

# Right to Terminate (Avoid) International Sales of Commodities

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“... as far as I remember, in every commercial litigation this question of whether you can reject or have a claim for damages has constantly been raised in various kinds of trade, and various kinds of contract, and, I daresay, will continue to be raised for centuries yet.” Scrutton L.J. in *Meyer v Kivisto* [1929] 35 Ll.L.Rep. 265

Amongst various remedies available for breach of contract, termination is the most drastic measure. In what circumstances termination should be permitted is a perennial question, which should be addressed by reference to the nature of the contract. There are a vast variety of sale contracts: those of small chattels to bulk commodities; those between merchants, between a merchant and a consumer, and between consumers; and those of purely domestic nature to those with significant international elements. The focus of this article is on international sales of commodities.<sup>1</sup> Commodities cover a wide range of agricultural products and raw materials, such as grain (e.g. wheat, barley, maize and corn), feed stuffs, oilseeds, sugar, coffee, cocoa, tea, oils, metals and ores.

The law of termination needs to ensure legal certainty and predictability while at the same time preserving sufficient flexibility to avoid injustice, which may arise in individual cases. This article will consider in the context of international sales of commodities how to achieve a reasonable balance between the requirements of legal certainty and predictability and the need to preserve sufficient flexibility. This question will be addressed under two major legal sources, *i.e.* English law and the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).<sup>2</sup> Notwithstanding that the question when termination right arises is a matter of great concern to traders, there is a great deal

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<sup>1</sup> Bridge, “The Evolution of Modern Sales Law” [1991] L.M.C.L.Q. 52, 62 says that it is a matter of reproach to the law of sale and to legal scholarship that distinction between international sales of commodities concluded under volatile trading conditions and other commercial sales have not been sufficiently investigated.

<sup>2</sup> Broader comparisons of the two regimes have been made elsewhere. See, *e.g.* R, Lee “The UN Convention on Contracts for the International Sale of Goods: OK for the UK?” [1993] J.B.L. 131; The UK Department of Trade and Industry “*United Nations Convention on Contracts for the International Sale of Goods (The Vienna Sales Convention); A Consultation Document*” URN 97/875 (1997).

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of uncertainty as to how exactly English law and the CISG are applied to international sales of commodities.

The choice of English law for analysis is amply justified by its importance in the practice of international sales of commodities. Standard form contracts choosing English law as the governing law<sup>3</sup> has long<sup>4</sup> been used widely in CIF or FOB sales of commodities regardless of whether the particular contract has any connection with England.<sup>5</sup> Internationally,<sup>6</sup> 85 per cent of the global trade in oils and fats is carried out under the standard contracts of FOSFA (Federation of Oils, Seeds and Fats Association), of which there are more than 50 forms according to the type of goods and the origin of the goods.<sup>7</sup> More than 80 per cent of the world trade in grain and feeds (but much less for rice) is carried out under the standard contracts of GAFTA (Grain and Feed Trade Association),<sup>8</sup> of which there are more than 100 forms.<sup>9</sup>

The CISG has been ratified by most of the major trading nations<sup>10</sup> and is now the most important source of law for international sales generally. In sales of commodities, the CISG is often excluded by standard forms<sup>11</sup> but it may be applied in the residual cases where such forms are not used. Should the United Kingdom ratify the CISG, how exactly the CISG applies to commodity sales would become an acute issue.

### Characteristic features of international sales of commodities

#### *a) Strong requirements of legal certainty and predictability*

It is well acknowledged<sup>12</sup> that international sales of commodities demand a high degree of legal certainty and predictability. Three reasons may be cited.

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<sup>3</sup> e.g. FOSFA Contract No.53 (FOB) para.27; GAFTA Contract No.100 (CIF) para.31. c.f. NAEGA Standard Contract No.2 (FOB) chooses New York law (clause 28).

<sup>4</sup> Over 120 years in the case of GAFTA contracts.

<sup>5</sup> Although the choice-of-law rules of some countries may confine the principle of party autonomy to the situation where the contract has certain connections with the country whose law is chosen, many others will give effect to the parties' choice irrespective of such connection: see, e.g. Art.3(3) of the Rome Convention on the Law Applicable to Contractual Obligations 1980 [1980] O.J. L 266/1).

<sup>6</sup> Even for U.S export, the GAFTA contracts are used for C&F and CIF grain sales and the FOSFA contracts are used for CIF and C&F soybeans sales, although the NAEGA standard contract No.2 (developed by the North American Export Grain Association) is used for FOB grain and oilseeds sales.

<sup>7</sup> [www.fosfa.org/contracts/index.htm](http://www.fosfa.org/contracts/index.htm).

<sup>8</sup> GAFTA's own estimate (communicated to the author in October 2002).

<sup>9</sup> [www.gafta.com](http://www.gafta.com).

<sup>10</sup> Two of the major exceptions are the UK and Japan.

<sup>11</sup> See, e.g. FOSFA Contract No.53 (Contract for Vegetable and Marine Oil (in bulk) FOB terms) para.28; GAFTA Contract No.100 (Contract for Shipment of Feedingstuffs (in bulk) CIF terms) para.33; NAEGA Standard Contract No.2 (FOB) clause 27. Art.6 of the CISG allows its application to be excluded by the parties' agreement.

<sup>12</sup> See e.g. Treitel, *The Law of Contract* (10th ed., 1999) p.737.

First, if a trader unlawfully terminates the contract, he will be liable for damages, the amount of which can be enormous because volatile market conditions can drastically alter the value of the goods in a short space of time and because the amount at stake can be enormous in the case of bulk shipment.<sup>13</sup> The traders, therefore, need to be able to tell accurately when they can lawfully terminate contracts.

Secondly, the traders also need to be able to tell promptly whether they have a right to terminate contracts. Many of the traders have a large number of contracts to manage on a volatile market. In international sales of commodities, many more contracts are concluded than the number of cargoes that can be physically delivered.<sup>14</sup> Most of them are concluded to speculate on the market price and do not contemplate physical delivery of the goods. Although the word “speculation” is often used in a pejorative sense, speculation introduces the much-needed liquidity and thus stabilizes the market.

Thirdly, the law needs to be capable of producing consistent results in its application to string sales. When goods are appropriated to speculative sales dealing with the same goods, a sales string emerges. It is undesirable if termination of some contracts on a string is allowed but termination of other contracts on the same string is not allowed for the same breach. The law should, therefore, be capable of producing consistent results.

*b) High likelihood of attempts of unmeritorious termination*

It does not seem sufficiently appreciated that unmeritorious termination is more likely to be attempted in international sales of commodities than in other sales. A termination of contract may be considered to be unmeritorious if the harm deriving from the breach is insignificant and is not the motive for termination. Unmeritorious termination can happen in any contracts, as where a capricious change of mind is the motive for termination. But the international sales of commodities are particularly susceptible to attempts of unmeritorious termination since they are likely to give the buyer a strong incentive and many opportunities to get out of what has become a bad bargain caused by a market decline.

If the market has fallen, the buyer obtains an incentive to terminate the contract as that would enable him to buy the same type of goods, or even the same goods, at the current lower market price. In such cases, a critical difference arises between terminating the contract and only claiming damages. Take, for example, a sale of a quantity of seeds sold on CIF terms at £10,000. The contract calls for the seeds to contain no more than 15 per cent fat. The seller delivered seeds contained 20

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<sup>13</sup> According to Branch, *Elements of Shipping* (7th ed., 1996) para.13.3, commodities such as copra, flour, grain and sugar are likely to be carried by chartered ship in bulk rather than on a liner service.

<sup>14</sup> In *Voest Alpine Intertrading v Chevron International Oil Co* [1987] 2 Lloyd's Rep. 547, an expert report stated that approximately 400 contracts were concluded each month in respect of 45 physical cargoes of FOB Sullom Voe Brent crude oil, describing the situation as “the tail wagging the dog.”

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per cent fat. They would have been worth £9,000 on the contract date but on the delivery date they were worth only £7,200 while the conforming seeds would have been worth £8,000. If the buyer can terminate the contract, the buyer can buy the seeds containing no more than 15 per cent fat at £8,000, saving £2,000. The buyer can, therefore, in effect put back on the seller the post-contract market decline. If, on the other hand, the buyer only claims damages, he must endure the market decline. For example, under s.53 of the Sale of Goods Act 1979,<sup>15</sup> the measure of damages is *prima facie* the difference between the value of the goods at the time of delivery to the buyer (£7,200) and the value they would have had if they had fulfilled the warranty of quality (£8,000), namely only £800. Four reasons can be offered to explain why international sales of commodities are likely to give the buyer a strong incentive and many opportunities to get out of a bad bargain caused by a market decline.

First, the buyer in an international commodity sale has a good chance of seizing upon the seller's breach. This is because the seller's obligations in an international commodity sale are more numerous and complicated than those in other sales. A CIF seller, for example, owes both physical and documentary obligations in respect of the goods, carriage, and insurance and the performance of those obligations has to be internally consistent.

Secondly, in an international commodity sale, the price fluctuation alone can turn a good bargain into bad. This is because many traders are speculators concerned solely with the price fluctuations and, unlike the parties to other sales, have no interests in the goods themselves. As sophisticated professional speculators, they are extremely sensitive to price fluctuations.

Thirdly, the price fluctuations are more transparent in international sales of commodities than in other sales. The prices of commodities which are traded on organised exchanges such as Chicago Board of Trade (CBOT) and London Futures and Options Exchange<sup>16</sup> are sympathetically tracked by the prices of the

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<sup>15</sup> Section 53 reads:

- “(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—
- (a) set up against the seller the breach of warranty in diminution or extinction of the price, or
  - (b) maintain an action against the seller for damages for the breach of warranty.
- (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
- (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.
- .....”

<sup>16</sup> This article is not concerned with sales on exchanges, which are conducted in accordance with the exchange's own regulations and contract specifications. In those sales, the buyers and sellers are not matched since the traders are dealing with brokers on the exchange or the exchange itself.

same or similar commodities traded outside the exchanges, though they are not necessarily identical because the prices on exchanges can be extremely volatile even within the course of a single day.

Fourthly, even if termination of a contract turns the buyer into a short buyer, the liquid market provides him with good opportunities of repurchase to cover his position. This contrasts with the situation where a sale of a non-market item is terminated. Thus if the buyer has terminated a sale of complex machinery tailored to the buyer's particular specifications, he may have difficulty finding an alternative source of supply.

The facts of *Hansa Nord*<sup>17</sup> provide an example of the buyer's most blatant attempt to terminate the contract for the seller's entirely harmless breach in order simply to escape from what has become a bad bargain caused by a market decline. In this case, the buyer, alleging that the shipment was not made in good condition, rejected the cargo and the seller was compelled to resell the cargo. In what was described by Lord Denning as "an astonishing sequence of events," the buyer managed to repurchase the same cargo through a middleman for a considerably lower price (£30,000 as compared with the original price of £100,000) and used it for the purpose originally intended without incurring any loss.<sup>18</sup>

Views may differ whether and in what circumstances the law should deter termination motivated by a market decline. It may be thought that no serious injustice is caused by such termination since many traders are repeatedly engaged in opportunistic activities and are, therefore, as likely to benefit from such termination as to suffer from it. To use the expression of Lord Lowry in *Bunge v Tradax*,<sup>19</sup> "today's buyer may be tomorrow's seller". At any rate, intermediate traders on a sales string are acting in both capacities. This is not however, a zero-sum game since allowing such a termination would undermine the whole premises upon which the traders speculative activities are based. The traders speculate on the market by concluding forward delivery contracts,<sup>20</sup> *i.e.* contracts for delivery on a future date.<sup>21</sup> They agree on a price by taking a chance on the future market conditions. Thus if they anticipate the market to rise, they buy for future delivery (go "long") and close their "long" position by making an equivalent sale. They are supposed to remain bound by the price initially agreed regardless of the subsequent fluctuation of the market price. The law should, therefore, deter termination motivated by a market decline. Although the application of law should not rely upon a party's inner motive, it is possible, as will be discussed below, to screen out the many cases of termination motivated by a market decline by looking only at the objective factors which are likely to indicate such motive.

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<sup>17</sup> [1976] Q.B. 44, 55.

<sup>18</sup> The court held that the buyer was not entitled to reject the cargo. See discussion on innominate terms below.

<sup>19</sup> [1981] 1 W.L.R. 711 at 720 (HL).

<sup>20</sup> *c.f.* spot contracts, *i.e.* contracts performed immediately or nearly so.

<sup>21</sup> For example, in the Brent oil market, it was said in *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep. 547 that forward deals started some six months ahead, with the main activity taking place one-two months ahead.

## 2. English law

The great majority of the English reported cases on sale of goods arose from international sales of commodities. What follows will examine how the termination rules of English law balance the requirements of legal certainty and predictability against the need to preserve sufficient flexibility and then make some interpretative suggestions.

### *a) Legal certainty and predictability*

Where the term, which has been broken, is a condition, the right to terminate arises irrespective of the gravity of the harm deriving from the breach. Many of the key terms in CIF and FOB contracts are conditions, such as those concerning documentary obligations,<sup>22</sup> the place of shipment,<sup>23</sup> and time such as time for shipment<sup>24</sup> and time for the tender of documents,<sup>25</sup> and time within which an FOB buyer must give notice of readiness to load.<sup>26</sup> It is, therefore, widely believed that English law provides a high measure of legal certainty and predictability. A number of caveats must, however, be entered to qualify this widely held notion. Those caveats are individually well known but their combined weight may not be sufficiently appreciated.

First, where an innominate term is broken, the need to assess whether the breach has gone to the root of the contract undermines legal certainty and predictability. In *Bunge v Tradax*,<sup>27</sup> Lord Lowry said, “decisions would be too difficult if the term were innominate, litigation would be rife and years might elapse before the results were known”. The problem may be exacerbated in international sales of commodities since prolonged litigation may be fought in successive contracts on a sales string.

Secondly, even where the term broken is a condition, the principle *de minimis non curat lex* (“the law pays no attention to trifles”) may operate to deny the right to terminate. This principle is supposed to have a very limited scope of application but since its applicability in individual cases is not always clear, it undermines legal certainty and predictability. Thus in *Jydsk Andels Foderstofforretning v Grands Moulins de Paris*,<sup>28</sup> the contract called for the delivery of 400 tons of bran with the seller’s option to load 10 per cent more or less. The buyer rejected the tender of a weight certificate showing gross weight of 441.147 tons but the court held that the excess of weight was so negligible that it did not entitle the buyer to

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<sup>22</sup> e.g. *Hansa Nord* [1976] 1 Q.B. 44, 70; S.I.A.T. *Di Dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd’s Rep. 53; *Soon Hua Seng v Glencore Grain* [1996] 1 Lloyd’s Rep. 398.

<sup>23</sup> *Petrotrade v Stinnes Handel* [1995] 1 Lloyd’s Rep. 142.

<sup>24</sup> e.g. *Bowes v Shand* (1877) 2 App. Cas. 455 (HL).

<sup>25</sup> e.g. *Toepfer v Lenersan-Poortman* [1980] 1 Lloyd’s Rep. 143.

<sup>26</sup> *Bunge v Tradox* [1981] 1 W.L.R. 711 (HL).

<sup>27</sup> [1981] 1 W.L.R. 711, 720.

<sup>28</sup> [1931] 39 L.L.Rep. 223.

terminate the contract.<sup>29</sup> It is not, however, clear whether the decision would have been the same if the weight had been, say, 442 tons.

Thirdly, where the term broken it is an implied condition regarding satisfactory quality and conformity with description and sample<sup>30</sup> or where goods are delivered in a wrong quantity,<sup>31</sup> sections 15A and 30(2A) provide that the buyer's right to terminate does not arise if the breach is "so slight that it would be unreasonable for [the buyer] to reject" the goods.<sup>32</sup> Those provisions were inserted into the Sale of Goods Act 1979 by the Sale and Supply of Goods Act 1994. If those provisions are applicable to international sales of commodities,<sup>33</sup> they qualify the legal certainty and predictability to the extent that the questions whether breach is "slight" and whether it is "unreasonable" for the buyer to reject, involve value judgment.

Fourthly, whether a term is a condition or an innominate term is not always clear for a number of reasons. If the parties themselves classified the term in their contract, their intention will be given effect. But ascertaining the parties' intention is not always straightforward. Even if a clause is stated in a contract to be a "condition," whether it should be regarded as such is a matter of construction of the contract.<sup>34</sup>

In the absence of the parties' own classification, statutory provisions and judicial precedents must be consulted. But their applications are not always clear.

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<sup>29</sup> See also *Tradox Internacional v Goldschmidt* [1977] 2 Lloyd's Rep. 604. In this case, the contract called for the delivery of a quantity of barley. The court held that the term "4% foreign matters" describing the purity of barley was an innominate term. But earlier, the GAFTA Board of Appeal held that a foreign matter content of 4.10% instead of 4% was commercially insignificant and *de minimis*.

<sup>30</sup> The Sale of Goods Act 1979 implies certain terms into sale contracts and treats them as conditions. Thus in a sale by description, section 13 implies a condition that the goods will correspond with the description. Where the seller sells goods in the course of a business, section 14(2) implies a condition that the goods are of satisfactory quality. If the buyer makes known to the seller any particular purpose for which the goods are being bought, section 14(3) implies a condition that a term that the goods are reasonably fit for that purpose. In a sale by sample, section 15 implies a condition that the bulk will correspond with the sample in quality.

<sup>31</sup> The buyer's right to reject goods for a delivery of wrong quantity is provided by s.30 of the Sale of Goods Act 1979. Paragraph (1) allows rejection for a shortfall and paragraph (2) allows rejection for an excess.

<sup>32</sup> Section 15A provides that in non-consumer sales a breach of the conditions implied by sections 13–15 is not to be treated as a breach of a condition but may be treated as a breach of a warranty if the breach is "so slight that it would be unreasonable for [the buyer] to reject" the goods. Section 30(2A) precludes the buyer's right to reject for a delivery of wrong quantity if the shortfall or excess "is so slight that it would be unreasonable for him to do so." While the *de minimis* principle may exclude the right to claim damages as well as the right to terminate, sections 15A and 30(2A) merely restrict the right to terminate. While the *de minimis* principle may apply to the breach of innominate terms or warranties as well as conditions to exclude the right to claim damages, section 15A merely applies to the breach of certain conditions. But the *de minimis* principle presumably applies only where the breach is more trivial than "slight" within the meaning of sections 15A and 30(2A).

<sup>33</sup> Some commentators argue that they are not. See below for discussion.

<sup>34</sup> *Schuler v Wickman* [1973] 2 Lloyd's Rep. 53 (HL) (This case concerns a distributorship agreement but the ruling has general applicability.)

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Thus s.13 of the Sale of Goods Act 1979 makes “description” a condition, but the case law suggests that not all the descriptions of goods are conditions: for example, in *Tradax Internacional v Goldschmidt*,<sup>35</sup> the term describing the purity of barley as “4 per cent foreign matters” was held to be an innominate term while in *Tradax Export v European Grain & Shipping*,<sup>36</sup> the court and the arbitrators held that the term describing the quality of soya bean meal as “maximum 7.5 per cent fibre” to be a condition, although the GAFTA Board of Appeal held that it was a warranty.

Furthermore, the classification made in previous cases cannot be taken as definitive since the significance of a term depends also on the facts of the case. For example, the proposition that time clauses are conditions is widely accepted in commercial contracts, especially in CIF, C&F and FOB contracts. But it is not followed in every case. In *State Trading Corporation of India v M. Golodetz*,<sup>37</sup> the seller in a C&F sale of sugar agreed to provide within seven days a guarantee that it would buy, to a value of 60 per cent of the value of the sugar, other goods from the buyer some time during the period of six months after the date of the contract. The sellers failed to open the guarantee in time. The court, acknowledging that the seller was in breach of a time clause, nevertheless held that the clause was not a condition on the ground that it was not a condition precedent to other performances under the contract, that it did not relate to the main and immediate transaction but related to another transaction which did not fall to be performed for further six months, and that it was relatively unimportant in terms of money.

Where the parties did not classify the term themselves and there is no relevant statutory provision or judicial precedent, the classification of terms depends upon the construction of the contract. After the category of innominate terms was first recognised in *Hongkong Fir Shipping v Kawasaki Kisen Kaisha*,<sup>38</sup> there was a period in which the courts displayed a tendency to regard terms as innominate terms rather than as conditions.<sup>39</sup> In *Hansa Nord*,<sup>40</sup> Roskill L.J. said “[i]n my view, a Court should not be over ready, unless required by statute or authority so to do, to construe a term in a contract as a ‘condition’”. In *Reardon Smith Line v Yngvar Hansen-Tangen*,<sup>41</sup> Lord Wilberforce described a number of the older cases as “excessively technical” and suggested that they should be re-examined by the House of Lords. The pendulum has, however, swung back since the House of Lords decision in 1981 in *Bunge v Tradax*<sup>42</sup> and the present trend appears to be

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<sup>35</sup> [1977] 2 Lloyd's Rep. 604.

<sup>36</sup> [1983] 2 Lloyd's Rep. 100.

<sup>37</sup> [1989] 2 Lloyd's Rep. 277.

<sup>38</sup> [1962] 2 Q.B. 26 (This case concerned a charterparty.).

<sup>39</sup> See *Hansa Nord* [1976] Q.B. 44 (the term which called for shipment to be made in good condition); *Tradax Internacional v Goldschmidt* [1977] 2 Lloyd's Rep. 604 (the term describing the purity of barley as “4% foreign matters”).

<sup>40</sup> [1976] Q.B. 44, 70 (CA).

<sup>41</sup> [1976] 2 Lloyd's Rep. 621 at 626. This case was concerned with a shipbuilding contract.

<sup>42</sup> [1981] 1 W.L.R. 711 (HL) (the term on the time within which an FOB buyer must give notice of readiness to load).



to favour classification as conditions.<sup>43</sup> In *Bunge v Tradax*,<sup>44</sup> Lord Wilberforce approved the Roskill L.J.'s statement made in *Hansa Nord* but held that in suitable cases, the courts should not be reluctant to hold that an obligation had the force of a condition if the intention of the parties in the contract so indicated. The courts sometimes stress the need for predictability and certainty. Thus in *Petrotrade v Stinnes Handel*,<sup>45</sup> when classifying the term stipulating the port of shipment as a condition, the Colman J. held:

“ . . . if, the place of shipment were only an innominate term, disputes would frequently arise as to the buyer's right to reject a tender of goods at a port other than that contracted for. There would be an issue whether it was so far from, or had such different characteristics from, the port of delivery identified in the contract as to deprive the buyer of substantially the whole benefit of the sale contract. The uncertainty to which such disputes would be bound to give rise and the certainty which is achieved if the place of shipment is a condition of the contract is clearly a highly relevant consideration in deciding how to classify the term”.

Disagreements can, however, still arise on the classification of hitherto unclassified terms. Thus, in *The Naxos*,<sup>46</sup> at issue was the term which imposed on the FOB seller an obligation to have the cargo ready for delivery at any time within the shipment period. The judge at first instance and the majority of the Court of Appeal held that it was not a condition but the House of Lords by a majority overruled.

#### *b) Unmeritorious termination*

As a general rule, if the seller is in breach of a condition, the buyer can terminate the contract even if the harm deriving from the breach is insignificant and is not the buyer's motive for termination. This is because the buyer does not have to be able to prove that the breach has caused him any actual harm. Breach of condition is an exception to, and not an application of, the requirement of substantial failure in performance<sup>47</sup> because “[i]t is by construing a contract (which can be done as soon as the contract is made) that one decides whether a term is . . . a condition, and not by considering the gravity of the breach of that term (which cannot be done until the breach is imminent or has occurred)”.<sup>48</sup> Since international sales of

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<sup>43</sup> See, e.g. *Tradax Export v European Grain & Shipping* [1983] 2 Lloyd's Rep. 100 (the term describing the quality of soya bean meal as “maximum 7.5% fibre”) c.f. *Tradax Internacional v. Goldschmidt* [1977] 2 Lloyd's Rep. 604 (above); *The Naxos* [1991] 1 Lloyd's Rep. 29 (HL) (the term which imposed on the FOB seller an obligation to have the cargo ready for delivery at any time within the shipment period); *Petrotrade v Stinnes Handel* [1995] 1 Lloyd's Rep. 142 (the term identifying the place of shipment).

<sup>44</sup> At 716.

<sup>45</sup> [1995] 1 Lloyd's Rep. 142.

<sup>46</sup> [1991] 1 Lloyd's Rep. 29 (HL).

<sup>47</sup> Treitel, *The Law of Contract* (10th ed., 1999), p.734.

<sup>48</sup> *Bunge v Tradax* [1981] 1 W.L.R. 711 at 719, per Lord Lowry.

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commodities on CIF or FOB terms involve numerous obligations classified as conditions, they are vulnerable to unmeritorious termination.

In the following cases, the courts allowed the buyers to terminate the contracts even though it is probable that the termination was not motivated by any harm deriving from the breach but the buyer's real motive was to escape from a bad bargain. In *Bowes v Shand*,<sup>49</sup> a CIF contract for the sale of rice called for shipment during March or April but the actual shipment was made in February. The court allowed the buyer to terminate the contract, notwithstanding that there was probably no difference in quality between the rice actually shipped and any rice which might have been shipped in the contractual shipment period. In *Re Moore and Landauer*,<sup>50</sup> a contract for the sale of tinned peaches called for them to be packed in cases of 30 tins each but the sellers tendered a consignment, part of which consisted of tins packed in cases of 24 each. The court allowed the buyer to terminate the contract against the falling market, notwithstanding that the umpire had found that there was no difference in the market value of the goods whether they were packed 24 tins in a case or 30 tins in a case. In *Arcos v Ronaasen*,<sup>51</sup> a contract for sale of timbers called for the staves to be of certain thickness but when the seller delivered, only about five per cent conformed to that requirement. The court allowed the buyer to terminate the contract, notwithstanding that the umpire had found that the goods were commercially within the contractual specification, merchantable, and reasonably fit for the purpose for which they were bought. In *Vargas Pena Apezteguia Y Cia v Peter Cremer*,<sup>52</sup> an FOB contract for the sale of cottonseed expeller called for a fat content to be no more than 15 per cent but a certificate of quality tendered showed a content of 15.73 per cent. The buyer rejected the documents but sold the goods on, paying the seller only the market price rather than the higher contractual price. The court found that the breach relied upon had caused the buyers no loss at all and that the buyer's conduct was caused by the fall in the market but nevertheless held that the buyer had the right to terminate the contract, although on the facts of the case, termination was not allowed since the buyer was taken to have accepted the documents.

Where, on the other hand, the term broken is an innominate term, the buyer cannot terminate the contract unless the breach goes to the root of the contract and, therefore, it is not likely that he can terminate when the harm deriving from the breach is not the motive for termination. Thus in *Hansa Nord*,<sup>53</sup> the essential facts of which have been set out above, the Court of Appeal classified the term calling for shipment to be made in good condition as an innominate term and did not allow the buyer to terminate the contract.

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<sup>49</sup> (1877) 2 App. Cas. 455 (HL).

<sup>50</sup> [1921] 2 K.B. 519 (CA).

<sup>51</sup> [1933] A.C. 470.

<sup>52</sup> [1987] 1 Lloyd's Rep. 394.

<sup>53</sup> [1976] Q.B. 44.

Even where the term broken is a condition, if it is an implied term concerning satisfactory quality or conformity with description and sample<sup>54</sup> or if delivery is made in a wrong quantity, unmeritorious termination will often not be allowed, if sections 15A and 30(2A) apply to international sales of commodities and the seller can prove that the breach is so slight that it is unreasonable for the buyer to reject the goods.

*c) Evaluation and suggestion*

It follows from the above observation that there is a trade off between legal certainty and flexibility on the one hand and flexibility and individual justice on the other. The classification as conditions enhances legal certainty and flexibility but at the sacrifice of flexibility and results in occasional injustice. The classification as innominate terms and restrictions imposed by sections 15A and 30(2A) on the buyer's rights to terminate the contract undermine legal certainty and flexibility but preserve flexibility to avoid unfair results. But it must be noted that the difficulty of classifying terms impairs legal certainty and predictability without introducing compensating flexibility.

To achieve a reasonable balance between the requirements of legal certainty and predictability and the need to preserve sufficient flexibility within the present framework of law,<sup>55</sup> it is submitted that the following interpretation should be taken:

- (1) Sections 15A and 30(2A) should be regarded as applicable to international sales of commodities. This would safeguard the essential flexibility.
- (2) Section 13 should cover widely the terms concerning the description of goods and the carriage of goods and the reliance on innominate terms should be lessened. This would enhance legal certainty and predictability.
- (3) The breach of time clauses and of documentary obligations should be excluded from the coverage of sections 15A and 30(2A). This would ensure the essential legal certainty and predictability.
- (4) The application of sections 15A and 30(2A) should be determined by looking only at objective factors. This would prevent the legal certainty and predictability from being unduly qualified.
- (5) The parties should be allowed to contract out. This would preserve the essential flexibility the parties in individual cases may like to retain.

Each of those suggestions will be explained in turn below.

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<sup>54</sup> ss.13 to 15 of the Sale of Goods Act 1979.

<sup>55</sup> More far-reaching suggestions for reform which goes beyond the present framework of law will not be attempted in this article. Bridge, "The Evolution of Modern Sales Law" [1991] L.M.C.L.Q. 52, 68 observes:

"As much as a legal purist might argue the case for a wholesale revision of sales law, it is quite plain that such a project is not sufficiently economically important to lay claim to a substantial share of the nation's wealth. It is also quite plain that the great diversity among sales transactions would make that a most difficult venture".

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### i) Application of sections 15A and 30(2A) to international sales of commodities

Some commentators take the view that the application of sections 15A and 30(2A) are excluded in the typical CIF or FOB sales, arguing that the parties in such sales have under section 15A(2)<sup>56</sup> impliedly agreed to exclude them<sup>57</sup> and that the use of such trade terms is evidence of a contrary usage of trade<sup>58</sup> within the meaning of section 30(5).<sup>59</sup> This interpretation stems from the strong requirements of commercial certainty in those sales but whether it will commend itself to the courts remains to be seen. It is submitted that a better view is that sections 15A and 30(2A) apply to international sales of commodities save in respect of the breach of time clauses and of documentary obligations. The application of those provisions should not be totally excluded for the following four reasons.

First, although it is true that international sales of commodities demand a high degree of certainty and predictability, it does not seem sufficiently appreciated that they are also particularly susceptible to attempts of unmeritorious termination. It would seem necessary to safeguard the essential flexibility to deny unmeritorious termination.

Secondly, it is possible to apply sections 15A and 30(2A) without unduly impairing certainty. As will be considered later, the application of those provisions can be determined by looking solely at objective factors.

Thirdly, sections 15A and 30(2A) are capable of striking a right balance between the requirements of legal certainty and predictability and the preservation of the essential flexibility. Treitel says that section 15A has sacrificed certainty without attaining justice. For the purpose of promoting justice, Treitel says that the right to reject should be restricted to serious breaches and not merely excluded if the breach is slight.<sup>60</sup> This observation seems, with respect, right for most sales. International sales of commodities, however, seem to demand a higher degree of legal certainty. Sections 15A and 30(2A) seems to be capable of hitting the right balance by excluding termination only in exceptional cases and by putting the onus on the seller (the party disputing the lawfulness of termination).

Fourthly, if sections 15A and 30(2A) are not applicable, the essential flexibility may not be preserved without distorting obligations. Thus, if in one case the court excludes unmeritorious termination by holding the term broken to be an innominate term, that classification becomes binding upon lower courts in subsequent cases regardless of whether unmeritorious termination is attempted. This would impair legal certainty if the term should have been classified as a

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<sup>56</sup> Section 15A(2) provides that the restriction on the buyer's right of termination under section 15A does not apply where a contrary intention appears in, or is to be implied from, the contract.

<sup>57</sup> Guest (ed.), *Benjamin's Sale of Goods* (5th ed., 1997) para. 18–224 (by Treitel). For a less unequivocal suggestion, see McKendrick (ed.), *Sale of Goods* (2000) para.10–005 (by McKendrick), which says that much is likely to depend on the facts of the case but in the case of commodity contracts it might not be difficult to lead evidence of a contrary intent.

<sup>58</sup> Guest (ed.), *Benjamin's Sale of Goods* (5th ed., 1997) para.19–012 (by Treitel).

<sup>59</sup> Section 30(5) provides that the restriction under section 30(2A) does not apply where there is a contrary usage of trade.

<sup>60</sup> Treitel, *The Law of Contract* (10th ed., 1999) p.745.

condition in the first place. There is also a danger that the obligation of satisfactory quality implied by s.14(2) of the Sale of Goods Act 1979 may be distorted.<sup>61</sup> In *Hansa Nord*, Lord Denning M.R. said that the condition of 'merchantable quality' implied by s.14(2) of the Sale of Goods Act 1893 then in force was broken only if the defect was so serious that a commercial man would have thought that the buyer should be able to reject the goods. If section 15A is applicable, compliance with the implied condition of satisfactory quality could be assessed without having to rely heavily on the consideration of desirability to permit termination.

**ii) Coverage of section 13** When Lord Wilberforce in *Reardon Smith Line Ltd v Hansen Tangen*<sup>62</sup> described some of the older cases as "excessively technical" and suggested that they should be re-examined by the House of Lords, he acknowledged that a "strict and technical view" might have to be taken "as regards the description of unascertained future goods (e.g. commodities) as to which each detail of the description may be assumed to be vital." Now that the essential flexibility is preserved by section 15A, it is submitted that the terms which describe the goods should be widely classified as conditions under section 13, whether they appear under the heading "commodity" or "specifications" in the contract. Thus a term as to impurities of goods, which was in one case<sup>63</sup> held to be an innominate term,<sup>64</sup> should now be classified as a condition under section 13. Through this treatment, certainty and predictability would be enhanced and at the same time the essential flexibility is preserved under section 15A.

Some terms concerning the carriage of goods have been classified as conditions on the basis that they are part of the description of the goods, though section 13 has not necessarily been applied as such. Thus in *Messers v Morrison's Export Company*,<sup>65</sup> the court held that the words "To be loaded on deck 1/3" in a sale of timber formed part of the description of the timber and allowed the buyer to terminate the contract on the ground that more than one-third of the timber was shipped on deck. Also, in *Petrotrade v Stinnes Handels*, the court held that the place of shipment formed part of the description of the goods and therefore classified it as a condition but without referring to section 13. Whether terms were description within the meaning of section 13 was not an important question until section 15A was introduced. Now that section 15A preserves the essential flexibility, it is submitted that section 13 should cover not only the terms which describe goods *per se* but also the terms concerning the carriage of goods, such as those identifying the name of the ship and the ports of shipment and destination,

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<sup>61</sup> The Law Commission, Report on Sale and Supply of Goods, Law Com. No.160, Scot. Law Com. No. 104, 1987, Cm.137, para.2.26.

<sup>62</sup> [1976] 2 Lloyd's Rep. 621, 626.

<sup>63</sup> *Tradax Internacional v Goldschmidt* [1977] 2 Lloyd's Rep. 604 ("barley containing no more than 4% foreign matter").

<sup>64</sup> c.f. *Tradax Export v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep. 100, in which the term "maximum 7.5% fibre" in sale of soya bean meal was held as a condition as part of the description of the goods.

<sup>65</sup> [1939] 1 All E.R. 92.

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those concerning the stowage of goods (e.g. carriage on deck), and those concerning the route of voyage (e.g. direct shipment<sup>66</sup> and transshipment). The wide coverage of section 13 would enhance legal certainty and at the same time preserve flexibility under section 15A.

**iii) Exclusion of the breach of time clauses and of documentary obligations from the coverage of sections 15A and 30(2A)** Although sections 15A and 30(2A) speak only of goods and not of documents, it is arguable that they should apply to the breach of documentary obligations.<sup>67</sup> It is also possible to argue that section 15A should apply to the breach of time of shipment by relying upon the authorities<sup>68</sup> which treated time of shipment as part of the description of goods.<sup>69</sup> However, when section 15A was drafted, it was not the intention of the Law Commission to alter the effect of the breach of time clauses in commercial contracts.<sup>70</sup> Moreover, for the reasons spelt out below, time clauses and documentary obligations should be strictly complied with. It is, therefore, submitted that the breach of time clauses and of documentary obligations should be excluded from the coverage of sections 15A and 30(2A).<sup>71</sup>

### 1) *Breach of time clauses*

Time clauses call for strict compliance because the requirements of legal certainty and predictability are particularly strong. Unlike other forms of breach, the full extent of the breach of time clauses cannot be ascertained while the delay continues. Also, facing the adverse market movement while the delay continues can be intolerable. The innocent party should, therefore, be allowed to terminate the contract forthwith and proceed with a covering transaction. Although exclusion of the application of section 15A would permit unmeritorious termination for a technical breach of a time clause, it may well be an acceptable price to pay in order to ensure the essential legal certainty and predictability.

### 2) *Documentary breach*

International sales of commodities typically call for the tender of a commercial invoice, bills of lading and a marine insurance policy.<sup>72</sup> In addition, other

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<sup>66</sup> In *Bergerco U.S.A. v Vegoil* [1984] 1 Lloyd's Rep. 440, the words calling for direct shipment was construed as restricting the ship on which the goods may be loaded ("direct ship") rather than as importing continuing undertaking to take the direct route.

<sup>67</sup> Debattista, *The Sale of Goods Carried by Sea* (2nd ed., 1998) para.9–15, though he notes in a footnote "no more than arguable."

<sup>68</sup> Beginning with *Bowes v Shand* (1877) 2 App. Cas. 455 (HL).

<sup>69</sup> Mckendrick (ed.), *Sale of Goods* (2000) 12–06 (by McKendrick).

<sup>70</sup> The Law Commission, *Report on Sale and Supply of Goods*, Law Com. No.160, Scot. Law Com. No.104, 1987 Cm 137) para.4.24. This report accompanied the bill which later became the Sale and Supply of Goods Act 1994.

<sup>71</sup> On documentary breach, see also Debattista, *The Sale of Goods Carried by Sea* (2nd ed., 1998) para.9–15; Guest (ed.), *Benjamin's Sale of Goods* (5th ed., 1997), paras 19–151 and 19–035 (by Treitel).

<sup>72</sup> An insurance policy is not required in the case of straight FOB contracts.

documents such as certificates of origin, quality, and weight may have to be tendered so that those matters are assessed by disinterested inspection agencies. Documentary breach arises if those documents are not in conformity with the sale contract in respect of such particulars as the origin, condition, quality, or quantity of the goods, name of the ship, shipment time, stowage of the goods (e.g. on deck or in hold), route of the voyage (e.g. direct shipment and transshipment), and ports of shipment and destination. The following reasons explain why documentary obligations should be strictly complied with.

First, in a sale calling for payment “cash against documents,” the buyer has to pay the price against the tender of documents. Even if the buyer is interested in the physical delivery of the goods, the documents are the only source of information and it is often difficult to assess the gravity of the harm indicated by documentary defects without the benefit of having the goods to examine. In *Soon Hua Seng v Glencore Grain*, Mance J. said<sup>73</sup>:

“A buyer presented with shipping documents must make a judgement on the documents whether or not they are acceptable. He does not, at least normally, have the goods available for inspection at that stage. He cannot evaluate how significant any documentary discrepancy will or may prove. He is entitled to know where he stands. All these factors point to a strict view of compliance with documentary requirements such as the present.”

Secondly, since international sales of commodities often form strings, it may well be that the buyers can only tender strictly conforming documents to fulfill their respective on-sale contracts. Commodities are standardised<sup>74</sup> by exchanges and inspection agencies by reference to their origin, grades,<sup>75</sup> the season’s overall quality and the calendar months of delivery. The prices of futures contracts for each standardized commodity on exchanges are often tracked by the prices of forward delivery contracts for the same or similar commodities in the physical market. The contracts in the physical market for the same commodity are eventually strung together by, in the case of CIF contracts, notice of appropriation. It is, therefore, vital for the documents tendered thereafter to be strictly conforming. In *Proctor & Gamble v Becher*, Kerr L.J. said<sup>76</sup>:

“There is usually no difference whatever between goods loaded at the end of January instead of the beginning of February. The goods are the same. But [commodity dealings are] not a trade in goods but in contracts for the shipment of goods. A January contract may be far more valuable than one for shipment in February”.

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<sup>73</sup> [1996] 1 Lloyd’s Rep. 398, 402. See also *S.I.A.T. Di Dal Ferro v Tradax Overseas SA*, [1980] 1 Lloyd’s Rep. 53, 62, *per* Megaw L.J.

<sup>74</sup> The standardisation of commodities performs an important role of aiding the ability of short sale and long purchase by making it easier to find matching contracts to cover. This in turn increases liquidity, contributing to the stabilisation of the market.

<sup>75</sup> Grades are determined by, for example, protein content (in the case of grains) and impurities (in the case of crude oils).

<sup>76</sup> [1988] 2 Lloyd’s Rep. 21, 22.

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In the same case, Nicholls, L.J. said<sup>77</sup>:

“ . . . a falsely dated bill of lading becomes effectively unmerchantable, in the sense of being non-negotiable (or, more accurately, non-transferable) once its true date is known. Its presentation by the sellers was a breach of contract even if the goods were in fact shipped during the contractual shipment period . . . [The buyer] may have found themselves ‘locked in’ on a falling market by holding a non-transferable bill of lading, when they might otherwise have been able to sell the goods afloat . . . [I]f the bill of lading had been correctly dated they could have used it to fulfil a previously concluded sub-sale covered by a notice of appropriation with which they were now unable to comply”.

Thirdly, requiring strict compliance with documentary obligations is desirable as it is generally consistent with the requirement of strict compliance under letters of credit.<sup>78</sup> Strict compliance with description under sale contracts should be understood in the same sense as under art.37(c) of the UCP 500,<sup>79</sup> which reads:

The description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.

Regarding the quantity of goods, art.39(b) of the UCP 500 provides for some tolerance. It reads:

Unless a Credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 5 per cent more or 5 per cent less will be permissible, always provided that the amount of the drawings does not exceed the amount of the Credit. This tolerance does not apply when the Credit stipulates the quantity in terms of a stated number of packing units or individual items.

In this respect, it is submitted that no tolerance should be permitted under sale contracts, except where the parties agree otherwise. The legislation of a national law cannot be delegated to the ICC. Although it is desirable for the law of sale to be consistent with the law of letters of credit, it is not essential.

In a sales string, the intermediate parties have no physical interest in the commodity and are merely trading documents but the first seller makes, and the last buyer takes, physical delivery. Should the same strictness be required of the compliance with documentary obligations whether or not the buyer is on a string of buyers; whether at the date of the tender of the defective documents he has or has not resold; or whether thereafter he might desire to resell by passing on the

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<sup>77</sup> *ibid.* at 30.

<sup>78</sup> In *S.I.A.T di dal Ferro v Tradox Overseas SA* [1980] 1 Lloyd's Rep. 53 at 62, Megaw L.J. asked rhetorically whether it is desirable or defensible to distinguish between documentary obligations under sale contract and under letters of credit.

<sup>79</sup> International Chamber of Commerce (ICC), *Uniform Customs and Practice for Documentary Credits (UCP) 500* (ICC Publication 500).



documents, rather than taking delivery of the goods on his own account?<sup>80</sup> All those situations could give rise to the same difficulty of assessing the gravity of the harm indicated by the documentary defects without the benefit of having the goods to examine. If the buyer has not resold at the date of the tender of the defective documents, if the market is rising, he may legitimately wish to take advantage of it by selling the goods on but if he does not have conforming documents, he may not be able to do so. For those reasons, it is submitted that the same strictness of compliance should be required in all those situations.

The last buyer can reject goods as well as documents but the rejection of goods is, if the submission made above is accepted, subject to the restrictions imposed by sections 15A and 30(2A). This would mean that different standards of compliance apply between documentary obligations and physical obligations.<sup>81</sup> Where a breach which entitles the buyer to reject goods is discovered or discoverable from documents at the time of their tender, if the buyer does not reject the documents, he is estopped from later raising the same breach as grounds for rejecting the goods on their arrival.<sup>82</sup> To this extent, sections 15A and 30(2A) do not come into operation even in respect of physical breach. Where, on the other hand, a breach, which entitles the buyer to reject goods, is neither discovered nor discoverable from documents, the buyer is allowed to reject the goods on their arrival.<sup>83</sup> This right of rejection of goods would be subject to the restrictions imposed by sections 15A and 30(2A). Then, should the buyer be awarded damages for the loss of opportunity to reject documents concealing the breach? Such an award of damages would effectively allow the buyer to put back the market decline to the seller. Notwithstanding that, such an award was made in *Finlay (James) v Kwik Hoo Tong Handel Maatschappij*<sup>84</sup> and the court in *Kwei Tek Chao v British Traders and Shippers*<sup>85</sup> extended this decision to the case where the buyer had yet to lose the right to reject goods, on the ground that it would be unreasonable to

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<sup>80</sup> In *S.I.A.T. Di Dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep. 53 at 62, Megaw L.J. asked and left unanswered whether distinctions should be made by reference to those criteria.

<sup>81</sup> In *Hansa Nord* [1976] Q.B. 44 at 70, Roskill L.J. held that clausing a bill of lading was a breach of condition while the defects in the condition of the goods which led to that clausing was a breach of an innominate term. He accepted, after initial hesitation, this conclusion which would lead to different standards of performance between the documentary obligations and the physical obligations.

<sup>82</sup> *Panchaud Freres SA v Etablissements General Grain Company* [1970] 1 Lloyd's Rep. 53 (CA). In this case, the false dating of the bill of lading (dated within the contractual period of shipment) was not discovered but was held discoverable since a certificate of quality tendered with the bill indicated that the goods had been inspected ashore after the contractual period of shipment. The buyer was not allowed to reject the goods later tendered.

<sup>83</sup> *Bergerco U.S.A. v Vegoil* [1984] 1 Lloyd's Rep. 440. In this case, deviation from the direct route was neither discovered nor discoverable by the bank which accepted on behalf of the buyer a certificate from the shipowner stating that the vessel would sail directly. The buyer was allowed to reject the goods, which subsequently arrived on the ground of the seller's breach to ship them on a direct ship.

<sup>84</sup> (1928) 32 Ll.L.Rep. 245, CA.

<sup>85</sup> [1954] 2 Q.B. 459.

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expect the buyer who had paid the price on the tender of documents to reject goods which constituted his only security for his claim against the seller. Those decisions have attracted many criticisms<sup>86</sup> since they effectively put the buyer into the position he would have been in, not if the contract had been performed, but if it had never been made. Since those criticisms are valid, it is submitted that if, after accepting the documents concealing the seller's breach, the buyer cannot reject goods due to the restrictions imposed by sections 15A or 30(2A), he should not be allowed to claim damages for the loss of opportunity to reject the documents.<sup>87</sup>

**iv) Interpretation of sections 15A and 30(2A)** The suggested exclusion of the breach of time clauses and of documentary obligations from the coverage of sections 15A and 30(2A) would result in the substantial curtailment of the scope of application of those provisions. Their operation is further restricted by the "certificate final" clauses, which are often found in standard form contracts making certificates issued by independent inspectors final and binding on both parties. The narrowness of the scope would not be against the drafter's intention since sections 15A and 30(2A) were "not intended as a major alteration in the law".<sup>88</sup> What follows will consider when the breach is "so slight that it would be unreasonable . . . to reject."

### 1) *The breach is so slight*

The Law Commission's earlier draft used to qualify the words "the breach" in section 15A with the words "the nature and consequences of."<sup>89</sup> Those words were deleted on the ground that the test of the consequences of breach might admit an element of subjectivity.<sup>90</sup> Whatever is meant by the "nature" of breach, the extent of deviation itself (e.g. "X centimetres longer", "Y kg more") is meaningless. The magnitude of breach can only be measured properly by assessing the gravity of the harm deriving from it. Since the Law Commission's intention was to avoid introducing subjective factors, it is submitted that only the objectively measurable harm should be assessed.

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<sup>86</sup> McGregor, *McGregor on Damage* (16th ed., 1997) para.918; Guest (ed.), *Benjamin's Sale of Goods* (5th ed., 1997) para.19-173 (by Treitel); Treitel, "Damages for Breach of a Cif Contract" (1988) L.M.C.L.Q. 457, 462 points out that considerations of certainty cease to be relevant once the buyer has lost the extra-judicial remedy of rejection and is claiming damages before a court, since certainty is no more promoted by adopting one measure of damages than another. c.f. Debattista, *The Sale of Goods Carried by Sea* (2nd ed., 1998) para.9-32; Bridge, *The International Sale of Goods* (1999) para.9.118.

<sup>87</sup> See also Guest (ed.), *Benjamin's Sale of Goods* (5th ed., 1997) para.19-172 (by Treitel).

<sup>88</sup> The Law Commission, *Report on Sale and Supply of Goods* (Law Com. No.160, Scot. Law Com. No.104, 1987 Cm.137) para.4.21.

<sup>89</sup> The Law Commission Working Paper No.85 and the Scottish Law Commission, Consultative Memorandum No.58, *Sale and Supply of Goods* (1983) summary of provisional recommendations, at para.7.1 (11).

<sup>90</sup> The Law Commission, *Report on Sale and Supply of Goods* (Law Com. No.160, Scot. Law Com. No.104, 1987 Cm.137 n.23 at p.41.

The objectively measurable harm will usually be the difference in the commercial value between the performance promised and the performance tendered. The facts of the past cases suggest that it will not be too difficult to establish that the difference in the commercial value is slight. Thus in *Vargas Pena Apezteguia Y Cia v Peter Cremer*,<sup>91</sup> the arbitrators found that there was no difference whatsoever in market value between cottonseed expeller with a maximum fat content of 15 per cent and that with a fat content of 15.73 per cent. In *Tradax Internacional v Goldschmidt*,<sup>92</sup> the GAFTA Board of Appeal found that the excess of foreign matter in barley by 0.10 per cent was commercially insignificant and *de minimis*. In *Re Moore and Landauer*,<sup>93</sup> the umpire found that there was no difference in the market value of the canned fruits whether they were packed 24 or 30 tins in a case.

Even if the difference in the commercial value is “slight”, the buyer’s particular purpose of purchase may make the harm to him more than “slight”. If the buyer has made known to the seller his particular purpose, the harm should be measured by reference to his purpose. However, if the buyer has not made known to the seller his particular purpose or even where he has, if he says that he has decided to change the purpose, the harm deriving from the buyer’s particular purpose should be discounted as it cannot be measured objectively.

## 2) *It would be unreasonable to reject*

In the Working Paper, the Law Commission says,<sup>94</sup> “[w]e suspect that in most cases businessmen will have a shrewd idea whether rejection would or would not be unreasonable.” Most of the cases in which businessmen will find termination unreasonable would be those in which the harm deriving from breach is not the motive for termination. Sections 15A and 30(2A) should, therefore, target such cases.

The buyer is, however, unlikely to admit that the harm deriving from breach is not his motive for termination. Then, inquiring into his real motive is difficult or often impossible since he can terminate the contract without specifying reasons or even giving wrong reasons.<sup>95</sup> When drafting sections 15A and 30(2A), the Law Commission sought to avoid introducing the question of the buyer’s motive<sup>96</sup> and its Report says that the buyer’s motive for termination is irrelevant to the

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<sup>91</sup> [1987] 1 Lloyd’s Rep. 394 (case concerning rejection of documents).

<sup>92</sup> [1977] 2 Lloyd’s Rep. 604.

<sup>93</sup> [1921] 2 K.B. 519 (CA).

<sup>94</sup> The Law Commission Working Paper No.85 and the Scottish Law Commission, Consultative Memorandum No.58, *Sale and Supply of Goods* (1983) para.4.60.

<sup>95</sup> *British and Beningtons Ltd v NW Cachar Tea Co* [1923] A.C. 48.

<sup>96</sup> It was decided that the concept of “good faith” should not be introduced. See the Law Commission, Working Paper No.85 and the Scottish Law Commission, Consultative Memorandum No.58, *Sale and Supply of Goods* (1983) para.4.57.

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application of section 15A.<sup>97</sup> Whether it would be unreasonable to reject should, therefore, be determined by looking solely at objective factors.

This means that the test of unreasonableness here cannot capture all the cases which sections 15A and 30(2A) should target, *i.e.* the cases where the harm deriving from breach is not the motive for termination. Also, to avoid unduly qualifying legal certainty, the number of factors to be considered should be limited. The Law Commission rejected the idea that there should be a list of circumstances in which rejection or non-rejection is permitted on the ground that the circumstances of sale transactions are so infinitely variable that any set of rules would both be extremely lengthy and yet incomplete.<sup>98</sup> While various factors may be relevant,<sup>99</sup> in international sales of commodities, the current market position relative to the position at the time of the conclusion of the contract, together with the magnitude of the breach, are powerful indicators of the motive for termination. The application of sections 15A and 30(2A) in international sales of commodities should, therefore, be determined as follows.

If the market has risen since the conclusion of the contract (scenario 1), the buyer would usually not seek to terminate the contract unless the breach causes him actual harm. Even if he no longer needs the goods, he may still wish to keep them as he may be able to sell them on at the current higher market price. Therefore, if in this scenario the buyer seeks termination, even if the objectively measurable harm is “slight”, the buyer may well have a particular purpose of purchase which he has not made known to the seller but which would make the harm to him more than “slight”. The termination is, therefore, likely to be motivated by the harm deriving from the breach. For this reason, sections 15A and 30(2A) should not be applied to exclude the buyer’s right of termination.

If the market is at the same level as at the time the contract was concluded (scenario 2), the buyer would usually not terminate the contract unless the breach causes him actual harm or unless he no longer needs the goods. Therefore, if in this scenario the buyer seeks termination and if the objectively measurable harm is “slight”, the buyer may be seeking termination because he no longer needs the goods. This may be considered to be an unmeritorious termination because the harm deriving from the breach is not the motive for termination. It is, however, also possible that the buyer’s particular purpose of purchase which he has not made known to the seller would make the harm to the buyer more than “slight.” Since it is not possible to differentiate those two possibilities by objective factors,

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<sup>97</sup> The Law Commission, *Report on Sale and Supply of Goods*, Law Com. No.160, Scot. Law Com. No.104, 1987 Cm.137) para.4.19.

<sup>98</sup> *ibid.* para.4.17.

<sup>99</sup> McKendrick (ed.), *Sale of Goods* (2000) paras 8–067, 068 and 069 (by Mitchell) suggests that some possible factors are the difference in value between the performance promised and the performance tendered, the importance of the breach to the buyer and the seller’s state of mind. For the last of those factors in particular, see also Brownsword, “Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract” (1992) 5 *Journal of Contract Law* 83.

sections 15A or 30(2A) should not be applied to exclude the buyer's right of termination.

If the market has fallen since the conclusion of the contract (scenario 3), the buyer would have an incentive to terminate the contract even if he still needs the goods (or goods of the same description) or even if the breach causes him no actual harm. Therefore, if in this scenario the buyer seeks termination and if the objectively measurable harm is "slight", the buyer's motive for termination may well be to escape from a bad bargain caused by the market fall. Sections 15A or 30(2A) should, therefore, be applied to exclude the buyer's right of termination. If the buyer's particular purpose of purchase which he has not made known to the seller makes the harm to him more than "slight," although the magnitude of the breach may be the motive for termination, in order to keep the test objective, sections 15A or 3(2A) should still be applied to exclude the right of termination.

In all the above three scenarios, the buyer's prediction over the future movement of market may also influence his motive. But it should be discounted in order to keep the test objective.

**v) Contracting out** The parties have a large measure of freedom to determine their right of termination. Thus the parties may classify particular terms in their contract. They may also contract out of section 15A by special agreement if they opt for stricter requirements of compliance. The special agreement is, however, more likely to seek to relax the strictness of the requirements. Even in international sales of commodities, the extensive rights of rejection may be regarded by the traders with some disfavour and it is not uncommon for the standard form contracts to provide for tolerance with a price allowance in matters of time and quality. For example, as for time of shipment, clause 26 of GAFTA No.79 (CIF) provides<sup>1</sup>:

EXTENSION OF SHIPMENT The period for shipment stipulated in this contract . . . shall . . . if claimed by the shipper, be extended for not more than eight days, provided that the shipper gives notice claiming extension . . . ; the notice . . . shall be passed on by intermediary sellers to their respective buyers . . . the sellers under their contract shall make an allowance to their buyers, to be deducted in the invoice from the contract price, based on the number of days by which the originally stipulated period is exceeded, in accordance with the following scale: one to four days, 0.50 per cent of the gross c.i.f price; . . . ; but if, notwithstanding such notice, the shipper defaults in shipment, then, the contract shall be deemed to have called for shipment during the originally stipulated period plus eight days, at contract price less 1.50 per cent, . . .

As for quality, clause 20(b) of GAFTA No. 79 provides<sup>2</sup>:

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<sup>1</sup> For other examples, see, e.g. clause 9 of GAFTA No.100 (CIF).

<sup>2</sup> For other examples, see, e.g. clause 5 of GAFTA 100 (CIF).

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Moisture—Any excess in the guaranteed maximum moisture content shall be allowed for off the contract price on the following scale: 1 per cent for 1 per cent up to the first 1 per cent excess. 1.50 per cent for 1 per cent of the excess over the first 1 per cent up to 2 per cent. 2.50 per cent for 1 per cent of the excess over 2 per cent up to 3 per cent. Fractions in proportion. If the excess exceeds 3 per cent, the allowance to be mutually agreed or settled by arbitration.

The fact that the parties can determine the tolerance and price allowance to suit their own circumstances provides further justification for making the default rules applicable outside the agreed tolerance clear and strict.

### 3. The CISG

While English law of termination relies on the system of *a priori* classification of terms, the CISG takes a very different approach. The remedy of termination (avoidance)<sup>3</sup> is considered to be the last resort in its scheme of remedies which include other less drastic remedies such as price reduction and the award of damages.<sup>4</sup> As a general rule, the buyer is not allowed to terminate the contract unless the breach is fundamental.<sup>5</sup> Article 49 reads<sup>6</sup>:

- (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; . . .

The key concept in the CISG termination rules is, therefore, the “fundamental breach.” It is defined by article 25 as follows:

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<sup>3</sup> In the CISG, the word “termination” is confined to termination by agreement (article 29). In this article, for the sake of consistency of terminology, the word “termination” is used to refer to “avoidance” in the CISG.

<sup>4</sup> Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed., 1999) para.304 says “[t]he framing of this text [of Article 49] was based on the conclusion that . . . avoidance should not be available for trivial departures that may readily be redressed by damages (art. 74).”

<sup>5</sup> The seller’s right to terminate also depends on fundamental breach. Article 64 provides:

- “(1) The seller may declare the contract avoided:
  - (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; . . . ”

<sup>6</sup> Article 51(2) confirms the application of this general rule in the context of a partial delivery of goods. Article 51 reads:

- “(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.
- (2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.”

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.

In the case of a delay in delivery, even if the delay does not amount to a fundamental breach, the buyer can terminate the contract if the seller does not deliver, or declares that he will not deliver, the goods within the additional period of time fixed by the buyer. The relevant provisions read<sup>7</sup>:

Article 49

(1) The buyer may declare the contract avoided:

...

(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 article 47 or declares that he will not deliver within the period so fixed.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

How exactly those provisions apply to sales of commodities<sup>8</sup> is not clear because of the dearth of reported cases arising from commodities sales. In the Unilex database,<sup>9</sup> over fifty cases are reported on article 49 but few of them concern sales of commodities.<sup>10</sup> The wide use of standard form contracts excluding the CISG is probably responsible for the scarcity of cases on sales of commodities. Without the benefit of developed case law, confident suggestions are

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<sup>7</sup> The seller's right to terminate is likewise. The relevant provisions read:

"Article 64

(1) The seller may declare the contract avoided:

...

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

Article 63

The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations."

<sup>8</sup> For a more general (than the issue of termination) consideration of the application of the CISG to international sales of commodities, see, e.g. J.D. Feltham, "C.I.F. and F.O.B. Contracts and the Vienna Convention on Contracts for the International Sale of Goods" [1991] J.B.L. 413.

<sup>9</sup> An international database of the case law on the CISG, *www.unilex.info*.

<sup>10</sup> Those appear to concern commodities sales are Bundesgerichtshof (Germany), April 3, 1996, VIII ZR 51/95; Oberlandesgericht Hamburg (Germany), February 28, 1997, 1 U 167/95; Tribunale di Appello di Lugano (Switzerland), 15.01.1998, 12.97.193.

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difficult to make and the suggestions made in the following discussion are tentative.

### *a) Legal certainty and predictability*

The CISG rules do not provide a high degree of legal certainty and predictability, inasmuch as they rely upon ambiguous concepts such as “fundamental breach” and “reasonable length.”

The “fundamental breach” is defined in article 25 but it in turn relies upon the nebulous concepts such as “substantial” (“substantially to deprive”) and “reasonable” (“reasonable person”). A wide range of factors need to be considered to assess whether a breach is fundamental. The factors which have been suggested by commentators and adopted by the courts include the importance of the breached term in the context of the contract, the value of the loss relative to the overall value of the contract,<sup>11</sup> the degree of fitness of the goods for their intended purpose, the availability of reasonable alternative remedies, absence of offer to cure, the possibility of cure, the loss of confidence in the party in breach and the foreseeability of the consequences of the breach.<sup>12</sup>

In the case of delay in delivery, the additional period of time fixed by the buyer must, according to article 47(1), be of reasonable length. To ascertain the reasonableness of the length, the buyer will have to take into account a number of factors, including the difficulty of cure<sup>13</sup> and the extent of the need for timely performance. This will make it difficult for the buyer to tell promptly and accurately how soon he will be able to terminate the contract. It has been acknowledged that the practice of commodities sales does not support the CISG approach to time clauses.<sup>14</sup>

It is not, however, impossible to introduce a higher degree of certainty and predictability by means of establishing a presumption that the breach of certain obligations is a fundamental breach regardless of the actual harm deriving from it. Indeed, suggestions that such a presumption should be established have been made in respect of the breach of time clauses and of documentary obligations, although some of them can be read as merely predicting that breach of those obligations is likely to be held as a fundamental breach.

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<sup>11</sup> Ziegel, “The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives” in Nina M. Galston and Hans Smit, *International Sales* (1984) at para.9–16 suggests that this factor is not determinative since the test is qualitative well as quantitative.

<sup>12</sup> Koch, “The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)” in Pace (ed), *Review of the Convention on Contracts for the International Sale of Goods (CISG)* (1999) 177.

<sup>13</sup> *Giustina International v Perfect Circle Europe SARL*, Cour d’Appel de Versailles (France) January 29, 1998.

<sup>14</sup> Ziegel, “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods” (1981) (reproduced at [www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html](http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html)) comment on art.25, para. 3 (stating that “[m]ercantile practice itself, with the possible exception of stipulations as to time in the international commodities trade, seems to support the CISG approach.”)



Thus with regards breach of time clauses, *Schlechtriem* takes the view that “[t]he late delivery of goods with a quoted market price is normally considered a fundamental breach”.<sup>15</sup> This view is inspired by article 28 of the ULIS,<sup>16</sup> which lays down a presumption in the following terms:

Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

Although this provision was not transplanted into the CISG, since that was only for the sake of consolidating the provisions on remedies,<sup>17</sup> it would be legitimate to introduce a similar presumption into the CISG. A German court appeared to adopt such a presumption in a case<sup>18</sup> concerned with a CIF sale of Iron-molybdenum between a German seller and an English buyer. As the seller did not deliver in time, the buyer had to make a substitute purchase at a higher price in order to fulfill a resale contract with a third party. The German court held that a delay in delivery could constitute a fundamental breach where it was obvious to the seller that the buyer had a special interest in punctual delivery and inferred such a special interest from the use of the Incoterms CIF. This decision contrasts with cases arising from other types of sales in which the courts have often refused to hold that a delay in delivery amounted to a fundamental breach.<sup>19</sup>

As regards documentary breach, the Secretariat’s Commentary on the 1978 Draft,<sup>20</sup> the closest counterpart to an official commentary on the CISG, frankly admits that the concept of “fundamental breach” is adrift from the practice of documentary sales. It says<sup>21</sup>:

“The rule that the buyer can normally avoid the contract only if there has been a fundamental breach of contract is not in accord with the typical practice under CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have often been able to

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<sup>15</sup> Schlechtriem, *Uniform Sales Law* (1986) p.60. See also Enderlein/Maskow, *International Sales Law* (1992) art.25, para.3; Huber, *Der UNCITRAL-Entwurf eines Übereinkommens für internationale Warenkaufverträge*: 43 *RabelsZ* 464 (1979), though Huber since changed his view: Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods* (CISG) (2nd ed., 1998 in English translation by Thomas) comment on art.49 (by Huber) at 5, stating “the circumstances of the particular case are decisive.”

<sup>16</sup> The Convention relating to a Uniform Law on the International Sale of Goods 1964. This Convention failed to attract many ratifications. Less than ten states ratified it and among them all but a few have since denounced it when they ratified the CISG.

<sup>17</sup> See 4 (1973) *UNCITRAL Year Book* 40 § 28.

<sup>18</sup> Oberlandesgericht Hamburg (Germany), February 28, 1997, 1 U 167/95.

<sup>19</sup> e.g. Landgericht Oldenburg (Germany), March 27, 1996, 12 O 2541/95 concerning the sale of clothes; Amtsgericht Ludwigsburg (Germany), December 21, 1990, 4 C 549/90 concerning the sale of women’s wear.

<sup>20</sup> Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods (UN DOC. A/CONF. 97/5).

<sup>21</sup> On the draft article 45 at para.7.

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refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance.”

It would, therefore, seem necessary to establish a presumption that a documentary breach is a fundamental breach, if the CISG is to be widely accepted by the traders. *Schlechtriem* says that neglecting to insure the goods during transport can be a fundamental breach if the lack of insurance deprives the buyer of the possibility of reselling the goods in transit but he adds that it is possible to assert a fundamental breach without proving the detriment though a detriment must at least be expected to be produced.<sup>22</sup> *Huber* takes a more general view that failure to present the documents required by the contract or relevant usage or practices or the presentation of defective documents must be regarded as a fundamental breach.<sup>23</sup> In a German Supreme Court case,<sup>24</sup> the buyer rejected certificates of quality and origin tendered in a sale calling for payment “cash against documents.” The court expressed sympathy with the *Huber’s* view,<sup>25</sup> acknowledging<sup>26</sup> that the delivery of contractually stipulated documents could be an essential contractual obligation, which, if breached, might entitle the buyer to terminate the contract in accordance with article 49(1). But in the instant case, the court did not allow termination, holding that the seller’s breach was not fundamental because the buyer failed to show that it was not possible to resell the supplied goods and because correct certificates could be obtained from other sources. This decision means that before resorting to termination, the buyer should have ascertained that the breach indicated in the certificates actually had serious consequences. However, in a sale calling for payment “cash against documents”, unless the buyer can terminate the contract upon the tender of defective documents, the buyer would have to pay against the documents.<sup>27</sup> Then, even if he can terminate the contract after ascertaining that the breach resulted in serious consequences, he

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<sup>22</sup> *Schlechtriem, Uniform Sales Law* (1986) 60, n.210. As it speaks of the possibility of reselling the goods, it is assumed here as referring to the documentary duty to tender an insurance policy rather than the physical duty to conclude insurance. c.f. Bonell, *Commentary on the International Sales Law* (1987) para.2.1.1.2 (by M. Will) which, referring to the same situation, says that the requirement of detriment fulfills the function of filtering out the case where breach of a fundamental obligation has occurred but not caused injury.

<sup>23</sup> *Schlechtriem* (ed.), *Commentary on the UN Convention on the International Sale of Goods* (CISG) (2nd, 1998 in English translation by Thomas) comment on art.49 (by Huber) at 16.

<sup>24</sup> Bundesgerichtshof, April 3, 1996, VII 51/95 (English translation (by Feuerstein edited by Janal) is available at <http://cisgw3.law.pace.edu/cases/960403g1.html>).

<sup>25</sup> Also with the view of Staudinger/Magnus, art.49 CISG, n.9 and 33.

<sup>26</sup> At II.2.d). aa).

<sup>27</sup> Art.58(3) of the CISG reads:

“The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.”

The Secretariat’s Commentary (Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods (UN DOC. A/CONF. 97/5)) on draft art.54 (now art.58) says at para.7:

This Convention does not set forth which procedures for delivery or payment are

may not be able to recover the price from the seller, who may be insolvent or located in an inaccessible jurisdiction. In addition, or even if the buyer can withhold the payment of price,<sup>28</sup> while the buyer is assessing the gravity of the consequences, on a rising market, the cost of procuring an alternative cargo will increase, which again he may not be able to recover from the seller.

Although the CISG contains no express provision stipulating that a presumption may be established that a breach of certain obligations is a fundamental breach, the textual basis may be found in the concept of “fundamental breach” itself. *Schlechtriem* says “I think the Convention’s doctrine of fundamental breach reflects the English doctrine of conditions. If a certain expectation is a condition, or “of the essence of the contract,” then the breach of this condition, of this contractual term, is a fundamental breach.”<sup>29</sup> Although this interpretation may not be consistent with the intention of other draftsmen,<sup>30</sup> it should be adopted in order to achieve the high degree of certainty and predictability required in international sales of commodities.

It has been submitted earlier in the context of English law that the terms concerning the description of goods and the carriage of goods should widely be regarded as conditions under s.13 of the Sale of Goods Act 1979. Since English law in this area has been shaped by the practice of international sales of commodities, if a similar degree of certainty and predictability is to be achieved, the terms classified as conditions in English law would have to be given a similar

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inconsistent with the buyer’s right to examine the goods prior to payment. However, the most common example is the agreement that payment of the price is due against the handing over of the documents controlling the disposition of the goods whether or not the goods have arrived. . . .

It seems to follow that in a “cash against documents” sale, the buyer has to pay against defective documents unless he terminates the contract.

<sup>28</sup> This would be the case if Article 58(3) is interpreted as reserving the right to withhold payment even in a “cash against payment” sale, if the documents are defective.

<sup>29</sup> Flechtner “Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More” [1999] *Journal of Law and Commerce* 191, 254.

<sup>30</sup> *Schlechtriem* was a member of the delegate of Federal Republic of Germany. But Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed., 1999) para.181–2 says:

“In developing the Convention there was no significant support for extending avoidance to include insubstantial deviations from the contract. Stricter avoidance (or ‘rejection’) rules in some domestic laws failed to take account of the special circumstances of international trade, such as the fact that claims that the goods are defective often are made only after expensive transport to the buyer’s place of business when avoidance for immaterial defects might needlessly lead to wasteful reshipment or redispotion of the goods in a foreign country. Moreover, the power to avoid the contract for immaterial defects in performance may tempt the seller (after a price rise) or the buyer (after a price decline) to avoid the contract and thus reverse the allocation of the effect of price changes which the contract contemplated.”

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treatment under the CISG<sup>31</sup> by establishing a presumption that the breach of those terms is a fundamental breach.

The parties are, however, free to agree not to submit to the presumption since the party autonomy is sacrosanct.<sup>32</sup>

### *b) Unmeritorious termination*

Under article 49(1)(a), the buyer cannot terminate the contract unless the breach is fundamental and, therefore, it is not likely that he can terminate when the harm deriving from the breach is not the motive for termination. If, however, the suggestion made above is accepted and the presumption is established, the buyer would not have to prove any actual harm and, therefore, would be able to terminate even if the harm deriving from the breach is not the motive for termination. Then, should the seller be allowed to rebut the presumption to exclude such termination?

As regards the presumption in respect of breach of time clauses or of documentary obligations, the one laid down in article 28 of the ULIS appears to be irrebuttable but it is not clear whether those suggested by commentators are intended to be irrebuttable. Since time clauses and documentary obligations should be strictly complied with,<sup>33</sup> it is submitted the presumption in respect of breach of those obligations should be treated as irrebuttable.

If the presumption is extended to the breach of other terms, it should be treated as rebuttable. Since the CISG contains no counterpart to sections 15A and 30(2A), the question what proof should be required of the seller would arise. One possible solution is to allow the seller to prove that the breach was in fact not fundamental within the meaning of article 25. This proof is much easier than that required under sections 15A and 30(2A), *i.e.* proof that the breach is so slight that it is unreasonable to terminate. Another possible solution is to allow the seller to exclude the buyer's termination only in exceptional cases under the requirement of good faith in article 7(1).<sup>34</sup> While the concept of "good faith" squarely

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<sup>31</sup> The practice of traders of commodities as reflected in English law may be brought in by article 9(2), which reads:

"The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

<sup>32</sup> Art.6.

<sup>33</sup> For reasons, see an earlier discussion whether the breach of time clauses and documentary breach should be covered by ss.15A and 30(2A) of the Sale of Goods Act 1979.

<sup>34</sup> Art.7(1) reads:

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

addresses the problem of unmeritorious termination<sup>35</sup> in that both relate to the inner motive, unless its application is determined by an objective test like the one suggested for sections 15A and 30(2A), it would not be suitable for sales of commodities. Also, whether any sophisticated objective test will develop in the absence of a unifying courts system is doubtful.

### Concluding remarks

A history of English law on the termination of international commodities sales is one of constant search for the optimal equilibrium between the requirements of legal certainty and predictability and the preservation of sufficient flexibility necessary to avoid unfair results. This article has sought to do the same in the light of the relatively recent addition to the landscape, *i.e.* ss.15A and 30(2A) of the Sale of Goods Act 1979.

How exactly the CISG rules of termination apply to sales of commodities is not clear due to the dearth of reported cases arising from this type of sales. It does not seem impossible to achieve the optimal equilibrium under the CISG if an elaborate interpretation is given such as the one tentatively suggested in this article. Since detailed interpretation is unlikely to develop through the case law, it is hoped that this article will stimulate academic discussion.

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<sup>35</sup> Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed., 1999) para.101 suggests that the concept of good faith can be used to deny termination of a contract after a market change when this remedy is used by one party to speculate at the other's expense, although it is not clear whether Honnold is in favour of the kind of presumption proposed in this article. Under the US Uniform Commercial Code, the "perfect tender rule" of s.2-601 permits a buyer to reject goods if they fail "in any respect to conform to the contract" but s.1-203 provides "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." In *Printing Center of Texas, Inc. v Supermind Publishing Co.*, 669 S.W. 2d 779, 784 (Tex. App. 1984), a case concerning a printing contract, the Texas Appeals court held "evidence of rejection of goods on account of a minor defect in a falling market would in some instances be sufficient to support a finding that the buyer acted in bad faith when he rejected the goods."