

Termination in regards to breach of time and documentary obligations in CIF contracts

**Comparative study between the English law and United Nations
Convention on Contracts for Sale of Goods 1980**



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Abbreviations

B/L Bill of Lading

CIETAC China International Economic and Trade Arbitration Commission

C.A.D. Cash against documents

CIF Cost, Insurance and Freight

C&F Cost and Freight

CFR Cost and Freight

CIETAC China International Economic and Trade Arbitration Commission

CISG United Nations Convention on Contracts for the International Sale of Goods 1980

CISG-AC The International Sales Convention Advisory Council

Com. Cas. Commercial Cases

FOB Free on Board

FOSFA Federation of Oils, Seeds and Fats Association

GAFTA Grain and Feed Trade Association

HL House of Lords

ICC International Chamber of Commerce

INCOTERMS International Commercial Terms

J.B.L. Journal of Business Law

K.B. Kings Bench

L. Rep. Lloyd's Report

L.J.K.B. Lord Justice Kings Bench

L/C Letter of Credit

Lloyd's Rep. Lloyd's Report

Q.B. Queens Bench

Q.B.D. Queens Bench Division

SGA 79 English Sale of Goods Act 1979

SGA 88 Norwegian Sale of Goods Act 1988

UCP Uniform Commercial Practices

ULF Uniform Law on the Formation of Contracts for the International Sale of Goods
(1964)

ULIS Uniform Law on the International Sale of Goods (1964)

UNCITRAL United Nations Commission on International Trade Law

1 Introduction

1.1 Research questions and practical relevance

International sales of commodities, often involve large sums of money and large shipments of goods. The CIF¹ contract has been chosen as subject for my analysis on the ground that it is the contract most commonly used in international commodity sales.²Commodity traders often purchase and sell goods to and from overseas customers with whom they haven't established close business link. A bank's involvement is a common practice, i.e. payment is being made through letter of credit.³When contracting parties have agreed to effectuate payment by means of a letter of credit, the buyer's bank takes upon itself the obligation to pay the purchase price when the seller tenders the documents that are stipulated in the letter of credit. The bank has no knowledge of the underlying contract or of the actual conformity of the goods that are traded. Consequently the tendered shipping documents must comply strictly with the terms of the credit.

Trade in commodities involve different concerns for the contracting parties in comparison with trade for highly specialized machinery.⁴Commonly, the original contracting parties are only part of string sales, the tendered documents will have to be passed down the string until they reach the final buyer. Because commodity markets are subject to drastic fluctuations, the contracts that take place in them are likely to be time sensitive in regards to the tendering and passing on of the notices and documents, these time limits must be

¹ Cost, insurance, freight.

² Bridge, Michael; *Uniformity and Diversity in the Law of International Sale*, 15 Pace International Law Review (2003) at p.58.

³ Today, more than 15 percent of international trade - over \$1 trillion a year - is financed using a letter of credit. See CGFS Papers No 50 Trade finance: developments and issues, Report submitted by a Study Group established by the Committee on the Global Financial System, January 2014.

⁴ Bridge, Michael; *International Private Commodity Sales* 19 Canadian Business Law Journal (1991) at p. 485.

strictly complied with it.⁵ Furthermore, because of the short time within which these documents must be considered and passed on, it is obviously important that the buyer should be able to determine his termination rights immediately after he becomes aware of any non-conformity disclosed in the documents. This important commercial decision whether to refuse the tender of non-conforming documents should not be complicated by asking the buyer to consider what the likely effect of any loss will be. The existence of predictable termination rights allow the buyer and seller to know exactly where they stand when such breach has occurred and will avoid timely and costly litigations.

For instance, a transport document, such as a bill of lading, is often used as evidence of: the shipment date; and serve as confirmation that seller has performed its physical obligations relating to the goods. The seller's duty to physically ship the goods within the contract period is reflected in his documentary duty to tender bill of lading accurately stating shipment within the same period. For example, when the seller tender bill of lading which evidence late shipment, the question of primary concern is whether the buyer has the right to reject the bill of lading disclosing the late shipment on the grounds on defective physical and documentary performance and terminate the contract accordingly? Another consideration is whether the seller has a right to cure a documentary effect in order to avoid termination by the buyer?

In this situation, the buyer will be interested in grasping their legal position – what are the legal consequences of the seller's breach and whether he has the right to reject the seller's non-conforming performance and terminate accordingly? Buyers are interested in being able to tell promptly whether they have a right to terminate the contract, as it is frequent in commodities trade to have a large number of contracts in the same time on a highly fluctuating market. Also in that way, the buyer avoids potential significant losses which

⁵ Mullis, Alastair; *Termination for Breach of Contract in C.I.F. Contracts under the Vienna Convention and English Law: Is There a Substantial Difference?* in *Contemporary Issues in Commercial Law (Essays in Honour of Prof. A. G. Guest)* 137-160 (E. Lomnicka & G. Morse eds., Sweet & Maxwell: London 1997). p.140.

could arise if he wrongly interpreted his legal position and wrongfully terminates the contract, as he could be held liable for damages of great amount because of the volatile market conditions.

This question will be addressed under two major legal sources, i.e. English law and the United Nations Convention on Contracts for the International Sale of Goods 1980 (hereinafter CISG or the Convention) because of their significance in the international trade law.

Termination is one of the most practically effective remedies in the context of international documentary sales of commodities. It can be considered as nearly eternal legal problem for the parties in the context of the commodities sales. It has a reappearing tendency on the agenda of sales lawyers, banks and insurance companies. Also, the commodities traders are very much interested in accurate assessment of their negotiating and settlement position.

The debate about what law is best for dealing international commodities and documentary trade often centers on the comparison of the English law and the CISG. The thesis should be therefore considered as an attempt to contribute to this debate further by examining the right of termination within the documentary and commodities trade.

1.2 Methodology and legal sources

Fluctuating market conditions characteristic for the commodity trades urge the need for certain and predictable legal framework. Due to the fact that we are doing a research on international sales, this thesis will address those legal questions addressing two most important legal sources: i.e. English Law and the CISG. The aim of this thesis is to compare the differences between the assessed legal systems considering the requirement of

certainty and predictability achieved in their remedial regime.⁶Commodity traders tend to exclude the CISG in many of the standard contract forms, in favor of the English international sales law.⁷ Internationally, over 85 percent of the global trade in oils and fats is carried out under the standard contracts of FOSFA (Federation of Oils, Seeds and Fats Association), of which there are more than 50 forms according to the type of goods and the origin of the goods.⁸More than 80 percent of the world trade in grain and feeds is carried out under the standard contract forms of GAFTA (Grain and Feed Trade Association).⁹ But does that mean that the CISG could not provide sensible legal framework for dealing with international sales contracts in the commodities industry?

There is existent opinion among some of the scholars mainly with common law background who argue that despite the success of the CISG as an instrument for unification of sales law around the world, application of the CISG in commodities sales will lead to certain level of uncertainty and unpredictability.¹⁰ The basis for their claim is that some of the provisions regarding the remedies are pretty vague and imprecise which cannot be particularly suitable for traders' interest in such a volatile market. On the other hand, the counter argumentation to this opinion is that open-ended provisions in the CISG were quite purposeful and serve to provide adequate flexibility for various international trade sectors.¹¹

⁶Gordley, James; Chapter 5: *The Functional Method*, in *Methods of Comparative Law*. Edited by P.G. Monater. Cheltenham, 2012 at p. 109. Comparative legal methodology can help us in evaluation of the rules; ascertainment the purpose of the rules; and how well the investigated rules serve those purposes.

⁷See, e.g. FOSFA Contract No.53 para.28; GAFTA Contract No.100 (Contract for Shipment of Feeding stuffs (in bulk) CIF terms) para.33. Art.6 of the CISG allows its application to be excluded by the parties' agreement.

⁸ <http://www.fosfa.org/about-us/>

⁹ <http://www.gafta.com/>

¹⁰ See e.g., Michael Bridge, *A Law for International Sales*, 37 Hong Kong L.J. 7 (2007); *Sasson's CIF and F.O.B. Contracts*, (5rd ed. 2012 edited by Filippo Lorenzon) Sweet & Maxwell; Guenter Treitel in *Benjamin's Sale of Goods*, (8th ed., M. Bridge ed., Sweet & Maxwell-Thomson Reuters: London 2010)) at 18-004.

¹¹ See e.g., Peter Schlechtriem, *Interpretation, Gap-filling and Further Development of the U.N. Sales Convention*, 16 Pace International L. Rev 279 (2004); Koji Takahashi, *Right to terminate (Avoid) International Sales of Commodities*, J. of Business L., 102-130 (2003). 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

Succinctly put, a question is to be asked—should the CISG be considered suitable for application to the commodities sales? By reviewing and analyzing the relevant provisions and available case law from the perspective of both legal systems, the thesis will consider the buyer termination rights and ascertain whether the differences in remedial regimes will likely to lead to substantial differences in the outcome? Additional comparison will be made in the context of the underlying consideration of the trade sector and to evaluate which of the assessed legal systems is better suited for international documentary sales of commodities?

As a result, this thesis will advocate the opinion that the CISG can be considered appropriate for commodity sales against proper interpretation; if applied by a judge or an arbitrator who understands the needs of the surrounding commercial context and appreciates the Convention flexibility.

1.2.1 English law

The English Sale of Goods Act 1979 (hereinafter SGA 79), does not include a statutory definition of the CIF term or any other concerning trade terms, rather it relies on the judicial development that followed the development of trade practices. The relevance of the English law is justified by the importance in the practice of international sale of commodities, as there is over a century of case law on the meaning and classification of the terms in the standard contract forms used in commodities trade. For the purpose of regulating commodities sales, the English law was often chosen as applicable law, even though the contract itself had no actual connections with England.¹²

Traders dealing with commodities are well aware of the legal significance of the terms, and legal rights in case of their breach, due to the longstanding reputation of the English law in

(Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel.

¹² Internationally, dominant percentage of the global trade in commodities in the agricultural sector is carried out under the standard contract forms prepared by the trade associations. See supra (notes 5 and 6).

documentary sales, as well as the clear approach adopted by the judges, classifying certain relevant legal terms in the standard contract forms for commodities.¹³

My analysis of the English case law is not meant to be an exhaustive examination of every decision connected to the theme of the thesis, but rather it focuses on the most influential judgments which have settled the *stare decisis*.¹⁴ In this connection, the discussion will be placed on the extensive termination rights in the sales law, on the principle that the most important terms in CIF contracts are promissory conditions and will give rise to termination rights. Since enacting section 15A of the SGA 1979, this position of English law is subject to qualification, disallowing automatic termination for breach of condition, if the ‘breach is so slight that it would be unreasonable for him to reject them’.¹⁵ The question will be whether such change in the law was intended to be applied for international documentary sales on shipment terms or not?

This thesis will identify the problems concerning the certainty and predictability and evaluate the claim that English law is better suited than the CISG to regulate international documentary sales of commodities.

1.2.2 CISG

The 1980 diplomatic conference in Vienna that produced the CISG was the outcome of 12 years of preparation, which took the starting point from the previous failed Hague conventions of 1964 on formation of sales contract (ULF) and obligations and remedies arising from sales contract (ULIS). The main reason why the Hague conventions failed to obtain widespread acceptance was the lack of involvement on the part of the developing world, the socialist economies of Eastern Europe and the United States. Therefore the

¹³ Alastair Mullis, *Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases in Anglo-Swedish Studies in Law* 348–9 (M. Andreas & N. Jarborg eds., LustusForlag: Stockholm 1998) at p.330.

¹⁴ Principles and rules established in a previous legal case that is either binding on or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts. See Wilson, Steve, Rebecca Mitchell, Tony Storey & Natalie Wortley, *English Legal System Directions* (Oxford University Press, 2011), p. 6.

¹⁵ This rule was introduced into the SGA 79, by the Sale and Supply of Goods Act 1994.

United Nations Commission on International Trade Law (hereinafter UNICITRAL), decided to form a Working group which would consist of different legal participants as well as social and economic systems and their work should ultimately lead to a new widely accepted Convention. After certain process of review enabled by UN members and international organizations, UNCITRAL accepted the 1978 Draft Convention on Contracts for the International Sale of Goods.

The final version of the Convention to a great extent is matching up with the provisions previously prepared in the Draft joined by few modifications. Regarding the 1978 draft as the closest equivalent to the official text of the CISG, the Secretariat Commentary on the 1978 Draft is perhaps the most authoritative source one can quote from the preparatory works of the Convention.¹⁶

The CISG has been ratified by most of the major trading nations,¹⁷ and is now the most important source of law for international sales generally comprising over two-thirds of international trade. Having come into force by contracting state it became automatically part of that country legal system regulating international sale contracts: governing the formation, content of the obligations, legal remedies available to the parties of an international sales contract. It will be applied by default in contracts for international sale of goods between parties whose place of business is in different Contracting states,¹⁸ or rules of private international rules lead to the application of the law of a Contracting state,¹⁹ unless the contracting parties have excluded its application.²⁰

Norway has also ratified the Convention, by enacting a separate Act²¹ on the ratification of the Convention. Norway as a 'dualistic' country, traditionally use the 'transformation'

¹⁶ Commentary on the 1978 Draft Convention on Contracts for the International Sale of Goods (UN DOC. A/CONF. 97/5).

¹⁷ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

Nowadays, eighty three states had adopted the CISG. England is the only major trading nation which has not ratified the Convention.

¹⁸ Art. 1(1)(a).

¹⁹ Art. 1(1)(b).

²⁰ Art. 6.

²¹ The relevant Act is titled "Lov om kjøp" dated 1988-05-13 No 26, in force from 1989-01-01. For the sake of simplicity I will use the term Norwegian Sale of Goods Act 1988 (hereinafter SGA 88).

method, which means transformation of the Convention into domestic statutory law; not only being translated, but also adapted and adjusted an integral version of the CISG, in accordance with the national legislative tradition. Norway is the only country in the world that chose to transform the Convention into a single body of law, governing both domestic and international sale, and creating an ‘unofficial’ version of the Convention, with numerous discrepancies in the wording of the statutory provisions, when compared with the authentic text of the CISG.²² It is beyond the scope of this thesis to consider in any detail the practical differences between the provisions as implemented in the SGA 88 and the ones in the authentic version of the Convention. I will limit my analysis on the provisions as they were enacted in the original text of the Convention.

Despite the CISG advanced status in regulating the international sales law, the English law continues to be dominant in the area of international commodity trade.

One of the concerns is that the CISG rules do not provide high degree of legal certainty and predictability, as they rely on ambiguous legal concepts such as ‘fundamental breach’²³ and ‘reasonable length’,²⁴ which makes it difficult for the traders to have a firm stand on their termination rights.²⁵ The ‘fundamental breach’ test requires reference to the surrounding factual circumstances, including full assessment of the actual harm suffered by the innocent buyer, which seems contrary to the notion of clear and certain rules, necessary for making prompt decisions on the volatile markets.²⁶ While I do support the claim that proper interpretation of article 25 requires an overall assessment of the circumstances and actual harm ensuing from the breach, given the importance of time and documentary obligations in the commodities trade, there will be sufficient grounds that the requirements of the test in the given situations will be met. Furthermore, the CISG rule which gives extensive possibility to cure defective documents as set forth in articles 34 and 48 could have a problematic effect on the seller's duty to provide documents in ‘strict compliance’ with the

²² Chapter 26 of Kai Krüger, *Norsk kjøpsrett* (Norwegian Sales Law), Bergen, 4th ed. 1999.

²³ See Arts. 25 and 49(1)(a).

²⁴ Art.47(1).

²⁵ Bridge, *Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods*, 59 *International & Comparative L. Quarterly* 911 (2010), at p. 922.

²⁶ Bridge, M, *Uniformity and Diversity*, (n. 2) at p. 68. Asserting that ‘hair trigger right of termination’ is required in the documentary sale of commodities.

contract terms.²⁷ I will argue that whilst cure of documents may be possible in principle, the scope for exercise of this right is limited due to the peculiarities of the surrounding commercial context.

CISG is a rather minimalistic text, which cannot provide definitions or special provisions regarding trade terms. Therefore, when illustrating CISG applicability to international documentary sales of commodities, we have a need to explain the international trade terms incorporation into the contract governed by the CISG, such as the International Commercial terms (hereinafter Incoterms) created by the International Chamber of Commerce (hereinafter ICC).²⁸ Nowadays, many of the international documentary sales contracts incorporate the Incoterms, which means that they can be incorporated into a CISG contract by an express agreement;²⁹ or impliedly incorporated within the meaning of article 9(2) of the CISG.³⁰

Another point is to be made to the payment effected through a letter of credit (hereinafter L/C) as a common mean of international trade payment. Despite the fact that the letter of credit represents an independent transaction by itself, it is also submitted that underlying sales contract can indeed be influenced by the fact that the parties have agreed to use and accept it as a method of payment. This system functions within the rules established by the international banking practice which has been standardized by the ICC by publishing The Uniform Customs and Practice for Documentary Credits (hereinafter UCP).³¹ When contracting parties have agreed to effectuate payment by means of a L/C, the buyer's bank itself takes the obligation to pay the purchase price when the seller tender the documents

²⁷ Article 34 gives the seller right to cure prior due date; Article 48 right to cure even after due date.

²⁸ The Incoterms rules or International Commercial Terms are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC). First published in 1936, the Incoterms rules have been periodically updated, with the eighth version— Incoterms 2010 having been published on January 1, 2011.

²⁹ See art 6 and 9(1).

³⁰ Article 9(2): The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the *parties knew or ought to have known* and which in international trade is *widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned*.

³¹ The ICC has developed the UCP by regular revisions, the current version being the UCP 600 which is formally in force from 1 July, 2007.

that are required in the L/C terms. The bank has no detailed knowledge of the underlying sales contract, or of the actual conformity of the goods subject to the transaction. Therefore, the tendered documents must be in 'strict compliance' with the terms of the credit.³²

Although the UCP do not apply to the relationship between the contracting parties of the sales,³³ it will be disputed that such principle can be incorporated by explicit reference in the contract or as an international trade usage under article 9(2).³⁴ Even if the UCP, as such, are not considered to be international trade usages, they at least offer some useful guidelines as to ascertain the reasonable intent of the parties in regard to the tender of documents.³⁵ In other words, if the parties have agreed to payment by means of a L/C, whether they in principle have implicitly agreed to apply the strict compliance principle to the tender of documents in the underlying sales contract?

In essence I will support the claim that the CISG has been construed as flexible legal regime which provides tools for contextual interpretation and enables application of the Convention in every particular trade sector.

As to the case law, my aim will be to examine how the courts have applied the Convention in the context of documentary sales contract, in concretely the buyer right to terminate the contract for breach of seller's physical and documentary obligations regarding the time of shipment. Practically speaking, detailed and absolutely uniform case law regarding the investigated legal issue is not to be expected.³⁶ Nevertheless, interpretation guideline stated in article 7(1) '*to promote uniformity in the application of the Convention*', requisite consideration of decisions of courts in other Contracting states, particularly where there is

³² See Art 14(a) of the UCP.

³³ See Art 4(a) of the UCP.

³⁴ Schwenger, *The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Nonconforming Goods and Documents*, Victoria University of Wellington Law Review 36:4 (2005) at p. 806.

³⁵ Article 8 sets out the criteria to ascertain the intent of the parties.

³⁶ Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, Reproduced with the permission of 24 Journal of Law and Commerce (2005) at p. 167. Most of the scholars and courts rejected the notion that CISG decision can have a binding effect which would oblige domestic courts to be bound by foreign case law.

established line of rulings or previous decisions on analogous questions which have ‘persuasive value’.³⁷

UNICITRAL attempts to aid such ‘international interpretation’ by designating national correspondents who send detailed decisions from national courts dealing with CISG issues. These decisions are published under the label of CLOUT (Case law on UNICITRAL texts), and even further systematized in UNICITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, which has further supported the goal of uniform interpretation of CISG.³⁸ Other important database for case law and scholarly articles on CISG is the one prepared by Queen Mary College of London University and Pace University, where can be found tremendous amount of materials connected with CISG.³⁹ As the body of reported CISG case law develops, we can expect that CISG will play an even greater role in its application to international sales contract, respectively to documentary sales on commodities as well.⁴⁰

The experiences of the reported CISG cases regarding the buyer's right to terminate the contract, could help a commodity sales lawyer to understand more clearly the factual settings that could appear in the process of an international commodities trade and thus have a precise insight into the traders’ needs and expectations.⁴¹

When considering how courts have applied the Convention in relation to important aspects for the present thesis, factors such as the *persuasive force of the reasoning* of the decision and the *soundness of the result* will be taken into equation.⁴² Another highly important factor is the identification of the stature of the tribunal rendering the decisions and the extent to which the decision is in accord with other decisions as factors that should affect

³⁷ Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183 (1994) at p. 204-205.

³⁸ Latest version of the Digest is published in 2012 <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

³⁹ <http://www.cisg.law.pace.edu/>

⁴⁰ There are now more than 2500 cases reported and available on the CISG Pace website, available at <http://www.cisg.law.pace.edu/cisg/text/case-annotations.html>. For ease of reference, this paper will generally cite the Pace website for any CISG case law cited.

⁴¹ Section 87 of Norwegian Sale of Goods Act implement article 7 of the CISG. It mandates Norwegian court on the principle of internationality when interpreting the provisions dealing with international sales.

⁴² See Lookofsky, Joseph; *Digesting CISG case law: How much regard should we have?* 8 Vindobona Journal of International Commercial Law and Arbitration (2004) at p. 218-19.

the weight to be accorded to a case.⁴³ On the other hand, the importance of CISG cases does not solely apply to court judgments. Arbitral awards can play an important role due to their 'internationality' and 'expertise' for issues which are deriving from international trade.⁴⁴ It will be argued that real difficulties with application of CISG stem not from the unsuitability of the provisions themselves, but from the way how some of the tribunals have handled the legal issues.

1.3 Limitation and terminology

First, as stated in the title, this thesis deals with the termination of the contract, where the primary consequence is that it releases both parties from their contractual obligations, while the non-conforming party remains bound to pay damages in accordance with the respective provision.⁴⁵ For the purpose of the present thesis, I would not address the legal effects of the termination in greater detail.

Second, it is beyond the scope of this thesis to consider in a detailed manner all the possible grounds for termination in the context of a CIF sales contract. In the present thesis, I will limit my discussion on the buyer's right to terminate the contract for breach of the seller's physical obligations to ship the goods within the contract period and its documentary obligations to tender a bill of lading accurately dated. The main reason why I selected this topic is because of its practical relevance throughout the years. Furthermore, the English law of termination in the context of documentary sales of commodities was construed in regard to the seller's documentary breach relating to the time of shipment.⁴⁶ It is submitted that such legal

⁴³ *Ibid.*

⁴⁴ Camilla Andersen, *The Uniform International*, (n. 36) at p. 169.

⁴⁵ Art. 81 CISG. For English law, see (HL) decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

⁴⁶ See Charles Debattista; *Bill of Lading in Export Trade*, Tottel Publishing: Haywards Heath 2009) at p. 207. This is hardly coincidence because *time is of the essence* in the particular type of sales contract. See: *Bunge Corporation v Tradax Export SA* [1981] 2 Lloyd's Rep 1 and *Toepfer v Lenersans Poortman NV* [1980] 1 Lloyd's Rep 143.

position is not expressly settled by the provisions of the Convention. Thus, it will be addressed further in the thesis that even if the matter is not expressly settled by the provisions of the Convention, its open-ended provisions together with its contextual rules of interpretation could produce same outcome in similar cases.

Third, the right of rejection is sometimes considered as being part of the termination rights, but on the other hand the rejection itself and the contract's termination must be considered as conceptually two different remedies.⁴⁷ Rejection is usually followed by termination, but the buyer has the discretionary right to reject a non-conforming performance, without terminating the contract.⁴⁸ Also rejection of either mode of performance (documents or goods), does not deprive the seller to cure its non-conforming performance when he still has contractual right to do so.⁴⁹ The author is aware of the complexity of the existence of the two rights of rejection and termination in regard to either mode of performance in documentary sales. For the purpose of the present work, my aim is to investigate the buyer's option to terminate when the tendered bills of lading evidence the late shipment of the goods.

The reader should be aware that some of the investigated cases refer to C&F and CFR Incoterm which indicates that the seller owes no duty under the contract for insurance. Since, the physical and documentary obligations relating to the time of shipment are identical to the one undertaken by CIF seller; they are of relevance for this work.

Lastly, the CISG uses the term "avoidance" in principle, and limits the use of termination to article 29, when there is termination by agreement of the parties, whilst English law uses the term 'termination'. This thesis however uses the word 'termination' instead the word 'avoidance' (which has been used in the CISG), just for the sake of its terminology consistency.

⁴⁷ See Michael Bridge; *The Sale of Goods*, 2nd ed., Oxford University Press: Oxford (2009) at p. 665.

⁴⁸ In the Convention the term rejection is found in article 86(1) stating that buyer has duty to preserve the goods whenever he reject the goods after the prerequisites for termination are met.

⁴⁹ See e.g. *Albright & Wilson UK Ltd v Biachem Ltd* [2001] EWCA Civ. 301, para. 29.

1.4 Outline

In the second chapter, preliminary comments will be made about the need for certainty and predictability in international sales of commodities.

In chapter three, the purpose is to examine the right of a buyer to terminate the contract for breach in relation to the seller's breach of his physical obligation to ship the goods within the contract period; and documentary obligations to tender an accurately dated bill of lading under English law.

Chapter four examines the buyer termination rights in the given context when the CISG is applicable. Despite the different remedial regime adopted by the CISG, application of that rules is unlikely to lead to substantially different result in the context of the buyer's right to terminate in cases of seller's breaches of timely and documentary obligations.

In the final chapter, concluding remarks will be given to the claim that Convention rules on termination for breach in the context of CIF sales contract is unlikely to produce an answer very different to that produced by English law. An additional consideration is to be taken to prove that the Convention rules' application in the process of commodity trade sales can be certain and predictable in spite of its proper contextual interpretation which will also be suggested in this current thesis.

2 Features of international sales of commodities and the commercial need for certainty and predictability

Commodity trade involves different considerations and raises fundamentally different concerns for the contracting parties involved in the process of trade in machinery and other capital goods.⁵⁰ Commodities range from agricultural products and raw materials, such as: grain (e.g. wheat, barley, maize and corn), to feed stuffs, oilseeds, sugar, coffee, cocoa, tea, oils, metals and others.⁵¹ Commodity pricings are subject to significant day-to-day fluctuations as the markets respond quickly to the pressures of supply and demand.⁵²

International commodity sales contract is usually made upon quick and informal basis, so many of the traders have concluded a large number of contracts on a volatile market.⁵³ It is very common for an international commodity sale that the 'volume of paper trading greatly exceeds the volume of dealings with the underlying goods'.⁵⁴ In that context, many of the commodity traders are often involved in the trading market as part of string sales of commodities, where only the initial shipper of the goods and the ultimate buyer are contemplating and have a physical approach to the goods.

The intermediate trades on the other hand are solely interested in the documents. That means that most of the so – called string traders are only interested in speculating on the market price, i.e. to buy the product cheaply and sell it more expensively throughout the transit of the goods.⁵⁵ String trading can simply be defined as 'the linking of two or more contracts which not only covers the same quantity of goods of the same contract

⁵⁰ Jan Hellner, *The Vienna Convention and Standard Form Contracts*, Petar Sarcevic & Paul Volkeneds, *International Sale of Goods: Dubrovnik Lectures*, Oceana (1986), Ch. 10, 335-363, at 338.

⁵¹ Commodities are all the things listed in The CRB (Commodity Research Bureau) *Commodity Yearbook* stating every possible commodity from A to Z. See <http://www.crbtrader.com/>.

⁵² There was drop of 2.5 million USD in the value of the cargo of gasoline in just four days in *ERG Raffinerie Mediterranee SPA v Chevron USA INC* (The Luxmar) [2006] 2 Lloyd's Rep 543.

⁵³ There were 31 contracts to move a quantity of fuel oil from a Thames port to an electricity generating station only 12 hours away upstream in *Vitol S.A. v Phibro Energy A.G.*, [1990] 2 Lloyd's Rep. 84.

⁵⁴ Bridge, *Private Commodity Sales*, (n. 4), at p 485.

⁵⁵ See Koji, *Right to terminate*, (n. 11), at p103.

description but which are also on substantially the same terms or have essential terms which overlap or are in common save as to the amount of the price'.⁵⁶

In order for string trading to be executed in an efficient manner, reliable standard are needed for every stage of the string. Therefore standard contract forms prepared by specialized trading associations such as GAFTA and FOSFA are often used in string sales in order to produce consistent results.⁵⁷

Commodity traders are obliged to follow a large scale of buying and selling obligations in a longtime period where *time is seen as of essence of the contract* due to the volatile market conditions.⁵⁸ It will be undesirable if for some particular breach, termination for some of the string contracts is allowed, while for the same breach, termination for the other contracts in the same string is not allowed. An ideal situation is the one where termination rights are equal and consistent for all the parties involved in the string. Due to the fact that many of the documentary sales can be concluded in the same time, it would be more practical if the lawyer can advise his client on having a proper management of his concluded contracts, where the law can provide some certain and predictable legal assessment.⁵⁹

If a trader unlawfully terminates the contract, he could become potentially liable to an enormous amount of damages due to the market fluctuations. The traders, therefore, need to be aware of the fact that they can legally terminate the contract. So, strictly defined termination rights do not necessarily mean impeding of the contracting parties' business, as the seller can easily sell his goods elsewhere. They can also be resold from the transit or delivery point without being shipped back to the seller's warehouse in a way when excessive costs for international transport backwards will not be required.

When speaking of commercial background, legal certainty should also be taken into consideration. For example, in case of a CIF contract as often form chosen for a type of

⁵⁶ Mulis, *Termination*, (n.4) at p 139.

⁵⁷ See supra notes 5-7.

⁵⁸ See *Bunge Corp. v. Tradax Export*, (n. 46), at pp. 545-7.

⁵⁹ In *Voest Alpine Intertrading v Chevron International Oil Co* [1987] 2 Lloyd's Rep. 547, an expert report stated that approximately 400 contracts were concluded each month in respect of 45 physical cargoes of SullomVoe Brent crude oil.

international commodity sale⁶⁰ documentary performance seems to have crucial value. Seller have to tender conforming shipping documents in order to discharge his obligations, and as it usual in string sales, these documents will have to be passed down the string until they reach the final buyer. Commercial logic indicates that even slight non-conformity of the tendered documents should not be accepted. The buyer is interested into commercially transferable documents, which can be easily transferred to sub-buyers or provide to banks for finance of the letter of credit transaction. Due to the market sensitivity of the goods, the contracts are usually concluded within special time limits for tendering of such documents, i.e. the time is of crucial importance for the performance.⁶¹ Therefore, certain and predictable termination rights in context of timely performance and in regard to the tender of conforming documents under CIF contracts are commercially acceptable.⁶²

⁶⁰ Bridge, Michael; *The International Sale of Goods*, Oxford University press (2013) see para. 1.09.

⁶¹ E.g. FOSFA contracts (e.g. FOSFA 24) "due despatch."

⁶² Bridge, Michael; *Uniformity and Diversity*, (n. 2) at p. 65.

3 Termination in regards to breach of time and documentary obligations under English law

3.1 Outline of remedies available to the buyer under the English law

Prior to examining the main subject of the thesis, a short outline is to be given of the remedial regime available for the buyer under English law. The primary interest of the buyer in context of international documentary sales, is whether he has right to treat the contract as terminated. He has right to exercise his termination rights in two situations. Firstly, where the term “broken by the seller“ is condition of the contract, in such case the buyer is entitled to treat the contract as discharged even when the breach of the term is only slight.⁶³ Secondly, the injured buyer will be entitled to treat the contract as discharged only if the seller's breached an intermediate term, which have deprived him of “*substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing these undertakings.*”⁶⁴

The English law contains extensive rights of termination in the international documentary sale of commodities, on the principles that important terms of the contract are promissory conditions and will give rise to termination rights. At this junction I will take a closer look at documentary sales contracts, with view to define the CIF term, being one of the most common forms used in international documentary sales of commodities.

⁶³ Subject only to s.15A SGA 1979. Eventual impact of this section in the context of the documentary sales of commodities will be considered in the next heading.

⁶⁴ This category was first recognized as general rule in common law in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, at 66 (L.J. Diplock judgment). In the context of the sale of goods was introduced by Denning in *Cehave v. Bremer Handelsgesellschaft (Hansa Nord)* [1976] Q.B. 44.

3.2 CIF contracts under English law

The seller in a CIF contract has a duality of obligations imposed on him, unlike in an ordinary domestic sales contract. In broad terms, the seller owes a physical obligation relating to the delivery of the contractual goods ‘on board’ in accordance with the terms of the contract or to buy goods afloat which match the contractual description.⁶⁵

The documentary obligations require the seller to procure and tender to the buyer documents stipulated for in the contract. In the absence of a provision in the contract to the contrary, these should include a *bill of lading* for the carriage of the goods, *insurance policy* covering the reasonable value of the goods, and a *commercial invoice* showing the amount which is due by the buyer.⁶⁶ These documents are required to be tendered in the proper form to trigger the buyer's liability for payment of the contract price.⁶⁷

There is a close link between the seller's obligations in relation to the goods (physical obligations) and in relation to the documents (documentary obligations), because the documents serve, amongst other things, as evidence of the extent to which the seller has complied with its physical obligations. In the following part, we shall examine the seller's physical duties to ship the goods within the shipment period, and the corresponding documentary duty to tender a bill of lading accurately stating shipment to have occurred within the shipment period.

⁶⁵ *Arnold Karberg & Co. v. Blythe, Greene, Jourdain & Co* (1915) 2 K.B. 379 at p.388 (per J. Scrutton).

⁶⁶ *Comptoir d'Achat et de Vente de Boerenbond Belge S.A. v. Luis de Ridder Limitada (The Julia)* (1949) A.C. 293 (per Lord Porter).

⁶⁷ *Biddel Bros v E Clemens Horst Co* [1912] A.C. 18 HL.

3.3 Seller's physical and documentary obligations as to the time of shipment: Conditions of the contract

3.3.1 The seller's obligation to ship the goods within the contract period

First of all, the contract terms may define that the goods must be shipped within the specific agreed date or within the agreed period. In absence of a specific time for shipment provided in the contract terms, the goods must be shipped within a reasonable time.⁶⁸

Whether the stipulations as to the time of shipment are to be treated *as of essence of the contract* depends on the term in the sales contract.⁶⁹ In the international sales of commodities concluded on CIF term, the shipment of the goods on board the vessel goes to the very essence of the contracts. Though the arrival of the goods at the destination point is provided in the sales contract, these contracts are concluded on shipment terms, where the delivery of the goods to the carrier at the loading port defines the seller's physical obligations under the contract.⁷⁰

As a general rule under English law, it was established in *Bowes v. Shand*,⁷¹ that stipulations as to the time of shipment form part of the description of the goods. In such case, the buyer is entitled to terminate the contract, irrelevant whether he suffered any loss from that breach. According to the facts of the case, parties concluded a CIF contract for sale of rice which called for shipment during March/April, but the actual shipment was made in February. In the words of Lord Cairns,⁷² breach of the seller's timely delivery obligations has to be 'of the essence' of an international sales contract:

"It is mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and alone might be a sufficient answer."

⁶⁸ J. Scrutton in *Landauer & Co v Craven* [1912] 2 K.B. 94, 107.

⁶⁹ Section 10(2) SGA 79.

⁷⁰ *Arnold Karberg* (n.65).

⁷¹ (1877) 2 App. Cas. 455 (HL).

⁷² *Bowes v Shand*.

Where the parties provide in the contract time framework for shipment of the goods, the importance of such term can be derived upon the construction of the contract. Express contract terms regarding the shipment date are usually made for the purpose of satisfying and fulfilling other sub-contracts in string sales.

Since this decision, it was established that stipulations as to the time of shipment form part of the description of the goods and the buyer is not obliged to accept goods which are different type from the ones stipulated in the contract. The buyer have expressly fixed his intent for rice shipped '*at that particular time*', and they are entitled to expect goods in absolute compliance with the time description.

However, the strict insistence that the goods must match their contractual description was qualified by s.15A of the SGA 79.⁷³ The reason behind such provision was to disallow buyer's attempt to terminate the contract for the seller's entirely harmless breach in order to simply escape from what has turned out to be bad contract due the market falling.⁷⁴

This position of the English law show that the automatic right to reject for breach of conditions does not always lead to fair and just outcome, and that in respect of certain breaches, the demand of 'justice' can be promoted in international sale context. Assume that S and B entered into a contract for the sale of wheat on CIF terms which provided that the goods were to be shipped during May 2013. Even when there is no express contractual provision as to the specific date of shipment and the goods were actually shipped on June 1st. Can the buyer reject the goods and terminate the contract on the basis that the term broken is a condition? In such circumstances objectively speaking, there was probably no great difference in the market price between the goods shipped one or couple of days after the contractual shipment period. If the policy behind s.15A of preventing rejection on unmeritorious grounds is to be supported it should surely apply in case where the seller's breach of stipulations as to time of shipment caused no loss to the buyer. But, as has been

⁷³ Section 15A Sale of Goods Act 1979 prevents a buyer who does not deal as a consumer from rejecting for breach of the terms implied by sections 13, 14 and 15 of the 1979 Act, 'if the breach is so slight that it would be unreasonable to allow him to do so'.

⁷⁴ Law Com. Final Report, Sale and Supply of Goods (Law Com No. 160, Cm. 137, 1987).

mentioned, in the context of documentary sales of commodities, arguments of commercial certainty and predictability may be promoted by strict termination rights.

When L.J McCardie in *Aron (J) and Co v Comptoir Wegimont SA*,⁷⁵ held that the words “*date of shipment is...an express term of the contract independent of that which is generally known as the description of the goods.*” In other words, timely shipment was a condition precedent to the buyer's payment duty and indeed formed part of the description of the goods and therefore classified it as a condition but without referring to section 13. This judgment became even more important when section 15A was introduced. Anyway, it was expressed in the preparatory works leading to the legal changes that legislator did not intend to alter the effect of the breach of time clauses in mercantile contracts.⁷⁶

Even though it is difficult to ascertain whether delay has caused any loss to the buyer, buyer is usually faced with unpredictable market movement while the delay continues; it may cause a further detriment to the buyer and deprive him from its commercial incentives for entering such contract.

The innocent buyer should be allowed to terminate the contract and enter into substitute transaction on the market. We often speak about highly professionalized traders which can be only interested in speculation activities, rather than actual physical delivery. It is important for such buyer to be able to determine his rights immediately after he becomes aware of the late shipment.

In practice, even where the goods were shipped with one day delay, the breach of such stipulation would entitle the buyer to reject and terminate the contract even if objectively the breach did not cause any harm to him.

In conclusion, the seller's obligations to physically ship the goods within the time period stipulated in the contract correspond with the requirements of legal certainty and predictability in the commodity sales. As L.J Kerr put in *Proctor & Gamble v Becher*,⁷⁷

⁷⁵ [1921] 3KB 435, 441.

⁷⁶ The Law Commission, *Report on Sale and Supply of Goods*, (n. 74) at para.4.24. The drafters of the section were clearly concerned about the possibility of introducing uncertainty into this area of law and therefore indicated that the buyer can terminate the contract regardless of the actual harm caused by the breach.

⁷⁷ [1988] 2 Lloyd's Rep. 21, 22.

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

The legal classification of the term as stipulation of the delivery period forms a condition of the contract; serve in favor of the efficiency and predictability, and enables the buyer to make quick and confident commercial decisions in situations where the seller have failed to ship the goods on time. Under the English law, the buyer could terminate the contract and and conclude a cover transaction which is in favor of the speedy market movements' existent in the commodities markets.

3.3.2 The seller’s obligation to tender an accurately dated bill of lading

Seller's duty to physically ship the goods within the contract period is reflected in his documentary obligations to tender a bill of lading dated accurately stating the shipment within the same period.⁷⁸

In absence of express terms in the contract, bill of lading is the only evidence of the physical shipment of the goods within the time stipulated in the contract. In *V Berg and Sons Landauer*,⁷⁹ where the contract sale of peas was calling for ‘shipment as per bill of lading dated or to be dated February or March 1925’. J. Rowatt's reasoning was that stipulation as to the shipment date of the bill of lading shall be regarded as a condition of the contract; the purpose of such term was to inform the buyer about the circumstances which affect the physical shipment of the goods.

The law has been developed in a way that it is implied that the seller has a duty to tender bill of lading which accurately states the date of shipment. In that context, even where the

⁷⁸ Ibid, (per. J. Devlin).

⁷⁹ (1925) 42 T.L.R. 142.

seller ship the goods within the contract period, but tenders bill of lading inaccurately stating that they have been shipped out of time, the seller failed to tender a document which correctly describes the goods.

In *Re General Trading Co. Ltd and Van Stolk's Commissienhandel*,⁸⁰ the seller performed his actual physical obligations correctly, by shipping the goods within the agreed contract period, but have tenders bill of lading which inaccurately states shipment outside that period, the seller has been held in breach of his separate documentary obligations. Facts of the case were as presented, the CIF sales contract was calling for January shipment and seller dully performed with actual shipment on time, but he has tendered a bill of lading which states February as shipment date, so the buyer was held entitled to treat the contract as discharged. J. Lawrence concludes that date of the bill of lading which is not in accordance with the sales requirements does not serve the buyer contractual interest, i.e. he was interested in receiving a bill of lading which he could easily sold out on the market.

To sum up, the both seller's physical and documentary obligations as to the time of the shipment are *prima facie* the essence of the contract. Under English law, the stipulation as to the shipment time and the consequent documentary evidence under the bill of lading are treated as conditions. Thus, the buyer will be entitled to terminate the contract where the goods are shipped outside the shipment period or where the tendered bill of lading disclose the shipment out of the contract period, irrelevant of the actual harm of the breach.

With the price often required to be paid upon the presentation of documents (cash against documents or L/C transaction), the buyer only evidence whether the seller has breached his physical duty is the tendered bill of lading. Arguments of commercial certainty substantiate the reasoning why the seller's physical and documentary duties relating to the timely shipment should be strictly complied. The buyer will be able to know accurately when he can lawfully terminate the contract.

⁸⁰ (1911)16 Com.Cas 95.

3.3.3 Seller's right to cure its non-conforming performances: Does the seller have a right to cure a documentary breach relating to the time of shipment?

SGA does not provide statutory basis for cure of its non-conforming performance as it has been seen as conflicting with the extensive termination rights under English law.⁸¹

Nevertheless, English law does informally recognize cure prior to delivery, in those cases where a tender has been made but has not been accepted by the buyer. In the decision of the Court of Appeal in *Borrowman v Phillips & Co v Free & Hollis*⁸², seller was entitled to retender if he still has time under the contract to do so. The reasoning put by the judge in this case does not deal specifically with seller's possibility to cure in case of defective documentary tender. However, there are some judicial pronouncements which are dealing with the possibility that in given circumstances seller could re-tender conforming documents.

For example, L.J Megaw in *SIAT di dal Ferro v Tradax*, express that seller could re-tender correct documents particularly where the time for performance has not yet expired.⁸³ It must be noted that this reasoning was given as an *obiter dictum*, while he did not quote any other authority in supporting such legal principle and he did not elaborate the cure issue in details. In align with this argumentation, in several later cases the judges put similar reasoning, but none of them have established clear authority.⁸⁴

According to the general principle and commercial practice, in case of unascertained goods, seller can cure by tendering replacement goods. Similarly, the seller of unascertained goods may be entitled to cure as long as his offer to appropriate a particular cargo for the contract has not been unconditionally accepted by the buyer. In this way, one

⁸¹ The Law Commission, *Report on Sale and Supply of Goods*, 1997 at para 4.1.3 ff. When the legal reform was considered, the legislators considered the possibility of introduction of a cure principle in reforming legislation but concluded eventually that cure should not be recommended as it will create undesirable uncertainty in commercial cases.

⁸² (1878) 4 QBD 500.

⁸³ [1980] 1 Lloyd's Rep 53 at 62-3.

⁸⁴ Lord Goff in *Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 399; J. Mance in *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398 at 403.

may explain the cases in which a seller was given a right to re-tender correct documents within the contract period when the buyer refused to accept them on the ground that they are not corresponding with the contract.⁸⁵

In context of our situation, if bill of lading is defective in a way that evidence late shipment of goods, the only way to cure such non-conformity is to tender a new bill of lading relating to another consignment which was shipped within the contract period. In sales contract which is calling specific goods, cure would be impossible, because the actual physical breach by the late shipment cannot be cured.⁸⁶

In principle, for all the reasons stated above, the restrictive attitude under English law towards the right of cure is understandable. In international documentary sales of commodities which are concluded often sold on string basis; and where payment is made through banks in letter of credit; arguments in favor of commercial certainty are dominant, so tender of strictly compliant documents is to be seen as of essence of the contract. In case where the seller have tendered bill of lading disclosing late shipment, it is unlikely that seller will have right to cure under English law.

3.4 Concluding remarks: Strict compliance principle in accordance with the commercial need for certainty and predictability

Termination of contract is important commercial decision and it should not be complicated by asking the buyer to consider what the likely effect of any loss will be. Clear-cut termination rights would also provide stability for the traders which have in handling their multiple contracts concluded in the same time on a volatile market. It reduces legal costs and potential expensive litigation proceedings and risk of high amount of damages in case of unlawful termination.

⁸⁵ *Empresa Exportadora de Azucar v. Industria Azucareva Nacional S.A. (The Playa Larga)* [1983] 2 Lloyd's Rep. 171 at 185

⁸⁶ Djakhongir Saidov, *Remedies for a Documentary Breach: English Law and the CISG* in K Rowley, L DiMatteo, S Saintier and Q Zhou (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press 2013) 434-465 at p. 458. The bill of lading evidence the seller's non-compliance with his physical obligations and the "clock can never be turned back."

Several arguments can be put in favor of the claim that seller's physical and documentary obligations regarding the time of shipment should be strictly complied with.

Firstly, a common scenario in the international sales is that parties have agreed to effectuate payment by means of a L/C; the buyer's bank takes upon itself the obligation to pay the purchase price when the seller tenders the documents that are stipulated in the letter of credit. The bill of lading allows the parties to raise finance on the basis of the strength of the document itself, so when the L/C was prescribed as method of payment, the bank could refuse to take such bill of lading, which evidence non-compliance with the terms in the contract.⁸⁷ The logic was that the bank has no knowledge of the underlying contract or of the actual goods that are traded. The documents must therefore comply strictly with the terms of the credit.

In respect to the time of the shipment stated on the bill of lading, art 20(a) (ii) of the UCP 600, which reads:

“A bill of lading, however named, must appear to indicate...the date on which the goods have been shipped on board.”

Anything less than bill of lading which is in strict compliance with the terms of letter of credit, will entitle the bank to refuse such tender. However, we must pronounce that L/C in itself is independent transaction from the underlying sales contract, see article 4(a) UCP. Thus, it cannot be disputed that, in order for the price to be paid, the documents required under a L/C need to be in conformity, because otherwise the bank will inevitably refuse to pay. This implies strict documentary obligation on the seller, and his failure to deliver conforming documents should not result in the buyer duty to make the payment himself.⁸⁸

⁸⁷ Lord Sumner formulate the ‘strict compliance’ principle in *Equitable Trust Co. v. Dawson Partners Ltd.*, Lloyds' List L.R. 49, 52 (H.L. 1927). See UCP article 14(a) for the respective principle.

⁸⁸ *Ficom SA v. Sociedad Cadex Lda* [1980] Lloyd's Rep 118.

The result is that the seller's non-compliance under a documentary constitutes a repudiatory breach of the underlying sales contract.⁸⁹

Secondly, the buyer often has to pay the price at the moment of the tender of documents in a so called 'cash against documents' transaction. What are the business considerations on buyer's mind in such moment? Buyer has no right to examine the goods prior making the payment, and the documents are the only source of information prior making the payment. The principle of strict compliance of documents will assist the speedy movement of the trade and enable the traders and their legal advisers in making a quick decision, bearing in mind that large quantity of goods and serious amount of money are at stake. This was appreciated in *Soon Hua Seng v Glencore Grain*, by J. Mance, where he said:⁹⁰

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

The importance of the buyer's commercial decision to terminate the contract should not be delayed or complicated with need for factual analysis of the situation. Also if court ruled that a documentary breach is not serious enough and trader unlawfully terminates the contract, he will be liable for damages, the amount of which can be enormous because of the volatile market conditions. Against such commercial background, the buyer has reasonable expectation for a bill of lading which is in strict compliance with the criteria stipulated in the sales contract, i.e. to evidence the accurate time of shipment as required under in the contract terms.

⁸⁹ See Benjamin's, *supra note*. 8, at para 23-216. The consequence is to characterize every instance of non-compliance under the L/C as a repudiatory breach of the underlying contract, irrespective of whether the tender of such documents to the buyer would constitute a repudiatory breach in the absence of the L/C.

⁹⁰ See *supra note* 84.

Also the tender of 'strictly compliant' document under the sales contract is desirable as it will follow the requirement of strict compliance under letter of credits. For the reasons of consistency, it is submitted by LJ Megaw in *SIAT di dal Ferro v. Tradax Overseas*,⁹¹ that distinction between 'cash against documents' and L/C transactions, is likely to lead to commercial uncertainty which is not desirable for the overall commercial context of this trade.

Thirdly, the buyer is entitled to anticipate documents under which he can trade with the goods without any difficulties, i.e. type of '*shipping documents as to be reasonably fit to pass the current commerce*'.⁹² The bill of lading is crucial for performance of string sales, as it represents a negotiable document of title. The bill of lading confers *prima facie title* over the goods to the named consignee or lawful holder. So, when the bill of lading disclosed late shipment, this document will be rejected by his sub-buyer on the basis of the non-conformity with the contract requirements. Commodities are often standardized by reference to important requirements such as: origin, grades, the season's overall quality and the calendar months of delivery, shipment date. The prices of futures contracts for each standardized commodity on exchanges are often tracked by the prices of forward delivery contracts for the same or similar commodities in the physicals market. The contracts in the physicals market for the same commodity are eventually stringed together by, in the case of CIF contracts, notice of appropriation. It is, therefore, vital for the documents tendered thereafter to be strictly conforming. In that context, L.J Kerr in *Proctor & Gamble v Becher*,⁹³ emphasize the commercial importance that bill of lading is accurately dated within the shipment period stipulated in the sales contract: '*it is not a trade in goods but in contracts for the shipment of goods*'. Though the goods are same, the fact that that have been shipped in two different months, can have serious financial consequences for the parties.

In conclusion, the quest for legal certainty and predictability in English law is clear by treating the seller's physical and documentary obligations relating to the time of shipment as conditions. The introducing of section 15A of the SGA, shown tendency that immediate

⁹¹ See (n.83).

⁹² *Hanson v Hammel & Horley Ltd* [1922] 2 A.C. at 46 (per L.J. Sumner).

⁹³ *Supra* note 77.

termination right for breach of condition sometimes can lead to unfair outcomes, and introduce certain flexibility in the English law. But in the context of the above mentioned arguments, the 'strict compliance' is more adept in resolving the complex commercial scenarios that could arise in the context of documentary and commodities trade.

It is without doubt that English law will give the traders clear termination rights at least where the timely and documentary obligations are concerned.

4 Termination in regards to breach of time and documentary obligations under the CISG

4.1 Outline of remedies available to the buyer under the CISG

The main reasons put forth for the claim for ‘unsuitability’ of the CISG to deal with international documentary sales of commodities are the vague legal concepts such as ‘fundamental breach’ and ‘reasonable length’, which are seen as inimical to the need of certainty and predictability in the fluctuating commodity markets.⁹⁴

The CISG is viewed as treating the termination as a remedy of last resort, with the central aim of preventing costs and economic waste that could arise as a result from the termination.⁹⁵

As a general rule, the buyer is only able to terminate the contract when the breach is fundamental, or, where the breach is one of non-fundamental nature, but the seller fails to perform within the additional reasonable period of time provided for in article 47(1), the so-called Nachfrist rule. So far as the latter right is concerned, it is designed to overcome the difficulty that late delivery may not be sufficiently late to allow the buyer to treat it as a fundamental breach. By fixing an additional period of time, as provided for in those provisions, the buyer can make ‘time of the essence’ so that a failure to perform within the additional period allows him to terminate the contract.⁹⁶

⁹⁴ See Bridge, *Avoidance*, (n.25); Wide practice of opting out of the CISG in the commodity trade, see (notes 5-7).

⁹⁵ See Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed., 1999) para.181-2 says: "In developing the Convention there was no significant support for extending avoidance to include insubstantial deviations from the contract."

⁹⁶ Koji, *Right to avoid*, (n.11), at p 125. In order to ascertain the reasonableness of the length of the additional time, the buyer will have to take into account a number of factors, including the need for timely performance,

As provided in article 25, a breach is fundamental if “it results in such detriment to the other party as *substantially to deprive* him of what he is *entitled to expect* under the contract, unless the party in breach *did not foresee* and a *reasonable person* of the same kind in the same circumstances would not have foreseen such a result.”

This provision has been interpreted as setting a very high bar which is not well suited to the documentary sales of commodities, particularly in relation to timely and documentary obligations.⁹⁷ However, given the evident importance of time and documentary obligations in the commodities trade, several arguments have been advanced that the concept of ‘fundamental breach’ is flexible enough to accommodate the principle of ‘strict compliance’ in the given commercial context.

It is argued that the CISG's expansive rights of cure up to the due date as set forth in article 34 and allowing cure after the due date in article 48 could have a problematic effect on the duty to provide documents in ‘strict compliance’. In contrary, the aim of this work will be to prove that whilst cure of documents may be possible in principle, it will generally not be effective in relation to cure documentary breach relating to the time of shipment due to the peculiarities of the surrounding commercial context.⁹⁸

4.2 CIF Contracts under the CISG

4.2.1 Introduction

There is no express definition of either CIF or FOB terms within the CISG provisions. This is not surprising; neither should serve as ground for dismissing the Convention suitability for dealing with commodity sales. CIF and other terms are ‘outgrowth of custom and usages

the seller’s possibility to cure. Mercantile practice regarding the breach of time clauses is strict in upholding commercial certainty with regard to these issues.

⁹⁷ Bridge, *A Law for International Sales*, (n.10) at p 22.

⁹⁸ See below in part 4.3.3.

of merchants’,⁹⁹ and they are subject to constant change in light of the developments in commercial practices. Even if the drafters of the Convention have attempted to fix the meaning of such trade terms in the text, that would have led to a problem of different nature, as that definition could easily get outdated in practice, while the text of the Convention is not easily changeable, and could not follow the trade practice in full extent. As there is an absence of express definition in the Convention, how should a court applying the Convention interpret those legal questions which arise in respect to such documentary sales?

Documentary sales are governed by the Convention, ‘*though in some legal systems such sales may be characterized as sales of commercial paper*’.¹⁰⁰ It is submitted that the Convention should be held as applicable even in a situation of ‘string sales’, where the documents are sold and transferred several times (by transfer of bill of lading) until the end buyer takes physical possession, since the object of the contract is not the document, but the underlying goods.¹⁰¹

Contracts concluded on CIF terms are described as ‘documentary sales’, indicating the importance of the seller’s duty to deliver the documents,¹⁰² or to assist the buyer in obtaining certain documents of title.¹⁰³

Other arguments in favor of the documentary nature of the CIF contract is the usual payment clause contained,¹⁰⁴ which stipulate that the buyer must pay the contract price against the documents, either in: (1) “cash against documents”; (2) “L/C payment”.

Since the Convention does not define a CIF contract we could use Incoterms to supplement the provisions of the Convention in this regard, as well as UCP in conjunction with the CISG to provide understanding for the CIF sales contract which provide for payment by letter of credit.

⁹⁹ Mulis, *Termination*, (n.5), at footnote 78.

¹⁰⁰ See Secretariat Commentary on the 1978 Draft, (n.16), at p. 13, para.8 of Commentary on Article 2.

¹⁰¹ See also, Peter Schlechtriem, *Interpretation*,(n.11) at note 11.

¹⁰² Ulrich G. Schroeter in Schlechtriem & Schwenger, *Commentary on the UN Convention on the International Sale of Goods (CISG)* 3ed.,Oxford 2010, at p. 431.

¹⁰³ CISG -AC 5, (n.11) at para 4.11.

¹⁰⁴ Mohs, *The CISG and the Commodities Trade, Private Law: National - Global - Comparative: Festschrift für Ingeborg Schwenzer zum 60. Geburtstag* /hrsg. von Andrea Büchler, Markus Müller-Chen, 2011, at p 1297.

4.2.2 CIF contract with “cash against documents” payment clause

In absence of clear terms regarding to the time of payment, under the Convention the buyer duty to pay arises, ‘when the seller places either the goods or documents controlling their disposition at the buyer's disposal’.¹⁰⁵ In the case of a CIF contract that would mean that the buyer should, subject to contrary agreement, pay against the documents. Due to the fact that payment and delivery are concurrent obligations, the ‘seller may make such payment a condition for handing over the goods or documents’.¹⁰⁶

Under the Convention default rule, the buyer does not have to pay the price until he has had an opportunity to examine the goods, ‘unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity’.¹⁰⁷ It is argued that this rule will be displaced in a CIF contract with ‘cash against documents’ payment clause; as such the buyer will have no right to examine the goods before making the payment.¹⁰⁸

Article 30 CISG states that the seller must hand over any documents relating to the goods ‘as required by the contract and this Convention’. Because the CISG nowhere stipulates what documents must be handed over, it is the contract terms that one must look, as well as any usages that would govern the parties contract by operation of Article 9 CISG. The contract may, and often does, stipulate that the seller must present more documents than those which simply control the disposition of the goods for purposes of Article 58 CISG. In the absence of explicit agreement by the parties, the buyer payment duty usually will arise against tender of negotiable bills of lading as the usual ‘*document controlling the disposition of the goods*’.¹⁰⁹

¹⁰⁵ Article 58 (1). Similarly, in the case of carriage of goods, ‘the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price’, according to article 58(2).

¹⁰⁶ Ibid.

¹⁰⁷ Article 58(3).

¹⁰⁸ See Secretariat's Commentary on the 1978, *supra note* 16, on draft art.54 (now art.58) para. 7.

¹⁰⁹ See Report of the First Committee, A/CONF.97/11, 32nd meeting, para.13 (1980).

If the sale is concluded on CIF Incoterm, the seller's documentary obligations are precisely regulated in their rules.¹¹⁰ It is argued that even if CISG contract does not expressly provide for Incoterm, the court could use the Incoterm as 'interpretative guide' to ascertain intent of the parties and they, therefore, can function as a subsidiary source of interpretation of the intent of the contracting parties when providing for such trade terms.¹¹¹

Incoterms are probably the most widely known sources of codified trade usages. They are widely accepted by business people, legal academics and practitioners on a worldwide scale for the interpretation of common used terms in international sales. Even if a sales contract is not concluded on the particular Incoterm, the seller's documentary obligation to tender conforming documents can be regarded as an international trade usage in accordance with article 9(2) CISG.¹¹² Even if the contract was not expressly concluded on CIF Incoterm, in several reported CISG cases, the courts have ruled that they could be understood as a usage within the meaning of the CISG.¹¹³

When the parties agreed on CIF term and payment is to be made against documents, a timely tender of strictly compliant documents is to be considered of utmost importance.¹¹⁴ Article 34 CISG stipulate that seller has to comply with its delivery obligation regarding the documents at the time and place and in the form required by the contract.

In this respect rule A8 of the CIF term stipulates "*the seller must at his own expense provide the buyer without delay...the usual transport document for the agreed port of destination.*" While reference is made to the usual transport document (e.g. bill of lading),

¹¹⁰ The INCOTERMS alter and supplement the provisions of the CISG. The possibility to alter and supplement the provisions of the CISG by incorporating trade terms will be based on the consensus of the parties, as provided for by Articles 6 and 9 of the CISG.

¹¹¹ Report by the Secretary-General of the UN Commission on International Trade Law, UN Doc. A/7618 §§ 48-50, 57.

¹¹² For the requirements of article 9(2), see (n. 30). For in-depth discussion on the issue, see William P. Johnson, Analysis of Incoterms as Usage Under Article 9 of the CISG, University of Pennsylvania Journal of International Law, Volume 35, Issue 2, 2014.

¹¹³ See e.g., Appellate Court Genova 24 March 1995 (Italy) (*Marc Rich v. Iritecna*) and Federal Appellate Court 11 June 2003 (USA) (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*).

¹¹⁴ See below 4.3.2.

in the second sentence of the same rule, it specifies exactly what are the documentary requirements for the seller in order to fulfill his contractual obligations. Applicative to our thesis, it is stipulated that the document must *'be dated within the period agreed for shipment'* and *'unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier'*. Thus, the seller's documentary performance should enable the buyer to claim the goods at the port of destination and/or to enable him to trade with the goods while in transit.

The question relevant for our research will be whether the incorporation of CIF term in itself may dictate strict compliance with timely and documentary obligations, or the given commercial context is decisive.

4.2.3 CIF contract with L/C as payment clause

The parties may have agreed that the buyer shall procure payment by letter of credit, and in such case the documents listed in the L/C must be presented before the payment is made.

The UCP provide a set of rules applicable to specific transactions in which L/C is agreed as method of payment between contracting parties. The wide use of L/C in international sales provides a strong indication of the fact that the principles underlying the UCP are widely known to, and regularly observed by, traders.¹¹⁵ Therefore, the UCP could apply, either by express reference in the sales contract, or as an international trade usage within the meaning of article 9(2) of the CISG.¹¹⁶ In alternative, even if the UCP as such are not to be considered as international trade usages, they at least provide guidance as to what reasonable person had to understand in cases when they decided to make payment upon L/C, according to article 8(3).¹¹⁷

¹¹⁵The UCP are widely adopted and in practice, banks in more than 170 countries operate letters of credit under this document.

¹¹⁶ See Schwenger, *Danger*, (n. 34) at p. 806.

¹¹⁷ *Ibid.*

The parties may have agreed that the buyer shall procure payment by letter of credit, in such case the documents listed in the L/C that must be presented before the payment is made. Pursuant to article 54 CISG, *'the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract'*. Thus, where letter of credit is stipulated as source of payment in the sales contract, it places on the buyer an obligation to have such a documentary credit opened by a bank in favor of the seller. This is a condition precedent to the performance of all the seller's duties and clearly falls within the buyer's control and may constitute a fundamental breach.¹¹⁸

Pursuant to articles 30 and 34, the seller has responsibility under such a documentary sales contract to hand over any documents in time and form required by the contract. Although letter of credit constitute payment mechanism which is typically independent¹¹⁹ from the legal claims and issues which could arise from the underlying sales contract, certain interplay between the provisions of the UCP and those of the CISG itself may occur in practice regarding time and form of the documents.¹²⁰

It seems current question to be raised in cases, when the parties have agreed on payment by means of L/C, whether they have impliedly agreed on setting the same high standard as strict compliance to documentary duties under the sales contract. I will argue that the underlying sales contract can indeed be affected by the fact that the parties have provided in their contracts for the payment under the L/C. Since the tender of strictly complying documents is an essential requirement to make a payment under a L/C, ultimately, effects to discharge the payment obligations under the sales contract. If the seller failed to deliver documents that are in 'strict compliance' with the terms of the L/C, thereby preventing the buyer to perform his contractual obligations (payment of the price), it should be taken as determinative factor when assessing interpreting the buyer right to terminate the underlying sales contract.

¹¹⁸ ICC Arbitration Case No. 7585 of 1992 (*Foamed board machinery*).

¹¹⁹ Article 4(a) UCP 600.

¹²⁰ Article 14(a) UCP, requires documents to 'appear on their face to be in accordance with the terms and conditions of the credit'.

4.3 Seller's physical and documentary obligations as to the time of shipment

4.3.1 The seller's obligation to ship to goods within the contract period

In many CIF sales contracts there will be express provisions as to the date, or period of shipment.¹²¹ The question arises in the absence of strict express terms as to these matters in the contract, how the CISG court would treat failure to ship the goods on time in documentary sales of commodities? In many cases, of course, late shipment by a day, for example will have little effect on the value of the goods and it may be that CISG courts will not, as a result, treat such cases of late performance as amounting to fundamental breach.

According to the reported case law,¹²² and the legal authors,¹²³ delay does not *per se* constitute a fundamental breach of the contract. Therefore, the seller's breach regarding to the time of delivery should not lead to immediate termination and the buyer should fix him an additional period of time as provided in article 47(1). Nevertheless, in some of the reported cases we can find indication that the breach of a time stipulation can constitute a fundamental breach 'if delivery within a specific time is of special interest to the buyer',¹²⁴ or there is a contractual clause stating that delivery must be effected at an exact time.¹²⁵

Yet, it has been suggested that, term could be considered essential not only when the parties specified it in the contract, but also in the light of the circumstances, customs, usage

¹²¹ Pursuant to CISG article 33 the seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract.

¹²² See e.g. Appellate Court München 8 February 1995 (Germany).

¹²³ Graffi, Leonardo, *Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention*, *Revue de droit des affaires internationales/ International Business Law Journal* (2003) No.3, at p. 341.

¹²⁴ Hamburg Appellate Court 28 February 1997 (*Iron molybdenum case*).

¹²⁵ Milan Appellate Court 20 March 1998, (*Italdecor v. Yiu's Industries*).

or other relevant factors.¹²⁶ Such approach in regards to breach of timely delivery could be found in article 28 of the ULIS, predecessor of the CISG, which lays down a presumption that in case of late delivery of the goods with a quoted market price is normally considered a fundamental breach. Same presumption should be introduced under the CISG, even though this provision was not transplanted into the CISG, the real reason why it was neglected in the CISG was for the sake of consolidating the provisions on remedies.¹²⁷

Unsurprisingly, the CISG decisions are far from reaching uniform decisions in this regards. In several cases, the tribunal assessed that the incorporation of the CIF Incoterm in the contract means that the time is of essence to the contracting parties, and seller's breach of a trade term will constitute a fundamental breach *per se*.¹²⁸

One German court¹²⁹ appeared to adopt such presumption in a case concerning the purchase of Iron-Molybdenium between a German seller and an English buyer. The Hamburg Court of Appeal found that the incorporation of CIF Incoterm by definition determines that timely delivery is *an essential* term of the contract. It was obvious to the seller that the buyer had a special interest in punctual delivery and inferred such a special interest from the use of the CIF Incoterm.

However, in a later case the same court questioned the existence of a trade usage that automatically renders untimely delivery in C&F sales a fundamental breach.¹³⁰ The conclusion reached by the court in this respect was that, there is no particular reason that Incoterm clause makes the 'time of shipment more of the essence', especially in the absence of express clause in the contract which would indicate that.

¹²⁶ Herbert Bernstein, Joseph M. Lookofsky, *Understanding the CISG in Europe* (The Hague 1997). at p. 89.

¹²⁷ E.g. 4 (1973) UNCITRAL Year Book 40 § 28. See also Schlechtriem, *Uniform Sales -The UN-Convention on Contracts for the International Sale of Goods* (1986) at p.60.

¹²⁸ The fundamentality of the breach is of great relevance in case of CIF Incoterm sales, where the risk has passed to the buyer when the goods are placed on the vessel's board (rule A5 CIF Incoterm). Article 70 CISG provides that, where the seller has committed a fundamental breach of contract, the buyer's remedies are not impaired merely because the risk of loss has passed to him.

¹²⁹ *Iron Molybdenium* (n. 124).

¹³⁰ See Hamburg Appellate Court at 12 November 2001 (*Memory module case*).

In the *Crude metal case*,¹³¹ arbitrators have reached conclusion that mere Incoterm clause do not provide anything that ‘time is of essence’ of the contract and seller's non-observance with the time limit would give the buyer automatic right to terminate the contract in situation where the time limit for shipment is not respected. According to the reasoning “*there might exist a usage of the trade to the effect...that...a CFR contract has to be understood as a fixed term contract.*” However, such question has been left open, as it is up to the buyer to prove the existence of such usage in the trade, which he failed to do so in the present case.

The conclusion reached in these decisions give us indication that in case of seller's failure to ship the goods on time, the CISG courts is likely to assess the consequences of the breach; in absence of express provisions in the contract which makes it clear that time is of the essence.¹³²

The moral of the story is that, if the CISG is applicable, it must be borne in mind that while the terms such as CIF are frequently used in the documentary and commodities trade, they are not necessarily confined to this context. It is not the mere incorporation of CIF term itself which gives relevance to the time factor, but overall observation of the commercial context of the transaction is decisive.¹³³ The seller's duty to physically ship the goods within the contract is reflected in his documentary duty to tender ‘*without delay*’ an ‘*accurately dated bill of lading*’ in order to perform his contractual obligations. Another fact is that the parties regularly agree on payment by means of L/C, where the bank needs certain documents used in CIF sales within the validity period of the L/C.

¹³¹ ICC Arbitration Case No. 7645, March 1995 (*Crude metal case*).

¹³² Strictly speaking clause A4 of the CIF Incoterm restate the same wording as seen in CISG article 33 regarding the time of delivery, i.e. that seller "must deliver the goods on board the vessel at the port of shipment on the date or within the agreed period". This wording itself does not suggest that the time automatically is of the essence of the contract, in absence of express contract terms providing to such effect.

¹³³ Benjamin K. Leisinger, *Fundamental Breach Considering Non-Conformity of the Goods*, Sellier European Law Publishers (2007) at p148.

In order to fully understand the buyer's possibility to terminate the contract in this area, we must explain the seller's corresponding documentary duty to deliver a bill of lading which evidences the late shipment of the goods.

4.3.2 The seller's obligation to tender an accurately dated bill of lading

As far as the Convention is concerned, the most important reference to documents is to be found in article 34 which says that 'if the seller is bound to hand over documents relating to goods, he must hand them over at the time and place and in the form required by the contract'. The failure to tender conforming documents amounts to a breach of contract but the right to terminate the contract is conditional upon establishing that the breach was fundamental. The draftsmen of the Convention recognized that the concept of 'fundamental breach' is not in support of the common practice of documentary sales of commodities. In this respect, the text of the Secretariat Commentary to article 49,¹³⁴ for example, says:

"The rule that the buyer can normally avoid the contract only if there has been a fundamental breach of contract is not in accord with the typical practice under c.i.f. and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have often been able to refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance."

In fact, there is a degree of conflict among scholars and practitioners when ascertaining the actual meaning of this phrase. It is suggested that parties should be able to expressly or impliedly invoke the principle of 'strict compliance' in documentary sales of

¹³⁴ Secretariat Commentary, (n.16). On the draft article 45 at para.7 (draft counterpart of CISG Art. 49).

commodities.¹³⁵ Several techniques of interpretation were proposed in order to achieve such outcome.

Firstly, it was argued that in case of documentary sales of commodities, special standards have to be applied in determining whether there is a fundamental breach. Documentary sales contracts require 'strict compliance' with documentary obligations. Even 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 article 8(2) and (3),¹³⁶ or by finding a commonly accepted usage in international trade in this respect and therefore applies to CISG contracts in accordance with article 9(2).¹³⁷

The provisions of Article 8 of the CISG stipulate that regard is to be given to the intent of the parties; this can be implied by investigating the statements, conduct and all relevant circumstances according to the understanding that a reasonable person of the same kind would have had in the same circumstances.¹³⁸ It is possible *commercial background to be taken into account in assessing what it is that the injured party was entitled to expect* and in such context lowering the test in article 25.¹³⁹

The typical commodity trader is interested in receiving conforming documents in all respects, especially the bill of lading. String sales are possible only by freely transferable documents. Banks dealing with these documents are not expected to have concerns with the actual performance of the underlying sales contract, i.e. to assess the extent to which the underlying goods are non-conforming.

There is another legal technique implied by authors advocating the "strict compliance" principle in the CISG, under which it is suggested that there is no need to derogate from the

¹³⁵ Mulis, *Termination*, (n. 5), at p 137.

¹³⁶ Bruno Zeller; *Commodity Sales and the CISG*; Camilla B. Andersen & Ulrich G. Schroeter eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmonds & Hill Publishing (2008) 627-639, see note 24.

¹³⁷ Koji, *Right to avoid*, (n. 11) at p. 129.

¹³⁸ Singh, Lachmi; Leisinger, Benjamin, *A Law for International Sale of Goods: A Reply to Michael Bridge*. *20 Pace International Law Review* (Oxford University Press), 2008 at p. 175.

¹³⁹ CISG-AC 5 (n.11), at para 4.17.

concept of the fundamental breach. Instead emphasis is to be placed on the standard of the 'deprivation of contractual expectation', in regard of the 'importance that the parties to the particular contract have given to each obligation'.¹⁴⁰ Documentary sales are often concluded on CIF trade term either with L/C or "cash against documents" payment clause.¹⁴¹ In such cases, they became part of the contractual agreement between the contracting parties, and they provide for the "time" and "form" of the seller's documentary duties.

If the parties have agreed on CIF term, according to rule A8 the seller must provide 'without delay' the usual transport document (e.g. bill of lading), dated within the period agreed for the shipment. UCP article 14(a) requires 'strict compliance' with the documentary requirements, e.g. the tendered documents must 'appear on their face to be in accordance with the terms and conditions of the credit'.¹⁴² The bank's promise to pay is conditional upon the seller presenting bill of lading which evidences the date of shipment as seen in article 20(a) (ii) UCP. It is disputed whether the parties must have incorporated the UCP or Incoterm into their sales contract expressly, or they can be incorporated as an international trade usage within the meaning of article 9(2) of the CISG.¹⁴³ In alternative, even if they don't meet the trade usage requirements as stipulated in the CISG, they at least offer some useful guidelines as to what reasonable parties would regard to be a fundamental breach in the context of documentary sales contract.¹⁴⁴

In such cases, these contract clauses constitute a part of the express or implicit agreement between the parties, upon which the seller's exact compliance with his obligation to tender the specified documents is designated as 'fundamentally important'.¹⁴⁵ Thus, the nature of the contractual obligation is an important factor in the determination of a fundamental

¹⁴⁰ Schroeter, (n.102), at p. 433.

¹⁴¹ Bridge, *International Sale of Goods*, (n.60), at para 4.04.

¹⁴² According to professor Schwenger, the strict compliance principle for the underlying sales contract can be derived directly from the respective article in the UCP. See Schwenger, *Danger*, (n. 34), at p.806.

¹⁴³ Bijl, Maartje, *Fundamental Breach in Documentary Sales Contracts. The Doctrine of Strict Compliance with the Underlying Sales Contract*, *European Journal of Commercial Contract Law* 1/2009 at p. 26.

¹⁴⁴ Schwenger, *Danger*, (n. 34), at p. 806.

¹⁴⁵ Schroeter, (n. 102), at p.433.

breach. In the given circumstances, it is suggested that the parties may have agreed on strictly conforming documents, even if they have not expressly agreed to include such a provision in the contract.¹⁴⁶ In such cases, the presumption should be established that breach of those obligations is likely to be held as a fundamental breach.¹⁴⁷

Thirdly, it was held that the term ‘detriment’ is a broader notion, so the ‘contractual interest’ cannot be the only factor to be taken into account. The test in article 25 does require an overall assessment of the circumstances, including an actual detriment which *in fact* results from the particular breach of the contract between these particular parties.¹⁴⁸ This means that the test will require from the tribunals to look beyond the mere non-conformity of the documents to ascertain that the breach resulted in serious consequences. Support for such argument can be found in the legislative history where it was stated that the test is circumstantial, taking in regard the ‘*monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party*’.¹⁴⁹

While I do agree with the proponents of the view that ‘fundamentality of the breach’ under the CISG depends upon the fact surrounding and resulting from the breach, in my view, seller’s physical and documentary breach relating to the time of shipment is likely to meet the requirements of article 25. For example, inaccurate bill of lading is effectively not transferable, either bank will refuse them, or his sub-buyer on the string could refuse to take possession of such document. He is not in position to resell them, or at least not in position to resell the goods in an efficient and profitable manner, i.e. *breach interferes with other activities of the injured party*. In a situation where a buyer trade with documents, and intends to resell them, the danger of substantially increased monetary harm is greater in case of fluctuating markets such as commodities. In case of falling market prices, the buyer

¹⁴⁶ Implied indication of strict compliance duty can be inferred from the type of the contract concluded and its accompanying trade customs and usage on a notional application of articles 8 and 9.

¹⁴⁷ Koji, *Right to avoid*, (n.11) at p. 125-127.

¹⁴⁸ Bridge, *Avoidance*, (n.25), at p. 934 note 130. See also the reasoning of the Supreme Court of Switzerland from 15 September 2000 (*FCF S.A. v. Adriafile Commerciale S.r.l.*).

¹⁴⁹ See Secretariat Commentary, (n. 16), on Art. 23 (draft counterpart of CISG Art. 25), Comment 3.

would probably have to make a substitute contract at a considerably lower price in order to fulfill his resale contract, i.e. there will be *monetary harm caused by the breach*.¹⁵⁰

On other side, the demand for factual analysis can be a positive force even in the commodities trade by preventing termination where the overall circumstances of the contract indicate that the buyer had not been essentially deprived of what he was entitled to expect under the contract. In case where the last buyer actually takes physical possession of the goods, he may not be entitled to terminate the contract merely by relying on the non-conformity of the documents.¹⁵¹ In the given circumstances, the court should considered all the relevant surrounding factors and the actual seriousness of the breach, and whether the buyer can still use the goods within his normal course of business.¹⁵² But, when the actual late performance disclosed in the documents itself make it impossible for the buyer to use the goods for the intended purpose, the seller is likely to have committed fundamental breach.¹⁵³

In sum, the seller's obligation to tender *accurately dated bill of lading* should be seen as '*of the essence of the contract*' and breach of this contractual term is likely to amount to a fundamental breach in the given commercial context. As far as I am aware, the decision of the ICC Arbitral Tribunal in *Crude Metal case*¹⁵⁴ is the only reported CISG award in this context and appeared to adopt such presumption.

In this case, the parties concluded a CFR Incoterm contract for sale of crude metal, and the payment was to be made by L/C which specified 30th September as the latest date for shipment and 20th day for expiry of the L/C. Subsequently, the shipment and L/C dates were changed to 15 October and 31 October 1991 respectively, with the expiry date of the L/C further changed to 15 November but no modifications made to the 15 October shipment date. The contract provided for the payment of a penalty in case of a delay of

¹⁵⁰ Due to the market sensitivity of the goods, the monetary harm suffered by the buyer can be great in relation to the overall value of the contract.

¹⁵¹ CISG-AC 5 (n.11), at para 4. 17.

¹⁵² E.g. Bill of lading disclosing late shipment of one day is unlikely to have serious consequences for the buyer who intended to use the goods for further processing.

¹⁵³ If the buyer had informed the seller that he had fixed a date for delivery for his sub-buyers and the delay in itself make it impossible for the buyer to resale the goods as planned.

¹⁵⁴ *Crude Metal case* (n.131).

more than fifteen (15) days in shipment which was interpreted as an agreement to tolerate a delay of 15 days. Uncertainties surrounded the actual date of shipment, in practice the seller shipped the goods on October 29th and its bank delivered the documents after mid-November. The buyer's bank informed the seller's bank that the document did not conform to the agreement between the parties. The buyer has argued his right to terminate the contract in view of the delay in shipment and the seller's tender of bill of lading without evidencing proper shipment date.

The tribunal held that seller's physical and documentary breach relating to the time of shipment was of sufficient magnitude to justify the buyer's claim for termination. I find this particular case -- if judged on the basis of the reasoning applied, satisfactory in several aspects.

Firstly, L/C payment clause indicates that parties have simultaneously agreed to 'strict compliance' principle to the documentary requirements under the sales contract.¹⁵⁵ The tribunal took the view that a L/C was only a conditional promise by the buyer to pay.¹⁵⁶ But since the sales contract contained no other clause providing for documentary requirements, it has been submitted that the documents mentioned under the L/C clause are meant to be submitted to the buyer, irrespective of whether the seller wants to take advantage of the L/C or not. The decision went even further, though the parties did not incorporate the UCP into their contract expressly, the reasoning was that they can serve as an auxiliary guidance as to what requirements the documents have to fulfill pursuant to the international trade usages.¹⁵⁷

Secondly, CFR Incoterm indicates that seller has a documentary obligation to tender accurately dated bill of lading. For the reasons given in the ratio of the decision, it is possible to apply the 'strict compliance' principle even if the contract was concluded on 'cash against documents' basis. The buyer's obligation to pay does not become due

¹⁵⁵ Unfortunately, not all of the reported CISG decisions appeared to adopt same 'strict compliance' principle when L/C was agreed as payment method. See for example CIETAC 25 June 1997 (*Art paper case*), CIETAC, 22 January 1998 (*Hot-rolled steel plate case*).

¹⁵⁶ In the mentioned cases from note 155, the tribunal took view that the mere discrepancy in the bill of lading was not enough to meet the fundamental test. When the bank did not make the payment due to the discrepancies, the seller had a right to claim the price directly from the buyer.

¹⁵⁷ *Crude metal case*, (n. 131), at para [61].

pursuant to article 58(1) until the seller has presented conforming bill of lading to the buyer, *either through bank or directly*.¹⁵⁸ Further, when the contract was concluded on C type of the Incoterms,¹⁵⁹ the buyer's right to reject non-conforming documents arises from rule B8: '*The buyer must accept the transport document in accordance with A8 if it is in conformity with the contract*'. This implies the buyer's right to reject tender of bill of lading which does not evidence accurate shipping date. In principle, the right to reject should be seen as independent from the right to terminate the contract.¹⁶⁰ Thus, the buyer has immediate right to reject the documents and withhold from payment, which do not require fundamentality of the breach. Practically speaking, in string trade, where the buyer is merely interested in dealing with the documents, the buyer's *contractual interest* will be greatly diminished and most probably he will be entitled to terminate the contract.¹⁶¹

Thirdly, the tribunal has emphasized that in cases where the contract is concluded on CFR Incoterm with L/C as method of payment, the buyer has "contractual interest" in receiving strictly conforming bill of lading. Even though the inaccurate shipment date was not the only discrepancy in the tendered bill of lading, in the greatest part of the reasoning, arbitrators assessed the consequences of the *inaccurately dated bill of lading* and ruled that the mere existence of the defect in the bill of lading alone make the full set of documents unsuitable for the intended use.¹⁶²

Finally, from the facts of the case, seller's was obliged to physically ship the goods by 15 October, as the latest allowed date for shipment and to present documents which are showing the exact date. The existence of penalty clause in case of delay was interpreted as indication that the buyer had provide for certain tolerance period in the outset, which means that seller late physical shipment of goods does not amount to fundamental breach itself. However, in the opinion of the tribunal it was held to be an overly formalistic approach to

¹⁵⁸ *Crude Metal case*, (n.131), at para [85].

¹⁵⁹ Such right to reject non-conforming documents can be regarded as an international trade usage in accordance with article 9(2). See Mohs, *The CISG and Commodities* (n. 104) at p. 1299. Reference to (n. 113) CISG cases which appear to found the CIF term as trade usage within the meaning of the CISG.

¹⁶⁰ See Saidov, *Remedies for Documentary*, note 86, at p. 445.

¹⁶¹ However, it may be subject to the seller's right to cure (see the discussion in the following heading).

¹⁶² *Crude metal case*, (n. 131) at para [73].

require from the buyer to fix an additional period for performance to the seller at that time and to deny the possibility of buyer to terminate the contract as a consequence of not having fixed the additional period of time. In the case, the seller's physical duty to ship the goods within contract period on time should have been evidenced in the bill of lading as required under the CFR rule A8 and even further to be in strict compliance with the terms agreed in the L/C. Consequently in regard to the discussion from the previous heading, even in the absence of express provisions that makes the time of shipment strict contractual term, the relevance of time factor stems from the overall context of the transaction.

As it can be recalled, not every CISG case has undertaken this approach when dealing with the seller's documentary duties. However, in the light of the decision and considerations presented above, we can conclude that if the Convention is used efficiently and effectively by the judges can produce clear and certain outcomes. While I am not inclining that we could hold the investigated case as a binding precedent, my aim was to encompass CISG case which has persuasive value in the documentary sales. In conclusion, the judge or an arbitrator who understands the needs of the surrounding commercial context and appreciates the Convention flexibility could reach a proper outcome in the given circumstances.¹⁶³

4.3.3 Seller's right to cure its non-conforming performance: Does the seller have a right to cure a documentary breach relating to the time of shipment?

It is conceded that CISG contains more expansive rights of cure in comparison with English law. The seller can cure any lack of conformity in its performance, including those

¹⁶³ Ferrari, Franco; CISG Case Law: A New Challenge for Interpreters? 17 Journal of Law and Commerce, 1999 at p. 261. "An arbitral award could have more influence on a specific solution than a decision of a supreme court of a country whose judges are not accustomed to dealing with international issues in general, and the CISG in particular."

in the documents, up to the due time for performance provided that cure ‘does not cause the buyer unreasonable inconvenience or unreasonable expense’.¹⁶⁴

In a sales contract concluded on L/C basis, the seller usually have specified time limit to tender conforming documents to the bank which could became due time for performance of documentary duties under the sales contract¹⁶⁵ Seller has possibility to cure the documentary defects, i.e. re-tend the documents within the same time limit under both the sales contract and the L/C. Thus, the seller's failure to tender conforming documents within the time specified in the letter of credit is likely to constitute a fundamental breach.¹⁶⁶

Even after the time stipulated in the contract, pursuant to article 48(1), CISG give further right to cure, which seems impractical for the documentary sales of commodities.¹⁶⁷ Although wording of the provision subjects this right to the buyer's right to terminate, it has been argued that all the relevant circumstances have to be taken into account, so this might prevent the buyer from terminating the contract.¹⁶⁸ This is however only possible if the seller can do so without *unreasonable delay or inconvenience to the buyer*. As it was mentioned above, once the L/C has expired, the seller cannot re-tender conforming documents to effect the payment in a way that has been agreed in the sales contract, without causing additional costs or inconvenience for the buyer.¹⁶⁹

The same restrictive reasoning towards the seller's possibility to cure should be applied in ‘cash against documents’ transaction. Incoterm rules A8 specify that the transport document has to be provided without ‘undue delay’. Furthermore, in the case of sale of commodities, which are typically traded in string and are often subject to rapid fluctuations

¹⁶⁴ Art. 34.

¹⁶⁵ *Crude metal case* (n.132) at para [38]. Tribunal didn't clarified the legal implications of the expiry date for presenting the documents in the L/C itself might have had with regard to the *contractual* time limit available for the seller to deliver the documents. According to the writer, since the L/C payment clause is stipulated term in the sales contract, the time allowed for presentation of the documents by the letter of credit should count as the seller's time limit for cure for the underlying sales contract.

¹⁶⁶ Once the letter of credit has expired, the seller cannot re-tender the documents to cure any defects to effect payment under the credit, and the payment cannot longer be effected through the agreed L/C, as it was agreed upon in the sales contract.

¹⁶⁷ Bridge, *A Law for International sales*, (n. 10) at p. 31.

¹⁶⁸ Singh; Leisinger, *A Reply*, (n. 138), at page 185; See also the decision of the German Supreme Court 3 April 1996, (*Cobalt sulphate case*).

¹⁶⁹ Bijl, *Fundamental Breach in Documentary Sales*, (n. 138) at p. 24.

in price, contractual time limits for tendering of documents should be strictly complied with, and article 48(1) would be inapplicable in most cases.¹⁷⁰

The question that matters for our thesis relates to the possibility to cure bill of lading which evidence shipment outside the contract period. It is rarely possible that seller will have chance to remedy such a defect in the document, as he cannot simply alter the bill of lading and insert contractually complying information.¹⁷¹ We must have into account the role of the bill of lading, as evidence for the physical shipment of the goods, which means that the seller cannot go back in time and ship the goods as contractually agreed.¹⁷² In order to cure such breach, the seller only way is to tender a fresh bill of lading relating to another consignment which is shipped on time.¹⁷³ If the parties have contractually agreed on specific goods, such re-tender is practically impossible and is likely to cause the buyer 'unreasonable inconvenience'. Also, commodities are subject to highly volatile markets, so the buyer will almost always be inconvenienced, and cure shouldn't be an easily available remedy in the given circumstances.

In sum, whilst cure of documents may be possible in certain circumstances, the scope for the exercise of this right when the bill of lading disclose late shipment is rather limited bearing in mind the complexity and the volatile nature of the commodities transactions.

¹⁷⁰ See Mulis, *Termination* (n. 5) at page 140. In order to exclude the possibility that seller will speculate with transfer of documents in accord with the price movements, at expense of their buyers.

¹⁷¹ Cure by repair is only possible where alterations are made to correct minor defects in the documents, such as clerical or typographical mistakes, but not in case of discrepancies which affect the representation of the goods. See Art.16(c) UCP 600.

¹⁷² Bridge, *Avoidance*, (n. 25) at p. 937.

¹⁷³ In *Crude Metal case* (n. 131) .The arbitrators principally acknowledged the seller's possibility to cure lack of conformity in the bill of lading by tendering a new bill of lading which indicates the shipping date as required in the contract. Facts of the case evidence that the seller did not endeavor to replace the defective set of documents with the new ones which would indicate the shipment within the contract period.

4.4 Concluding remarks: Strict compliance principle in accordance with the commercial need for certainty and predictability

In the assessed situation, the remedial regime of the CISG appears to be suitable for documentary sales of commodities, and correspond effectively with the backdrop of the trade sectors where legal certainty and predictability are overriding principles. CISG is capable to govern contracts in these trade sectors, in other words a number of provisions of the Convention could be utilized to adopt strict approach in concordance with the commercial needs for certainty and predictability.

Firstly, even if the seller's breach of timely obligation does not constitute a fundamental breach per se, the relevance of time factor stems from the overall facts surrounding the transaction.

Secondly, when the parties in the contract itself stipulated that payment is to be made by L/C, this implies that the seller has duties to tender documents in 'strict compliance' with the contract terms, otherwise the buyer should have right to terminate the contract.¹⁷⁴ The CISG gives recognition to the fact that international documentary sales contract are not concluded in commercial vacuum, but against the background of trade terms and commercial practices.¹⁷⁵ Where the sale contract imposes documentary obligations through L/C, then it is up to him to perform them accordingly, if he fails to act in accordance with such agreement, he should bear the consequences. Tribunals applying the CISG are advised to apply the same documentary standard to a sales contract as under the L/C transaction. This will promote high degree of certainty and predictability required in the international sales of commodities.

Thirdly, based on considerations of certainty-the strict performance rule should be relevant even where the documents are tendered to the buyer directly for payment in 'cash against documents' transactions. The standard rules in the Convention are flexible enough to adapt to the rigor trading environment and commercial context and to lead to support for "strict

¹⁷⁴ Schwenger, *Danger*, (n. 34) at paragraph 44.

¹⁷⁵ Secretariat Commentary (n. 16). On article 45, para.7 (draft counterpart of CISG Art. 49).

compliance" principle. In the case of "cash against documents" transaction the buyer can refuse to accept a documentary tender, by withholding the payment, if 'documents controlling the disposition of the goods' are not presented.¹⁷⁶ Incoterms entitle the buyer to reject non-conforming documents pursuant to rule B8 when they are not in full conformity with the contract requirements. The wording of Incoterm rules expressed intent of the drafters to make them compatible with the stringent L/C requirements.¹⁷⁷ As it was discussed above, the court can consider whether an international usage in terms of Article 9(2), i.e., implicitly agreed, has come into existence in respect of the buyer right to reject non-conforming documents.¹⁷⁸

How to assess whether such non-conforming tender alone constitutes a fundamental breach of the contract? The interpretation of the statements or acts of the parties can be interpreted according to article 8 of the CISG. Did the buyer make his position as a trader during the contractual negotiations known, or the seller as a reasonable person in the circumstances should have known about this. In string sales, where the buyer is intermediate trader using the contract for purely financial purpose, he needs documents with whom he can 'deal' without any difficulty, i.e. the breach is likely to be fundamental and the buyer should be entitled to an immediate termination of the contract.

Fourthly, as a matter of fact the principle of fundamental breach in conjunction with the contextual rules of interpretation in article 8 is flexible enough to be adapted to the particular needs of businesses in the commodity sector. The nature of the contractual term is an important factor when determining the fundamentality of the breach of the contract.¹⁷⁹

In that context, the court could find that the 'term is of essence of the contract', which would result as a fundamental breach.¹⁸⁰ In case of dispute, terms should be interpreted

¹⁷⁶ See CISG-AC 5 (n.11) at para. 4.19. Article 58 embodies the principle of 'payment against delivery' as concurrent conditions. Also according to article 71, a party is allowed to suspend the performance of its obligations if it anticipates the other party's "non-performance of a substantial part of obligations."

¹⁷⁷ See also Ramberg, Jan; *CISG and Incoterms*, at p.402. If the document is not dated within the period agreed for shipment it would not comply with the L/C requirements; nor it would comply with the usual requirements for documentary sales.

¹⁷⁸ See above note 113.

¹⁷⁹ Zeller, *Commodity*, (n.136), at page 632.

¹⁸⁰ Professor Schlechtriem made analogy between the fundamental breach test and the English doctrine of conditions. E.g. if a certain expectation is a condition, or 'of the essence of the contract', then the breach of this condition, of this contractual term, is a fundamental breach." See Flechtner "Transcript of a Workshop on

pursuant to article 8 of the CISG, to establish the intent of the parties. Article 8(2) prescribes that the statements or conduct in question must be interpreted by the courts and tribunals by using the 'reasonable person' test, in other words objective or hypothetical intention of the parties. The objective intent is determined by the court, taking all the necessary evidence as described in article 8(3) into consideration.¹⁸¹ In other words, the duty of strict compliance can be inferred merely from the type of contract and its accompanying trade customs and usages.¹⁸² The court should be able to find that the objective intention of the parties was that such term is of essence and to analyze the fundamental breach requirement in that context, pursuant to article 8 of the CISG.¹⁸³

On other view, this was hold as an argument for modifying the CISG, in particular article 25, which is against the drafters intention.¹⁸⁴ According to the proponent of this view, while implied modification of the provisions was expressly provided in ULIS article 3, it was not repeated in the CISG. This should indicates a change in legal direction for the possibility of implied modification of the provisions of the Convention, while still should be possible, should not be lightly inferred. As it can be recalled from the above discussion, I concur with the opinion that we do not need to derogate from article 25; we simply assume that the strict compliance with timely and documentary obligations was the 'importance of the interest' created by the contract in the given context. Therefore, the seller s breach of these requirements will be fundamental from the outset in the given circumstances.¹⁸⁵

Fifthly, it has been submitted that the possibility of cure will be limited in the documentary sales of commodities, since the trade is often conducted through strings which are heavily dependent on a prompt tender of conforming documents. Similarly, where the payment is by a L/C, after the period of the original presentation of the documents has expired, seller

the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More" [1999] Journal of Law and Commerce 191, at p. 254.

¹⁸¹ Article 8(3): "...all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

¹⁸² Considerations to be taken into account: L/C as a method of payment; Incoterm rule; string trading; volatility of the markets.

¹⁸³ Schwenger, *Danger* (n. 34) at page 806.

¹⁸⁴ Bridge, *Avoidance* (n. 25) at page 935.

¹⁸⁵ For the discussion in this respect see the paragraph beginning with the note 151.

cannot cure any previous defects to effect the payment under the letter of credit as it was stipulated in the sales contract. The possibility of cure after the due date will generally not extend to commodity sales, as the rapidly changing market conditions could easily lead to "unreasonable inconvenience or delay" to the buyer. If we sum up all the peculiarities of the surrounding trade sectors, the seller should have no right to cure its non-conforming documentary performance.

Finally, as has been mentioned, the Convention emphasizes the principle of party autonomy, in other words it allows the parties to “*exclude the application of the Convention or... derogate from or vary the effect of any of its provisions.*”¹⁸⁶ In such case, where the parties themselves have stipulated an express provision in a contract that time is of the essence or that special significance is to be put on the documentary performance, so even slight deviation in this regard will entitle the buyer to terminate the contract. Standard form contracts appear to be a common method upon which commodity traders attempt to define their relationships in a standard and consistent way. This article, not only allows the parties to exclude the CISG but they are allowed to modify or exclude articles to tailor the contract to their commercial interests. CISG will only serve to fill the gaps left by the standard contract forms.

¹⁸⁶ Art. 6

5 Final remarks: Comparative assessment in the context of the certainty and predictability

First of all, the claim that English law rules in relation to breach are generally clear and precise is correct, and that its application would lead to predictable results when applied in international sales of commodities concluded on CIF shipment terms. The fact that English law has over 100 years of case law which regulate the documentary sales of commodities, and classifying terms relating to physical and documentary duties of shipment as conditions, means that commodity traders would immediately know their termination rights.

Despite the fact that the CISG does not have the same pedigree of English law addressing the problems that one sees in reported cases, if used properly in conjunction with the INCOTERMS and the UCP, could offer a workable solution for the scope of issues and problems arising in the area of documentary sales of commodities.

Furthermore, it is argued that the Convention approach is more conducive of a just result while the commodity trade necessitates the principles of certainty and predictability. Without doubt, the English law is still more favorable to termination even to slight breaches than the Convention, where the actual harm needs to be assessed. But that is not an indication that the CISG can be deemed inappropriate for regulating commodities without having an overall understanding of the relevant provisions of the Convention and how they can be utilized in the given commercial context. It does not seem impossible that the precondition for termination are likely to be met in the case when the seller's breach his physical and documentary obligations regarding the time of shipment. Thus, in the specific commercial context the solution under the CISG is quite similar to the "strict compliance" rule under the English law.

The demand for factual analysis can be a positive force even in the context of the documentary sales of commodities. For example in an international sales of commodities where the payment will not take place against documents or through letter of credit, and

where the buyer is the person who actually takes the physical possession of the goods. In such commercial circumstances, either the buyer will in any event not be interested in rejecting the goods and termination of the contract, or the court considering all the relevant surrounding factors is unlikely to find that a fundamental breach exists.¹⁸⁷ However, the need to assess a surrounding factual background also arises in English law, where the legislator by enacting s 15A, has conceded that the automatic termination rights does not always achieve a fair outcome, though in respect of the seller's physical and documentary breaches relating to time of shipment, the demands of commercial certainty are considered prevailing under English law. In my opinion, the flexibility and open-ended provisions of the Convention are in fact a strength of the Convention; they provide an optimal equilibrium between the requirements of legal certainty and flexibility necessary to avoid unjust results in individual cases.

The special commercial context is equally important when assessing the seller's opportunity to cure the defective bill of lading. This is only possible if the seller can do so without unreasonable delay or inconvenience to the buyer. As the prices of the commodities are volatile and in a typical L/C or string transaction, cure will almost always lead to additional costs of inconvenience to the buyer. The tribunals should be attentive to the need of predictability and certainty in the commercial sector when assessing the seller's opportunity to cure the bill of lading. All things considered, practically speaking, in regard to the possibility to cure the two regimes are not as different as they are, perceived to be.

In respect of the investigated legal issues, the claim that the Convention will lead to different results is by no means necessarily true. The quest for certainty in English law is evident in treating the time and documentary breaches as breaches of condition, while the CISG demands a factual analysis in order to ascertain whether those breaches amount to a fundamental breach. As argued in the thesis, proper interpretation of its provisions with its contextual rules of interpretation are flexible enough and may lead to similar results to the ones achieved under English law.

¹⁸⁷ For the discussion in this respect, see paragraph with notes 151-153.

While the CISG does not share the same number of reported judgments and case law that the English law has on commodity sales, it has witnessed that it is possible to achieve certain and predictable result under CISG if an elaborate interpretation is given as the one suggested here. Unfortunately, detailed and uniform interpretation has not been developed through the case law so far. However, by indicating sensible and persuasive decisions and hopefully increasing number of courts worldwide will take them in consideration, there will be cause for optimism.

In sum, the criticism that use of the CISG in documentary and commodity sales would lead to problems and uncertainty are exaggerated. I have stressed out the experience and extensive scope of English law in governing such contracts and as expression of parties' intention as one of the reason why commodity traders seems to continue to choose English law instead of the Convention. However, the practice of opting out of the CISG in commodity sales contracts could be advised, particularly given the CISG's suitability in addressing the timely and documentary obligations as core needs of international commodity traders.

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