

3.2 Die Klägerin verlangt in ihrem Rechtsbegehren 1 die Bezahlung von Fr. 13'538.-. Gemäss ihren Behauptungen schuldet ihr der Beklagte aber den effektiven Betrag von € 8'884.53. Die Umrechnung dieser Schuld in Schweizer Franken wurde von der Klägerin selber vorgenommen. Da die Alternativermächtigung von Art. 84 Abs. 2 OR nur für den Schuldner, nicht aber für den Gläubiger gilt, darf dieser bei einer Fremdwährungsschuld nicht auf Inlandwährung klagen (vgl. *Peter Gauch/Walter R. Schluetz/Jörg Schmid/Heinz Rey*, Schweizerisches Obligationenrecht, Allgemeiner Teil, 2 Bde., 8. A., Zürich 2003, N 2345). Das klägerische Rechtsbegehren ist deshalb entsprechend den Behauptungen der Klägerin auf € 8'884.53 umzudeuten.

Gestützt auf die von den Parteien geschlossenen Verträge ist der Beklagte gemäss Art. 53 CISG verpflichtet, den Betrag von insgesamt € 8'884.53 zu zahlen.

4. Die Klägerin macht Verzugszins von 15% seit dem 12.2.2003 geltend. Dazu ergibt sich Folgendes:

4.1 Der Kaufpreis ist gemäss Art. 58 Abs. 1 und 3 i.V.m. Art. 69 CISG ohne besondere Aufforderung oder Einhaltung von Formalitäten zu zahlen, sobald der Verkäufer dem Käufer die Ware zur Verfügung gestellt und der Käufer Gelegenheit gehabt hat, sie zu untersuchen. Die Fälligkeit der Forderungen über € 1'202.14, € 1'74.40, € 98.05 und € 1'696.50 (insgesamt € 1'71.09) trat daher im vorliegenden Fall vor dem 12.2.2003 ein. Die Forderungen über € 448.44 und € 45.- (insgesamt € 493.44) wurden erst mit ihrer Lieferung am 17.2.2003 fällig. Für die Forderung von € 5'220.- ergibt sich schliesslich der 23.4.2003 als Fälligkeitstermin.

Im Anwendungsbereich des CISG bildet bereits die Nichtzahlung zum Fälligkeitstermin eine Pflichtverletzung, so dass die Verzinsungspflicht sofort mit der Fälligkeit einsetzt (*Schlechtriem*, Internationales UN-Kaufrecht, Tübingen 1996, N 319). Verzugszins ist daher grundsätzlich ab Fälligkeitstermin geschuldet. Die Klägerin verlangt auf dem Betrag von € 3'171.09 nur

Verzugszins ab dem 12.2.2003. Gestützt auf die prozessuale Dispositionsmaxime (§ 75 Abs. 2 ZPO) ist das Handelsgesicht an diesen Zeitpunkt gebunden. Für den Betrag von € 493.44 ist hingegen erst ab dem 17.2.2003 und für den Betrag von € 5'220.- ab dem 23.4.2003 Verzugszins geschuldet.

4.2 Die Höhe des Zinssatzes regelt das CISG nicht. Die Frage ist nach demjenigen nationalen Recht zu entscheiden, welches durch das internationale Privatrecht des Forumstaates bestimmt wird (BGE 4C.197/1998 vom 28.10.1998 E. 6 m.w.H. = [www.cisg-online.ch](http://www.cisg-online.ch) Nr. 413; *Bacher* in: *Schlechtriem*, Kommentar zum Einheitlichen UN-Kaufrecht, 3. A., München 2000, Art. 78 N 27 und 32). Gemäss Art. 118 Abs. 1 IPRG gilt für den Kauf beweglicher körperlicher Sachen das Haager Übereinkommen vom 15.6.1955 betreffend das auf internationale Kaufverträge über bewegliche körperliche Sachen anzuwendende Recht. Art. 3 Abs. 1 des Übereinkommens bestimmt, dass, sofern eine Erklärung der Parteien über das anzuwendende Recht fehlt, der Vertrag dem innerstaatlichen Recht des Landes untersteht, in dem der Verkäufer zu dem Zeitpunkt, an dem er die Bestellung empfängt, seinen gewöhnlichen Aufenthalt hat. Da die Klägerin als Verkäuferin ihren Sitz in Deutschland hat, ist die Höhe des Zinses nach deutschem Recht zu bestimmen.

Bei Handelsgeschäften bestimmt sich der massgebliche Zins grundsätzlich nach § 352 HGB. Diese Bestimmung ist überall dort anzuwenden, wo die Parteien eines Rechtsgeschäfts Kaufleute sind und das Geschäft in Ausübung ihres Betriebes oder Handelsgewerbes vorgenommen wurde (§ 343 Abs. 1 HGB). Dies ist vorliegend der Fall.

Den Parteien steht es nach deutschem Recht frei, einen höheren Verzugszinssatz als den gesetzlichen zu vereinbaren. Eine solche Vereinbarung haben die Parteien im vorliegenden Fall nicht getroffen. Es ist demgemäss auf die allgemeine Regel des deutschen Rechts über die Höhe des Verzugszinses zurückzugreifen.

[Kostenentscheidung]

## Dokumentation

### CISG Advisory Council Opinion No. 5<sup>1</sup>, The buyer's right to avoid the contract in case of non-conforming goods or documents<sup>2</sup>

Rapporteur: Professor Dr. *Ingeborg Schwenzer*, LL. M., Professor of Private Law, University of Basel.

#### Article 49 CISG

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

<sup>1</sup> To be cited as: 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: Professor Dr. *Ingeborg Schwenzer*, LL. M., Professor of Private Law, University of Basel.

Jan Ramberg, *Chair* Eric E. Bergsten, Michael Joachim Bonell, Alejandro M. Garro, Roy M. Goode, Sergei N. Lebedev, Pilar Perales Viscasillas, Peter Schlechtriem, Ingeborg Schwenzer, Hiroo Sono, Claude Witz, *Members* Loukas A. Mistelis, *Secretary*

The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG. At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for

## Opinion on Article 49 (1)(a)

1. In determining whether there is a fundamental breach in case of non-conformity of the goods giving the buyer the right to avoid the contract according to Art 49(1)(a) CISG, regard is to be given to the terms of the contract.
2. If the contract does not make clear what amounts to a fundamental breach, regard is to be given in particular to the purpose for which the goods are bought.
3. There is no fundamental breach where the non-conformity can be remedied either by the seller or the buyer without unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance.
4. Additional costs or inconvenience resulting from avoidance do not influence per se whether there is a fundamental breach.
5. The issue of avoidance in case of non-conforming accompanying documents such as insurance policies, certificates etc., must be decided by resorting to the criteria set forth in 1. to 4.
6. In the case of documentary sales, there is no fundamental breach if the seller can remedy the non-conformity of the documents consistently with the weight accorded to the time of performance.
7. In the commodity trade, in general, there is a fundamental breach if there is no timely delivery of conforming documents.
8. If the non-conformity does not amount to a fundamental breach, the buyer still has a right to withhold payment and to refuse to take delivery if reasonable under the circumstances.

Comments<sup>3</sup>

## I. Introduction

1.1 Rules on avoidance of contract in case of non-conforming goods have to take into account three different interests:<sup>4</sup> The buyer is interested in a low threshold for avoidance, while the seller's interest is in a high threshold for avoidance. Economic reasons such as costs and risk of transportation or storage may also play a role. These conflicting interests have to be balanced.

1.2 There have been great differences of opinion among domestic legal systems concerning the question of under which circumstances the buyer may avoid the contract in case of non-conforming goods or documents. Art 49(1)(a) CISG provides that avoidance is possible "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." According to Art 25 CISG, a breach is fundamental "if it results in such detriment to the [buyer] as substantially to deprive him of what he is entitled to expect under the contract, unless the [seller] did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

1.3 Reference to case law shows that the interpretation of the notion of fundamental breach in cases of non-conforming goods by national courts and arbitration tribunals differs considerably even within one single legal system.

1.4 Special problems arise with respect to non-conforming documents and the commodity trade in particular. Special rules have been established by the International Chamber of Commerce. Thus, the Incoterms 2000<sup>5</sup> contain detailed rules governing the obligations of the seller to provide for documents,<sup>6</sup> and the buyer to accept them,<sup>7</sup> respectively. Such rules are widely incorporated into international contracts.<sup>8</sup>

a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, was elected Secretary. The CISG-AC has consisted of: Prof. Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, Professor of Private Law, University of Stockholm, Faculty of Law; Rector, Graduate School of Law, Riga, Latvia; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At its meeting in Rome in June 2003, the CISG-AC elected as additional members, Prof. Pilar Perales Viscasillas, Universidad Carlos III de Madrid, and Prof. Ingeborg Schwenzer, University of Basel. At its meeting in Madrid in October 2004, Professor Jan Ramberg was elected Chair of the CISG-AC for a three year term.

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<sup>2</sup> This opinion is a response to a request by the Chair of the International Sales Committee of the International Law and Practice Section of the New York State Bar Association. The question referred to the Council was:

"Under what circumstances may the buyer avoid the contract under Article 49 CISG in case of a non-conforming tender? If the parties to a contract do not derogate from or vary the effect of any of the provisions of the CISG, are there circumstances in which the CISG would permit avoidance if the goods or the tender of delivery fail in any respect to conform to the contract."

This opinion is focusing on the most important issues of non-conforming tender, namely non-conforming goods and documents.

<sup>3</sup> The rapporteur gratefully acknowledges lic. iur. Benjamin K. Leisinger for his assistance in the preparation of this opinion.

<sup>4</sup> Cf. SCHLECHTRIEM, Subsequent Performance and Delivery Deadlines – Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods, at I. Avoiding a Contract on Account of Non-Conformity with Tendered Goods, p.1 et seq., online at <http://www.cisg-online.ch/cisg/Schlechtriem-PaceInt'LLRev.pdf>.

<sup>5</sup> See ICC-Publication No.560 ED.

<sup>6</sup> See A8 of the respective clauses.

<sup>7</sup> See B8 of the respective clauses.

<sup>8</sup> This may be done, firstly, by express reference. Furthermore, there is a tendency among courts and scholarly opinions that such rules amount to usages in international trade within the meaning of Art 9(2) CISG. See WITZ/SALGER/LORENZ/W. Witz, *International Einheitliches Kaufrecht*, Heidelberg 2000, Art 9 para 14; ITALY, *Marc Rich & Co. A.G. v. Iritecna S.p.A.*, Corte d'appello di Genova, 24 March 1995, CISG-online 315; ARGENTINA, *Elastar Sacifia v. Bettcher Industries, Inc.*, Juzgado Nacional de Primera Instancia en lo Comercial, 20 May 1991, CISG-online 461; UNITED STATES, *St. Paul Ins. Co. v. Neuromed Med. Sys.*, US District Court (S.D.N.Y.), 26 March 2002, CISG-online 615; UNITED STATES, *BP International, Ltd. and BP Exploration & Oil, Inc., Plaintiffs-Appellants v. Empresa Estatal Petroleos de Ecuador, et al., Defendants, Empresa Estatal Petroleos de Ecuador and Saybolt, Inc., Defendants-Appellees*, US Court of Appeals (5th Circuit), 11 June 2003, CISG-online 730. More differentiated: Bridge, *The International Sale of Goods*, Oxford 1999, at 2.48 and 2.49; SCHLECHTRIEM/SCHWENZER/Schmidt-Kessel, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2<sup>nd</sup> ed., Oxford 2005, Art 9 para 26.

## 2. Domestic Legal Systems

2.1 Civil law systems were originally based upon the Roman sales law rule that, in the case of defects in the quality of the goods, the buyer had the right either to demand reduction of the purchase price (*actio quanti minoris*) or to avoid<sup>9</sup> the contract (*actio redhibitoria*).<sup>10</sup> However, modern statutes, such as the German Statute on Modernization of the Law of Obligations,<sup>11</sup> the Scandinavian Sales Laws<sup>12</sup> or the Netherlands Civil Code,<sup>13</sup> are oriented towards the CISG and apply the notion of fundamental breach or similar key concepts for the avoidance of the contract. The same is true for other international uniform law instruments, such as the UNIDROIT Principles<sup>14</sup> and the Principles of European Contract Law.<sup>15</sup>

2.2 In contrast to this, common law sales law was based upon the idea that the buyer could only avoid (terminate) the contract if the non-conformity is sufficiently serious.<sup>16</sup> This restriction, however, only applies to accepted goods,<sup>17</sup> thus making "acceptance" or its revocation key notions. Before there has been acceptance, the so-called "perfect tender rule"<sup>18</sup> applies, giving the buyer the right to reject the goods if they do not conform to the contract in any respect. However, during the past decades the perfect tender rule itself has been subject to several restrictive modifications. Thus, s. 15A Sale of Goods Act, inserted by the Sale and Supply of Goods Act 1994, states that if the buyer does not deal as a consumer, the breach may not be treated as a breach of condition if the breach was so slight that it would be unreasonable for the buyer to reject the goods. Similarly, some US courts have limited the perfect tender rule by applying the good faith principle,<sup>19</sup> especially in cases of a rightful and effective cure<sup>20</sup> by the seller in accordance with § 2-508 UCC.<sup>21</sup>

<sup>9</sup> Domestic legal systems use many different notions, such as termination, nullification, repudiation, cancellation, rescission or avoidance. This opinion always uses the expression "avoidance" as this reflects the terminology of the CISG, see, e.g., in Arts 49, 75, 76(1) CISG.

<sup>10</sup> Cf. Germany: former § 462 Bürgerliches Gesetzbuch (BGB) (in force until 31 December 2001); France: Art 1644 Code Civil; Switzerland: Art 205 Code of Obligations. But see Austria: Art 932 Allgemeines Bürgerliches Gesetzbuch (ABGB), only giving a right to avoid the contract in cases where repair is not feasible and a proper use is not possible. For details see Rabel, *Recht des Warenkaufs*, Volume 2, Tübingen 1958, p. 232 et seq.

<sup>11</sup> SCHULDRECHTSMODERNISIERUNGSGESETZ of 26 November 2001, in force since 1 January 2002, § 323 BGB.

<sup>12</sup> See Section 39 Norwegian Sale of Goods Act 1988 <http://www.jus.uio.no/lm/norway.sog.act.1988/doc#116>; Section 39 Finnish Sale of Goods Act 1987 <http://www.finlex.fi/pdf/saadkaan/E5.PDF>; Section 39 Swedish Sale of Goods Act 1990. For details see KJELLAND, *Das neue Recht der nordischen Länder im Vergleich mit dem Wiener Kaufrecht (CISG) und dem deutschen Kaufrecht*, Aachen 2000.

<sup>13</sup> See Art 6:265 Burgerlijk Wetboek.

<sup>14</sup> See Article 7.3.1 UNIDROIT Principles of International Commercial Contracts 2004.

<sup>15</sup> See Article 4.303 Principles of European Contract Law.

<sup>16</sup> Under English Law, avoidance depends upon the question whether there was a breach of condition or a mere breach of warranty. See for the distinction between "condition" and "warranty": *Cehave N.V. v. Bremer Handelsgesellschaft m. b. H. (The Hansa Nord)*, 1 Q.B. 44 (C.A.), 1976; see also s.11, s.14 and s.15A of the Sale of Goods Act 1994. According to § 2-608(1) Uniform Commercial Code (UCC), the buyer may revoke acceptance if acceptance of a lot or commercial unit whose

non-conformity substantially impairs its value to the buyer if the buyer has accepted it. For an overview of the system of avoidance in common law systems in general see Treitel, *Remedies for Breach of Contract*, Oxford 1988, Sections 259, 260.

<sup>17</sup> Under English law, in s.35(1) Sale of Goods Act as amended by the Sale and Supply of Goods Act 1994, it is laid down that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. For details see Benjamin's *Sale of Goods*, 6th ed., London 2002, 12-044 et seq. In the UCC, *acceptance* is dealt with in § 2-606. *Acceptance* occurs in three different ways: according to § 2-606(1)(a) UCC, the first possibility is that the buyer, after a reasonable possibility to inspect the goods, signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity. Pursuant to § 2-606(1)(b) UCC, *acceptance* also occurs, if the buyer fails to make effective rejection after the buyer had a reasonable opportunity to inspect the goods. Finally, *acceptance* occurs if, according to § 2-606(1)(c) UCC, "the buyer does any act inconsistent with the seller's ownership". Here, the buyer's knowledge and behavior is decisive; for illustrations see WHITE/SUMMERS, *Uniform Commercial Code*, 5th ed., St. Paul 2000, § 8-2.

<sup>18</sup> See § 2-601(a) UCC, s.35 Sale of Goods Act 1994.

<sup>19</sup> See § 1-203 UCC. See also Treitel who points out, "[t]his so-called perfect tender rule [particularly as recited in UCC 2-601] at first sight gives rise to a very wide power to terminate regardless of the seriousness of the nonconformity. But the appearance is deceptive as the requirement of seriousness is re-introduced by a number of other provisions which must be read together with UCC 2-601." Treitel, *op. cit.* (footnote 16) Section 269. For other relevant provisions of the UCC, see ALBERT H. KRITZER, *Guide to Practical Applications of the CISG*, Deventer/Boston 1990, Suppl. 4 (February 1993), p. 206.

<sup>20</sup> Such a cure can be the delivery of conforming replacement goods, repair or even price adjustments sufficient to compensate the buyer and reduction in the price. See for replacement goods: *T.W. Oil, Inc. v. Consolidated Edison Co.*, US Court of Appeals (N.Y.), 15 December 1982, 1982 N.Y. LEXIS 3846; *DEL DUCA/GUTTMAN/SQUILLANTE*, *Problems and materials on sales under the Uniform Commercial Code and the Convention on International Sale of Goods*, Cincinnati 1993, p. 359; *Calamari & Perillo*, *Contracts*, 3rd ed., St. Paul 1988, § 11-20, p. 468. See for repair: *Wilson v. Scampoli*, US Court of Appeals (D.C.), 2 May 1967, 1967 D.C. App. LEXIS 156. For price adjustments and reduction: WHITE/SUMMERS, *op. cit.* (footnote 17), § 8-6, p. 338; *Oral-X Corp. v. Farnam Cos., Inc.*, US Court of Appeals (10th Circuit), 26 April 1991, 1991 U.S. App. LEXIS 7377.

<sup>21</sup> In the course of the recent revision of the UCC there have also been discussions in the Study Group as to whether to replace the perfect tender rule with the requirement that would permit rejection only if a non-conformity "substantially impairs the value of the performance to the buyer", see the draft of § 2-501 UCC as of July 1996 <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2sale.pdf>. However, ultimately a majority of the Study Group recommended that the perfect tender rule be maintained as the standard, see § 2-601 UCC Draft 2002. For the whole discussion see: Lawrence, *Symposium: The Revision of Article 2 of the Uniform Commercial Code: Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller*, 35 *Wm and Mary L. Rev.* 1635, 1637 et seq. (1994).

### 3. Drafting History

3.1 The basic concept of fundamental breach was already present in Art 10 ULIS<sup>22</sup> and was not questioned during the preparatory work for the CISG. The function of this concept in the case of tender or delivery of non-conforming goods was to avoid causing these goods to be returned, which would result in considerable economic detriment.

3.2 Although the concept of fundamental breach itself was unquestioned, the preconditions for the breach being fundamental and the necessity to declare the contract avoided remained in dispute until the Vienna Conference. Ultimately, it was decided that the seriousness of the breach should be determined by reference to the interests of the promisee as actually laid down and circumscribed by the contract.<sup>23</sup> Concerning the avoidance of the contract, the CISG clearly deviates from ULIS. Under Art 44(2) ULIS, the buyer could fix an additional time to remedy any breach in cases, where the non-conformity of the goods or the delay in delivering conforming goods did not yet amount to a fundamental breach under Art 43 ULIS. The fruitless elapse of such a „Nachfrist“ always enabled the buyer to avoid the contract, regardless of the fundamentality of the original defect in performance. Art 49(1)(b) CISG, in contrast, limits the possibility for the buyer to fix an additional period of time to cases of non-delivery, thus excluding this possibility for non-conforming goods.<sup>24</sup> Still, also under CISG the weight the contract accords to the time of performance always has to be kept in mind when defining a fundamental breach.<sup>25</sup>

3.3 The history of the CISG clearly documents that there is no equivalent to the original perfect tender rule in Anglo-American law. Although its wording could be misunderstood,<sup>26</sup> Art 86 CISG in itself does not give the buyer a general right to reject any non-conforming tender.<sup>27</sup> Rather, under the CISG such a right is limited to certain situations: Art 52 CISG allows the buyer to refuse to take delivery only if the seller delivers the goods before the date fixed or if he delivers a quantity of goods greater than that provided for in the contract. In all other cases of non-conforming tender, the requirement for rejection is a fundamental breach.

### 4. Interpretation

#### a) General Remarks

4.1 A fundamental breach of contract giving the buyer the right to avoid the contract or to ask for substitute goods presupposes that the defect has a serious importance to the buyer. In considering avoidance, one has to take into account whether the buyer can be required to retain the goods because he can be adequately compensated by damages or a price reduction. The substantiality of the detriment to the buyer may be ascertained by having regard to the terms of the contract, the purpose for which the goods are bought and finally, by the question of whether it is possible to remedy the defect. In any case, the question of time has to be given due consideration.

#### aa) Terms of The Contract

4.2 First and foremost, it is up to the parties to stipulate what they consider to be of the essence of the contract.<sup>28</sup> Whether or not a contractual agreement is of the essence is a matter of interpretation under Art 8 CISG. In doing so, several courts held a breach to be fundamental where the parties

had explicitly agreed on certain central features of the goods, such as unsweetened apple juice concentrate,<sup>29</sup> the thickness of a roll of aluminium<sup>30</sup> or soy protein products that have not been genetically modified.<sup>31</sup> If the parties act accordingly, there is also no room for the seller to argue that he did not foresee the detriment to the buyer, if the goods do not conform to such express terms.

#### bb) Purpose for Which Goods are Bought

4.3 If the contract itself does not make clear what amounts to a fundamental breach, one of the central questions is for what purpose the goods are bought. Where the buyer wants to use the goods himself, such as machinery for processing, globes for marketing purposes<sup>32</sup> or compressors for use in air-conditioners<sup>33</sup>, in the usual case it cannot be decisive whether the goods could be resold even at a discount price. Rather, the decisive factor is whether the goods are improper for the use intended by the buyer. However, regard is to be had to the question whether the buyer is able to make use of the goods or to process them differently without unreasonable expenditure.<sup>34</sup> Where the buyer himself is in the resale business, the issue of a potential resalability becomes relevant. There is also a fundamental breach here if the goods are not resalable at all, e.g., food not complying with national health regulations.<sup>35</sup> If the

<sup>22</sup> Uniform Law on the International Sale of Goods, online at <http://www.unidroit.org/english/conventions/c-ulis.htm>.

<sup>23</sup> Cf. O.R. p.295 et seq., p.300; SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM, op. cit. (footnote 8), Art 25 para 2.

<sup>24</sup> During the drafting of the CISG, a number of attempts were made to reintroduce the "time element". See O.R., p.354 et seq.

<sup>25</sup> Cf. SCHLECHTRIEM, op. cit. (footnote 4), p.6.

<sup>26</sup> Art 86(1): "If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, [...]". Art 86(2): "If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, [...]".

<sup>27</sup> See O.R., p.399.

<sup>28</sup> This would amount to a "condition" in English legal terminology. See also the notion of „Zusicherung“ under former §§ 459(2), 463 BGB (in force until 31 December 2001) or the "dicta et promissa" in Roman sales law, see Rabel, op. cit. (footnote 10), p.132 et seq.

<sup>29</sup> See GERMANY, OLG Stuttgart, 12 March 2001, CISG-online 841.

<sup>30</sup> See CIETAC (China International Economic and Trade Arbitration Commission), 30 October 1991, CISG-online 842.

<sup>31</sup> See SWITZERLAND, Appellationsgericht Basel-Stadt, 22 August 2003, CISG-online 943.

<sup>32</sup> See GERMANY, LG München, 27 February 2002, CISG-online 654.

<sup>33</sup> See UNITED STATES, *Delchi Carrier, S.p.A. v. Rotorex Corp.*, US Court of Appeals (2nd Circuit), 6 December 1996, CISG-online 140.

<sup>34</sup> See ICC International Court of Arbitration, 7754 of 1995, CISG-online 843; GERMANY, OLG Stuttgart, 12 March 2001, CISG-online 841. But see: GERMANY, LG München, 27 February 2002, CISG-online 654, globes still could be used for advertising even though they were not able to rotate.

<sup>35</sup> See GERMANY, LG Ellwangen, 21 August 1995, CISG-online 279; ICC International Court of Arbitration, 8128 of 1995, CISG-online 526; SWITZERLAND, Appellationsgericht Basel-Stadt, 22 August 2003, CISG-online 943; GERMANY, BGH, 2 March 2005, CISG-online 999, in this case, however, avoidance was not declared, but the court granted a price reduction to zero. But see: GERMANY, BGH, 8 March 1995, CISG-online 144, mussels still good for consumption because there was no health risk.

defect of the goods does not hinder their resalability, still, it cannot be said that there is never a fundamental breach. The question then is whether resale can reasonably be expected from the individual buyer in his normal course of business.<sup>36</sup> A wholesaler with broader access to markets in the business concerned has more opportunities to resell the goods than a retailer. A retailer cannot be expected to resell the goods at a discount price if, by doing so, he would be likely to damage his own reputation.<sup>37</sup> In determining the likelihood of this, regard is to be had to the retailer's specific target group of customers.<sup>38</sup> In all these cases, due regard should be had to the possibilities of the seller himself to dispose of the goods, thus balancing the possibilities and interests of the buyer and seller.

cc) *Possibility of Repair or Replacement*

4.4 Though the objective essential nature of the defect is always a necessary condition to establish a fundamental breach of contract, it will not always be sufficient. In cases where the non-conformity of the goods can be remedied by the seller – e.g., by repairing the goods<sup>39</sup> or delivering substitute or missing goods<sup>40</sup> – without causing unreasonable delay or inconvenience to the buyer, there is not yet a fundamental breach.<sup>41</sup> Here, due regard is to be given to the purposes for which the buyer needs the goods. If timely delivery of conforming goods is of the essence of the contract, repair or replacement usually will lead to unreasonable delay.<sup>42</sup> 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. Furthermore, the buyer should not be expected to accept cure by the seller if the basis of trust for the contract has been destroyed, e.g., due to the seller's deceitful behaviour.<sup>43</sup> When the seller either refuses to remedy the defect,<sup>44</sup> simply fails to react, or if the defect cannot be remedied by a reasonable number of attempts within a reasonable time,<sup>45</sup> then a fundamental breach will also be deemed to have occurred.<sup>46</sup>

4.5 If in a given case the buyer is in a better position than the seller to have the goods repaired himself or by a third party, to buy missing parts<sup>47</sup> or – in case of a defect in quantity – to buy the missing amount of goods, he is obliged to do so and may not declare the contract avoided for fundamental breach.

dd) *Additional Costs or Inconvenience Resulting from Avoidance*

4.6 It may be questionable as to whether the fact that the goods are still on the premises of the seller – e.g., in case of delivery EXW, or if the buyer realizes the non-conformity before the shipping of the goods – or are stored in a warehouse affects the notion of fundamental breach because the goods do not have to be transported back to the seller in case of avoidance of the contract. The idea to prevent commercially unreasonable costs for the transport of the goods, might advocate lowering or raising the prerequisites for avoidance, respectively. However, even if the seller does not have to transport the goods back, he may face storage costs exceeding the costs for transportation.<sup>48</sup> Furthermore, in cases where the goods have already been shipped, they do not necessarily have to be transported back to the seller if the buyer avoids the contract; the seller may be able to redirect them to another buyer or sell them at the place where they are located. Thus it would be necessary to decide on an approach, independent from the location of the goods, in order to assess the costs that the avoidance of the contract would cause to the seller. This, however, would lead to unpredictable results.

b) *Non-conforming Documents*

4.7 In the first place, one has to distinguish between two different situations: First, there are various documents that usually accompany a contract of sale, e.g., insurance policies, certificates of origin, certificates of inspections, custom clearance certificates, etc. Second, a contract of sale can require delivery by the handing over of documents of title, e.g., bills of lading. Other documents such as dock warrants, warehouse receipts or their respective electronic equivalents can also be required.

aa) *Accompanying Documents*

4.8 In the case of accompanying documents, the question as to whether the buyer may avoid the contract must be decided by resorting to the general mechanisms of the Convention already established for determining a fundamental breach.<sup>49</sup>

4.9 If the documents are delivered but do not conform to the contract description, this is to be treated like a defect in quality. Thus, initially, what is decisive is whether the defective documents limit the buyer in using the goods according to his

<sup>36</sup> See GERMANY, OLG Frankfurt a.M., 18 January 1994, CISG-online 123, the burden of proof that resale is not possible lies on the buyer; GERMANY, OLG Stuttgart, 12 March 2001, CISG-online 841.

<sup>37</sup> See GERMANY, LG Landshut, 5 April 1995, CISG-online 193, clothes; GERMANY, Hans. OLG Hamburg, 26 November 1999, CISG-online 515, jeans; GERMANY, OLG Köln, 14 October 2002, CISG-online 709, designer clothes. See also: GERMANY, OLG Oldenburg, 1 February 1995, CISG-online 253, limited circle of interested sub-buyers would only buy the goods at a discount of 50%.

<sup>38</sup> See GERMANY, OLG Köln, 14 October 2002, CISG-online 709, buyers of designer clothes have higher standards.

<sup>39</sup> See SWITZERLAND, Handelsgericht des Kantons Aargau, 5 November 2002, CISG-online 715.

<sup>40</sup> See GERMANY, LG Köln, 16 November 1995, CISG-online 265.

<sup>41</sup> Cf. SCHLECHTRIEM/SCHWENZER/Schlechtriem, op. cit. (footnote 8), Art 25 para 20.

<sup>42</sup> All Incoterms 2000 clauses in A4 call for delivery "on the date or within the period agreed for delivery". One German Court, Hans. OLG Hamburg, 28 February 1997, CISG-online 261, has argued that a C.I.F. contract has to be understood as a fixed term contract. But see: ICC International Court of Arbitration, 7645 of 1995, CISG-online 844, the Incoterms clauses C.F.R. do not, however, specify that abiding to the time limit is an obligation of especially essential importance.

<sup>43</sup> See obiter, GERMANY, BGH, 3 April 1996, CISG-online 135, BGHZ 132, 290 et seq.

<sup>44</sup> See GERMANY, LG Berlin, 15 September 1994, CISG-online 399.

<sup>45</sup> See GERMANY, LG Oldenburg, 6 July 1994, CISG-online 274; UNITED STATES, *Delchi Carrier, S.p.A. v. Rotorex Corp.*, US Court of Appeals (2nd Circuit), 6 December 1996, CISG-online 140.

<sup>46</sup> For a thorough discussion of the dogmatic controversy considering the relationship between Art 49(1)(a) CISG and Art 48(1) CISG see: SCHLECHTRIEM/SCHWENZER/Schlechtriem, op. cit. (footnote 8), Art 25 para 20; Fountoulakis, *Das Verhältnis von Nacherfüllungsrecht des Verkäufers und Vertragsaufhebungsrecht des Käufers im UN-Kaufrecht*, Internationales Handelsrecht (IHR) 2003, p.160 et seq.

<sup>47</sup> See GERMANY, LG Heidelberg, 3 July 1992, CISG-online 38.

<sup>48</sup> See CIETAC (China International Economic and Trade Arbitration Commission), 6 June 1991, CISG-online 845, transport costs of US \$1,750 and storage costs for a period of three years approximately US \$17,000.

<sup>49</sup> See GERMANY, BGH, 3 April 1996, CISG-online 135, BGHZ 132, 290 et seq.

plans, e.g., to resell them. If they do not, a fundamental breach can never be assumed. If they do limit him, the seriousness of the defect depends upon whether the buyer can still use the goods in a reasonable way even with non-conforming documents, or – if not – whether the non-conformity of the documents can be remedied in time either by the seller or by the buyer himself.<sup>50</sup>

4.10 The case of missing accompanying documents is to be treated like a defect in quantity and not as an equivalent to non-delivery of the goods. That means that also in this case, a fundamental breach of contract has to be established on the individual facts of the case, thus enabling the buyer to avoid the contract only in accordance with Art 49(1)(a) CISG; Art 49(1)(b) CISG is not applicable.

#### bb) Documentary Sales

4.11 Nowadays, a majority of international sales contracts incorporate the Incoterms of the ICC. A number of courts and scholars already hold that they have become a usage in international trade within the meaning of Art 9(2) CISG, thereby complementing the rules of the Convention.<sup>51</sup> Except for EXW, all Incoterms 2000 clauses contain the seller's obligation to deliver or to assist the buyer to obtain certain documents of title.<sup>52</sup> Thus, in turn, all such contracts can be referred to as documentary sales contracts.

4.12 According to Art 1(1) CISG, the Convention applies to contracts of sale of goods. However, there cannot be any doubt that documentary sales of goods shall be covered by the Convention as well, "though in some legal systems such sales may be characterized as sales of commercial paper."<sup>53</sup> This even holds true for so called "string transactions", i.e., when documents are sold and transferred several times until the final purchaser takes physical delivery of the goods.<sup>54</sup>

4.13 In documentary sales contracts, the tender of "clean" documents is of the essence of the contract. Thus, B8 of all Incoterms 2000 clauses (except for EXW) provides that the buyer must accept the transport document and/or other evidence of delivery in accordance with the seller's obligation. This implies the buyer's right to reject any tender of non-conforming documents irrespective of the goods' actual conformity or non-conformity with the contract.<sup>55</sup>

4.14 However, the seller may remedy any lack of conformity in the documents. If, for example, the bill of lading is "unclean" because it refers to damage to the goods or their packaging, the seller may tender a new bill of lading relating to other goods, which does not contain such a reservation. If the bill of lading indicates a late loading date, the seller may subsequently purchase goods "afloat" which were loaded on time and tender to the buyer the bill of lading issued for those goods. However, again, this is only possible if it does not cause unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance.<sup>56</sup>

4.15 In a majority of international sales contracts, the parties stipulate that the purchase price is to be paid by means of documentary credit including standby letter of credit.<sup>57</sup> In this case, the UCP 500<sup>58</sup> usually apply, either by express reference or, as is frequently held, as an international trade usage<sup>59</sup> within the meaning of Art 9(2) CISG.<sup>60</sup>

4.16 Art 20 et seq. UCP 500 set out, in detail, under what circumstances the documents are to be accepted as clean, or may be rejected, respectively. However, this question concerns the relationship between the seller and the bank, which is not a subject of this Opinion. Suffice to say, that payment by means

of documentary credit as such does not necessarily influence the possibility of the buyer to avoid the contract in case of non-conforming documents.

#### c) Commodity Trade

4.17 In those parts of the commodity market, where string transactions prevail and/or prices are subject to considerable fluctuations,<sup>61</sup> special standards have to be applied in determining whether there is a fundamental breach. There, timely delivery by the handing over of clean documents – that can be resold in the normal course of business – is always of the essence of the contract.<sup>62</sup> If the parties do not stipulate this importance by respective clauses, this can be derived from the circumstances by an interpretation of the contract pursuant to Art 8(2), (3) CISG.<sup>63</sup> As a result, in practice, the seller's possibility to remedy a defect in the documents normally does not exist in the commodity trade. Thus, in this specific trade branch the solution under the CISG is quite similar to that under the perfect tender rule. However, the last buyer, who

<sup>50</sup> See for example: GERMANY, BGH, 3 April 1996, CISG-online 135, BGHZ 132, 290 et seq. In this case, seller provided for a non-conforming certificate of origin and a non-conforming certificate of analysis. The court held that the seller could easily get a new certificate of origin from the local Chamber of Commerce and that the certificate made by buyer's expert was a valid new certificate of analysis.

<sup>51</sup> For references see *supra* (footnote 8).

<sup>52</sup> See the provision A8 of the respective clauses.

<sup>53</sup> See SECRETARIAT COMMENTARY, O.R., p.16, Art 2 para 8.

<sup>54</sup> See the thorough discussion of this question by: SCHLECHTRIEM, Interpretation, gap-filling and further development of the UN Sales Convention, at <http://www.cisg-online.ch/cisg/publications.html>, text accompanying footnotes 15-24.

<sup>55</sup> See *ibid.*, at II.5.c(cc).

<sup>56</sup> For a thorough discussion of this question, see above para. 4.4.

<sup>57</sup> See SCHÜTZZE, Das Dokumentenakkreditiv im Internationalen Handelsverkehr, 5th ed., Heidelberg 1999, p. 26; also see ICC Homepage: [http://www.iccwbo.org/home/documentary\\_credits/documentary\\_credits.asp](http://www.iccwbo.org/home/documentary_credits/documentary_credits.asp).

<sup>58</sup> Cf. 1993 Revision, ICC- Publication NO. 500.

<sup>59</sup> See for a list of countries that have acknowledged collectively and banks in other countries which also have acknowledged them: Schütze, op. cit. (footnote 57), Appendix IV, p. 341 et seq.

<sup>60</sup> See WITZ/SALGER/LORENZ/W. Witz, International Einheitliches Kaufrecht, Heidelberg 2000, Art 60 para 13, *ibid.*, Art 54 para 3.

<sup>61</sup> See for agricultural products: FUHRMANN/GRUCCI, Warenterminbörsen in Deutschland, Working Paper 9603, at 2.a., online at: <http://www.uni-potsdam.de/u/makrooekonomie/docs/9603.htm>. For iron molybdenum: GERMANY, Hans. OLG Hamburg, 28 February 1997, CISG-online 261: price was 9,70 US \$/kg and changed to 30 US \$/kg. For commodity prices in general, see: MATTHIES/TIMM, World Commodity Prices 1999-2000, Association d'Instituts Européens de Conjoncture Economique – Working Group on Commodity Prices, 1999, online at: <http://www.hwwa.de/Publikationen/Report/1999/Report191.pdf>.

<sup>62</sup> Cf. UNIDROIT Principles 2004, Art 7.3.1, Official Comment 3.b.; Bridge, The Sale of Goods, Oxford 1997, p.155; Poole, Textbook on contract law, 7th ed., Oxford 2004, para 7.5.3.2; SCHLECHTRIEM, op. cit. (footnote 54), at I.1.; Mullis, Termination for Breach of Contract in C.I.F. Contracts Under the Vienna Convention and English Law; Is there a Substantial Difference?, in: LOMNICKA/MORSE (ed.), Contemporary Issues in Commercial Law (essays in honor of Prof. A.G. Guest), London 1997, p.137-160, at: <http://www.cisg.law.pace.edu/cisg/biblio/mullis.html>.

<sup>63</sup> See SCHLECHTRIEM, op. cit. (footnote 54), at I.1.

actually takes the goods, may not avoid the contract merely by relying on the non-conformity of the documents.

*d) Buyer's Right to Withhold Performance*

4.18 In non-documentary sales cases, if the non-conformity of the tendered goods does not amount to a fundamental breach, as a general rule, the buyer is obliged to accept the goods as a right to avoid the contract does not exist according to Art 49(1)(a) CISG. However, in this situation, a right to withhold performance can be advocated independent of the regular legal remedies. The buyer can at least temporarily refuse payment and even suspend his obligation to take delivery until he has decided on his next courses of action.<sup>64</sup>

4.19 The CISG recognizes a right to withhold performance in several provisions. Art 58 CISG embodies the principle of "payment against delivery" as concurrent conditions. According to Art 71 CISG, a party may also suspend its own performance if performance by the other party is insecure. Further rights to withhold performance are contained in Arts 81(2) second sentence CISG, 85 second sentence and 86(1) second sentence CISG. The prevailing literature derives a general principle of a right to withhold performance according to Art 7(2) CISG from such provisions.<sup>65</sup>

4.20 As an initial consequence of that general right, the buyer may withhold the payment of the purchase price; however, this right must be limited to the extent of the non-conformity and the expected detriment. If the extent of the non-conformity cannot be easily ascertained, the buyer should be given the right to withhold the whole purchase price for a reasonable time that is necessary to inspect the goods and to estimate the extent of the expected detriment.

4.21 Besides the possibility to withhold the purchase price, the general right to withhold performance allows the buyer to suspend his obligation to accept delivery within the meaning of Arts 53, 60 CISG for a reasonable time.<sup>66</sup> This, however, does not mean that the buyer is not obliged to physically take possession of the goods and preserve them according to Art 86 CISG. The practical consequence of the buyer's right to refuse to take delivery is only important where the risk of loss has not yet passed pursuant to Arts 67 or 68 CISG. The risk then passes according to Art 69(1) CISG when the buyer takes over the goods, which implies an acceptance – within the meaning of taking delivery – by the buyer.

<sup>64</sup> SCHLECHTRIEM, *op. cit.* (footnote 54), at II.5.a).

<sup>65</sup> See for a thorough discussion: SCHLECHTRIEM, *op. cit.* 54, at II.5.; *idem*, *Internationales UN-Kaufrecht*, 2<sup>nd</sup> ed., Tübingen 2003, at: 42d, 205 et seq., 250; STAUDINGER/MAGNUS, *Wiener UN-Kaufrecht (CISG)*, Berlin 2005, Art 4 para 74a; W. Witz, *Zurückbehaltungsrechte im Internationalen Kauf – Eine praxisorientierte Analyse zur Durchsetzung des Kaufpreisanspruchs im CISG*, in: Schwenger/Hager (eds.), *Festschrift für Peter Schlechtriem zum 70. Geburtstag*, Tübingen 2003, p. 291, 293 et seq.; for case law see also GERMANY, AG Altona, 14 December 2000, CISG-online 692. The question was left open in GERMANY, OLG Düsseldorf, 24 April 1997, CISG-online 385. Section 42 of the Scandinavian Sale of Goods Acts (Finland, Norway and Sweden) also sets forth an explicit right to withhold; for comments see RAMBERG, *Köplagen*, Stockholm 1995, pp. 455-459. See also Art 7.1.3 UNIDROIT Principles 2004.

<sup>66</sup> See SCHLECHTRIEM, *op. cit.* (footnote), at II.5.c)bb).

### CISG Advisory Council Opinion No. 5: Annex (Case Overview)<sup>1</sup>

Country / Arbitration	Court	Date	Docket No.	CISG-online No.	Details
1. Arbitration	ICC Court of Arbitration	1 January 1995	7754	843	<ul style="list-style-type: none"> <li>- Facts: Buyer ordered computer hardware from seller, which was to be provided by seller's supplier and assembled by buyer's customer. A modification to the hardware was made prior to delivery, which was unknown to buyer and buyer's customer. Buyer's customer informed seller that it could not accept the modification and requested that the hardware be in accordance with the initial documentation. In the meantime, buyer informed seller that only half of the amount of hardware initially ordered would be needed due to difficulties experienced by buyer's customer. Seller shipped an initial consignment of modified hardware to buyer, who accepted the equipment but refused to accept the rest.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: The goods have to be totally improper for their utilization. In this case, the non-conformity only caused buyer severe problems.</li> <li>- Case text: <a href="http://cisgw3.law.pace.edu/cases/957754i1.html">Link to English text of arbitration award http://cisgw3.law.pace.edu/cases/957754i1.html</a></li> </ul>
2. Argentina	Juzgado Nacional de Primera Instancia en lo Comercial	20 May 1991	50272	461	<ul style="list-style-type: none"> <li>- Facts: Buyer from Argentina bought goods from US seller. The seller asked for interest accrued between the date of delivery of the goods and the date fixed in the contract for the deferred payment of the price.</li> <li>- Decision: No discussion of fundamental breach. Seller was granted interest.</li> <li>- Reasons for decision: Accrual of interest during the agreed period in case of deferred payment constitutes a usage widely known and regularly observed in international trade. This can be compared with the Incoterms, which, being a trade usage, are also applicable through Art. 9(2) CISG.</li> <li>- Case text: English translation <a href="http://cisgw3.law.pace.edu/cases/910520a1.html">http://cisgw3.law.pace.edu/cases/910520a1.html</a></li> </ul>
3. Germany	Bundesgerichtshof	3 April 1996	VIII ZR 51/95	135	<ul style="list-style-type: none"> <li>- Facts: Dutch company had entered into four separate sales agreements with the German buyer for the delivery of five tons of cobalt sulfate. They agreed that the goods should be of British origin and that the seller should supply certificates of origin and quality. Payment was by means of documentary credit and the parties agreed on delivery EXW.</li> <li>- Breach: Certificate of origin was wrong. The goods were from South Africa. The quality also fell short of the description in the contract because the seller delivered cobalt sulphate that is usually used for feeding animals.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: The buyer could get the necessary documents himself without unreasonable expenditure.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/960403g1.html">http://cisgw3.law.pace.edu/cases/960403g1.html</a></li> </ul>
4. Germany	OLG Frankfurt am Main	17 September 1991	5 U 164/90	28	<ul style="list-style-type: none"> <li>- Facts: Italian producer sells shoes to German buyer. The parties had agreed upon an ancillary duty of preserving exclusivity.</li> <li>- Breach: Seller also sold shoes to other buyers.</li> <li>- Decision: Fundamental breach.</li> </ul>

<sup>1</sup> Annex to the 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: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel. The case overview was prepared for the CISG Advisory Council by Benjamin K. Leisinger, Academic Assistant at the University of Basel, and contains all cases cited in or underlying Opinion no 5. This means that some cases are related to the Incoterms as an international trade usage or the relevance of time and are without direct connection to the avoidance of the contract because of non-conformity of the goods or documents.



Country / Arbitration	Court	Date	Docket No.	CISG-online No.	Details
					<ul style="list-style-type: none"> <li>- Reasons for the decision: Even the breach of an ancillary duty can amount to a fundamental breach. The trustworthiness of the seller was harmed.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/910917g1.html">http://cisgw3.law.pace.edu/cases/910917g1.html</a></li> </ul>
5.	Germany OLG Frankfurt am Main	18 January 1994	5 U 15/93	123	<ul style="list-style-type: none"> <li>- Facts: German buyer purchases shoes from Italian producer.</li> <li>- Breach: Shoes were non-conforming. Wrong material, color, etc.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: The buyer did not argue that he could not use the shoes in a reasonable way.</li> <li>- Case text: English abstract + link to German text <a href="http://cisgw3.law.pace.edu/cases/940420g1.html">http://cisgw3.law.pace.edu/cases/940420g1.html</a></li> </ul>
6.	Germany OLG Frankfurt am Main	20 April 1994	13 U 51/93	125	<ul style="list-style-type: none"> <li>- Facts: German buyer bought 1.75 t of New Zealand-mussels from Swiss Seller. Buyer discovered the non-conformity in Germany, i. e., after the transport.</li> <li>- Breach: Mussels were cadmium-contaminated.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: Mussels still could be used for consumption.</li> <li>- Case text: English abstract + link to German text <a href="http://cisgw3.law.pace.edu/cases/940420g1.html">http://cisgw3.law.pace.edu/cases/940420g1.html</a></li> </ul>
7.	Germany OLG Hamburg	14 December 1994	5 U 224/93	216	<ul style="list-style-type: none"> <li>- Facts and Breach: See supra 3.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: The fact that seller provided for the wrong certificates is not decisive as the buyer could easily acquire correct documents himself without unreasonable expenditure. It is not decisive whether the duty to provide for clean documents was a primary duty of the seller or not.</li> </ul>
8.	Germany OLG Hamburg	28 February 1997	1 U 167/95	261	<ul style="list-style-type: none"> <li>- Facts: British buyer and German seller contracted for the supply of 18 tons of iron-molybdenum from China, CIF Rotterdam. Goods had to be transported from China to Rotterdam.</li> <li>- Breach: Delay in delivery.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for decision: It was essential to perform prior to that date. The parties agreed to Incoterm CIF, then time is always of the essence.</li> <li>- Good example for fluctuations in price.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/970228g1.html">http://cisgw3.law.pace.edu/cases/970228g1.html</a></li> </ul>
9.	Germany OLG Hamburg	26 November 1999	1 U 31/99	515 (= IHR 2001, 19)	<ul style="list-style-type: none"> <li>- Facts: German buyer purchasing pants from Brazil seller. The non-conformities were discovered after transportation by plane.</li> <li>- Breach: 80-90% of the goods were wrongfully labeled regarding their size and, partly, they were mouldy and stained.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for decision: The goods deviated altogether from the contractually agreed quality.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/991126g1.html">http://cisgw3.law.pace.edu/cases/991126g1.html</a></li> </ul>

Country / Arbitration	Court	Date	Docket No.	CISG-online No.	Details
10. Germany	OLG Hamm	22 September 1992	19 U 97/91	57 (= IHR 1999, 24)	<ul style="list-style-type: none"> <li>- Facts: German buyer purchasing 200 t of bacon from Italian enterprise.</li> <li>- Breach: Goods have not been packaged.</li> <li>- Decision: Having due consideration to the circumstances, the bacon did not have to be packaged. Thus, there was a duty to take delivery.</li> <li>- Reasons for the decision: If a buyer wants to reject the goods (i.e., withhold performance of the duty to accept the goods, Art. 53 CISG), it is decisive whether the seller acted in conformity with the contract.</li> <li>- Case text: English abstract + link to German text <a href="http://cisgw3.law.pace.edu/cases/920922gl.html">http://cisgw3.law.pace.edu/cases/920922gl.html</a></li> </ul>
11. Germany	OLG Koblenz	31 January 1997	2 U 31/96	256 (= IHR 2003, 172)	<ul style="list-style-type: none"> <li>- Facts: Dutch seller delivered acrylic blankets to a German buyer.</li> <li>- Breach: Some of the blankets were of inferior quality and buyer claimed that five reels of blankets were missing.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: Account has to be taken not only of the gravity of the defect, but also of the willingness of the party in breach to provide substitute goods without causing unreasonable inconvenience to the other party. In this case, even a serious lack of quality was said not to constitute a fundamental breach as the seller had offered to furnish additional blankets.</li> <li>- Case text: English abstract + link to German text <a href="http://cisgw3.law.pace.edu/cases/970131gl.html">http://cisgw3.law.pace.edu/cases/970131gl.html</a></li> </ul>
12. Germany	OLG Köln	14 October 2002	16 U 77/01	709 (= IHR 2003, 15)	<ul style="list-style-type: none"> <li>- Facts: German company bought designer clothes from Italian seller.</li> <li>- Breach: Clothes were poorly cut.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for the decision: Decisive whether or not it is possible for the buyer to otherwise manufacture or sell the goods in regular business dealings; possibly even with a price reduction, without unreasonable expense, despite the deviation of the goods from the contractually agreed quality or despite another defect. Customers of expensive designer clothes have high standards and almost all clothes were rendered unmarketable by the defects.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/021014gl.html">http://cisgw3.law.pace.edu/cases/021014gl.html</a></li> </ul>
13. Germany	OLG Stuttgart	12 March 2001	5 U 216/99	841	<ul style="list-style-type: none"> <li>- Facts: German buyer purchasing 100 t of apple juice concentrate and strawberries from Austrian seller. Goods had been transported from Poland to Germany.</li> <li>- Breach: Seller mixed apple juice concentrate with glucose syrup. Buyer discovered the non-conformity of the goods after carrying out tests at its site in Germany.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: It is decisive whether, without unreasonable expenditure, the buyer was able to process the goods differently or sell them in the normal course of business, if only with a price discount, and if the buyer could reasonably be expected to take such measures. In this case, buyer used the goods for the production of apple fruit drinks, which may contain sugar additives.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/010312gl.html">http://cisgw3.law.pace.edu/cases/010312gl.html</a></li> </ul>
14. Germany	Landgericht Berlin	15 September 1994	52 S. 247/94	399	<ul style="list-style-type: none"> <li>- Facts: German party buying shoes from Italian seller.</li> <li>- Breach: Shoes were non-conforming.</li> <li>- Decision: Fundamental breach.</li> </ul>

Country/Arbitration	Court	Date	Docket No.	CISG-online No.	Details
					<ul style="list-style-type: none"> <li>- Reasons for decision: When a party denies the breach and refuses to repair or to make a new delivery, there can be a fundamental breach.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/940915g1.html">http://cisgw3.law.pace.edu/cases/940915g1.html</a></li> </ul>
15. Germany	Landgericht Darmstadt	22 December 1992	14 O 165/92	177	<ul style="list-style-type: none"> <li>- Facts: See supra 6.</li> <li>- Breach: Mussels were cadmium-contaminated.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: It was still possible to resell or eat the mussels. There was no danger to the health.</li> <li>- Case text: Link to German text <a href="http://cisgw3.law.pace.edu/cases/921222g1.html">http://cisgw3.law.pace.edu/cases/921222g1.html</a></li> </ul>
16. Germany	Landgericht Ellwangen	21 August 1995	1 KfH O 32/95	279	<ul style="list-style-type: none"> <li>- Facts: German buyer purchasing 80 t of paprika from Spanish seller.</li> <li>- Breach: The paprika contained approximately 150% of the maximum concentration of ethyl oxide admissible under German food and drug law.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for the decision: The goods were not in accordance with German food and drug law and, therefore, were not suitable for resale in Germany.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/950821g2.html">http://cisgw3.law.pace.edu/cases/950821g2.html</a></li> </ul>
17. Germany	Landgericht Hamburg	5 November 1993	404 O 175/92	215	<ul style="list-style-type: none"> <li>- See supra 3.</li> <li>- Case text: Link to German text <a href="http://cisgw3.law.pace.edu/cases/931105g1.html">http://cisgw3.law.pace.edu/cases/931105g1.html</a></li> </ul>
18. Germany	Landgericht Heidelberg	3 July 1992	O 42/92	38	<ul style="list-style-type: none"> <li>- Facts: German buyer purchasing computer components from US seller.</li> <li>- Breach: Seller delivered wrong amount.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: Subsequent delivery would have still been possible and reasonable.</li> <li>- Case text: English abstract + link to German text <a href="http://cisgw3.law.pace.edu/cases/920703g1.html">http://cisgw3.law.pace.edu/cases/920703g1.html</a></li> </ul>
19. Germany	Landgericht Landshut	5 April 1995	54 O 644/94	193	<ul style="list-style-type: none"> <li>- Facts: Swiss buyer and German seller agreed on the delivery of sportswear in the value of 143.394.65 DM.</li> <li>- Breach: Sportswear shrunk about 10 to 15% after being washed.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for the decision: The clothes shrunk about two sizes. Customers would have either returned the merchandise or would not have bought any more from the buyer.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/950405g1.html">http://cisgw3.law.pace.edu/cases/950405g1.html</a></li> </ul>
20. Germany	Landgericht München	27 February 2002	5 HKO 3936/00	654 (= IHR 2003, 233)	<ul style="list-style-type: none"> <li>- Facts: German party bought globes from Italian seller.</li> <li>- Breach: Globes were unable to spin because of insufficient performance of the motor.</li> <li>- Decision: No fundamental breach.</li> </ul>

Country / Arbitration	Court	Date	Docket No.	CISG-online No.	Details
					<ul style="list-style-type: none"> <li>- Reasons for decision: Restitution of the goods is arduous, especially in international trade. The purpose of the goods is of the essence. In this case, the globes were to be used as a prestigious show object. The spinning of the globes is not the main function.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/020227g1.html">http://cisgw3.law.pace.edu/cases/020227g1.html</a></li> </ul>
21. Germany	Landsgericht Oldenburg	6 July 1994	12 O 3010/93	274	<ul style="list-style-type: none"> <li>- Facts: German purchaser buying furniture from Austrian seller.</li> <li>- Breach: There were deviations in the color and the joints were different in size.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for decision: An unsuccessful repair amounts to a fundamental breach. A reduction in price in the value of 50% constitutes a substantial loss.</li> <li>- Case text: Link to German text <a href="http://cisgw3.law.pace.edu/cases/940706g2.html">http://cisgw3.law.pace.edu/cases/940706g2.html</a></li> </ul>
22. Germany	Amtsgericht Hamburg	14 December 2000	317 C 472/00	692	<ul style="list-style-type: none"> <li>- Facts: French buyer purchasing clothes from German seller. Alleged non-conformities were discovered at buyer's site in France.</li> <li>- Breach: Non-conformity not described.</li> <li>- Decision: No discussion with regard to fundamentality of the breach. General principle of a right to withhold performance.</li> <li>- Reasons for the decision: Court impliedly stated that a rejection of the goods is possible if the buyer gave notice of non-conformity.</li> <li>- Case text: Link to German text <a href="http://cisgw3.law.pace.edu/cases/001214g1.html">http://cisgw3.law.pace.edu/cases/001214g1.html</a></li> </ul>
23. Germany	Amtsgericht Ludwigsburg	21 December 1990	4 C 549/ 90	17	<ul style="list-style-type: none"> <li>- Facts: German buyer bought textiles from French Seller. Goods had to be transported.</li> <li>- Breach: Delay in delivery.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: The value of the goods was not affected by a delay of two days.</li> <li>- Case text: Link to German text <a href="http://cisgw3.law.pace.edu/cases/901221g1.html">http://cisgw3.law.pace.edu/cases/901221g1.html</a></li> </ul>
24. Switzerland	Bundesgericht	15 September 2000	4C.105/ 2000	770	<ul style="list-style-type: none"> <li>- Facts: Italian enterprise bought 40 t of cotton from Swiss company – payable by means of letter of credit. Goods had to be transported from Egypt to Italy.</li> <li>- Breach: Delay in the delivery of the goods.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for the decision: A delay in the delivery of goods constitutes a fundamental breach of contract if the parties decided that the delivery must be made at a specific date, and that date was determinative from the point of view of the interest of the buyer in the performance of the contract and the seller knew this, especially in cases concerning seasonal goods. The circumstances determine if the delivery must be without other delay. This is also true for the delivery at a certain date of goods for which the price in the market varies everyday. Such circumstances exist when an agreement with a reseller is concerned and the price can go down suddenly and considerably.</li> <li>- Case text: English translation + French text <a href="http://cisgw3.law.pace.edu/cases/000915s2.html">http://cisgw3.law.pace.edu/cases/000915s2.html</a></li> </ul>

Country / Arbitration	Court	Date	Docket No.	CISG-online No.	Details
25. Switzerland	Bundesgericht	28 October 1998	4C.179/1998	413 (= IHR 2000, 14)	<ul style="list-style-type: none"> <li>- Facts: Buyer from Switzerland purchasing frozen meat from German seller.</li> <li>- Breach: The value of the goods was reduced by 25.5% because of blood and moisture in the meat.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for decision: An objective standard has to be applied. The relevant question to be asked is whether the goods can reasonably be used in another way or be resold, even with any reduction in price. In Germany, a deviation of 10% of the value of the goods is considered to be fundamental. In the case at hand there was the opportunity to resell the goods in a reasonable way.</li> <li>- Case text: English abstract + link to German text <a href="http://cisgw3.law.pace.edu/cases/981028s1.html">http://cisgw3.law.pace.edu/cases/981028s1.html</a></li> </ul>
26. Switzerland	Zivilgericht Basel. Stadt	1 March 2002	P 1997/482	729	<ul style="list-style-type: none"> <li>- Facts: Swiss company buying soy protein products from Belgian seller. Goods had to be transported to Switzerland.</li> <li>- Non-conformity was discovered in Switzerland.</li> <li>- Breach: 9/26 of the goods were genetically modified.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for the decision: The interest of the parties concerning a special agreement is decisive. For the parties and in the food industry in general, the question whether food is genetically modified or not is very important.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/020301s1.html">http://cisgw3.law.pace.edu/cases/020301s1.html</a></li> </ul>
27. Switzerland	Handelsgericht des Kantons Aargau	5 November 2002	O-R.20010-0029	715 (= IHR 2003, 178)	<ul style="list-style-type: none"> <li>- Facts: German buyer purchasing inflatable triumphal arch from Swiss seller. Non-conformity was detected after installation in Hockenheim.</li> <li>- Breach: Triumphal arch deflates.</li> <li>- Decision: No fundamental breach.</li> <li>- Reasons for the decision: Repair or delivery of replacement goods was possible without unreasonable delay. The triumphal arch was to be used over a longer period of time.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/021105s1.html">http://cisgw3.law.pace.edu/cases/021105s1.html</a></li> </ul>
28. Switzerland	Kantonsgericht Schaffhausen	27 January 2004	No.11/1999/99	960	<ul style="list-style-type: none"> <li>- Facts: Swiss buyer bought fifty model locomotives, each with a size of 75 cm and a weight of 10 kg, from German seller.</li> <li>- Breach: Locomotives had delicate gears and while the locomotives were in operation, there was unacceptable noise.</li> <li>- Decision: Fundamental breach</li> <li>- Reasons for the decision: Goods could not be used for resale.</li> <li>- Case text: English translation + German text <a href="http://cisgw3.law.pace.edu/cases/040127s1.html">http://cisgw3.law.pace.edu/cases/040127s1.html</a></li> </ul>
29. Switzerland	Appellationsgericht Basel. Stadt	22 August 2003	33/2002/SAS/so	943 (= IHR 2005, 117)	<ul style="list-style-type: none"> <li>- Facts and Breach: See supra 26</li> <li>- Decision: Fundamental breach</li> <li>- Reasons for the decision: The question whether food is genetically modified or not was very important.</li> <li>- Case text: English translation + link to German text <a href="http://cisgw3.law.pace.edu/cases/030822s1.html">http://cisgw3.law.pace.edu/cases/030822s1.html</a></li> </ul>

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30. USA	U.S. Court of Appeals (5 <sup>th</sup> Circuit)	11 June 2003 <b>Case name</b> BP International- al. and BP Exploration & Oil, Inc., Plaintiffs-Appellants v. Empresa Estatal Petroleos de Ecuador, et al., Defendants, Empresa Estatal Petroleos de Ecuador and Saybolt, Inc., Defendants-Appellees	02-20166	730 (= IHR 2003, 189)	<ul style="list-style-type: none"> <li>- Facts: Buyer from Ecuador purchasing 140,000 barrels of unleaded gasoline from US seller. Goods were to be transported – CFR, Incoterms – from Texas to Ecuador. Non-conformity was discovered in Ecuador after transportation.</li> <li>- Breach: Gum content of the gasoline was too high.</li> <li>- Fundamentality of the breach was not discussed due to passing of the risk.</li> <li>- The CISG incorporates Incoterms through article 9(2).</li> <li>- Case text: <a href="http://cisgw3.law.pace.edu/cases/030611u1.html">http://cisgw3.law.pace.edu/cases/030611u1.html</a></li> </ul>
31. USA	U.S. Court of Appeals (2 <sup>nd</sup> Circuit)	6 December 1995 <b>Case name</b> Delchi Carrier, S.p.A. v. Rotorex Corp.	95-7182, 95-7186	140	<ul style="list-style-type: none"> <li>- Facts: Italian enterprise bought from US seller 10,800 compressors for use in air conditioners. The goods had to be shipped and payment was to be made by L / C.</li> <li>- Breach: The compressors had reduced cooling capacity and consumed too much energy.</li> <li>- Decision: Fundamental breach.</li> <li>- Reasons for the decision: Cooling capacity und energy consumption are important aspects for air conditioners.</li> <li>- Case text: <a href="http://cisgw3.law.pace.edu/cases/951206u1.html">http://cisgw3.law.pace.edu/cases/951206u1.html</a></li> </ul>
32. USA	U.S. District Court, (S.D. New York)	26 March 2002 <b>Case name</b> St. Paul Guar- dian Insurance Company and Travelers Insurance Company, as subrogees of Shared Imaging, Inc. v. Neuroformed Medical Systems & Support, GmbH, et al.	00 Civ.934 (SHS)	615 (= IHR 2005, 256)	<ul style="list-style-type: none"> <li>- Facts: US buyer purchasing Magnetic Resonance Imaging System (“MRI”) from German seller.</li> <li>- MRI had to be transported – CIF.</li> <li>- Breach: MRI was damaged when it arrived at its ultimate destination.</li> <li>- Fundamentality of the breach was not discussed.</li> <li>- CIF Incoterm governed by virtue of article 9(2) CISG. Risk passed.</li> <li>- Case text: <a href="http://cisgw3.law.pace.edu/cases/020326u1.html">http://cisgw3.law.pace.edu/cases/020326u1.html</a></li> </ul>