

DIFFERENCES BETWEEN CISG AND ULIS

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This research facilitates the discovery of the relative strengths and weakness of CISG and ULIS and enhances wider and deeper comprehensibility of how and where CISG's Articles conflict with ULIS. Notwithstanding, this study involves looking back and draws a distinction between the past and present on the grounds that ULIS itself is regarded as a historical factor in the development of CISG. In clarifying the debate, it is important to synthesise the differences between ULIS's and CISG's provisions, which calls for a contextual approach, with an analytical eye, to appraise both Conventions. A comparability study provides a deeply informed perspective with which to achieve a better understanding of the practical and doctrinal purposes of the two legal systems, namely by asking how CISG and ULIS tackle similar contentions with different tech-

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niques. Comparison is considered as an effective experiment to improve and reform current practices.

Introduction

Universal commerce has increased sharply since 1955¹ due to the integration of world markets and the dissolution of barriers to the flow of goods,² enabling businesses to reach the rest of the world faster than ever before.³ Global trade has grown because of the limited natural resources of individual states which makes the notion of self-sufficiency implausible.⁴ International sales account for two-thirds of world trade.⁵ The proponents of international trade assert its necessity for many reasons. First, it helps nations to attain economic prosperity⁶ and higher living standards. International sales

¹ Ray August, *International Business Law: Texts, Cases and Readings* (London, Prentice Hall 2000) 354.

² Joseph Stiglitz, *Globalization and its Discontents* (London, Penguin Books 2002) 9.

³ Peter Van den Bossche; Werner Zdouc cited Firedman, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2014) 5.

⁴ Frederick van der Ploeg, 'Natural Resources: Curse or Blessing?' (2011) 49(2) *Journal of Economic Literature*, 399.

⁵ Michael Woodin; Caroline Lucas, *Green Alternatives to Globalisation* (London, Pluto Press 2004) 18.

⁶ Stiglitz (n 2) 4; Bossche; Zdouc (n 3) 6.

make Mitsubishi Company, for instance, wealthier than the economies of Denmark, Turkey and Thailand.⁷ Second, it exploits productive ability,⁸ which fosters the alleviation of poverty.⁹ Finally, it fosters better understanding between nations.¹⁰

Due to the large-scale movement of goods throughout the world, the need for an international convention to govern international transactions has become crucial to secure a healthy and reliable from of globalisation.¹¹ International conventions seek to achieve equity between the contracting parties, and solve their disputes outside of the realms of domestic law,¹² which is neither compatible with global trading¹³ nor predictable.¹⁴

⁷ Woodin; Lucas (n 5) 18.

⁸ *ibid* 20.

⁹ Stiglitz (n 2) 5.

¹⁰ Bossche; Zdouc (n 3) 16-17 & 21.

¹¹ *ibid* cited Coase, 31. Globalisation is not a new phenomenon but it existed even before the First World War. There were large overseas flows of commodities and investments. *ibid* 6.

¹² Giuditta Cordero-Moss, *International Commercial Contract* (Cambridge University Press 2014) 70.

¹³ Roy Goode; Herbert Kronke; Ewan McKendrick, *Transnational Commercial Law* (Oxford University Press 2011) 52; Michael Bonell, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of International Sales Law' (2002) 36 *Revue Juridique Themis*, 286.

¹⁴ Jan Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law Volume 3: Financial Products, Financial Services and Financial Regulation* (Oxford, Hart Publishing 2013) 627-629. Bossche; Zdouc (n 3) 32.

International conventions seek to accomplish the goal of harmonising the differences¹⁵ between national laws and provide the parties with knowledge of the rules which govern their contract in advance.¹⁶ Fairness and neutrality, which is desired by trading businesses, can be reached by using a supranational instrument¹⁷ as opposed to partial national law,¹⁸ which would be more familiar and beneficial to one party than the other.¹⁹

¹⁵ James Fawcett; Jonathan Harris; Michael Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2012) 937; Shani Salama, 'Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, an Inter-American Application' (2007) 38 *The University of Miami Inter-American Law Review*, 243.

¹⁶ Salama (n 15) 227; C. Bianca, Michael Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan, Giuffrè 1987) 66.

¹⁷ Ewan Mckendrick, *Contract Law* (Palgrave Macmillan 2013) [9].

¹⁸ Herbert Kronke, 'The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond' (2205) 25 *The Journal of Law and Commerce* 462; Ulrich Magnus, 'Interpretation and Gap-filling in the CISG and in the CESL' (2012) 11(3) *Journal of International Trade Law & Policy* 266-267.

¹⁹ Alejandro Garro, 'The Gap-filling Role of The UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG' (1995) 69 *Tulane Law Review*, 1153-1159; Michael Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (New York, Transnational Publishers 2004) 307.

Some domestic laws align with the seller while others are buyer-friendly,²⁰ and other municipal laws are biased towards their nations. Domestic law may therefore disturb the equilibrium of the contract, which is a critical principle of impartiality.²¹ Thus, international conventions encourage fair and effective cross-border contracts for commercial activities,²² promoting interdependent relationships.²³ Attempts to establish such conventions began in the 1920s with the International Institute for Unification of Private Law (UNIDROIT), which sought to harmonise the law among various jurisdictions²⁴ associated with the international sale of goods.²⁵ The Uniform Law for the International Sale of Goods (ULIS)²⁶ was completed in 1964 but failed to achieve international agreement on principles for the

²⁰ Goode et al cited Anderson (n 13) 276.

²¹ For example, CISG Art. 74. Using a supranational instrument facilitates predictability and regulates the incorporation of national financial systems into one borderless global economy. Bossche; Zdouc (n 3) 6; Magnus (n 18) 267.

²² Bossche; Zdouc cited Jackson (n 3) 32.

²³ *ibid* 32.

²⁴ Magnus (n 18) 267.

²⁵ Jason Chuah, *Law of International Trade: Cross-border Commercial Transactions* (London, Thomson Reuters 2013) 175; Esin Örüçü; David Nelken, *Comparative Law* (Oxford, Hart Publishing 2007) 264-277.

²⁶ It is also called the Hague Convention 1964.

sale of goods²⁷ (receiving only nine ratifications)²⁸ on the grounds that it was a purely European project drafted without the participation of developing countries.²⁹ Furthermore, ULIS emerged during the era of decolonisation which made many developing countries reluctant to enter into international conventions as they were focusing on developing their own economic and political structures.³⁰ In 1980, the UN Commission on

²⁷ John Honnold, 'The Uniform Law for the International Sale of Goods: The Hague Convention of 1964' (1964)13(3) *The American Journal of Comparative Law* 394; August (n 1) 535.

²⁸ Sonia Viejobueno, 'Progress through Compromise: the 1980 United Nations Convention on Contracts for the International Sale of Goods' (1995) 28 (2) *The Comparative and International Law Journal of Southern Africa* 201; Chuah (n 25) 175; August (n 1) 535.

²⁹ Goode et al (n 13) 257; August (n 1) 535; Gyula Eörsi, 'A propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31(2) *The American Journal of Comparative Law*, 335.

³⁰ M. Shafiq, M, *The UN Convention on the International Sale of Goods* (Cairo, Dar Alnahda Alarabeya 1998) 25; Leon Trakman; Nicola Ranieri, *Regionalism in International Investment Law* (Oxford University Press 2013) 479. Also, some countries found that ULIS' substantive legal content was not convincing. Goode et al (n 13) 257; Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 *Ohio State Law Journal* 269. ULIS is still applied in a few countries such as Gambia. San Marino withdrew from ULIS in 1st March 2013 and ratified CISG which came into force on 1st March 2013. UNIDROIT, 'Status - Convention Relating to a Uni-

International Trade Law (UNCITRAL) created, with input from more than 60 countries,³¹ the UN Convention on Contracts for International Sale of Goods (CISG),³² which has been ratified³³ by as many as 96 states,³⁴ and the number is increasing.³⁵ Its popularity as a set of substantive rules³⁶ makes it a noteworthy example of harmonising transnational law.³⁷ Notably, almost all of the disputes between Chinese contracting parties and other foreign parties, settled under the China

form Law on The International Sale of Goods (ULIS) (The Hague, 1964)' <<https://www.unidroit.org/instruments/international-sales/ulis-1964/status/>> [accessed 8/10/2023].

³¹ August (n 1) 535.

³² It is also called the Vienna Convention or UN Convention on the International Sale of Goods. Chuah (n 25) 175.

³³ Harold Berman, 'The Uniform Law o International Sale of Goods: A Constructive Critique' (1965) 30(2) Law and Contemporary Problems, 355; Graeme Cooper, 'The Reclamation Rights of Unpaid and Unsecured Sellers in International Trade' (1987) 17 Columbia Business Law Review 31.

³⁴ See

<https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> [accessed 4/9/2023].

³⁵ See Paul Berman, 'From International Law to Law and Globalization' (2005) 43 Columbia Journal of Transnational Law 490.

³⁶ Schwenzer; Kee, 'Global Sales Law: Theory and Practice', in Ingeborg Schwenzer; Lisa Spagnolo, *Towards Uniformity: The 2nd Annual Maa Schlechtriem CISG Conference* (Hague, Eleven International Publishing 2010) 157.

³⁷ See *ibid* 157.

International Economic and Trade Arbitration Commission (CIETAC) were governed by the CISG.³⁸

Studying the history of CISG requires first studying the convention on which CISG is based, namely ULIS. The comparison between these Conventions is tantamount to understanding how the new law differs from its predecessor. The nucleus of this research is the disparity between the two Conventions associated with the provisions of the remedies and obligations of the parties which are regarded as the core of the international sale of goods contract.³⁹ Many Articles of both Conventions run in parallel⁴⁰ but others are different as CISG changed, supplemented and eliminated some parts of the text of ULIS. This study discusses in detail the evaluation of hidden aspects of such variance between the CISG and ULIS, and estimates the procedural, tech-

³⁸ Gotanda, 'Yin & Yan: A Comparison of Monetary Remedies in International Investment and Transnational Commercial Disputes', in Schwenzer; Spagnolo (n 36) 49-51.

³⁹ The ULIS' system in displaying the remedies was not adopted by CISG. In ULIS, each obligation was attached by the appropriate remedy for its breach, in order to make the trader directly aware of the lawful consequences for such breach. See: Bianca; Bonell (n 16) 329; Shafiq (n 30) 166. Nevertheless, the repetition of the remedial provisions makes such system inconvenient and difficult to understand so that, in CISG, the remedies was united in one section for each the seller's obligations part and the buyer's obligations part. Bianca; Bonell (n 16) 329.

⁴⁰ Such as the majority of the Articles in connection with delivery of the goods, for example, Article 20, 22 & 23 of ULIS and Article 33 of CISG.

nical, conceptual and textual differences by scrutinising the Articles of both Conventions. It investigates whether the amendments to ULIS by CISG result in the best outcome, and one that is compatible with international sale and represents a compromise between different legal systems. This comparison determines the drafters' intentions of CISG on one hand, and analyses CISG's preferential approach for a particular issue on the other.

The literature lacks such a comparison between CISG and ULIS, which is important in order to fully appreciate the CISG. This comparison is conducted by elucidating the Articles in both conventions, supported with the case-law on CISG and hypothetical scenarios on ULIS to clarify the discrepancy between both regimes. ULIS suffers from a scarcity of precedents, whereas interpretation of the CISG is relatively easy to analyse due to accessible databases.⁴¹ This research demonstrates the efficiency of CISG, which may result in many countries leave sticking 'their domestic sales law as a tail to international kite'⁴² in order to participate and be an effective participant of the international community in global trade.

Because the subject is associated with certain concepts like 'internationality', 'selling' and 'goods', it is ne-

⁴¹ Jeffrey Hartwig, 'Schmitz-Werke GMBH & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Difference and Developing International Legal Norms' (2003) 22 *Journal of Law and Commerce* 97-98.

⁴² Honnold, 'The Uniform Law' (n 27) 332.

cessary to include a synopsis to explain these hypotheses under the two Conventions.

1.1. Internationality

ULIS and CISG will not be applied unless the contract is international. ULIS takes into account cumulative factors in order to specify the 'internationality' and therefore its application.⁴³ The first requirement of internationality is that the parties' businesses are physically based in different countries, although these countries do not have to be contracting states.⁴⁴ Second, the contract should either involve the movement of goods across borders, the issuance of the offer and acceptance in different states, or the delivery of the goods in a state other than the state in which the contract was formed.⁴⁵ On the other hand, CISG stipulates that it will be applied only either when parties' business places exist in different contracting states,⁴⁶ or when the rules of private law lead to the application of the domestic law of contracting state.⁴⁷ Reliance solely on the parties' business places could cause uncertainty at the time of for-

⁴³ László Réczei, 'The Area of Operation of the International Sales Conventions' (1981) 29 *American Journal of Comparative Law* 514.

⁴⁴ Honnold, 'The Uniform Law' (n 27) 333.

⁴⁵ ULIS Art. 1; *ibid* 274; Shafiq (n 30) 63-66; Rosett (n 30) 274.

⁴⁶ CISG Art. 1; Réczei, (n 43) 517.

⁴⁷ CISG Art. 1; August (n 1) 536.

mation of the contract, especially when a party has relevant business places in different countries.⁴⁸ Moreover, the norms of ULIS are a more persuasive representation of a truly international contract⁴⁹ while CISG may encompass national contracts concluded in one country and involving goods which do not entail shipment⁵⁰ just because the parties' business places are in different contracting states. The CISG's aim is to expand its scope and effectively cover all sales of goods that might be regarded as international.⁵¹

1.2. Sale of Goods

Neither of the Conventions defines the concept of 'sale' or 'goods'. Instead, the Conventions list categories of sale that are out of scope. Consumer purchasing and selling by auction are excluded under CISG⁵² but not

⁴⁸ Rosett (n 30) 269.

⁴⁹ Bradley Richards, 'Contracts for the International Sale of Goods: Applicability of the United Nations Convention' (1981) 69(1) Iowa Law Review 218.

⁵⁰ Rosett (n 30) 275.

⁵¹ *ibid* 275.

⁵² CISG Art. 2(a) & (b); Schwenger; Hachem, 'General Provisions: Article 2', in Ingeborg Schwenger, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press 2014) 49-54; Martin Davies; David Snyder, *International Transactions in Goods: Global Sales in Comparative Context* (Oxford University Press 2014) 48; August (n 1) 537.

under ULIS.⁵³ CISG also precludes sales where the predominant part of the seller's obligations is merely to supply labour or other services,⁵⁴ for example, if a hotel supplies a factory with wood and materials in order to manufacture beds. Here, the function of the factory is limited to making such goods.⁵⁵ This contract does not constitute a sale under CISG, but it does ULIS, which does not exclude such a sale from its scope. In this way, ULIS has a wider scope for application than CISG.

1.3. The Importance of the Paper and the Reason for the Length of the Study

As Pearl S. Buck emphasised, 'if you want to understand today you have to search yesterday.' From this standpoint, it is important to be aware of the historical aspect of any international treaty, thus scrutinising the antecedent of the UN Convention on Contracts for International Sale of Goods (CISG), namely The Convention relating to a Uniform Law on the International Sale of Goods (The Hague 1964, ULIS) is vital. The paper is nearly 15,000 words and this length is justifiable, as the work is a comparative study between two international Conventions, as it is crucial in order to understand, for

⁵³ ULIS Art. 5; John Honnold, 'The Draft Convention on Contracts for the International Sale of Goods: An Overview' (1979) 27(2/3) *The American Journal of Comparative Law* 227.

⁵⁴ CISG Art. 3(2).

⁵⁵ Shafiq (n 30) 73.

example, the general principles upon which the newer Convention (CISG) is based, and to know the history by examining all the articles of the former and the newer Conventions. This method also serves to illustrate what adjustments and amendments have occurred to ULIS. As the American historian David McCullough emphasised, 'history is who we are and why we are the way we are', therefore this facilitates the recognition of what CISG is and why it is the way it is today. This approach is to avoid the abandonment of amendments and to adopt the opposite, as George Santayana clarified, 'those who do not remember the past are condemned to repeat it.' This study is inevitable for the sake of assessing and evaluating the two Conventions side-by-side and to conclude a final judgement regarding whether the change has been effective. This imperative evaluation between the present and the past enables the reader to observe the development of innovative ideas in the practical side of sale of goods all over the world.

1.4. The Author's Role in Advancing Knowledge: Novel Contributions:

This study focuses on the differences between the two Conventions, which is more important than knowing the similarities. Take this simple example: when X paints their wall the colour green, and after a while 'they change the colour to beige. This informs you that green was probably not the best option and should be avoided. In contrast, where the colour is the same, there is no additional information to be acquired. This applies to the named Conventions, as the differences can pro-

vide the interpreter with benchmarks or criteria about the mentality and the philosophy of the current Convention (CISG). Hypothetical and real cases are provided to highlight the disparities between the two Conventions, and analytical evaluation is provided after each contrast to assess the attitude of each Convention.

To the author's knowledge, there is no single work about this comparison which covers the mentioned areas in the study, such as, *inter alia*, obligations of the seller, including delivery of goods, conformity of goods, and claim of third parties, in addition to buyer's duties, remedies for a seller's breach of contract, embracing specific performance and the seller's right to cure, and obligations of the buyer, remedies for the buyer's breach of contract, anticipatory breach, installment contract and damages.

2. Obligations of the Seller

According to both Conventions, the seller is duty-bound to deliver the commodities to the buyer as agreed in the terms of the contract.¹

¹ CISG Art. 30 & ULIS Art. 18. Herbert Bernstein; Joseph Lookofsky, *Understanding the CISG in Europe* (London, Kluwer Law International 2003) 72; Michael Bridge, *Benjamin's Sale of Goods* (London, Thomson Reuters 2014) 423. It is required under both CISG and ULIS to deliver documents related to the sale of goods transaction, like a health certificate, bill of lading and certificate of origin to the buyer. CISG Art. 34 & ULIS Art. 50. J. Abdulaziz, *Obligation of Conformity in the Contract of the International Sale of Goods: According to Vienna Convention* (Cairo, Dar Anahda Alarabia 1996) 278. CISG adds a condition that does not exist in ULIS, namely that if the seller delivered defective documents before the agreed time, the seller might rectify such defects (e.g. typing errors or missing signatures), when two criteria are met: a) the rectification occurs before the agreed date for the delivery, and b) this does not cause unreasonable inconvenience or unreasonable expense to the buyer. CISG Art. 34. Stefan Kröll; Loukas Mistelis, Pilar Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (Oxford, Hart Publishing 2011) 480; Joseph Morrissey; Jack Graves, *International Sales Law and Arbitration* (Netherlands, Kluwer Law International 2008) 165; Robin

2.1. Delivery of Goods

Under CISG, if the parties have not specified the place for the handing-over of goods, and the contract imposes upon the seller the carriage of goods;² the seller will fulfil their commitment if they hand the goods over to the first inland carrier for *transmission to the buyer*.³ For example, from their premises in Birmingham, a seller hands over the goods to an overland carrier to transport them by truck to an establishment in London, where the goods will be packed.⁴ The goods are then handed over again by a truck to a maritime carrier in a British port to ship them to the port of Marseille to be transported by road to Paris, where the buyer's firm is located. The seller, under CISG, carried out their commitment at the point of the delivery of the goods to the British port, not when handing over the goods to the

Burnett, *Law of International Business Transactions* (Sydney, The Federation Press 1999) 21. Some scholars affirm that such a condition replicates Article 37 of CISG about the early delivery of goods. Kröll et al (n 56) 481. It would be more precise if the latter Article encompassed goods and documents instead of duplicating the same issue in two Articles.

² Such as in the terms of C & F and CIF Contracts.

³ Bianca; Bonell (n 16) 251; Larry Dimatteo; Lucien Dhooge; Stephanie Greene; Virginia Maurer; Marisa Pagnattaro, *International Sales Law: A Critical Analysis of CISG Jurisprudence* (Cambridge University Press 2005) 104-105.

⁴ Vincent Heuze, *La Vente Internationale de Marchandise* (Paris, Librairie Generale de Droit et de Jurisprudence 2000) 327.

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overland carrier in the seller's premises.⁵ ULIS does not designate exactly which carrier the seller should hand the goods over to;⁶ whether, as in the above example, the overland carrier in London, the maritime carrier in the British port, or the overland carrier tasked with transporting the goods to Paris.⁷ Determining the time at which the obligation of delivery is accomplished is very important as it consequently decides when the liability of risk transfers to the buyer.⁸ Under CISG the risk passes to the buyer when the goods are handed over to the first carrier,⁹ or when the goods are delivered to the place at the date agreed in the contract.¹⁰ Thus, if

⁵ Shafiq (n 30) 137; Schwenzer, *Commentary* (n 52) 929.

⁶ ULIS Art. 19(2). It states that delivery will be affected from the moment of handing over the goods to '...the carrier for transmission to the buyer.'

⁷ John Honnold, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations* (Netherlands, Kluwer Law and Taxation Publishers 1989) 115; André Tunc, *Commentary on the Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale* (Pace Law School Institute of International Commercial Law 1998) 46. Available:

<<https://www.unidroit.org/english/conventions/1964ulis/explanatoryreports/ulis-ulfc-explanatoryreport-e.pdf>> [accessed 29/9/2023]

⁸ CISG Art. 67(1) & ULIS Art. 19(1), 19(2) & 97(1). Honnold, *Documentary* (n 62) 454.

⁹ CISG Art. 67(1) & ULIS Art. 99(1), which mentioned merely 'carrier'. Burnett (n 56) 14.

¹⁰ CISG Art. 67(1) & 69 & ULIS Art. 97(1).

the goods deteriorated after the time of the delivery, the seller is not liable. Under ULIS, the obligation of delivery is not complete unless the goods conform to the contract.¹¹ This can result in consequences for the seller as they would bear all responsibility¹² at these later stages in transit when the buyer would best-placed to take care of the goods, assess the damage and protect them from any further possible harm.¹³ This applies even if the goods perished in transit or in possession of the buyer. CISG separates the obligation of delivery and the obligation of conformity of goods.¹⁴ Therefore, the seller performs their obligation of delivery even if the goods are defective¹⁵ and any loss or damage that occurred after this point is borne by the buyer unless such loss is otherwise proven to be the liability of the seller.¹⁶ The seller is responsible for all 'pre-shipment' or 'pre-delivery' defects.¹⁷ However, it is difficult for

¹¹ ULIS Art. 19(1). Ronald Graveson; Ernest Cohn; Diana Graveson, *The Uniform Laws on International Sales Act 1967* (London, Butterworths 1968) 63-64; Viejobueno (n 28) 224.

¹² *ibid* 224.

¹³ Muna Ndulo, 'The Vienna Sales Convention 1980 and the Hague Uniform Laws on International Sale of Goods 1964: A Comparative Analysis' (1989) 38(1) *International and Comparative Law Quarterly* 18.

¹⁴ Honnold, *Documentary* (n 62) 121 & 250.

¹⁵ Bianca; Bonell (n 16) 253.

¹⁶ CISG Art. 66 & 67(1). Ingeborg Schwenzer; Christiana Fountoulakis; Mariel Dimsey, *International Sales Law: A Guide to the CISG* (Oxford, Hart Publishing 2012) 491-492.

¹⁷ Burnett (n 56) 14.

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the buyer to prove that the goods were damaged before shipment or that the loss did not occur in transit.¹⁸ In such circumstances it is advisable to resort to INCOTERMS¹⁹ contracts, such as Cost Insurance and Freight (CIF) contracts which require insurance of the goods.²⁰ The seller may also issue a certificate from a neutral company to prove the conformity of goods before exportation.²¹ In the earlier example it might be more appropriate to refer to the first maritime carrier as a point for delivering the goods, thereby avoiding passing the risk to the overland carrier in London on the grounds that the seller is closer to the goods than the buyer and can assess any damages and pursue compensation if needed. Furthermore, if the goods were ruined during the transmission from London to the British port because of an accident, this would be a local issue that the seller can deal with, being more familiar with the legal system in their country.

CISG, unlike ULIS, adds that a seller's retention of documents pertaining to the goods does not affect the

¹⁸ Bianca; Bonell (n 16) 489.

¹⁹ International Commercial Terms sponsored by International Chamber of Commerce. This kind of terms seeks to bring harmonisation by persuasion instead of imposition. Schwenzer; Spagnolo (n 36) 162; Mckendrick (n 17) [9].

²⁰ P.S. Atiyah; John Adams; Hector MacQueen, *Atiyah's Sale of Goods* (England, Pearson Education Limited Publishing 2010) 430-431 & 415; Chuah (n 25) 82-84.

²¹ Atiyah et al (n 75) 195; Michael Bridge, *The International Sale of Goods* (Oxford University Press 2013) 121.

risk passing to the buyer.²² An example to illustrate: a seller is contracted to deliver medical machines to the port of their buyer, but with the stipulation that the title and documents of the goods would not transfer until full payment. The goods are damaged in transit. The court refuses to attach the risk to the seller because neither the title nor the documents are transferred to the buyer.²³ Thus, CISG is more practical as it places great importance on the physical possession than the actual ownership of the goods in terms of who bears the risk in transit. This is more suitable to international sales whereas the link between ownership and bearing risk is more appropriate to domestic sales. Moreover, CISG, unlike ULIS, obliges the seller, at the buyer's request, to provide all of the information necessary to facilitate the issuing of insurance,²⁴ such as the names and addresses of insurance companies in the seller's country.²⁵ This provision is beneficial to encourage insurance the goods so that any dispute concerning damages to the goods can be shifted away from the parties and to the insurance company. Additionally, it enhances the cooperation between the parties and expedites international transactions.

²² Art. 67(1).

²³ *St. Paul guardian insurance company et al v Neuromed medical systems & support et al* (26/3/2002) 00 Civ 9344 United States Federal District court (New York) (2002). Morrissey; Graves (n 56) 160.

²⁴ Bianca; Bonell (n 16) 260.

²⁵ Shafiq (n 30) 137.

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A question arises: if the goods are sold in transit, when does the risk transfer to the buyer? Assume that on 1st September, a perfume shipment was sent from the Marseille port to be handed over to an Egyptian company. On 5th September, while the goods were in transit, the Egyptian company sold them to a Greek corporation. The ship's captain therefore received an order to send the goods to Piraeus port.²⁶ The Greek corporation received the goods, but they were defective. Under ULIS, the risk passes retroactively to the Greek corporation from the time the goods were handed over to the carrier, i.e. 1st September.²⁷ Therefore, the seller (the Egyptian company) is not liable for the non-conformity of goods.²⁸ This provision was criticised on the grounds that it is unjust to transfer the risk before the contract of sale was made.²⁹ However, if the Egyptian company knew about the goods' defects before dealing with the Greek company,³⁰ the passage of goods to the buyer would be from the moment of concluding the contract while the goods were in transit.³¹ A seller could exploit this provision of ULIS by selling defective goods, which is a particular problem in cir-

²⁶ ibid 213-214.

²⁷ ULIS Art. 99(1). Bianca; Bonell (n 16) 496.

²⁸ Viejobueno (n 28) 225.

²⁹ Bianca; Bonell (n 16) 496.

³⁰ Bad faith seller.

³¹ ULIS Article 99(2). A. Sultan, *Passage of Risk in the Contract of International Sale of Goods* (Cairo, Dar Anahda Alarabia 2010) 185-186.

cumstances where the buyer may be unable to determine when the defects occurred. CISG determines the time that the delivery was completed³² as the time of concluding the contract associated with the goods sold in transit,³³ i.e. 5th September in the above example. Alternatively, according to CISG, the transfer of risk occurs at the point of handing over the goods to the carrier³⁴ when the parties intended to refer to such point (when, for instance, endorsing the goods' insurance which covers all the risk from the time the goods are loaded on the ship).³⁵ Some scholars advocate the approach of ULIS and argue that it is too troublesome to pinpoint the time of the goods' loss or damage in transit, such as determining the moment when sea water may have leaked into the goods' containers.³⁶ However, CISG's rationale is more judicious on two grounds: First, in many cases the deterioration of goods can be verified by experts to determine the exact time of the damage, i.e. whether it occurred before or after concluding the contract.³⁷ The time of a disaster, such as a fire or collision, can also easily be pinpointed through

³² Therefore, passing the risk to the buyer.

³³ CISG Art. 68. Ndulo (n 68) 19.

³⁴ CISG Art. 68; Burnett (n 56) 15.

³⁵ Schwenzer et al, *International Sales Law* (n 71) 498-499.

Nevertheless, if the seller knows, or ought to have known about the defects, the seller is liable for such defects or loss. CISG Art. 68; *ibid* 499.

³⁶ Sultan (n 86) 188- 189; Bernstein; Lookofsky (n 56) 109-110.

³⁷ Abdulaziz (n 56) 131.

technological communications.³⁸ Second, an international convention should not protect a seller operating in bad faith as this could undermine confidence in international trade.³⁹

2.2. Conformity of Goods

Under both Conventions, the seller should provide the buyer with goods matching the quantity, quality and description required in the contract.⁴⁰

2.2.1. Goods' Characteristics

ULIS rules that the buyer's claim of non-conformity shall not be taken into consideration if such non-conformity is trivial or is within the limits of tolerance ratios.⁴¹ For example, a slight difference in the weight of cotton is customary.⁴² CISG does not explicitly mention such exemption provision. Some scholars hold that mentioning such a clause in CISG would be superfluous, especially as minor discrepancies⁴³ in goods are

³⁸ Heuze (n 59) 331.

³⁹ Consequently, global growth, mutual interdependence and universal prosperity will recede. Bossche; Zdouc (n 3) 6-20.

⁴⁰ Bianca; Bonell (n 16) 269; Bernstein; Lookofsky (n 56) 75; Graveson et al (n 66) 72; Bridge, *Benjamin's* (n 56) 551.

⁴¹ ULIS Art. 33(2).

⁴² Shafiq (n 30) 147.

⁴³ Schwenger, *Commentary* (n 52) 569.

overlooked under customary international law and such law should, in any case, be applied pursuant to Article 9 of CISG.⁴⁴ Other scholars find that ignoring such difference in conformity of goods is pursuant to the principle of 'good faith',⁴⁵ which is regarded as one of the important general principles on which CISG is based.⁴⁶ On the other hand, some scholars are reluctant to impose the principle of good faith, due to the absence of express provision which imposes such obligation.⁴⁷ Others affirm that slight dissimilarity should not be disregarded because some contracts rely on totally intact goods.⁴⁸ For instance, a company is contracted to manufacture and sell statues with the characters' names provided on the statue. On the delivery date, the buyer refused to pay the price on the grounds that the names appeared on the left side. The seller did not make a transgression, as long as the contract mentioned nothing about the place of the names and, furthermore, this dif-

⁴⁴ Customary international law is compulsory, unless the parties agreed otherwise. Shafiq (n 30) 147.

⁴⁵ The Vienna Convention on the Law of Treaties 1969 states in Article 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. See: Spagnolo, 'Global Sales Law', in Schwenzer; Spagnolo (n 36) 191.

⁴⁶ Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Translation: Geoffrey Thomas (Oxford University Press 1998) 65; Bernstein; Lookofsky (n 56) 92-93; Goode et al cited Kastely (n 13) 283.

⁴⁷ Goode et al (n 13) 279; Bridge, *The International Sale of Goods* (n 76) 509.

⁴⁸ Bridge, *Benjamin's* (n 56) 551&723.

ference could be deemed inconsequential. However, at the time of the negotiations, the buyer explained that the aim of the statues is to glorify noble characters, meaning that it is important for their identities to be conspicuous. Because of these subtleties, under CISG the importance of the defects is left to the decision-makers on a case-by-case-basis.

i) Packaging the Goods

Article 35(1) of CISG includes a kind of conformity that is not referred to by ULIS: the conformity of packaging the goods.⁴⁹ This kind of conformity is crucial as the commodities in international sales usually cross long distances with a variety of means of transportation that expose them to different weather conditions. With such conditions, most cases of lack of conformity in goods are attributed to defective packaging failing to protect them.⁵⁰ CISG points out three sequential steps to be followed. First, the goods should be packed according to the requirements of the contract. Second, in the absence of such stipulation, the goods should be packaged consistently with the usual manner of packaging for similar commodities⁵¹ e.g. flowers wrapped in

⁴⁹ CISG Art. 35(1). Bianca; Bonell (n 16) 276-277.

⁵⁰ Abdulaziz (n 56) 98.

⁵¹ Bianca; Bonell (n 16) 277.

cellophane.⁵² Finally, the goods must be packed in an adequate manner to preserve them,⁵³ especially if the goods are new and unique,⁵⁴ e.g. made from briquette or ore.⁵⁵ In the case of *Conservas La Costeña v Lanín San Luis*, a contract was agreed to deliver 8,000 tins of canned fruit from Argentina to Mexico, but when the buyer received the goods, they discovered that the goods were damaged. The tribunal found that the seller was liable for this because they failed to package the goods in a way that was sufficient to protect them, as dictated by CISG.⁵⁶ It is problematic to claim under ULIS that the non-conformity of goods is due to inadequate packaging. Nevertheless, Article 35(1) of CISG may conflict with Article 9 of CISG, which imposes an obligation to apply the usage of international trade widely known, as some commodities, like ores and minerals,⁵⁷ are customarily shipped unpackaged. The

⁵² Also, electronic devices are placed in cardboard boxes surrounded by nylon cushions. Shafiq (n 30) 146.

⁵³ In the absence of a usual manner.

⁵⁴ Bianca; Bonell (n 16) 277.

⁵⁵ *ibid* 277.

⁵⁶ CISG Art. 53(2) (d). *Conservas La Costeña S.A. de C.V. v Lanín San Luis S.A. & Agroindustrial Santa Adela S.A.* (29/04/1996) M/21/95 COMPROMEX, Comisión para la Protección del Comercio Exterior de Mexico; Morrissey; Graves (n 56) 179.

⁵⁷ Ajay Menon, '8 Major Types of Cargo Transported Through the Shipping Industry' (5/5/2021) <<https://www.marineinsight.com/types-of-ships/8-major-types-of-cargo-transported-through-the-shipping->

question is whether the judge should rely on the usage of international law⁵⁸ or the obligation of packaging the goods,⁵⁹ in the case of defective goods being received due to packaging faults.

ii) Sale by Sample

If contracted to sale by sample, the goods should be compatible with the characteristics of the sample sent by the seller.⁶⁰ CISG classifies the consignment of the sample as a guarantee of the quality of the purchased goods to be received, unless it is agreed otherwise.⁶¹ Under ULIS, the consignment of a sample does not mean that the seller will provide similar goods.⁶² Instead, a sample is merely an indication of the nature of the goods offered.⁶³ It would have to be agreed, either explicitly or implied, that goods with the same features of the sample would be delivered.⁶⁴ Under ULIS, if the parties contracted to sell goods by sample, the seller

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try/#:~:text=Dry%20bulk%20cargo%20refers%20to,carriers%20in  
clude%20ores%20and%20minerals.>
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58 CISG Art. 9.

⁵⁹ CISG Art. 35(2)(d).

⁶⁰ ULIS Art. 33(c) & CISG Art. 35(2)(c).

⁶¹ Schwenzer, *Commentary* (n 52) 582-583; Dimatteo et al (n 58) 117; Davies; Snyder (n 52) 190.

⁶² ULIS Art. 33(c).

⁶³ Bridge, *Benjamin's* (n 56) 597.

⁶⁴ ULIS Art. 33(c).

should provide in the delivered goods all qualities found in the sample, and they are responsible for non-conformity even if the buyer is aware (or could not be unaware) of the goods' defects at the time of signing the contract.⁶⁵ Conversely, CISG excludes the seller from liability for any lack of conformity, even in the case of sale by sample and where the buyer was aware of non-conformity when signing the contract.⁶⁶ The approach of ULIS is preferable because it relies on the contract, which contains a clause to sell by sample, which provides the measure of conformity. The seller cannot evade their contractual obligations by arguing that the buyer knew the goods' defects at the time of concluding the contract.⁶⁷ Additionally, Article 35(3) of CISG facilitates the seller's ability to prove the buyer's presumed knowledge of lack of conformity when articulating that the buyer '...could not have been unaware...'.⁶⁸ This impedes the contractual balance between the parties which is a critical principle of international conventions.⁶⁹ Furthermore, under CISG, a problem can arise if the parties agreed on common descriptions of the goods in the contract, such as the colour but definite specifications, such as the shape, were referenced by the sample without mention in the contract.⁷⁰ Parol evi-

⁶⁵ ULIS Art. 36. Honnold, *Documentary* (n 62) 123.

⁶⁶ CISG Art. 35(3).

⁶⁷ Heuze (n 59) 256-258.

⁶⁸ CISG Art. 35(3).

⁶⁹ For example CISG Art. 74. Abdulaziz (n 56) 228.

⁷⁰ Atiyah et al (n 75) 205.

dence is usually not admissible to show that the sale is by sample.⁷¹ This may be considered a legal loophole that gives the seller the green light to confirm the characteristics of their own goods according to the buyer's general needs.⁷² It is recommended to forewarn the buyer, when CISG is applicable, that sale by sample should be mentioned in the contract (specifying, for example, the number of the sample agreed on) to avoid conflict with the seller over which qualities of the sample were agreed on.

iii) Uses of Goods

Under both Conventions, the goods must be appropriate for ordinary use⁷³ which means the goods should have the basic characteristics of typical goods in order to be tradable.⁷⁴ ULIS states that goods should be suitable to their ordinary use (in singular) in contrast to CISG which refers to ordinary purposes (in plural).⁷⁵ If the goods referred to are used vehicles, for example, which are used for multiple purposes including travelling,

⁷¹ *ibid* 205; Rod Andreason, 'MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law under the Convention on Contracts for the International Sale of Goods' (1999) *Brigham Young University Law Review*, 358.

⁷² CISG Art. 65(1) & ULIS Art. 67(1).

⁷³ CISG Art. 35(2)(a) & ULIS Art. 33(1)(d). Honnold, 'The Uniform Law' (n 27) 337.

⁷⁴ Davies; Snyder (n 52) 194-195.

⁷⁵ CISG Art. 35(2) (a) & ULIS Art. 33(1) (d).

loading and racing, it is sufficient under ULIS that only the main ordinary purpose is available i.e. the ability of the vehicles to move, whereas CISG takes into account the existence of all ordinary purposes of such vehicles. CISG enables the buyer to reject goods if they are not suitable to one of their purposes.

Moreover, under both Conventions, the goods should be suitable for any other particular purposes⁷⁶ which the buyer intends to use the goods for. Therefore, Jeeps should not only be operational, but should also be able to sustain extreme climate conditions and withstand dense sand if, at the time of concluding the contract, the buyer expressly or implicitly informed the seller that they would use the Jeeps for oil exploration in the deserts.⁷⁷ CISG, unlike ULIS, supplements a requirement that the buyer should demonstrate their reliance on the seller's skills to supply the goods according their particular requirement.⁷⁸ Thus, CISG imposes a liability on the buyer to search for a specialist in manufacturing the concerned goods for a particular use.⁷⁹ Consequently, if the seller is just an intermediary,⁸⁰ or if the buyer knows of the limited capabilities⁸¹ of the seller to meet their requirements, the buyer cannot claim afterwards

⁷⁶ CISG Art. 25(2) (b) & ULIS Art. 33(1) (e).

⁷⁷ Shafiq (n 30) 145.

⁷⁸ The second sentence of CISG Art. 35(b). Davies; Snyder (n 52) 195-196; Bridge, *The International Sale of Goods* (n 76) 549.

⁷⁹ Schwenzer, *Commentary* (n 52) 581-582.

⁸⁰ *ibid* 582.

⁸¹ Atiyah et al (n 75) 194.

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that the goods did not conform to their particular purpose.⁸² However, it is difficult to refer to the buyer's non-reliance if the seller is a manufacturer or when they use effective inducement to persuade the buyer to agree to purchase the commodity.⁸³ In these cases reliance will be presumed.⁸⁴ Finally, if the contract elaborated on the specific purpose desired by the buyer, the seller cannot afterwards deny their obligation to provide such goods, on the basis that the buyer did not rely on their skills, as consent between the parties is legally binding. ULIS instead relies on the seller's declaration of refusal if the buyer's private purpose for the goods outweighs the seller's capacity. Dependence on the seller's refusal is preferable on the grounds that the seller is best equipped to estimate their own abilities.

2.2.2. Claim of Third Persons

Both Conventions necessitate that the goods sold should be free from the rights or claims of a third person, unless the buyer agrees to buy the goods with these claims.⁸⁵ Such rights and claims can incur the buyer significant expenses for litigation, protection and indemnification.⁸⁶ CISG enlarges the explanation of the

⁸² Shafiq (n 30) 145.

⁸³ Atiyah et al (n 75) 194.

⁸⁴ ibid 194.

⁸⁵ ULIS Art. 52 & CISG Art. 41. Bianca; Bonell (n 16) 318; Bridge, *The International Sale of Goods* (n 76) 557.

⁸⁶ Bianca; Bonell (n 16) 318.

third person's claim, specifically claims related to industrial and intellectual property.⁸⁷ Industrial property claims includes brand, trademark ownership or patenting, whereas intellectual property claims encompass copyright, translation rights and composing.⁸⁸ For example, if a bookshop in Cairo bought copies of a French book that was printed and published in Paris and the author came into conflict with the publisher in France about the copyright, they may threaten the bookshop with legal action which might end in a ban on selling such books and expropriating them.⁸⁹ The seller (the bookshop) is liable for such a claim of copyright infringement only if they knew or could have been unaware of the issue at the time of concluding the contract.⁹⁰ CISG, unlike ULIS, limits the seller's liability through specifying the relevant laws to determine whether the seller is in breach or not: first, the law of the country where the goods will be resold or used, in case of contemplating such countries at the time of concluding the contract; or in other cases, and second, the law of a country where the buyer's business is located.⁹¹ However, the seller is not liable for the claim if: (i) the buyer knew about the existence of such a claim, or they are culpable of lack of knowledge; or (ii) the seller complies with the buyer's technical specifications,

⁸⁷ CISG Art. 42, 43 & 44. Honnold, *Documentary* (n 62) 426.

⁸⁸ Shafiq (n 30) 161.

⁸⁹ *ibid* 162.

⁹⁰ CISG Art. 42(1).

⁹¹ Art. 42(1) (a) & (b). Honnold, *Documentary* (n 62) 427.

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which infringe the intellectual and industrial property rights.⁹² Such an Article does not exist in ULIS. The increasing significance of intellectual and industrial property rights made by the drafters of the CISG enacts a distinctive regime for such claims.⁹³

2.2.3. Time of Assessing Conformity

The seller is liable for all defects that existed in goods before transferring the risk to the buyer⁹⁴ even if such defects did not appear until the goods were used by the end consumer.⁹⁵ The carrier of the goods does not necessarily have the knowledge or experience to examine and verify the goods. Moreover, such examination may require opening the packages of goods, which would in turn compromise the quality of packaging and expose the goods to risk of damage.⁹⁶ CISG only requires the defects to exist before passing the risk to the buyer in order to blame the seller, regardless of who caused the defect.⁹⁷ Conversely, ULIS protects the buyer's right to

⁹² Art. 42(2) (a) & (b). Kröll et al (n 56) 657-658.

⁹³ ibid 648.

⁹⁴ CISG Art. 36(1) & ULIS Art. 35(1).

⁹⁵ Heuze (n 59) 276.

⁹⁶ Abdulaziz (n 56) 138; Albert Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the international Sale of Goods*, (Boston, Kluwer and Taxation Publishers 1989) 292.

⁹⁷ CISG Art. 36 (1). Abdulaziz (n 56) 139.

claim non-conformity when the defects occur before⁹⁸ the delivery, and when such defects are the result of the seller's own actions (or their agent's).⁹⁹ To illustrate, if the goods are a shipment of wheat, and two days after receiving them the buyer discovers that they are full of mites,¹⁰⁰ the seller is liable for the non-conformity of the goods under CISG,¹⁰¹ but they are not under ULIS. The seller is not liable under ULIS because the defects, which *appeared* after passing the risk to the buyer, are not due to the seller's acts¹⁰² even if such mites *existed* before the risk was passed to the buyer. CISG expands the sphere of the seller's responsibility when adopting such objective criterion¹⁰³ to close off the possibility of the seller selling defective goods. Furthermore, CISG extends the seller's liability for the deterioration of goods where this occurs (not appears) beyond the passage of risk¹⁰⁴ in two scenarios. The first is if the non-conformity is due to a breach of seller's obligations,¹⁰⁵ such as the contract containing a term obligating the seller to send their experts to periodically check the goods and train the buyer's employees about the best

⁹⁸ When ULIS indicated in Art. 35(2) that the seller is liable for the 'consequences' of unconformity.

⁹⁹ ULIS Art. 35(2).

¹⁰⁰ *ibid* 141.

¹⁰¹ Bianca; Bonell (n 16) 286.

¹⁰² *ibid* 284.

¹⁰³ *ibid* 284.

¹⁰⁴ Shafiq (n 30) 149.

¹⁰⁵ CISG Art. 36(2). Kröll et al (n 56) 545.

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methods for using the sold goods.¹⁰⁶ The seller is liable for any technical malfunction in the devices sold that occur after delivery to the buyer, if the defects occur as a result of their failure to perform the above obligations. The second is if the contract contains a term of guarantee¹⁰⁷ to ensure the characteristics of the goods within a period of time¹⁰⁸ then the seller should warrant any defects that may appear in that time.¹⁰⁹ Such provision does not exist in ULIS. Practically, the guarantees and additional obligations of the seller are contractual obligations, i.e. they are expressly mentioned in the contract and there is no need to replicate such terms in the Convention.

2.2.4. Buyer's Duties

Both CISG and ULIS stipulate two conditions for the buyer's claims alleging non-conformity to be considered valid:¹¹⁰

¹⁰⁶ Shafiq (n 30) 149.

¹⁰⁷ Atiyah et al (n 75) 288.

¹⁰⁸ Such as a 12-month guarantee. Bridge, *Benjamin's* (n 56) 723.

¹⁰⁹ Kröll et al (n 56) 546; Dimatteo et al (n 58) 107-108.

¹¹⁰ Dimatteo et al (n 58) 77; Bernstein; Lookofsky (n 56) 87.

(i) Inspection of Goods

ULIS imposes on the buyer the responsibility of examining the goods 'promptly'¹¹¹ once they are handed over. Therefore, the buyer should immediately inspect the goods after obtaining them.¹¹² CISG requires examination of the goods to take place in '... as short a period as is practicable in the circumstances.'¹¹³ The two Conventions presuppose the rapid inspection of goods to accurately identify the evidence of imperfections, prevent the defects from exacerbating¹¹⁴ and eliminate any concerns about terminating the contract.¹¹⁵ The two Conventions have practical differences due to the different phrasing they use. Impediments beyond the buyer's control,¹¹⁶ such as a general strike, can be taken into account under CISG to determine the time taken to examine the goods.¹¹⁷ Additionally, some

¹¹¹ ULIS Art. 38(1). Eörsi (n 29) 335.

¹¹² Graveson et al (n 66) 58.

¹¹³ CISG Art. 38(1).

¹¹⁴ John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Boston, Kluwer and Taxation Publisher 1991) 328; Dimatteo et al (n 58) 76.

¹¹⁵ Shafiq (n 30) 151.

¹¹⁶ As a juristic reasoning by analogy to CISG Art. 79(1). Kritzer (n 151) 304.

¹¹⁷ *ibid* 304. Alternatively, arrival of the goods just before public holidays may make it difficult to find a specialist in the inspection process at this time. Dimatteo et al (n 58) 78.

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circumstances are considered through CISG (but absent from ULIS),¹¹⁸ which may lengthen or shorten the procedure of the inspection, such as: the quantity of the goods; their packaging;¹¹⁹ their nature; whether they are complex machinery or simple devices; and the country of the buyer, including whether it is a developing country or a big industrial city.¹²⁰

In cases where the buyer resells the goods to a third person,¹²¹ under ULIS the buyer cannot defer the inspection until the goods reach the new destination; only if the goods are re-dispatched without trans-shipment.¹²² This requirement is harsh on the buyer as, in practice, it is normal that the resale of goods entails them to be shipped to another destination.¹²³ CISG permits deferral of the inspection of goods, even in cases of trans-shipment, until the goods reach the new destination,¹²⁴ and stipulates instead that the buyer should have no reasonable opportunity to examine the goods before this time.¹²⁵ To illustrate, in a contract made between a German company and a US company to sell

¹¹⁸ ULIS Art. 38(1). Eörsi (n 29) 335.

¹¹⁹ Dimatteo et al cited Garro; Luzern (n 58) 78.

¹²⁰ Alejandro Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' (1989) 23(2) *International Lawyer* 470.

¹²¹ Shafiq (n 30) 153.

¹²² Bianca; Bonell (n 16) 295.

¹²³ *ibid* 295.

¹²⁴ ULIS Art. 38(3) & CISG Art. 38(2). Dimatteo et al (n 58) 81.

¹²⁵ Bianca; Bonell (n 16) 295.

books, the buyer did not examine the goods (due to their packaging), and exported them to other buyers, who discovered that these books were different to the ones that they expected. The court would accuse the original seller of the non-conformity.¹²⁶ This would not be the case under ULIS because the goods were trans-shipped, which would require the buyer to check them upon receipt. However, it is impractical to open the packaging of the goods to check their conformity if they are then going to be transported again to be resold to other buyers.¹²⁷ Thus, changing the means of transportation does not necessarily give a buyer reasonable opportunity to examine the goods.¹²⁸ Hence, ULIS is bound to be too seller-friendly in this respect.¹²⁹

(ii) Notice of Non-Conformity

Under ULIS, the buyer should notify the seller 'promptly' of any lack of conformity after examining

¹²⁶ Louis Lafili; Franklin Gevurts; Dennis Compbell, *Survey of the International Sale of Goods* (Boston, Kluwer and Taxation Publishers 1986) 110.

¹²⁷ Honnold, *Uniform Law* (n 169) 327-328.

¹²⁸ *ibid* 327-328.

¹²⁹ Kröll et al (n 56) 561.

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the goods.¹³⁰ This was replaced in CISG by a 'reasonable time'.¹³¹ The formulation of CISG is more flexible as the reasonable period may vary depending on the type of goods.¹³² If the goods are food products, faster notification is required than if the goods are, for example, clothes.¹³³ CISG, unlike ULIS, exempts the buyer from the notification within a 'reasonable time' if the buyer has an acceptable excuse for their failure to inform the seller about the non-conformity,¹³⁴ such as a strike which halts telecommunications, internet disconnection in the buyer's area, or if the nature of the goods calls for inspection by a foreign specialist identify any defects.¹³⁵ In such circumstances, the buyer is limited to using specific remedies, such as price reductions or claims for damage, 'except for loss of profit'.¹³⁶ However, the concept of 'reasonable excuse' lacks clarity.¹³⁷ Some scholars assert that the court may regard the buyer's unfamiliarity with the notice system as a reasonable excuse.¹³⁸ It is hard to take into account the purely per-

¹³⁰ ULIS Art. 39(1). Burnett (n 56) 20.

¹³¹ CISG Art. 39(1). Schwenzer, *Commentary* (n 52) 622-623.

¹³² Heuze (n 59) 270-271.

¹³³ *ibid.*

¹³⁴ CISG Art. 44. Morrissey; Graves (n 56) 216; Dimatteo et al (n 58) 91.

¹³⁵ Abdulaziz (n 56) 218.

¹³⁶ CISG Art. 44. Morrissey; Graves (n 56) 216; Viejobueno (n 28) 222.

¹³⁷ Garro cited schlechtriem, 'Reconciliation of Legal Traditions' (n 175) 472.

¹³⁸ Kröll et al (n 56) 674.

sonal circumstances of the buyer as a reasonable excuse, such as the buyer's illness or lack of experience of the international commerce requirement, especially as they may fabricate their ignorance or hardship to justify their non-notification. Therefore, it must be estimated by a reasonable person in the same circumstances. Some commentators argue that this provision is biased towards the buyer, therefore the seller should protect themselves by adopting a clause in the contract that eliminates any excuses for failure to provide notice.¹³⁹ However, CISG achieves parity between the parties as it allows the buyer to justify why they did not notify the seller, which is compatible with trade practice. ULIS adds a third stipulation on the buyer in order to claim non-conformity; the seller (or their agents) must be invited to examine the goods to prove their defects.¹⁴⁰ CISG eradicated this rule, which is regarded as a harsh technicality¹⁴¹ that is inconsistent with international trade practice.¹⁴²

Both Conventions contain a limitation cut-off period¹⁴³ in which the buyer loses the right to resort to lack of

¹³⁹ Dimatteo et al (n 58) 91.

¹⁴⁰ The second sentence of ULIS Art. 39(2). Graveson et al (n 66) 76-77.

¹⁴¹ Honnold, 'The Uniform Law' (n 27) 335.

¹⁴² Schwenzer, *Commentary* (n 52) 622-623.

¹⁴³ David Fagan, 'The Remedial Provisions of the Vienna Convention on the International Sale of Goods 1980: A Small Business Perspective' (1998) 2 *The Journal of Small and Emerging Business Law* 328.

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conformity if they did not notify the seller within two years from the date of handing over the goods.¹⁴⁴ Such a period is related to hidden defects that cannot be detected immediately.¹⁴⁵ Notwithstanding, such period is too long for food goods and may be too short for industrial equipment, so it is advisable to include a guarantee period in the contract that corresponds to the nature of the goods.¹⁴⁶ CISG excludes the two-year period if the contractual guarantee duration is longer or shorter than such period,¹⁴⁷ while ULIS permits lengthening the two-year period but not shortening it,¹⁴⁸ although the need to curtail such period is necessary for some kinds of perishable goods, such as flowers.

ULIS adds another condition in which the buyer loses their right to claim non-conformity if they have not determined which remedy they should use within one year from the date of notifying the seller of the goods' defects.¹⁴⁹ This period is too long as the buyer would be expected to decide on the course of action within a reasonable time after notifying the seller about non-conformity in order not to leave the seller concerned

¹⁴⁴ CISG Art. 39(2) & ULIS Art. 39(1). Dimatteo et al (n 58) 77; Bernstein; Lookofsky (n 56) 94-96.

¹⁴⁵ Kröll et al (n 56) 612-613.

¹⁴⁶ Abdulaziz (n 56) 217; Bernstein; Lookofsky (n 56) 95.

¹⁴⁷ Art. 39(2). Morrissey; Graves (n 56) 216; Fagan (n 198) 331.

¹⁴⁸ Last sentence of Art. 39(1) CISG and last sentence of Art. 39(1) ULIS. Abdulaziz (n 56) 216-217; Graveson et al (n 66) 76-77.

¹⁴⁹ ULIS Art. 49(1).

over the fate of the goods and to avoid disputes occurring after lengthy periods of time, during which the evidence may be lost.¹⁵⁰

¹⁵⁰ Shafiq (n 30) 159; Graveson et al (n 66) 81.

3. Remedies for a Seller's Breach of Contract

3.1. Specific Performance

'Specific performance' occurs in cases where a buyer demands the actual terms of the contract to be met and refuses to be compensated payment of damages in place of this.¹ If a seller's breach of the contract is because the goods suffer from a lack of conformity, the buyer can

¹ Anthony Kronman, 'Specific Performance' (1978) 45(2) The Chicago Journal of International Law 352. Such a remedy is generally recognised in civil law countries, contrary to common law systems, which allow specific performance in limited cases. Schwenzer et al, *International Sales Law* (n 71) 465. Notably, the buyer cannot resort to specific performance in both conventions when the court, settling the dispute, would not do so under its domestic law in relation to similar local contracts. CISG Art. 28 & ULIS Art. 16. Bernstein; Lookofsky (n 56) 119-120; Bridge, *Benjamin's* (n 56) 684.

ask for specific performance, thereby requiring substitute goods from the seller, or repair of the defective goods.² ULIS, unlike CISG, forbids the buyer from resorting to such a remedy if the buyer is reasonably able to purchase alternative goods.³ Suppose that a Spanish buyer is contracted with an Austrian seller to sell bars of silver and, on the agreed date of delivery, the seller refuses to perform on the grounds that the market price of silver in Austria increases.⁴ Under CISG, the buyer can ask for specific performance, but ULIS prevents the buyer from doing so if they are able to purchase such silver bars at a reasonable price from an Italian seller instead, for example. This could allow the seller to neglect their obligations to deliver a contract, if the merchandise they are selling can be accessible from other market sources.⁵ Furthermore, ULIS restricts the repair of defective goods to the producer and manufacturer,⁶ which is favourable to the seller.⁷ CISG requires two conditions in order to demand substitute goods. First, the defects of goods must constitute a fundamental

² CISG Art. 46(1) & ULIS Art. 24(1)(a); 26(1); 30(1); 31(1); 41(1) & 42(1). Ndulo (n 68) 15.

³ ULIS Art. 25. Bianca; Bonell (n 16) 334; Mahdi Zahraa; Abdullah Ghith, 'Specific Performance under the Vienna Sales Convention, English Law and Libyan Law' (2000)15(3) Arab Law Quarterly 309.

⁴ Bernstein; Lookofsky (n 56) 119.

⁵ Zahraa; Ghith cited Honnold (n 208) 307.

⁶ Art. 42(1)(a). Abdulaziz (n 56) 424.

⁷ See CISG Art. 46(3). *ibid* 431.

breach,⁸ as the replacement involves sending new commodities to the buyer and returning the defective ones, which causes significant expenses to the seller.⁹ Second, the buyer has a duty to return the goods in a similar condition to which they received them.¹⁰ This reflects the diligence with which CISG seeks to balance the parties' interests.

3.2. The Seller's Right to Cure

The seller may fail to perform their obligations in the case of delayed delivery or otherwise handing over of non-conforming goods.¹¹ The seller has a right to remedy any fault from their side after the delivery date passes.¹² CISG necessitates that such remedy must be at the seller's expense, while ULIS requires not causing the buyer unreasonable expense.¹³ In this way, under CISG, the seller is the only responsible party for remedying their breach of the contract, while under ULIS,

⁸ CISG Art. 46(2). Bianca; Bonell (n 16) 335.

⁹ *ibid* 335. Shafiq (n 30) 175.

¹⁰ CISG Art. 82(1).

¹¹ Schwenzer, *Commentary* (n 52) 734-735; Burnett (n 56) 25-26.

¹² ULIS Art. 44(1) & CISG Art. 48(1). Morrissey; Graves (n 56) 220; Bernstein; Lookofsky (n 56) 73.

¹³ ULIS Art. 44(1) & CISG Art. 48(1).

the buyer may participate materially in the seller's rectification, either directly or indirectly, such as by using their time and resources to fix the defective goods. CISG stipulates that the seller should address such problems within a reasonable period.¹⁴ In the case of *Tetracycline*, the court refused to exercise the seller's right to remedy their performance because the defects needed a considerable amount of time to be fixed, which would cause substantial damages to the buyer.¹⁵ This condition is significant as, under ULIS, which does not require such prerequisite, the seller may take too long to fix their performance, impeding the rapidness of international transactions. The non-existence of such a condition makes the buyer forced to grant the seller an additional period of time to fulfil their obligations, which should be of reasonable length (according to Article 27(2), 31(2) and 44(2) of ULIS, and Article 47 of CISG) in all cases related to non-fundamental breach, in order not to give the seller an opportunity to take an excessive length of time (more than a reasonable time) to resolve the matter.¹⁶

ULIS states that if defective goods represent a fundamental breach of contract and the buyer has not promptly declared the contract avoided, the seller may

¹⁴ CISG Art. 48(1).

¹⁵ *Tetracycline HCL case* (23/6/1995) – 271 C 18968/94
Amtsgericht München (Local Court Munich)
Germany; Morrissey; Graves (n 56).

¹⁶ Schwenzer, *Commentary* (n 52) 737; Kröll et al (n 56) 714.

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exercise their right to remedy their performance,¹⁷ whereas CISG refers to Article 49, associated with the avoidance, as if it encourages terminating the contract when the breach is fundamental.¹⁸ For example, a seller sends a notice to a buyer apologising for not dispatching the goods on 15th September, as specified in the contract, and informing them that the day of dispatch will be the 20th September instead. In response, the buyer may exploit the situation to avoid the contract, not allowing the seller to attempt to resolve the situation.¹⁹ This is the opposite of the principle adopted by CISG to reduce resorting to avoidance.

3.3. Reduction of Price

A buyer may request a reduction in the price of the goods because of the seller's inadequate performance.²⁰

¹⁷ ULIS Art. 44(1).

¹⁸ Article 48(1) of CISG started with the words: '[s]ubject to article 49'. Article 49 is related to the cases permitted to avoid the contract. Bianca; Bonell (n 16) 348.

¹⁹ Shafiq (n 30) 180.

²⁰ A. Kheir, *Contracts for the International Sale of Goods: Through Vienna Convention and the efforts of United Nations Committee of International Trade Law (UNCITRAL) and International Commercial Chamber(ICC)* (Cairo, Dar Alnahda Alarabeya 1994) 95; Burnett (n 56) 25.

CISG confines this mechanism to the non-conformity of goods,²¹ but under ULIS, the buyer can use this remedy for a deficiency of any of the seller's obligations.²² There are perceived contradictions in ULIS as it allows the technique of price reduction to be used in relation to any breach on one hand, but exempts the breaching party from compensation if they are facing highly difficult circumstances on the other.²³ Therefore, a seller that may be facing adverse circumstances preventing them from being able to deliver the goods by the agreed time can be exempted from compensation. At the same time, ULIS gives the buyer the opportunity to reduce the price by as much as, if not more than, the equivalent amount of inoperative compensation.

The calculation of a price reduction is different in the two Conventions. CISG compared the value of the delivered (defective) goods and the hypothetical value of the conforming goods at the time of delivery.²⁴ It is not always an easy task to determine the actual value of the goods at the time, especially if there is no common

²¹ CISG Art. 50. August (n 1) 575.

²² ULIS Art. 46.

²³ ULIS Art. 74(1). Eric Bergsten; Anthony Miller, 'The Remedy of Reduction of Price' (1979) 27(2/3) The American Journal of Comparative Law 273.

²⁴ CISG Art. 50. Schwenzer, *Commentary* (n 52) 774; Dimatteo et al (n 58) 138-139.

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price or no similar products on the market.²⁵ ULIS estimates the price reduction according to the difference between the actual value of the goods, not the contracted price, at the time of concluding the contract and the defective goods.²⁶ A true assessment of the goods' value at the time of concluding the contract could especially difficult if this date is in the distant past.²⁷ For example, in a contract to sell and deliver cheese for \$90,000 to the buyer's port, the goods were found to be worth \$95,000 according to the market value at the time that it concluded.²⁸ The seller dispatched the goods, but during the journey, the ship was interned for two months due to unexpected hostilities. The ship finally reached its destination, but the quality of the cheese had suffered and was now worth \$20,000. The value of the conforming goods at the time of the delivery amounted to \$100,000.²⁹ The reduction in value is \$80,000 (\$100,000 minus \$20,000), so under CISG, the buyer would pay the amount agreed in the contract minus this reduction (\$90,000 minus \$80,000), which comes to \$10,000. However, the reduction in value under ULIS is \$75,000, as it uses the market price of the goods at the time of agreeing the contract, not the agreed price in

²⁵ Heuze (n 59) 413.

²⁶ ULIS Art. 46. Abdulaziz (n 56) 446.

²⁷ It is challenging to know the circumstances surrounding the product, such as supply and demand elements, in that time.

²⁸ In an ex-ship contract, the seller is responsible for the transit risks. Atiyah et al (n 75) 421.

²⁹ Honnold, *Uniform Law* (n 169) 335-336.

the contract (\$95,000 minus \$20,000). Therefore, the buyer would pay \$15,000 (\$90,000 minus \$75,000).

Under CISG, the buyer may consider which choice would be more advantageous to them; the remedy of the damages or the price reduction, and in doing so may depart from neutrality and disrupt the balance between the parties' interests. If the value of goods at the time of delivery increases, the buyer will likely resort to the price reduction, but if the value declines, they will instead claim damages.³⁰ However, CISG supplements a restriction that the buyer is not allowed to reduce the price if the seller offers to remedy their performance and the buyer refuses.³¹ This restriction reduces the buyer's ability to abuse this mechanism. However, this can also be used in a non-fundamental breach with no definition of such a breach,³² giving the buyer an opportunity to ask for a price reduction without a valid reason or for something that is inconsequential to them,³³ such as delivering goods with a different colour. Some commentators argue that the difference in colour does not constitute a hindrance to discharging the goods on

³⁰ Morrissey; Graves (n 56) 282; Bergsten; Miller (n 228) 274.

³¹ CISG Art. 50.

³² Schwenzer, *Commentary* (n 52) 773; Atiyah et al (n 75) 297-300.

³³ Especially if the two countries are equally efficient in the industry.

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the market,³⁴ while others regard it as a breach of the contract.³⁵

³⁴ The same applies to a difference in the goods' origin. C. Witz, *Les Premières Applications Jurisprudentielles du Droit Uniforme de la Vente Internationale* (Paris, L.G.D.J 1995) 85-87.

³⁵ Fagan (n 198) 326.

4. Obligations of the Buyer

The buyer is under a duty to pay the price and accept the delivery of goods in accordance with the terms of the contract.¹

4.1. Price of Payment

In order to ensure that the buyer will pay the owed purchase price,² both Conventions oblige the buyer to take steps and undertake procedures for the preparation of paying the price.³ ULIS gives examples for this provision, such as opening a documentary credit or giving a banker's guarantee.⁴ CISG is satisfied with only mentioning the provision's aim and deletes such examples to clarify that these procedures are not compulsory but

¹ Bridge, *Benjamin's* (n 56) 481.

² Kröll et al (n 56) 804.

³ CISG Art. 54 & ULIS Art. 69.

⁴ ULIS Art. 69.

are dependent on each case.⁵ ULIS states that payment and delivery are concurrent conditions.⁶ Consequently, the buyer may refuse to pay until the seller has delivered the agreed goods.⁷ This stipulation is not expressly stated in CISG because it corresponds to internal sale.

In the absence of the purchase price being stated in the contract explicitly or implicitly, the purchase price will be determined under CISG,⁸ according to the price generally charged at the time of concluding the contract for similar goods sold under comparable circumstances.⁹ It is difficult to know which price should be charged if there are no identical goods in the market,¹⁰ such as unique works of art.¹¹ A further complication is that CISG does not pinpoint in which geographical market the general price should be taken from. Under ULIS, the purchase price will be specified pursuant to 'the price generally charged by the seller...' at the time of

⁵ Schwenzer, *Commentary* (n 52) 812; Dimatteo et al (n 58) 93-95.

⁶ ULIS Art. 71. Bridge, *The International Sale of Goods* (n 76) 563.

⁷ *ibid* 563-564.

⁸ The purchase price could be determined implicitly if the price was specified according to the previous contract, or by referring to the price of the stock exchange. Shafiq (n 30) 194.

⁹ CISG Art. 55. Kröll et al (n 56) 814-815; Bernstein; Loo-kofsky (n 56) 101-102.

¹⁰ Bianca; Bonell (n 16) 403.

¹¹ Shafiq (n 30) 196.

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concluding the contract.¹² This criterion is neither practical nor neutral as the buyer is left with no protection.¹³ However, some scholars assert that it is the buyer's duty to discover this price and they cannot allege at a later time that such price is unfair or unexpected.¹⁴

This provision contradicts two other clauses. First, the contract is valid when the price is not specified, but the validity of the contract is excluded from the sphere of both Conventions.¹⁵ Second, there is a proviso in both Conventions that requires the offer to be sufficiently definite,¹⁶ and the price constitutes an essential element of a contract.¹⁷ One commentator asserts that the Conventions exaggerate in seeking to preserve the contract by filling the gap of the price, as it is regarded as the heart of the contract.¹⁸ Reliance on external factors does not necessarily mean that such factors reflect the parties' intentions.¹⁹

¹² ULIS Art. 57. Eörsi (n 29) 334.

¹³ Schwenger, *Commentary* (n 52) 816.

¹⁴ Graveson et al (n 66) 86.

¹⁵ CISG Art. 4(a) & ULIS Art. 8 of ULIS. Bianca; Bonell (n 16) 401.

¹⁶ CISG Art. 14(1) & ULF Art. 4(1).

¹⁷ *ibid* 402.

¹⁸ Dimatteo et al (n 58) 96-97.

¹⁹ *ibid* 97; Kröll et al (n 56) 813.

4.1.1. Place of Payment

CISG expressly refers to the place of payment agreed in the contract and, in the absence of such an agreement, the buyer should pay at the seller's place of business or at the place where goods are handed over.²⁰ ULIS does not refer to the parties' consent but instead obliges the buyer to directly pay the price at the seller's place of business or at the place where goods are handed over.²¹ CISG gives great consideration to the will of the parties, which is compatible with both international trade and the circumstances of each contract. However, some commentators assert that there is no need to set a place of payment because payment in the form of notes and cheques is an anachronism in the technological age, and payment should instead be carried out electronically, supported by a secure, robust and available system.²²

²⁰ CISG Art. 57(1). Bianca; Bonell (n 16) 412.

²¹ ULIS Art. 59(1).

²² Stig Mjolsnes; R. Michelsen, 'Open Transnational System for Digital Currency Payments' (1997) 5 Proceedings of the Thirtieth Hawaii International Conference on System Sciences 198-207. Both Conventions are silent about the currency in which the buyer should pay. Kröll et al (n 56) 806; Bridge, *The International Sale of Goods* (n 76) 563. Some scholars advocate payment in the currency of the buyer's place of business. Bridge, *The International Sale of Goods* (n 76) 395. Others assert paying in the currency of the seller's place of business. Shafiq (n 30) 197.

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4.1.2. Time of Payment

Under CISG, if the contract does not mention the time of payment, the buyer should pay the price when the seller put the goods 'at the buyer's disposal',²³ i.e. when the buyer is able to possess and use the goods without hindrance. The goods do not have to be seized physically, as long as the seller notifies the buyer about placing them in a specific place.²⁴ ULIS requires the price to be paid when the seller delivers the goods.²⁵ From the wording of ULIS, it seems that the buyer is not obliged to pay until they receive the goods, so placing the goods at the buyer's disposal is not enough to qualify. Such interpretation is evidenced by the statement in ULIS that the buyer should be given an opportunity to examine the goods before payment:²⁶ such examination can only be practiced when the goods are physically with the buyer. However, CISG has an exception for not giving the buyer the opportunity to examine the goods, namely when such examination is incompatible with the procedures of the delivery, such as placing the goods at the buyer's disposal. CISG is more suitable to international sales, especially when the contract is 'Ex-Works',²⁷ as the seller delivers the goods when they

²³ CISG Art. 58(1); Burnett (n 56) 14.

²⁴ Shafiq (n 30) 134.

²⁵ ULIS Art. 71. Graveson et al (n 66) 92.

²⁶ ULIS Art. 71.

²⁷ The seller has to make the goods available at the agreed place. Ex Works (EXW) <<https://www.incotermsexplained.com/the->

place them at their factory or at another named place, such as a warehouse.²⁸

In cases where the contract involves carriage of goods, ULIS permits the seller to either postpone dispatching the goods until the price is paid or to dispatch them while reserving the right to retain the goods during transit until they receive payment.²⁹ CISG thus allows the seller to not hand over the goods to the buyer, after dispatching them, depending on payment.³⁰ The seller cannot therefore wait for payment before dispatching the goods.³¹ This reflects the contractual equality between the parties, where the seller cannot be granted a secure procedure to ensure they receive payment before sending the goods while the buyer, having paid, not sure whether or not the goods will be dispatched. Furthermore, CISG omits the clause related to retaining the right to dispose of the goods during transit by the seller because, in many cases, the risk is transferred to the buyer once the goods are loaded on board, particularly

incoterms-rules/the-eleven-rules-in-brief/ex-works/> [accessed 8/10/2023).

²⁸ International Chamber of Commerce, 'Incoterms® 2020' <<http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>> [accessed 8/10/2023]; Atiyah et al (n 75) 408.

²⁹ ULIS Art. 72(1).

³⁰ CISG Art. 58(2).

³¹ Bianca; Bonell (n 16) 420-421.

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if the contract is Free on Board (FOB).³² Thus, it is unreasonable while passing the risk to buyer, who bears all costs thereafter, to permit the seller to act freely with the goods.

ULIS indicates that if the contract entails payment when documentation is exchanged, the buyer is not authorised to defer payment until they examine the goods.³³ CISG makes no mention of such a case because, on one hand, it reflects the general provision of the parties' autonomy to organise their affairs³⁴ and, on the other hand, this generally occurs when the contract is Cost Insurance and Freight (CIF), which compels the seller to arrange and pay for transport and insurance.³⁵ Hence, once the seller has handed the documents, i.e. insurance and freight, to the buyer, the total price is payable unless agreed otherwise.³⁶

³² 'Free On Board (FOB)'

<<http://www.incotermsexplained.com/the-incoterms-rules/the-eleven-rules-in-brief/free-board/>> [accessed 8/10/2023]; Atiyah et al (n 75) 408.

³³ ULIS Art. 72(2).

³⁴ Goode et al (n 13) 271.

³⁵ 'Cost Insurance and Freight (CIF)'

<<http://www.incotermsexplained.com/the-incoterms-rules/the-eleven-rules-in-brief/cost-insurance-freight/>> [accessed 8/10/2023]; Bridge, *The International Sale of Goods* (n 76) 130 & 184.

³⁶ Shafiq (n 30) 200.

4.2. Taking Delivery

This obligation consists of two parts, outlined below.³⁷

4.2.1. Buyer Facilitating Delivery

Under ULIS, the buyer should undertake everything that is 'necessary' to enable the seller to hand over the goods.³⁸ That means the buyer is obliged to carry out all these actions, even if this is beyond what a reasonable buyer would expect. Such things might relate to the regulations of the seller's country, such as checking the conformity of goods by the buyer before shipment according to the seller's jurisdiction. However, recognising that the buyer should not be expected to know all the regulations of their sellers, CISG modified such a clause so that buyers should carry out all actions that are 'reasonably expected' to facilitate delivery.³⁹ This means buyer is expected to comply with administrative formalities, such as acquiring an import license according to the legislations of their country.⁴⁰

³⁷ Honnold, *Documentary* (n 62) 437.

³⁸ ULIS Art. 65. Ndulo (n 68) 17.

³⁹ CISG Art. 60.

⁴⁰ Schwenzer et al, *International Sales Law* (n 71) 456. Also, in cases where the contract is FOB, the buyer is expected to arrange and pay for carriage to enable the seller to deliver the goods. *ibid* 455; Chuah (n 25) 54.

4.2.2. Taking Over Goods

ULIS imposes on the buyer the responsibility of 'actually' taking the goods over,⁴¹ meaning that the buyer, or their agents, should physically receive the goods.⁴² However, the original buyer would not take the goods over if they resell them to a third party before the seller's notification of placing the goods in their factory⁴³ and the ultimate buyer will receive them instead. CISG removed the word 'actually' to reflect compatible with such practice in international trade.⁴⁴

In the Ex-Works contract, risk passes to the buyer when they take the delivery from the seller's place of business⁴⁵ at the agreed time.⁴⁶ However, if the buyer fails to take the delivery at this agreed time, when will the risk transfer to the buyer? If the agreed date for taking the goods was between 1st October until 25th October and the buyer took the delivery on 22nd October, the

⁴¹ ULIS Art. 65.

⁴² Honnold, *Documentary* (n 62) 437; Atiyah et al (n 75) 301-302; Burnett (n 56) 13.

⁴³ The contract is ex-works. Chuah (n 25) 35.

⁴⁴ CISG Art. 60(b).

⁴⁵ Atiyah et al (n 75) 420; Burnett (n 56) 13.

⁴⁶ CISG Art. 69(1) & ULIS Art. 97(1). Bernstein; Lookofsky (n 56) 102-103.

risk would transfer to the buyer from that date under both Conventions.⁴⁷ However, there is a difference if the buyer fails to take the delivery in this period of time. Under ULIS, the risk would pass to the buyer on the final day, in this case 25th October.⁴⁸ This provision may encourage the buyer to postpone taking over the goods until 25th in order to keep the risk in the hands of the seller as long as possible. CISG, by contrast, passes the risk for the goods to the buyer on the first day, i.e. 1st October, in the case that they do not take over the goods within the agreed period.⁴⁹ This encourages the buyer to acquire the goods punctually. Nevertheless, it is crucial to require the buyer to notify when the goods are placed at their disposal, even if the contract mentions the date, for fear that the buyer may wrongly assume that the seller delayed in placing the goods. Moreover, the contract may specify the delivery date without indicating the latest date on which delivery of the goods can be taken. Thus, it is beneficial to recommend that the buyer takes over the goods when the seller places them at the buyer's disposal, or within a reasonable time from this point in time. CISG mentions another scenario, namely, placing the goods with a third party⁵⁰ or in a warehouse.⁵¹ The risk passes to the buyer when the buyer is notified that the goods are placed in

⁴⁷ ULIS Art. 97(1); Article 69(1).

⁴⁸ ULIS Art. 98(1).

⁴⁹ CISG Art. 69(1).

⁵⁰ Schwenzer et al, *International Sales Law* (n 71) 502.

⁵¹ Schwenzer, *Commentary* (n 52) 939.

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the location.⁵² This case does not depend on the goods being taken over but, instead, on the seller's unilateral act of placing them somewhere.⁵³ This rule is efficient for the seller as the goods are not with them to preserve the goods until the buyer picks them up at a later time.

⁵² CISG Art. 69(2).

⁵³ Schwenzer, *Commentary* (n 52) 939.

5. Remedies for the Buyer's Breach of Contract

5.1. Specific Performance

Under CISG, if the buyer has not performed any of their obligations, such as paying the purchase price or taking the delivery, the seller may turn to the court, asking for specific performance.¹ ULIS stipulates two restrictions to the use of this provision: (i) this mechanism is restricted to non-payment of price, thus the seller cannot ask for specific performance in relation to other obligations of the buyer;² and (ii) the seller is not en-

¹ CISG Art. 62. A court belonging to common law jurisdiction has the right to refuse resorting to such a remedy. CISG Art. 28 & ULIS Art. 16. Schwenger et al, *International Sales Law* (n 71) 464; Viejobuono (n 28) 210. This provision is regarded as a compromise between civil and common law systems. Garro, 'Reconciliation of Legal Traditions' (n 175) 459.

² ULIS Art. 61(1).

titled to require the buyer to pay the price when it is reasonably possible for them to resell the goods.³ The conduct of ULIS is analogous to the common law systems, which tighten the application of this remedy, whereas CISG enlarges such application in a way that is equivalent to civil law jurisdictions.⁴

5.2. Avoidance

Under ULIS, the buyer's failure to pay the price on the agreed day amounts to a 'fundamental breach' of contract and the seller should either ask the buyer to pay the price⁵ or declare the contract avoided.⁶ This decision should be within a reasonable time, otherwise the contract will be automatically avoided.⁷ This provision enables the buyer, when the contract is no longer profit-

³ ULIS Art. 61(2).

⁴ Bianca; Bonell (n 16) 452.

⁵ In case the component court permits specific performance according to Article 16 of ULIS.

⁶ ULIS Art. 62(1).

⁷ *ibid.* In cases where the seller certainly wants to avoid the contract, there is no need to declare avoidance within a reasonable time as long as the fate of the contract, ultimately, will be *ipso facto* avoidance. Thus, this provision would be more judicious if it required the seller to ask the buyer to pay the price within a reasonable time, otherwise the contract would be automatically avoided from the moment the reasonable time expired.

able to them, to avoid the contract by merely withholding the price. Such a hypothesis is not found under CISG. CISG prohibits the seller from declaring the contract avoided with respect to any failure of the buyer's obligations, as long as the buyer has paid the price.⁸ CISG supplements two exceptions to the above rule.⁹ First, in cases where the buyer was late in performing any of their obligations, and on that grounds the seller declares the contract avoided before they 'know' that the performance was fulfilled.¹⁰ This provision enlarges the avoidance remedy. This remedy should not be restricted to 'late' performance but, instead, to 'undue delay'. CISG uses a solely subjective criterion which relies on the seller's knowledge, where the seller may pretend that they do not know that the late performance is fulfilled in order to terminate the contract. Thus, objective criterion should be added according to a reasonable person's knowledge.¹¹ Second, on the assumption that the buyer refuses to perform any of their obligations, the seller is permitted to declare the contract avoided within a reasonable time after they knew¹² of such refusal.¹³

⁸ CISG Art. 2(2). Schwenzer et al, *International Sales Law* (n 71) 477.

⁹ CISG Art. 64(2).

¹⁰ For example, the buyer may pay the price but appears late to take the delivery. The seller can declare the contract avoided, even though the buyer may actually take over the goods but does not inform the seller of this. Schwenzer, *Commentary* (n 52) 904.

¹¹ *ibid* 904.

¹² Or ought to have known.

¹³ CISG Art. 64(2). *ibid* 903; Shafiq (n 30) 205.

Determining whether the buyer's attitude embodied procrastination or rejection is problematic, especially when the buyer does not communicate their position.

5.3. Designating the Specifications of Goods

The parties may agree on the nature of the goods to be sold but refer specifications of details to a later time, to be clarified by the buyer. For example, a contract was concluded to sell shoes without specifying the colours, which are to be designated a month before delivering the goods.¹⁴ The buyer may not specify the goods' features on the agreed date or after receiving a request from the seller to specify them.¹⁵ Under ULIS, the seller may either determine the specification themselves¹⁶ or declare avoidance directly after the buyer's failure to determine the goods' specifications.¹⁷ CISG only permits the seller to decide on the goods' specifications, but does not allow them to avoid the contract on the basis of the buyer's failure to designate such specifications.¹⁸ CISG exemplifies the notion of obviating the termination of the contract.¹⁹ Practically, ULIS is pre-

¹⁴ Heuze (n 59) 296.

¹⁵ CISG Art. 65(1) & ULIS Art. 67(1).

¹⁶ ULIS Art. 67(1).

¹⁷ Schwenzer et al, *International Sales Law* (n 71) 480-481.

¹⁸ CISG Art. 65.

¹⁹ Shafiq (n 30) 208; Burnett (n 56) 21.

ferable as in many cases the buyer would want to undertake a feasibility study in their country's market on the goods' specifications, such as the demand factor and price discrimination, so that they can maximise their profits,²⁰ while the seller would have no knowledge about these demands in the buyer's country. The buyer's silence may indicate an unwillingness to buy such goods, especially where their marketability is reduced.²¹ The seller's act of specifying the goods' features and dispatching them to the buyer will most likely result in the buyer's refusal to take the delivery and pay the price.²² Some scholars advocate that the seller should be allowed to avoid the contract, under CISG, in case of difficulty in determining the specifications, on the grounds that it constitutes a fundamental breach.²³

ULIS stipulates that when the seller specifies the features of the goods in place of the buyer, they should provide all the specifications they are aware of and are required by the buyer²⁴ (i.e. real knowledge).²⁵ This should be in line with previous dealings or with the negotiations between the parties prior to concluding the

²⁰ Scott Fay; Jinhong Xie, 'Probabilistic Goods: A Creative Way of Selling Products and Services' (2008) 27(4) Marketing Science 675.

²¹ Shafiq (n 30) 206.

²² Heuze (n 59) 297.

²³ Bianca; Bonell (n 16) 475-476; Kröll et al (n 56) 876.

²⁴ Bianca; Bonell (n 16) 476.

²⁵ ULIS Art. 67(1).

contract. CISG requires the availability of specifications that are likely to be known by the seller²⁶ i.e. supposed knowledge. Under CISG, a question arises regarding whether the seller is obliged to provide goods of particular specifications that are required in the buyer's country, as long as the seller is likely to be aware of them. For instance, if the goods are a shipment of chocolate to a Middle Eastern buyer, should the goods be free from gelatin pork or alcohol, despite none of this being mentioned in the contract? Some scholars repudiate such a notion on the grounds that the seller is not expected to know other countries' requirements.²⁷ Others assert that the seller should provide specifications in specific cases, such as when the seller has a branch in the buyer's country, or the seller regularly exports to such a country.²⁸ In the Video recorders case, a seller delivered video recorders to a Swiss buyer with solely German instructions. It was held that the seller delivered non-comforting goods for two reasons: first, it is reasonable under such circumstances to provide the instructions with any other language spoken in Switzerland; and second, it was known to the seller that such devices would be sold in Switzerland..²⁹

²⁶ CISG Art. 65(1).

²⁷ Heuze (n 59) 254-256; François Dessementet, *Convention de Vienne sur les Contrats de Vente International de Marchandises*. (Lausanne, CEDIDAC 1993) 278; Chuah (n 25) 186.

²⁸ Morrissey; Graves (n 56) 172-175.

²⁹ *Video recorders case* (9/5/2000) 10 O 72/00 Landgericht Darmstadt, Germany.
Chuah (n 25) 187.

5. Remedies for the Buyer's Breach of Contract

The benchmark of seller's knowledge under ULIS seems easier and more realistic, and is dependent on communications between the parties. CISG, however, expands the knowledge criterion to include all requirements that the seller might know. Allowing a seller to determine the specifications of the goods may lead to an imbalance between the parties' interests because such a determination could only meet the minimum requirements of the buyer to not incur expenses and to obtain the largest return on the agreed price.³⁰ It is useful to stipulate that the seller should render goods with specifications not less than the average.³¹

³⁰ H. Almasri, *Modern Mechanisms in International Trade* (Cairo, Dar Alnahda Alarabeya 2010) 55.

³¹ Bridge, *The International Sale of Goods* (n 76) 550.

6. Common Remedies for the Breach of Contract

There are common remedies that can be applied to either a buyer or a seller's breach of contract. Initially, under both Conventions, the adjudicator is not permitted to give parties any supplementary period in which to perform their failed obligations¹ for two reasons: first, to not make the international procedures longer and more expensive;² and second, to not '...expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties.'³ However, CISG mentions that this period only disallowed if the counterparty resorts to a remedy when a breach occurs.⁴ The contravening party may therefore be granted an extension period in which to perform their obligations before the other party resorts to a remedy. However, this period will be suspended when the aggrieved party uses a remedy. Some scholars are

¹ ULIS Art. 24(3); 64; CISG Art. 45(3); 61(3).

² Bianca; Bonell (n 16) 332.

³ ibid cited the Secretariat's Commentary 332.

⁴ Kröll et al (n 56) 685; Schwenger, *Commentary* (n 52) 700.

strictly against the capability of judges to grant the defaulting party such a period whether before, after or during the affected party resorts to a remedy.⁵ ULIS assertively bans the provision of a supplementary period by an adjudicator in relation to any of the seller's obligations⁶ but it confines this prohibition (which is associated with the buyer's obligations) to the failure to pay the price.⁷ Therefore, if the buyer does not take the delivery, they may be granted such a period in which to perform their obligation. Based on the above, CISG treated the parties equally, whereas ULIS impeded the equilibrium between the parties, which may impede the achievement of neutrality.

6.1. Avoidance of Contract

It is desirable in international contracts to minimise the usage of a termination mechanism,⁸ especially when

⁵ Honnold, *Documentary* (n 62) 428.

⁶ ULIS Art. 24(3).

⁷ ULIS Art. 64. Bianca; Bonell (n 16) 443.

⁸ Heuze (n 59) 375; M. Omar, *Paying the Price in the International Sale of Goods Contract as One of the Fundamental Obligations of the Buyer*. (Cairo, Technical Office of Legal Publications) 28.

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they are made after arduous and expensive negotiations.⁹ An avoidance penalty can be used in three cases:

6.1.1. Occurrence of Fundamental Breach

Under CISG, if a fundamental breach occurs, the affected party is permitted to use severe remedies such as avoiding the contract or asking for substitute goods.¹⁰ Under ULIS, it is not permitted to declare the contract avoided for the mere non-conformity even if it constitutes a fundamental breach.¹¹ In the Spanish paprika case, the seller contracted with a buyer to supply paprika

⁹ See CISG Art. 81 & ULIS Art. 78. Heuze (n 59) 392-393.

¹⁰ CISG Art. 25. Ingeborg Schwenzer, 'The Danger of Domestic Preconceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents' (2005) 36 Victoria University of Wellington Law Review 799-801. This idea is found in ULIS as well. ULIS Art. 10. Will, 'General Provisions: Article 25', in Bianca; Bonell (n 16) 209-207. The affected party can declare the contract avoided when there is a fundamental breach. ULIS Art. 32; 43; 52(3); 52(4); 55(1) & CISG Art. 49(1). The aggrieved party should notify the default party of the desire to terminate the contract 'promptly' (under ULIS) or within a 'reasonable time' (under CISG). ULIS Art. 43 & CISG Art. 64(1)(a) & 26. Eörsi (n 29) 334.

¹¹ ULIS Art. 43. Abdulaziz (n 56) 393; A. Abdulhameed, *The Avoidance of the International Sale of Goods contract according to the Vienna Convention of 1980* (Cairo, Dar Alnahda Alarabeya 2001) 60.

ka complying with the permissible qualities in Germany, but delivered the spice with much greater ratios of ethyl oxide than is allowed in the country.¹² In this example, use of the termination device under CISG is legitimate. By contrast, ULIS prevents recourse to avoidance even if it represents a fundamental breach, unless the agreed upon terms of delivery are also breached.¹³ Some scholars argue that each of the previous obligations, i.e. non-conformity and breach in delivery, should separately constitute a fundamental breach,¹⁴ while others believe that both obligations may together equate to a fundamental breach.¹⁵ Fundamental breach should be estimated independently in relation to each obligation according to the effect on the aggrieved party.

In ULIS, the breach is fundamental when the breaching party knew, or ought to have known at the time of concluding the contract, that a reasonable person in the position of the injured party would not have entered the contract because of such breach.¹⁶ The legislator in this way merely relies on the knowledge of the breaching party to consider whether a breach is fundamental.¹⁷ This could give the breaching party the chance to claim

¹² *Spanish paprika case* (21/8/1995) 1 KfH O 32/95 District Court Ellwangen; Morrissey; Graves (n 56) 175-176.

¹³ ULIS Art. 43.

¹⁴ Abdulaziz (n 56) 393; Abdulhameed (n 335) 60.

¹⁵ Bianca; Bonell (n 16) 360.

¹⁶ Tunc (n 62) 24.

¹⁷ ULIS Art. 10. Graveson et al (n 66) 55.

ignorance and, therefore, to preclude avoidance of the contract.¹⁸ It is difficult for the injured party to prove anything to the contrary.¹⁹ For example, an external defect in the 'bat toggle switch' of the goods is slight in value compared with the overall value of the goods, so the breaching seller may believe, at the time of concluding the contract, that it is not fundamental.²⁰ CISG complicates the way in which the breaching party can exonerate themselves from committing a fundamental breach²¹ by asking whether a reasonable person would foresee the detrimental impact it would have on the injured party. By adding such a criterion - from an objective standpoint, the breaching party can neither excuse a lack of knowledge nor incorrect assessment on their part.²² Suppose that a someone selling cheese uses colours and preservatives in its production, which exceed the normal quantity, which causes a problem for the buyer. Under ULIS, the seller may claim that they did not know that the buyer would not want to purchase the product with such ingredients, because specific percentages or health rules of such ingredients are not specified in under the contract. Under CISG, any reasonable

¹⁸ Schroeter, 'General Provisions: Article 25', in Schwenzer, *Commentary* (n 52) 412; Shafiq (n 30) 120.

¹⁹ Shafiq (n 30) 120.

²⁰ Schroeter, 'General Provisions: Article 25', in Schwenzer, *Commentary* (n 52) 407.

²¹ *ibid* 401.

²² Eduardo Grebler, 'Fundamental Breach of Contract under the CISG: A Controversial Rule' (2007) 101 *American Society of International Law* 409.

person might foresee the dangers that might be caused by such ingredients, especially if they violate international standards. The time at which this consideration should be made is not specified in CISG²³ so one may wonder whether foreseeing the consequences of a breach should be at the time of the breach or at the time of making the contract.²⁴ Many scholars suggest that the relevant point of time is the time of contracting,²⁵ which ULIS expressly refers to.²⁶ However, this time is not practical as a party may commit a breach after concluding the contract²⁷ and never think about the consequences in the time of concluding the contract.²⁸ For example, if a buyer asks the seller to protect some chemical goods by maintaining the appropriate temperature during transportation, and the seller agreed, yet the goods were received in a damage state,²⁹ CISG and ULIS would come to different conclusions. In this scenario, the seller did not predict the breach and its consequences at the time of concluding the contract because they believed that the goods would not decompose. This does not constitute a breach under ULIS, be-

²³ CISG Art. 25.

²⁴ Chuah (n 25) 190.

²⁵ Davies; Snyder (n 52) 367.

²⁶ ULIS Art. 10. Will, 'General Provisions: Article 25', in Bianca; Bonell (n 16) 220.

²⁷ See Graveson et al (n 66) 55.

²⁸ Fagan (n 198) 336.

²⁹ *Jasmine Aldehyde case* (23/2/1995) China International Economic and Trade Arbitration Commission [CIETAC]; Morrissey; Graves (n 56) 167-168.

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cause it depends merely on a subjective criterion i.e. on the defaulting party's prediction, without indication to the reasonable person.³⁰ CISG, however, makes reference to a reasonable person in addition to the seller to evaluate whether the damage to goods to goods could have been predicted. In this case, any reasonable person in the place of the seller would certainly predict that chemicals would be affected by the climatic conditions. CISG does not specify the time of this prediction for two reasons: (i) the terms of the contracts may be amended³¹ after concluding the contract, thus what the defaulting party expected at the time of concluding the contract, would not reflect the reality; and (ii) CISG intended to exclude the time of foreseeability to pave the way for subsequent information which could appear after concluding the contract.³² For example, a one-day delay in the delivery of goods does not constitute a fundamental breach as such, but it is so if the buyer wants to display them in an exhibition on that day in particular³³ and the seller was made aware of this (even if this was after the contract was made). However, some practical complexities could arise. Assume that a contract was signed to deliver children's snacks during September, but in August a health rule was promulgated in the

³⁰ Honnold, *Documentary* (n 62) 416; Graveson et al (n 66) 55.

³¹ CISG Art. 29(1).

³² It is mentioned in Article 8(3) as 'subsequent conduct'. Schroeter, 'General Provisions: Article 25', in Schwenzer, *Commentary* (n 52) 180-181.

³³ Shafiq (n 30) 120.

buyer's country that bans any children's snacks that contain more than 10% sugar. The buyer informs the seller of this requirement at the time, but it might still be too late. Should the buyer's communication be considered the point at which the seller could predict the goods being unsuitable? This kind of issue is controversial and would benefit from the addition of a touchstone in such provision to assess the seriousness of the breach, namely the ability of the buyer to use or resell the goods even if they incur extra expenses or loss (because such losses will be compensated by the seller without the need to terminate the contract).³⁴

The assessment of a fundamental breach in CISG does not only look at the foreseeability by the breaching party, but it also requires the injured party to suffer a detriment which substantially deprives them of what they had expected under the contract,³⁵ rather than on what the breaching party promised in the contract.³⁶ This is likely to also be the case when applying ULIS. For example, a supplier breaches their commitment to export raw materials consistent with the contract. The importing factory did not suffer detrimental consequences from this at first because it had sufficient raw materials for its operation, but when the materials in

³⁴ Davies; Snyder (n 52) 367-368.

³⁵ CISG Art. 25. Dimatteo et al (n 58) 126; Franco Ferrari, 'Fundamental Breach of Contract under the UN Sales Convention; 25 years of Article 25 CISG' (2006) 25 *Journal of Law and Commerce* 495; Burnett (n 56) 23; Goode et al (n 13) 297.

³⁶ Grebler (n 346) 409.

stock were depleted and the factory was in dire need of goods, the detriment occurred.³⁷ According to this scenario and under CISG, a fundamental breach arises from the moment the stocks of the materials were consumed and the buyer suffered a detriment.³⁸ However, under ULIS, a fundamental breach occurs from the moment the breach was committed.³⁹ It seems that CISG gives the seller a chance to put off their obligations when they know that the buyer does not need the goods at the exact time of the delivery. Some scholars argue that reliance on the injured party's expectations gives an easy release from the contract in the case of market price fluctuation⁴⁰ because CISG depends merely on subjective criterion, namely deprivation of what the injured party is entitled to expect.⁴¹ This may impair the contract as a source of obligations.⁴² Even the goods are intact, they may be refused by the buyer on the grounds that they do not meet their expectations. Objective criterion was not added such as '... what a reasonable person is entitled to expect...'. ULIS objective criterion when describing the attitude of the aggrieved party, describing a situation where '...a reasonable person

³⁷ Kheir (n 225) 86-87.

³⁸ CISG Art. 25.

³⁹ ULIS Art. 10. Honnold, 'The Uniform Law' (n 27) 344.

⁴⁰ Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) *International and Comparative Law Quarterly* 912.

⁴¹ CISG Art. 25.

⁴² Grebler (n 346) 411.

...would not have entered into the contract...'. Adding an impersonal measure may lift the threshold of expectations under the contract, exceeding those of the aggrieved party.

6.1.2. Converting to Fundamental Breach

Both Conventions permit the aggrieved party to grant an additional period of a reasonable length of time as a deadline⁴³ to the breaching party when they have not performed their obligation within the contractual period.⁴⁴ Under ULIS, the buyer can set the additional period for the seller in relation to any failure of performance,⁴⁵ and if this time passes without fulfilling the contractual obligation, the breach automatically becomes a fundamental breach.⁴⁶ One author describes this as a regrettable provision, saying that the avoidance remedy is a dangerous tool and should be applied exclusively to extreme problems.⁴⁷ CISG employs this mechanism solely to non-delivery.⁴⁸ This limitation re-

⁴³ Shafiq (n 30) 171.

⁴⁴ ULIS Art. 27(2); 31(2); 44(2); 62(2) & CISG Art. 47; 63. Shafiq (n 30) 172; Burnett (n 56) 26.

⁴⁵ Such as not delivering the goods or delivering non-conforming goods. Honnold, 'The Uniform Law' (n 27) 346.

⁴⁶ ULIS Art. 27(2); 31(2); 44(2). Bianca; Bonell (n 16) 361.

⁴⁷ Honnold, 'The Uniform Law' (n 27) 346.

⁴⁸ CISG Art. 47 (1). Schlechtriem (n 101) 176; Schwenger, *Commentary* (n 52) 801-802.

duces the chance of it being exploited by applying it to minor faults.⁴⁹ However, such a system of fixing additional time will give the party a way to terminate the contract in case of any market price fluctuation⁵⁰ to serve their own interests.⁵¹ For instance, if the agreed date for a delivery is the 1st February and the seller could not deliver the goods on that date, the buyer could give the seller an additional period, until the 10th February, to deliver. If the seller still could not perform the task within the additional period, the breach becomes fundamental and enables the buyer to exit the contract, even if the buyer does not actually need these goods until October. This provision contradicts the touchstone to measure the fundamental breach, which is the deprivation of the expectation of the aggrieved party under the contract as a whole rather than the contractual obligation. Additionally, this provision does not specify what 'non-delivery' is.⁵² It is equal if the seller does not deliver the goods at all, or if they have seller has just not delivered a small quantity of the goods. In the latter case, it is an abuse of rights to avoid the contract as a result of this breach, therefore, consideration on a case-by-case basis should be adopted to make a decision.⁵³ Moreover, this provision under CISG might contradict other provisions concerning permission modifying the

⁴⁹ Bianca; Bonell (n 16) 361.

⁵⁰ Bridge, *The International Sale of Goods* (n 76) 912.

⁵¹ Fagan (n 198) 342; Bridge, *Benjamin's* (n 56) 684.

⁵² Bridge, *Benjamin's* (n 56) 684.

⁵³ Grebler (n 346) 413.

contract on the mere parties' agreement.⁵⁴ Thus, if the buyer gives the seller a period of time after the contractual time expired to deliver the goods, it may be unclear whether such period is considered a modification of the delivery's date or an additional period of time. Each interpretation will have totally different implications. In the case of modifying the delivery's date, the seller's failure to deliver the goods by the new date will not be converted into a fundamental breach; whereas in the case that such a duration is deemed an additional period, the default of delivery will be directly regarded as a fundamental breach. Some scholars assert that a party should set the additional period with the condition that it is a hard deadline, i.e. an obligation rather than a hope, such as 'the goods should be delivered by 1st November'. Other words cannot constitute an additional period, such as 'we hope the goods will arrive by 1st November'.⁵⁵

6.1.3. Automatic Avoidance

Under ULIS, contract avoidance may occur automatically without dependence on the parties' will⁵⁶ and without the need for notification.⁵⁷ For example, when

⁵⁴ CISG Art. 29(1). Kröll et al (n 56) 702-703.

⁵⁵ Schwenzer, *Commentary* (n 52) 726.

⁵⁶ Honnold, *Documentary* (n 62) 84; Eörsi (n 29) 334.

⁵⁷ Christopher Jacobs, 'Notice of Avoidance under the CISG: A Practical Examination of Substance and from Considerations, the

the buyer, in case of the seller's failure to perform their obligations, purchases alternative goods,⁵⁸ or when the seller resells the goods, in case of the buyer's failure to pay the price, the contract is terminated automatically from the time of repurchasing or reselling.⁵⁹ The contract is also ipso facto avoided when the seller's failure to deliver the goods⁶⁰ at the agreed time⁶¹ or at the agreed place⁶² amounts to fundamental breach and the buyer has not exercised their right to choose a remedy within a reasonable time, or does not promptly inform the seller of their decision if they are asked to do so.⁶³ The breaching party may unknowingly perform their obligations because they are unaware of the intended contract avoidance.⁶⁴ This provision encourages the non-implementation of contractual commitments even when the defaulting party commits an insignificant breach for fear that it would be avoided automatically. There is therefore great uncertainty in the fate of the contract.⁶⁵ Automatic avoidance is obviated in CISG⁶⁶

Validity of Implicit Notice and the Question of Revocability'
(2003) 64 University of Pittsburgh Law Review 417.

⁵⁸ ULIS Art. 25. Ndulo (n 68) 16. Viejobueno (n 28) 210.

⁵⁹ ULIS Art. 25 & 61 respectively. Honnold, 'The Draft Convention' (n 53) 228.

⁶⁰ ULIS Art. 51.

⁶¹ ULIS Art. 26(1) & (2).

⁶² ULIS Art. 30(1) & (2).

⁶³ Shafiq (n 30) 121; Honnold, *Documentary* (n 62) 88; Ndulo (n 68) 16-17.

⁶⁴ Jacobs (n 381) 418.

⁶⁵ Bianca; Bonell (n 16) 360.

because it is incompatible with the principle of the parties' autonomy,⁶⁷ thus avoidance always requires notification.⁶⁸

6.2. Anticipatory Breach

If the circumstances indicate that a party will commit a breach in the future, the counterparty may either suspend their performance or avoid the contract.⁶⁹

6.2.1. Suspending Performance

A party can suspend the accomplishment of their obligations on the grounds that incidents occur, after concluding the contract, that unequivocally signify that the counterparty will not be able to carry out their obligations as contractually required.⁷⁰ Under ULIS, such

⁶⁶ See Abdulhameed (n 335) 317.

⁶⁷ See CISG Art. 26. Schwenzer et al, *International Sales Law* (n 71) 465.

⁶⁸ Clemens Pauly, 'The Concept of Fundamental Breach as an International Principle to Create Uniformity of Commercial Law' (2002) 19 *Journal of Law and Commerce* 225; Ferrari (n 359) 489.

⁶⁹ CISG Art. 71 & 72 & ULIS Art. 73 & 76.

⁷⁰ CISG Art. 71 & ULIS Art. 73. Shafiq (n 30) 220-221; Burnett (n 56) 26-27.

suspension cannot be utilised unless the counterparty is confronting a difficult economic situation, such as the buyer being declared bankrupt.⁷¹ CISG broadens such incidents to include: (i) acute deficiency in a party's creditworthiness;⁷² (ii) serious deficiency in their ability to perform, such as a fire in the seller's factory;⁷³ and (iii) a party's conduct in performing the contract, such as failure to obtain an export license or to procure materials necessary for manufacturing the goods.⁷⁴ CISG's manner is more correct on the basis that suspension is contingent on the existence of evidence of the counterparty's inability to implement their required obligations. The important thing is the result, i.e. the lack of the capacity of a party, not the reason, i.e. the financial difficulty. Therefore, if a government denies to issue an export license,⁷⁵ the buyer, under CISG, can suspend their obligation to pay, because it is clear that the goods will not be delivered to their country. Under ULIS, the buyer should probably pay the price on the grounds that such denial does not constitute economic difficulty, thus the seller may obtain export license for a third country, where the buyer should take over the goods.

⁷¹ ULIS Art. 73(1). Kröll et al (n 56) 921.

⁷² Bridge, *The International Sale of Goods* (n 76) 579.

⁷³ Or outbreak of war. Kritzer (n 151) 466; August (n 1) 579; Kröll et al (n 56) 921.

⁷⁴ Or failure to provide a bank confirmation. Kröll et al (n 56) 922. Shafiq (n 30) 223.

⁷⁵ Harold Berman (n 33) 357.

6.2.2. Avoiding the Contract

A party may declare the contract avoided when it is clear that the counterparty will commit a fundamental breach in the future,⁷⁶ such as reselling the goods to another buyer who offers a higher price,⁷⁷ which could incur definite delays if the seller has to manufacture new items for the original buyer. CISG stipulates that a party that wants to activate avoidance or a suspending mechanism should first notify the counterparty and request sufficient assurances of their capability to perform the contract.⁷⁸ The party is only obliged to follow this procedure if time allows them to do so.⁷⁹ CISG does not clarify the standard time allowance in this situation and, under this ambiguity, a party may misuse or exploit this instrument. CISG imposes on the innocent party the obligation to continue their performance and not to declare avoidance when the debtor (the other party) provides assurances on delivering their commitments.⁸⁰ Under ULIS, when either party suspends their performance, it is unclear when they should resume it. Adequate assurances may be refused because there is

⁷⁶ CISG Art. 72 & ULIS Art. 76. Schwenzer, *Commentary* (n 52) 972.

⁷⁷ Shafiq (n 30) 228.

⁷⁸ CISG Art. 71(3). August (n 1) 580; Eörsi (n 29) 335.

⁷⁹ CISG Art. 72(2).

⁸⁰ CISG Art. 71(3) & 72(2). Kröll et al (n 56) 959-960; Fagan (n 198) 337-371.

no imposition to accept them under ULIS.⁸¹ Furthermore, ULIS permits a party to suspend their performance or declare avoidance without any notification.⁸² The counterparty may perceive this as the suspending party committing a breach of contract. Notably, under both Conventions, it may be unsuitable to suspend performance, relying merely on personal concerns and thoughts that the other party may not fulfill their contractual obligations. Otherwise, this would open the way for the party to easily liberate themselves from their contractual performance. Therefore, an objective measure should be added in relation to a reasonable person in the same circumstances.

6.3. Instalment Contract

An instalment contract supplies multiple deliveries, creating long-lasting obligations.⁸³

6.3.1. General Rule

According to CISG, each delivery is an independent entity.⁸⁴ Therefore, if a party commits a fundamental

⁸¹ Thus, despite a seller controlling a strike in their factory, the buyer may refuse to perform their obligations.

⁸² Harold Berman (n 33) 357.

⁸³ Schwenger, *Commentary* (n 52) 985.

breach in relation to one delivery, or instalment, the other party may declare avoidance merely in respect to that instalment.⁸⁵ To illustrate, a contract requires supplying wheat in six consecutive deliveries. The first four deliveries conform to the contract's requirements, but the fifth delivery is unfit for human consumption. The buyer can declare the contract avoided solely in respect of the fifth delivery.⁸⁶ ULIS does not address the partial avoidance just in relation to the present delivery.⁸⁷ The approach of CISG reflects an intention to maintain the contract.

6.3.2. Exceptions

Under CISG, when a party commits a breach of an instalment, this gives good grounds to predict that future fundamental breaches will also occur,⁸⁸ thus the innocent party is permitted to avoid the contract in relation to future instalments.⁸⁹ This mechanism is available under ULIS, but it does not require clear prognosis of a future fundamental breach, instead merely stipulating

⁸⁴ Davies; Snyder (n 52) 383.

⁸⁵ CISG Art. 73(1). Kritzer (n 151) 465. Abdulhameed (n 335) 270; Chuah (n 25) 194.

⁸⁶ Heuze (n 59) 387-388.

⁸⁷ Kröll et al (n 56) 970.

⁸⁸ CISG Art. 73(2). Dimatteo et al (n 58) 128-131.

⁸⁹ Schwenger, *Commentary* (n 52) 989.

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the fear of failure to perform future obligations.⁹⁰ This aspect of CISG represents another example of complicating a party's ability to terminate the contract.

Under CISG, the buyer may avoid the whole contract if the entire deliveries cannot be used for the purpose indicated in the contract.⁹¹ For instance, a contract was made with a supplier for a special kind of marble, which composed of four pieces to be dispatched in four instalments, to be used to carve a large statue. The first delivery conformed to the contract but the second delivery showed the marble to be different in colour to the first delivery, making it impossible to install the statue. This constituted a fundamental breach.⁹² ULIS relies on subjective measures in order to avoid the contract entirely, by asking whether the whole contract became worthless to the injured party or not. Thus, the buyer is able to terminate the whole contract based on their claim that the contract has become worthless to them, despite the breach not being fundamental.⁹³ In the above example, the buyer may avoid the contract under ULIS because, although the quality is identical to the contract's specifications, critically, the source of the marble in the second instalment is different. The sub-

⁹⁰ ULIS Art. 75(1). Bianca; Bonell (n 16) 532.

⁹¹ CISG Art. 73(3). Schwenzer et al, *International Sales Law* (n 71) 527-528.

⁹² Shafiq (n 30) 233.

⁹³ ULIS Art. 75(2). Graveson et al (n 66) 96-97.

jectivity of this criterion may permit the buyer to misuse the tool according to their interests.

7. Damages

This section addresses queries relating to calculation of damages, loss mitigation, bodily injuries and exemption from damages.

7.1. Calculation of Damages

There is a provision in both Conventions concerning how to calculate the damages in case the contract is avoided, without purchasing alternative goods or reselling the goods in question.⁹⁴ The compensation equals the difference between the price agreed upon and the current value of the goods at the time of the termination.⁹⁵ The current value, under ULIS, would be based on the market of the place in which the transaction occurs.⁹⁶ However, the transaction could be interpreted differently, either as the place of delivery or the place where the contract was concluded. CISG settles this

⁹⁴ CISG Art. 76 of CISG & ULIS Art. 84.

⁹⁵ CISG Art. 76(1) & ULIS Art. 84(1).

⁹⁶ ULIS Art. 84(2). Graveson et al (n 66) 101-102.

dilemma by referring to the place, where the goods were agreed to be delivered to the buyer.⁹⁷ CISG adds a new clause that if the buyer is supposed to take over the goods, the current value of the goods would be that at the time of them changing hands, rather than the time of the contract avoidance.⁹⁸ Such a clause is important to prevent the buyer from deferring declaring the avoidance until the price of the commodity changes to their advantage.⁹⁹ The possibility of speculating in case of not receiving the goods is lessened because the buyer is restricted to declaring the termination within a reasonable time.

7.2. Loss Mitigation

The affected party should adopt measures to mitigate the loss resulting from the breach in order to obtain compensation.¹⁰⁰ For instance, if a contract was concluded for the sale of red apples, and the buyer instead received green apples, the buyer should mitigate the loss by reselling the non-conformed goods as soon as possible to avoid the goods perishing. CISG expands this clause by obliging the affected party to also take measures to mitigate the loss of profit on behalf of the

⁹⁷ CISG Art. 76(2).

⁹⁸ CISG Art. 76(1). Kröll et al (n 56) 1029.

⁹⁹ Shafiq (n 30) 243.

¹⁰⁰ CISG Art. 77 & ULIS Art. 88.

breaching party.¹⁰¹ Thus, the buyer in the aforementioned example should resell the goods at the best price possible, for the benefit of the seller. ULIS, which does not adopt this clause expansion, could be a more practical option in this case because the aggrieved party should, arguably, not take extreme measures to help the breaching party.¹⁰²

7.3. Liability for Personal Injury

CISG excludes liability for death or personal injury that may be caused by defective goods.¹⁰³ Therefore, the seller cannot be asked for compensation for such damages under CISG, but instead seek reparation under municipal law. ULIS, by contrast, does not exclude such liability.¹⁰⁴ This is preferable for three reasons, First, ULIS confines cases to damages of tort claims, with any other penalties to be arranged according to the applicable law. Second, any reasonable seller will expect the possibility of mortal damage if the goods are, for instance, gas or chemicals.¹⁰⁵ Finally, including such consequences in the Convention's sphere would

¹⁰¹ CISG Art. 77.

¹⁰² Morrissey; Graves (n 56) 287.

¹⁰³ CISG Art. 5.

¹⁰⁴ Schwenzer, *Commentary* (n 52) 96; Morrissey; Graves (n 56) 714.

¹⁰⁵ Joseph Lookofsky, 'Not Running Wild with the CISG' (2011) 29 *The Journal of Law and Commerce* 153.

enlarge its application, unify measures relating to damages and deter the seller from violating the terms of the contract and safety rules.¹⁰⁶

7.4. Exemptions

When a party cannot perform any of their contractual duties due to an unforeseeable and unavoidable difficulty that is beyond their control, the party is exempted from liability of damages (during such impediment).¹⁰⁷ It is to be contested whether difficulties in terms of economic hardship, like the increase in the cost of raw materials, constitutes an 'impediment'.¹⁰⁸ One scholar asserts that such changes in prices are foreseeable by any seller.¹⁰⁹ Conversely, in *Scafom International BV v Lorraine Tubes S.A.S.*, a court concluded that the dramatic increase in prices constitutes an impediment.¹¹⁰ Economic difficulties are likely to be considered an obstacle under ULIS on the grounds that it uses the word 'circumstances', which is broader than the word

¹⁰⁶ Especially if the goods are reactive substances.

¹⁰⁷ CISG Art. 79(1) & ULIS Art. 74(1). Schwenzer et al, *International Sales Law* (n 71) 584.

¹⁰⁸ Davies; Snyder (n 52) 332.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid*; *Scafom International BV v Lorraine Tubes S.A.S.* (19/6/2009) C.07.0289.N Belgian Supreme Court.

'impediment' used in CISG.¹¹¹ CISG supplements this provision with an important scenario, namely the exemption from liability for damages because of the conduct of a third person.¹¹² If a third person is engaged to perform all or some of the contractual obligations of one party,¹¹³ but this person fails to implement their duties, does the third party's failure constitute an impediment to the original party which relieves them of liability? Assume that an Egyptian car manufacturing company contracted with a Moroccan enterprise to export cars in June. The Moroccan enterprise demanded tires with certain specifications to suit the nature of the area where the goods are supposed to be used. Consequently, the Egyptian company resorted to using a third party, i.e. a company that specialises in producing tyres, to supply such tyres in April. A fire then broke out at the tyre company, making it impossible for them to fulfil the commitment to manufacture the required tyres by the agreed date. This resulted in a failure of the Egyptian company to perform its obligations.¹¹⁴ To exempt

¹¹¹ Aburima Ghith, 'Exemption of Non-Performance of the Seller's Contractual Obligations' (2006) 20 (3) Arab Law Quarterly 270; T. Weitzmann, 'Validity and Excuse in the U.N. Sales' (1997) 16 Journal of Law and Commerce 285. Because the impediment is not defined in both Conventions, the national courts could pinpoint it through the lens of their municipal law. Thus, it is important to include the contract with a clarifying clause. Andreason (n 126) 356; Davies; Snyder (n 52) 327-332.

¹¹² Art. 79(2). Kröll et al (n 56) 1079.

¹¹³ Ghith (n 435) 286.

¹¹⁴ Shafiq (n 30) 257; Ghith (n 435) 287.

the Egyptian company from liability of damages under CISG, it should first prove that the non-performance of the third party was unpredictable and out of the control of the Egyptian company and, second, that the fire was an unpredictable and unavoidable event for the tyre manufacturing company itself.¹¹⁵ CISG stipulates this twofold proof on the grounds that the Egyptian company cannot be exempted from liability to pay damages due to the impediment of the third party, especially if it can ask the third party¹¹⁶ for damages: this would cause unjust enrichment.¹¹⁷ However, if the contract between the Egyptian company and the third party is under a domestic law that does not exempt the third party from paying indemnity, then the Egyptian company will gain damages. Thus, CISG should stipulate first that the impediment of the third party is unforeseeable and unavoidable to the original party and, second, that the third party is exempted, under the applicable law governing their relationship, from damages.

¹¹⁵ Schwenzer, *Commentary* (n 52) 1079.

¹¹⁶ Tires company.

¹¹⁷ Shafiq (n 30) 258.

8. Conclusion

Disputes arising from the contravention of international commercial contracts should be settled pursuant to a uniform set of norms to provide international trade with legal clarity¹ and to ensure the proper standards for commercial contracts at the global level.² Multilateral agreements, like ULIS and CISG, urge a process of harmonisation towards achieving a unified international legal framework.³ This paper has reviewed the differences between these Conventions⁴ to determine which one best satisfies the needs of universal merchandising. It finds as a result of the comparison that the techniques employed in CISG surpass those of ULIS. For instance,

¹ Louis Marquis, *International Uniform Commercial Law: Toward a Progressive Consciousness* (Hampshire, Ashgate Publishing 2005) 101.

² Andreason (n 126) 355. Therefore, there will be greater flow of goods internationally, which fosters the notion of international marketability. Trakman, Ranieri (n 30) 480-493.

³ Dalhuisen (n 14) 627-629.

⁴ Franz Werro, 'Notes on the Purpose and Aims of Comparative Law' (2001) 75(4) *Tulane Law Review* 1226.

unlike ULIS, CISG designates exactly⁵ when delivery commitments should be made, i.e. handing over the goods to the first carrier.⁶

The comparability of the structural and functional elements of both Conventions facilitates the detection of their imperfections and aids scholars to make recommendations any novel changes in compliance with contemporary commerce standards. For example, parties are able to declare the contract terminated in the case of a fundamental breach without supervision from either the tribunal or the court,⁷ and both Conventions strictly require a fundamental breach to terminate the contract. However, they are lenient on the issue of defining this breach.

This work shows that CISG in many cases resolves the systemic imperfections of ULIS in order to achieve harmonisation among states. Many provisions demonstrate the doctrine of CISG which is to reduce the application of the termination mechanism on international contracts, such as averting automatic avoidance.⁸ CISG also offsets the interests of both parties on grounds of

⁵ ULIS Art. 19(2). Honnold, *Documentary* (n 62) 115; Tunc (n 62) 46.

⁶ Shafiq (n 30) 137; Schwenzer, *Commentary* (n 52) 929.

⁷ E. Sleem, *The international Sale* (Alexandria, Monshaat Alma'ref 2004) 82.

⁸ Schlechtriem (n 101) 176. ULIS departs from the CISG's jurisprudence, which considers avoidance as a last resort. Goode et al (n 13) 52; Bonell, 'The UNIDROIT Principles' (n 13) 286.

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equity in many provisions.⁹ For example, the court's period of grace is prohibited in relation to any of the parties' obligations,¹⁰ contrary to ULIS, which permits granting such a period in case of the buyer's failure to take the delivery.¹¹ Further, CISG omits some of the requirements of ULIS, which are more suitable to national sales, such as the stipulation to invite the seller to examine the goods to demonstrate the existence of defects in order to claim non-conformity.¹² On the other hand, the sphere of application of ULIS is much wider than that of CISG. For instance, if the defects of the goods causes an explosion which damages the buyer's warehouse and causes mortal harm to one of the buyer's workers,¹³ under ULIS the seller bears all losses incurred by the buyer, such as compensation for the detriment of other commodities, the loss of the profits if they were sold¹⁴ and the compensation for the injured worker.¹⁵ Corporal injuries are excluded under CISG.¹⁶

⁹ CISG Art. 25. Will, M. 'General Provisions: Article 25', in Bianca; Bonell (n 16) 215.

¹⁰ ULIS Art. 24(3).

¹¹ ULIS Art. 64. Bianca; Bonell (n 16) 443.

¹² The second sentence of Article 39(2) of ULIS. Graveson et al (n 66) 76-77.

¹³ Heuze (n 59) 402.

¹⁴ CISG Art. 74 & ULIS Art. 82. M. Alsharqawi, *International Commercial Contracts* (Cairo, Dar Alnahda Alarabeya 2002) 209 - 210.

¹⁵ In cases where the seller predicted or ought to predict such consequence of their breach at the time of concluding the contract. ULIS Art. 82.

This evaluation of Conventions is beneficial to states as it allows them to make a more informed decision on which Convention to ratify or to use as a model law for their domestic statutes. It also assists the contracting parties to exclude provisions of one Convention from their contract¹⁷ or adopt the perspective of another, as applicable. A comparative study reveals the need for statutory modification in some provisions, something that is incompatible with the norms of international trade practice.¹⁸ For instance, some Articles in both Conventions are no longer relevant or applicable, such those associated with the place of payment because of the shift to electronic payment.¹⁹ Furthermore, this comparison helps the parties to discover major gaps when an interpretation can be found neither in the convention's Articles nor in its general principles.²⁰ The parties should design their contract in the knowledge of a Convention's gap, choosing to follow in these instances, for example the conduct of ULIS or to adopt the rules of other international instruments (e.g. UNIDROIT Principles²¹ or International General Conditions

¹⁶ CISG Art. 5.

¹⁷ Mckendrick (n 17) [9].

¹⁸ Werro (n 445) 1227.

¹⁹ Mark Parry; Tomoko Kawakami, 'Virtual Word of Mouth and Willingness to Pay for Consumer Electronic Innovations' (2015) 32(2) *Journal of Product Innovation Management* 192.

²⁰ Bianca; Bonell (n 16) 66; Fawcett et al (n 15) 930-931.

²¹ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (n 19) 305.

such as the conditions issued by the European Economic Commission on the Supply of Machinery Equipment Contracts)²² in their contractual terms. As the great number of national laws constitutes a stumbling block to the flow of international trade in goods, filling gaps in the terms of the contract is crucial to minimise the chance of domestic law being applied.²³ Consequently, the parties can confidently sign the contract and envisage that future conflicts will be solved either by the convention or by their contractual clauses.

More importantly, steps should be taken to create an International Commercial Court²⁴ to ultimately promote uniformity and attain internationality.²⁵ This aim of harmonisation helps actors across the world to act in a more fraternal way²⁶ being under the umbrella of one legal system that motivates the sharing and exchange of legal perspectives. In this way, dissolving the frontiers between states through a unified substantive law will move away from different legal families and help to transform the vast global civilization into a more international community.

Some of the differences between CISG and ULIS are:

²² Shafiq (n 30) 8-11.

²³ Magnus (n 18) 266-267; Mckendrick (n 17) [9].

²⁴ Michael Bridge, 'Issues Arising under Articles 64, 72 and 73 of the United Nations Convention on Contracts for the International Sale of Goods' (2006) 25 *The Journal of Law and Commerce* 405.

²⁵ CISG aims to promote uniformity. CISG Art. 7(1).

²⁶ Tunc (n 62) 2.

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