that, despite the seller's breach of condition or serious breach of an intermediate term, if the buyer is deemed to have accepted the goods, he loses his right to reject them,[176] although he may claim damages for the overpaid amount.[177] According to s 35 of the SGA, the buyer is deemed to have accepted the goods when he:

- intimates to the seller that he has accepted them;[178]
- performs an act inconsistent with the seller's ownership of the goods;[179] and
- retains the goods for a 'reasonable time' without intimating to the seller that he has rejected them.[180]

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168 Reynolds in Guest (1997), para 10–028.
169 *Bunge Corp v Tradax Export SA* [1981] 2 All ER 513.
170 Reynolds in Guest (1997), para 12–031; Goode (1995), pp 363–66; Bridge (1999), pp 91–92. For example, *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India Ltd (The Kanchenjunga)* [1990] 1 Lloyd's Reports 391 at 399; *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 QB 459; *Borrowman, Phillips & Co v Free and Hollis* (1878) 4 QBD 500.
171 Atiyah (2001), p 508.
172 Bridge (1997), p 201.
173 Section 2–508.
174 Article 7.1.4.
175 Article 8:104.
176 Section 11(4).
177 The seller retains the right to damages up until six years from the date of the breach of contract: Limitation Act 1980.
178 Section 35(1)(a).
179 Section 35(1)(b).
180 Section 35(4).

The first head of acceptance has no counterpart in the CISG. While the buyer will lose his right to avoid under the CISG for failure to give to the seller timely notice of non-conformity, of third party claims or of avoidance itself, there is no corresponding loss of the right to avoid if the buyer indicates to the seller that the goods are perfectly acceptable. In any case, this head has now fallen into relative disuse.[181] Similarly, the second head is not found in the CISG. The only possible parallel is found in Art 82(2)(c) of the CISG, which holds that if the buyer transforms, uses or resells the goods he may inhibit his restitution of the goods substantially in the condition in which he received them.[182] Only the third head is familiar in the context of Arts 39, 43 and 49(2) of the CISG, the question of what constitutes a 'reasonable time' also being a question of fact.[183]

Under any of these three heads, the buyer cannot be deemed to have accepted the goods, thereby losing his right to avoid, before he has had a reasonable opportunity of examining them.[184] Thus, a person who signs an acknowledgment of receipt of goods before examining the goods will not be taken to have accepted the goods within the meaning of s 35(1)(a) of the SGA.[185] Likewise, under Art 38 of the CISG, the buyer has a non-legal obligation to examine the goods 'within as short a period as is practicable in the circumstances'.[186] The period for giving notice of non-conformity under Art 39 of the CISG (and consequently the period for declaring avoidance under Art 49(2)(b) of the CISG) begins when the buyer discovers, or ought to have discovered, the defect. This point will be influenced by the nature of the defect, but will ordinarily be the expiry of the period for examining the goods.[187]

Avoidance of the contract by the seller

When is the seller entitled to avoid?

The position under the CISG

Chapter III of the CISG deals with the obligations of the buyer to pay the price[188] and take delivery of the goods,[189] whilst Section III sets out remedies for

181 Bridge (1997), p 171.
182 Bridge (1997), p 172. Article 82(2)(c) provides that the buyer does not lose his right to avoid despite being unable to make restitution in accordance with Art 82(1) where the buyer has resold, consumed or transformed the goods in the normal course of business before he discovered or ought to have discovered the lack of conformity. Section 35(6)(b) performs a similar role in relation to sub-sales.
183 Section 59.
184 Sub-sections 32(2) and (5).
185 Atiyah (2001), pp 513–14; Bridge (1997), pp 170–71.
186 This is not a legal obligation. Thus failure to examine does not render the buyer liable in damages, but may eventually result in loss of the buyer's right to avoid: Schwenzer in Schlechtriem (1998), p 302.
187 Schwenzer in Schlechtriem (1998), pp 315–16.
188 Articles 54–59.
189 Article 60.

breach of contract by the buyer. Many of the provisions contained in these two sections confer parallel rights on the seller in the case of the buyer's breach, as conferred on the buyer in case of the seller's breach. So, Art 61 of the CISG mimics Art 45 of the CISG in allowing the seller to claim damages,[190] require performance by the buyer[191] or avoid the contract. Likewise, Art 64(1) of the CISG is virtually the mirror image of Art 49(1) of the CISG in conferring on the seller a right to avoid the contract. The central element of Art 64(1)(a) of the CISG is the notion of fundamental breach, whereas 64(1)(b) of the CISG also provides that the injured seller may avoid in limited circumstances under the *Nachfrist* mechanism.[192] These parallels, as well as some remaining differences, between the remedies for the buyer's and the seller's breach will be further discussed below.

(1) Article 64(1)(a)—fundamental breach by the buyer

According to Art 64(1)(a) of the CISG, the seller is entitled to avoid the contract for a fundamental breach of any obligation by the buyer. Again, the determinative factor in fundamental breach is not the quantum of loss suffered in monetary terms, but the significance attributed to die particular obligation by the parties. Indeed, the Secretariat Commentary questions how frequently, in practice, the buyer's failure to make good his primary obligation to pay the price and take delivery will constitute a fundamental breach. It states that 'in most cases the buyer's failure would amount to a fundamental breach…*only after the passage of some period of time*'.[193] This uncertainty highlights the advantages of the *Nachfrist* procedure, which allows the seller to avoid immediately on expiration of the additional period without waiting until he is certain that the breach has become 'fundamental'.

(2) Article 64(1)(b)—buyer's failure to comply with a Nachfrist ultimatum

The seller's right to issue a *Nachfrist* ultimatum under Art 63 of the CISG parallels the buyer's same right under Art 49(1)(b) of the CISG. Article 63(1) of the CISG provides that 'the seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations'.[194] Under Art 63(2) of the CISG, the seller is prohibited during that period from resorting to any remedy for breach of contract unless the buyer notifies the seller that he will not perform within the additional period. Article 64(1)(b) of the CISG allows the seller to declare the contract avoided if the buyer does not, or declares he will not, perform his obligation to pay the price or to take delivery of the goods within the additional period granted under Art 63(1) of the CISG. Thus, while the seller may issue a *Nachfrist* ultimatum under Art

190 Articles 74–77.
191 Article 62.
192 For an analysis of Art 64 from an American perspective, see Kritzer (1989), pp 427–31.
193 Secretariat Commentary, OR, p 50 (emphasis added); Kritzer (1989), p 429; Honnold (1989), p 440. Compare Enderlein and Maskow (1992), p 244.
194 Article 63(1).

63(1) of the CISG for failure by the buyer to perform *any* of his obligations, only the buyer's failure to pay the price or take delivery of the goods will enable the seller's avoidance under Art 64(1)(b) of the CISG. In these limited circumstances, there is no requirement that the failure to pay or take delivery amounts to a fundamental breach. In all other instances, the seller's right to avoid for the buyer's failure to perform an obligation[195] depends solely upon whether the breach in question constitutes a fundamental breach. Thus, the *Nachfrist* avoidance mechanism provides a degree of certainty to the seller by allowing the seller to avoid the contract without first establishing a fundamental breach of contract by the buyer.

The position under English law

Like the CISG, the SGA imposes two primary obligations on the buyer: the duty to pay the price under s 27 SGA, and the duty to take delivery of the goods under s 28 of the SGA. However, the CISG provides much more satisfactory protection to an injured seller than the SGA. While the SGA contains general provisions dealing with the right of the buyer to avoid the contract for repudiation by the seller, there are no general provisions dealing with the equivalent right of the seller.[196] In this respect, the SGA lacks the symmetry offered by the CISG.

The effect of s 10(1) of the SGA is to create a *prima facie* presumption that the buyer's duty to pay the price is not a condition, even in a commercial contract of sale.[197] The result is that the seller is not entitled to declare the contract avoided for the buyer's late payment, although he is entitled to claim interest,[198] and may sue the buyer for any damage suffered. This rule has been criticised as an extension of compulsory credit to the buyer.[199] However, it may be off-set by a tendency of the courts to treat stipulations as to time in commercial contracts as conditions which may extend to time of payment in certain circumstances.[200]

Nevertheless, the 'unpaid seller'[201] has certain statutorily enshrined real remedies which he may exercise over the goods and which may allow avoidance. Under s 39 of the SGA, whether or not the property in the goods has passed to the buyer, the unpaid seller is granted a lien on goods while he is in possession of them. He is also granted the right of stoppage in transit where the buyer is insolvent, and a right of resale. The right of resale is of greatest interest

195 For example, the obligation to 'sell goods only to specified resellers or at specified prices': Hager in Schlechtriem (1998), p 491.
196 The repeated reference in ss 11 and 53(1) to the right to 'reject the goods' indicates that it was only intended to cover the buyer's remedies.
197 Goode (1995), p 423.
198 Harris in Guest (1997), paras 16–006–16–010.
199 Atiyah (2001), p 303.
200 *Bunge Corp v Tradax Export SA* [1980] 1 WLR 711; Atiyah (2001), p 83.
201 'Unpaid seller' is defined in s 38 of the SGA.

in the context of avoidance, since it involves the seller accepting repudiation by the buyer and treating the contract as void. Thus, under s 48(1) of the SGA, 'a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit'.

Section 48(4) of the SGA allows the seller to resell the goods where the seller has expressly reserved the right of resale on default by the buyer. Moreover, 'where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender the price', the unpaid seller may, under s 48(3) of the SGA, resell the goods and sue for damages. This latter provision, strikingly similar to the CISG's *Nachfrist* mechanism, reflects the common law rule that time can be made of the essence by service of notice.[202] Although this was originally an equitable principle for contracts for the sale of land,[203] *RV Ward Ltd v Bignall* confirmed that it also operates in contracts for the sale of goods and s 48(3) of the SGA.[204]

Where the buyer has not signalled their repudiation under s 48 of the SGA, the seller must resort to the general law of contract to determine when the buyer has acted so as to repudiate the contract. If the buyer evinces 'an intention to be no longer bound by the contract',[205] the seller is entitled to accept this repudiation, treat the contract as avoided, and deal with the goods as owner.[206]

The seller's rights in relation to instalment contracts have not been clarified by s 31 (2) of the SGA, which allows the buyer to avoid in relation to the individual parts of an instalment contract. It appears from *Warinco AG v Samor SPA*[207] that the seller is entitled to avoid the contract for future instalments where it is clear that the buyer will not perform. Notably, an unqualified refusal to pay may constitute repudiation by the buyer, although payment for prior instalments is not usually a condition precedent to delivery of subsequent instalments by the seller.[208] The seller's right of stoppage in transit under s 39(1)(b) of the SGA roughly equates to the right to suspend performance under Art 71 of the CISG, albeit narrower in scope.

When does the seller lose the right to avoid?

The position under the CISG

The circumstances in which the seller loses the right to avoid under the CISG are set out in Art 64(2) of the CISG. These relate to the point at which

202 Goode (1995), p 445.
203 *Stickney v Keeble* [1915] AC 386.
204 [1967] 1 QB 534 at 550; Ziegel (1984), pp 9–17, n 49.
205 *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 AC 434 at 444.
206 *Compagnie de Renflouement v W Seymour Plant Sales & Hire Ltd* [1981] 2 Lloyd's Reports 466 at 482.
207 [1977] 2 Lloyd's Reports 582 at 588; [1979] 1 Lloyd's Reports 450.
208 Guest (1997), para 8–081.

knowledge of the breach or knowledge of performance occurs, either constructively or in fact. Notably, the seller will never lose the right to declare the contract avoided unless the buyer has actually paid the price. Moreover, the total price must have been paid, so that, in the case of payment by instalments, all instalments must have been paid.[209]

In determining when the seller loses the right to avoid, the Convention distinguishes between 'late performance by the buyer' in Art 64(2)(a) of the CISG and 'any breach other than late performance by the buyer' in Art 64(2)(b) of the CISG. Logically, 'late performance' in Art 64(2)(a) of the CISG covers circumstances in which performance has occurred, albeit after the due date.[210] Presumably then, Art 64(2)(b) of the CISG covers all breaches in which the buyer's performance remains outstanding. The implication is that, in either case, the seller is initially entitled to avoid the contract, either for fundamental breach by the buyer or the buyer's failure to comply with a *Nachfrist* ultimatum.

In the case of a late performance, namely late payment of the price or delay in taking delivery, the seller loses the right to declare the contract avoided immediately upon becoming aware that performance has been rendered.[211] However, each separate breach which entitles the seller to avoid is a separate ground for avoidance, and the loss of the right to avoid in respect of one breach does not preclude the right to avoid in respect of another.[212] With respect to breaches other than late performance, the seller loses the right to avoid where: (1) the price has been paid in full; (2) he does not avoid within a reasonable time after he knew or ought to have known of the breach; or (3) he does not avoid within a reasonable time after the expiration of an additional period fixed by a *Nachfrist* ultimatum; or (4) after the buyer has declared he will not perform within that period.[213]

The position under English law

The SGA provides negligible guidance as to the situations where the seller's right to avoid the contract is lost. However, it is generally accepted that this occurs where the buyer has both the possession of, and the property in, the goods.[214] At this time, the seller has no remedy against the goods themselves, but must be content with a personal claim against the buyer for the price or damages under the contract. One possible justification for this approach is that

209 Secretariat Commentary, OR, pp 50–51; Kritzer (1989), p 430; Honnold (1989), pp 440–41; Hager in Schlechtriem (1998), p 492; Knapp in Bianca and Bonell (1987), p 470.
210 Hager in Schlechtriem (1998), p 492.
211 Article 64(2)(a).
212 Knapp in Bianca and Bonell (1987), p 473.
213 Article 64(2)(b).
214 Goode (1995), p 441. The seller may retain the *power* to transfer good title to the goods to a second buyer in circumstances in which he does not have, as against the original buyer, the *right* to resell the goods: Harris in Guest (1997), para 15–102; Atiyah (2001), pp 464–65.

the seller should be afforded no more favourable treatment than the buyer under the SGA. As s 11(4) of the SGA deprives a buyer who has accepted the goods of his right to avoid for a seller's breach of condition, a seller who has transferred possession of and property in the goods should likewise lose the right to avoid for the buyer's breach.[215] This approach differs markedly from that taken in CISG, which seems to allow the seller to avoid the contract even after the buyer has been in possession of the goods for a considerable period of time.[216] At English law, it is also possible for the seller to waive his right to avoid at common law, as occurred in *Panoutsos v Raymond Hadley Corporation of New York.*[217]

Conclusion

Twenty-one years after inception of the CISG, the UK is one of the few major trading nations to have abstained from ratification. Originally, the UK justified its position by reference to the alleged certainty of English law in comparison to the general provisions of the CISG. However, as has been shown, the CISG establishes a very structured and comprehensive regime for avoidance of the contract which compares favourably with the complexity of English sales law. For the most important breaches, the *Nachfrist* mechanism counterbalances any uncertainty created by the broad definition of fundamental breach. Moreover, English sales law, in its current state, presents no greater degree of certainty to litigants than the CISG, which favours performance of the contract and reflects international trends in sales laws. Further, the provisions of the CISG regulating avoidance effect an equitable balancing of both parties' interests by creating near-perfect symmetry between the rights of the buyer and the seller. In contrast, the SGA gives precedence to the rights of the buyer. Practically, this may lead English buyers to exclude of the CISG from their contracts in favour of English law, whilst English sellers will be more likely to adopt the opposite approach.

Finally, it is unlikely that the UK will be able to shelter its trader from the scope of the CISG in the future, given the apparent popularity of the Convention. In the 13 years since the CISG came into force, it has been ratified by countries accounting for over two thirds of all world trade,[218] and over 670 cases on the CISG have been decided worldwide.[219] In the same period, the value of the UK's international trade has more than doubled.[220]

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215 See Harris in Guest (1997), para 15–118.
216 Ziegel (1984), pp 9–33.
217 [1917] 2 KB 473. See also Beatson (1998), pp 496–500.
218 Pace University CISG database at www.cisg.law.pace.edu/cisg/cisgintro.html.
219 Will (2000), p 6.
220 In 1988, the UK exported goods to the value of £81,654.9 million and imported £106,571.2 million worth of goods. In the year 2000, the UK exported £187,382.3 million and imported £222,266.9 million worth of goods: HM Customs & Excise Statistics (2000), Table 1.

Against this backdrop, there is no doubt that UK merchants will increasingly encounter the Convention in their business dealings. However, if the UK maintains its isolation, English courts will only contribute to the development of a CISG jurisprudence occasionally, where the proper law of the contract incorporates the Convention.[221] Thus, the UK can best protect its traders by embracing the CISG and contributing to the evolution of global commercial norms.

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221 For example, *Egmatra v Marco Trading Corp* [1999] 1 Lloyd's Reports 862.

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