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CHAPTER 35

AVOIDANCE FOR NON-CONFORMITY OF GOODS UNDER ART. 49(1)(A) CISG

1. INTRODUCTION

This contribution focuses on avoidance for non-conforming goods. Non-conformity and its consequences represent some of the most challenging applications of the fundamental breach doctrine,¹ and one of the most recurrent topics in CISG litigation.² The challenge stems from divided opinions from both commentators and jurisprudence on many aspects of avoidance for non-conforming goods.

Despite the clarifications contributed by the CISG Advisory Council in its Opinion no. 5,³ uncertainty persists. In providing a treatment of this subject the authors endeavour to honour the persistent efforts of Prof. Bergsten to create further understanding of the CISG.

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¹ Peter Huber & Alastair Mullis, *The CISG* (Regensburg: European Law Publisher, 2007), 227.

² Leonardo Graffi, 'Case Law on the concept of fundamental breach in the Vienna Sales Convention', *International Business L.J.* (2003): 338 at 341.

³ CISG-AC Opinion no 5, The buyer's right to avoid the contract in case of non-conforming goods or documents 7 May 2005, Badenweiler (Germany). Rapporteur: Prof. Dr Ingeborg Schwenzer (hereinafter 'CISG-AC no. 5'); Joshua D.H Karton & Lorraine de Germiny, 'Has the CISG Advisory Council come of Age?', *Berkley J. Int'l L.* 27 (2009): 448 at 473.

At the outset this contribution will introduce the prerequisites of avoidance in Articles 49(1)(a) CISG. This introductory section will be followed by a section on the concept of non-conformity of goods. Thereafter the authors continue by outlining breaches sufficient for fundamentality. The impact of the right to cure and some practical advice will precede the authors' conclusion.

2. PREREQUISITES OF AVOIDANCE ACCORDING TO ARTICLE 49(1)(A) CISG

This section introduces Article 49(1)(a) CISG, explaining that not only expressly fundamental terms, but any contractual duty, may trigger the right of a buyer to avoid. Article 49(1)(a) CISG forms the basis for avoidance of contracts by a buyer due to non-conformity of delivered goods. It draws upon Article 35 CISG, which defines non-conformity, and Article 25 CISG, which defines fundamentality, as used throughout the entire Convention's text.⁴ Considerations of guilt are immaterial to the determination of a fundamental breach of contract.⁵

Application of Article 25 CISG is unnecessary when parties define a fundamental term (or characteristic) explicitly.⁶ Breach of an explicitly fundamental term will usually result in a fundamental breach.⁷ When the importance of a term has not been made explicit, the fundamental nature of a term is subject to interpretation of Article 25 CISG.

When interpreting a contract with regard to fundamentality, Article 8 CISG provides guidance for such interpretation.⁸ Article 8 CISG focuses on internal elements. The parties' intent is to be considered foremost [Article 8 (1) CISG] followed by a reasonable person's understanding [Article 8(2) CISG]. To determine parties' intent, contractual negotiations, established practices between

⁴ See Articles 46, 49, 51, 64, 70, 72, 73 CISG.

⁵ W.-A. Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)* (Neuwied: Leuchterhand, 2000), Art. 49 para. 2.

⁶ Peter Schlechtriem & Ingeborg Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods 3rd ed.* (Oxford: Oxford University Publishers, 2010), Art. 25 para. 21.

⁷ Peter Schlechtriem & Ingeborg Schwenzer (eds.), *Kommentar zum einheitlichen UN Kaufrecht 4th ed.* (Munich: Beck, 2004), Art. 25 para. 2.

⁸ Franco Ferrari, 'Fundamental Breach of Contract Under the UN Sales Convention – 25 Years of Article 25 CISG', *J.L. & Com.* 25 (2006): 489 at 497; Lachmi Singh & Benjamin Leisinger, 'A law for international sale of goods: a reply to Michael Bridge', *Pace Int'l L. Rev.* 20 (2008): 161 at 177.

the parties, trade usages and any subsequent conduct [Article 8(3) CISG] may be drawn upon.

Avoidance may be triggered not only by a breach of a fundamental term. A breach of any contractual duty may also trigger the right to avoid, if it reaches sufficient severity.⁹ While a breach of a fundamental term will directly result in a fundamental breach giving the right to avoid, a breach of a non-fundamental term must meet the criteria set out in Article 25 CISG.¹⁰ Article 25 CISG, due to its vagueness¹¹ and complexity, has not been interpreted uniformly.¹² This contribution will focus on fundamentality in section 4 below and remain for the next section on the topic of the simple breach.

3. NON-CONFORMITY OF GOODS

Non-conformity may appear in various forms. It may be that the goods are not delivered in time, that they are not in conformity with contractual terms, that they are not fit for the ordinary purpose or any particular purpose made known to the seller (Article 35 CISG). It is important to identify the form of the lack of conformity in the context of avoidance, even though the CISG is based on the notion of a uniform concept of non-conformity. Article 49(1) CISG differentiates between non-delivery [Article 49(1)(b) CISG] and other forms of seller's failure to perform any of its obligations [Article 49(1)(a) CISG].

3.1. Non-Delivery of Goods

Article 49(1)(b) CISG permits avoidance in case of non-delivery only when the seller does not deliver the goods within the additional period of time fixed by the buyer. This means that as a general rule late delivery does not constitute a fundamental breach of contract in the sense of Article 49(1)(a) CISG. However, there are exceptions when time is of the essence, seasonal or perishable goods are involved or the delivery date has been exceeded to an unbearable extent.¹³ As

⁹ J. Lookofsky, *Understanding the CISG 3rd ed.* (Alphen aan den Rijn: Kluwer Law International, 2008), 117.

¹⁰ Heinrich Honsell (ed.), *Kommentar zum UN-Kaufrecht 2nd ed.* (Heidelberg: Springer 2010), Art. 49 para. 17a.

¹¹ Karen Alverson Cross, 'Commerical Calamaties: Parol Evidence under the CISG: the "Homeward Trend" Reconsidered', *Ohio St. L.J.* 68 (2007): 133 at 140; Ferrari, *supra* note 8, 492.

¹² CISG-AC no. 5, *supra* note 3, para. 1.3; Schlechtriem/Schwenzer, *supra* note 6, Art. 25 para. 1.

¹³ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 49 para. 5.

example, fundamental breach has been found when the length of a delay in performance approached, in its effect, non-performance. This would be the case when the agreed delivery date was one week and the seller had delivered only one-third of the goods after two months.¹⁴

In civil law countries *aliuds* are sometimes treated as non-deliveries rather than non-conforming deliveries. The concept of *aliud* is virtually unknown in common law countries. Delivered goods not corresponding to goods contracted for in a particularly blatant manner, are commonly referred to as *aliuds* (a bike is delivered instead of a car). The line between non-conforming goods and *aliuds* can be a thin one, depending greatly on the specific contract, the specific industry and the specific parties involved (e.g. is a car with stick shift an *aliud* compared to a car with automatic transmission?).

The question could be relevant under the CISG, as well, since non-conformity and non-delivery trigger different consequences. For non-delivery Article 49(1)(b) CISG applies, while for non-conforming deliveries Article 49(1)(a) CISG applies. While Article 49(1)(b) CISG expressly provides for a seller to receive additional time for delivery prior to avoidance, Article 49(1)(a) CISG does not contain such language.

To avoid drawing this line, commentators and jurisprudence suggest a uniform application of Article 49(1)(a) CISG for all non-conforming goods as defined in Article 35/25 CISG. It is reasoned, that dogmatically, an *aliud* constitutes a discrepancy in nature or description as defined under Article 35 CISG, regardless of how obvious the non-conformity is.¹⁵ This means that as long as a seller delivers *something*, Article 49(1)(a) CISG applies. Under the CISG, non-delivery

¹⁴ Pretura circondariale di Parma, 24 November 1989 (Knapsacks, bags, wallets case), CISG-online 316 (Italy); Secretariat's Commentary "The seller no longer has the right to remedy the failure to perform after the delay amounts to a fundamental breach even if the buyer has not as yet declared the contract avoided." at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-48.html>.

¹⁵ Graffi, *supra* note 2, 341; Huber/Mullis, *supra* note 1, 133; Schwenger, in Schlechtriem/Schwenger, *supra* note 6), Art. 35 para. 10, footnote 47; OGH 29 June 1999 (Dividing wall panels case), CISG-online 483 (Austria); OLG Celle 10 March 2004 (Commercial vehicles case), CISG-online 824 (Germany).

means “not-at-all” delivery. Case law from Austria¹⁶, Germany¹⁷ and recently China¹⁸ supports this notion.

3.2. Other Forms of Non-Conformity

Article 35 CISG sets the relevant standard for the question of non-conformity of goods. First and foremost the contractual terms are decisive in this respect. If the delivered goods do not conform to these requirements quantitatively, qualitatively or in description, there is a breach of contract [Article 35(1) CISG]. If the contract does not contain sufficient requirements that the goods need to satisfy, Article 35(2) CISG uses objective criteria to determine the conformity of the goods.¹⁹ The intended purpose is of particular importance.²⁰

(a) Article 35(2)(a) CISG

When the buyer has not made known a particular purpose to the seller (e.g. by indication of the desired country of use), the goods must be fit for the purpose goods of the same description would ordinarily be used [Article 35(2)(a) CISG].

Some examples of cases of Article 35(2)(a) CISG are:

- The seller delivered a refrigeration unit that broke down soon after it was first put into operation.²¹
- The seller delivered wine that had been diluted with 9 per cent water, causing domestic authorities to seize and destroy the wine.²²
- The seller substituted a different component in a machine without notifying the buyer and without giving the buyer proper instructions for installation; as a

¹⁶ OGH, 21 March 2000, CISG-online 641 (Austria).

¹⁷ BGHZ 132, 218-228 (3 April 1996), CISG-online 135 (Germany).

¹⁸ Shanghai First Intermediate People’s Court, 25 December 2008, decided in a liquor sales contract. The seller had delivered only partially and the part delivered was not one of the brands contained in the sales contract. It was thus an *aliud* case that was treated as a case of non-conforming delivery, CISG-online 2059 (China).

¹⁹ B. Piltz, *Internationales Kaufrecht 2nd ed.* (Munich: Beck, 2008), para. 5-28; Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 12.

²⁰ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 12.

²¹ Cour d’appel Grenoble, 15 May 1996 (Refrigeration equipment for transportation of produces, etc. case), CISG-online 219 (France).

²² Landgericht Trier, 12 October 1995 (Wine case), CISG-online 160 (Germany).

result, the machine failed after three years of use, thus disappointing the buyer's expectation for "long, continuous operation of the [machine] without failure".²³

We will now turn to the meaning of "ordinary use" and the required quality of the goods.

(i) Ordinary Use

Goods can have many different uses and therefore the question becomes whether the goods need to be fit for all, some or just one of the uses. It is in dispute whether ordinary purpose,²⁴ all ordinary purposes,²⁵ the average purpose,²⁶ an advertised purpose, or just one of many potential purposes, as long as the goods can be used for the usual purpose,²⁷ should be applied. If the goods are not fit for occasional, but not ordinary, uses,²⁸ they only lack conformity if the buyer made this use known to the seller [Article 35(2)(b) CISG].²⁹ If the delivered goods do not fulfil all but merely some of the purposes, the seller must inform the buyer of this fact.³⁰ The goods have to fit for commercial purposes which means in principle that they need to be resalable.³¹ Groceries need to be non-perishable for a certain time.³²

²³ Arbitration Institute of the Stockholm Chamber of Commerce, 5 June 1998 (4,000 ton rail press case), Case law on UNCITRAL texts (CLOUT) abstract no. 237 (Sweden).

²⁴ Singh/Leisinger, *supra* note 8, 175.

²⁵ Magnus, in Honsell, *supra* note 10, Art. 35 para. 13.

²⁶ Christoph Brunner, *UN-Kaufrecht - CISG: Kommentar zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf von 1980: unter Berücksichtigung der Schnittstellen zum internen Schweizer Recht* (Bern: Stämpfli, 2004), Art. 35 para. 8; Magnus, in Honsell, *supra* note 10, Art. 35 para. 13.

²⁷ Huber/Mullis (*supra* note 1), 135.

²⁸ Secretariat's Commentary, Art. 35, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html>; Max Hutter, *Die Haftung des Verkäufers für Nichtlieferung bzw. Lieferung vertragswidriger Ware nach dem Wiener UNCITRAL-Übereinkommen über internationale Warenkaufverträge vom 11. April 1980*, (Diss. Regensburg, 1988), 41.

²⁹ CIETAG Arbitration Award of 22 May 1996 available at <http://cisgw3.law.pace.edu/cases/960522c1.html>.

³⁰ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 13; Secretariat's Commentary, Art. 33 para. 5, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-35.html>.

³¹ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 14.

³² BGH, 2 March 2005, CISG-online 999 (Germany).

(ii) Quality Standard

Even if the (generic) goods are fit for an ordinary use, the question is if they have to be of average quality, and if the answer is in the affirmative, whether it is in addition or in the alternative to the ordinary use.

Some authors define the fitness for purpose (in addition or entirely) by a quality standard. MAGNUS prefers an average quality requirement.³³ It further seems that goods must be fit for use for that purpose for a reasonable length of time to meet the conformity standard.³⁴

The interpretation favoured in common law countries requires the goods to be of a merchantable or marketable quality.³⁵ Goods are in conformity with the contract if a reasonable buyer would have concluded contracts for the goods at similar prices if the buyer had known the quality of the goods.³⁶ Another view, derived from civil law, calls for goods of average quality. A reasonable quality criterion may also be drawn upon.³⁷

A Dutch case decided that Article 35 (2)(a) CISG should be interpreted according to the reasonable quality criterion. The arbitral tribunal in that case found that that the reasonable quality test met the terms of Article 7(1) CISG. It stated that the reasonable quality standard furthermore was compatible with the preparatory works of CISG.³⁸

Also, in a more and more regulated world, the issue of whether conformity, and the required quality can be determined by reference to regulatory requirements prevailing in the buyer's jurisdiction has been considered in a number of decisions and articles.³⁹

³³ Magnus, in Honsell, *supra* note 10, Art. 35 para. 13.

³⁴ Schwenger, in Schlechtriem/Schwenger, *supra* note 5, Art. 35 para. 14, concerning perishable foods; LG Munich, 27 February 2002, CISG-online 654 concerning machinery (motors for globes must be fit to run for several years) (Germany); Magnus, in Honsell, *supra* note 10, Art. 35 para. 15.

³⁵ LG Berlin, 15 September 1994 (*Shoes case*), CISG-online 399 (Germany).

³⁶ Netherlands Arbitration Institute, 15 October 2002, Case No. 2319 (Condensate crude oil mix case), IHR 2003, 283, CISG-online 740 and 780 (Netherlands), available at <http://cisgw3.law.pace.edu/cases/021015n1.html>.

³⁷ CISG-online 780, *supra* note 36.

³⁸ CISG-online 780, *supra* note 36.

³⁹ BGH, 8 March 1995, VIII ZR 159/94 (New Zealand mussels case), CISG-online 144 (Germany); Court of Appeal Grenoble, 13 September 1995, 93/4126' (Italian Cheese Case)

While as a general rule a seller is not responsible for compliance with the regulatory provisions or standards of the importing country even if he knows the destination of the goods,⁴⁰ there are exceptions depending on the circumstances of the individual case. A seller needs to comply with such regulations, if the same one exist in a seller's country, a buyer drew a seller's attention to the regulatory provisions and relied on a seller's expertise (Article 35(2)(b) CISG), a seller knew or should have known of the requirements because of special circumstances, such as the fact a seller has maintained a branch in the importing country, the existence of a long-standing connection between the parties, the fact a seller has often exported into a buyer's country or the fact a seller has promoted its products in a buyer's country.⁴¹ However, these cases fall under Article 35(2)(b) CISG, which is discussed in further detail below.

(b) Article 35(2)(b) CISG

Article 35(2)(b) CISG refers to specific uses, which a seller has been made aware of or should have been aware of. When the goods are intended for a buyer's own use, the goods must be fit for such use, whether it is as machinery for processing, globes for marketing purposes,⁴² compressors for use in air-conditioners⁴³ or component in computers.⁴⁴ Similarly, where the goods are intended for resale, they must be fit for resale. An exception to a buyer's entitlement to receive a product fit for its intended use is said to exist when a seller has no expertise. In such cases a buyer cannot reasonably rely on a seller's delivery of goods fit for a particular purpose.⁴⁵

A particular purpose can be very specific. One court found that a seller violated Article 35(2)(b) when he delivered skin care products that did not maintain specified levels of a vitamin throughout their shelf life.⁴⁶ "The special purpose

CISG-online 157 (France); Peter Schlechtriem & Petra Butler, *UN Law on International Sales 2nd ed.* (Berlin: Springer, 2009), 139.

⁴⁰ CISG-online 144, *supra* note 39; Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 17.

⁴¹ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 17.

⁴² CISG-online 654, *supra* note 34.

⁴³ US Court of Appeals (2nd Circuit), *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 6 December 1996, CISG-online 140 (United States of America).

⁴⁴ Appellate Court Paris, 7 October 2009 (Computer motherboard case) CISG-online 2034 (France).

⁴⁵ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 24.

⁴⁶ Helsinki Court of First Instance, 11 June 1995, affirmed by Helsinki Court of Appeal, 30 June 1998 (Skin care products case) CISG-online 1304 (Finland); see also Tribunale di Busto Arsizio, 13 December 2001 (Machinery case), CISG-online 1323 (Italy).

(...) was known by the [seller] with sufficient clarity”, and that “the buyer counted on the seller’s expertise in terms of how the seller reaches the required vitamin A content and how the required preservation is carried out.”⁴⁷

The exact form this knowledge must take is in dispute. SCHWENZER suggests, if e.g. a buyer makes a seller aware of the country of use, this seller becomes liable for the goods’ usability there: When for example a buyer makes a seller aware that goods will be subjected to certain climatic conditions, will be used in a context where certain ethical principles are of high importance or will be used in a country where specific public law regulations apply, a seller must conform to those standards.⁴⁸ Otherwise the goods would not be fit for use intended by a buyer.⁴⁹ Circumstantial evidence of awareness may also suffice, such as third party information or awareness of the habitual place of business of a buyer. Such awareness must exist at the time of conclusion of the contract.⁵⁰

However, a buyer cannot reasonably rely on the seller’s knowledge of the importing country’s public law requirements or administrative practices relating to the goods, unless it pointed out such requirements to the seller.⁵¹ The German Supreme Court therefore found that mussels with cadmium levels exceeding the recommendations of German health regulations did not violate the requirements of Article 35(2)(b) when there was no evidence that the buyer had mentioned the regulations to the seller.⁵²

However, in a recent New Zealand case, which involved trucks that were running, but could not be registered, the court held, that

“Trucks are ordinarily used for carting goods on the road. These trucks were mechanically capable of being driven on the road. However, the [Buyer]s contend that because the trucks were not registrable at the point of sale, and

⁴⁷ CISG-online 1304, *supra* note 46.

⁴⁸ See above 3.2.(a)(ii); Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 20.

⁴⁹ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 21; MüKomm/Benicke, Art. 35 para. 8.

⁵⁰ Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 23; Magnus, in Honsell, *supra* note 10, Art. 35 para. 18.

⁵¹ CISG-online 144, *supra* note 39.

⁵² CISG-online 144, *supra* note 39.

never could be fully registered, they could not be driven and were therefore not fit for the ordinary purpose”.⁵³

4. FUNDAMENTAL BREACH

4.1. Elements of a Fundamental Breach

A fundamental breach requires a certain objective importance.⁵⁴ To determine the gravity of non-conformity often proves fact-intensive. The criteria generally applied to determine fundamentality of the non-conformity can be derived from the financial loss suffered, the percentage of goods affected and the purpose the goods were to serve.⁵⁵ Whether these criteria apply cumulatively or individually also depends on the circumstances.

(a) Purpose

Not every breach authorizes the buyer to avoid the contract. As mentioned before, the breach must be fundamental (Article 49(1)(a) and Article 25 CISG). This has to be decided according to the individual contract.⁵⁶ If the interpretation of the contract does not make clear if the breach of a certain contractual clause is fundamental, the purpose for which the goods were bought is essential.⁵⁷ When a purpose is stated explicitly in the contract, the goods must be fit for such purpose to avoid a breach. Whether this breach then is fundamental depends on whether a buyer is substantially deprived of what it was entitled to expect. Even though the specific purpose of a contract may not be fulfilled, it is still possible that a buyer is not entitled to avoid.

⁵³ High Court of New Zealand, 30 July 2010, *RJ & AM Smallmon v. Transport Sales Limited and Grant Alan Miller* (New Zealand) available at <http://cisgw3.law.pace.edu/cases/100730n6.html>.

⁵⁴ CISG-AC no. 5 (*supra* note 3), para. 4.4.; Vincent Heuzé, *La vente internationale de merchandise*, 375 (Paris: JOUVE, 2000).

⁵⁵ Describing the lack of a definition of detriment in the CISG and mentioning criteria, Robert Koch, “Fundamental breach”: Commentary on whether the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 25 CISG’, in *An International Approach to the Interpretation of the United Nations Convention on Contracts for the Sale of Goods (1980) as Uniform Sales Law*, ed. J. Felemgas (New York: Cambridge University Press, 2007), 125.

⁵⁶ CISG-AC Opinion no. 5, *supra* note 3, para. 4.2.

⁵⁷ <http://www.cisg.law.pace.edu/cisg/text/digest-art-49.html>.

Thus, e.g., the delivery of frozen meat with an excessive fat and water content -- and which, therefore, was worth 25.5 per cent less than meat of the contracted-for quality, according to expert opinion -- was not regarded as a fundamental breach of contract since the buyer could resell the meat at a lower price or could otherwise make use of it.⁵⁸ By contrast, in a CIETAC arbitration, broadcasting equipment was sold and recommended by a seller as including “*launching broadcast services*”. The equipment did not perform such services, so that the arbitral panel, focusing on the advertised purpose, found a fundamental breach existed.⁵⁹

If the non-conforming goods cannot be reused (if the buyer intended the goods for its own use) or resold (if the buyer is in the resale business) using reasonable efforts and without unreasonable inconvenience to the buyer, the delivery constitutes a fundamental breach and entitles the buyer to declare the contract avoided,⁶⁰ even if the resale requires a rebate or produces a loss.⁶¹ The crux seems to lie in which exact duties the buyer has to reuse or resell.⁶² There are courts that only allow avoidance if no alternate use at all can be found, although it is admitted that the alternatives may not result in unreasonable expenditure or effort to a buyer.⁶³ In a case on point, a seller delivered tantalum powder with oxygen content exceeding 1,300 ug/g, instead of the provided for oxygen content. The powder would have been useable if it had been mixed with the buyer’s product differently, resulting in a much larger quantity of the desired material. The buyer was entitled to avoid, even though the powder would have been useable. The buyer would have, using a different mixture, had too much of the product. It could not have used such quantities, so that avoidance was permitted.⁶⁴

⁵⁸ BGer 4C.197/1998, 28 October 1998 (Meat case), CISG-online 413 (Switzerland).

⁵⁹ CIETAG Arbitration Award, 22 May 1996 available at <http://cisgw3.law.pace.edu/cases/960522c1.html>.

⁶⁰ Cour de cassation, 23 January 1996 (artificially sugared wine case), CISG-online 159 (France); OLG Frankfurt a.M., 18 January 1994 (Shoes with cuts or cracks in the leather case), CISG-online 123 (Germany); LG Landshut, 5 April 1995 (*Sport clothing case*, T-shirts which shrink by two sizes after the first washing), CISG-online 193 (Germany).

⁶¹ CISG-online 135, *supra* note 17; CISG-online 413, *supra* note 58.

⁶² <http://www.cisg.law.pace.edu/cisg/text/digest-art-49.html> - 22.

⁶³ ICC International Court of Arbitration, 7754 of 1995, CISG-online 843; OLG Stuttgart, 12 March 2001, CISG-online 841 (Germany); but see CISG-online 654, *supra* note 34; Saenger, ‘Article 49 CISG’, in *Internationales Vertragsrecht*, eds. F. Ferrari et al. (Munich: Beck, 2007), Art. 49 CISG para. 7.

⁶⁴ OLG Innsbruck, 1 February 2005, CISG-online 1130 (Austria).

Even though the CISG should be interpreted uniformly, the criteria used vary from country to country, and sometimes even from court to court. German⁶⁵ and Swiss⁶⁶ courts attach great importance to whether non-conforming goods could be reused or resold in the ordinary course of business (even at a lower price, which would then lead to a claim for damages). Some authorities do not distinguish if the buyer bought the goods for its own use or to resale. They require the buyer in both cases to take a reasonable effort to resale in the ordinary course of business,⁶⁷ as long this is possible without unreasonable inconvenience or harm to the buyer's reputation.⁶⁸ What is reasonable, convenient or harmful to the reputation depends on the nature of buyer's business.⁶⁹ We do not agree with this case law. If the buyer is not in the resale business, it has no use for the goods and is thus substantially deprived of what he was entitled to expect under the contract. The question of an attempted resale may become relevant when considering mitigation of damages, but is not a question of permissibility of avoidance.

US-American and French courts have not made use of this criterion.⁷⁰ Therefore, a fundamental breach has also been found, without reference to whether alternative use or resale was possible for the buyer, when the goods had major

⁶⁵ CISG-online 135, *supra* note 17; but CISG-online 654, *supra* note 34.

⁶⁶ CISG-online 413, *supra* note 58.

⁶⁷ OLG Frankfurt a.M., 18 January 1994, CISG-online 123 (Germany), the burden of proof that resale is not possible lies on the buyer; CISG-online 841, *supra* note 63; Ferrari, *supra* note 8, 493.

⁶⁸ LG Landshut, 5 April 1995 (clothes), CISG-online 193 (Germany); Hans. OLG Hamburg, 26 November 1999 (jeans), CISG-online 515 (Germany); OLG Köln, 14 October 2002 (designer clothes), CISG-online 709 (Germany); OLG Oldenburg, 1 February 1995, CISG-online 253 (Germany) (limited circle of interested sub-buyers would only buy the goods at a discount of 50%).

⁶⁹ Only where the seller knew. I do not see why the seller should have a different position just by the nature of the buyer – this kind of thing does not influence the decision to sell as a conscious risk assessment which goes into the price, like credit worthiness or establishment in the business. The buyer is given an unfair advantage also over other buyers for no reason other than mitigation is easier for the reseller. A wholesaler with broader access to markets in the business concerned has more opportunities to resell the goods than a retailer. CISG-AC Opinion no 5, *supra* note 3.

⁷⁰ CISG-online 140, *supra* note 43; CISG-online 159, *supra* note 60; Cour de cassation, 26 May 1999 (Laminated sheet metal case), CISG-online 487 (France) (metal sheets absolutely unfit for the foreseen kind of manufacture by the buyer's customer); CISG-online 1323, *supra* note 46 (delivery of a machine totally unfit for the particular use made known to the seller and that was incapable of reaching the promised production level represented a serious and fundamental breach of the contract, since the promised production level was an essential condition for the conclusion of the contract; the lack of conformity therefore was a basis for avoidance).

defects and the buyer required the goods for manufacturing its own particular products.⁷¹

It seems safe to say, that when an appropriate alternative use can be found, the specific intended use may lose some weight in the determination of fundamentality.⁷² In a German case, in which coal in a particular quality for the purposes of firing was purchased, and inferior quality was delivered, avoidance was not permitted, because it was still useable for firing with minor adaptation to the previewed firing process.⁷³ The general purpose of firing was still possible and in the specific instance with only minor adjustments to the particular firing process.

If the buyer's ordinary business or sphere of operation was unforeseeable to the seller⁷⁴ no avoidance is granted when goods conform to standards applicable in seller's country. However, if the buyer indicated the sphere of operation to the seller or a special use could have been anticipated, the seller's foreseeability will be present, as shown in the following cases.

An arbitral case affirmed in the United States of America held that the standards in a buyer's country apply with the court especially noting that a seller should have been aware of them.⁷⁵ A similar holding was delivered on December 11, 2008 by the Tribunale di Forlì.⁷⁶ In a decision of July 14, 2009, a Spanish court decided a case of the sale of 'banderas de portugal' for the soccer world championship 2010. These banderas were to contain reference to the Portuguese national team for the world championship. The banderas, however, did not correctly represent the Portuguese national team. Thus it was not usable for the world championship 2010 and a fundamental breach had occurred.

⁷¹ CISG-online 140, *supra* note 43; CISG-online 159, *supra* note 60; CISG-online 487, *supra* note 70; CISG-online 1323, *supra* note 46.

⁷² Schroeter, in Schlechtriem/Schwenzer, *supra* note 6, Art. 35 para. 33.

⁷³ OLG Munich, 2 March 1994, CISG-online 108 (Germany).

⁷⁴ In which case the prevailing an accepted standard requires conformity with health and safety regulations of the seller's country, regardless of the buyer's sphere of operation. CISG-online 135, *supra* note 17; CISG-online 413, *supra* note 58; OGH, 25 January 2006, CISG-online 1223; CISG-online 144, *supra* note 39; agreeing Huber/Mullis, *supra* note 1, 137; Mark R Shulman & Lachmi Singh, 'China's implementation of the UN Sales convention through arbitral tribunals', *Colum. J. Transnat'l L.* 48 (2010): 242 at 274.

⁷⁵ *Med. Mktg Int'l v. Internationale Medico Scientifica, S.R.L.* No. Civ. A. 99-0380, 1999 (E.D. La 17 May 1999), CISG-online 387 (United States of America). The US American court upheld the holding of the arbitrator stating that the arbitrator had distinguished the German precedent.

⁷⁶ CISG-online 1788, *infra* note 89.

An alternative approach suggests the need for a cover purchase as decisive criterion for reseller and ordinary buyer alike. Where a buyer does not need to purchase a replacement for whatever reason, there should not be avoidance.⁷⁷ If a reseller buys goods in order to fulfil his own obligations of a previously arranged sale to a third party that purchase relates to a specific (resale) purpose. As such the purchase should be treated like a case of “own use”.⁷⁸

(b) Financial Loss

While it would be easy to equate detriment with financial damages, the term detriment must be interpreted much more broadly.⁷⁹ Financial loss alone can only be regarded as a persuasive but not decisive criterion.⁸⁰ Insignificant financial loss alone does not exclude a fundamental breach. However, if the loss is financially insignificant and other detriment cannot be proven, a buyer will be hard pressed to avoid a contract. It should be remembered, that the duty to mitigate requires a buyer to minimize his losses, which may in turn have an impact on the fundamentality of the breach. Mitigation should in theory not have an influence on the right to avoid. Thus financial loss is only a persuasive criterion when determining a fundamental breach. In reality, numbers do matter, as demonstrated in the following Swiss case: Delivery of frozen meat that was too fat and too moist and consequently was worth 25.5 per cent less than meat of the contracted quality (according to an expert opinion). This was not regarded as a fundamental breach of contract.⁸¹

(c) Quantity and Necessary Percentage of Non-Conformity

When speaking of quantity it is important to consider that partial non-delivery and non-conformity of only a part of the delivered goods themselves are treated the same under the CISG for purposes of avoidance of the contract [Article 51 CISG].

⁷⁷ Benjamin K. Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods* (Munich: European Law Publishers, 2007), 130; Ferrari, *supra* note 8, 502.

⁷⁸ Huber/Mullis, *supra* note 1, 226.

⁷⁹ Ferrari, *supra* note 8, 493; Graffi (*supra* note 2), 338.

⁸⁰ See also CISG-AC Opinion no 5, *supra* note 3, para. 4; Graffi, *supra* note 2, 338 f.; Schlechtriem, in Schlechtriem/Schwenzer, *supra* note 6, Art. 25 para. 2; CISG-online 135, *supra* note 17.

⁸¹ CISG-online 413, *supra* note 58. The reason given was that the buyer had the opportunity to resell the meat at a lower price or to otherwise process it, however the characteristic and worth difference was so substantial that the court addressed the issue of resale.

The delivery of a surplus as well as the delivery of insufficient quantity is technically a delivery which is not in conformity with the contract according to Article 35(1) CISG. However, excess deliveries do not turn into a case of fundamental breach. Surplus may be rejected and does not deprive a buyer of the benefit of the bargain.⁸² Incomplete deliveries, while representing a quantitative lack of conformity, do not represent a fundamental breach either.⁸³ Additional circumstances causing substantial deprivation are required and often proved by failure to deliver a large portion of the goods. As an example, on December 28, 2008, the Shanghai First Intermediate People's Court decided in a liquor sales contract. A seller had delivered only a small percentage of the goods and – additionally – none of the brands listed in the sales contract. The court found a fundamental breach.⁸⁴

The same can be true when a large portion of the goods are either non-conforming or heavily affected by the non-conforming goods.⁸⁵ A US-American court considered 93% of delivered goods performing below the cooling capacity usual in the business for air conditioners a fundamental breach.⁸⁶ In a French case, 380 of 445 non-conforming motherboards were sufficient to avoid the entire contract.⁸⁷ A German court found 420 kg out of 22 tons non-conforming goods sufficient for avoidance.⁸⁸ On December 11, 2008, the Tribunale di Forlì decided that the value of the non-conforming goods was more than 90% and entitled the buyer to avoid the contract.⁸⁹ The Italian case also makes reference to the inconvenience caused to the buyer of a cure by the seller, which will be discussed below.⁹⁰

⁸² LG Köln, 5 December 2006 (Plastic faceplates for mobile telephones case), CISG-online 1440 (Germany).

⁸³ Schwenger, in Schlechtriem/Schwenger, *supra* note 5, Art. 35 para. 8; OLG Düsseldorf, 24 April 1997 (Shoes case), CISG-online 385 (Germany).

⁸⁴ The court listed other factors as well.

⁸⁵ Gsell, in Honsell, *supra* note 10, Art. 25 para. 36. One must remember that as long as something has been delivered, no case of non-delivery is present.

⁸⁶ CISG-online 140, *supra* note 43.

⁸⁷ CISG-online 2034, *supra* note 44; see also Cour d'appel (CA) Paris, 4 June 2004, CISG-online 872 (France).

⁸⁸ OLG Hamm, 22 Sept 1992 (dirty bacon case), CISG-online 57 (Germany).

⁸⁹ Tribunale di Forlì, 9 December 2008, CISG-online 1729 and 1788 (Shoe case) also cited as 11 December 2008 (Italy).

⁹⁰ See below *supra* note 126.

Absent express contractual agreement,⁹¹ defects in small numbers (usually in the 0/00), that are based on imperfections in the manufacturing process of a seller (“*Ausschuss*”) are permissible insofar as the particular trade or industry permits them and thus will not be regarded as non-conformity.⁹² Immaterial discrepancies, such as colour of an invisible component part, that do not (materially) effect the good or the end product, i.e. where a characteristic, which is non-conform has only an imperceptible effect on the whole, will not amount to a fundamental breach.⁹³ In an SCC arbitration, a temperature effect in a pressure transmitter did not entitle a buyer to avoidance, as the non-conforming factor only had an imperceptible effect on the whole product.⁹⁴ Flawless goods are not required.⁹⁵

When minor or replaceable parts are missing, a buyer may be required to purchase them,⁹⁶ provided it can easily and conveniently do so.⁹⁷ However, this is not undisputed. On Mai 18, 2009, the Swiss Federal Court decided a case involving a system for packaging, consisting of ten machines and a conveyor belt. The performance of the belt was below standard of both buyer’s and seller’s contention by 71% and 40% respectively, which entitled the buyer to avoidance for fundamental breach, even though just one part, the belt, needed replacing for the entire system to perform to contractual standards.⁹⁸

If avoidance of the contract is possible when only a part of the goods delivered is in conformity with the contract depends on the use(es) the remainder of the (unaffected) goods can reasonable be put to.⁹⁹

⁹¹ Arbitration in front of SCC between CL from PRC and R from Brazil, 5 April 2007, Note 144, CISG-online 1521.

⁹² Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 9.

⁹³ K. Neumeyer & C. Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises* (Paris: CEDIDAC, 1993), 272; Schwenger, in Schlechtriem/Schwenger, *supra* note 6, Art. 35 para. 33.

⁹⁴ CISG-online 1521, *supra* note 91, para. 146.

⁹⁵ CISG-online 1521, *supra* note 91, para. 144; Michael Bridge, *The International Sale of Goods*, (Oxford: Oxford University Press, 1999), para. 3.25.

⁹⁶ LG Heidelberg, 3 July 1992, CISG-online 38 (Germany); Müller-Chen, in Schlechtriem/Schwenger, *supra* note 6, Art. 49 para. 26, footnote 90.

⁹⁷ CISG-AC Opinion no 5, *supra* note 3, para. 4.5; CISG-online 38, *supra* note 96.

⁹⁸ Here the buyer was not required to buy a substitute transport belt.

⁹⁹ Gsell, in Honsell, *supra* note 10, Art. 25 para. 36. One must remember that as long as something has been delivered, no case of non-delivery is present; Graffi suggests that to constitute fundamental breach, non-conforming goods must amount to almost the entire shipment. Graffi, *supra* note 2, 342; the authors disagree on the basis of the subjective nature of Article 25 CISG.

5. IMPACT OF RIGHT TO AVOID ON RIGHT TO CURE

Assuming a breach occurred and was fundamental, a buyer may still be prevented from avoiding the contract.

Generally speaking, a seller has a right to cure defects. However, Article 48 CISG is subject to Article 49 CISG by its express wording, thus giving the latter preference over a seller's right to cure.¹⁰⁰ If a cure is not possible, a fundamental breach will exist. In a Russian arbitration, a non-repairable design defect, which hindered the smooth and uninterrupted use of a machine, was considered a fundamental breach.¹⁰¹

Once a seller delivered, a buyer must determine whether he must allow a seller an opportunity to cure. Commentators and jurisprudence have answered this question divergently.¹⁰² For some the right to cure amounts to a negative element for the determination of a fundamental breach. Some courts have held that easy reparability precludes finding of a fundamental breach.¹⁰³ The effect of the possibility to cure is debatable. According to one view, a fundamental breach is only established, i.e. only begins to exist, when the cure failed, was not performed properly or proves unreasonable to the buyer.¹⁰⁴ Some courts have held that a lack of conformity that can easily be repaired does not constitute a fundamental breach.¹⁰⁵ If the seller offers and effects speedy repair or replacement without inconvenience to the buyer, several decisions have denied the existence of a fundamental breach.¹⁰⁶

¹⁰⁰ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 14; Graffi, *supra* note 2, 343.

¹⁰¹ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 21/2005 of 18 October 2005, CISG-online 1457, para. 5.3.

¹⁰² Honsell, *supra* note 10, Art. 49 para. 18.

¹⁰³ Handelsgericht des Kantons Zürich 26 April 1995 (Saltwater isolation tank case), CISG-online 248 (Switzerland).

¹⁰⁴ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 15.

¹⁰⁵ CISG-online 248, *supra* note 103; <http://www.cisg.law.pace.edu/cisg/text/digest-art-49.html> - 26.

¹⁰⁶ Cour d'appel, Grenoble 26 April 1995 (Marques Roque v. Manin Reviere) (Candy case), CISG-online 153 (France); Oberlandesgericht Koblenz 31 January 1997 (Acrylic blankets case), CISG-online 256 (Germany); <http://www.cisg.law.pace.edu/cisg/text/digest-art-49.html> - 27.

Another view propounds that the right to cure suspends the right to avoid, which exists from the outset, until a reasonable time has passed fruitlessly.¹⁰⁷

The effect of both opinions is, that by repairing the goods¹⁰⁸ or delivering new goods¹⁰⁹ without unreasonable delay or inconvenience to a buyer, a seller prevents - the existence of (first opinion)¹¹⁰ or the application of avoidance as remedy (second opinion)¹¹¹ - a fundamental breach.¹¹² The extension of the possibility to cure has limits.¹¹³ A seller does not have the right to extend its time to cure beyond the bounds of convenience and reason.

Generally, courts are reluctant to consider a breach fundamental when a seller offers and effects speedy repair without any inconvenience to a buyer.¹¹⁴ For others, the possibility of a cure only suspends the right to avoid the contract until either the cure has failed, has been refused or made unreasonable by the passage of time.¹¹⁵ This passage of time does not equal a time limit to be set by a seller, but rather a reasonable length of time, similar to the length of time required in cases of late delivery without fixed date.¹¹⁶ SCHLECHTRIEM maintained that a breach is fundamental whether it can be cured or not.¹¹⁷ Yet another opinion grants a buyer an immediate right to avoid only in a limited number of

¹⁰⁷ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 14; Singh/Leisinger, *supra* note 8, 184; Michael Bridge, 'A law of International Sales', *Hong Kong L.J.* 37 (2007).

¹⁰⁸ Handelsgericht des Kantons Aargau, 2 November 2002, CISG-online 715 (Switzerland).

¹⁰⁹ LG Köln, 16 November 1995, CISG-online 265 (Germany).

¹¹⁰ Singh/Leisinger, *supra* note 8, 176; Ferrari, *supra* note 8, 501.

¹¹¹ John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention 4th ed.* (Aspen Publishers, 2009), 327 ff; Ingeborg Schwenzer, 'Avoidance of the contract in case of non-conforming goods', *J.L. & Com.* 25 (2005): 437 at 439.

¹¹² Schlechtriem, in Schlechtriem/Schwenzer, *supra* note 6, Art. 25 para. 20; Robert Koch, 'The concept of fundamental breach of contract under the United Nations Convention on contracts for the international sale of goods, CISG', in *Review of the Convention on the Contracts for the International Sale of Goods 1998* (Kluwer, 1999), 177-354, 224 ff.; Larry A. DiMatteo et al., *International Sales Law - A Critical Analysis of CISG Jurisprudence* (New York: Cambridge University Press, 2005), 135.

¹¹³ Ferrari (*supra* note 7), 504; CISG-online 769.

¹¹⁴ CISG-online 153, *supra* note 106; CISG-online 256, *supra* note 106.

¹¹⁵ Secretariat's Commentary, Art. 48, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-48.html>.

¹¹⁶ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 49 para. 5.

¹¹⁷ Peter Schlechtriem, 'Subsequent performance and delivery deadlines – avoidance of CISG Sales contracts due to non-conformity of goods', *Pace Int'l L. Rev.* 18 (2006): 83 at 87.

circumstances.¹¹⁸ Additional reasonable time to cure is not required when time was of the essence, if the basis of trust has been destroyed, if the remedy is unreasonable,¹¹⁹ if a seller seriously refuses to remedy the defect¹²⁰ or if the defect cannot be remedied by a reasonable number of attempts within a reasonable time.¹²¹

The Secretariat's commentary gives preference to the right to avoid, allowing the buyer to cut off the seller's right to cure.¹²² However, the commentary also states that

“In some cases the failure of the goods to operate or to operate in accordance with the contract specifications would constitute a fundamental breach only if that failure was not remedied within an appropriate period of time. Until the passage of that period of time, the buyer could not preclude the seller from remedying the non-conformity by declaring the contract avoided”.

Avoidance was considered justified in an ICC arbitration, where the cost of repair or preparing for replacement was almost one third of the price of the goods since this was too much inconvenience for the buyer.¹²³ In an Italian case a seller offered only conditional replacement, which was unreasonably inconvenient and thus need not have been accepted by the buyer. Avoidance was granted.¹²⁴ On October 7, 2009, in another French case, avoidance was permitted after an attempted repair did not alleviate the problem entirely.

In cases where repair is effected in an easy way, avoidance will be denied. Where repairable parts of a hangar were defective, no fundamental breach was found.¹²⁵

¹¹⁸ Martin Karollus, 'UN-Kaufrecht: Vertragsaufhebung und Nacherfüllungsrecht bei Lieferung mangelhafter Ware', *ZIP - Zeitschrift für Wirtschaftsrecht*, (1993): 490 at 496 f.

¹¹⁹ Art. 48(1) CISG. The question of reasonability must be answered on a case by case basis, but inconvenience must be very severe. Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 9, footnote 17.

¹²⁰ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 49 para. 9; CISG-online 399, *supra* note 35.

¹²¹ LG Oldenburg, 6 July 1994, CISG-online 274 (Germany); CISG-online 140, *supra* note 43.

¹²² Secretariat's Commentary, Art. 48, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-48.html>.

¹²³ ICC case no. 7531 France 1994, in *Dir. Comm. int.*, 1996, 636 (unfit scaffolding, not conforming to sample), Case law on UNCITRAL texts (CLOUT) abstract no. 304 available at <http://cisgw3.law.pace.edu/cases/947531i1.html>.

¹²⁴ CISG-online 1788, *supra* note 89.

¹²⁵ CISG-online 153, *supra* note 106.

However, the Swiss federal court decided a case of a system for packaging consisting of ten machines and a conveyor belt. The performance of the belt was below standard of both the buyer's and the seller's contention by 71% and 40% respectively. This entitled the buyer to avoid for fundamental breach, even though just one part needed replacement for the entire system to function to standard.¹²⁶

The – known or should have known – purpose of the contract will strongly influence the exact time limits imposed.¹²⁷ What is reasonable must be decided on a case-by-case basis.¹²⁸

6. PRACTICAL ADVICE

Due to the protracted relationship between Article 48 CISG (right to cure) and Art. 49 CISG (right to avoid the contract) it is paramount for the parties to communicate with one another. The question of priority does not arise if the seller offers (subsequent) performance to Article 48(2) and (3) CISG in response to a buyer's notice of defect. The buyer is then forced to state if it wishes to accept subsequent performance or to avoid the contract, thus removing uncertainty about the remedy.¹²⁹

For practical purposes it can be recommended to the buyer to set an additional period of time for remedying the defect in any case of non-conformity, even though this is not a formal prerequisite for cases that fall under Art. 49(1)(a) CISG.¹³⁰ Through that means the buyer can force the seller to act within a time that is considered reasonable in that specific case. If the seller does not remedy the defect within this period, it will be easier for the buyer to successfully prove unreasonableness.¹³¹

¹²⁶ Here the buyer was not required to buy a substitute transport belt.

¹²⁷ The governing view is the buyer's objective view. Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 9,

¹²⁸ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 9, but see CISG-AC Opinion no 5, *supra* note 3, para. 4.4:

In finding such unreasonableness the same criteria have to be applied as in case of late delivery; namely whether exceeding a time limit - either a date or the end of a period of time - amounts to a fundamental breach.

¹²⁹ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 16.

¹³⁰ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 15.

¹³¹ Müller-Chen, in Schlechtriem/Schwenzer, *supra* note 6, Art. 48 para. 10.

7. CONCLUSION

As this contribution has shown, the topic of avoidance for non-conforming goods is riddled with uncertainty and differences of opinion. In the end, a buyer's interest, a seller's interest and economic reasons such as costs and risk of transportation or storage must be balanced to determine whether a certain feature of the contract must be considered fundamental under the circumstances.¹³² However, non-conforming goods present three distinct problems relating to fundamental breach and thus a buyer's right to avoid.¹³³ Buyer's interest in low avoidance threshold, seller's in high avoidance and waste in unwinding the contract.¹³⁴ A common sense approach and knowledge of the state of international opinion and jurisprudence will assist in writing convincing briefs.

The opinions and decisions presented in this section should only form a basis for a critical analysis along the lines of common sense and precedent in one's own jurisdiction. The practitioner should always

“[...] take into account whether a buyer can be required to retain the goods because he can be adequately compensated by damages or a price reduction”.¹³⁵

¹³² Schlechtriem, *supra* note 117.

¹³³ Schroeter, in Schlechtriem/Schwenzer, *supra* note 6, Art. 25 para. 43.

¹³⁴ Schlechtriem, *supra* note 117, 83 f.

¹³⁵ CISG-AC Opinion no 5, *supra* note 3, para. 4.1.

Liber Amicorum Eric Bergsten