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AVOIDANCE OF A CONTRACT UNDER THE CISG

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INTRODUCTION

According to Part I of the United Convention on Contracts for the International Sale of Goods (CISG) from Articles 1 to 6, the instrument only applies to contracts of sale of goods concluded between parties.¹ They must have their places of business in different States when these are Contracting States or² when the rules of private international law lead to the application of the law of a Contracting State³ irrespective of the nationality of the parties or the civil or commercial character of the parties or of the contract.⁴

The third part of the CISG concerns the sales of goods. The second chapter of the third part stipulates the obligations of the seller. The obligation of the seller is to deliver the goods, to hand over any documents relating to them and to transfer the property of relative goods.⁵ The third chapter of the third part contains the obligations of the buyer. In terms of Article 53, the first obligation of the buyer is the payment of the contractually agreed purchase price. The second, to take delivery of the goods as prescribed by the contract and the Convention.

Remedies are available in the event of breach of contract.⁶ The term “breach” is used to describe non-performance under the contract. The distinction between “fundamental” and “non-fundamental” breach is decisive as it dictates the various remedies available to the aggrieved party. “Fundamental breach of contract”, as defined by Article 25 is vital for an understanding of the system of remedies in the CISG.⁷ The article can be summed up as follows: There would be fundamental breach, when:⁸

¹ Article 1.

² Article 1(1)(a).

³ Article 1(1)(b).

⁴ Article 1(3).

⁵ Article 30.

⁶ Articles 46, 47, 48, 49, 50, 51, 52, 62, 63, 64, 65, 74, 76, 77.

⁷ Campbell *Remedies for International Sellers of Goods* (2009) 20.

⁸ The CISG is rather unclear as to precisely when the detriment must be foreseeable. See Carr *International Trade Law* (2012) 85.

- (I) There is a detriment. This requirement is generally easily complied with, such as late delivery, non-payment for goods, lack of conformity of goods with the specifications are likely to produce some detriment of an economic kind.
- (II) The detriment substantially deprives the co-contractant of what he is entitled to expect under the contract. This is case dependent of course. However, where the seller fails to deliver goods, or delivers goods other than those contracted for, or the buyer does not accept delivery, the detriment could be substantial.
- (III) Results are foreseeable. This may be at the time of conclusion of the contract or at the time of the breach.”

Articles 45 to 52 contain the remedies where the seller has breached the contract. In these circumstances, the buyer will be entitled to specific performance by substitute or repair of the goods, the extension of the period of performance of the seller, late performance of the seller even after the date of delivery agreed, avoidance of the contract, reduction of the price, and damages. Remedies are also available to the seller,⁹ should the buyer have breached the contract. These remedies closely resemble those available to the buyer.

The ultimate remedy¹⁰ available to the prejudiced party is the avoidance of the contract.¹¹ The effect of this is the termination of the contractual obligation between the parties and, where applicable, damages.¹²

In the event of non-fundamental breach, the prejudiced party may also declare the contract avoided if the party in breach does not perform within an additional period of time (“Nachfrist”)

⁹ Articles 62, 63, 64, 65.

¹⁰ Bridge *The International Sales of Goods* (2013) 569; Eiselen, Ferrari, Flechtner and Garo *UNCITRAL Digest of Case Law of the United Nations Convention on the International Sale of Goods* (2008) 160.

¹¹ Magnus “The remedy of avoidance of a contract under CISG-General remarks and special cases” 2005 2006 *Journal of law and commerce* 424.

¹² Schlechtriem and and Schwenzler *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2005) 415; Bridge (n 10) 565.

fixed by the prejudiced party.¹³ The prejudiced party is allowed to upgrade a non-fundamental breach to one which justifies avoidance by using the “Nachfrist”-procedure.¹⁴

The purpose of this dissertation, is to examine the cancellation rules prescribed in the CISG. The investigation is limited to a discussion on Article 49 (rules pertaining to the buyer’s avoidance) and Article 64 (rules concerning the seller’s avoidance). Chapters 1 and 2 deal specifically with these articles and, the importance of Article 25 will also be discussed as it sets out the meaning of fundamental breach – which is decisive in entitling the buyer or the seller to avoid the contract.



¹³ Felemegas *An International Approach to the Interpretation of the United Nations Conventions on Contracts for the International Sale of Goods 1980 as Uniform Law* (2007) 199, Kroll, Mistelis and Viscasillas *UN Convention on Contracts for The International Sale of Goods -CISG Commentary* (2011) 723.

¹⁴ Huber and Mullis *CISG A New Textbook for Students and Practitioners* (2007) 180.

CHAPTER I

AVOIDANCE BY THE BUYER

(Article 49)

Article 49 of the CISG reads as follows:

- “(1) The buyer may declare the contract avoided:
- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
 - (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.
- (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
 - (b) in respect of any breach other than late delivery, within a reasonable time:
 - (i) after he knew or ought to have known of the breach;
 - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
 - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance.”

1.1. Overview of the Article 49

The seller’s breach may entitle the buyer to a right to damages, specific performance, a reduction in the purchase price, or avoidance of the contract.¹⁵ Avoidance of the contract is a remedy of last resort that is available when the buyer can no longer be expected to continue with the contract.¹⁶ He must declare the avoidance of the contract by notice to the seller, which must clearly express the buyer’s intention to cancel the contract. A declaration of avoidance, rightfully made and duly communicated to the seller in accordance with the applicable notice rules, serves to terminate the contract, thus putting an end to performance obligations of both

¹⁵ Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2011) 107.

¹⁶ Eiselen, Ferrari, Flechtner and Garo (n 10) 160.

parties.¹⁷ Article 49 governs the buyer's right to avoid the contract as a response to a non-performance by the seller.¹⁸

Under Article 49(1)(a), avoidance by the buyer is limited where the seller's breach is fundamental as defined in Article 25. The only exception to that rule is Article 49(1)(b) where a buyer can avoid a contract in the absence of fundamental breach by fixing an additional period of time (Article 47). This possibility is limited to cases of non-delivery.¹⁹ Article 49(1) therefore concerns the grounds for avoidance by the buyer.²⁰

Article 49(2) sets out the various circumstances under which the buyer can forfeit the right to insist on the avoidance of the contract.²¹ The article indeed provides the buyer the right to avoidance, which will apply only if the seller has delivered the goods. This right is subject to a complicated regime of time limits.²²

1.2. Preconditions of avoidance (Article 49(1))

1.2.1. Avoidance for fundamental breach (Article 49(1)(a))

The buyer's right to avoid for fundamental breach must be read in conjunction with Article 25. The buyer has the right to avoid the contract if the seller's breach is fundamental as opposed to one considered less serious. Avoidance of the contract under Article 49(1)(a) presupposes that (a) the seller has failed to perform one of his obligations and (b) that his "failure to perform" amounts to a fundamental breach of contract.²³ The non-performance must substantially deprive the buyer of what he was objectively entitled to expect under the contract, unless the breaching party did not foresee and, a reasonable person in the same circumstances would not have foreseen such a result.²⁴

¹⁷ Lookofsky *Understanding the CISG* (2012) 109.

¹⁸ Kroll, Mistelis and Viscasillas (n 13) 723.

¹⁹ Huber and Mullis (n 14) 180; Kroll, Mistelis and Viscasillas (n 13) 723.

²⁰ Schlechtriem and Schwenger (n 12) 415.

²¹ Schwenger, Fountoulakis and Dimsey *International Sales law -A Guide to CISG* (2012) 382.

²² Kroll, Mistelis and Viscasillas (n 13) 741.

²³ Schlechtriem and Schwenger (n 12) 416.

²⁴ Eiselen, Ferrari, Flechtner and Garo (n 10) 160; Ryder, Griffiths and Singh *Commercial Law (Principles and Policy)* (2012) 207.

Relevant case law in this regard correspond with the explanation. In *Foliopack v Daniplast*,²⁵ the plaintiff, a Swiss buyer, placed an order with the defendant, an Italian seller. The order contained a request that the goods must be delivered within the following 10 to 15 days. Almost two months after receiving the order and the confirmation, the seller specified the purchase price and assured the buyer that all the goods would be dispatched within a week. Yet, after this communicate, two months later, the buyer had not yet received the goods. As a consequence, the buyer sent a notice to the seller cancelling the order and demanding a refund of the purchase price including interest and damages. The court held that the seller's delay in delivering the goods and the eventual delivery of one third of the goods (two months subsequent to the conclusion of the contract) amounted to a fundamental breach of the contract.²⁶ The buyer was entitled to avoid the contract and to recover the full purchase price already paid to the seller.

The opposite was decided elsewhere in the *Shoes case*.²⁷ The court did not allow the buyer to avoid the contract in a case involving an Italian seller and a German buyer for the sales of shoes. The seller demanded partial payment against the quantity of goods that were delivered even though the quantity was less than contractually agreed. The buyer sought to claim damages for non-performance and the right to suspend payment until delivery of the missing quantity was made. The Court held in favour of the seller because the buyer had no grounds to avoid the contract, and the partial delivery of goods by the seller in this case did not amount to a fundamental breach within the meaning of Article 49(1)(a).

Article 25 defines fundamental breach in terms of “detriment”, “substantial deprivation” and “foreseeability”.²⁸ If the breaching party can reasonably foresee the substantial deprivation resulting from this action, then the breach could be considered fundamental.²⁹ The breach remains fundamental if a reasonable person in the same situation would have foreseen the same

²⁵ Court of First Instance, Parma (*Foliopack v Daniplast*), Italy 24 November 1989 [translation available] [<http://cisgw3.law.pace.edu/cases/891124i3.html>].

²⁶ Article 49(1)(a).

²⁷ Appellate Court, Dusseldorf (*Shoes Case*), Germany 24 April 1997 [translation available] [<http://cisgw3.law.pace.edu/cases/970424g1.html>].

²⁸ Felemegas (n 13) 125.

²⁹ Eiselen, Ferrari, Flechtner and Garo (n 10) 80.

result irrespective whether the particular seller in fact foresaw that his actions would deprive the buyer of most or all the benefit of the contract.³⁰

The most important precondition in the context of “fundamental breach” is the breach of an obligation deriving from either contract, the practice established between the parties, or the usages referred to in Article 9.³¹

The instrument contains no provision regarding the moment at which the consequences of the breach must have been foreseeable. One court has to decide that moment.³² In general, the buyer bears the burden of proving the elements of fundamental breach.³³

There are some types of situations developed by guidelines for breach which are fundamental:

1.2.1.1. Delay in delivery

An absolute failure to deliver by the seller constitutes a fundamental breach of contract. Late delivery is not as such a fundamental breach of contract.³⁴ A delay in performance may, nevertheless, amount to a fundamental breach if time was of the essence. In other words, punctual delivery was crucial to the buyer and this was clear to the seller at the conclusion of the contract. The fact that time was of the essence can be derived from an express stipulation in the contract or the circumstances of the case, in particular, from the background of the transaction.³⁵ For example, where delivery is expressly required to be made by a fixed date. However, it will constitute an exception rather than the rule.³⁶

The buyer can declare the contract avoided due to delay (of delivery) but he or she is required to fix an additional time of performance prior to such an indication.³⁷ Fixing additional time of

³⁰ Carr (n 8) 85.

³¹ Ferrari “Fundamental breach of contract under the UN sales convention” 2005 2006 *Journal of law and commerce* 493.

³² Eiselen, Ferrari, Flechtner and Garo (n 10) 80.

³³ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

³⁴ Kroll, Mistelis and Viscasillas (n 13) 729.

³⁵ Huber and Mullis (n 14) 225.

³⁶ Schlechtriem and Schwenger (n 12) 417.

³⁷ Article 49(1)(b).

performance is stipulated in Article 47. After this period the buyer can declare the contract avoided if the delivery is not effected. Nevertheless, fixing an additional period of time would be meaningless if the delay constitutes a fundamental breach under Article 49(1)(a).³⁸

Generally, however, the fact that the buyer has not yet fixed an additional period of time will usually indicate that the delay in delivery has not yet decisively impaired his interest in receiving it. There has therefore not yet been a fundamental breach of contract.³⁹

Even if a delay in delivery is not shown to be a fundamental breach, Article 47 allows the buyer to fix an additional reasonable period of time for delivery beyond the contractual due date. If the seller fails to deliver by the end of that additional period, the buyer may, in terms of Article 49(1)(b) declare the contract avoided. A seller's failure to deliver within an additional period determined pursuant to Article 47, therefore, amounts to a fundamental breach of contract.⁴⁰ However, this approach should not be followed if the delay constitutes a fundamental breach. Determination of the exact moment in this regard would be difficult.⁴¹

The Judgment of Arnhem Appellate Court of the Netherlands of October 7, 2008, in the matter of *Arens Sondermaschinen GmbH v Smit Draad / Draad Nijmegen B.V.*⁴² provided that the grace period did not apply when the late delivery amounts to a fundamental breach. The buyer will not be required to grant the seller an additional period of time as foreseen in Article 47. However, the Court held that the buyer's declaration to give a definite decision after the expert's report in order to declare the avoidance of the contract constituted the setting of an additional period of time which expired on the date of the test. Hence, it was clear to the seller that the buyer intended to give the seller a last chance to fulfil his obligations.

Moreover, the Court held: "Determining whether the breach was fundamental or not in connection with Article 49(1) is relevant to determine if the non-performance could be remedied within a reasonable period of time or not".

³⁸ Kroll, Mistelis and Viscasillas (n 13) 729.

³⁹ Schlechtriem and Schwenzer (n 12) 417.

⁴⁰ Eiselen, Ferrari, Flechtner and Garo (n 10) 161.

⁴¹ Huber and Mullis (n 14) 226.

⁴² Appellate Court Arnhem Gerechtshof (*Arens Sondermaschinen GmbH v Smit Draad / Draad Nijmegen B.V.*), Netherlands 7 Octobre 2008 [translation available] [<http://cisgw3.law.pace.edu.cases/081007n1.html>].

1.2.1.2. *Definite non-delivery*

Definite failure is the situation where the seller refuses to deliver or when it becomes impossible.⁴³ It usually amounts to a fundamental breach of contract.⁴⁴

- If the delivery is subject of a refusal to perform by the seller;

The buyer can conclude that the seller does not intend to deliver the goods. In such a case, there is no need for the buyer to fix an additional period of time for the seller's performance. Sometimes, the seller can declare before the date of the delivery that he will not perform his obligations. Then, the buyer has the right to avoid the contract. The refusal to perform may consist in a categorical declaration by the seller, that he is unable to deliver or that he does not wish to deliver.⁴⁵ To be fundamental, the refusal must be serious and definite. For instance, if the seller indicates, without justification, that he will only perform if the buyer makes additional payments not agreed to the contract. It is submitted that in such a case nothing should prove on whether the seller honestly believed that he was entitled to such additional payments.⁴⁶

In *Calzados Magnanni v Shoes General International*,⁴⁷ the buyer, a French company, placed an order with the seller, a Spanish company, for 8,651 pairs of shoes to be marketed under the "Pierre Cardin" trade name. The seller denied having received any orders and refused to deliver. The buyer resorted to substitute manufacturers. The buyer was late in supplying its retailers and 2,125 unsold pairs were returned. The buyer then filed a claim amounting to 712,879 f [French francs] for the unsold pairs and for loss of the company's brand image. In addition, the buyer accused the Spanish company of acts of unfair competition. Although the seller denied the very existence of a contract of sale and relied on Article 18(1), according to which silence or inactivity does not in itself amount to acceptance, the court held that the contract had indeed been concluded, even in the absence of any express acceptance on the part of the seller.

⁴³ Eiselen, Ferrari, Flechtner and Garo (n 10) 161; Schlechtriem and Schwenzer (n 12) 417.

⁴⁴ Kroll, Mistelis and Viscasillas (n 13) 731.

⁴⁵ Schlechtriem and Schwenzer (n 12) 417.

⁴⁶ Kroll, Mistelis and Viscasillas (n 13) 731.

⁴⁷ Appellate Court Grenoble (*Calzados Magnanni v Shoes General International*), France 21 October 1999 [translation available] [<http://cisgw3.law.pace.edu/cases/991021f1.html>].

The Court further held that “refusal, without any legitimate reason, to fulfil an order received by falsely maintaining that the order had not been placed constitutes a fundamental breach by the seller within the meaning of Article 25.”

- In some cases, the delivery by the seller is objectively and permanently impossible;

The buyer in this case has the right to avoid the contract for fundamental breach. Avoidance by the buyer is not automatic even in that case. Divergent rules of domestic law which declare a contract invalid in a case of impossibility are not applicable even if impossibility is a ground of avoidance.⁴⁸

If delivery is not objectively impossible, fundamental breach of the contract may not readily be inferred.⁴⁹ In the case of the inability of the seller to perform, the buyer can extend the period of performance by fixing an additional time. The buyer can cancel the contract anytime prior to the delivery date if the impossibility occurs before the due date of delivery.

1.2.1.3. Delivery of non-conforming goods

The delivery of non-conforming goods under Article 35 is not *ipso facto* a fundamental breach of contract. The parties may define in their contract which requirements shall be fundamental in the sense that their breach will lead to avoidance.⁵⁰ As stipulated in Article 35, the seller must deliver goods that are of the quantity, quality and description prescribed in the contract. Any breach of these duties represents a breach of contract.⁵¹

The delivery of non-confirming goods is a complex situation within the doctrine of fundamental breach. It is, of course not possible to give a complete picture here and it must be remembered that the decision whether any breach is fundamental will always have to be made on a case-by-case basis.⁵² The delivery of defective goods represents the most problems in this regard. Avoidance will here depend on the severity on the breach. Court decisions on this point have concluded that a non-conformity relating to quality remains a mere non-fundamental

⁴⁸ Schlechtriem and Schwenger (n 12) 418.

⁴⁹ Schlechtriem and Schwenger (n 12) 418.

⁵⁰ Kroll, Mistelis and Viscasillas (n 13) 732.

⁵¹ Ryder, Griffiths and Singh (n 24) 203.

⁵² Huber and Mullis (n 14) 227.

breach of contract. The determining factor appears to be whether the buyer, without unreasonable inconvenience, can use the goods or resell them.⁵³ The same problem could occur when the defective goods are repairable; then the lack of conformity does not constitute a fundamental breach and can be repaired.⁵⁴

On the other hand, if repair or resale of non-conforming goods is not possible, delivery constitutes a fundamental breach and the buyer is entitled to avoid the contract. The fact that the breach is objectively serious does not automatically lead to avoidance because the seller can remedy the breach by repair or substituting the goods⁵⁵ within a reasonable time.⁵⁶ If the seller fails to remedy the non-conformity of goods within the reasonable time, the buyer can declare the contract avoided. The buyer is not entitled to avoid the contract during the remedial period available to the seller.⁵⁷

Article 38 provides that the buyer must examine the goods within a short period of time. If the contract involve carriage of goods, the examination may be deferred until after the goods have arrived at their destination.⁵⁸ If the goods are defective, he or she must notify the seller⁵⁹ of the defect for him or her to cure.⁶⁰ If he fails to send the notice, he will lose the right of avoidance.⁶¹

Where the goods sold are subject to third party claims,⁶² the position is similar to the cases of non-conformity. Particular emphasis should be placed on whether the breach can be cured by the seller under reasonable conditions, by for instance, discharging the third party or, in a sale of generic goods, by delivering other items of the same type which are not subject to the third party rights.⁶³

⁵³ Eiselen, Ferrari, Flechtner and Garo (n 10) 161.

⁵⁴ Kroll, Mistelis and Viscasillas (n 13) 732; Schlechtriem and Schwenger (n 12) 420.

⁵⁵ Article 46(2) and Article 46(3).

⁵⁶ Schlechtriem and Schwenger (n 12) 419; Huber and Mullis (n 14) 227.

⁵⁷ Schlechtriem and Schwenger (n 12) 420.

⁵⁸ Ryder, Griffiths and Singh (n 24) 204.

⁵⁹ Article 39.

⁶⁰ Article 46(2).

⁶¹ Ryder, Griffiths and Singh (n 24) 204.

⁶² Articles 41, 42 and 43.

⁶³ Kroll, Mistelis and Viscasillas (n 13) 735.

1.2.1.4. Defects in documents

Defects in documents relating to the goods constitute a fundamental breach if they fundamentally impair the buyer's ability to resell or otherwise deal in the goods.⁶⁴ The case of missing documents is similar to defects in documents.⁶⁵ The breach of defect in documents is treated as fundamental if the delivery of goods and the delivery of documents cannot be separated in the commercial context of the contract. For example documentary letter of credit, documentary sales of commodities.⁶⁶ The documents required by the buyer must be that which he needs to dispose the goods or to take delivery at the place of destination. The failure to hand over the right documents will be considered as a fundamental breach under Article 25. It will be the same if the parties agreed to "cash against documents".⁶⁷

Defects in documents and delivery of non-conforming goods should be solved in the same manner. If the seller is obliged to hand over the documents and fails to do so in time or hand over defective documents, the position is similar to the delivery of non-conforming goods.⁶⁸

In the absence of an agreement that strict conformity is the essence of the contract, the major criteria should be the seriousness of the breach and the question whether the seller can cure the defect.⁶⁹

If a buyer discovers that goods are non-conforming with what is stipulated in the contract, it has been suggested that he may "reject" the goods.⁷⁰

1.2.1.5. Breach of ancillary obligations

Other forms of breach can be fundamental if it deprives the buyer of what he expects substantially under the contract. That breach is considered to be fundamental in terms of Article 25.⁷¹ There is a fundamental breach if the non-performance is fundamental and if the seller

⁶⁴ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

⁶⁵ Schlechtriem and Schwenger (n 12) 420.

⁶⁶ Huber and Mullis (n 14) 232.

⁶⁷ Schlechtriem and Schwenger (n 12) 420.

⁶⁸ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

⁶⁹ Kroll, Mistelis and Viscasillas (n 13) 735.

⁷⁰ Ryder, Griffiths and Singh (n 24) 204.

⁷¹ Felemegas (n 13) 126; Kroll, Mistelis and Viscasillas (n 13) 725.

does not remedy within a reasonable time.⁷² In other words, it depends on the facts whether the breach is serious or not and whether cure is possible.⁷³ For example, the unjustified denial of a valid contract after having taken possession of the goods can amount to a fundamental breach of contract.⁷⁴

A seller can be in violation of several contractual obligations; but this will not necessarily constitute fundamental breach. The breach will be considered fundamental where the prejudiced party loses the main benefit under the contract.⁷⁵

1.2.2. Avoidance by additional period of time in case of non-delivery (Article 49(1)(b))

1.2.2.1. Notions of non-delivery

As seen above, the buyer can insist on avoidance if there is a fundamental breach of contract under Article 49(1)(a). Under Article 49(1)(b), the ground of avoidance is limited only “in case of non-delivery”.⁷⁶ If a 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”, it presupposes that he failed to fulfil his delivery obligations as stated in Article 31.⁷⁷

This procedure gives the buyer the right of avoidance even if the breach is not fundamental. This route to the avoidance of the contract is often called “Nachfrist”- mechanism.⁷⁸ In other words, Article 49(1)(b) allows the buyer to upgrade a non-fundamental breach to one which justifies avoidance by using the “Nachfrist”- procedure.⁷⁹

⁷² Schlechtriem and Schwenger (n 12) 420.

⁷³ Kroll, Mistelis and Viscasillas (n 13) 726.

⁷⁴ Eiselen, Ferrari, Flechtner and Garo (n 10) 81.

⁷⁵ Eiselen, Ferrari, Flechtner and Garo (n 10) 81.

⁷⁶ Kroll, Mistelis and Viscasillas (n 13) 737.

⁷⁷ Huber and Mullis (n 14) 235.

⁷⁸ Huber and Mullis (n 14) 180.

⁷⁹ Huber and Mullis (n 14) 180.

1.2.2.2. Additional period of time

The buyer can fix an additional period of time for the seller to perform his obligations in case of non-delivery.⁸⁰ After the expiration of this period, the buyer is entitled to avoid the contract. He is thereby released from the burden of proving a fundamental breach of contract.⁸¹

The expiration of additional time does not lead automatically to avoidance. The buyer can fix a new additional period of time. Then, the contract will be avoided when the new additional period expires.⁸²

Article 47(1) states: “The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations”.

Avoidance under the “Nachfrist”-procedure contains two grounds:

- Additional period of time under article 47

Article 49(1)(b) refers to the “Nachfrist” provision of Article 47.⁸³ Under article 47, the buyer can fix an additional period of time within which the seller has to deliver goods. The most important points to be noted are that an additional period of time for performance is fixed by combining a specific demand for performance⁸⁴ with a date determinable by reference to the calendar.⁸⁵

He should extend the period of performance of the seller with a declaration of avoidance.⁸⁶ The “Nachfrist” notice must be effective. It has to stipulate performance by a particular date and include a specific demand for performance. Hence, it should be clear about the additional period of time fixed and the limit on the delivery’s date. The seller has to perform within a reasonable period of time. “Reasonable” depends on the circumstances of the case.⁸⁷

⁸⁰ Schlechtriem and Schwenger (n 12) 421.

⁸¹ Schwenger, Fountoulakis and Dimsey (n 21) 399.

⁸² Schlechtriem and Schwenger (n 12) 422.

⁸³ Kroll, Mistelis and Viscasillas (n 13) 739.

⁸⁴ Article 47.

⁸⁵ Schlechtriem and Schwenger (n 12) 422.

⁸⁶ Bridge (n 10) 566.

⁸⁷ Felemegas (n 13) 201.

The buyer can fix several periods of time if he or she remains interested in the seller's performance. He or she can extend the period for a second, third and further time.⁸⁸

- Absence of delivery or refusal to deliver within the fixed period

The buyer can avoid the contract if the seller has not delivered the goods within the period fixed for delivery. Before the end of additional time, he cannot declare the avoidance.⁸⁹

The seller can declare his or her refusal to perform before the expiration of additional time. Then, the buyer can declare avoidance of the contract immediately, even before the expiry of the additional period.⁹⁰ The buyer is the one who has to prove the seller's refusal to perform.⁹¹

It should be noted that, Article 49(1)(b) applies only if the time of delivery has already passed.⁹²

Sometimes, the seller can declare his desire to perform only after the additional time. The buyer has the right to accept or not. If not, he must declare, without delay that he will not accept the seller's proposal. Otherwise, the period fixed will be extended⁹³ until the expiration of the period referred by the seller.⁹⁴

1.2.2.3. Documents

Article 30 concerns the delivery of the goods and the obligations to hand over the documents.⁹⁵ In the case where the buyer has to hand over the document for disposal of goods, the seller must furnish the documents (bill of lading, a corresponding combined transport operator, a warehouse warrant) which will allow him to take delivery. If he does not, taking delivery will not be possible.⁹⁶

⁸⁸ Bridge (n 10) 566.

⁸⁹ Campbell (n 7) 33.

⁹⁰ Huber and Mullis (n 14) 239.

⁹¹ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

⁹² Kroll, Mistelis and Viscasillas (n 13) 738.

⁹³ Articles 48(2) and 48(3).

⁹⁴ Schlechtriem and Schwenger (n 12) 428.

⁹⁵ Huber and Mullis (n 14) 236.

⁹⁶ Schlechtriem and Schwenger (n 12) 423.

If he did not do this, the buyer can apply Article 49(1)(b) because not handing over the document constitutes non-delivery. In this case, the buyer may fix an additional period of time for handing over the documents. The buyer also has the possibility to avoid for fundamental breach under Article 25.⁹⁷

The failure to deliver other documents (that may be required by the contract, but not needed for the disposition of the goods) will not amount to a non-delivery in the sense of Article 49(1)(b) and the buyer will have to rely to on the fundamental breach doctrine under Article 49(1)(a) if he wants to avoid the contract.⁹⁸

1.3. Limits of avoidance (Article 49(2))

Avoidance by the buyer is subject to a complicated regime of time limits under Article 49(2).⁹⁹ Article 49(2) presupposes that the seller has delivered the goods at some point in time.¹⁰⁰ This provision can only be applicable if there was a delivery.¹⁰¹ It is about the period of time for declaration of avoidance.

As may be inferred from this article, if the delivery date has passed but still outstanding, the buyer may wait as long as he or she wishes before avoiding irrespective of Article 49(1).¹⁰² This provision is applicable because there was a delivery by the seller but the buyer intends avoiding. Late delivery¹⁰³ or other types of breach¹⁰⁴ lead to avoidance under this article.¹⁰⁵

It should be noted that the declaration of avoidance falls under Article 27.

⁹⁷ Kroll, Mistelis and Viscasillas (n 13) 738.

⁹⁸ Huber and Mullis (n 14) 237.

⁹⁹ Huber and Mullis (n 14) 239.

¹⁰⁰ Huber and Mullis (n 14) 239.

¹⁰¹ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

¹⁰² Schlechtriem and Schwenger (n 12) 426.

¹⁰³ Article 49(2)(a).

¹⁰⁴ Article 49(2)(b).

¹⁰⁵ Huber and Mullis (n 14) 240.

1.3.1. Cases of late delivery (Article 49(2)(a))

In case of late delivery, the buyer loses the right to declare the contract avoided unless he does so within a reasonable time after he has become aware that delivery has been made.¹⁰⁶ A reasonable period of time is generally considered as being very brief.¹⁰⁷ It begins to run only when “the seller” has delivered the goods”.¹⁰⁸

A buyer who is awaiting a delayed delivery need not attempt to estimate when the delay is sufficient to constitute a “fundamental breach”.¹⁰⁹

If the seller delivers after the agreed date of delivery, even though the delay in delivery already constitutes a fundamental breach¹¹⁰ or even though an additional period of time for performance fixed¹¹¹ has already expired, he or she cannot thereby simply deprive a buyer who has not yet declared the contract avoided of his right to avoid the contract under Article 49(1)(a) or Article 49(1)(b). The buyer remains entitled to avoid the contract but, since delivery has been made. He must declare the contract avoided within a reasonable time (Article 49(2)(a)).¹¹² The reasonable time is subject of the circumstances of the particular case and on the particular provision of the CISG regarding the time of declaration.¹¹³

1.3.2. Other types of breach (Article 49(2)(b))

Article 49(2)(b) concerns cases involving any breach other than late delivery.¹¹⁴ The reasonable period starts to run through (i) to (iii).

- (i) In cases of fundamental breaches other than late delivery, the period commences when the buyer knew or ought to have known of the breach”.¹¹⁵

¹⁰⁶ Kroll, Mistelis and Viscasillas (n 13) 742.

¹⁰⁷ Huber and Mullis (n 14) 240.

¹⁰⁸ Schlechtriem and Schwenger (n 12) 428.

¹⁰⁹ Honnold *Uniform Law for International Sales Under 1980* (2009) 439.

¹¹⁰ Because the contract requires delivery at a fixed date.

¹¹¹ Article 47.

¹¹² Schlechtriem and Schwenger (n 12) 427.

¹¹³ Schlechtriem and Schwenger (n 12) 427.

¹¹⁴ Huber and Mullis (n 14) 241.

¹¹⁵ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

“It is submitted the term “knew” refers to positive knowledge and the term “ought to have known” refers to negligent ignorance. In the case of non-conforming delivery, as a rule the buyer ought to have known of the breach at the time when examination under article 38 would have shown the non-conformity. With regard to other breaches, one should start from the assumption that the buyer is not bound to check whether the seller actually performed his obligation so that one should assume a case of negligent ignorance only if the buyer had concrete indications that the seller was in breach”.¹¹⁶

In case of delivery of non-conforming goods, the buyer must notify the defect to the seller within a reasonable period of time.¹¹⁷ The principle is that the buyer must declare the contract avoided within a reasonable time after he knew or ought to have known of the breach of contract.¹¹⁸ If he fails to do so, he will lose the right of avoidance.¹¹⁹

- (ii) If the buyer has fixed an additional period of time of reasonable length for the seller to perform under Article 47, it starts to run after the expiry of that additional period or after the seller’s declaration to not perform within this period.¹²⁰

Under Article 49(2)(b)(ii), the buyer has to claim the seller to perform¹²¹ within the time limit. If he did not do so, he will lose his right to claim performance so that he could not effectively fix a “Nachfrist” under Article 47 in order to gain a right of avoidance.¹²²

It is possible for the buyer to fix more than one additional period of time. He or she can fix a second or further additional period of time when the first one is expired.¹²³

¹¹⁶ Kroll, Mistelis and Viscasillas (n 13) 742.

¹¹⁷ Article 39.

¹¹⁸ Article 49(2)(b)(i).

¹¹⁹ Schlechtriem and Schwenger (n 12) 429.

¹²⁰ Bridge (n 10) 591.

¹²¹ Article 46(2), 46(3).

¹²² Kroll, Mistelis and Viscasillas (n 13) 743.

¹²³ Kroll, Mistelis and Viscasillas (n 13) 743.

- (iii) Where the seller has proceeded under Article 48(2), the period commences after the expiration of this relevant period or after the buyer has declared that he will not accept performance.¹²⁴

When the seller proposes to remedy by performing¹²⁵ within a period after the date of delivery and fails to perform during this period, the buyer must declare the contract avoided. He or she must declare after the expiry of the cure period.¹²⁶ If he or she fails to do so, he or she will lose the right to avoid the contract.

If the buyer does not agree with the offer of performance made by the seller, the reasonable time for him to avoid the contract under Article 49(2)(b)(iii) begin as soon he has declared he will not agree with the seller's offer of performance.¹²⁷

A relevant example in this matter is the *Coke case*.¹²⁸ The plaintiff, a Swedish seller of coke which was delivered to a company in the former Yugoslavia under instructions of the defendant, a German buyer, sued demanding payment of the purchase price. The buyer objected mainly relying on a complaint made by the Yugoslavian company that the coke was of inferior quality. The court held that the supply of goods of inferior quality did not constitute a fundamental breach of contract that could justify the avoidance of the contract and the refusal to pay. It was found that, in any event, that the buyer would have lost the right to declare the contract avoided since the buyer claimed avoidance of the contract four months after delivery, which could not be considered as a reasonable time under Article 49(2).

In the "*Fabrics case*",¹²⁹ the defendant, a German buyer, refused to pay the purchase price asserting that parts of the fabrics delivered by the plaintiff, an Italian seller of textiles, were of a color different from that specified in the contract. The court of first instance held in favor of

¹²⁴ Eiselen, Ferrari, Flechtner and Garo (n 10) 162.

¹²⁵ Article 48.

¹²⁶ Huber and Mullis (n 14) 242.

¹²⁷ Schlechtriem and Schwenger (n 12) 434.

¹²⁸ Appellate Court München (*Coke case*), Germany 2 March 1994 [translation available] [<http://cisgw3.law.pace.edu/cases/940302g1.html>].

¹²⁹ Appellate Court Düsseldorf (*Fabrics case*), Germany 10 February 1994 [translation available] [<http://cisgw3.law.pace.edu/cases/940210g2.html>].

the plaintiff. The appellate court held that the fact that some of the textiles delivered were of a different color did not amount to non-conformity with contract specifications since the textiles were not unfit for the purpose for which they were bought (Article 35(2)(b)). The court held that such a delivery constituted partial non-performance, as a result of which the buyer was entitled to exercise the rights prescribed in Articles 46 to 50.¹³⁰ However, it was found that the buyer failed to fix an additional period of time of reasonable length for performance by the seller, and consequently, it was held that the buyer could not exercise those rights (in term of Articles 39, 47(2) and 49(1)(b)). The only right that the buyer had not lost as a result of its failure to fix an additional period of time for performance by the seller, was the right to demand payment of damages for breach of contract by the seller.¹³¹ However, the court found that the buyer had not demanded such damages. In addition, it was held that the buyer had lost the right to declare the contract avoided.



¹³⁰ Article 51.

¹³¹ Article 45.

CHAPTER II

AVOIDANCE BY THE SELLER

(Article 64)

Article 64 states that:

- “(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; or
 - (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.
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
- (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
 - (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
 - (i) after the seller knew or ought to have known of the breach; or
 - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of Article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.”

2.1. Overview of Article 64

Article 64 provides the situations where the seller can avoid the contract in case of the buyer's breach. The overall picture of this article resembles the one in Article 49.¹³²

Article 64 makes a clear distinction between the seller's right to avoid a contract and the limitations to do it.

Under Article 64(1), the seller can avoid the contract when the breach of the buyer is fundamental,¹³³ and if the buyer has not paid the price or has not taken the delivery within an additional period of time for performance fixed by the seller under Article 63. The CISG abandons *the ipso facto* avoidance of the contract that was found in the Convention Relating to

¹³² Huber and Mullis (n 14) 325.

¹³³ Article 25.

a Uniform Law on the International Sale of Goods (ULIS). In all instances the avoidance of the contract must be declared.¹³⁴

Article 64(2) sets certain time limits for those cases in which payment has already been made.¹³⁵ If the payment has been made but the buyer is late in performance of one of its other obligations, the seller must avoid the contract before it learns of the buyer's ultimate performance.¹³⁶ In all other cases, the seller must declare the avoidance within a reasonable time after he or she knows or ought to have known about the buyer's breach,¹³⁷ after the expiry of the additional period of time fixed by the seller, or after the buyer's declaration of no performance.¹³⁸

The declaration of avoidance must be made by notice to the buyer (Article 26) who bears the risk of its loss or delay in transit (Article 27).¹³⁹

2.2. Requirements for avoidance (Article 64(1))

2.2.1. Avoidance for fundamental breach of contract (Art 64(1)(a))

Article 64 (1) (a) sets out the right of a seller to avoid the contract in case of the buyer's breach is fundamental under Article 25. Article 25 attempts to define fundamental breach in terms of "detriment", "substantial deprivation" and "foreseeability".¹⁴⁰

"The concept of fundamental breach does not depend upon the extent of the loss suffered in purely quantitative terms, but rather on the fact that under the agreement reached by the parties the obligations breached is of such importance that its breach substantially impairs the creditor's interest in the performance of the contract".¹⁴¹

To determine if a breach substantially deprives the other party of what it was entitled to expect under the contract, the analysis commences with an assessment of the parties agreement and

¹³⁴ Kroll, Mistelis and Viscasillas (n 13) 869.

¹³⁵ Huber and Mullis (n 14) 325.

¹³⁶ Article 64(2)(a).

¹³⁷ Article 64(2)(b)(i).

¹³⁸ Article 64(2)(b)(ii).

¹³⁹ Schlechtriem and Schwenger (n 12) 491.

¹⁴⁰ Felemegas (n 13) 125.

¹⁴¹ Schlechtriem and Schwenger (n 12) 490.

their evaluation of the performance's importance.¹⁴² For instance, a buyer's refusal to open a letter of credit as required by the contract has been held to constitute a fundamental breach.¹⁴³ A definitive failure to pay and a final refusal of delivery are also considered as fundamental breach.¹⁴⁴

The duty to pay the purchase price includes the duty to take the necessary steps for that purpose.¹⁴⁵ The obligation to take over the goods involves all acts which could reasonably be expected of the buyer in order to enable the seller to make delivery.¹⁴⁶

2.2.1.1. Non payment

The obligation of the buyer to make payment is ruled by Article 53. Article 54 identifies enabling steps that are a part of this obligation.¹⁴⁷

The failure to make payment in due time is not as such a fundamental breach.¹⁴⁸ It becomes fundamental depending on the essence of time.¹⁴⁹ Thus, it was held that a definitive failure to pay the price constitutes a fundamental breach of contract.¹⁵⁰

The essential character of timely payment results from the commercial background of the transaction. By way of example, in CIF contracts¹⁵¹ which provide for payment by DLC, the time of payment will usually be the essence and the letter of credit must be opened no later than the first day of the agreed shipment period.¹⁵²

¹⁴² Howard, "Rejection, revocation, of acceptance, and avoidance: a comparative assessment of UCC and CISG goods oriented remedies" 2013 *Minnesota journal of law* 22.

¹⁴³ Eiselen, Ferrari, Flechtner and Garo (n 10) 80.

¹⁴⁴ Eiselen, Ferrari, Flechtner and Garo (n 10) 194.

¹⁴⁵ Article 54.

¹⁴⁶ Article 60.

¹⁴⁷ Felemegas (n 13) 200.

¹⁴⁸ Huber and Mullis (n 14) 326.

¹⁴⁹ Schlechtriem and Schwenger (n 12) 490.

¹⁵⁰ Eiselen, Ferrari, Flechtner and Garo (n 10) 194.

¹⁵¹ Cost, Insurance and Freight.

¹⁵² Huber and Mullis (n 14) 327.

2.2.1.2. *Not taking delivery*

The buyer's obligation to take delivery is subject to Article 60. The buyer must perform all the acts that could reasonably be expected of him or her to enable the seller to make delivery and must take over the goods.¹⁵³

Like payment, the delay of taking delivery does not lead automatically to the avoidance of contract. The delayed delivery of goods is not deemed a fundamental breach.¹⁵⁴ The essence of time of taking delivery determines whether the breach is fundamental or not.¹⁵⁵

The contractually agreed-time of taking delivery can be seen as significant. The breach of not taking delivery at that agreed moment will be fundamental.¹⁵⁶ It can be derived from the contract or from a legitimate interest of the seller (for example because he urgently needs his storage or transport facilities or because the goods are perishable).¹⁵⁷

A final refusal of taking delivery of the goods by the buyer is a fundamental breach of contract.¹⁵⁸

*Manganese case*¹⁵⁹ deals with a fundamental breach by the buyer where he or she failed to take delivery and pay the price. The seller incurred various fees and resold the goods for a lower price. The Chinese seller contracted with a buyer from Luxembourg for the CFR (Cost and Freight) contract for the sale of manganese to Rotterdam. The seller shipped the goods to Rotterdam but the buyer neither took delivery of the goods nor paid for them. The seller persistently urged the buyer to pay for the goods under Article 53. As a result, the goods remained at the destination port, and the shipping agent began charging the seller demurrage and dock rental fees.

¹⁵³ Felemegas (n 13) 200.

¹⁵⁴ Eiselen, Ferrari, Flechtner and Garo (n 10) 194.

¹⁵⁵ Huber and Mullis (n 14) 328.

¹⁵⁶ Schlechtriem and Schwenger (n 12) 491.

¹⁵⁷ Huber and Mullis (n 14) 328.

¹⁵⁸ Eiselen, Ferrari, Flechtner and Garo (n 10) 194.

¹⁵⁹ CIETAC Arbitration proceeding (*Manganese case*), China 30 December 2002 [translation available] [<http://cisgw3.law.pace.edu/cases/021230c1.html>].

The arbitral tribunal ruled that the buyer fundamentally breached the contract and is therefore liable under Articles 61 and 64. The seller fulfilled its obligation to deliver the goods, but the buyer refused to take delivery and make payment, which constituted a fundamental breach of the contract.

A recent case in Spain, the *Cereal Case*,¹⁶⁰ has also shed some important light on these matters. A brokerage firm specializing in trading cereals issued an invoice on 17 June 2008. A Spanish (the buyer) and a French company (the seller) had a deal involving 9,000 tons of forage wheat to be delivered in five batches (August, September, October, November and December 2008) at €195 per ton. The invoice specified the port of delivery. On 18 August 2008, the seller made the first delivery at the port of Tarragona. There followed two further deliveries, which the buyer did not collect. The seller brought an action against the buyer for breach.

The Court held that, since the delivery of the first three batches to the buyer and the failure to pay the price were attested, the sale and purchase contract had clearly been correctly avoided by the seller, in accordance with the provisions of Articles 61(a) and 64 (1)(b). It held the contract to have been avoided when the seller notified the buyer of that fact in a fax sent on 16 October 2008.

2.2.2. *Avoidance under the “Nachfrist”-procedure (Article 64(1)(b))*

The second ground of avoidance for the seller, based on a “Nachfrist” procedure is introduced under Article 63. This seller’s right parallels the buyer’s right under Article 49(1)(b).

The seller may fix a reasonable additional period of time for the buyer to perform his obligations.¹⁶¹

The “Nachfrist” mechanism in one hand gives the buyer a “second chance” to perform (thus serving the general objective of the CISG to avoid a termination of the contract as long as possible). On the other, it also presents certain advantages for the seller.¹⁶² The seller can

¹⁶⁰ Supreme Court (*Cereal case*), Spain 1 July 2013 [translation available] [<http://cisgw3.law.pace.edu/cases/130701s4.html>].

¹⁶¹ Peacock "Avoidance and the Notion of Fundamental Breach under the CISG: An English Perspective" 2003 *International trade law and business* 125.

¹⁶² Huber and Mullis (n 14) 329.

declare the contract avoided if the buyer does not perform his obligations within the additional period of time fixed under Article 63(1), or if he declares that he will not do so during this period.¹⁶³

But one point bears emphasis; failure to comply with the “Nachfrist” notice provides a basis for avoidance only when it calls for performance of the buyer’s basic obligations “to pay the price and to take delivery.”¹⁶⁴ It is clear from Article 63(2) that the buyer’s declaration of his unwillingness to perform must reach the seller.¹⁶⁵

The most significant issue in drafting a “Nachfrist” notice is determining the “additional period of reasonable length” one should fix in the notice.¹⁶⁶ In the absence of an express agreement, it must be made in light of the circumstances of the case at hand.¹⁶⁷

The buyer’s obligation to pay the price encompasses taking the necessary steps for that purpose, as provided in Article 54.¹⁶⁸ The buyer’s obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods.¹⁶⁹

If the buyer has breached within the additional period, the seller may be entitled to avoidance irrespective of whether the breach is fundamental or not.¹⁷⁰ If he wishes to avoid and is in doubt over whether the buyer’s delay constitutes a “fundamental breach”, he can clarify the situation by giving the buyer a “Nachfrist” notice.¹⁷¹ The convention however, does not elaborate beyond this general provision requiring the issuance of a notice. Indeed, the CISG is

¹⁶³ Felemegas (n 13) 199.

¹⁶⁴ Honnold (n 109) 503.

¹⁶⁵ Schlechtriem and Schwenger (n 12) 491.

¹⁶⁶ Kimbel “Nachfrist notice and avoidance under the CISG” 1998 1999 *Journal of commercial law* 301.

¹⁶⁷ Felemegas (n 13) 201.

¹⁶⁸ Eiselen, Ferrari, Flechtner and Garo (n 10) 195.

¹⁶⁹ Article 60.

¹⁷⁰ Felemegas (n 13) 201.

¹⁷¹ Honnold (n 109) 505.

silent as to whether a proper notice must be communicated explicitly or whether it can be accomplished through implicit conduct.¹⁷²

It should be noted, however, that under Article 64(1)(b), avoidance is available only for a breach of the buyer's obligations to pay the price or to take delivery.¹⁷³ In practice, however, most breaches are likely to concern these obligations so that the scope of Article 64(1)(b) is actually rather wide. Moreover, certain ancillary duties of the buyer are classified by the CISG as part of the obligation to pay the price.¹⁷⁴

It is worth referring to the *Spirits* case.¹⁷⁵ An Austrian company, the plaintiff, entered into a contract for the purchase and transport of spirits to Russia with the Swiss branch of a company that had its headquarters in Liechtenstein. The contract was never performed because a dispute arose among the parties regarding the mode of transport and the final date of performance. The Austrian buyer sued the Swiss seller for repayment of an advance payment, while the defendant claimed damages for breach of contract. The court held since the buyer had not established a documentary letter of credit as the parties had agreed, the seller had the right to declare the contract avoided after having fixed an additional period of time for performance.¹⁷⁶ It rejected the argument made by the buyer under Article 72(1) because the seller had held back delivery of the goods. The seller was entitled to declare the contract avoided and claimed for damages.

2.3. Time-limit of the declaration of avoidance (Article 64(2))

Article 64(2) sets time-limits on the seller's right of avoidance.¹⁷⁷ The provision can be applied only if the buyer has already paid the price.¹⁷⁸ It stipulates clearly that the seller's right to avoid is not subject to time limitations as long as the buyer has not paid. Once the price has been

¹⁷² Jacobs, "Notice of avoidance under the CISG: a practical examination of substance and form considerations, the validity of implicit notice, and the question of revocability" 2002 2003 *University of Pittsburg law* 401.

¹⁷³ Kroll and Mistelis and Viscasillas (n 13) 869.

¹⁷⁴ Huber and Mullis (n 14) 329.

¹⁷⁵ District Court Saane (*Spirits case*), Switzerland 20 February 1997 [translation available] [<http://cisgw3.law.pace.edu/cases/970220s1.html>].

¹⁷⁶ Articles 63(1) and 64(1)(b).

¹⁷⁷ Felemegas (n 13) 205.

¹⁷⁸ Honnold (109) 355.

paid, the seller can exercise his right of avoidance within specified periods.¹⁷⁹ Article 64(2)(a) restricts the right of the seller to avoid in cases of late performance and Article 64(2)(b) to other breaches other than late performance.¹⁸⁰

2.3.1. Late performance (Article 64(2)(a))

The seller may have the right to declare the contract avoided either because the late payment constitutes a fundamental breach or because he has fixed an additional period of time which has now passed.¹⁸¹

Under Article 64(2)(a) the seller loses his right to declare avoidance if he was aware of the late performance by the buyer.¹⁸² If the buyer makes payment after an essential, contractually-agreed time for performance or after the expiry of an additional period of time fixed for performance, the seller loses his right to avoid the contract as soon as he becomes aware that the late payment has been made.¹⁸³

2.3.2. Other breaches (Article 64(2)(b))

As long as the buyer has not performed, the case will not fall within Article 64(2), but instead within Article 64(2)(b).¹⁸⁴

In case of breaches other than late performance,¹⁸⁵ the seller loses his right to declare the contract avoided within a reasonable period of time starting from the moment when the seller knew or ought to have known of the breach (Article 64(2)(b)(i)) or from when the additional period fixed under Article 63(1) has expired (Article 64(2)(b)(ii)) or the buyer has declared that he will not perform his obligations within this period (Article 64(2)(b)(ii)).¹⁸⁶

¹⁷⁹ Eiselen, Ferrari, Flechtner and Garo (n 10) 195.

¹⁸⁰ Schlechtriem and Schwenger (n 12) 492.

¹⁸¹ Kroll, Mistelis and Viscasillas (n 13) 871.

¹⁸² Huber and Mullis (n 14) 333; Eiselen, Ferrari, Flechtner and Garo (n 10) 195.

¹⁸³ Schlechtriem and Schwenger (n 12) 493.

¹⁸⁴ Huber and Mullis (n 14) 333.

¹⁸⁵ Article 64(2)(b).

¹⁸⁶ Schwenger, Fountoulakis and Dimsey (n 21) 477; Schlechtriem and Schwenger (n 12) 493.

A breach within the meaning of Article 64(2)(b)(i) can only be fundamental because the seller would have no right to avoid the contract in other cases. However, where the seller has fixed an additional period of time for performance, Article 64(2)(b)(ii) always applies, even if failure to perform already amounted to a fundamental breach of contract.¹⁸⁷ Article 64(2)(b)(ii) only applies to obligations that have not been performed. Not to obligations that have been performed though.¹⁸⁸

In the *Jewellery* case,¹⁸⁹ a German plaintiff (seller) sold jewellery to two Austrian defendants (buyers) based on several orders which explicitly contained a clause whereby the purchase price should be paid in advance. After three reminders, the seller in a letter eventually fixed an additional period of time for payment by the buyer, stating that after the expiration of that period he would refuse to accept any payment and consequently claim damages or declare the contract avoided. The buyers refused to pay the price in advance asserting that the parties had agreed on payment after delivery. The seller suffered loss of profit and claimed damages for breach of contract.

The Supreme Court affirmed the decision of the Court of Appeal and highlighted that, while a declaration under Article 64 is not subject to any form of requirements or time limits, it should leave no doubts as to the avoidance of the contract. Insofar as the wording of the seller's letter on the avoidance of the contract may have left doubt about the status of the contract, the subsequent lawsuit was found to have replaced the declaration of avoidance.

Under Article 74, damages for breach consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages are limited to the loss which the party in breach had foreseen or should have foreseen at the time when the contract was concluded. In this case the buyers could foresee the loss of profit suffered by the seller.

¹⁸⁷ Schlechtriem and Schwenger (n 12) 493.

¹⁸⁸ Kroll, Mistelis and Viscasillas (n 13) 872.

¹⁸⁹ Supreme Court (*Jewellery* case), Austria 28 April 2000 [translation available] [<http://cisgw3.law.pace.edu/cases/000428a3.html>].

CONCLUSION

In the first and second chapters, it was examined when both the buyer and the seller are entitled to avoid the contract. Also when this right can be extended and limited.

Generally, a party can avoid the contract as a result of fundamental breach committed by the counterpart. Usually, the fundamental breach is determined by the non-performance or failure to performance of the party in breach.

The CISG's concept of avoidance receives support not only due to the interest in upholding the contract, whereby cancellation should only be a remedy of last resort, but also as a reflection of real business practice and the case law in the field.¹⁹⁰

The main requirements of avoidance are more or less the same for all pre-mentioned situations: first, a fundamental breach of contract; second, notice; third, not always but for the practically most important cases, a time limit; and fourth, the return of the substantially unchanged goods.¹⁹¹

The Articles 49(1)(a) and 64(1)(a) set out avoidance in case of the failure of performance as a fundamental breach under Article 25. Nevertheless, not all breaches are fundamental and, all the parties are not intended in avoiding the contract. Unlike the common law systems, The CISG introduces a remedy of performance by fixing an additional period of time for performance. This possibility is available to both the buyer and the seller.¹⁹²

Articles 49(1)(b) and 64(1)(b) provide a solution in case of breach. It can be remedied by additional time (Article 47 for the buyer and 63 for the seller). It is called "Nachfrist"-procedure. The buyer, can remedy the breach by this procedure in case of non-delivery. For the seller, this procedure will apply if the buyer has not paid the price or if he has not taken the delivery. The prejudiced party has the right to fix an additional period of time for performance

¹⁹⁰ Schwenger "Avoidance of the contract of the case of non-conforming goods" 2005 *Journal of law and commerce* 442.

¹⁹¹ Magnus (n 11) 425.

¹⁹² Carr (n 8) 86.

of the party in breach. After this time, the prejudiced party can avoid the contract if the other party has not performed his obligations.

It is also possible to avoid even if the party in breach has already performed. Articles 49(2) and 64(2) are the relevant provisions in that cases. They deal with the circumstances under which the parties may lose the right of avoidance. The first part of these articles deal with the issue of late performance (late payment or late delivery, respectively). Those situations are limitations of avoidance. The party who intends avoiding the contract has to do it within a specified period. If he or she fails to do so, this right will be forfeit.

Paragraph 2(b) of each article deals with the limitations of avoidance by the injured party in case of breach other than late performance.

When a breach does occur, the contract is not avoided *ipso facto*. The injured party must serve notice of avoidance on the breaching party (Article 26).¹⁹³ The declaration is effective only if it is made by notice to the other party. There are no formalities in this regard. Avoidance, according to Article 81, releases both parties from their obligations subject to any damages which may be due.¹⁹⁴



¹⁹³ Bridge (n 10) 566.

¹⁹⁴ Chuah *Law of International Trade: Cross Border Commercial Transaction* (2009) 164.

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