

THE REMEDY OF AVOIDANCE OF CONTRACT UNDER  
CISG—GENERAL REMARKS AND SPECIAL CASES

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A. INTRODUCTION

Under the CISG, avoidance is the one-sided right of a party to terminate the contract by its mere declaration.<sup>1</sup> Such termination of a contract is the hardest sword that a party to a sales contract can draw if the other party has breached the contract. No other remedy—claim for performance, price reduction, damages—has the same incisive effect. For, it not only deprives avoidance to the party in breach of the benefit of the contract including the lost profit and renders often futile prior investments; if it is the seller who has breached the contract he is also burdened with the risks of the goods. These risks of damage to, or even loss of, the goods are particularly high when the goods are already in a foreign country. In CISG sales, this is typically the case. The seller must then either retransport the goods with the respective costs or attempt to resell them on the foreign market, which he may not know very well. Rightfully declared avoidance can therefore be very burdensome to the seller. However, if it is the buyer who has breached the contract the consequences of termination may be hard for him, too, in particular if he already has resold the goods and now faces damages claims from his sub-buyers because of non-delivery or if he already made investments in expectation of the delivery. Therefore, it is clear that on the one hand the remedy of avoidance should not be granted too easily, but on the other hand there must be a borderline from where the innocent party must be entitled to bring the contract to an end.

The following paper gives first (Part B) an overview over the availability and general requirements of the remedy of avoidance now that the CISG is 25 years old and has been applied in practice for 17 years.<sup>2</sup> In the second section

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1. See CISG arts. 49, 64, 72 and 73 (“may declare the contract avoided”).

2. The CISG entered into force in the first Contracting States in 1988. However, since the predecessor of the CISG, the Hague Uniform Sales Law of 1964, contained more or less identical regulations, international practice, court decisions and legal doctrine to the questions now relevant under the CISG existed already before though to a limited extent because only few states had ratified the Hague

(Part C), the paper will focus on the avoidance issue in cases where the seller has violated obligations other than the obligation to deliver conforming goods. The specific case of avoidance because of delivery of defective goods is dealt with by the paper of Prof. Schwenger; avoidance because of the buyer's breach of contract is discussed in the paper of Prof. Bridge.

## B. GENERAL REMARKS ON AVOIDANCE

### 1. *Avoidance as a Remedy of Last Resort*

The CISG has taken into account the often harsh consequences of a one-sided declared termination of contract. For this reason, it provides for rather far-reaching and strict requirements for the remedy of avoidance. In particular, the right to terminate the contract is only granted if the other party has committed a sufficiently serious—"fundamental"—breach.<sup>3</sup> Then, the aggrieved party can no longer be expected to conform to the contract. A simple breach of contract does not entitle the aggrieved party to avoid the contract. This concept of the CISG has led courts<sup>4</sup> and doctrine<sup>5</sup>—rightfully in my opinion—to conclude that avoidance under the CISG is a remedy of last resort, or an *ultima ratio* remedy, which should not be granted easily. It should be granted only if it would be unconscionable to expect the continuation of the contract by the aggrieved party.

On the other hand, does the qualification as *ultima ratio* remedy not mean that the aggrieved party has first to exercise all other remedies before it is entitled to declare the contract avoided. If a fundamental breach has occurred,

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Law.

3. See *supra* Part B(3)(a).

4. See CLOUT Case No. 171 [Bundesgerichtshof, Germany, 3 Apr. 1996], published in 132 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN (BGHZ) 290 (German); CLOUT Case No. 428 [Oberster Gerichtshof, Austria, 7 Sept. 2000], published in INTERNATIONALES HANDELSRECHT (IHR) 42 (2001) (German); Oberlandesgericht Köln, Germany, 14 Oct. 2002, published in INTERNATIONALES HANDELSRECHT 15 (2003) (German).

5. See Franco Ferrari, *Wesentliche Vertragsverletzung nach UN-Kaufrecht: 25 Jahr Artikel 25 CISG*, INTERNATIONALES HANDELSRECHT (IHR) 4 (2005); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 304 (3d ed. 1999); Ulrich Magnus, in STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN—WIENER UN-KAUFRECHT (CISG) art. 49 ¶ 4 (2005); Huber, in 3/1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH art. 49 ¶ 3 (4th ed. 2004); Peter Schlechtriem, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT. DAS ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF—CISG—KOMMENTAR art. 25 ¶ 21a (Peter Schlechtriem & Ingeborg Schwenger eds., 4th ed. 2004).

the immediate right to terminate the contract accrues and may be immediately exercised by the aggrieved party in the form and within the period required by the CISG. The *ultima ratio* phrase shall only remind that the right to avoid the contract shall be granted reluctantly and that one should not be too quick to accept a breach of contract as fundamental.

### 2. *Availability of Avoidance Under the CISG*

The CISG grants the remedy of avoidance in four different situations: first, where the *seller* has fundamentally breached the contract (regulated by Article 49); second—in a parallel manner—where the *buyer* has fundamentally breached the contract (regulated by Article 64); and third, in the situation that it is clear and almost certain that either the seller or the buyer *will* fundamentally breach the contract (anticipatory breach regulated by Article 72). The fourth situation is the case of an *instalment sale*. Avoidance with respect to the single instalment is permitted if a party committed a fundamental breach with respect to that single instalment; avoidance of the contract as a whole can be claimed where the fundamental breach concerns the whole contract (Article 73).

### 3. *Requirements of Avoidance*

The main requirements of avoidance are more or less the same for all pre-mentioned situations: first, a fundamental breach of contract; second, notice; third, not always but for the practically most important cases a time limit; and fourth, the return of the substantially unchanged goods.

#### a. *Fundamental Breach of Contract*

The central requirement for avoidance is the fundamentality of the breach of contract. The fundamental breach is defined by Article 25. According to this provision, the aggrieved party must have been substantially deprived of what it was entitled to expect under the contract. In other words, as a consequence of the non-performance or incorrect performance of a contractual obligation of the other party, the aggrieved party must have mainly lost its interest in the contract.<sup>6</sup> Whether this is the case has to be determined from

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6. CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG. KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF VON 1980. UNTER

an objective point of view, however, in light of the purpose of the contract which the parties have fixed.<sup>7</sup> If these requirements are met, then the breach is of a fundamental nature and allows the innocent party to declare the contract avoided. Fault or negligence on the part of the breaching party is not required.

However, the definition of the fundamental breach in Article 25 alone rarely suffices to solve cases since it is rather abstract and contains several uncertain terms which leave a rather wide discretion for those who have to apply the provision. Therefore, only international case law for the different situations of breach of contract offers clear guidance. Thus far, international case law has been able to establish certain groups of cases where it is rather clear whether a breach is fundamental. These groups of cases will be shown below.<sup>8</sup>

*b. Notice*

The CISG further requires that the party who is entitled to terminate the contract give notice of avoidance (Article 26). Unlike its predecessor, the CISG does not permit automatic termination of a contract.<sup>9</sup> Otherwise, it would often be uncertain for the parties and difficult to recognise at which date the contract was terminated. The party entitled to declare the contract avoided must, therefore, always inform the other party that it exercises its right of avoidance.

Notice of avoidance must be communicated to the other party by appropriate means of communication. Dispatch of the notice by ordinary means suffices. Today, therefore, even e-mail will do.<sup>10</sup> Receipt of the notice

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BERÜCKSICHTIGUNG DER SCHNITTSTELLEN ZUM INTERNEN SCHWEIZER RECHT art. 25 ¶ 8 (2004); ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT. KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF art. 25 ¶ 8 (1991); Magnus, *in* STAUDINGER, *supra* note 5, at art. 25 ¶ 13; Schlechtriem, *supra* note 5, at art. 25 ¶ 9; Michael R. Will, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW. THE 1980 VIENNA SALES CONVENTION art. 25 no. 2.1.21 (C.M. Bianca & M.J. Bonell eds., 1987).

7. CLOUT Case No. 248 [Bundesgericht, Switzerland, 28 Oct. 1998] (CISG-Online No. 413); Ferrari, *supra* note 5, at 5; Brigitta Lurger, *Die wesentliche Vertragsverletzung nach Article 25 CISG*, INTERNATIONALES HANDELSRECHT (IHR) 91 (2001); Magnus, *in* STAUDINGER, *supra* note 5, at art. 25 ¶ 13.

8. *See infra* Part C.

9. *See thereto* Jan Hellner, *Ipsa Facto Avoidance*, *in* PRIVATAUTONOMIE, EIGENTUM UND VERANTWORTUNG, FESTGABE FÜR HERMANN WEITNAUER 85 *et seq.* (Ehmann ed., 1980).

10. Franco Ferrari, *Brief Remarks on the Conclusion of Contracts on the Internet and the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 5 THE EUROPEAN LEGAL FORUM (E) 301, 307 (2000/2001); Henry D. Gabriel, *General provisions, obligations of the seller, and*

is not essential since it is the other party who committed a fundamental breach and who has to bear the risk of any incorrect or failing transmission of the declaration of avoidance (Article 27).

The notice requirement itself is rather strict. Though the notice need not expressly mention the term avoidance or termination it must make unambiguously clear that the contract is to be terminated. If, for instance, a notice expresses that the goods are “immediately and totally” (*sofort und total*) at the seller’s disposal, that the repayment of the price is requested and that any further delivery is refused, it is regarded as a sufficiently clear declaration of avoidance.<sup>11</sup>

The notice requires no specific form. It can be made in writing or even orally.<sup>12</sup> It is, however, disputed whether the CISG allows also for an implicit declaration of avoidance and whether mere conduct can constitute such implicit declaration.<sup>13</sup> Thus far, cases of that kind appear to be rare and there is no case law on the question. Nonetheless, where the conduct of the party shows clearly the intention to terminate the contract and where the conduct is communicated to the party in breach, this should suffice due to the general principle of freedom of form enshrined in Article 11. However, in case of any ambiguity, no valid declaration of avoidance can be inferred from conduct. Therefore, it is not a sufficiently clear expression of intent to terminate the contract if the buyer has bought goods in replacement or if the seller has resold the goods.<sup>14</sup> Also, the mere redelivery of the goods without comment does not amount to a valid notice of avoidance since the message inherent in such uncommented redelivery is regularly ambiguous: it can either mean that the buyer wants to terminate the contract under Article 49 or that he only

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*remedies for breach of contract by the seller*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 341 *et seq.* (Franco Ferrari et al. eds., 2004); Magnus, in STAUDINGER, *supra* note 5, at art. 27 ¶ 17.

11. See Oberlandesgericht Köln, Germany, 14 Oct. 2002, *published in* INTERNATIONALES HANDELSRECHT 15, 17 (2003) (German).

12. CLOUT Case No. 176 [Oberster Gerichtshof, Austria, 6 Feb. 1996], *published in* RECHT DER WIRTSCHAFT (RiW) 203 (1996) (German).

13. In favor, see Christoph Benicke, in 6 MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH art. 26 ¶ 5 (2004); Rainer Hornung, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 25 ¶ 10 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); Lurger, *supra* note 7, at 91; Magnus, in STAUDINGER, *supra* note 5, at art. 25 ¶ 13; Burghard Piltz, *Neue Entwicklungen im UN-Kaufrecht*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2056, 2063 (2003); Schlechtriem, *supra* note 5, ¶ 108. *Contra* WILHELM-ALBRECHT ACHILLES, KOMMENTAR ZUM UN-KAUFRECHTSÜBEREINKOMMEN art. 26 ¶ 2 (CISG) (2000); HERBER & CZERWENKA, *supra* note 6, at art. 26 ¶ 3.

14. CLOUT Case No. 294 [Oberlandesgericht Bamberg, Germany, 13 Jan. 1999], *published in* TRANSPORTRECHT—INTERNATIONALES HANDELSRECHT (TRANSP-IHR) 17 (2000) (German).

requests a substitute delivery under Article 46. Only if further accompanying circumstances clearly eliminate this ambiguity can a valid declaration of avoidance be inferred from such conduct.

*c. Further Requirements and Restrictions*

*i) Time Limit*

In general, the Convention provides for no specific time limit to declare the contract avoided.<sup>15</sup> Only the general rules on limitation apply. As the case may be, these are either the limitation rules of the respective UN Convention on Limitation<sup>16</sup> or of the applicable national law which in turn has to be determined according to the rules of private international law in force at the place of the seized forum. Yet, the CISG prescribes two important exceptions where a time limit applies:

If the seller has already delivered the goods, the buyer can exercise an eventual right of avoidance only during a reasonable time thereafter (Article 49(2)). According to the international court practice, this time frame is not long. Its precise length depends in the first line on the circumstances of the case. However, if there are no specific circumstances, two months,<sup>17</sup> and all the more five months,<sup>18</sup> have been regarded as unreasonably long (leading to the loss of the right of avoidance) while five weeks was still reasonable and allowed the buyer to validly terminate the contract.<sup>19</sup>

An almost identical rule applies if it is the seller who is entitled to terminate the contract and if the buyer has already performed his central obligation under the contract; namely, he has already paid the price (the buyer

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15. FRITZ ENDERLEIN ET AL., INTERNATIONALES KAUFRECHT. KAUFRECHTSKONVENTION, VERJÄHRUNGSKONVENTION, VERTRETUNGSKONVENTION, RECHTSANWENDUNGSKONVENTION art. 49 no. 2, 6 (1991); Gruber, in 3/1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH art. 26 ¶ 9 (4th ed. 2004); MARTIN KAROLLUS, UN-KAUFRECHT. EINE SYSTEMATISCHE DARSTELLUNG FÜR STUDIUM UND PRAXIS 180 (1991); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT. DAS UN-KAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) IN PRAXISORIENTIERTER DARSTELLUNG § 5 ¶ 390 (1993); but contra, reasonable period of time applies, Homung, *supra* note 13, at art. 26 ¶ 14.

16. UN Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (New York, 1974-1980) [hereinafter UN Limitation Convention]. The scope of application of the UN Limitation Convention (as amended) corresponds entirely with the scope of application of the UN Sales Convention.

17. CLOUT Case No. 83 [Oberlandesgericht München, Germany, 2 Mar. 1994]; CLOUT Case No. 124 [Bundesgerichtshof, Germany, 15 Feb. 1995].

18. CLOUT Case No. 282 [Oberlandesgericht Koblenz, Germany, 31 Jan. 1997].

19. CLOUT Case No. 165 [Oberlandesgericht Oldenburg, Germany, 1 Feb. 1995].

must then have violated another—accompanying—duty and thereby have committed a fundamental breach). Then, the seller must also react within a reasonable time and declare the contract avoided during that time. Details of the beginning of the period are regulated by Article 64(2). Though there appears to be no case law on that provision,<sup>20</sup> the period of time should be fixed in the same way as mentioned above for the case that the seller had already performed the contract.

If no specific time limit of the CISG, but only the general period of the applicable limitation statute applies, this period can be rather long, for instance four years under the UN Limitation Convention<sup>21</sup> or even six years under national law—like in many common law countries.<sup>22</sup> It may be questioned whether the principle of good faith—in its particular form of a waiver of rights by inaction—justifies a reduction to this time limit. It is here suggested that, in principle, such a reduction is admissible. The underlying general principles of the CISG (Article 7(2)) comprise the principle that a party is precluded from exercising its rights if this party by its conduct has led the other party to believe that it will not exercise the respective right.<sup>23</sup> This principle also underlies Article 16(2)(b) and Article 29(2). Therefore, this principle can lead to a reduction of the time period otherwise prescribed by very generous statutes of limitation.

### *ii) Restitution of the Goods*

Under the CISG, the buyer loses, in principle, his right to declare the contract avoided if he cannot return the goods in substantially the same condition in which he received them (Article 82(1)). If full restitution of the goods is impossible, termination is generally excluded. There are, however, certain exceptions to this principle which widely reduce too harsh

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20. See Article 64(2) and the comment there in The UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, art. 64, U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/64 (8 June 2004).

21. UN Limitation Convention, *supra* note 16, at art. 8.

22. See for instance Limitation Act of 1980 § 2 (Eng.).

23. See in this sense ACHILLES, *supra* note 13, at art. 4 ¶ 14; BRUNNER, *supra* note 6, at art. 4 ¶ 55; Kurt Siehr, in KOMMENTAR ZUM UN-KAUFRECHT art. 4 ¶ 26 (Heinrich Honsell ed., 1997); Magnus, in STAUDINGER, *supra* note 5, at art. 4 ¶ 53; but contra, for instance, Arrondissementsrechtbank Amsterdam, Netherlands, 5 Oct. 1994, published in 231 NEDERLANDS INTERNATIONAAL PRIVAATRECHT (NIPR) 195 (1995) (Dutch); Anja Fenge, *Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf*, HANS THEODOR SOERGEL, BÜRGERLICHES GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN (CISG) art. 4 ¶ 9 (13th ed. 2000).

consequences of the principle. Article 82(2) provides that the buyer does not lose the right of avoidance if he has neither caused the impossibility of full restitution of the goods nor if the goods were impaired through their proper examination nor if their non-conformity—giving rise to the right of avoidance—was only discovered after the goods had already been consumed or transformed. Nonetheless, case law has shown that even these rather far-reaching exceptions need further extension, namely for the case where the buyer improved the goods.<sup>24</sup> In such a case, the buyer is likewise unable to return the goods in an unaltered condition and none of the express exceptions apply. Yet, it would be irreconcilable with the purpose of Article 82 to deny in that case the buyer's right of avoidance. Therefore, the buyer can exercise any right of avoidance.

It is remarkable that the principle that the right of avoidance is excluded unless full restitution of the goods is possible is one of the very few rules of the CISG which the UNIDROIT Principles of International Commercial Contracts<sup>25</sup> and the Lando Principles of European Contract Law<sup>26</sup> have not adopted. Both sets of Principles allow termination even if the buyer cannot return the goods at all or only in a deteriorated condition. He then has to compensate the seller for the lost value.

### *iii) Unavoidable Impediment to Perform*

The right of the aggrieved party to terminate the contract is, however, not excluded or in any way restricted if the breach of contract giving rise to the right of avoidance is excused because an unforeseeable and unavoidable impediment hindered the breaching party to perform the contract (Article 79(5)). Irrespective of the excuse, the non-performance or incorrect performance remains a breach of contract which permits avoidance if it is fundamental.<sup>27</sup>

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24. CLOUT Case No. 235 [Bundesgerichtshof, Germany, 25 June 1997], *published in* RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 1037 (1997) (German); *see also* Benicke, *supra* note 13, at art. 82 ¶ 3; Magnus, *in* STAUDINGER, *supra* note 5, at art. 82 ¶ 8.

25. *See* UNIDROIT Principles of International Commercial Contracts art. 7.3.6 (2004).

26. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW art. 9:309 (Ole Lando & Hugh Beale eds., 2000).

27. In the same sense *see* HONNOLD, *supra* note 5, ¶ 308; Markus Müller-Chen, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 49 ¶ 4 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); Anton K. Schnyder & Ralf Michael Straub, *in* KOMMENTAR ZUM UN-KAUFRECHT art. 49 ¶ 15 (Heinrich Honsell ed., 1997).



#### 4. *Consequences of Avoidance*

The CISG provides mainly for four different consequences of a valid avoidance of the contract: release from obligations, restitution of what has already been performed, the right to calculate damages in an abstract way, and the duty to preserve the goods.

##### *a. Release from Obligations*

It is more or less self-understanding that the central obligations under the contract must end when termination becomes effective (Article 81(1) sentence 1). It is less self-understanding that certain duties and provisions of the contract continue to bind the parties. From a practical point of view, it is most important that jurisdiction clauses and arbitration clauses of the contract remain in force despite any valid declaration of avoidance (Article 81(1) sentence 2). Also, where damages have already become due—even as a consequence of a penalty clause<sup>28</sup>—such right to damages survives the end of the contract.

##### *b. Restitution*

Each party is entitled to reclaim what it has supplied or paid under the contract (Article 81(2)). Because the Convention deals with this issue, any recourse to national law for such claims is unnecessary, and is in fact wrong; national law on unjust enrichment, or like institutions, does not apply.

In addition to the return of the goods and/or of the price, restitution includes, first, interest on any sum which has to be repaid and, second, compensation for the benefits which a party derived from the goods, mainly from their use (Article 84). As in Article 78, the rate of interest has been deliberately left open; equally, as in Article 78, this gap has to be filled by redress to the applicable national law as determined by the rules on conflicts of law.<sup>29</sup>

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28. See Court of Arbitration of the International Chamber of Commerce, Award No. 9978, Mar. 1999, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=471&step=FullText>.

29. ACHILLES, *supra* note 13, at art. 81 ¶ 3; Lüderitz & Dettmeier, *Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)*, HANS THEODOR SOERGEL, *supra* note 23, at art. 81 ¶ 7; Magnus, *in* STAUDINGER, *supra* note 5, at art. 81 ¶ 11.

*c. Abstract Calculation of Damages*

Even after a valid avoidance of the contract, a party remains entitled to damages if any damage has already been suffered. But now, the party can calculate its damages in an easier and abstract way: if this party executed a reasonable substitute transaction then simply the (negative) difference between the price of the original contract and the price for the substitute transaction can be claimed (Article 75). Where no reasonable substitute transaction has been made but where a current price of the goods exists, the (negative) difference between the contract price and the current price constitutes the recoverable damage which the aggrieved party can claim without further proof of a concrete loss.

*d. Preservation of Goods*

Finally, the party in possession or control of the goods which require restitution has to take reasonable steps to preserve those goods in the interest of the other party, even if the contract has been rightfully terminated (Articles 85 and 86). Thus, this duty of preservation also survives the termination of the contract.

*e. Relationship to Other Remedies*

As already mentioned, avoidance leaves a claim for damages untouched. Such a claim can, therefore, be combined with a declaration of avoidance. Other remedies which presuppose that the contract is still in force—like a claim for performance or price reduction—are, however, irreconcilable with avoidance and do not survive the termination of the contract.

*f. Transformation of Duties*

In essence, avoidance transforms the contract from a future-oriented ongoing relationship into a backward-oriented restitution relationship. The contractual duties turn into restitution and preserving duties whose violation results in damages like a violation of the primary duties of the living contract.<sup>30</sup>

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30. For a detailed discussion see Hornung, *supra* note 13, at art. 81 ¶ 9 *et seq.*

## 5. *Evaluation*

If a short intermediate summary is to be drawn, the conditions under which the remedy of avoidance of contract is granted and the consequences which result from it adequately reflect the importance of this remedy and also take adequate account of the problems which are coupled with termination of contract.

### C. THE BUYER'S RIGHT TO TERMINATION

The following part discusses the buyer's right to declare the contract avoided. Four different situations may give rise to that right: non-delivery of the goods, delivery of non-conforming goods (however, this situation is not dealt with here but in the paper of Prof. Schwenger), late delivery and neglect of other duties. In each of these cases, avoidance requires that the seller's non-performance amounts to a fundamental breach of contract.

#### 1. *Non-delivery*

Where the seller finally does not deliver the goods or finally refuses—even before the delivery date—to deliver, such non-performance or announced non-performance regularly constitutes a fundamental breach.<sup>31</sup> However, if only a minor part of the contract is not finally performed, e.g., one of several deliveries not supplied, it remains a non-fundamental breach.<sup>32</sup> It is, on the other hand, a fundamental breach if the seller requests, as condition for delivery, that the buyer first fulfills further conditions—pre-payments or the like—which had not been agreed upon in the original contract.<sup>33</sup> The same result has been reached in an ICC arbitration case where the seller unjustifiably denied granting rebates which had been agreed upon in the contract.<sup>34</sup>

However, without a clear renunciation of its obligations, it might remain doubtful after the delivery date has passed without delivery whether the seller

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31. CLOUT Case No. 90 [Pretura circondiale di Parma, Italy, 24 Nov. 1989]; CLOUT Case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995].

32. CLOUT Case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 Apr. 1997].

33. CLOUT Case No. 293 [Hamburg Court of Amical Arbitration, Germany, 29 Dec. 1998], published in *NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGS-REPORT ZIVILRECHT (NJW-RR)* 780 (1999) (German).

34. Court of Arbitration of the International Chamber of Commerce, 20 Dec. 1999, published in *INTERNATIONALES HANDELSRECHT (IHR)* 21 (2004) (German) (with note by Kühner).

will finally deliver. Therefore, in such a situation, the buyer is on the safe side only if he fixes an additional period of time according to Article 47. After this period has lapsed without delivery, this is regarded by law as a fundamental breach (Article 49(1)(b)) and the buyer may terminate the contract. Yet, it has to be stressed that this mechanism functions solely where the goods had not yet been delivered.<sup>35</sup>

## 2. Late Delivery

As a general rule, late delivery does not constitute a fundamental breach.<sup>36</sup> The buyer may claim damages if the delay has caused him any damage. However, he is generally not entitled to terminate the contract for this reason. Further circumstances must be present to turn a mere delay into a fundamental breach. This will be the case where the parties have agreed that time for performance is of the essence, for instance, in case of just-in-time-delivery. Equally, where the parties have agreed that the delivery should be executed “in the quickest possible way” (*schnellstmöglich*) and where the seller was or could have been aware of the buyer’s urgent need of the goods (mobile phones), delivery nearly a week after the agreed date was held to be a fundamental breach.<sup>37</sup> Also, where seasonal goods are bought, delivery at the end of, or after, the season is a fundamental breach because the goods are then substantially useless for the buyer who loses what he reasonably could expect from the contract.<sup>38</sup>

If the parties have agreed on one of the INCOTERMS, like CIF or FOB, this in itself does not transform a simple delay into a fundamental breach.<sup>39</sup>

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35. Where delivery is severable the same rule applies to the missing part if only parts of the goods have been delivered.

36. Corte di Appello Milano, Italy, 20 Mar. 1998, available at <http://cisgw3.law.pace.edu/cases/980320i3.html>; CLOUT Case NO. 275 [Oberlandesgericht Düsseldorf, Germany, 24 Apr. 1997]; Oberlandesgericht München, Germany, 1 July 2002 (CISG-Online no. 656); Landgericht München, Germany, 20 Feb. 2002, published in INTERNATIONALES HANDELSRECHT (IHR) 24 (2003) (German); Benicke, *supra* note 13, at art. 25 ¶ 20; Ferrari, *supra* note 5, at 7; Gabriel, *supra* note 10, at 337; VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES—DROIT UNIFORME 361 (2d ed. 2000).

37. Oberlandesgericht Düsseldorf, Germany, 21 Apr. 2004, published in INTERNATIONALES HANDELSRECHT (IHR) 24 (2005) (German).

38. CLOUT Case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 Apr. 1997] (CISG-Online no. 385); Corte di Appello Milano, Italy, 20 Mar. 1998, available at <http://cisgw3.law.pace.edu/cases/980320i3.html>; BRUNNER, *supra* note 6, at art. 25 ¶ 12; Ferrari, *supra* note 5, at 8; Gruber, *supra* note 15, at art. 25 ¶ 21; Schlechtriem, *supra* note 5, at art. 25 ¶ 18.

39. In the same sense see Ferrari, *supra* note 5, at 8.

A German court decision<sup>40</sup> stating the contrary must be interpreted in light of the facts of that case. The seller of a CIF sale of a commodity, whose price decreased rather quickly, had informed the buyer three months after the delivery date that it needed more time for negotiations with its own supplier leaving it uncertain whether and when delivery could be effected. The Court correctly held that this amounted to a fundamental breach.

Where goods with rapidly fluctuating prices on—sometimes extremely—volatile markets are bought the implicit agreement may be inferred from the circumstances that even a short delay should entitle the buyer to declare the contract avoided.<sup>41</sup> The reason for this solution is the fact that in such cases the buyer should not bear the risk of a dramatic price drop and the further risk of the seller's eventual insolvency due to that drop.

As already mentioned, where the seller has failed to deliver at all, the buyer can fix an additional period for delivery and after its unsuccessful lapse terminate the contract (Articles 47 and 49(1)(b)). This possibility provides a procedure which helps to avoid the uncertainty of whether and when delayed delivery becomes a fundamental breach. It should be made use of whenever the fundamentality of the delay remains doubtful.

### 3. *Violation of Other Duties*

Also, the violation of duties other than those already mentioned can amount to a fundamental breach, however, only where the non-performance of the duty deprives the buyer of the main benefit of the contract. Additional duties are provided in the CISG itself, for instance to mark the goods for their identification, to arrange for the carriage of the goods where the seller accepted this duty or to provide all information necessary for the buyer to effect insurance (Article 32). Further additional duties may be specifically agreed upon.

However, cases are rare where the breach of such additional duty amounted to a fundamental breach. Courts have regarded it a fundamental breach where the seller had infringed a resale restriction<sup>42</sup> or a valid exclusive

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40. CLOUT Case No. 277 [Oberlandesgericht Hamburg, Germany, 28 Feb. 1997], *published in* FORUM DES INTERNATIONALEN RECHTS 168 (1997) (German).

41. Magnus, *in* STAUDINGER, *supra* note 5, at art. 49 ¶ 10.

42. CLOUT Case No. 2 [Oberlandesgericht Frankfurt, Germany, 17 Sept. 1991], *published in* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 633 (1992) (German); CLOUT Case No. 217 [Handelsgericht Aargau, Switzerland, 26 Sept. 1997], *published in* 1 SCHWEIZERISCHE ZEITSCHRIFT FÜR EUROPÄISCHES UND SCHWEIZERISCHES RECHT (SZIER) 178 (1998) (German).

sales agreement<sup>43</sup> or a re-import restriction.<sup>44</sup> If the seller fails to perform any of the other mentioned additional obligations it is rather unlikely, though not impossible, that their non-performance will deprive the buyer of the main benefit of the contract and therefore constitute a fundamental breach.

#### D. CONCLUDING REMARKS

For any legal system it is a challenging task to draw the line between cases where the contract continues despite its breach by one party and cases where the aggrieved party has to be permitted to terminate the contract and to regain its freedom to contract anew. The CISG reacts with a whole set of rules to that problem. The Convention grants the remedy of avoidance rather reluctantly and this policy is approved by the courts. In general, the dividing line between retaining and ending the contract is drawn depending on whether there is a serious infringement of the aggrieved party's contractual interests. These interests are mainly defined subjectively by the party itself. But the seriousness of the infringement, the fundamentality of the breach, is determined objectively. This mixed concept of subjective and objective elements allows taking notice of the interests of both parties. It has stood the test of practice. Its underlying policy considerations appear to be solid and sound. And it provides sufficient flexibility which is necessary to meet the differentiated variety of possible situations.

The sufficient certainty of law which is needed is achieved by establishing groups of cases for which the courts have laid down guiding principles. The international case law has thus far developed in a helpful way. Deep-rooted differences in the reviewed field are relatively rare. UNCITRAL's CISG Digest will further support a uniform application of the Convention.

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43. CLOUT Case No. 282 [Oberlandesgericht Koblenz, Germany, 31 Jan. 1997] (CISG-online no. 256).

44. CLOUT Case No. 154 [Cour d'appel Grenoble, France, 22 Feb. 1995], *published in* JOURNAL DU DROIT INTERNATIONAL 632 (1995).