



NEWCASTLE UNIVERSITY

SCHOOL OF LAW

**THE COMPATIBILITY OF SAUDI DOMESTIC LAW WITH THE
SELLER'S OBLIGATIONS UNDER THE VIENNA CONVENTION (CISG)**

By

Ismaeel Ibrahim AlJeriwi

Mr. Ian Jeffries Dawson

Dr. Nazmi Orkun Akseli

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Dedicated

to the soul of my Father

to my Mother, Wife and Children (Ghadah, Khaled and Muhamad)

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ABSTRACT

This thesis seeks to determine the degree of compatibility between the United Nations Convention on the International Sale of Goods (CISG) and the relevant principles and practices in operation in Saudi Arabia which are derived from Islam's *Shari'ah* law. The prospects for the harmonization of international sales will be enhanced considerably if no fundamental conflicts can be shown to exist. Furthermore, given its success in gaining worldwide acceptance, compatibility of the CISG with *Shari'ah* law would have significant implications for individual businessmen and women, companies, banks and arbitrators in commercial disputes who desire their transactions to be governed by recognised international standards as well as Islamic rules.

A comparative study is therefore undertaken of the CISG and Saudi law concerning two crucial elements of sales contracts: the seller's obligations and the buyer's remedies. The contexts and backgrounds of the two legal systems and their approaches to contractual agreements are first described, revealing strongly contrasting origins, structures and procedures but nevertheless demonstrating encouraging underlying similarities in general aims and principles. The main body of the thesis then discusses in detail questions of the delivery of goods, their conformity to the contract and the law, protection against third party rights, and remedies for failure to perform in conformity. Key issues include the nature and timing of control of the goods, the identification of defects and the passage of risk associated with them, protection against third parties, recognition of the main buyer's remedies (specific performance, avoidance and reduction in price) and the role of customary usage within particular business spheres.

Widely divergent forms of expression are found to produce many of the apparent differences found in the analysis, which are rendered eminently reconcilable when the deeper guiding intentions of the two legal frameworks are taken into account. Potentially obstacles to compatibility are explained in terms of the sources of Western traditions in civil and common law whereas schools of thought in Saudi jurisprudence vary in interpretations of Islamic primary texts. Nonetheless the rights of the parties to freedom of contract, the role of custom and the encouragement of certainty surrounding their expectations are common driving principles in Saudi and Islamic law, and adoption of the prevailing international norms would, in fact, help make this more explicit in contemporary Saudi practice. In addition the impact of different interpretations of the primary texts provides certain flexibility in Saudi law to recognise and accept the provision of the CISG particularly when the CISG's rules have already been suggested by one of the representative schools of thought.

A final summary of the research findings thus concludes that no substantial barriers are found with respect to the specific comparisons made. Given the many benefits that would accrue, and subject to the outcome of further work examining other aspects of the CISG including the rule of interest, it is provisionally recommended that the Saudi Arabian government should consider signing the Convention.

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<i>Arab L. Q</i>	<i>Arab Law Quarterly</i>
<i>B.U.I.L.J</i>	<i>Boston University International Law Journal</i>
CFR	Cost and Freight
CIF	Cost, Insurance and Freight
CIP	Carriage and Insurance Paid To
CISG	Convention on Contracts for the International Sale of Goods
CISG-AC	CISG Advisory council
CLOUT	Case Law on UNCITRAL Texts
CA	Court of Appeal
CPT	Carriage Paid To
DAF	Delivered At Frontier
DDP	Delivered Duty Paid
DDU	Delivered Duty Unpaid
DEQ	Delivered Ex Quay
DES	Delivered Ex Ship
<i>E.J.L.R</i>	<i>European Journal of Law Reform</i>
EXW	Ex Works
FAS	Free Alongside Ship
FCA	Free Carrier
FOB	Free On Board

FOSFA	Federation of Oils, Seeds and Fats Associations
GAFTA	Grain and Feed Trade Association
<i>H.K.L.J</i>	<i>Hong Kong Law Journal</i>
<i>I.R.L.E</i>	<i>International Review of Law and Economics</i>
<i>I.T.B.L.R</i>	<i>International Trade & Business Law Review</i>
<i>I.C.L.Q</i>	<i>International & Comparative Law Quarterly</i>
ICC	International Chamber of Commerce
Incoterms	International Commerce terms
<i>J.I.I.F.A</i>	<i>Journal of International Islamic Fiqh Academy</i>
<i>J.L.&Com</i>	<i>The Journal of Law and commerce</i>
<i>J.L.B</i>	<i>Journal of Business Law</i>
JLR	Journal of Legal Rules (<i>Majalat Alahkam Alshar'iah</i>)
<i>M.J.G.T</i>	<i>Minnesota Journal of Global Trade</i>
O.L.G	Provincial Court of Appeal
O.R.	Official Records
OIC	Organisation of the Islamic Conference
<i>P.I.L.R</i>	<i>Pace International Law Review</i>
PECL	Principles of European Contract Law
<i>R.P.A</i>	<i>Revista Para el Analisis</i>
<i>R.Z.A.I.P</i>	<i>Rabels Zeitschrift für Ausländisches und Internationales Privatrecht</i>
RSA	Refined Sugar Association
SC	Supreme Court
SGA	The UK Sale of goods act

Tex. Int'l L. J.	<i>Texas International Law Journal</i>
<i>U.P.J.T.L.P</i>	<i>University of Pittsburgh Journal of Technology Law & Policy</i>
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law on the International Sale of Goods
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
<i>V.J.I.C.L.A</i>	<i>Vindobona Journal of International Commercial Law & Arbitration</i>
UCC	United States' Uniform Commercial Code
WIPO	World Intellectual Propriety Organisation

GLOSSARY OF TERMS

<i>Shari'ah</i>	Islamic Law
<i>Qur'an</i>	The revealed Scripture (the first primary source of shari'ah)
<i>Sunnah</i>	Prophetic Tradition
<i>Ijma'</i>	consensus
<i>Ijtihad (adj.) Mujtahid (n.)</i>	endeavour of a qualified jurist to derive or formulate a rule of law
<i>'aqd, 'uqod (pl.)</i>	contract
<i>Fuduli</i>	uncommissioned agent
<i>Gharar</i>	risk and uncertainty
<i>Ghubn</i>	excessive inequity
<i>Tadlis</i>	cheating
<i>Salam sale</i>	Forward contract
<i>Istisna'</i>	agreement for manufacturing goods
<i>Riba</i>	usury
<i>Qabd</i>	delivery (receipt)
<i>Mithli</i>	fungible
<i>Qimi</i>	non-fungible
<i>Khiyar, Khiyarat (pl.)</i>	option (right to avoid the contract)
<i>Iqalah</i>	revocation
<i>Bay'</i>	sale
<i>Figh</i>	Islamic jurisprudence
<i>Al-najash</i>	price hiking

INTRODUCTION

As result of the rapid growth of the economy in Saudi Arabia, the country has been involved in a considerable increase in international trade. In 2005 Saudi Arabia became a full member of the WTO and it has become clear that the change in patterns of trade requires parallel legal reform.

Having adequate law for sale contracts is critical in facilitating commercial activities especially between countries and in resolving legal problems that may arise from the rules of contracts such as poor formulations and lack of clarity in parties' rights and obligations.

The Saudi system of commerce law is still under development, especially with regard to the gap between the domestic contract law and international law. The different background from which the Saudi law is derived (Islamic *shari'ah* law) compared to those of many other international legal systems (chiefly common and civil law) may increase the disparities between them. In this respect it is important to find common ground between different laws governing international contracts. For this purpose the role of the United Nations Convention on Contracts for the International Sales of Goods (the CISG), which has become the most generally accepted law internationally in this field, is an important effort to bridge the gaps between different contract laws in moving towards a uniform law for all international sales of goods.¹

Since Saudi Arabia has not yet ratified the CISG, a study comparing the two systems might provide valuable guidance in the consideration of the CISG as alternative applicable law to Saudi international contracts. By proving that they do not contradict the teachings of *shari'ah*, (as the reference of Saudi law) a major obstacle to ratification would be removed.

¹ Cruz P, *Comparative Law in a Changing World*, (London: Cavendish, 2007), p.436.

IMPORTANCE OF THE STUDY

The driving force behind the proposal for considering the ratification of the CISG is the wish for the Saudi legal system to escape its isolation from the international trade community,² particularly since Saudi contract law was not derived from the internationally recognised systems (civil and common law).

At the international level, concerns around certainty and clarity in Saudi law can be major issues, since it is not codified and references made to Islamic law are not easily accessible to foreign parties. In addition, Islamic law does not provide direct answers addressing current developments in international trade. Thus the CISG can be examined on the grounds of the necessity of having clear and definite laws which can respond properly to international sales contracts.

This need for this engagement has become urgent for the Saudi legal system in order to meet the demands of the fast growth of Saudi international trade. Without parallel development in the law and the economy, the stability of Saudi society will be affected. The worst case scenario of slow legal development and reduced international engagement might be a gradual withdrawal from the application of Saudi national law where sale contracts involve international parties. This would inevitably lead to the isolation of the national jurisdiction even within Saudi boundaries.

The requirement of the Saudi system for any law to comply with Islamic law may create some pressures and barriers amongst foreign traders, and may encourage stereotypes of the law being unduly rigid. In particular, the example of the strict position of Islamic law against usury in trade is well known. These barriers and stereotypes are in many cases unfounded, and are partly due to

² This concern has been raised by some officials in the UK, which is still outside the CISG, despite the important position of the English law internationally. Bridge MG, *The International Sale of Goods*, 2nd edition, (Oxford: Oxford University Press, 2007), p.507.

a lack of communication between Saudi law and other laws. Therefore, engagement with the international community represented by ratifying the CISG would be a desirable solution, allowing Saudis to escape from isolation as well as removing groundless stereotypes about their legal system.

This can be demonstrated by the example of Islamic banking which, by its existence, opens the door for Islamic law to engage with international conventional banking without any major problems. Without initiatives developing and implementing Islamic principles in banks, the situation would be more difficult, with the problem of interest being the main part of bank profits.³ Therefore, as the main purpose of the CISG is to serve the sale of goods internationally, the adoption of the CISG in Saudi would be easier than the adoption of Islamic banking, particularly as existing Saudi law shares many similarities with the CISG as will be revealed by this study.

The need to reform Saudi law should, however, not be seen only through its benefit for the growth of the economy but also as an Islamic duty to protect the rights of contractual parties and to increase stability and certainty.⁴

Additionally, the CISG has gained wide recognition in the international community as discussed further somewhere later.⁵ This alone makes its ratification by Saudi authorities an important choice worthy of consideration.

³ El-Gamal M, *Islamic Finance: Law, Economics, and Practice*, (Cambridge: Cambridge University Press, 2009); Chapra M U, *The Future of Economics: An Islamic Perspective*, (Leicester: The Islamic Foundation, 2000); Chapra M U, *Towards a Just Monetary System: a Discussion of Money, Banking and Monetary Policy in the Light of Islamic Teachings*, (Leicester: The Islamic Foundation, 1985); Archer S and AbdelKarim R A(eds.) *Islamic Finance Innovation and Growth*, (London Euromoney 2002); Al-Jarhi M, and Iqbal M, *Islamic Banking Answers to Some Frequently Asked Questions*, (Jeddah: Islamic Development Bank Islamic Research and Training Institute 2001); Iqbal M and Molyneux P, *Thirty Years of Islamic Banking History, Performance and Prospects*, (London: Palgrave Macmillan 2005).

⁴ See section: 1.3.2.2.

The advantage of applying the CISG in Saudi would be extremely helpful for a better understanding of the concepts and expressions used in international contracts to rely upon in negotiating and structuring transactions. Having common international conceptual language standards for terms such as fundamental breach, additional period, good faith, reasonableness and conformity would be an important step in reducing conflicts between laws and avoiding misunderstandings between judges and lawyers from different countries.⁶ Besides this significant benefit, the role Saudi contract law will still apply international in many areas because of the special approach of the CISG scope of not covering all aspects of sale contracts in order to allow substantial role to be played by national laws particularly in the area of validity which is an important part of Saudi law where some transactions have been prohibited.

Moreover, since Saudi law in sale contracts adopts Islamic *shari'ah* jurisprudence, the benefits of examining Islamic contract law together with the CISG would be seen beyond the borders of Saudi Arabia to include those who are interested in comparative examinations between cultures and nations⁷ as well as for individual merchants and arbitration tribunals who seek transactions that comply with Islamic principles.

AIM AND SCOPE OF THE STUDY

This thesis aims to address both general and specific goals. The primary concern in this thesis is to explore how the CISG and Saudi law address the seller's obligations and the buyer's remedies, in order to analyse the extent to which these obligations and remedies under Saudi law are

⁵ See Section: 1.2.3.

⁶ Schlechtriem P. (x2005), p.32.

⁷ Foster N, 'Islamic Commercial Law: An Overview' (II), (4/2007)(405) *Revista Para el Analisis*, p.18.

compatible with the CISG. This study also examines the involvement of Islamic teaching and their impact on Saudi sale contracts' rules.

The particular question which this thesis aims to answer concerns to what extent the differences between the CISG and Saudi law in the seller's obligations and buyer's remedies may affect the ratification of the CISG by Saudi Arabia; whether or not, in fact, the CISG is suitable as an important alternative in Saudi Arabia with regard to its practical role in international trade.

Due to the limitations on the research the scope of this study intends to focus mainly on the CISG's articles covering the seller's obligations and the buyer's remedies (Arts.30-52) and their counterparts in Saudi law. Reference to other CISG articles is made where necessary. The scope of this study precludes detailed discussion of the controversial rule of interest in the CISG, because it is more important to focus on reaching solid grounds of agreement between the two systems on major areas of the contract rules such as the sellers' obligations and buyers' remedies to lay the foundation for mutual understanding. Only with that foundation might further convergence on more problematic areas, such as interest,⁸ be possible.

Therefore, investigating and examining the prospective of Saudi and Islamic law beyond the prohibition of interest allow deeper understanding of the compatibility and shows wider horizon of the Saudi approach in sale contract. Although the present research does not intend to fully analyse other parts of the CISG, these areas of examination can be justified as they lie at the heart of the CISG's rules of sale contracts and therefore have significant implications for the

⁸ The contradiction of interest to Islamic law has been highlighted by some commentators see for example: Bonell M, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *A.J.C.L.*, P.2, Akaddaf F, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG compatible with Islamic law principles?' (2001) 13 *P.I.L.R.*; Twibel T, 'Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under *Shari'a* Law: Will Article 78 of the CISG be enforced when the forum is an Islamic state?' (1997) 9 *International Legal Perspectives*; see also further discussion regarding interest in section: 1.4.4.

results.⁹ The proof of the compatibility between the two systems in this major part of seller's obligations and the buyer remedies should offer promising solid grounds for bridging the gap between them and encouraging profound examination for the impact of areas of potential tension between them.

METHODOLOGY

This study conducts a comparative analysis between Saudi law and the CISG. Separate discussions are firstly conducted of the relevant rules in CISG and Saudi law in order to provide a general understanding of each set of obligations before conducting the comparison. While the main reference for explaining the CISG's provisions are recent commentaries and case law, in Saudi law the situation is quite different. The primary sources of *shari'ah* (the Qur'an and *Sunnah*) are the main reference points in Saudi sale contract law, which plays a similar role to the CISG's provisions. However, regarding secondary sources, a very prominent role in contemporary Islamic contracts is played by classical Islamic jurisprudence. Saudi jurists and judges seek precedents in classical jurisprudence to provide judgements relevant to contemporary practices.¹⁰ Therefore frequent reference regarding Saudi law is made in this study to the early classical Islamic literature along with other contemporary references. Court decisions have no influence in Saudi law and have not been published yet.¹¹ The difficulty of studying sale contracts under Islamic law is that its structure is designed differently from its counterpart in the CISG. In this regard careful investigation has to be conducted, firstly, to find the relevant rule in all different parts of a sale contract before deciding upon the absence of a counterpart rule in

⁹ Flechtner H, 'Funky Mussels, a Stolen Car, and Decrepit Used Shoes: Non-Conforming Goods and notice thereof under the United Nations Sales CISG "CISG"' (2008) 26 *B.U.I.L.J.*, p.3.

¹⁰ El-Gamal M, *op.cit.* p.64.

¹¹ Vogel F, *Islamic Law and Legal System Studies of Saudi Arabia*, (Leiden: Boston Koln: Brill, 2000), p.8.

Saudi law. Despite the fact that the CISG has been ratified by some Arabic and Islamic countries including Egypt, Syria and Iraq, reference to these countries as supporting authority for the proposition that the CISG is compatible with Islamic law will not provide any basis for the compatibility. This is because of the influence of western civil law in these countries whereas in Saudi law reference has been made solely to shari'ah rules.¹²

Reference in Saudi law has to be made to primary sources and the literature of Islamic jurisprudence, which have not been codified through a uniform set of rules or articles.¹³ Hence the applications in the literature of sale of goods contract law can be diverse, some of which provide more than one opinion on each issue. Therefore, in order to study Saudi contract law and to examine how far it differs from the CISG, it is important to avoid subjective selections between the different opinions of various Islamic schools of thought, which may mislead the reader about the actual law. Objective examination can be achieved by introducing Saudi law on the basis of a consistent method, by nominating a representative reference as a guideline or bridge in exploring it. Other references can be used to support or to oppose the approach of the nominated reference, especially when there is stronger opinion has been supported by particular jurisprudence committees.

¹² See for example: Sharqawi M, *Al-'uqud Al-tijariah Al-ddawliyah: Dirasah Khasah L'aqd Al-bai' Al-dawli*, (Cairo: Dar Al-Nahdah Al-'arabiah, 1992); Shafeeq M, *Itifaqet Al-omam Almotahidah bishan Al-bai' Al-dawli Lelbadai'*, (Cairo: Dar Al-Nahdah Al-'arabiah, 1988); More literature in Arabic is available at: <http://www.cisg.law.pace.edu/cisgarabic/middleeast/Arabibl.htm>; See also in English: El-Saghir II, *The Interpretation of the CISG in the Arab World*, in Janssen/Meyer, eds., *CISG Methodology*, (Munich: Sellier, 2008), this article focuses on Egyptian law and the author does not consider awarding interest as a matter of conflict in Egyptian courts.

¹³ Legal structure of Saudi contract law raises the question of codifying Islamic Law. See below chap.1 fn:69.

Selection of a constant reference can be achieved by using the set of articles of one of the most important texts in the contemporary literature, namely the Journal of Legal Rules¹⁴ (*Majalat Alahkam Alshar'iah*; hereafter referred to as the JLR). This work has not been approved by the juridical system; however, it derives its rules and provisions merely from the main textbooks of guidelines drawn up by the jurisdiction's committee to be practised in the courts.¹⁵ This work is known as the first and only attempt to codify the sale of goods in the Hanbali school of thought,¹⁶ which is officially applied in the country as the main reference system. It was drawn up in 1346AH (1926AD) by Ahmed Al-Qari¹⁷ the president of the Supreme Court in *Makkah* at that time. It comprises 2882 articles in twenty-one books (chapters).

Unlike the CISG, Saudi law does not distinguish between the sale of goods and other properties. The contract of sale deals with all different types of objects, including goods and real estate. In this context, examples cited in this study of actions other than the sale of goods are governed by the same rules as the sale of goods.

¹⁴ The word *Majalah* can be translated into English as Journal; however, the actual meaning in this title is related to one of its definitions in Arabic as a collection of wisdom; see Al-Qari A, *Majalah Al-Ahkam Al-Shar'iah* (The Journal of Legal Rules) (eds. Abu Sulaiman A and Ali M) (Jeddah: Tihamah, 2005, 3rd edn.), p.27.

¹⁵ See below chap.1, fn:71.

¹⁶ For the other schools of thought there were some earlier works of codification, the most prominent being the *Majalat Alahkam Al'Adliyah* of the Hanafi School, developed during the Ottoman Empire, which the Hanbali *Majalah* was written to correspond to.

¹⁷ See above fn: 14.

CHAPTER ONE: INTRODUCTION TO THE LAW OF SALE CONTRACT IN THE CISG AND SAUDI LAW

1.1 INTRODUCTION

Conducting a comparative examination of sale contracts as a particular branch of law requires in the first place the consideration of the entire system. Identifying the background and the approach of each legal system provides an important introduction to the comparison and assists in the explanation of similarities and differences. This chapter therefore offers a general introduction to the areas of research covered in the study by outlining the laws to be discussed. The chapter is divided into three main parts, the first part introducing the CISG and its status and position in international trade. In the second and major part of the chapter, relevant aspects of the Saudi legal system are identified, including the nature of domestic contract law and the influence of Islamic jurisprudence. To show the general approach of its contract law, the main principles of Islamic contract law are introduced. The final part of this chapter assesses the extent of potential compatibility which might exist between the CISG and Saudi Law in their general principles concerning the sale contract.

1.2 PART ONE: OVERVIEW OF THE CISG

1.2.1 Introduction

The unification of international contracts¹ can be achieved either by adopting rules from international private law to identify the applicable national law; or by unifying the substantive law for the contract to avoid or reduce the need of intervention by national laws of states.² The importance for unifying the substantive contract law can be seen from the legal environment which the parties come from, as the parties of an international contract may come from countries which have extensive differences between them both in legal culture, being either common law or civil law countries, and in the maturity of their domestic legal system between developed or developing countries as Kritzer explains.³ These differences, as well as the influence of religions as the case in Saudi Arabia and the different expressions they use, will affect communication between the parties and can mislead them in their interpretation of the contract's terms and phrases.

¹ International contract law is a specific part of private international law. however some aspects of international trade law belong to international public law where the role of the states takes part, see: Chuah J, *Law of International Trade* (London: Sweet and Maxwell, 2005), p.1; Fawcett JJ, Harris JM and Bridge MG, *International Sale of Goods in the Conflict of Laws*, (Oxford: Oxford University Press, 2005), pp.2-5; Goldstajn A, 'Reflections on the structure of the modern law of international trade' in Sarcevic, P (ed.) *International Contracts and Conflicts of Laws* (London: Graham and Trotman/MartinusNijhoff, 1990), p.15.

² See: Report of the Secretary-General (*Official Records of the General Assembly, 21st Session, Annexes*, agenda item 88, doc A/6396, reprinted in *UNCITRAL Yearbook*, vol.I: 1968-1970, part one, chap. II, sect. B. para: 14-19, available at <http://www.uncitral.org>; Bridge MG, (2007), *op.cit.*, p.506; Ly F, 'Sources of International Sales Law: An Eclectic Model' (2005-06) 25 *J.L&Com*, p.1-2; Dutton K, 'Risky Business: The impact of the CISG on the International Sale of Goods' (2005) 7 *E.J.L.R.*, p.242-3; Goode R, 'Rule, practice, and pragmatism in transnational commercial law' (2005) 54 *I.C.L.Q.*, p.555.

³ Kritzer A, 'The Convention on Contracts for the International Sale of Goods: Scope, interpretation and resources' (1996) 1 *Cornell Review of CISG Convention*, p.147, available at <http://www.cisg.law.pace.edu/cisg/biblio/kritzer.html>; Bridge MG, (2007) *op.cit.*, pp.506-8; Flechtner II, 'Globalization of law as documented in the law on International Sales of Goods', in Erauw J and Taelman P (eds.), *Nieuw Internationaal Privaatrecht: Meer Europees, meer globaal, Reeks* (Gandius PUC Willy Delva, nr. 35, Mechlin, Kluwer, 2009) p.541; Hondius E, 'CISG and a European Civil Code: Some reflections' (2007) 71(1) *R.Z.A.I.P.*, p.100.

A variety of internationally recognised organisations play a particularly significant role in introducing each of the above two approaches.⁴ Some of these organisations are operated through governments such as UNCITRAL,⁵ UNIDROIT,⁶ and the Hague Conference on private international law;⁷ others operate independently of governments such as ICC (International Chamber of Commerce)⁸ and Trade associations in London.⁹

⁴ Schlechtriem P, in Schlechtriem P, and Schwenzer I, (eds.), *Commentary on the UN Convention on the International Sale of Goods* (CISG), 2nd edition (Oxford: Oxford University Press, 2005) p.1

⁵ This is a branch of the United Nations established in 1966; it has been involved in many areas of international commercial transactions, such as preparing uniform international rules for arbitration, carriage of goods by sea, secured transactions, standard form contracts, electronic commerce and negotiable instruments. The CISG is one of the most important activities of the UNCITRAL (more details concerning the CISG are discussed below). See the website of UNCITRAL <http://www.uncitral.org/uncitral/en/about/origin.html>; United Nations, *The UNCITRAL Guide* (Vienna: United Nations, 2007) pp.1-48; Honnold J, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Deventer: Wolters Kluwer Law and Business, 2009), pp. 6-8.

⁶ This is based in Rome. Set up in 1926, and it has 61 member states and is involved in many international activities including the work the Hague Conventions 1964 on the Sale of Goods (ULIS and ULF), Geneva Convention on Agency in the International Sale of Goods in 1983, the Cape Town Convention 2001 dealing with international security interests in certain types of mobile equipment. The UNIDROIT Principles of International Commercial Contracts were issued by its institute in 1994 and revised in 2004. These principles are designed to be adopted by private contractual agreement and by arbitrators, and they can be used in conjunction with the CISG. See UNIDROIT website: <http://www.unidroit.org/english/presentation/main.htm>; Bonell M, 'The CISG and the UNIDROIT Principle of International Commercial Contracts: Two complementary instruments' (2009) 10 *International Law Review of Wuhan University*, pp.104-8; Bridge MG, (2007), *op.cit.*, p.14-5; Carr I and Stone P, *Statutes and Conventions on International Trade Law* (London: Cavendish, 2003), pp.454-580; Report of the Secretary-General, *cahp.1*, fn: 2 paras: 27-30.

⁷ It was originally convened by the government of the Netherlands in the nineteenth century. It has prepared multilateral treaties related to international private law, and for sale of goods there are two conventions by the Hague Conference: one, the Convention on the Law applicable to Contract for the International Sale of Goods (Hague 1986) has not entered into force yet, the other which is still valid and considered to be one of its successful achievements in the field of international trade is the convention on the Law Applicable to International Sales of Goods (1955 – entered into force 1964). See its website:

http://www.hcch.net/index_en.php?act=text.display&tid=26; 'UNCITRAL Report on the Co-ordination of Work of Other Organisations Related to International Trade Law' (1988) in Cheng C (ed.) *Basic Documents on International Trade Law* (Netherlands: Kluwer, 1990), p.72; Bridge MG, (2007), *op.cit.*, p.506.

⁸ The ICC was founded in 1919 in Paris, its activities include the International Court of Arbitration (ICA), which receives under its rules hundreds of cases every year, ICC Incoterms 2000 and the ICC model contracts. See ICC website: <http://www.iccwbo.org/id93/index.html>; Kelly D, 'The International Chamber of Commerce' (2005) 10 *New Political Economy*, p.259; Boggiano A, *op.cit.* p.4

⁹ There are particular trade associations whose bodies are located in London, including the Grain and Feed Trade Association (GAFTA), the Refined Sugar Association (RSA), and the Federation of Oils, Seeds and Fats Associations (FOSFA). These associations have been established for over 130 years developing standard contracts for particular ventures and procedures for their arbitration service. See: Bridge MG, (2007), *op.cit.*, pp.13-4; Faure E, 'International Arbitration' (1976) 53 *Journal of the American Oil Chemists' Society*, p.235.

In the following paragraphs a general introduction to the CISG is given. The section opens by describing in turn the CISG's establishment, aims, structure, scope and principles. It concludes with an assessment of the standing and position of the CISG in international trade today.

1.2.2 Description

1.2.2.1 Establishment of the CISG

The predecessor of the CISG are the (ULF) and (ULIS); adopted in the Hague Conference on 1 July 1964.¹⁰ Because there was a shortage of countries that ratified them (only nine),¹¹ the UNCITRAL took the unification of the law of international sales as a very high priority in its programme of work. In the Vienna conference between 10th of March and 5th of April 1980 delegates from sixty two countries deliberated the draft of the CISG, and forty-two countries voted in favour of the CISG. On 11 April 1980 UNCITRAL then was able to table a final draft for acceptance at the Vienna Diplomatic Conference.¹² The convention entered into force on the 1st of January 1988 after reaching the necessary number of ten ratifications according to Art.99

¹⁰ The first draft was in 1935 and it was interrupted by the Second World War; see Schwenger I, and Hachem P, 'The CISG - Successes and Pitfalls' (2009) 57 *American Journal of Comparative Law*, p.459; Sono K (Secretary of UNCITRAL), *The Vienna Sales Convention: History and Perspective* in Sarcevic P and Volken P (eds.), *International Sale of Goods*, (Oceana: Dubrovnik Lectures, 1986), p.1.

¹¹ Socialist and developing countries considered that these conventions favour sellers represented by the industrial countries. See Schwenger/Hachem (2009) 57 *A.J.C.L.*, *op.cit.*, p.460.

¹² See Schlechtriem P, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.2; Ziegel J, and Samson C, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, (1981) available at: <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>; Eiselen S, 'Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa' (1996) 116 *South African Law Journal*, pp.333-5.

of the CISG.¹³ The official languages of the CISG are Arabic, Chinese, French, English, Russian, and Spanish.¹⁴

1.2.2.2 The aim of the CISG

The main aim of the CISG is to promote international trade by removing legal barriers in transactions between international traders.¹⁵

In the preamble of the CISG it was drafted that the Convention aims to promote friendly relations among States on the basis of equality and mutual benefits. By adopting unified rules that “take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade”¹⁶ Although reduction of cost was not mentioned directly in the CISG as its purpose for choosing the method of unifying substantive law, it is an important goal¹⁷ and it can be inferred from the state intention to remove the barriers in international law, since the cost of litigating under a foreign domestic law is markedly high and can be one of the barriers to international trade.

¹³ See Schwenger/Hachem (2009) 57 *A.J.C.L*, *op.cit.*, p.460; Sono K (Secretary of UNCITRAL), in Sarcevic/Volken, *op.cit.*, pp.2-5.

¹⁴ At the end of the CISG’s text it was stated that it was “DONE [sic.] at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.”

¹⁵ Huber P in Huber/Mullis, *The CISG A New Textbook for Students and Practitioners*, (Publ: Sellier, European Law, 2007), p.3; Honnold J, *Documentary History of the Uniform Law for International Sales* (Kluwer Law and Taxation Publishers, 1989), p.3. This aim can be derived from the general aims of the UNCITRAL, which were mentioned in the preamble to the resolution of the United Nations General Assembly setting up that body, see: The General Assembly Resolution 2205(XXI) (17 December 1966) available online at: <http://www.uncitral.org/uncitral/en/about/origin.html>.

¹⁶ See the preamble of the text of the CISG, available online at: <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>.

¹⁷ Flechtner H, in Erauw/Taelman (2009), *op.cit.*, p.542.

It can be said here that the aim of the CISG has been achieved so far, which can be seen in the success of the CISG in harmonising and gaining worldwide acceptance.¹⁸

The CISG does not aim to cover certain aspects of sales law that appear frequently, such as provisions on letters of credit, methods of perfecting security interests in goods, validity of the contract and claims for death or personal injury caused by the goods.¹⁹

The reason for this limitation upon the scope of the Convention can be answered by Kroll:

Certain matters were considered to be too controversial for inclusion in the CISG since the national laws differed too much to harmonize the various approaches. To ensure maximum support for the Convention, the drafters decided to leave these issues outside the CISG's scope of application.²⁰

This approach, to gain wide acceptance among nations rather than to cover all aspects of the contract, is compatible with the UNCITRAL general aims.

1.2.2.3 General principles of the CISG

The CISG embodies certain principles identifying a general approach to govern the sale of goods contracts, the way to govern the sale contract and how the CISG can be interpreted. These

¹⁸ More details of the importance of the CISG is given at the end of this section.

¹⁹ Arts 4,5; see also *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods* (1989) V 89-53886, paras.7-11, available at: <http://www.cisg.law.pace.edu/cisg/text/p23.html>; Ly F, (2005-06) 25 *J.L.&Com*, op.cit., p.2-3.

²⁰ Kroll S, 'Selected Problems Concerning the CISG's Scope of Application' (2005-06) 25 *J.L.&Com*, p.39; Baun A, 'Checklist on the CISG' in Kritzer A (ed.) *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law International, 1994), available online at: <http://www.cisg.law.pace.edu/cisg/biblio/kritzer2.html> ; Ly F, (2005-06) 25 *J.L.&Com*, p.2-3; Bonell M, (2008) 56 *A.J.C.L*, op.cit., P.1.

principles can be gathered from its articles either directly or implicitly.²¹ The following seems the most important principles:

Art.7 (1) requires three conditions for the interpretation of the CISG, in line with its major function of harmonising and unifying the law of contract.²² Firstly, the basis of the CISG's interpretation should be international, not subject to national understanding. Secondly, the interpretation also needs to consider promoting uniformity in its application. Finally, members are obliged to observe good faith²³ in interpreting the CISG.²⁴ Although as a legal concept, good

²¹ A list of principles were gathered from case law in UNCITRAL Digest (2008) at Art.7 case law: party autonomy, good faith, estoppels (contradictory behaviour), place of payment of monetary obligations, currency of payment, burden of proof, full compensation, informality, dispatch of communication, mitigation of damages, binding usages, set-off, right to interest, and *Favor contractus*; see more details about these principles at:

<http://www.cisg.law.pace.edu/cisg/text/digest-art-07.html#h> . The extrapolation of general principles from case law may affect the uniformity of the CISG, since courts and tribunals at an international level do not have the form of a common supreme court to obtain consensus between them. In this regard, Andersen rightly doubts the efficacy of this approach, asking "To what extent is the creation of these general principles in case law an expression of an international autonomous development of an "overarching legal order" for the CISG within which to function (as intended)? And to what extent are they glorified homeward trends?" See: Andersen C, 'General Principles of the CISG - Generally Impenetrable?' in Andersen/Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, (Wildy: Simmonds and Hill Publishing, 2008), pp.29-30. The article also indicates an important point about the general principles in the absence of a fixed structure since "They do not present a practitioner with a given set of rules for interpretation -- they allow him or her choice at a buffet of flexible options, to pick that most suited to his/her own interpretational technique and apply it as a (poorly) disguised *homeward trend*" (pp.32-3).

²² For more discussion about the rules of how the CISG can be interpreted, see Huber P, *Some Introductory Remarks on the CISG* (Munich: Sellier, European Law Publishers, 2006), p.229. In this regard, legal literature and also international interpretation have important roles to play in urging courts to look at what other courts are doing instead of resorting to their national laws; for this purpose UNCITRAL publishes a digest of the case law to encourage the use of citation of cases across jurisdictional borders, available online at:

http://www.uncitral.org/uncitral/en/case_law/digests.html ; see also Bridge MG (2007) *op.cit.*, pp.532-3.

²³ The application of good faith and fair dealing as an explicit standard to govern the parties' conduct was rejected by the CISG's drafters; instead, the role of good faith in the CISG was adopted solely for the interpretation of its rules by courts. Bridge considered this provision as something of a mystery in its application, as according to one view, governing the interpretation by good faith implies that the parties are subject to this principle, and he suggested that it is likely that only the expressed mention of the standard was rejected rather than that the standard itself as a general principle; see Bridge MG, (2007) *op.cit.*, p.535. Many commentators refer to the principle of good faith "as a gap-filling principle for matters governed by, but not expressly settled in the CISG", as Hofmann stressed. This view follows the history of Art.7, wherein the explicit reference to good faith as a standard was rejected by the drafters, so that the application of good faith must be kept at its restrictive meaning; Hofmann N, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 *P.I.L.R.*, pp.165-8; Schlechtriem P, in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.95. It seems that the application of good faith is limited for the purpose of interpreting the CISG and not as a duty of the parties, but it is difficult to draw a line between these in practice.

²⁴ There is no clear standard of good faith in the CISG and no independent source for this principle can be referred to except for the CISG itself and usages under Art.9, which requires the development of the application of this

faith is admittedly vague, Hofmann pointed out that “truth, fidelity, fairness, and reasonableness are concepts most people would associate with good faith as a moral obligation”²⁵ He calls this the good faith principle associated with the objectivity principle. In the CISG there are a number²⁶ of provisions requiring objective measurement by referring to ‘reasonable conduct,’ ‘reasonable period of time,’ ‘reasonable reliance,’ and ‘expectation of reasonable partners’. These standards require objective judgment without looking at individual situations.²⁷

The autonomy of parties is a basic principle in the CISG, permitting them to exclude the application or to derogate from or vary the effect of any of its provisions.²⁸ In the seller’s obligations, for example, stress is given to the parties’ agreement for it to be fulfilled such as Art.30 “as required by the contract”, Art.32(1) “in accordance with the contract” and Art.35 “required by the contract”.

principle in the international case law of trade: Schlechtriem P, in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.100; Honnold J, (2009) *op.cit.*, pp.93-5; Sheehy B, ‘Good Faith in the CISG: The interpretation problems of article 7’, No. 339, in *Berkeley Electronic Press (BEPRESS) Legal Series* (2004) available at: <<http://law.bepress.com/cgi/viewcontent.cgi?article=1815&context=expresso>> ; and see Huber P, *Some Introductory Remarks on the CISG*, *op.cit.*, pp.228-9; Hofmann N, (2010) 22 *P.I.L.R.*, *op.cit.*, pp.165-8 (this author identified good faith in the CISG by an interesting comparison between English and German law suggesting that good faith under the CISG is not extent to the German concept and more closer to the concept of fairness, reasonability and equity in English law). Practical examples of good faith are the main indication of its meaning by commentators. In the Secretariat’s Commentary there are several examples of articles which contain the principle of good faith, for instance Art.37 in the seller’s obligation, Art.48 on the seller’s right to cure, Art.40 which disqualifies the seller from relying on the buyer’s failure to give notice if the seller was aware of the defect, and Art.49 (2) on the loss of the right to avoid the contract. UN Conference on Contracts for the International Sale of Goods, *Official Records*, (New York, United Nations, 1991) p.18,(3).(hereinafter O.R.) The secretariat’s commentary was made under the authority of the secretary-general responding to the request of the commission of the 1978 draft to provide helpful analysis of it. An authorised commentary was rejected at the diplomatic conference. See: Honnold J, (1989), p.404.

²⁵ Hofmann N, (2010) 22 *P.I.L.R.*, 145, p.159.

²⁶ It is mentioned thirty-seven times in the CISG.

²⁷ Art.39(1), Art.16(2)(b) and Art.8(2); see Schlechtriem P, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.104, who considers the great number of provisions referring to ‘reasonableness’ to be the functional equivalent of good faith; Schlechtriem P, in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.104, fn 50, Schlechtriem’s point seems very important, since good faith requires objective measurement of a reasonable person, period or conduct. Since the CISG does not provide a definition for reasonableness, there is a useful definition in PECL Art.1:302; see Lando O and Beale II (eds.), *Principles of European Contract Law: Parts I and II* (Hague; Kluwer Law International, 2000), pp.126-128.

²⁸ Art.6. See UN document (1989) V.89-53886 paragraph 12 available at: <http://www.cisg.law.pace.edu/cisg/text/p23.html>. The exception for Art.12 is connected with the requirement of writing if the court of a country involved in the contract requires the contract to be in writing.

In upholding it, the CISG attempts to adhere to the contract as far as possible. This principle can be recognised through the restrictive rules on avoidance.²⁹ It is important in international trade to keep to the contract in order to avoid the impact of damaging it, especially for the sale of them when some goods have already been delivered.

In the obligation to observe usage and practice, parties are bound to the usage to which they have agreed; or have practised between themselves, or which is widely known and regularly observed in that particular branch of international trade.³⁰

1.2.3 Assessment

The CISG has gained world-wide acceptance, and represents a landmark in the process of the international unification of law since its entry into force on 1 January 1988, the number of contracting states rose to 76 by 2010, representing the five continents,³¹ including nine of the ten leading trading countries and covering more than two-thirds of world trade.³²

The importance of the CISG can also be seen in the fact that the number of decisions rendered both by state courts and arbitral tribunals in its application is rapidly increasing, and approximately 2500 of these decisions have been published.³³ So, by applying the CISG in national courts, and particularly by engaging with CISG case law, judges will gain more experience of international legal disputes and their settlement. In the case of Saudi Arabia it

²⁹ Art.51

³⁰ Art.9 (1)(2). See also: Huber P, *Some introductory remarks on the CISG*, *op.cit.*, p.238-9; Ferrari F, 'What Sources of Law for Contracts for the International Sale of Goods? Why one has to look beyond the CISG' (2005) 25 (3) *I.R.L.E.*, p.333-6.

³¹ The list of countries adopted the CISG according to the UNCITRAL report is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html last view 20/9/2010.

³² Schwenzer/Hachem (2009) 57 *A.J.C.L.*, *op.cit.*, p.457; Ferrari F, (2005) 25 No.3 *I.R.L.E.*, p.314; Bonell M, (2008) 56 *A.J.C.L.*, p.4.

³³ See: <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html> (accessed on 20/9/2010).

would be beneficial for courts and legal practitioners to be familiar with these proceedings, since the CISG requires that its interpretation should be of an international character, (Art. 7(1) of the CISG). In addition, the establishment of the CISG fills a gap in international contracts of sale by providing substantive law for contracts, whereas the majority of previous activities in this field such as unifying the principles of contracts or identifying applicable laws had taken different approaches.³⁴ Although the Hague conventions of 1964 (ULF and ULIS) are similar to the CISG in their approach as uniform substantive law,³⁵ they did not gain world-wide acceptance,³⁶ and after the CISG was drawn up, the ULF and ULIS were significantly re-drawn.³⁷

Some recent studies of the CISG have showed the importance of the CISG through its practical influence at both national and international levels. Schwenger and Hachem point out that several international institutions and a great number of countries have considered the CISG as a role model in drafting their principles and laws.³⁸ They suggest that the characteristics of the CISG responsible for this influence are mainly related to the drafters' approach to using an independent legal language and transparent structure, thus avoiding the traditional heritage of domestic law and making the CISG a suitable alternative for international contracts.³⁹ However, it can also be considered that the similarities between the CISG and other recent national and international legal developments are due to the generalisations made in the CISG and its easy language, which removes many barriers between different legal systems all of which are designed to serve the

³⁴ UNIDROIT principles and the Hague Convention on the Law Applicable to International Sales of Goods are examples; see chap.1, fn: 6,7.

³⁵ Even though these Conventions have achieved significant importance in practice and have been used as an example and model. See Schlechtriem P, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.1.

³⁶ See section: 1.2.2.1.

³⁷ See Andersen C, *The Uniformity of the CISG and its Jurisconsultorium: An analysis of the terms and a closer look at examination and notification* (Aarhus School of Business, 2006), p.77.

³⁸ See the detailed examples of international organisations and states where the CISG is used: Bonell M, (2008) 56 *A.J.C.L.*, p.5-8; Schwenger/Hachem (2009) 57 *A.J.C.L.*, *op.cit.*, pp.461-3.

³⁹ *Ibid.*, p.462.

same goals and targets. This can be illustrated by the existence of similarities between Saudi law and the CISG in the absence of a direct influence between them; the former being drafted several centuries ago and developed within a system of Islamic law, whose roots are not inherited from traditional civil or common law environments.

Nevertheless, despite the wide recognition of the CISG's value in the international community, some criticisms remain regarding its application as well as its approach in some provisions.

One major criticism of the CISG relates to the problem of its uniform interpretation. Ambiguous language and imprecise terms such as 'reasonable' and 'fundamental breach' leave room for widely differing interpretations, as Gillette and Scott indicate.⁴⁰ In particular, there is no general supreme court maintaining the uniform interpretation of CISG court decisions.⁴¹ Schwenger and Hachem defend the CISG approach, arguing that "there are other means to safeguard uniformity. It is now common ground that uniform law has to be interpreted autonomously and regard is to be had to its international character". They conclude that, although foreign decisions have no binding effect upon domestic law and national courts, "[S]till, their potential persuasive authority is widely and justly recognized today".⁴²

⁴⁰ Gillette C and Scott R, 'The Political Economy of International Sales Law' (2005) 25 *I.R.L.E.*, p.474.

⁴¹ See the comments of Gillette and Scott: "To the contrary, we would anticipate that as decisions become more numerous and are handed down by additional jurisdictions, without any formal mechanism for deciding which decisions are "correct," the scope of non-uniform interpretation will increase" (*Ibid*, p.480); Bailey went further in criticising the CISG in its unification, claiming that "The obscure legal content of the explicit but ambiguous principles of Article 7 and the vague nature of the unstated principles of the Convention are unlikely to lead to uniform results in either application or interpretation of the CISG": Bailey J, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an obstacle to a uniform law of international sales' (1999) 32 *Cornell International Law Journal* p.299.

⁴² Schwenger/Hachem (2009) 57 *A.J.C.L.*, *op.cit.*, p.468. They pointed out the accessibility and the availability of different foreign legal materials through the database of UNCITRAL and others including English translation programme of non-English cases and the CISG-AC. p.469.

Another problem of the application of the CISG which may hinder uniformity is the use of national law remedies concurrently with those of the CISG, especially for legal systems that apply remedies based on tort for the damage to the contract. Honnold addressed this problem with an example supposing that domestic law gives a contract 'label' to remedies of fraudulence, saying that "If the Convention cannot be construed to deal with those problems, domestic remedies are not excluded merely because they are characterised as 'contract' rather than 'tort.'"⁴³ Thus it can be said that, regardless of its characteristics, access to domestic law is only available where the CISG does not invoke such rules that are provided by the domestic law, since, according to Art.7 (2), the CISG's available rules displace any counterpart in domestic law.⁴⁴

In discussing the position of the CISG, an important question arises concerning the neutrality between parties. On the one hand, developing countries argue that the CISG is too seller-friendly, mainly in respect of the obligation of examining⁴⁵ the goods and giving notice⁴⁶ of non-conformity.⁴⁷ On the other hand, developed countries consider the CISG too buyer-friendly, pointing to the strict liability and the attenuation of the notice requirement.⁴⁸ In the light of these

⁴³ Honnold J, (2009) p.81.

⁴⁴ See the last part of the above section: 1.2.2.2.

⁴⁵ See the full discussion of the obligation of examination at section 3.2.6.

⁴⁶ See the full discussion of the obligation of giving notice at section: 3.2.7.

⁴⁷ Akaddaf F, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG compatible with Islamic law principles?' (2001) 13 *P.I.L.R.*, pp.12-3. The focus of this article was on the impact of the CISG on developing countries and the influence of the civil law in Arabic nations. It also discussed the sources of Islamic law, its principles in contract, and the problem of interest as in the CISG Art.78. However, the present study does not discuss the stance of Islamic law regarding the CISG's provisions, except for the remedy of specific performance.

⁴⁸ Schwenger/Hachem (2009) 57 *A.J.C.L.*, *op.cit.*, p.476.

contrary opinions it may be suggested that the CISG is neutral and fair for both parties, as Schwenger and Hachem point out.⁴⁹

Thus, where comparative study between the national law of Saudi Arabia and international contracts is attempted, the CISG is the appropriate representative of international sale contracts. In addition, given its important position and advantage in unifying international sale of goods contracts, the question of ratifying the CISG in Saudi Arabia should be considered as an important step in linking the Saudi system in contract law to recognised international standards.

Saudi contract law in general is the subject of examination in the following sections.

⁴⁹ *Ibid.*

1.3 PART TWO: SAUDI SALE CONTRACT LAW

Examining the compatibility of the seller obligations of Saudi sale contract law with the CISG, calls for a general understanding of the system and its origin. Contract law derives its rules from the general laws that are adopted and adhered to by a state or country. Although in many countries Civil law and Common law are the basis of domestic laws, Saudi Arabia refers to another source (Islamic law/*shari'ah*) as the basis and source of its legislation. Recognising the different origin of Saudi law requires that consideration should be made not only to the similarities and differences in the individual provisions of the obligations, but also to the general aims and principles as the difference in articulating the law does not necessarily mean they are incompatible. In this part focus is made to the impact of governing sale contracts in Saudi by the *shari'ah* system. An important question here one may have, particularly from a common or civil law background, is to what extent the rules of *shari'ah* are flexible in contract to allow the development and adoption of trade need and whether the aim of *shari'ah* intervention in contracts serve different purposes to those in the CISG. The following sections attempt to highlight these issues; the first section introduces general aspects of Saudi law: a) Islamic law (*shari'ah*) law, and b) commercial law. The second section presents a detailed examination of the Islamic principles in commercial contract law.

1.3.1 General legal system

Saudi Arabia has no formal constitution. The functions of a constitution are served by *Al-Nizam al-Asasi*, Basic Regulation of Governance. Article 1 of the Basic regulation declares Islam the

official state religion and the Quran and *Sunnah* the Constitution.⁵⁰ Pursuant to this law, Saudi Arabia implements an Islamic legal system, and general jurisdiction is exercised by judges trained in *shari'ah* jurisprudence. In addition to the general *shari'ah* provisions, many modern legal concepts are frequently applied in day-to-day issues. The modern Saudi commercial system thus rests on two bodies of law, the *Shari'ah* law and particular commercial acts as follows.

1.3.1.1 Islamic law (shari'ah)

Although Saudi Arabia is a relatively new country, its legal system, as stated above, is derived from Islamic law, which was the predominant law of the region since the inception of Islam; thus the role of the Saudi government was only to continue practicing the existing law.⁵¹

Shari'ah is the primary source of Saudi law and it can be understood as a cultural and civilizational system.⁵² It permits secondary secular laws and actually decrees co-existence with them, in order to play an essential role in civil and commercial practice, however, any such secular laws must not conflict with the provisions of *shari'ah*.

Shari'ah is governed by four primary sources, the Qur'an, the *Sunnah*, *Ijma'*, and qiyas. The Qur'an is the main source and it is a compilation of revelations received by the Prophet Muhammad from God (*Allah*). The *Sunnah* is the second source and it may be defined as the practice, conduct, and tradition of the Prophet Muhammad. It supplements, clarifies, and explains the provisions of the *Qur'an*.⁵³ *Ijma'* or consensus is an agreement among Islamic

⁵⁰ See *Al-Nizam al-Asasi*, Basic Regulation of Governance of the Kingdom of Saudi Arabia (March, 1992, No.A/90). available in Arabic at: <http://www.mofa.gov.sa/Detail.asp?InSectionID=1747&InNewsItemID=24887>

⁵¹ *Ibid.* Art.1 states that the Qur'an and the prophetic tradition (*Sunnah*) are the country's constitution; Art.7 of this law restates Islamic Law as the foundation of the country, declaring that the government draws its authority from the Qur'an and the prophetic tradition, and that these two sources govern all administrative regulations of the state.

⁵² Foster N, 'Islamic Commercial Law: An Overview' (I) (4/2006) (384) *Revista Para el Analisis*, pp.2-4.

⁵³ See Vogel F, *op.cit.*, p.4.

scholars about the appropriate rule of law applicable to a particular situation. Finally, the *qiyas* or reasoning by analogy, ⁵⁴ is used in cases where there is no appropriate legal authority,⁵⁵ or the texts are not clear enough. The judge or the scholar is then authorized to apply guidance from a more objective standpoint from the science of analogy, which is the *qiyas* (reasoning by analogy).

The latter two sources are the result of *ijtihad*⁵⁶ or interpretation, and cannot be independent of the former two sources;⁵⁷ they have to be supported by them, and should not conflict with them.⁵⁸ Ibn Taymiyyah, one of the leading jurists in Islamic jurisprudence (d. 728/1328) stated that “The *shari’ah* [the law] that every Muslim must follow, and that those in authority must support and struggle for, is the Book [the Qur’an] and the *Sunnah*”.⁵⁹

⁵⁴ For a general explanation of these four sources see the introduction of Edge I (ed.) *Islamic Law and Legal Theory* (Aldershot: Dartmouth, 1996). pp.xvi-xviii; and for more detail on each source see the following articles, reprinted in Edge’s book: Burton J, ‘*The Collection of the Qur’an*’, p.111; Wensinck AJ, ‘*The Importance of The Tradition for the Study of Islam*’, p.133; Hourani G, ‘*The Basic of Authority of Consensus in Sunnite Islam*’, p.155; Hallaq W, ‘*Non-Arguments in Sunni Juridical Qiyas*’ p.205.

⁵⁵ This includes all issues that have not been governed directly by the Qur’an and *Sunnah*. Thus the function of reasoning analogy is to develop and respond to issues that did not exist at the time of the Qur’an and *Sunnah*, including new contracts and trade customs. In this respect examining the compatibility of Saudi law with the CISG may require frequent reference to this source.

⁵⁶ *Ijtihad* means literally “striving” and refers to the independent endeavour of a qualified jurist to derive or formulate a rule of law to determine the true ruling of divine law in a matter on which the revelation is not explicit or certain, on the basis of evidence found in the Qur’an and the *Sunnah*. Express injunctions have no room for *Ijtihad*. Implied injunctions can be interpreted in different ways by way of inference from the accepted principles of the *Shari’ah*. See for the meaning of *Ijtihad*: Vogel F, *op.cit.*, pp.4-5; Foster N, (I)(4/2006), *R.P.A op.cit.*, p.6; Qal’aji M, and Qaini S, *Mo’jam Loghat Alfogaha*, (Beirut: Dar Al-Nafais, 1988) p.405; Sanow Q, *Mo’jam Mostalahat Usul Al-Fiqh* (Damascus: Dar Al-fikr, 2000).

⁵⁷ There are rules and methods which must be conducted in interpreting the Qur’an and *Sunnah* and the interpreter has to be familiar with the subject of Usul al-Fiqh (the principles of jurisprudence); see chap.1 fn: 64.

⁵⁸ *Ijtihad* is the door for the development of Islamic law to respond to changes in the society and to provide new rules to fit with current issues. See for example Ayda M, ‘Harmonisation of International Commercial Arbitration Law and Sharia the Case of Pacta Sunt Servanda Vs Order Public the Use of *Ijtihad* to Achieve Higher Award Enforcement’ (2009) 6 Macquarie University Journal of Business Law, pp.93-118.

⁵⁹ Ibn Taymiyyah A, *Majmo’a Fataua Ibn Taymiyyah* (Ibn Qasim collection), (Madinah: King Fahd Publishing, 2004), vol.35, p.360.

While the primary sources are not structured as codes of law,⁶⁰ the *shari'ah* secondary sources are structured by opinions of jurists to provide rules and practical provisions in response to the needs of the society which surrounds them⁶¹ with references to the primary sources.⁶² The judges primarily apply *shari'ah* according to the main teachings of different schools of thought, predominantly the Hanbali School of jurisprudence.⁶³

To implement Islamic law in courts, the judges are required to be qualified to the level of *ijtihad* and their role is to find the appropriate provision,⁶⁴ reflecting the meaning of the primary sources, for their cases.⁶⁵ In this regard Vogel, in his modern observation of Saudi legal system, rightly pointed out that “Almost all rules applied today in Saudi Arabian courts can be found in books of *fiqh* written by medieval ‘*ulama*’ [jurists]”.⁶⁶ This means that the courts generate their rules from a very extensive range of judgements and opinions within the main Islamic schools of thought,⁶⁷ some of which give more than one provision for one issue.⁶⁸ In the last 80 years

⁶⁰ Foster N, (I)(4/2006), *R.P.A*, *op.cit.*, p.5.

⁶¹ This development of early Islamic law, of testing the realities of law and the law which they found around them by Islamic standards, should be followed by present Islamic jurists as Schacht suggested: “it is the task of the modern Islamic jurists and legislators to do the same with different materials and to arrive at a new synthesis”. Schacht J. ‘*Problems of Modern Islamic Legislation*’ (1960) in Edge I (ed.) (1996), *op.cit.*, p.545.

⁶² Vogel F, *op.cit.*, p.4-5; Hallaq W, *History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997).

⁶³ There are three other main schools, the *Hanafi* (mainly found in Turkey, Iraq, Syria, Central Asia and the Indian Subcontinent), the *Maliki* (in north Africa), the *Shafi'i* (in Egypt, East Africa, Iraq, Persia, Central Asia and the Far East). The geographical zone of the *Hanbali* school is mainly confined to the Arabian peninsula and some parts of Iraq and Syria. See Khadduri M, ‘Nature and Sources of Islamic Law’ (1953) in Edge I (ed.), *op.cit.*, pp.96-104; Vogel F, *op.cit.*, p.9. The differences between these schools are about the interpretation of relatively minor provisions; see Al-says M, *Tarykh Alfiqh Al'Islamy* (Beirut: Dar Alkutb Al'ilmiah, 2006).

⁶⁴ Identifying the appropriate provision has to follow the structure of *Usul al-Fiqh* (the origins/fundamentals of the law), which is the study of the origins, principles, and sources upon which Islamic jurisprudence is generated. It refers to the issue of what the sources of Islamic law are and the procedures by which the law applicable to particular cases are derived from them. It involves the philosophical rationale of the law to apply analogy; see Vogel F, *op.cit.*, pp.33-56.

⁶⁵ Judges are obliged by Art.48 of the Basic regulation of Governance to “apply the rules of the Islamic *Shari'ah* in the cases that are brought before them, in accordance with what is indicated in the Qur'an and the *Sunnah*, and statutes decreed by the Ruler which do not contradict the Qur'an or the *Sunnah*”.

⁶⁶ Vogel F, *op.cit.*, p.9.

⁶⁷ See chap.1, fn: 63; for the problem of different views of *Shari'ah*, Foster N, (I)(4/2006), *R.P.A*, *op.cit.*, p.11.

⁶⁸ Although it seems difficult to project a workable order from this concept of law, particularly for those trained in civil or common law, the correct application of *ijtihad* can be seen as a significant advantage for developing the law

proposals of unifying *shari'ah* law did not succeed;⁶⁹ instead, the high committee of the judiciary system issued a resolution⁷⁰ that one reference should be the main guideline for the courts to follow in their decisions. The reference was to the most popular view in the Hanbali school of thought, and certain text books were suggested,⁷¹ however, in this resolution it was declared that where appropriate, judges are allowed to apply other opinions from outside the Hanbali School.

1.3.1.2 Saudi commercial law

With the universal development of commercial transactions, Saudi Arabia, has embraced the free market and therefore its basic economy relies heavily on importing and exporting. Accordingly,

and meeting the demand of modern trade (see chap.1, fn: 58). Despite this broad concept of Saudi law, in practice, as Vogel demonstrated in his extensive study of Saudi law, "several macrocosmic-law mechanisms operated to assure some degree of common, predictable conformity of views among *qadis* [judges]. These practices were adopted, however, not overtly as either doctrines or formal institutions, but behind the scenes, such as through widespread respect for the views of senior *ulama* [jurists] and *qadis* [judges] or by ad hoc concessions in particular cases justified by arguments low on the epistemological hierarchy of proof" Vogel F, *op.cit.*, p.25. This comment of Vogel is extremely important in understanding the whole picture of the application of Sharia'h in Saudi Arabia; more relevant discussion in the following paragraphs concerns the codification of the law.

⁶⁹ Abu-Zaid P, *Fiqh Annoazil* (Beirut, Al-Risalah foundation, 1996), p.25. The issue of codifying Islamic law is strongly debated today in present-day Saudi Arabia. The main reasons for the opposition can be summarised as follows: Mandatory code will limit judges' scope to practise their interpretation of the primary sources which are, sometimes, different from their understanding. Also it may detrimentally affect the development of qualifying scholars of the level of *ijtihad*. Finally, rules of Islamic law have been sufficient to serve legal needs from the beginning of Islamic history until the present. Regarding this discussion it seems that the majority of those who are in favour of developing the law refer merely to the civil law, as the influence of the French civil law is widespread in Arab countries. However it can be suggested that following the system of common law would be the appropriate solution, so focusing on precedent as a main reference for the courts would create stability in court practices and reduce uncertainty in the law. See, for the opposition to codification: Abu-Zaid P, *op.cit.*, pp.57-100; Albasam A, *Taknin Al-Shari'ah Adraroh wa Mafasidoh*, (Makkah: Dar Athkafah, 1959); Al-Shathri A, *Taknin Al-Shari'ah Bain Atahlel wa Altahreem* (Riyadh, Dar Al-Fadilah, 2005), pp.14-23; Al-Fozan S, *Taknin Al-Shari'ah*, *Al-Jazirah Newspaper*, Issue: 11913 (11/5/2005), available online at: <http://search.al-jazirah.com.sa/2005jaz/may/11/rj2.htm>. For support for codifying Islamic law, see: Al-Qasim A, *Al-Islam wa Taknin Al-Shariah* (Cairo, Al-Madani Publications, 1966); Ibn-Humaid S, *Al-Jami' fi Fiqh Al-Noazil* (Riyadh: Al-Obaikan, 2005); Al-Obaikan A, *Al-Maqsood Bitaduin Al-Shari'ah* (Al-Riyadh Newspaper, issue: 13514, 24/6/2005), available online at: <http://www.alriyadh.com/2005/06/24/article74578.html>.

⁷⁰ See the high judicial committee's decision No. 3 in 5/7/1928 (1347/1/17), authorised by Royal Decree in 8/9/1928 (1347/3/24).

⁷¹ The two main textbook references were written by Al-Buhoti M (d. 1641): *Kashaf Al-Qina' 'an Matn Aliqna'* (Riyadh: Al-Nasir Al-Hadithah, 1982) and *Sharh Mountaha Al-iradat*, (Beirut: 'Alam Al-kutub, 1996); see Vogel F, *op.cit.*, p.94.

in addition to the *shari'ah* law, modern Saudi has enacted regulations⁷² for most commercial activities and their required procedures.⁷³ These acts reflect the ongoing development of commercial law in Saudi. New procedures on new bases are evolving to form modern commercial law in Saudi. A note on some commercial acts follows below, after which the sale contract is described in more detail as the subject of this thesis.

Saudi law differentiates between civil and commercial transactions in terms of the type of court and for some special rules which have been designed specifically for commercial transactions.⁷⁴ Therefore, the following regulations are designed to serve different parts of commercial activities:

- Commercial Court Law.⁷⁵
- Companies Law,⁷⁶ and its amendments.⁷⁷
- The Combat of Commercial Fraud Law.⁷⁸
- The Competition Law.⁷⁹
- Foreign Investment Law.⁸⁰

⁷² These codified regulations do not follow the above argument because the discussion is only related to codifying Sharia'h rules.

⁷³ Numerous regulations for commercial transactions have been established since 1930 and have been amended several times.

⁷⁴ Al-Jabr M, *Al-Qanon At-Tijary As-Saudi*, (Riyadh: self-published , 1996), pp.5-8. Islamic contract did not originally differentiate between commercial and non-commercial transactions; Foster N, (I)(4/2006), *R.P.A, op.cit.*, p.4.

⁷⁵ Issued by Royal Decree M/32 (1931), available at: <http://www.commerce.gov.sa/circular/default15-1.asp> (Arabic).

⁷⁶ Issued by Royal Decree M/6 (1965).

⁷⁷ It is available at: <http://www.commerce.gov.sa/circular/default10-1.asp> (Arabic).

⁷⁸ Royal Decree M/11 (1984) available at:

<http://www.commerce.gov.sa/circular/default23-1.asp> (Arabic).

⁷⁹ Royal Decree M/25 (2004) available at: <http://www.commerce.gov.sa/circular/default42-1.asp> (Arabic)

- Instalment sale Law.⁸¹

Regarding the rules concerning the sale of goods, as they are part of civil law, they have not been codified in a particular uniform act, as mentioned above. Instead, they have been dealt with under the rules of sale, which are instituted under the contract of sale chapters in the literature of Islamic jurisprudence.⁸²

The rules of contracts of sale in classical Islamic literature are divided into three main categories according to the state of the goods and whether or not they are present at the contractual time.⁸³

The main ordinary type of contract, is the sale contract which is designed to serve the sale of *Al-naqd*. Here the object of sale is exchanged for the price at the contractual time. The major discussion in contract law was conducted primarily to regulate this type of contract. If the goods are not present at the contractual time, the contract falls under the sale of *salam* (forward sale) whereby the payment is in advance for non-specific generic goods to be delivered at a future date by the seller, who carries out the duty to supply some unascertained goods to the buyer.⁸⁴

Another type of sale contract created for manufactured goods (*Istisna'*) where the contract calls for goods to be manufactured and also allows the price to be paid in the future.⁸⁵ This classification is based on the requirement of identifying the goods. In the *salam* and *Istisna'*

⁸⁰ Royal Decree M/1 (2000) available at: <http://www.mci.gov.sa/english/moci.aspx?Type=8&PageObjectId=742>, (English). For more detail about these regulations see Al-Jabr M, *op.cit.*, pp.18-26.

⁸¹ Royal Decree M/13 (2005) <http://www.commerce.gov.sa/circular/default45-1.asp>, (Arabic). For more details of these regulations, see Al-Jabr M, *op.cit.*, pp.18-26; Al-Gamidi A and Husni B, *Commercial Law* (Riyadh: Al-Shigri, 2007), pp.4-6, 16.

⁸² The structure of the chapter on contracts of sale starts with the formation of the contract, followed by the conditions for validity, stipulations in the contract, the options in the sale (the right to terminate the contract) the usury (*Riba*) and currency exchange (*Sarf*), and the forward sale (*Salam*). See Al-Hajawi S, (d. 1552), *Zad Al-Mstikna' fi Ekhtsar Al-Mkna* (Riyadh: Al-Roshd, 2002).

⁸³ El-Gamal M, *op.cit.*, p.66; Foster N, (II)(4/2007), *R.P.A*, *op.cit.*, p.6.

⁸⁴ See: the JLR Arts.174, 485-492; Al-'Ayashi F, *Albai' 'ala al-Sifah wa-Macathbut fi Al-Thimah* (Jeddah: Al-Ma'had Al-Islami Al-Buhoth, 2000), pp.23-3; Al-Mesry R, *Fiqh Al-Moamalat Al-Maliah*, (Damascus: Dar Al-Qalam, 2006), pp.168-70.

⁸⁵ Al-Salos A, *Maosoa'h Al-Gadaia Al-Fiqhiah Al-Moa'serah wa Al-Iqtasad Al-Islami* (Beirut: Moasasat Arraian, 2005), pp.816-43; Al-Mesry R, *op.cit.*, pp.71-37.

cases, contracts require for their validity, among other conditions, full descriptions as discussed in the obligation of conformity.⁸⁶ The most important reason for this division is that, according to some jurists in the early Islamic literature the *Salam* contract was permitted as an exception from the main principle of the object of sale being present at the contractual time and owned by the seller.⁸⁷ The *Istisna'* contract was not recognised in the early literature due to the lack of any textual guidelines from the primary sources, especially if the price or part of it is agreed to be at a late time such as after manufacturing the goods.⁸⁸ At present, there is consensus among jurists about the permissibility of all of these kinds of contracts.⁸⁹

This study focuses on the CISG's seller obligations and its counterpart in Saudi law. Therefore it is important for the purpose of facilitating the comparison and deciding whether or not they are compatible to follow the structure of the CISG's articles in the seller's obligations and their counterparts in the above named contracts in Saudi law.

From this discussion it can be concluded that Islamic law where the contract law is part of requires for applying any law that they are in harmony with the teaching of *shari'ah*. Having said that does not necessarily mean that the law is rigid in its nature. Since the law is not based on particular formal rules, and judges are given the power to practice *ijtihad* in their cases, this environment should encourage the appropriate development of the law. The evolution of commercial regulations in Saudi can be seen as part of the flexibility of Islamic law to adopt and

⁸⁶ See chapter three: 3.3.2.2.

⁸⁷ This contract is explicitly permitted by a prophetic tradition for some farming contracts, and some commentators extend this contract only to similar cases; Al-Bukhary, No. 2241.

⁸⁸ Al-Salos A, *op.cit.*, p.827.

⁸⁹ In *Salam* contract, see for example the decision No. 85 (9/2) in 1-6/4/1995 of International Islamic Fiqh Academy under the (OIC) (1996) 9 (1) *Journal of International Islamic Fiqh Academy*, p.371. For *Istisna'* contract, see the decision No. 65 (7/3) in 9-14/5/1992 of International Islamic Fiqh Academy under the (OIC) (1992) 7 (2) *J.I.I.F.A.*, p.223.

recognise contemporary trade. However, because sale contract law already occupied an important part of Islamic jurisprudence, Saudi law refers to the literature as a law for the contract. The following section provides a general picture of the nature of and approach to sale contracts in Islamic law.

1.3.2 Contract Law in Islamic jurisprudence

It has been seen above that Saudi Arabian Contract Law can be understood only in the context of the rules pertaining to contract law under *shari'ah*. The aim of the study in hand is to examine the extent to which Saudi and Islamic law have the flexibility to develop and reflect the needs of modern commerce, with specific reference to the CISG.

Clear demonstration of the approach of Islamic law is a prerequisite to facilitating potential compatibility between the CISG and Saudi law. Therefore, preparatory to addressing specific research questions concerning the seller's obligations, the necessary starting point is an examination of the relevant provisions of *shari'ah* law. By this means the common principles of contract law in Islamic jurisprudence may be brought together and highlighted.

This section of Part Two therefore addresses respectively a) Islamic doctrine regarding commercial law, b) general principles of Islamic contract law; and c) transactions prohibited by Islamic contract law.

1.3.2.2 Islamic doctrine regarding contract law

In terms of traditional Islamic doctrine, no special system for contract law was ever drawn up. When Islam came, the existing transactions were approved of by the *shari'ah*. Islam's role was confined to protecting the people's wealth from exploitation, and to tackling all things that

according to Islamic understanding might cause animosity or hatred in society, through providing restraints and conditions such as the prohibition of deception, *Gharar*,⁹⁰ usury and gambling; all of which are considered in Islam to be major causes of animosity and hatred between people.⁹¹ Thus it can be concluded that Islamic law deals only with some aspects of contract law and does not establish a complete substantive law of contract.⁹²

Transactional laws have a potential capability for flexibility and development within legitimate Islamic aims and restraints. Most acts of worships in Islam are purely acts expressing service to God, whether their justification can be clearly known or not, such as the reason for the differing numbers of units in prayers. On the other hand, knowing the justifications and reasons behind certain rulings in the field of financial transactions (contract law) is seen as essential, as it is the means for people to understand the decrees and the benefits they gain from them.

The prominent Islamic scholar Al-Shatibi said "The basic principle of the structure of worship for a person is for it to be done without looking at its meaning; on the other hand, the basic principle of transactions is for their meanings to be known."⁹³

Ibn Taymiyyah, another prominent scholar, said of the leader of one of the main Islamic schools: "His [Ahmed bin Hanbal] basic principle in the majority of contracts is to bear in mind the

⁹⁰ Risk (uncertainty and hazard).

⁹¹ Shaper M. *Al-Madkhal ila Fiqh al-Moamalat*, (Amman: Dar Annfais, 2004), pp.17-18. Some contemporary studies of Islamic law try to explain the positive Islamic attitude to commerce by suggesting that "the prophet's merchant before his mission, another the social and economic importance of trade in the Muslim Middle East ... yet another the involvement of jurists in trading activity" Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.3. These justifications are insufficient to explain the approach of Islamic law involved in almost all aspect of society. So, as mentioned above, the reason for the Islamic interest in commerce reflects the Islamic approach to organising society.

⁹² In Islamic law there are about 25 types of contracts including commercial and non-commercial contracts. See: Al-Zarqa M, '*Aqd Al-Bay*' (Damascus: Dar Al-Kalam, 1999), p.9-12; Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.4.

⁹³ Al-shatibi I, *Al-Muwaafaqaat fee Usool Ashari'ah*, (Beirut: Dar Al-Ma'irefah, 2004) vol.2, p.300.

general interest of people.”⁹⁴ In the Islamic concept, it is established that the real owner of money and property is Allah, and the role of mankind is to be as trustees for him.⁹⁵ Thus, contract law cannot be separated from faith and morality.⁹⁶ This approach implied the fundamental requirement of acting in good faith in contracts, as discussed below in the contract’s principles.

From an Islamic perspective, paid work and earning money through legitimate means is something praiseworthy. Moreover, developing the earth’s resources, earning money, and dispensing with the need to rely on other people are recommended by Islamic teaching. For example, in the Qur’an advice was given at the time of pilgrimage confirming that “There is no sin on you if you seek the Bounty of your Lord (during pilgrimage by trading).”⁹⁷ According to Ibn Abbas (a companion of the Prophet): “*Aukadh* and *majenah* were markets (for people who come for the pilgrimage in Makkah) in pre-Islamic times, and (when they embraced Islam) they feared committing sins if they carried on their business in the time of pilgrimage, so for this reason this verse was revealed.”⁹⁸ This verse shows that there should not be any contradiction between performing religious duties and being involved in trade. It may also be inferred that the approach of these verses is in favour of involvement in trading activities.

In the Prophetic traditions, there are many reports urging people to work and gain their livelihood. The prophet said: “There is no one who plants something and birds or people or

⁹⁴ Ibn Taymiyyah A, *Fataua*, vol.31, p.266.

⁹⁵ This role can be observed clearly when the Qur’an encourages people to give charity from Divine provision: “Believe in Allah and His Messenger and spend of that whereof He has made you trustees” (Qura’n, 57:7).

⁹⁶ Foster N (I)(4/2006), *R.P.A, op.cit.*, p.5. In one prophetic report it says: “May Allah have mercy on a man who is tolerant when he buys, when he sells and when he asks for payment” (Al-Bukhary, No. 2076).

⁹⁷ Qur’an, 2:198.

⁹⁸ Al-Bukhary: No. 1770.

animals eat from it, but he will have the reward of charity of it”⁹⁹ He also said: “If one of you were to tie together a bundle of firewood and carry it on his back and sell it, that would be better for him than asking a man who may give (something) or refuse to give.”¹⁰⁰ Commenting on these reports, the scholar Al Nawawi said: “It is a collective obligation to have crafts and trades and that which is necessary for livelihood.”¹⁰¹ Al Sherbeny said: “if people refrain from trades and crafts, they will be committing a sin and they are seeking to destroy themselves.”¹⁰²

In sum it can be said that even though the priority of Islamic teaching was mainly linked to religious activities, involvement in commerce is also acknowledged and highly recommended. In certain cases the emphasis on trade was made to encourage individuals not to rely on others for their financial support.

It can be inferred from this doctrine that legal activities which aim to facilitate sale contracts and secure transactions between parties, as the CISG does, should be given the same encouragement as well.

1.3.2.3 General principles of Islamic contract law

The presentation below of general principles and rules in Islamic contract law forms the core part of this section.

⁹⁹ Al-Bukhary: No. 2320.

¹⁰⁰ Al-Bukhary: No.1470; Muslim: No. 1042.

¹⁰¹ Al-Nawawi E, *Al-Majmo' Sharh Al-Mohathab*, (Riyadh: Maktabat Al-Irshad, n.d.)vol.4, p.213.

¹⁰² Shaper M, *op.cit.*, pp.25,106,109,204.

1.3.2.3.1 Freedom of contract

The basic principle of transactions is that they are fundamentally permissible and correct. This principle includes all types of contract and all terms and conditions needed in the contract.¹⁰³

There is nothing in the primary sources restricting contracts to a specific form or structure, which cannot be departed from. In other words, permissibility does not require proof, as in essence any transaction is permissible. However, in the case of a challenge to the norm of permissibility, evidence is required.¹⁰⁴ This is the view of the majority of jurisprudence scholars,¹⁰⁵ and is supported by many sources, including the Qur'an which said "whereas Allah has permitted trading and forbidden *riba* (usury)."¹⁰⁶ The word 'trading' refers to what may be termed as sale in any form, whether old or new, or what people might develop in the future, and it is impermissible to limit the meaning of general text without substantiation. The Qur'an also says following some prohibited transactions "... except it be a trade amongst you, by mutual consent."¹⁰⁷ This verse, having first prohibited the unjust acquisition of people's property, permits trade with mutual consent. Additionally, the Prophet said: "The Muslims are bound by their conditions, except for conditions which forbid something that is permitted or permit something that is forbidden."¹⁰⁸

On the other hand, there are some jurists in the early Islamic literature who argue that it is not permitted to include conditions in any given contract, except for specific types of conditions

¹⁰³ Arts.247-249 of JLR.

¹⁰⁴ This point is significant for the purpose of compatibility between Saudi law and the CISG, so in this thesis frequent reference is made to this principle.

¹⁰⁵ Ibn Al-Qayyim M, *I'alam Al-Moakiain* (Cairo: Assa'adh, 1985), vol.1, p.344; Abu Zuhrah M, pp.223-35.

¹⁰⁶ Qura'n, 2:275.

¹⁰⁷ Qura'n, 4:29.

¹⁰⁸ At-Tirmithi: No. 1352.

which were found in the Prophet's lifetime, and permitted by him.¹⁰⁹ For evidence they cite the prophetic saying: "what is wrong with those who stipulate conditions that are not in the book of Allah [Qur'an]? Whatever conditions are not in the Book of Allah are invalid, even if there are a hundred conditions, the decree and conditions of Allah are more deserving of being fulfilled."¹¹⁰

According to this opinion, any condition not approved of by the Qur'an and *Sunnah* is not permissible. However, it can be argued that the meaning of 'conditions' in the report was related a particular condition of that case which is contrary to Islamic teaching as the rest of the report shows. This concept can be deduced from the remainder of the saying "the decree and conditions of Allah are more deserving of being fulfilled," which is meaningless unless such conditions are contrary to Qur'an and *Sunnah*.¹¹¹ Ibn Taymiyyah highlighted this principle, saying "it is permissible to hold contracts with conditions, if they are to the benefit of the people, and do not contain what Allah and his messenger forbid; ... no one is allowed to make them forbidden."¹¹²

In the light of this discussion it is clear that the second view has no reliable basis. The above Prophetic saying cannot support their arguments and for that reason the view does not find favour with contemporary jurists.¹¹³

As far as freedom of contract is concerned, it should be noted that there is no fixed formula and framework which must be followed by the contracting parties. A contract can be concluded by

¹⁰⁹ Rayner S, *The Theory of Contracts in Islamic Law* (London: Graham and Trotman, 1991), pp.305-351. Al-Zuhayli W, *Al-Fiqh Al-Islami wa Adilatuh* (Beirut: Dar Al-Fikr, 1985), vol.4, p.476.

¹¹⁰ Al-Bukhary: No. 2561

¹¹¹ Al-'Imrany A, *Al-Aoqod Al-Maliah Al-Morakabah*, (Riyadh: Konos Ashbilia, 2006), p.69.

¹¹² Ibn Taymyya, A *Al-qua'd Al-Noraneeah*, (Bierut: Dar Al-Ma'rifah, 1979) p.104.

¹¹³ Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.10.

any means including writing,¹¹⁴ speaking, acting and handling. This is the view of the vast majority of jurists.¹¹⁵ Ibn Al-Qayyim affirmed that: “when the intention of the speaker is known by any indication, it should be accepted. As the purpose of the form of words is to represent the speaker’s intention, and as long as this is known by any means, it should be taken into account, whether by signal, writing, gesture, logical indication, context, or frequent habit.”¹¹⁶ This principle can be seen as one of the main tools for the compatibility of Saudi law with the CISG as this study has explained with respect to the seller obligations.

1.3.2.3.2 The principle of consent

Consent, or willingness, as seen above is another fundamental principle of contract law. Contract law is based on the mutual consent of the parties involved, and contracts cannot be valid without it. This is supported by the Qur’anic verse referred to above in the first principle “... except it be a trade amongst you by mutual consent,”¹¹⁷ The Qur’an also says “but if they (women), of their own good pleasure, remit any part of it to you (husbands), take it, and enjoy it without fear of any harm (as Allah has made it lawful).”¹¹⁸

From these texts it can be seen that property and money remain under the control of their owners without transfer from them to others except by mutual consent; this ownership right is equal for

¹¹⁴ Islamic law does encourage documenting the contract, as a way of protecting society from conflicts which may arise as result of denial or forgetfulness (Qur’an, 2:282). This is the longest verse in the Qur’an, known as the ‘debt verse’.

¹¹⁵ In contrast, however, another view is that contracts must be in words, unless it is for a minor deal which can be made by handling. Some views hold that spoken words should be in the past tense, because present or future formulae may express negotiation or promise only. The reason for this is precautionary against weakening the contract or making it ambiguous. Because these views have no ground in Islamic primary sources, the majority of jurists do not favour these restrictions. Al-’Alali p, *Al-Nnadreah ala’Mh Lla’Qod* (Riyadh: Dar Ashoaf, 2005), pp.208-231.

¹¹⁶ Ibn Al-Qayyim M, *op.cit.*, vol.1, p.218.

¹¹⁷ Qur’an 4:29.

¹¹⁸ Qur’an 4:4.

both men and women. In the *Sunnah*, the Prophet says: “sale is but by mutual consent,”¹¹⁹ and “Whoever does wrong to a *mu'aahad* (a non-Muslim who has a peace treaty with Muslims), or tries to put him down, or burdens him with more than he can bear, or takes something from him without his consent, I will be his opponent on the Day of Resurrection.”¹²⁰ Al-Qurtobi said “People’s possessions are prohibited (to be taken) and nothing should be removed from them unless there is correct legal evidence.”¹²¹ He also added: “Non-Muslims’ possessions are protected the same as Muslims’.”¹²²

1.3.2.3.3 Obligation of fulfilling contracts and vows

Islamic law emphasises the fulfilment and respect of vows for the sanctity of contractual obligations.¹²³ Fulfilling a covenant is described as one of the characteristics of a believer,¹²⁴ and to break promises as characteristic of the hypocrite; as described by a prophetic report.¹²⁵

Al-Tahir ibn Ashour said “the reason for making contracts obligatory is to avoid their being broken, to obtain as a divine right the purpose of *shari'ah*, which is to protect society from disputes.”¹²⁶ Fulfilment of the duties of contract is imposed by religion before the judiciary makes it binding.¹²⁷ So it is a personal sin in Islam not to adhere to what was agreed upon. Furthermore, in an important prophetic report it is said that “The seller and the buyer have the

¹¹⁹ Ibn Majah: No.2185

¹²⁰ Abu Daood: No.3052.

¹²¹ Al-Qurtobi, *Al-Jami' Al-Ahkam Al-Qura'n*, (Riyadh: Dar 'Alam Al-kutub, 2003), vol.3, p.170.

¹²² *Ibid.*, vol.5, p.377.

¹²³ The Qur'an says “O you who believe! Fulfil (all) contracts,” (5:1); Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.4; also see Qur'an 17:34.

¹²⁴ Qur'an 23:8.

¹²⁵ Al-Bukhary: No.34; Muslim: No.58.

¹²⁶ Ibn Ashour A, *Maqased al-Sharia'h*, (Amman: Dar Al-Nafaes, 2001) p.148.

¹²⁷ Qotah A, *Al-Qua'd wa Dauapt Al-Fiqhiah Al-Qarafiah Zomrat At-Tamlikat Al-Maliah*. (Beirut: Dar Al-Bashair Al-Islamiah), vol.2, p.531.

right to keep or return goods as long as they have not parted or till they part.”¹²⁸ This report means the same as the civil law principle *pacta sunt servanda*.¹²⁹

Among the issues confirming the importance of keeping contracts is that:

- If there is a dispute between the parties about the validity of their contract, the burden of proof is the duty of the party who claims invalidity, since the main principle of contracts is to be valid and correct.¹³⁰
- If the contract includes some part which is not permissible (e.g. risk/*gharar*), invalidity applies only to that part, not to the entire contract.¹³¹
- If a delivery is involved in an invalid contract, it is treated as a valid contract, and there is no excuse for any party to refuse to carry out the contract’s obligations.¹³²

Some contracts according to their nature are not compulsory, such as agency contracts, trusts, donation contracts and company contracts, as they do not depend on financial exchange.¹³³

In the sale contract, the right to avoid the contract is provided only under the rules of *khiyarat* (options); a discussion of these options is made in chapter five.¹³⁴

¹²⁸ Al-Bukhary: No.1973; Muslim: No.1532.

¹²⁹ Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.4.

¹³⁰ Al-nnadoy A, *Jamharat Al-Qauaid Al-Fiqhiah fee Al-Moa'mlat Al-Malih* (Riyadh: Al-Rajehi Company, 2000), vol.1, p.335.

¹³¹ Deah A, *Al-Qua'd wa-liduapit Al-Fiqhiah LiAhkam Al-Mabea*, (Amman: Dar An-Nafais, 2005), pp.88,97. The validity of the rest of the contract is subject to whether or not the contract can be divided. See more detail in section: 5.3.2.2.6.

¹³² Al-Husain A, *Al-Qua'd wa Adaoapit Al-Fiqhiah Ilmo'amlat Al-Maliah I'nd Ibn Taymiyyah* (Cairo: Dar At-Taseel, 2002), vol.2, pp.219,224,247.

¹³³ Abu Zuhrah M, *Al-Milkieah wa Nadareeat ala'Qed fee Al-Sharia'h Al-Islamiah*, (Cairo: Dar al-Fikr Al-Arabi, 2002), p.79.

¹³⁴ See section: 5.3.2.2.

1.3.2.3.4 A consideration of 'purposes' in Contract law.

In contract law, the role of words is to express the intention of the parties regarding their contract. When the purpose is thus made clear, attention should be paid to it, and the outcome of the contract is geared to it. As the prophetic report says: "Actions are but by intentions" ¹³⁵ Ibn Al-Qayyim showed the value of this rule: "The *shari'ah* principle, which cannot be replaced, is that purposes and intentions are considered in transactions as much as they are considered in worship."¹³⁶ It is a legal maxim that in contracts attention is due to the realities and meanings, not to forms and words. This principle nullifies the use of any kind of trick or twist to defeat what is right or to shirk duty.¹³⁷

The real meaning can be known by the words attached to the purposes of the contract, for example, if a person says his car is a gift for someone for £1000, the contract will be governed under the rules of sale contract, not of gift contract. Intention of the parties can also be revealed by the accompanying conditions of the contract.¹³⁸

1.3.2.3.5 The consideration of custom in contract law.

Custom is an important pointer to meaning in a contract. Custom may be defined as an accepted way of behaving or of doing things with logical sense in a society over a period of time.¹³⁹ In Islamic law, custom is a rule which should be referred to in many practical cases. For example, in many Qur'anic verses the precise rights of wife and husband can be identified by custom.¹⁴⁰ In

¹³⁵ Al-Bukhary: No.1; Muslim: No. 1907.

¹³⁶ Al-Husain A, *op.cit.*, vol.1, p.366.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*, p.353.

¹³⁹ Shaper M, *op.cit.*, p.198.

¹⁴⁰ Qura'n, 2:228, 233.

another case, the amount of the wage due to the orphan's guardians refers to reasonableness (according to his labour).¹⁴¹

The role of custom can also be demonstrated by means of interpreting words and names in Islamic jurisprudence. In the practice of Islamic contract law, there are some legal maxims based on custom, for example "the customary contract is the same as the contract by words", "usage among traders is as valid as what is prescribed", and "everything that is involved in the name of the commodity by custom is treated as part of it in law."¹⁴²

This principle provides a solid basis for the link between Islamic law and the reality of society. Regarding the purpose of compatibility of Saudi law with the CISG, custom should, as this study shows in several places, play an important role to bridge the gap between Saudi law and the development of international trade and its customs, which the CISG becomes part of.

1.3.2.3.7 Equity and equality

In the Qur'an and *Sunnah* there are many texts confirming this principle.¹⁴³ Islamic contract law requires the obligation that each party be treated justly under any given contract.¹⁴⁴ Although consent (willingness) is the main condition which contracts depend on, consent alone is not enough. Islamic contract law also emphasises that each party be treated in balance of counter value under the contract.¹⁴⁵ So, if a contract entails oppression, then it will be impermissible; as

¹⁴¹ Qura'n, 4:6.

¹⁴² Al-nnadoy A, *op.cit.*, vol.1, p.266.

¹⁴³ The Qura'n: (16: 90) says "Indeed, Allah orders justice and good conduct." ; also in another vesre: (5: 8) it says "O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety; and fear Allah. Verily, Allah is well-acquainted with what you do;"

¹⁴⁴ Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.5.

¹⁴⁵ *Ibid*, p.5; Islam M, 'Dissolution of Contract in Islamic Law' (1998) 13 *Arab L.Q*, p.341. There are differences between schools of thought in applying the balance. According Hanafis and shafi'is the application is limit to the

the Prophet said: “There shall be no unfair loss or the causing of such loss.”¹⁴⁶ These words are considered a legal maxim for many provisions in the jurisprudence of financial transactions.¹⁴⁷ Due to the fact that there is no clear guideline for the use of this principle, the practice of it may result in some uncertainty; Ibn Taymiyyah therefore rightly called for the moderate application of this principle affirming that “The basic principle of this is that Islamic law does not deprive people of any transaction that they need except where evidence against it is found in the Qur’an or the *Sunnah*.”¹⁴⁸

1.3.2.3.8 Observance of good faith

There is no distinction between ethical values and the law. Parties to a contract are required to deal honestly; as the Prophet said: “... if both the parties (buyer and seller) spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transaction, and if they told lies or hid something, then the blessings of their transaction would be lost.”¹⁴⁹

All the above rules deal with issues relevant to morality. Therefore it is not surprising that no explicitly enunciated principle of good faith was given; Foster explained this concept in Islamic law as that “all principles and rules discussed so far are the material to be compared with Western ‘good faith’.”¹⁵⁰

case of fraudulent imputation whereas Maliki and Hanbali include innocent or inexperienced victims of unbalanced contract. Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.6; Rayner S, *op.cit.*, p.93.

¹⁴⁶ Narrated by Ibn Majah, No.2340 and Ahmed, No.22843.

¹⁴⁷ Al-husain A, *op.cit.*, vol.2 p.175.

¹⁴⁸ *Ibid*, vol,2 p182.

¹⁴⁹ Narrated by Abu Daood: No.3383.

¹⁵⁰ Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.14.

Good faith is understood to guard against trickery and falsification, which defeats what is right or uses what is prohibited.¹⁵¹ For instance, when discussing the seller's and buyer's right of cancellation as long as they are in the session meeting for the sale; the Prophet said that: "... neither of them is allowed to leave the other in fear of asking for cancellation."¹⁵² Ibn Taymiyyah stressed that "the prohibition of trickery and falsification has been substantiated by the Qur'an, *Sunnah*, scholars' consensus, and the general foundations of the faith and Islam."¹⁵³ Yet the broad meaning of good faith may lead to some uncertainty, especially in commercial transactions¹⁵⁴ where "economic efficiency has to be viewed in the context of religious values,"¹⁵⁵ as suggested by Foster. However, despite its problematic conception in Saudi law, the *Khiyarat* (options) in contracts can provide guidelines for the framework of the principle of good faith. As a general rule, parties cannot avoid the contract unless they are entitled to one of these options. Consequently, if the claim of bad faith has no basis in these options, the contract cannot be avoided.¹⁵⁶ In addition the concept of good faith should be understood within the above discussion regarding the doctrine of Islamic law in contracts, as their rules base on reasons and the benefit of people.

¹⁵¹ See chap.1 fn: 180.

¹⁵² Ahmed: No.6721. For more detail in this rule see section: 5.3.2.2.1.

¹⁵³ Al-Husain A, *op.cit.*, vol.1, p.404; vol.2, p.191.

¹⁵⁴ In Western tradition, where the concept of 'good faith' originated, certainty is given primarily over good faith for the benefit of economic efficiency; however, in civilian matters the law is more influenced by concepts of fairness. Foster N, (II), *R.P.A, op.cit.*, p.14. It should be noted here that common law is different from the civil law in the concept of good faith. In civil law in Germany good faith was codified, whereas in English law (common law) no general principle of good faith was given; however the law is familiar with concepts such as reasonableness, fairness and equity. See Hofmann N, *op.cit.* (2010) 22 *P.I.L.R* 145, pp.159-65. In this regard one may, very roughly, picture the three traditions as occupying different points on the scale of good faith, with Islamic law at one end, with the maximum requirement of good faith in the contract, civilian law somewhere in the middle, and common law at the other end.

¹⁵⁵ Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.14.

¹⁵⁶ See section: 5.3.2.2.

1.3.2.4 Prohibited transactions in Islamic financial jurisprudence

As stated above, certain transactions are prohibited in Islamic financial jurisprudence. As Ibn Taymiyyah stated, “generally the aim of prohibiting transactions in the Qur’an and the *Sunnah* is to achieve justice and prevent oppression, whether the oppression is major or minor, such as unjustly appropriating the property of others, usury and gambling.”¹⁵⁷ The other justification for prohibition is to protect society from enmity and hatred¹⁵⁸ according to the Islamic approach to balancing the scale of justice, peace and oppression.

These general approaches of Islamic law can be a point of convergence between many of the laws of different countries, including the CISG. Although the application of those values at ground level differs from one system to another, agreement on principles and values that govern the financial system is an important step in achieving harmony between laws.

Transactions are classified as prohibited on grounds of one of three reasons:

- I. Due to usury.
- II. Due to *Al-gharar* (risk).
- III. Due to fraud or deception.

1.3.2.4.1 Usury

In the interpretation of Quranic verses about usury,¹⁵⁹ the prominent jurist Qatadah described usury: “In pre-Islamic times people used to sell goods up to a certain time, and when this time

¹⁵⁷ Al-Husain A, *op.cit.*, vol.1, p.162.

¹⁵⁸ Qura’n, 5:91; chap.1 fn: 172, below.

¹⁵⁹ Qur’an, 2:275; 2:278.

was due, if the buyer did not have money the seller would give him another period of time with extra charge.”¹⁶⁰

There are two major kinds of usury related to the exchange in specific types of items:¹⁶¹ (i) *Riba An-Nasî'a* (delay) where the price of the object of sale is postponed. Regarding interest on loaned money there is a consensus among jurists about the prohibition of interest; and (ii) *Riba Al-Fadl*, i.e. taking a superior item of specific types of goods by giving more of the same kind of goods of inferior quality, e.g., dates of superior quality for dates of inferior quality in great amounts.¹⁶²

It is clear that Islamic law prevents the investment of money for money. Therefore, in order to avoid the above prohibited transactions, Islamic banks and investors resort to some alternative transactions where the bank participates in the transaction not only by its money. An example of one of the most frequently used alternatives is *Al-Mudarabah*: joint speculation. The idea of this contract is based on a partnership between three parties: the owner of funds, the bank, and the owner of investment projects (investor). The bank gives the depositor's money to the investor to invest the money, the profits to be distributed according to the agreement between the parties. If there is loss, every party loses what they have contributed. (All parties share the profits and losses).¹⁶³

¹⁶⁰ See: Al-Salos A, *op.cit.*, p.79.

¹⁶¹ The items fall into one of two categories: one for means of payment for goods, that is to say, currency. The other is for food, including specifically wheat, barley, dates and salt, but also all kinds of nourishment for people, provided that the exchange of these food commodities is by either dry measure, or weight (and not number). See: Muslim: No. 4068; Al-Salos A, *op.cit.*, p.82; Deah A, *op.cit.*, pp.307-25.

¹⁶² Al-Mesry R, *op.cit.*, pp.12-3; Al-Salos A, *op.cit.*, p.82.

¹⁶³ See Shaper M, *op.cit.*, p.347; Al-Silmi A, *Al-Gish wa Athruh fee ala'Qud* (Riyadh: Konoze Eshbelia, 2004) vol.1, pp.307,328.

Regarding delay in the payment of instalments, methods for solving this problem under Islamic law is limited to a few solutions such as strengthening the debt by giving a pledge at the time of signing the contract, to be sued by the bank in the event of a delay in payment. Another solution is to include a condition in the contract that in the event of delay in the payment of some of the debtor's instalments the rest of the instalment will be due immediately. In the case of work contract or supply contract it is permitted by the Board of Senior Scholars of Saudi Arabia¹⁶⁴ to stipulate what is so called *shart jazaiy* (penalty clause), which means the contractor has to pay extra in case of failing to finish his work on the time.¹⁶⁵ However, delay in the debtor's payment of instalments is not included in this penalty clause. As indicated above, this is impermissible, since a penalty increase would be the result of a new exchange between money and money.¹⁶⁶

Penalty clauses can be seen as an important point to bring Saudi law closer to the concept of the provision of interest in the CISG Art.78 which is known as the main obstacle between the CISG and Islamic law.¹⁶⁷

1.3.2.4.2 Gharar¹⁶⁸

Gharar refers to something of an unknown consequence, neither its occurrence nor its actuality or quantity can be foreseen.¹⁶⁹ *Gharar* can be present in the format of a contract itself, such as

¹⁶⁴ The Board of Senior Scholars is the top official religious authority in Saudi Arabia. It is comprised of thirty to forty of the country's most senior scholars, formed in 1971 to provide *fatwas* (Islamic rulings) on matters either submitted to it by the government or otherwise requiring the establishment of general rules. See Ansary A, *A Brief Overview of the Saudi Arabian Legal System*, published online (June, 2008) by GobleLex at: http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm#_Toc200894564

¹⁶⁵ See Decision No.25 in 3/9/1974 of the Board of Senior Scholars of Saudi Arabia; decision No.133 (14/7) in 11-16/2/2003 of International Islamic Fiqh Academy under OIC (2003) 14(1) *J.I.I.F.A*; Abu Suliman A, *Fiqh Al-Moa'amalat Al-Hadithah*, (Dammam: Dar Ibn Al-Jausi, 2005), pp.574,598.

¹⁶⁶ See the decision of Islamic Fiqh Council under the Muslim World League in its 11th round in 19-26/2/1989.

¹⁶⁷ Twibel T, 'Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) under Shari'a Law: Will Article 78 of the CISG be enforced when the forum is an Islamic state?' (1997) 9 *International Legal Perspectives*, pp.25-92.

¹⁶⁸ There is no exact meaning in English for this word, words of a similar semantic meaning include risk, uncertainty and hazard.

uncertainty in identifying which goods have been agreed upon, or the formula is not definite in the sale. *Gharar* can also be a result of uncertainty concerning the object of sale involved in a contract, such as selling an object that cannot be delivered or does not belong to the seller.¹⁷⁰ In the Prophet's tradition there are specific prohibitions regarding this kind of sale.¹⁷¹ In addition, some specific contracts are forbidden on grounds of *gharar* being involved. The following are examples:

Al-ma'iser/al-gemar (games of hazard/gambling): the prohibition of gambling is written in the Qur'an.¹⁷² Gambling contains *gharar* hazard because the gambler deals with an unknown consequence.¹⁷³

Sale of commodities not belonging to the seller: the Prophet said "Do not sell what you do not possess,"¹⁷⁴ as the seller might not be able to deliver the commodity, which is a kind of risk in this contract.¹⁷⁵

To address the fact that varying degrees of risk can be found in many contracts and in some cases cannot be avoided, Islamic jurists identify standards of risk which may invalidate a contract:

- The *gharar* is to be in the main content of the contract, not in a subsidiary part.¹⁷⁶
- If this kind of risk is not required for public need and is not inevitable. Conversely, if there is public need, and the risk still cannot be avoided, then the risk is permissible.¹⁷⁷

¹⁶⁹ Al-Husain A, *op.cit.*, vol.1, p.161; Al-Salos A, *op.cit.*, pp.172-3.

¹⁷⁰ Deah A, *op.cit.*, p.120,186.

¹⁷¹ Muslim: No.3874.

¹⁷² See Qur'an, 5:91: "*Shaitan* (Satan) wants only to excite enmity and hatred between you with intoxicants (alcoholic drinks) and gambling."

¹⁷³ See Shaper M, *op.cit.*, p.21.

¹⁷⁴ Narrated by Al-Tirmithi, No.1232.

¹⁷⁵ See Deah A, *op.cit.*, pp.163-4.

¹⁷⁶ See Al-Mesry R, *op.cit.*, p.140.

- *Gharar* is prohibited where it could lead to dispute in similar circumstances.¹⁷⁸

1.3.2.4.3 Fraud (deception)

Showing the contract in a way which misrepresents its reality or conceals a feature which, if the other party was aware of, would cause them to reject the proposed contract is prohibited deception.¹⁷⁹ The prohibition of fraud in the Islamic texts is referred to in general and in some specific types of contracts.¹⁸⁰ Some transactions are also specifically prohibited because of the involvement of fraud, including the following:

Al-mussrah (withholding milk): This kind of contract applies to the sale of animals, when the seller deliberately keeps the milk in the animal's udder by not milking for a number of days, to create the expectation that the animal gives large quantities of milk. The Prophet said: "Do not hold the milk of camels and sheep, and the buyer of such an animal has the right within three days to either accept the contract or to return that animal for a refund, adding a dry measure of dates as compensation of the milk which has been used by the buyer."¹⁸¹

Talaqi Arrkpan (going to meet travellers): this type of sale occurs when the dealer in the market goes to meet a trader coming from the country outside to buy his goods before his arrival at the

¹⁷⁷ *Ibid.*, p.141.

¹⁷⁸ See Deah A, *op.cit.*, p.187.

¹⁷⁹ See Al-Silmi A, vol.1, p.33.

¹⁸⁰ Qur'an, 7:85; In the tradition, the prophet passed by a pile of food and put his hand into it, and his fingers touched something wet. He said, "What is this, O seller of the food?" The man said "It got rained on, O Messenger of Allaah." He replied, "Why did you not put it (the wet part) on top of the pile so that the people could see it? He who deceives does not belong to me," narrated by Muslim: No.102.

¹⁸¹ Al-Bukhary, No.2148; Muslim, No.151,1524; ; see also Al-'Umary M, *Ighatht Aljumo' betarjehat Ibn 'Uthaymeen fi Albeo'* (Dammam: Dar ibn Aljawzi, 2006), p.184.

market. The Prophet prohibited this transaction, and allows the seller to break the contract when he arrives at the market.¹⁸²

From the above examination of the Islamic approach regarding contracts it can be concluded that the intervention of the Islamic primary sources in contract is limited to include the general concept of common rules of morality in contracts. The principles of freedom and consent are the promising grounds for seeking the compatibility between the CISG and Saudi law. With regard to the prohibited transactions (*riba*, *gharar* and deception) reasons for their prohibition were drawn clearly to some understandable purposes which are essentially to promoting justice and protecting the society from animosity. Therefore the comparison between the CISG and Saudi law should not be limited to individual prohibited cases without looking at the reason behind their prohibitions. Considering the reasons of prohibitions would play a significant role in cases where there is no clear explicit rule for banning particular transactions

¹⁸² Al-Bukhary, No.2158; Muslim, No.1521. See also section: 5.3.2.2.3: the example of price hiking (*Alnajash*) in the option of sale at higher price.

1.4 THE POTENTIAL COMPATIBILITY OF THE CISG WITH SAUDI LAW

Even though the sources of legislation in the CISG and Saudi systems differ, this does not necessarily mean that the laws themselves will be different. However, from the introduction to Saudi law in this chapter one may note that its concept of law differs from that of the contemporary western environment where the CISG was generated.¹⁸³ Law in western societies tends to comprise publicly known, formal, objective and compulsory rules in the form of published legislation and the decisions of courts. Whereas Saudi law is not codified in the same way because the Islamic literature is its main source. The only form similar to western concepts is a rule which has been stated clearly and directly in a Qura'nic verse or in an authentic prophetic report.¹⁸⁴ An example of this is the prohibition of usury in contracts, which is generally and widely known to be applicable and binding. The impact of this difference between Saudi law and western systems plays a significant role in comparing them. Not having formal law, the possibility of introducing new rules or customs can be much easier, on the one hand. On the other hand, this concept of Saudi law provides a vital guideline for what can be accepted in and compatible with Saudi law. Thus, proving that the CISG does not contradict the clear meaning of the Qur'an or authentic prophetic reports would be the major task, and the first step in persuading Saudi Arabia to ratify the convention.

The purpose of this section is to show the potential for harmonisation between the two systems, in terms of their approaches to and principles in sale contracts in general and the seller's obligations in particular; and to indicate general points of potential conflict between them.

¹⁸³ Barnes W, 'Contemplating a Civil Law Paradigm for a Future International Commercial Code' (2005) 65 *Louisiana Law Review* 677-774.

¹⁸⁴ These rules fall under the third source of Islamic law, *Ijma'* (consensus). See section: 1.3.1.1.

Details of the CISG's articles are discussed later in the main body of the thesis, the general similarities can be highlighted as follows

1.4.1 Potential capability of freedom of contract in Saudi Law

According to the basic principle in Islamic law that contracts are permissible, which is upheld by the majority of Islamic jurists, it is evident that the CISG cannot be prohibited on the grounds that it did not originate from Islamic law or that its provisions do not exist in Islamic law. In addition, the case for freedom of contract can be supported by the fact that in Islamic law there is no requirement for a contract to be in a specific form or to contain a specific formula. Instead the main concern in Islamic contracts is to protect society according to the logical sense of the Islamic perspective. This principle is crucial for the purposes of narrowing the divide between Islamic law and the CISG. It gives scope for individual provisions to be considered, rather than rejecting the Convention in its entirety.

1.4.2 Similarity in aims

Examination of the CISG and Saudi law shows that the main consideration in both is to reduce conflict and to protect the rights of merchants. For example, the aims of UNCITRAL, which the CISG is a branch of, include the "promotion of friendly relations," and "the maintenance of peace and security."¹⁸⁵ In addition, one reason for unifying international contract law is to obtain a balance between parties and to prevent damage to the property of others.¹⁸⁶ In Saudi law these aims are considered to be the main reason for the existence of the law. This can be seen in the

¹⁸⁵ See chap1, fn 15.

¹⁸⁶ *Ibid.*

reasons for prohibiting certain kinds of transactions, the emphasis on justice in trade and the encouragement of parties to document their contracts.

1.4.3 Similarity in principles

The general principles of both systems reveal that they are similar in many areas, as in the following:

- Observing good faith. The CISG requires the good faith. Although Islamic law has no express reference to good faith, it urges the observance of similar concepts in dealings (fairness and honesty), and forbids parties committing trickery and falsification in their transactions. The required degree of this principle is not clear in either system. However in the CISG it is a very restrictive principle (for interpretation only), which is different from Saudi law where priority in contracts is given to good faith over economic efficiency. This may raise the question of certainty in Saudi contract law, since excessive resort to this principle may reduce predictability. Although certainty is the principle of prohibiting *gharar*, and the practice of good faith has to be derived from the *Khiyarat* (options)¹⁸⁷, it is difficult to decide the extent to which the rule of good faith is applied in Saudi law. In any case this matter should not affect the compatibility of the systems since both recognise its standard conception.
- The objective standard in the CISG refers to for the meaning of what the parties have agreed upon, in the event of conflict between them. In Islamic contract law the principle of considering the purposes of the law rather than the words used is similar. In both laws an objective standard is recognised.

¹⁸⁷ See section: 5.3.2.2.

- Party autonomy in the CISG is clearly stipulated, and therefore the party's consent is an essential part of the convention. The equivalent rule in Islamic law is the principle of mutual consent, which is treated as the main condition for the validity of contracts.
- Upholding contracts: in both laws, there is emphasis on fulfilling contracts and keeping to them as far as possible; there are restrictive rules on both sides concerning avoidance.
- Observing usage and practice: the CISG considers the parties' customs and trade usage as part of their contract. The same consideration has also been given to customs in Islamic law.

1.4.4 General dissimilarities between the CISG and Saudi Law:

Considering the effect of Islamic prohibited transactions on the CISG, The previous section listed the main reasons for prohibited transactions under three categories. The second and third categories (*gharar* and fraud) are generally compatible with the CISG, as the convention aims to protect international contracts from these two prohibited transactions. However, there may still be concern about potential conflict between the CISG and Saudi law arising from parts of the CISG which are outside the scope of this study, such as in particular the provision of Art.78 regulating interest in contracts. It is suggested here that careful consideration should be given to what Islamic banking regulations can afford in cases where banking interest is dealt with in a way compatible with Islamic principle. It should also be borne in mind that, given the wide range of similarities revealed in this study, one single incompatibility should not preclude taking advantage of the major benefits of the CISG. A possible solution within the application of the CISG can be suggested for Saudi judges who cannot grant the interest remedy under *shari'ah* courts. This is that although Art.78, entitles the aggrieved party to interest, it does not specify its rate. As a general rule, in the absence of the general principles on which the CISG is based,

Art.7(2) refers to the applicable law.¹⁸⁸ In this regard, if Saudi law is applicable and the rate of interest is zero, judges will have no difficulty in applying Art.78 since there no reward will be given.

¹⁸⁸ Many courts refer to the national rate. See Gotanda J, 'When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates under Article 78 CISG' (1/2009)13 *V.J.I.C.L.A.*, p.231 where the author suggested a different approach. In U.S.: District Court, Kansas, (28/4/2008), No. 03-4165-JAR, available at: <http://cisgw3.law.pace.edu/cases/080428u1.html>, the Court decided to apply the federal rate on the ground that the matter of the rate of interest is not resolved by the CISG; Duhl G, (2009) 64 *The Business Lawyer*, *op.cit.*, p.1291-2.

CHAPTER TWO: SELLER OBLIGATION OF DELIVERY UNDER THE CISG AND SAUDI LAW

2.1 INTRODUCTION

As demonstrated in the introductory chapter, the question of compatibility between the CISG and Saudi law is the main concern of this thesis; the purpose of which is to examine whether or not the CISG can be an acceptable alternative solution, under Saudi law, for the seller's obligations in international sale contracts. This chapter discusses the obligation of delivery in both sets of laws taking into consideration the expectation of the parties involved.

When the contract of sale of goods has been concluded, the exchange between the buyer and the seller is the subject matter of the contract. This exchange involves several obligations on both parties. While the buyer is bound to pay the price of the goods as the main duty, the seller must deliver the goods to the buyer. The fulfilment of these general duties has to meet the expectations of both, and although this chapter is specifically concerned with the seller's obligations, the buyer's expectations about the delivery of the goods may be determined by the terms of the parties' agreement. However, if the parties fail to set particular conditions for the terms of delivery and there is no relevant custom between them or common usage in their kind of trade, the applicable law will apply to determine what the buyer should expect in order to receive the delivered goods. The function of the law is to ensure the safe transfer of goods to the buyer; thus, it requires rules on where the goods have to be placed and whether or not the seller has to take positive action to perform the delivery. Determining the time of delivery is an important practical part of the transaction. The law should also play an important role in identifying the time of transferring the risk related to the goods. Besides this, rules for transferring the title and the

documents relating to the goods are significant in allowing the buyer to have free disposal of the goods.

As this study considers the CISG and Saudi Law, it should be noted that these legal systems were generated in different contexts and have significantly different backgrounds. Whereas the CISG was developed in an environment of civil and common law, Saudi contract law has been derived from an Islamic law. It must be borne in mind that Saudi contract law developed within the forms of Islamic law which took shape across many centuries, whereas the CISG was devised during the modern trade era over the last few decades in order to meet the needs for international sale contracts. The impact of this historical gap between the two systems is clearly significant on comparison. An important consequence is that a prominent role should be given to classical Islamic jurisprudence in this comparison with the recent development of the CISG. Whereas the more recently updated examination of the CISG is more important for reflecting the development of its application, seeking precedents in classical jurisprudence may be the key to justifying the compatibility of Saudi law with the CISG.¹

As mentioned before, Saudi law is regulated by different structures, and there is no particular section dealing with delivery.² These differences will inevitably be reflected in the way each system deals with the rules and provisions of delivery. The buyer's expectations for delivery under the CISG may differ in many ways from the corresponding ones under Saudi law because of their nature and origin.

¹ Although Islamic law as discussed above permits all kind of contracts, jurists "are generally reluctant to declare that a contemporary financial practice is permissible under Islamic law" as stated by El-Gamal M, *op.cit.*, p.64; See sections: 1.3.1.1, and 1.3.2.3.1.

² See chap.1, fn:82.

The question of the concept of delivery under the CISG and Saudi law has to be investigated in order to develop a common theoretical framework of this obligation. Even though no express definition of delivery is provided in the CISG, the concept of delivery is implied by the rules provided in the articles concerning delivery. Understanding the general concepts of delivery under each system may then facilitate their comparison. The meaning of the concept of delivery can be inferred from the practical function of delivery according to the laws; this may lead to the question of the position of each law towards actual and constructive delivery and whether or not the seller can fulfil his duty without taking any positive action.

Discussing the rules of the seller's duty of delivery should consider expectations of the buyer under both the CISG and Saudi law. For example, if the parties to a contract conclude their contract within the confines of Saudi Arabia, their expectation of delivery will not include any rules for shipping or the delivery of documents. This is normally required in international contracts; thus the expectation of the place of delivery will be limited to a few places. Whereas if the seller is in the UK and the buyer in Saudi Arabia the expectation of the latter regarding the place of delivery becomes more controversial if the parties fail to identify it, or if the sale includes the shipment of the goods. Therefore the CISG was designed to respond to the different types of places which might be the lawful locations for delivery, such as the seller's place of business, the buyer's place of business, on board the ship, or at the ports of shipping or destination. However, regarding the place of delivery, under Islamic law no attention has been given to delivery across the borders and the involvement of shipping. Consequently Saudi law has failed to provide rules for the delivery of the related documentation for the goods, which is an essential part of delivery in the CISG and modern trade in general.

As for the buyer's expectation regarding time of delivery, and differences in the characteristic of the systems, then these should also be considered. For instance, in international trade the buyer has to make many arrangements to take delivery, and, any delay in the transaction may result in significant damage for him. Therefore the CISG contains a substantial number of provisions concerning time of delivery, whereas in Saudi law the rules for buyer's expectation regarding delivery time are not regulated in detail to cover all circumstances. This law was generated in the early stages of Islamic history prior to the development of contemporary international trade.

Despite the difficulty in comparing the CISG and Saudi law due to their origins and differences concerning the parties' expectations, this does not necessarily lead to the conclusion that these laws are incompatible with each other, so long as their approach does not substantially differ, and the functions of the relevant rules can be similar in their results. Therefore, this chapter examines in detail the rules of delivery under the CISG and Saudi law as well as their general approaches and considers the consequences of any differences found between them.

The following sections discuss the CISG and Saudi law to identify the approaches taken by each to the obligations and rules of delivery focusing on place and time, and the transfer of risk, title, and documents of the goods under each set of statutory regulations to show how the obligation of delivery is dealt with and what the buyer should expect from the seller under each system. The conclusions arising from this examination should indicate how Saudi traders and decision makers could consider the CISG as their preferred choice for international contracts.

2.2 PART ONE: THE SELLER'S OBLIGATION OF DELIVERY UNDER THE CISG

2.2.1 Introduction

Regarding the seller's obligations of delivery, The CISG provides chapter II in its third part.

Art.30 of the CISG was designed as an introduction to the essential obligations of the seller. These are summarised as: delivery of goods, handing over any documents relating to them and transfer of property in the goods. The obligation of conformity is not made explicitly in this article; however, its concept is implied by the requirement of this obligation: "as required by the contract and this convention".

These obligations in Art.30 are discussed in greater detail in the CISG as follows: Arts.31 to 34 provide the seller's duty in delivering the goods and handing over the documents. The obligations relevant to conformity and third party claims are dealt with in Arts.35 to 44. One exception with regard to the obligation of the passing of property and transfer of title which was mentioned in Art.30; however this is not dealt with in any detail in these articles. The CISG does not define when the property passes, nor what is required in obtaining the passage of the property; since these issues are left to be governed by the jurisdiction of the applicable national law.³

³ Art.4(B) states that the convention is not concerned with: "(b) the effect which the contract may have on the property in the goods sold". See: Enderlein F, 'Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods', in Sarcevic P, and Volken P, (eds.), *International Sale of Goods*, (Dubrovnik Lectures, Oceana 1996), p.145.

The CISG places emphasis on the parties' agreements in the contract as its fundamental source for their rights and obligations; as expressed in Art.6,⁴ which was designed specifically to address this principle. Hence the obligations of the CISG can be used only as supplementary to the parties' contract.⁵

The following part of this chapter discusses the meaning of delivery, its place and time, and the handing over documents.

2.2.2 The definition of delivery

2.2.2.1 General meaning of delivery

Delivery can be defined as "the active transportation of the goods to the buyer".⁶ This definition focuses on the actual or physical delivery rather than constructive means such as delivery by document. The Sale of goods act (SGA 1979) in 61(1) similarly defined delivery as the "voluntary transfer of possession from one person to another".

ULIS defines delivery in Art.19 (1) as the handover of conforming goods. In this definition, conformity is an additional requirement for the seller to perform their obligation of delivery. The reason for this is to increase the consequence of breaches of conformity; that is, to be the same as if the seller did not deliver the goods. However, the link between delivery and conformity seems to cause practical difficulties in the passing of risk in some cases, such as if the buyer intends to

⁴ Art.6 states: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

⁵ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.144; see the principle of parties' autonomy in section: 1.2.2.3. In the ULIS, Art.18 is an identical provision to Art.30 in CISG, which established that the seller "shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in goods, as required by the contract and the present Law". However, though they are similar in the essence, they have different approaches to tackling these obligations. While the CISG is more practical, the ULIS concern is given in detail. See Lando O, *Articles 30-34* in Bianca-Bonell (ed.), *Commentary on the International Sales Law* (Milan: Giuffrè, 1987), p.246.

⁶ Bridge MG, *The Sale of Goods* (Oxford: Clarendon Press, 1997), p.202.

accept minor defects in the delivered goods. In such a case, the question of the passing of risk will remain unanswered, because the passage of risk is associated with delivery⁷ and the delivery of non-conforming goods is not effective unless the buyer accepts the delivery. Here the buyer's declaring of acceptance becomes the certain time for passing the risk.⁸

2.2.2.2 Definition of delivery in the CISG:

Unlike in ULIS and English law, the concept of delivery was not defined in the CISG. The approach of the CISG Articles related to delivery⁹ intends to describe how the seller can perform their obligations, rather than whether or not delivery actually takes place.¹⁰ Therefore, delivery may involve some action by the seller, such as transferring the goods to a carrier or at the buyer's place of business. On the other hand, delivery may not need any positive action from the seller if for instance it is the buyer's duty to come and collect the goods. In this case, the duty of the seller is to place the goods at the buyer's disposal.

Huber and Widmer justified this approach of the CISG by stating that it "seeks to define the delivery obligation in such a way that it can be performed unilaterally by the seller, without the need for the buyer's co-operation".¹¹

Expressions of "delivery" and "hand over" are mentioned in the CISG several times. Honnold defined the meaning of the hand over in the CISG as "the Convention speaks of physical acts of

⁷ See section: 2.2.6.1.

⁸ See: Honnold J, (2009), *op.cit.*, pp.314-5; Lando O, in Bianca-Bonell, *op.cit.*, pp.245-6.

⁹ Arts.30 to 34.

¹⁰ Honnold J, (2009), *op.cit.*, p.315.

¹¹ Huber U, and Widmer C, *Articles 30-34* in Schlechtriem P, and Schwenzer I, (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Oxford University Press, 2005), p.343; Mullis A, in Huber/Mullis (2007), *op.cit.*, p.107.

transfer of possession—the ‘handing over’ of the goods”.¹² From the different uses of ‘delivery’ and ‘hand over’, it can be suggested that ‘delivery’ is a broader term which can be used to express the obligation of the seller as a party in the contract without any additional specification of how this obligation is to be performed or whether or not the seller should take positive action. However, ‘handing over’ implies an extra meaning of positive action to be taken. This can be seen in the practice of the CISG where these terms are used. For the seller’s obligation regarding documents, the duty is to hand them over to the buyer; where the norm for documents is for them to be sent to the other party rather than being placed at his disposal at the seller’s place of business. This is because the goods can either be dispatched or made available to the buyer; hence, the term ‘delivery’ can be used in either case in the CISG.

Since the CISG takes a clearly practical approach to the meaning of ‘delivery’, it takes into consideration the seller’s performance of the duty of delivery by placing the goods as required by the contract and the CISG is enough for the purpose of fulfilling the obligation of delivery, even where the goods are defective or do not meet the condition of conformity.¹³ On this ground, defective delivery will be considered only under the obligation of conformity.¹⁴

2.2.3 Place of delivery:

In addition to the parties’ autonomy rule, Art.31 provides three other alternative default places in identifying the place where the seller has to deliver the goods in order to fulfil their duty:

- (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer

¹² Honnold J, (2009), *op.cit.*, p.509.

¹³ Lando O, in Bianca-Bonell, *op.cit.*, p.253; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.148.

¹⁴ See section: 3.2.1.

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

2.2.3.1 Contractual agreement

As mentioned in the above discussion on Art.30, the CISG attaches substantial weight to the parties' agreement in their contract. Art.31 begins its provisions with this indication: "if the seller is not bound to deliver the goods at any other particular place." Essentially, this suggests that applying the terms of this article can merely come into force when the parties have not explicitly or implicitly contracted otherwise.¹⁵ Therefore Art.31 is rarely applied,¹⁶ and there are numerous examples of court decisions passed according to this article referring to the parties' autonomy. For example, a German appellate court held that "the legal consequences of Art.31 CISG only come into play if the seller is not bound to deliver the goods at any other particular place".¹⁷ In another case the court held that the parties' contractual autonomy prevails over Art.31 of the CISG.¹⁸

In practice, however, most contracts refer to the customary place of shipment clauses.¹⁹ Although these terms have become popular in practice, they are interpreted differently from country to

¹⁵ Brand R, 'CISG Article 31: When Substantive law Rules Affect Jurisdictional Results' (2005-06) 25 *J.L.&Com*, p.182; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.145; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.110.

¹⁶ See: Lookofsky J, *Understanding the CISG: A compact guide to the 1980 United Nations CISG on Contracts for the International Sale of Goods* (3rd edn.) (Alphen aan den Rijn, Kluwer Law International, 2008), p.70; Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-9; Lando O, in Bianca-Bonell, *op.cit.*, p.251.

¹⁷ Germany: Provincial Court of Appeal: *OLG Köln*[1997] 27 U 58/96, available at: <http://cisgw3.law.pace.edu/cases/970108g1.html>

¹⁸ Germany: OLG München Provincial CA, (3/12/1999), No.23U4446/99, available at: <http://cisgw3.law.pace.edu/cases/991203g1.html>

¹⁹ See: Lookofsky J, (2008), *op.cit.*, p.101; Dutton K, (2005) 7 *E.J.L.R.*, p.255; Lando O, in Bianca-Bonell, *op.cit.*, p.252; Mullis A, in Huber/Mullis (2007), *op.cit.*, p.107-10.

country.²⁰ This was the reason for the popularity of the Incoterms' version, which shall now be discussed.

2.2.3.2 Incoterms 2000²¹

The ICC established the Incoterms in order to avoid variations in the interpretation of these terms. The extensive rules of the Incoterms cover a range of contractual obligations with a strong interest in delivery as the key function of their regime.²² They focus on the contract of carriage, contracts of insurance for delivery, the passing of risk, obtaining licences, authorisations, checking, packaging and marking, division of costs and giving notice to the buyer. The counterparts to the detailed Incoterms rules in the CISG are the general provisions of Arts.31, 67-69.²³

Classification of Incoterms is divided into four categories, according to the level of risk for the seller. The lowest level of risk is E term and there is only one term, "ex works" (ExW) where the seller's obligation is to deliver the goods by making them available at their premises. The following group is F terms where the seller's duty of delivery is to take some action to deliver the goods, including export licence or any other official authorisation: free to the carrier in FCA, free alongside the ship in FAS, or free on board the vessel in FOB. The third group is C terms

²⁰ See: Lookofsky J, (2008), *op.cit.*, p.70, note 22; Schlechtriem P, and Butlery P, UN Law on International Sales: The UN Convention on the International Sale of Goods, (Berlin: Springer, 2009) , p.110; Ramberg J, in Andersen/Schroeter *op.cit.*, p.403. An illustration of the different definitions of delivery terms is the Uniform Commercial Code of the United States, wherein the definitions of these terms are not always consistent with the Incoterms' definitions; see Brand R (2005-06) 25 *J.L.&Com*, p.182, fn: 4.

²¹ The new version of Incoterms 2010 will be launched in September 2010 and will enter into force in January 2011; see <http://www.iccwbo.org/incoterms/>. Incoterms 2000 does not introduce many changes to the 1990 version, except for FAS, DEQ and FCA terms.

²² See: Lookofsky J, *The 1980 United Nations CISG on Contracts for the International Sale of Goods* in Herbots J and Blanpain R (eds.), *International Encyclopaedia of Laws – Contracts* (The Hague: Kluwer Law International, 2000), p.85.

²³ Ramberg J, in Andersen/Schroeter (2008), *op.cit.*, pp.399-400.

and they are similar to F terms but the seller, in addition, has to arrange for the contract of carriage in CFR (cost and freight) and CPT (carriage paid to). In CIF (cost, insurance and freight) and CIP (carriage and insurance paid to) the seller also has to arrange for insurance. The final group is D terms where the buyer faces the highest level of liability: DES: to be delivered ex ship at the named port of destination, DEQ: delivered ex quay at the usual quay at the named port of destination, DAF: delivered at the named point at the frontier in the seller's country and DDP or DDU: delivered duty paid or unpaid at the named place in the country of importation.²⁴

These Incoterms define the place of delivery by the parties' explicit reference, or may be by virtue of the parties' previous practice, or by an accepted international trade practice.²⁵ In this regard the CISG, pursuant to Art.9(2),²⁶ recognises both known and regularly observed international trade usage to be considered as law in the absence of the parties' contractual agreement.²⁷ However, if the use of trade terms does not refer explicitly to the Incoterms, it tends to be uncertain whether or not Art.31 applies.²⁸

In a case addressed by the French Court of Appeals in Paris, a French company ordered winter clothing from a German seller. The contract referred to "transport: ex work" and the buyer claimed that the term "ex work" concerns only the modes of transport of the goods. The French

²⁴ See: Carr I, *International Trade Law* (3rd edn) (London: Cavendish Publishing, 2005), pp.50-1; Ramberg J, in Andersen/Schroeter (2008), *op.cit.*, pp.394-403, where he provides the legal development of the Incoterms from their inception.

²⁵ Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.85.

²⁶ It states that: "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

²⁷ According to Art.8(3), interpretation of what the parties have agreed on may be affected by the popularity of INCOTERMS clauses.

²⁸ Liu C, 'Place of Performance: Comparative analysis of Articles 31 and 57 of the CISG and counterpart provisions in Article 7:101 of the PECL' in Felemegas J (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge: Cambridge University Press, 2007), p.349.

courts refused jurisdiction in favour of the courts of Germany and rejected the buyer's objection that the place of delivery should be in France, holding that,²⁹ according to Art.31(a), the place of delivery is to be the place where the goods were handed over to the first carrier for transmission to the buyer.³⁰ In this case, even though the outcome of the "ex work" term and Art.31 (a) is the same for the purpose of determining the country of performance, the court determined the place of delivery by reference to Art.31 (a) rather than the disputed "ex work" term. In another case, a United States Federal Court considered the use of the term CFR to be incorporated within the Incoterms' version through Art.9(2) of the CISG, because of "the fact that they are well known in international trade."³¹ Many courts therefore consider the structure of the contract prior to deciding whether these terms are used to fix a place of delivery or only to allocate the costs of despatching the goods.³² In order to avoid uncertainty, Ramberg affirmed that "it is preferable to explicitly refer to Incoterms in their present version in the contract of sale."³³ It seems that clear-cut reference to the Incoterms version is significant in making the contractual agreement sufficient without the need for further reference to international customs for more explanation.

The question of the relationship between the CISG and the Incoterms has been subject to some criticism. The CISG was accused of failing "to capture the central ground of sales practice" as Bridge argued, adding that "they do not accommodate well-understood delivery terms, like FOB

²⁹ Pursuant to Article 5(1) of the Brussels Convention (1968), the place of performance determines the competent jurisdiction.

³⁰ France: CA Paris, (18/3/1998) No.97/25212, available at: <http://cisgw3.law.pace.edu/cases/980318fl.html>.

³¹ U.S: CA (5th Circuit), (11/6/2003), CLOUT No. 575, available at: <http://cisgw3.law.pace.edu/cases/030611u1.html#2>; Dutton K, (2005) 7 *E.J.L.R.*, p.255.

³² See: UNCITRAL 'Digest of Case Law on the United Nations Convention on the International Sale of Goods, Article 31' (2004), A/CN.9/SER.C/DIGEST/CISG/31, p.2, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/551/02/PDF/V0455102.pdf?OpenElement>

³³ Ramberg J, in Andersen/Schroeter (2008), *op.cit.*, p.304.

and CIF, and do not mesh well with Incoterms".³⁴ The focus of this criticism was on the CISG's rules of delivery and passing the risk, which were said to contradict the Incoterms. However, according to an alternative view, this criticism has no substantial basis; as the CISG from its initial inception considered the needs of international trade. Conference delegates during the drafting process of the CISG took into account the different social, economic and legal systems,³⁵ particularly the contribution of the International Chamber of Commerce (ICC).³⁶ At the same time the ICC, which is the subject of Bridge's argument, expressed complete appreciation of and support for the CISG by applying the provisions of the CISG as the ICC model terms, the example of that is the *force majeure* clause (2003).³⁷ According to the second view, the relationship between the CISG and the Incoterms in trade practice are complementary. The CISG applies in the absence of contractual agreement.³⁸ Ramberg highlights the advantage of this approach of the CISG, saying that:

international commerce practice would require changes from time to time ... it would be impractical to include definitions in an international convention which certainly would not be flexible enough to account for necessary adaptations to changed commercial practice.³⁹

³⁴ See: Bridge MG, *The Transfer of Risk Under the UN Sales Convention 1980 (CISG)*, in Andersen/Schroeter (eds.), (2008), *op.cit.*, p.105.

³⁵ See the aim of the CISG in section: 1.2.2.2.

³⁶ Schwenger/Hachem, (2009) 57 *A.J.C.L.*, *op.cit.* p.475; they refer to Schlechtriem, 'Twenty-Five Years of the CISG: An international lingua franca for drafting uniform laws, legal principles, domestic legislation and transnational contracts', in Fletcher H et al. (eds.) *Drafting Contracts Under the CISG* (2008), p.169.

³⁷ Kessedjian C, 'Competing Approaches to Force Majeure and Hardship' (2005) 25 *I.R.L.E.*, 415, pp.425-6, available at: <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>

³⁸ Valioti Z, 'Passing of Risk in International Sale Contracts: A Comparative Examination of the Rules on Risk under the CISG and Incoterms' 2000 (2004 #2) *Nordic Journal of Commercial Law*, p.33; Singh L, and Leisinger B, 'A Law for International Sale of Goods: A Reply to Michael Bridge' (2008) 20 *P.I.L.R.*, p.187-8.

³⁹ Ramberg J, in Andersen/Schroeter (2008), *op.cit.*, p.399, also see his other articles: 'To What Extent do Incoterms 2000 Vary Articles 67(2), 68 and 69?' (2005-06). 25 *J.L.&Com.* pp.219-22; Ramberg J, '*INCOTERMS 2000 - The Necessary Link Between Contracts of Sale and Contracts of Carriage*' (2008) 58 (1-2) *Zbornik PFZ*, pp 35-46; see also: Schwenger/Hachem (2009), 57 *A.J.C.L.*, *op.cit.*, wherein they suggest that "The CISG serves as a general background; the Incoterms that are being revised every ten years are responsible for the fine-tuning" (p.477).

In analysing the foregoing discussion, it seems that the first view's understanding of the CISG's framework in relation to the Incoterms is questionable because, as the second view reveals, the CISG was designed to avoid conflicts with other agreements by giving substantial concern to the parties' agreements as elaborated in the above explanation of the first sentence of Art.31. However, with respect to Bridge's view (as one of the most prominent commentators on the international sale of goods), it can be said that the reason for his suggestion comes from his expectation that the CISG should cover a wide range of contractual regulations: "the CISG should be doing precisely that, by laying down presumptive rules from which the parties depart in only a minority of cases." This expectation goes beyond the CISG's approach in general as a convention, and therefore his point can be seen as criticism of the CISG in its approach, using the rule of passing the risk as an example.

Regarding the matter of place of delivery, the CISG differentiates between cases according to whether or not there is involvement of carriage, or whether or not the parties know the place of goods to be sold at the time of concluding the contract. These are now discussed below.

2.2.3.3 Delivery involving carriage of goods

Art.31(a) is applicable only to contracts that involve "carriage." In this case the seller's duty is to deliver the goods to the first carrier for transmission to the buyer.⁴⁰ The concept of "carriage" and "carrier" necessitate an independent carrier between the seller and the buyer. So if the goods are effectively moved by the parties' own actions, the concept of carriage and carrier in Art.31(a)

⁴⁰ France: Cour de Cassation (SC), (2/12/1997), No.95-20.809, available at: <http://cisgw3.law.pace.edu/cases/971202f1.html>. In this case the court considered that the place of delivery was in Italy where the goods were handed over to the first carrier for delivery to the buyer according to Art. 31(a).

will not apply, and the seller will still be responsible for the goods whilst they are kept under their custody.⁴¹

Delivery in this circumstance, means to hand over the goods to the carrier, which, as mentioned earlier, means to convey transfer of physical control of the goods.⁴² Therefore the seller is responsible for the goods if he leaves them on an unattended jetty pending arrival of the carrier.⁴³

However, in cases related to group F terms where the seller is not responsible for arrangement of carriage, it is the buyer's obligation to conclude the contract of carriage and to inform the seller of this arrangement. Thus if the seller fails to deliver the goods because of the buyer's failure to co-operate, the seller's liability will be excluded according to Art.80.⁴⁴ The buyer is then responsible for not taking delivery.⁴⁵

Handing over the goods to the first carrier may apply even though there is an indication to contrary customary terms if the parties fail to agree on a particular place. In such a case, the seller still fulfils their obligation by handing the goods to the first carrier.⁴⁶ However, when there is an agreement on the place, such as a railway station or FOB airport, the parties' agreement

⁴¹ Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.348; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.147; Honnold J, (2009), *op.cit.*, p.311; Lookofsky J, (2008), *op.cit.*, p.70; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.111-2. This provision plays an important role in relation to the rules of risk of loss; more detail is given in section: 2.2.6.1.

⁴² Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-11; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.112.

⁴³ Honnold J, (2009), *op.cit.*, p.312.

⁴⁴ Art.80 states that: "A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."

⁴⁵ The buyer's duty in taking delivery is stated in Art.53 "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.", and Art.60 "The buyer's obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and (b) in taking over the goods."

⁴⁶ See: Fountoulakis C, Schwenzer I, Dimsey M, (eds.), *International Sale Law*, (London: Routledge-Cavendish, 2006), pp.213-4.

will prevail and the seller has to deliver the goods to that place, even if the delivery to this place is not to the first carrier.⁴⁷

In the case of delivery to a forwarding agent, it is difficult to consider this as the first carrier. However, the answer depends on the position of the forwarder, and whether or not they play a role in taking responsibility over the goods as carrier. If not, then the seller will not have discharged their duty until the carrier hands them over.⁴⁸

2.2.3.4 Supplementary obligations of arrangement for shipment:

As the majority of international sales of goods involve carriage, the CISG supplements the provisions of Art.31(a) with Art.32, which deals with various cases where there is no agreement with respect to arrangements for the carriage of goods.

Subparagraph 1 considers the seller's obligation to give notice of delivery to the buyer as follows:

If the seller, in accordance with the contract or this CISG, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

Giving notice of the consignment is a crucially important action in commercial practice to be carried out by the seller, and it is usually affected in the documents issued by the carrier.⁴⁹ However, Art.32(1) requires notice as an obligation of the seller to inform the buyer of the consignment specifying the goods in cases where the goods are not identified by markings on

⁴⁷ See: Huber/Widmer in Schlechtriem/Schwenzer, (2005) *op.cit.*, pp.347-348.

⁴⁸ *Ibid*, p.347; Lando O, in Bianca-Bonell, *op.cit.*, p.253; Mullis A, in Huber/Mullis (2007) *op.cit.*, pp.113-5. The latter author described three different types of freight forwarding contracts.

⁴⁹ Mullis A, in Huber/Mullis (2007), *op.cit.*, p.119; Lando O, in Bianca-Bonell, *op.cit.*, p.258.

them or by the shipping document. This notice protects the buyer from the seller identifying the goods for the contract later, particularly after they have been damaged or lost, and thus passing the risk to the buyer.⁵⁰

The result of failing to give notice of the consignment by the seller is that the risk will not pass on to the buyer.⁵¹ This is considered to be a breach of contract, and the remedy depends on whether or not it is deemed fundamental.⁵²

When the contract involves arranging for carriage of the goods, Art.32(2) identifies what the seller is required to do in order to fulfil their obligation as follows:

If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

This paragraph relates to cases where the seller is bound by the contract to arrange for carriage, even if the transport itself or its cost is not their responsibility.⁵³ It provides that the seller's conduct for these arrangements must be made according to appropriate means in accord with the circumstances, such as selecting the right carrier and giving the correct instructions. Moreover, it is an obligation for the seller to arrange for appropriate vehicles and routes. The standard for these obligations must be according to the usual terms.⁵⁴

The last provision of Art.32 is related to the seller, who is not bound to effect insurance for the goods to be delivered. Paragraph 3 states:

⁵⁰ Huber/Widmer in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.383; Mullis A, in Huber/Mullis (2007), *op.cit.*, p.117.

⁵¹ See Arts.67 and 69(3).

⁵² Honnold J, (2009), *op.cit.*, p.320; and Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-12.

⁵³ Huber/Widmer in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.387.

⁵⁴ Mullis A, in Huber/Mullis (2007), *op.cit.*, pp.120-1; Lando O, in Bianca-Bonell, *op.cit.*, p.388. See Enderlein F, in Sarcevic/Volken, *op.cit.*, p.150; Honnold J, (2009), *op.cit.*, p.320.

If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

This obligation applies only when the buyer requests this information. However, when the buyer requests insurance information, the seller is obliged to send it as soon as it is available.⁵⁵ When failing to do so, the seller is liable to pay damages under the CISG's rules.⁵⁶

2.2.3.5 Delivery not involving carriage of goods

It is uncommon for international sale contracts to be concluded without the involvement of the carriage of goods. The CISG provides Art.31 (b and c) when "there is neither an arrangement under the contract as to the place of delivery nor is carriage an obligation of the seller".⁵⁷

2.2.3.5.1 Goods at a particular place

Art.31(b) applies where the place of the goods is known to the parties at the time of concluding their contract, even if the goods are yet to be manufactured or produced, as long as both parties know that particular place.⁵⁸ In this respect, the place of delivery is the particular place known to them; hence, the seller's duty is to place the goods at the buyer's disposal at that place to enable the buyer to collect them.⁵⁹ Thus, placing the goods at the buyer's disposal requires doing everything necessary to enable the buyer to take complete control of them, such as giving the

⁵⁵ Mullis A, in Huber/Mullis (2007), *op.cit.*, p.121.

⁵⁶ See Schlechtriem P, in Galston/Smit, *op.cit.*, pp. 6-12; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.121.

⁵⁷ Maskow D, and Enderlein F, *International Sales Law* (New York: Oceana Publications, 1992), pp.131-2 (cited later as Maskow/Enderlein).

⁵⁸ Germany: District Court: LG Aachen, (14/5/1993), No.43O136/92, available at:

<http://cisgw3.law.pace.edu/cases/930514gl.html>. Because the parties did not agree otherwise the court applied Article 31(b) of the CISG, and determined that Aachen in Germany, where the goods had been manufactured, was the place where the seller was obliged to deliver; Karollus M, "Judicial Interpretation and Application of the CISG in Germany 1988-1994", *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995) 51-94, available online at: <http://cisgw3.law.pace.edu/cisg/wais/db/editorial/karollus930514gl.html>

⁵⁹ Mullis A, in Huber/Mullis (2007) *op.cit.*, p.116; Secretariat Commentary, O.R. p.30,(16).

buyer a delivery order; instructions to the warehousemen; and giving the buyer a notice to inform him that the goods are placed at his disposal if required.⁶⁰ The place of delivery in this subparagraph is the same as in the ex work clause of Incoterms.⁶¹

The requirement of identifying the goods has been dealt with in the chapter on passing risk Art.69 (3) provides that “the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.”⁶² The method of identifying the goods to the contract is dealt with in Art.67, providing that: “by markings on the goods, by shipping documents, by notice given to buyer or otherwise.”

2.2.3.5.2 Goods not in a particular place

For the purpose of covering all of the possible options for the place of delivery, the CISG deals, in Art.31(c), with cases of delivery, in which neither the carriage of goods nor the place of goods are known during the conclusion of the contract. In such cases the place of delivery is the seller’s place of business at the time of the conclusion of the contract.⁶³

If the seller has more than one place of business, Art.10 (a) defines the place of business as that “which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of

⁶⁰ Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.358; Secretariat Commentary O.R. p.30,(16); Mullis A, in Huber/Mullis (2007) *op.cit.*, p.117.

⁶¹ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.148.

⁶² From the text of the CISG Art.69 (3). See below the rules of passing the risk, section: 2.2.6.1.

⁶³ Mullis A, in Huber/Mullis (2007) *op.cit.*, p.116.

the contract”. Additionally, the habitual residence can be adopted as a reference if a party does not have a place of business.⁶⁴

2.2.4 Time of delivery

Under the seller’s obligation of delivery, the CISG tackles the issues related to the time of delivery mainly under Art.33, which is divided into three subparagraphs: (a) and (b) deal with the contractual agreement where a date or period of time is fixed by the parties;⁶⁵ and (c) is concerned with contracts where no time of delivery has been mentioned by them.

2.2.4.1 Delivery at a specific time

Art.33 provides that “the seller must deliver the goods: (a) if a date is fixed by or determinable from the contract, on that date”.

In this subparagraph, there is no negative legal issue, as the time of delivery is clear and the duty of the seller is to deliver the goods at that time. In addition, a definite time can be implicitly referred to in the contract, such as when an event takes place after the contractual time or at the request of the buyer or a third party.⁶⁶

The question of counting usage as a reference to identify the time of delivery is not explicitly provided in this article. However, usage can be included under the meaning of “determinable from the contract” in this subparagraph,⁶⁷ as well as from the general principle of recognition of

⁶⁴ Art.10 (b). See Liu C, in Felemegas J (2007), *op.cit.*, p.347,359.

⁶⁵ These subparagraphs reinforce the general principle of Arts.6 and 30, which give priority to the parties’ contractual agreement as the main obligation of compliance.

⁶⁶ Lando O, in Bianca-Bonell, *op.cit.*, p.263; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.122.

⁶⁷ See Enderlein F, in Sarcevic/Volken, *op.cit.*, p.151.

usages and practices in the CISG.⁶⁸ Hence, the time recognised by both parties through usage or practice should be recognised as a determinable time. Finally, in the cases of an indefinite event or date of delivery, the seller's obligation to deliver might not apply under this subparagraph, and the contract should be considered as if there is no indication as to the time of delivery in the contract. Consequently, the applicable rule for such a contract is Art.33(c).⁶⁹ In the case where a contract which only indicates the time of taking delivery, the seller's duty is to deliver the goods with enough time to enable the buyer to take delivery.⁷⁰

Art.33(a) does not specify at which part of the day the seller has to deliver the goods. This issue has also been given no attention in the literature where the commentators' focus is on defining the correct date in different types of agreement.⁷¹ However, Viscasillas highlighted the problem of time for receiving documentation after business hours on the fixed date, suggesting that as long as the delivery can be proven by means which indicate the time, such as email or fax, the delivery should still be effective "because it was delivered prior to midnight".⁷² On these grounds it can be said that the CISG is not concerned with this issue, following its general approach to not engage with all details in contracts. However, within the CISG, time can be determined by reference to the common usage and practice which is, as mentioned above, before the midnight on the relevant day. In addition, several other issues need to be taken into account;

⁶⁸ Art.9 (1) states that "The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." Also see Art.9(2) for international usages and practices.

⁶⁹ Mullis A, in Huber/Mullis (2007) *op.cit.*, p.1123.

⁷⁰ Lando O, in Bianca-Bonell, *op.cit.*, p.262; U.S. Federal District Court (New Jersey), (4/4/2006), No.Civ.01-5254(DRD), available at: <http://cisgw3.law.pace.edu/cases/060404u1.html>, see more details of this case in section: 5.2.3.1.1.

⁷¹ See for example: DiMatteo L et al., *International Sales Law: A critical analysis of CISG jurisprudence* (Cambridge: Cambridge University Press, 2005), p.107; Honnold J, (2009), *op.cit.*, p.322; Fountoulakis/Schwenzer/Dimsey (2006), *op.cit.*, p.229; Huber/Widmer in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.348; Lookofsky J, (2008), *op.cit.*, p.70.

⁷² Viscasillas P, 'Contract Conclusion' (1996-97) 16, *The J.L. & Com*, p.329.

namely the role of the fundamental breach, as mentioned in the above case where the court considered that a delay of two days was not fundamental.

2.2.4.2 Delivery in a specific period of time

The second paragraph of Art.33 continues to describe the legal conditions of the contractual agreement in terms of the time of delivery as follows:

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date.

While Art.33(a) deals with the contract involving a fixed date of delivery, the other option for determining the time of delivery in the contract can be a period of time; any day in this period can be the time for seller to deliver the goods; in turn, the buyer's obligation is to be ready to take delivery during that period.⁷³ However, according to this paragraph, in some cases instead of authorising the seller to choose the time within the period, it can be indicated that the buyer is to choose the appropriate date for delivery.⁷⁴ Such cases can be found in FOB contracts where shipment is fixed by the contract to be under the buyer's responsibility. In such a case, the buyer will determine the date of shipment when he selects the ship at the port of delivery. Similarly, in ex work contracts the buyer may have to take delivery within a stipulated period of time when the goods have been placed at his disposal at the seller's place of business.⁷⁵

This provision can be illustrated by a German case where the contract included that "autumn goods, to be delivered July, August, September." The German buyer refused to accept the goods

⁷³ Ying C, *Time of Delivery and Early Delivery: Comparison between provisions of the CISG (Articles 33 and 52(1)) and the counterpart provisions of the PECL (Articles 7:102 and 7:103)* in Felemegas J, *op.cit.*, p.361.

⁷⁴ Mullis A in Huber/Mullis (2007), *op.cit.*, pp.123-4.

⁷⁵ See Enderlein F, in Sarcevic/Volken, *op.cit.*, p.152; and Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.397.

because the delivery was made on 26 September claiming that the period for delivery had expired. The court applied CISG as the applicable law and awarded the Italian seller the full sales price, since delivery was made during the contractual period of time.⁷⁶ In this case, even though the buyer expected to receive one-third of the goods during each month, there was insufficient evidence in this circumstance to support the allegation. Thus, delivery during the explicitly defined period was justified by the court.

2.2.4.3 Delivery in a reasonable time

The final paragraph of Art.33 intends to cover cases that do not fall into the above circumstances. It states that: “(c) in any other case, within a reasonable time after the conclusion of the contract.”

Reasonable time is the time of delivery in these cases and it begins to run after the conclusion of the contract. In order to determine “reasonable time” for performing delivery, acceptable commercial conduct and practice in relation to similar circumstances as the case should be introduced.⁷⁷ Honnold stated that “what is ‘reasonable’ can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade.”⁷⁸ In this respect, a reasonable time can be affected by various aspects, such as the buyer purpose of the goods, the location of the parties (whether or not they are close to one another) and the situation of the goods (whether

⁷⁶ Germany: Petty District Court, (24/4/1990), No.5C73/89, available at: <http://cisgw3.law.pace.edu/cases/900424gl.html>

⁷⁷ See Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.87.

⁷⁸ Honnold J, (2009), *op.cit.*, p.136.

they are to be manufactured or not). Also, observing the general principle of good faith (Art.7 (1)) is important as an element in identifying reasonable time.⁷⁹

In one case an Italian plaintiff sold a bulldozer to a Swiss defendant who refused to pay as a result of late delivery. The court held that since delivery was made within no more than two weeks after the seller had received the first instalment, handing over the machine to the carrier could be considered in time, since no date had been fixed by the parties (Art.33(a)), and so Art. 33(c) was applied.⁸⁰

In this article, the CISG does not deal with issues relating to early or late delivery. These matters are left to Arts.47, 49 and 52.

2.2.5 Handing over of documents

2.2.5.1 Introduction

Relations between the parties in international trade are often not close enough to justify a delivery on credit by the seller. Therefore arrangements for the use of documents to control delivery of goods can be sufficient for an exchange of goods for a price. These documentary exchanges are widely recognized in international trade practice.⁸¹ In the CISG Art. 34 was designed to deal with delivery of documents as follows:

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure

⁷⁹ Ying, C, p.362; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.125-6; Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-16.

⁸⁰ Switzerland, Tribunal Cantonal Valais (CA), (28/10/1997), No.C197167, available at: <http://cisgw3.law.pace.edu/cases/971028s1.html>

⁸¹ Honnold J, (2009), *op.cit.*, p.324; see, for instance, Incoterms 2000 (CFR, CIF...) under proof of delivery at A8.

any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

The reference to handing over documents in Art.34 was merely stated concerning the contractual agreement itself. However, Art.30 includes the obligation of handing over documents as one of the main seller's obligations, as mentioned above.⁸² The approach of the CISG to delivery suggests that the obligation of the seller to deliver the goods is independent of the obligation of the tender of documents relating to the goods.⁸³ Thus, Art.34 addresses the handing over obligation separately from the obligation of delivery of the goods, which is dealt with under Arts.31, 32 and 33. In this regard, the seller's duties can be confined to the tender of documents. For instance, in cases where the goods to be sold are in the possession of a third party, the seller may fulfil their obligations merely by the tender of documents, which transfers control of the goods to the buyer.

Unlike with the delivery of goods provision, the CISG does not lay down particular rules with regard to time, place, and form for the handing over of documents; rather, reference is made merely to the parties' agreement, requiring the seller to fulfil the agreed handing over of documents without suggesting rules for silent contracts.⁸⁴ Bridge criticised the approach of the CISG on documentary rules saying that "it is a blank page".⁸⁵ However, it could be argued that

⁸² See 2.2.1.

⁸³ Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.403; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.126.

⁸⁴ Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.403. For the delivery of goods, Arts.31 and 33 lay down specific provisions related to the form, place and time of such delivery.

⁸⁵ Bridge MG, 'A Law for International Sales' (2007) 37 *H.K.L.J.*, p.29 compares the CISG and the Sale of Goods Act of the UK, suggesting that even though the Sale of Goods Act is mute on the seller's obligations related to documents, "there has been time to develop a rich body of case law on documentary duties under the Act, whereas, even after 20 years of its application, there is insufficient evidence in the case law of any distinctive approach of the CISG to the strictness of the seller's documentaries duties" (p.28); a similar criticism that "The true meaning of the provision must be that if the contract is silent, usages and good faith must provide the answer;" was made by Lando O, in Bianca-Bonell, *op.cit.*, p.267.

there is no need for particular rules for handing over documents,⁸⁶ because this obligation is linked to the goods themselves and the payment for them. Thus the place and time of delivery of documents can be determined from the rules of delivering the goods and payment. Therefore, if the contract does not mention these rules, their interpretation can be made by the general principles of the CISG.⁸⁷

2.2.5.2 Documents relating to the goods

Art.34 neither provides a definition of the required documents nor lists them. It simply requires the seller to deliver the documents related to the goods. In this regard the documents which the seller has to hand over should be provided by the contract, and they can also be identified by indicating one of the Incoterms in the contract.⁸⁸ For example, if the contract mentions the CIF term, the documents required are: a clean negotiable bill of lading,⁸⁹ an invoice of the goods shipped, an insurance policy, and the certificate of origin and consular invoice.⁹⁰

⁸⁶ The original draft prepared by UNCITRAL does not contain the provision of Art.34, which was proposed by the Canadian delegation during the diplomatic conference. See Enderlein F, in Sarcevic/Volken, *op.cit.*, p.155; Honnold J, *Documentary History*, *op.cit.*, pp.116-7, 142, 148.

⁸⁷ These principles of interpretation can be found in Art.8, which refers to the contract meaning, Art.9 to the relevant usages, and Art.7(1) the observance of good faith in international trade. See Huber/Widmer in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.404.

⁸⁸ CISG-AC, Opinion No.5, CISG-AC, Opinion No 5, The buyer's right to avoid the contract in cases of non-conforming goods or documents 7 May 2005, Badenweiler (Germany). Rapporteur: Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel, opinion para.5 and comment para.4.11-13, available at: <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=147&sid=147>; Mexico: The Compromex arbitration, (29/4/1996) M/21/95, available at: <http://cisgw3.law.pace.edu/cases/960429ml.html>. In this case the Argentinian-Chilean firm (the seller) did not provide the Mexican buyer with the due invoice for the entire agreed price. The Compromex held that both the Argentinian and the Chilean firms (the seller's subcontractor) should have provided the buyer with all documents (invoices) corresponding to the amount and value of the goods paid for by the buyer.

⁸⁹ The clean negotiable bill of lading is a document issued by the carrier confirming receiving the goods in apparent good condition with a title to the goods issued to the shipper, whose endorsement is required to make it negotiable (and can be sold and bought during transit); see Hinkelman E, *Dictionary of International Trade: Handbook of the global trade community* (Novato: World Trade Press, 2005), p.346.

⁹⁰ See INCOTERMS 2000 C.I.F., A.8, A.10.

In addition, previous practice between the parties and customary trade usage are important elements specifying what documents the seller must provide to the buyer, as in Art.9.⁹¹

The provisions of Art.34 deal mainly with the documents of title which give the holder control over the goods, such as bills of lading and warehouse receipts.⁹² Other relevant documents covered by this article include the insurance policies, commercial invoices and certificates of origin. Furthermore, technical documentation relating to the goods may be required in the case of plant and machinery.⁹³

As for the question of whether or not a seller is obliged to procure an export licence in the case of absence of a contractual agreement can be answered with regard to the general principle of the CISG concerning international trade usage and delivery. In general, the seller is not obliged to procure customs documents for the export of goods.⁹⁴ Incoterms 2000 being widely known as reference in international trade usage, whereby the seller is not bound to deliver the goods at any particular place and the contract does not involve the carriage of goods. Here the seller has no duty to provide the buyer with an export licence and or to pay export taxes.

⁹¹ See: Mullis A, in Huber/Mullis (2007) *op.cit.*, p.127.

⁹² *Ibid.*

⁹³ See: UNCITRAL Digest of Case Law on the CISG Art.34, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/V04/551/57/PDF/V0455157.pdf?OpenElement>, also see Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.404; Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-17.

⁹⁴ See: UNCITRAL Digest of Case Law on the CISG Art.34, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/V04/551/57/PDF/V0455157.pdf?OpenElement>. Incoterms in its ex-work terms provide a similar approach however in "DEQ" (Delivered Ex-Quay), Incoterms 2000, the seller is responsible for any export licence and tax. Because of the uncertainty in this matter, Honnold J, (2009), *op.cit.*, p.316-7 rightly suggested that "It is best if the parties deal specifically in the contract with the question of responsibility for export licences and export taxes."

2.2.5.3 Cure of Non-Conforming Documents

The second and third sentences of Art.34 provide a solution or a cure for the problem of non-conforming documents.⁹⁵ This allows the seller to cure any lack of conformity in the documents as long as the cure is within the agreed time of delivery⁹⁶ and does not cause the buyer any unreasonable inconvenience or expense.⁹⁷ For example, the seller could replace the documents if they were originally in the wrong language, or supplement the documents if copies were missing.⁹⁸

Despite the fact that the right of the seller to cure should play a major role in avoiding the economic waste, which may occur if the buyer rejects the goods, it was argued that this right will only be implemented in practice in the case of manufactured goods.

However, the question of the effect of the seller's right to cure defects in documents in commodities trade is somewhat controversial and may lead to various problems, as Bridge warned. Since the time of handing the documents over is usually required to be as soon as possible after shipment, but without giving a precise date, the seller may consider his delivery of defective documents as being before the final date of delivery, therefore allowing defects to be corrected according to Art.34. The problematic effect of this right can be seen in the rules on

⁹⁵ These sentences of Art.34 are similar to the rule of curing defects in goods in Art.37; the rules of Art.37 generally apply to the provisions of Art.34 regarding the cure of defects in documents; see Honnold J, (2009), *op.cit.*, p.326.

⁹⁶ According to Art.48, even after passing that date. See section: 5.2.2.4.2.

⁹⁷ CISG-AC, Opinion No.5, *op.cit.*, opinion para.5 and comment para.4-14; China: International Economic and Trade Arbitration Commission [CIETAC] (PRC), (11/4/1994) No. CISG/1994/06, available online at: <http://cisgw3.law.pace.edu/cases/940411c1.html>. In this case a Chinese buyer purchased old papers from an American seller; the delivery term was CIF Yantai. The buyer requested the seller to deliver the correct bills to be able to pick up the goods. The seller cured only two of the six bills and the Tribunal held that the seller should assume responsibility and should refund to the buyer the payment for the last four batches of the goods.

⁹⁸ See Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-18.

clean documents.⁹⁹ Clean documents can be transferred and pledged; however, if they are defective, the buyer may experience difficulties if they are cured at a later date.¹⁰⁰ The answer to this problem can be made within the rules of the CISG as rightly suggested by Schwenger and Hachem. If the cure of defective documents will amount to a fundamental breach then the buyer does not have to accept the cure. Pursuant to Art.8 (2), (3) circumstances related to the contract is sufficient to protect the buyer's right even without an explicit stipulation.¹⁰¹

2.2.6 Effects of delivery

For the purpose of comparing delivery rules in Saudi law with the CISG the effects of delivery should be considered in order to examine whether or not they are compatible. The rules of passing risk are regulated under the CISG with close reference to the place of delivery; therefore, it is important for an understanding of the effect of delivery to refer to the CISG's provisions on transferring the risk even though these are in actuality beyond the scope of this thesis.¹⁰² The following paragraphs briefly highlight the transfer of risk as a major effect, along with the other relevant effects of delivery.

2.2.6.1 Passing of risk

The question of whether the transfer of risk takes place with the seller's fulfilment of the obligation of delivery has not been tied to the delivery rules in the CISG.¹⁰³ However, from an

⁹⁹ See above for the meaning of this document chap.2, fn: 89.

¹⁰⁰ Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.31; Under English law the buyer has the right to not accept an unclean bill of lading of this sort.

¹⁰¹ Schwenger/Hachem (2009) 57 *A.J.C.L.*, *op.cit.*, p.477; Singh L, and Leisinger B, (2008) 20 *P.I.L.R.*, p.164-7. According to CISG-AC fundamental breach generally occurs in the commodity sales: CISG-AC, Opinion No.5 *op.cit.*, para.7.

¹⁰² This thesis as discussed above is limited to the seller's obligations section of the CISG from Art.30-52.

¹⁰³ Passing risk upon delivery is the approach of ULIS Art.97(1). During the preliminary work for the CISG this idea of linking delivery with passing risk was rejected; see Honnold J, *Documentary History*, *op.cit.*, p.73, 83. Regardless

examination of the rules on passing risk,¹⁰⁴ the acts which accomplish it are similar to those acts by which delivery takes place.¹⁰⁵

For the purpose of the passing of risk, Art.67(1) provides similar rules to Art.31(a) when a contract involves the carriage of goods.¹⁰⁶ It considers that the seller's act of handing the goods over to the carrier is the time where risk is transferred.¹⁰⁷ Art.67(1) states that

If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.

It should be noted that there is no link between this rule of passing risk and the seller's responsibility for the payment of the shipping costs.¹⁰⁸

Similar to the obligation of identifying the goods in order for delivery to take place (Art.32(1)), Art.67(2) states that: "the risk does not pass to the buyer until the goods are clearly identified to the contract." Art.67(2) offers more detail than Art.32(1), providing examples of how the goods can be identified: "whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise." The importance of this rule can be seen in the sale of large quantities of fungible goods to various buyers, whereby a particular buyer cannot bear the risk of damaged or

of rejection, the approach of the passing of risk rules in the CISG is very similar to those for delivery, as discussed in this section.

¹⁰⁴ The rules of transfer of risk are dealt with in Chapter IV of part III of the CISG: Arts.66-70. Arts.67-69 are discussed here in this section as they are related to delivery. Art.66 deals with the contractual consequence of risk, and Art. 70 discusses the effects of avoidance for fundamental breach on the transfer of risk. For more details on the CISG's rules on transfer of risk, see Bridge MG, in Andersen/Schroeter (2008) *op.cit.*, pp.77, 105.

¹⁰⁵ Mullis A, in Huber/Mullis (2007) *op.cit.*, p.109; Dutton K, (2005) 7 *E.J.L.R.*, p.248.

¹⁰⁶ See: Honnold J, (2009), *op.cit.*, p.312; Dutton K, (2005) 7 *E.J.L.R.*, p.251; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.115.

¹⁰⁷ Bridge pointed out that this main rule of paragraph 1 of Art.67 is based on a reasonable policy, by allocating the risk to the buyer in international sales of goods, in "that it is better to give the buyer as the person on the spot the task of determining what has happened to the goods in transit;" see Bridge MG, in Andersen/Schroeter (2008) *op.cit.*, p.86; Honnold J, (2009), *op.cit.*, p.509.

¹⁰⁸ *Ibid* p.312, the author refers to the 2000 Incoterms (Carriage Paid To (CPT)). This can be seen as an appropriate example of using these international terms to interpret the CISG internationally, as required by Art.7(1).

lost goods without assurance that they are his goods.¹⁰⁹ However, a difficult question may arise in the case of the carriage of goods which are sold in bulk to more than one buyer in a single shipment. Lookofsky suggests that it is sufficient for the transfer of the risk to inform the buyer that a particular bulk contains his goods, and if the damage is partial, the various buyers ought to share the damages according to their proportions of the shipment.¹¹⁰ Another solution suggested by Ramberg considers that “breaking bulk as a requirement for the passing of the risk would keep the original seller at risk until the goods have arrived at the destination.”¹¹¹ Although there is no specific guide on this issue, the former suggestion would be considerably fairer for bulk sales, because the share of risk between buyers according to their proportions is the same as identifying the goods in designated goods, whereby each buyer will bear the risk of their own goods.

If the goods are sold in transit, delivery rules do not explicitly state how delivery takes place. However, for the transfer of risk, Art.68 addresses the time of passing risk being the time of concluding the contract if there is no other agreement. In practice, however, it is difficult in some cases to pinpoint the time when damage during transport occurs in order to link this to the time of concluding the contract.¹¹² The second sentence of Art.68 therefore suggests some conditional solutions to avoid such uncertainty: “if the circumstances¹¹³ so indicate, the risk is assumed by the buyer [retroactively] from the time the goods were handed over to the carrier who issued the

¹⁰⁹ Lookofsky J (2008), *op.cit.*, p.102-3. This is similar to the seller’s requirement under Art. 336 of the JLR of Saudi law.

¹¹⁰ Lookofsky J (2008), *op.cit.*, p.103; see also: Bridge MG, in Andersen/Schroeter (2008) *op.cit.*, p.93.

¹¹¹ Ramberg J, (2005-06), 25 *J.L.&Com.* p.221.

¹¹² Dutton K, (2005) 7 *E.J.L.R.*, p.251.

¹¹³ Even though the provision of the second sentence relies on an unclear precondition, Enderlein and Maskow declared that “there is unanimity as it was articulated already at the diplomatic conference, in that a *transport insurance* is regarded as such a condition”, Maskow/Enderlein, *op.cit.*, p.271; for a similar meaning see Hager G, Art.68 in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.687. In this context it can be said that since the international sale contract requires insurance for the carriage of the goods, the buyer in most cases will bear the risk from the time of handing the goods over to the carrier.

documents embodying the contract of carriage.”¹¹⁴ Although it may seem strange for the risk to pass in some cases retroactively before the conclusion of the contract, this logical dilemma can be resolved, as Ramberg pointed out: “if the sale is regarded as a sale of documents putting the subsequent buyers of the goods in the same position as the first buyer.”¹¹⁵ Since there is no obvious better solution, this could be an acceptable explanation.¹¹⁶ The third sentence of Art.68 restricts exceptional cases in the second sentence stating that

Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

This last sentence is designed as Lookofsky clarified,¹¹⁷ to prevent the seller profiting from “a failure to disclose events which would lead to the passing of risk.”

When the contract does not involve the carriage of goods, Art.69 provides rules for transferring risk which are similar to those in Art.31(2)(3). According to Art.69(1), if the buyer is not bound to take over the goods at a place other than the seller’s place, the risk passes when the buyer takes the goods over at the seller’s place or if the buyer fails to take over the goods at the agreed time after they have been placed at his disposal at the seller’s place, provided that the buyer commits a breach of contract by failing to take delivery.¹¹⁸

¹¹⁴ Bridge criticised this second sentence for providing little help, since Art.6 (parties agreement) and Art.9 (usage) would achieve the same goal; Bridge MG, in Andersen/Schroeter (2008) *op.cit.*, p.95. Although this is a valid criticism, it is common in the CISG to refer to the parties’ agreements (see 2.2.3.1).

¹¹⁵ Ramberg J, (2005-06). 25 *J.L.&Com.* p.221; similarly see: Dutton K, (2005) 7 *E.J.L.R.* p.251.

¹¹⁶ This problem would not occur under Saudi law, whereby the seller has to possess the goods before reselling them. See sections: 3.2.3.2 and 4.3.1.1.

¹¹⁷ Lookofsky J (2008), *op.cit.*, p.103.

¹¹⁸ Dutton K, (2005) 7 *E.J.L.R.* p.252; Honnold J, (2009), *op.cit.*, p.313, fn:10; Art.69 provides that in these circumstances, the risk of loss remains on the seller until the buyer “takes over” the goods, or when this period has expired; Lookofsky J (2008), *op.cit.*, p.104.

Art.69(2) addresses cases whereby the buyer is bound to collect goods at a place other than the seller's place of business. It states that "the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place." For the purpose of passing risk by placing the goods at the buyer's disposal, the final part of Art.69 requires that "the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract."¹¹⁹

In conclusion, it can be said that the transfer of risk in the CISG follows the seller's fulfilment of his obligation of delivery, whether or not the contract involves the carriage of the goods. The risk to the goods while in transit is significantly more difficult to identify, and is discussed separately in Art.78. The reason for not merging the rules of delivery and those of the transfer of risk was highlighted by Honnold: "Article 31 and the other provisions in this chapter deal with the *contractual obligations* of the parties; problems such as allocation of risk are dealt with by provisions addressed directly to those problems".¹²⁰

2.2.6.2 Other effects

Besides the transfer of risk, several other rules are linked to delivery. One of these rules is the time for the seller's responsibility for any lack of conformity which, according to Art.36(1), is the time of the passing of risk, and this time, as mentioned above is the time of delivery.¹²¹ The other effect is that the place of delivery, as identified by the CISG, may help to provide solutions

¹¹⁹ See for more discussion: Bridge MG, in Andersen/Schroeter (2008) *op.cit.*, pp.97-101.

¹²⁰ Honnold J, (2009), *op.cit.*, p.315.

¹²¹ See section: 3.2.4.

for the vexed question of which court specifically has jurisdiction, since the place of delivery is the basis for jurisdiction according to some international conventions.¹²².

¹²² Brand R (2005-06) 25 *J.L.&Com*, p.192, whose focus in this article was the impact of Art.31 on jurisdictional issues in courts applying the European regulation as well as in the US; See Art.5 of the new Brussels I regulation. In Denmark: Supreme Court, (15/2/2001), No.U2001.1039II, available at: <http://cisgw3.law.pace.edu/cases/010215d1.html>. It was held that since the place of performance according to Art. 31 (a), was Italy, the Supreme Court of Denmark did not have jurisdiction according to the relevant rule of the (EU) Brussels convention.

2.3 PART TWO: THE SELLER'S OBLIGATION OF DELIVERY UNDER SAUDI LAW

2.3.1 Introduction

The major seller obligations in Saudi law lie in the delivery of the object of sale.¹²³ The importance of delivery is derived from the impact of performing this obligation on the parties' legal rights, since the time of concluding a contract is insufficient for the buyer to practise some of his rights until delivery takes place. In this section, the seller's obligation of delivery is examined by discussing the meaning of delivery, how delivery takes place, actual and constructive delivery, what should be included in the items delivered, and the place, time and costs of delivery.

2.3.2 The seller's obligation to deliver the goods

2.3.2.1 The meaning of delivery¹²⁴

Identifying the meaning of delivery is a fundamental part of a contract because performance of delivery is directly linked to various rules related to the validity of the contract, as well as to the parties' rights and responsibilities towards the object of sale.¹²⁵

Due to its importance, the rules dealing with the obligation of delivery are clarified in the whole second chapter of the first part of the JLR.¹²⁶

¹²³ 'Ashosh, A, *Ala'god almadaniah fi asharia'h Al-Islamiah* (Cairo: Dar Tharoat Linashr, 1999), p.171.

¹²⁴ The subject of delivery has been dealt with in *Shari'ah* law under the title of *Al-Qabd* ('grasping').

¹²⁵ Regarding Arts.322 and 378 of JLR, after the time of concluding of the contract, any disposal of the object of sale and its production by the seller is invalid. From these articles it can be inferred that the ownership of the sold object transfers instantly; however, delivery is the time when the buyer can practise his legal rights. See: Al-Jnco 'A, *Attagabud fi al-Fiqh al-Islami* (Amman: Dar Anfais, 2004), p.312; Ibn 'Uthaymeen M, *Al-Sharh Al-Momti' a'la Zad Al-Mstaqni* (Dammam: Dar Ibn Al-Jaozi, 2001), vol.8, p.368; Al-Zuhayli W, *Financial Transactions in Islamic jurisprudence*, [translated in to English by El-Gamal, M.], (Beirut: Dar Alfikr, 2007), vol.1, p.51. See the effect of delivery in section: 2.3.3.

However, before defining delivery under the JLR, a brief indication is needed of its meaning within different Islamic schools, in order to understand how it was tackled by the *Shari'ah* in general. According to the *Hanafi* school of thought; delivery is *al-takhliyah*, when the buyer is given full access to the object of sale and permission¹²⁷ from the seller to allow the buyer to use them, along with the removal of any obstacles according to local custom.¹²⁸ In this definition, delivery can be accomplished without any proactive action by the seller. The Maliki school on the other hand, suggests that delivery is the possession of things and the ability to have control of them, whether or not they can actually be handled by hand.¹²⁹ This definition focuses on the buyer's position in delivery rather than the actions of the seller. In other words, concern is given to the consequences of the seller's duty in delivery. The meaning of possession in this context does not necessarily require any action by the parties to the contract, because it does not differentiate between the object of sale being movable or immovable. Moreover, it has been said in the Maliki school that giving full access and permission (*al-takhliyah*) is the fundamental principle of delivery.¹³⁰ In Shafi'i thought, delivery is linked to the type of sold items and whether they are movable or not. If the goods are movable, delivery takes place by handing them over to the buyer, and if they are immovable, it is achieved by giving full access and permission (*al-takhliyah*).¹³¹ Al-Nawawi¹³² explained how delivery takes place, referring to the custom for

¹²⁶ See chapter four, Arts.305-314; chapter seven, Arts.328-340; and chapter eight, Arts.341-348.

¹²⁷ The literal meaning of *Al-Takhliyah* is 'to abandon', which does not reflect the actual meaning as mentioned in the definitions.

¹²⁸ See: Al-Kasani A, *Badai'a Al-Sanai'a* (Beirut: Dar Al-Kitab Al-Arabi, 1990), vol.5, p.244.

¹²⁹ Ibn Jozia M, *Al-Qaoanin Al-Fiqhiyah* (Beirut: Dar Al-Kitab Al-Arabi, 1989), p.328.

¹³⁰ Ibn Rushd M (the grandson), *Beda'iat Al-Mujtahid Wa Nehaiat Al-Moqtasid* (Beirut, Dar Al-Fikr, 1995), vol.2, p.144.

¹³¹ Al-Nawawi E, *Al-Majmo' op.cit.*, vol.9, p.275.

¹³² A leading Shafi' scholar.

each type of objects.¹³³ According to the Shafi'i' school, some positive action has to be made in order to perform delivery in the sale of goods, (movable objects).

Finally, in its definition of delivery, the Hanbali school refers to *al-takhliyah*, giving full access and permission to the items, adding that they should be distinguished from other items and if sold by measurement, they should be measured for the purpose of delivery. Moreover, reference is made to customs for the type of object of sale to be considered.¹³⁴ In this definition there is an indication of the requirement to distinguish between sold goods and non-sold goods as a part of delivery.¹³⁵

From the above definitions, it can be said that there is unanimous agreement between all schools regarding *al-takhliyah* (being given full access and permission) being the meaning of delivery in the sale contract. In addition, clear reference has been made to customs and usage for the performance of delivery according to different types of sold items. However, if the sold items are movable, according to some views (Shafi'i' and Hanbali), the delivery requires some action to be taken. In Shafi'i', physical movement of items is part of delivery. As for Hanbali, if the movable object requires measurement by weight or volume to be identified, the items must be measured or weighed. Additionally, if items are sold in bulk, their physical movement is then required.¹³⁶

Looking at the JLR approach, Art.333 states that "delivery of anything is according to its custom, thus, delivery of what is sold as bulk is by moving it and delivery for what can be taken by hand is by taking it by hand." Art.336 indicates that the delivery of the object of sale that requires weighing or measuring should be done by weighing or measuring them.

¹³³ *Ibid*, vol.9, p.275.

¹³⁴ Ibn Qudamah A, *Al-Mogni*, (Beirut: Dar Al-fikr, 1985), vol.4, p.125.

¹³⁵ This is similar to the rule of Art.32 (1) in the CISG.

¹³⁶ See the JLR Art.336.

Some contemporary researchers have examined the differing opinions regarding delivery, suggesting that its meaning should be limited to *al-takhliyah* (giving full access and permission), and that it should also take into account the custom for the type of object being sold. The only exception is the sale of food, as there are clear prophetic reports ordering buyers not to resell until it has been moved from the place where it was first sold.¹³⁷

Considering the ongoing discussion about the meaning of delivery, it can be concluded that there are no fixed rules of delivery for all kinds of goods and properties. While there is a clear request for the seller to hand over the object of sale to the buyer in order to perform delivery, some prophetic reports suggest that delivery may occur even without any action being taken. Those who differentiate between food and other items are making an effort to infer consistent rules from these prophetic reports.¹³⁸ These differentiations are subject to the jurists' interpretations, thus it can be suggested that the purpose for using prophetic reports in this matter is to ensure that complete legal delivery has taken place according to the contract, and to reduce uncertainty in trade to the minimum. This approach can be supported by the frequent references made to the custom for each type of items, and the differences between prophetic reports can be seen as applying to different modes of delivery according to particular commodities. On this ground, one may suggest here that delivery can be defined as *al-takhliyah*, which means allowing the buyer to use the object of sale pursuant to the seller's removal of all obstacles and barriers that might hinder the buyer's ability to use them. This can be considered to constitute delivery according to the custom relating to the object sold.

¹³⁷ See: Al-Jnco. 'A, *op.cit.*, pp.19-28; Al-Zarqa M, (1999), *op.cit.*, p.114.

¹³⁸ For more detail about these reports, see: Al-Jnco 'A, *op.cit.*, pp. 23-7; Al-Zuhayli W, (2007), *op.cit.*, vol.1, pp.121-3.

2.3.2.2 States of delivery

Although contract law does not include any explicit statement obliging the seller to deliver a sold object,¹³⁹ delivery is undoubtedly one of the main obligations of the seller. Proof of this obligation can be found in two of the rules of contract. One of these is the condition of sale relating to the object of sale being deliverable at the time of concluding the contract. According to Art.273 of JLR if the contract involves the sale of items which are undeliverable, the contract is invalid.¹⁴⁰ This would include the sale of a half of undividable goods, the sale of a debt to anyone other than the debtor, and the sale of fish in water or birds that are difficult to catch unless they are in an enclosed area.¹⁴¹ From this condition it can be inferred that the obligation of delivery is a key point of the contract, and thus the contract will be nullified if one of its consequences happens to be the non-delivery of an object of sale.

Other relevant rules state with regard to the obligation of delivery in a contract, it is the right of the seller to withhold the object of sale.¹⁴² According to Art.329 of the JLR, the seller does not have the right to withhold the object of sale contingent on the buyer's payment, as long as the payment is brought by the buyer at the time of delivering the goods, because that delivery is a result of the contract.¹⁴³

Applying these rules in modern international contracts can show that payments for the goods are normally secured with the involvement of banks and other intermediaries between buyers and

¹³⁹ The reason for not stating the obligation of delivery might be justified by the natural result of concluding the contract being that delivery will follow thereupon, which may go without saying.

¹⁴⁰ Al-Zuhayli, (2007), *op.cit.*, vol.1, p.47.

¹⁴¹ See: Art.283 of JLR; Al-Buhoti M, *Kashaf Al-Qina' 'an Matn Aliqna'* (Riyadh: Al-Nasir Al-Hadithah, 1982), vol.3, p.162.

¹⁴² The right to withhold is discussed in section: 5.3.2.3.

¹⁴³ See also Art.331 of JLR. Al-buhoti M, *Sharh Mountaha Al-iradat*, (Beirut: 'Alam Al-kutub, 1996), vol.2, p.187.

sellers. Thus, the seller is obliged to deliver the object of sale as a result of concluding the contract.

2.3.2.3 Mechanisms of delivering the goods:

From the above discussion on the meaning of delivery, it can be said that the main principle of its achievement may vary according to the custom for each kind of sale object (Art.333 of the JLR). However, the applications of this principle in the literature also vary, since there are two different types of delivery:

2.3.2.3.1 Actual delivery

Actual delivery can be defined as a tangible or physical delivery, such as delivery by exchanging hands, measuring by volume or weight, or transporting the object from one place to another.¹⁴⁴

There is no disagreement about this type of delivery among jurists,¹⁴⁵ and the actual method of delivery depends on the nature of the object of sale and the relevant custom¹⁴⁶ into the following:

1. The delivery of non-transferable property: Arts.334 and 335 identify the method of delivering houses and the like by *al-takhliyah* which means giving full access and permission to the buyer. So if the object is a house, it should be delivered by handing over the keys to the buyer or by opening the door to him.¹⁴⁷ One question that needs to be asked, however, is whether or not the registration of real estate, with the notary department in the Ministry of Justice, is part of delivery process. The answer to this question can be found in sale contract

¹⁴⁴ Lotfi B, *Al-Tadawel Al-Electroni Llomlat*, (Amman: Dar Al-Nafacs, 2009), p.50.

¹⁴⁵ See: Al-Jnco 'A, *op.cit.*, pp.45-52; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.67.

¹⁴⁶ See: Al-Jnco 'A, *op.cit.*, pp.46-9; Al-Zarqa M, '*Aqd Al-Bai*' (Damascus: Dar Al-Kalam 1999), p.115.

¹⁴⁷ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.67. In the Hanafi school some suggest that in the sale of a house the buyer, in order to have actual delivery, must stand in it or near its edge or door: Al-Jnco 'A, *op.cit.*, p.49.

law, which considers mutual consent between the parties to conclude the contract which then becomes valid and enforceable by the agreement itself.¹⁴⁸ For delivery purposes, the registration process can be seen as a type of *al-takhliyah*, and it becomes by custom the same as giving full access and permission.¹⁴⁹ In the case of selling fruit but not the trees, the seller has to allow the buyer to pick the fruit. Then if the property sold is not accessible to the buyer because of control by the seller or a third party, there is no actual delivery.¹⁵⁰

2. The delivery of specified designated movable goods, such as in buying a volume of food in bulk¹⁵¹ or a certain animal. According to the last part of Art.333; the delivery of transferable bulk goods should involve it being transported from the seller's place to the purchaser's place. If the commodity is an animal, the buyer should take it with him. In this case actual delivery will be through transporting the commodity from the seller's place.¹⁵²
3. Transferable goods that are usually delivered by hand, such as small commodities (clothes, jewellery, etc.), are required to be delivered by hand according to the second part of Art.333.¹⁵³
4. A fungible transferable commodity such as grains requires weighing, measuring, or numbering, in order to be sold. According to Art.336, actual delivery takes place by receiving

¹⁴⁸ See above for the time of transferring the title of the goods, chap.2 fn: 125.

¹⁴⁹ In Saudi law, even the registration of real estate is required, the law is silent about the effects of the contract before registration, and therefore reference has to be made to Islamic contract law. See: 'Ashosh A, *op.cit.*, p.171. In Egyptian law, the sale contract for real estate will not be recognised by mutual agreement only until the official registration is transferred through the relevant department; see Marqus S, *A'qd Al-Bai'* (Beirut: Al-Manshorat Al-Huqoqeeah, 1990) p.376.

¹⁵⁰ Al-Zarqa M, (1999), *op.cit.*, pp.115-6; Al-Jnco 'A, *op.cit.*, p.50.

¹⁵¹ This means a non-estimated commodity, which does require assortment from others by counting, weighing or measuring by volume.

¹⁵² Al-Jnco 'A, *op.cit.*, p.48; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.67.

¹⁵³ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.67; Al-Jnco 'A, *op.cit.*, p.47.

the commodity directly from the seller through its estimated method, either by weighing or numbering, and the presence of the buyer or his delegate is required.¹⁵⁴

Delivery in the abovementioned cases is considered to be actual delivery, and its validity is approved by all jurists as mentioned above.

2.3.2.3.2 Constructive Delivery

Constructive delivery essentially means unhandled delivery by *al-takhliyah*, in which the seller places the goods at his place of business at the buyer's disposal without them being transported.¹⁵⁵ The applications of this method in the literature are very diverse. Pursuant to the JLR rules, as already mentioned for actual delivery, constructive delivery is only recognised in immovable property such as real estate. However, actual delivery is required in all movable cases depending on the type goods as mentioned above. This view is derived from prophetic reports which instruct the buyer to move, identify, or count the goods before proceeding to take any action.¹⁵⁶ A contrary view suggests that this opinion is inconsistent, since the requirements for actual delivery were not clearly stated in prophetic reports. In some cases the prophet permitted the buyer to have full disposal of the object of sale as soon as the contract was concluded; that is, by constructive delivery.¹⁵⁷ The International Islamic Fiqh Academy recommended this view, pointing out that delivery by the constructive method should be accepted as long as the buyer has full access and permission to use the object, even if there is no actual delivery.¹⁵⁸ Concerning the prophetic reports that request the buyer to transfer or to possess the goods before taking any

¹⁵⁴ Al-Jnco 'A, *op.cit.*, p.49; Ibn Qudamah A, *Al-Mogni*, *Op.cit.*, vol.4, p. 111; Al-Zarqa M, (1999) *op.cit.*, p.115.

¹⁵⁵ See: Lotfi B, *op.cit.*, p.50; Al-Jnco 'A, *op.cit.*, p.53.

¹⁵⁶ Kamil O, *Al-Qoaid Al-Fiqhiah Al-Kubra wathruha fi Al-Mua'malat Al-Maliah* (Alorman: Dar Al-Katbi, 2001) p.377.

¹⁵⁷ See these reports in Al-Jnco 'A, *op.cit.*, p.57.

¹⁵⁸ Decision No. 53(6/4) in 14-20/3/1990 of International Islamic Fiqh Academy under the Organisation of the Islamic Conference (OIC) (1990) 6 *J.I.I.F.A.*, p.453.

action with them, these were intended merely to ensure that delivery of the correct object at the agreed quantity would take place. This can be interpreted as referring to goods that are mixed with others, as with fungible goods (Art.336) which cannot be delivered without being identified to the contract.¹⁵⁹ In this regard, this requirement is the same as the provision of Art.32 (1) of the CISG where the seller has to notify the buyer of the consignment specifying the goods.

In analysing the foregoing debate and bearing in mind the needs of businesses and the integration of sales activity with other transactions in contemporary situations, it can be said that the second viewpoint is more efficient economically for movable commodities and is more likely to be accepted. Moreover, the meaning of actual and constructive delivery can be the same in some cases when the goods are identified at the seller's place.

2.3.2.4 Cost of delivery

According to Art.344 of the JLR, any expenditure related to delivery should be incurred by the seller. For example, if the object of sale requires measuring, the cost of measurement should be paid by the seller.¹⁶⁰ However, in the case of selling fruit in trees (without selling the trees) or grass in land (without selling the land), Art.346 of JLR states that the buyer should bear the cost of the picking the fruit and harvesting the grass.

If the goods require transportation, Art.343 of JLR states that the cost of this should be paid by the buyer.¹⁶¹ This needs to be understood as referring to the cost of transportation after the goods have been placed at the agreed place, since the cost of bringing goods to the place of delivery is

¹⁵⁹ See: Al-Jnco 'A, *op.cit.*, p.58.

¹⁶⁰ Al-Buhoti M, *Kashaf Al-Qina'*, *op.cit.*, vol.3, p.247.

¹⁶¹ *Ibid.*

the seller's responsibility (Art.242 of JLR).¹⁶² So if the seller and the buyer agree to that the goods will be delivered at a certain place, the seller has to bear the cost of transportation to the named place.¹⁶³

Nevertheless, the seller and the buyer may agree otherwise, and their agreement should prevail in the contract where the agreed party becomes responsible for such payment.¹⁶⁴

2.3.2.5 The scope of delivery

The JLR in Arts.295 to 304 mentions various criteria to define what can and cannot be included, and even though these criteria were designed for contracts involving the sale of real estate; the approach to other commodities can be included by analogy. These criteria provide an important guideline of the Saudi law approach regarding the delivery of documents and the requirement of packaging which were articulated explicitly only by the CISG: (Arts.34 and 35(d)).

The first criterion is language and custom, and Art.295 considers what is deemed supplementary to the object of sale according to its name and the language and custom of the forum in which the contract took place, to be part of the sale. This article gives some examples of how this criterion is applied. In the sale of a house, the land and any attached yard or garden are included. In the sale of a field, its trees, plant and buildings are included.¹⁶⁵

¹⁶² Al-Nawawi E, *Al-Majmo'*, *op.cit.*, vol.9, p.268; Al-Soas A, *Makhatir Al-Tamoil Al-Islami*, The Third International Islamic Economy Conference (Makkah: Umm Al-Qura University, 2005), available at: <http://uqu.edu.sa/page/ar/64284>. For a similar meaning see Art.345, which states that the buyer is responsible for calculating the price before delivery and if the seller re-calculates it after delivery, the seller should bear the cost.

¹⁶³ Art.342 of the JLR states that "if the contractor stipulates a specific known place for delivery the cost of the transportation is the seller's responsibility".

¹⁶⁴ 'Ashosh A, *op.cit.*, p.176.

¹⁶⁵ Ibn Qudamah A, *Al-Mogni*, *op.cit.*, vol.4, pp.198-200; see also Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.52.

Art.296 states another criterion which includes everything permanently attached to the land, such as the roots of crops or trees in a field if harvesting is to be conducted regularly. Thus, ripe fruit and crops ready to be harvested are not included, as they are intended to be removed at the contractual time. However, crops that will be harvested only once, such as onions, carrots and barley, are not included in the sale.¹⁶⁶

The third criterion mentioned in the JLR concerns items connected permanently to the object of sale for its benefit. Art.297 gives an example of this where fixed ladders, doors and shelves are included in the sale.¹⁶⁷ The final criterion include things needed for the object of sale or which are considered for its benefit by custom, even though they are not considered as part of the object of sale (Art.298). For example, the sale of an animal includes its bridle.¹⁶⁸

Arts.299 and 300 indicate that what is excluded from the object sold is anything that is not connected to the object and would not be encompassed in its name by custom, such as buried treasure in land, or furniture in a house or cutlery and detached ladders.¹⁶⁹

Besides these criteria to identify what should be included in the sold object, Art.302 gives priority to the agreement by the parties to decide what is included and excluded in the object sold as they wish in the contract. The aforementioned rules can then be used to fill gaps in the case of no such agreement between the contractual parties.¹⁷⁰

¹⁶⁶ These examples are given in Art.296 in explaining its meaning. For more detail see Al-Buhoti M, *Kashaf, op.cit.*, vol.3, pp.277-278.

¹⁶⁷ Al-Buhoti M, *Kashaf, op.cit.*, vol.3 p.274.

¹⁶⁸ 'Ashosh A, p.178.

¹⁶⁹ Al-Buhoti M, *Kashaf op.cit.*, vol.3 p.277; see also Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.52.

¹⁷⁰ 'Ashosh A, *op.cit.*, p.179.

It can be concluded that these provisions, albeit antiquated with regard to contemporary trade, are very poor in providing specific rules for movable goods. This may still show the direction and the approach of Saudi law regarding the scope of delivery, which should be consistent with custom, the meaning in the language used, and what is connected to the object of sale for its benefit.

Al-Zuhayli indicated towards another method of identifying what can be included in the object of sale, suggesting that the rights attached to merchandise include “all the rights pertaining to the object of sale without which the object of sale would not have been desired”.¹⁷¹ This approach considers the purpose of the goods as a criterion for what the seller has to deliver as part of the object. The criteria mentioned in the JLR will be likely to satisfy the desired purpose of the buyer.

In light of this discussion, it can be inferred that the official documents accompanying the dispatch of goods from one country to another are part of the obligation of delivery, since the failure of the seller to hand-over documents may result in preventing the buyer from receiving and possessing them. Thus, according to the above criteria, handing over documents is included either by international custom or as a requirement for the object of sale under the first or last criteria. This issue may lead to the question of the position in Saudi law of providing insurance in respect of the carriage of the goods. This question can be answered in the light of the position of insurance in Islamic law, which can be divided into co-operative (mutual) insurance and commercial insurance.¹⁷²

¹⁷¹ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.52.

¹⁷² The main difference is that, in the former, the insurance organisation is not seeking to profit from the insurance activity; the main role of the organisation is to mitigate the losses that may affect some members. Here, any unused

The insurance contract involves a substantial level of *gharar* (uncertainty), since hazard is one of its cornerstones and payment depends on future probabilistic events which may or may not occur. Jurists consider commercial insurance contracts to be prohibited, sanctioning instead co-operative insurance as being in compliance with Islamic principles.¹⁷³

2.3.2.6 Time of delivery

The JLR does not specify the time when the seller has to deliver the object of sale to the buyer. Nevertheless, the issue of time of delivery is discussed in the JLR's section of the seller's right to withhold the object of sale. Art.329 states that "if the price is due immediately, the seller has to deliver the object first, and then the buyer pays the price". Accordingly, the seller has to deliver the object at the same time as he receives the price.¹⁷⁴ The delivery of the commodity should precede the payment of the price. However, the second part of Art.329 provides that "if the due price is not available in the session, the seller has the right to withhold the commodity until receipt of the payment".¹⁷⁵

However, if they have both agreed to delay payment or to pay on an instalment basis, the seller must deliver the object of sale immediately upon the signing of the contract. In this regard, Art.331 states that "if the seller and the buyer agreed to defer the price, the seller has no right to withhold the object of sale".

money still belongs to those who are insured, whereas a commercial insurance company seeks profit at the expense of the insured. See also Permanent Committee Fatwa, *Al-Tameen* ('insurance') 19 *Journal of Islamic Research* (Riyadh), p.22; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.87.

¹⁷³ See the Council of Senior Scholars' Decisions Nos.51/55 in 4/4/1397H (1977G), available in Arabic at: <http://www.alifta.net/Fatawa/FatawaDetails.aspx?View=Page&PageID=5666&PageNo=1&BookID=3#P288>; For more details see: Al-Salos A, *op.cit.*, pp.363-95.

¹⁷⁴ If the parties are in dispute about who should deliver first, Art.328 provides that a trusted person should become involved and both parties deliver the price and goods to him, then he deliver the goods and then the price.

¹⁷⁵ See also Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.64.

It is worth mentioning that in the sale of *sarf* (a money exchange contract) it is conditional for the validity of a contract that the buyer and seller have to make the exchange of object and price prior to parting.¹⁷⁶ The reason for this is to avoid the prohibited transaction of *riba* (usury).¹⁷⁷

2.3.2.7 The place of delivery

Arts.341 and 342 of the JLR identify the place where the seller should deliver the goods. According to Art.341, the seller should deliver the goods at the place of the contract. However, according to the Hanafi school, if the contract was silent, the place of delivery is the location of the goods when the contract is concluded.¹⁷⁸ In considering these opinions, one may note that their basis refers to custom and reasonableness,¹⁷⁹ rather than the specific teaching of the primary sources (Quran and *Sunnah*). In other words, it can be said that these rules are subject to what can be considered as customary or reasonable. Thus, if the custom of international trade suggests that the location of the goods at the time of concluding the contract is the delivery place, or the seller's place, there is no reason to follow the above provision of Art.341.

Moreover, Art.342 gives the parties the right to choose the place of delivery, stating that "if the buyer stipulates delivery of the goods to be at a specific place, the seller undertakes to deliver the goods at the same place that has been agreed by the contract." In fact, the right to choose the place of delivery is not just a right, but it can also be an obligation. In this regard, Art.419 states that, for the validity of the contract, if the contract was signed at a place other than a possible

¹⁷⁶ See JLR Arts.474-383; these eleven articles are designed specifically to prevent the contract from falling into prohibited *Riba* (usury).

¹⁷⁷ See section: 1.3.2.4.

¹⁷⁸ Hydar A, *Dorar Al-Hukam Sharh Majallat Al-Ahkam*, (Beirut: Dar Al-Kutub Ali'lmyah, 1993), Arts.285-286; Al-Jnco 'A, *op.cit.*, p.81.

¹⁷⁹ Al-Shrbiny M, *Mogni Al-Mohtaj Sharh Al-Mennhaj*, (Beirut: Dar Al-Kutub Al-'elmiah, 2009), vol.2, p.104. For example it has been said that, because the buyer becomes the owner of the commodity in the contractual session, he should receive it at that location.

place of delivery, the parties must explicitly mention where the place of delivery will be.¹⁸⁰ However, if the contractual place cannot be reached (such as on a ship or a similar location), and the parties fail to identify another place, the contract is invalid according to one view since it may lead to creating disputes between the parties when no one place more appropriate than on other.¹⁸¹ Another view suggests that if the contract was concluded in a place where delivery is not feasible, the seller has to deliver the goods to the closest feasible place to the contractual location.¹⁸²

In examining these two views, one should note that this issue would not arise if the place of the seller's business or the location of the goods is the actual place of delivery. Moreover, since international trade tends nowadays to recognise a place of business as an official place for correspondence, it becomes much easier to identify the place involved rather than to consider the contract avoided.

2.3.3 The effects of delivery

When the seller delivers the goods to the buyer by either actual or constructive delivery, the seller's duty is completely fulfilled. However, the period between the conclusion of the contract and receiving the goods by the buyer may cause some uncertainty in terms of liability for the goods in case of loss or damage, and the right to gain profit before the delivery takes place. In Saudi law there are two main effects of the performance of delivery; the passing of risk and the right of disposal of the goods. The exact time when the risk passes and responsibility for damage depending on its cause are discussed below. The following section then deals with the

¹⁸⁰ See Al-Jnco 'A, *op.cit.*, p.50.

¹⁸¹ Ibn Qasim A, *Hashiat Al-Rod Al-Morbi'* (Riyadh: Al-Matabi' Al-Ahliyah Ilaofist, 1985), vol.5, p.28.

¹⁸² Al-Smarkndi A, *Tuhfat Al-Foqha*, (Beirut: Dar Al-Kutub Ali'lmiah, 1994), vol.2, p.13; Al-Zuhayli W, (2007), *op.cit.*, vol.1, pp.248-9.

relationship between delivery and the right of the buyer to dispose of the goods by reselling them.

2.3.3.1 Passing the risk

2.3.4.1.1 Time of the passing of risk

According to the JLR, the time of passing of risk is classified depending on the way in which goods have been defined in the contract, in one of the two following cases:

1- Fungible goods (*mithli*):¹⁸³ if the object sold is not specifically designated in the contract and requires the action of the seller to identify it by measurement, weight, or number, the risk according Art.349 will pass when they are delivered to the buyer by measuring, weighing, or numbering them. This is due to the fact that ownership of these types of goods cannot be transferred without being identified, and when the measurement, weight, or number of the goods has been identified by the buyer, only then the risk will be on the buyer.¹⁸⁴

2- Specifically designated object (non-fungible): this type of object does not require the seller to identify it, as it is identified specifically in the contract. The time for the risk to be transferred to the buyer as provided by Art.320 is the time of the conclusion of the contract, if the seller places the object under the buyer disposal at the seller's place.¹⁸⁵

¹⁸³ Goods that can be returned in kind, such as gold for gold, silver for silver, dollar for dollar, wheat for wheat etc.

¹⁸⁴ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.244.

¹⁸⁵ See also Ibn Qudamah A, *Al-Mogni*, *op.cit.*, vol.4 p.110; Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 pp.242-244; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.58; 'Abdulbar M, *Nadareet Tahamul Atabia'ah fi Al-Fiqh Al-Islami* (Cairo: Al-Fijalah, 1950). p.89.

In contrast to the approach of the JLR, however, there is an alternative opinion among legal commentators on this matter. The majority of scholars¹⁸⁶ consider that the seller is liable for the sold goods until they are delivered to the buyer, and the buyer is not responsible for any damage which may occur before receiving them. Here the consequence of obliging the seller to deliver the goods is to be responsible for any damage to them before delivery.¹⁸⁷

Considering these views, it seems that the approach of the JLR has tended to focus on identifying the particular object to the contract rather than to the party who has control over it. Nevertheless, the JLR Art.320 suggests that the transfer of risk occurs after concluding the contract, it requires the seller to give the buyer full access to the goods. In this regard it can be said that the buyer becomes responsible for the specifically designated object not because the contract was concluded but because the delivery has taken place by *al-takhliyah*,¹⁸⁸ which is sufficient for the delivery to take place. This is true because it can be inferred that the above specific object does not require any proactive action on behalf of the seller to identify them, thus they are under the buyer's disposal from the moment of concluding the contract which is the same as delivery in Art.31 (b, c) the CISG.¹⁸⁹

2.3.3.1.2 Responsibility for damage

The loss of or damage to the object of sale is affected by different factors, and may be caused by a natural disaster, the seller, a third party or the buyer. Therefore the JLR differentiates between

¹⁸⁶ This is the opinion of the Hanafi and Shafi' schools; see Al-Jnco 'A, *op.cit.*, p.207.

¹⁸⁷ Al-Zarqa M, (1999) *op.cit.*, p.121.

¹⁸⁸ See the discussion about the mechanism of delivering the goods, section: 2.3.2.3.

¹⁸⁹ The rule of Art. 31(b, c) considers the time of conclusion of the contract as the time of delivery when the seller places the goods under the buyer's disposal. See section: 2.2.3.5.

cases where the damage can be compensated for or not, and in each case there are different provisions as follows:

If the object of sale of fungible goods is totally ruined by natural disaster before delivery, the risk will be on the seller, and consequentially the contract is immediately terminated as suggested by the first part of Art.315. The second part of Art.315 suggests that unless the seller has already offered the items for collection and the buyer has refused to receive them, the buyer can withhold the price, or regain it if already paid. Since no one is responsible for the damage, immediate termination of the contract is the only available remedy.¹⁹⁰ As discussed above this rule does not include damage to specifically designated objects, which will in this case be at the buyer's risk, since he was already entitled to dispose of the object.¹⁹¹

Art.317 gives more options for the buyer when the damage can be compensated for. If the object is damaged before delivery by the seller's negligence or by a third party, the seller will be liable for it and the buyer has the option either to avoid the contract or to conclude it by asking for compensation or suing the third party. When the buyer decides to conclude the contract, the second part of Art.317 provides him with one of two solutions according to the type of the object of sale. If the object is fungible the seller has to deliver a replacement, and if the contract was made to a specifically designated object, the contract will not be avoided and the buyer can ask for the value¹⁹² of the damaged object.¹⁹³

¹⁹⁰ Al-Husain A, *op.cit.*, vol.2, p.271.

¹⁹¹ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.243; Al-Jnco 'A, *op.cit.*, p.69.

¹⁹² The difference between requesting the value of the damaged object and terminating the contract and returning the paid price is that the value of the object can be more than what has been paid, since it is subject to market prices.

¹⁹³ See: Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.373; Al-Jnco 'A, *op.cit.*, p.69;

Obviously, the seller has no liability for the sold goods if the buyer causes such damage, even before receiving the goods, as the involvement of the buyer is considered as delivery in itself, because the buyer cannot damage the goods unless he has access to them. The risk will pass to the buyer if he refuses to receive the goods. In this case the buyer, according to Art.316, has no right to opt for invalidation, or to be compensated, and has to pay the full agreed price.¹⁹⁴

2.3.3.2 The buyer's right of disposal of the goods before delivery

Even though the buyer owns the goods from the moment of concluding the contract,¹⁹⁵ his right of disposal of the goods before delivery (e.g. to resell or hire them) is limited. Pursuant to the JLR Art.324, the buyer is not allowed the disposal of the goods before delivery takes place if they are fungible goods (*mithli*). On the other hand, Art.323 includes a different provision for the sale of specified designated goods by allowing the buyer the right of disposal of the goods from the time of contract.

This dichotomy in the JLR has been subject to some criticism among jurists because, according to some,¹⁹⁶ the buyer is not authorised to dispose of any type of items whether fungible or non-fungible until delivery has taken place.¹⁹⁷ Another view suggests that the buyer is entitled to dispose of the goods before delivery except for the sale of food which can only be done after delivery.¹⁹⁸

¹⁹⁴ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, pp.243-4.

¹⁹⁵ See chap.2, fn: 125.

¹⁹⁶ This opinion was supported by the Shafi' school, and some of the Hanbalis and Hanafis. Some of the latter permit the disposal of real estate that cannot be damaged; see Al-Jnco 'A, *op.cit.*, p.228.

¹⁹⁷ Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.377.

¹⁹⁸ *Ibid*, pp.230-4.

This issue is controversial among jurists,¹⁹⁹ the reason being related to what can be understood by different prophetic reports. Many jurists consider the literal meaning of the individual reports rather than considering the collective rulings in all cases identifying the attribute behind them.²⁰⁰ However, according to the prevailing view above, which suggests that both actual and constructive delivery are lawful as long as they are accepted by local custom. The approval of constructive delivery provide better understanding to the JLR approach regarding the non-fungible objects by suggesting that the permission of the disposal of them is because that the delivery has occurred constructively even they are still at the seller's place of business which is similar to the approach of Art 31 (b), (c) of the CISG.

Since the relation between delivery and the buyer's rights of disposal is linked in these different opinions, it is important to discuss the reasons for this link according to these opinions which may provide better understanding of the Islamic approach regarding delivery.

2.3.4 Islamic approach of delivery

Passing of risk is correlated with the right of disposal of the goods, and therefore the goods remain at the seller's risk until the buyer has the right of disposal of them.²⁰¹ This relationship derives from the basic principle of *al-kharaj bi-al-daman* ("gain accompanies liability for loss").²⁰² According to this rule, when the JLR allows the buyer to gain the benefit from the

¹⁹⁹ See for more detail, *Al-Moso'ah Al-Fiqhiah Al-Kuwaitiah*, (Ministry of Islamic Affairs of Kuwait, 2006), vol.4, p.90 (cited later as *Al-moso'ah Al-Kuwaitiah*).

²⁰⁰ Ibn Taymiyyah A, *Fataua*, *op.cit.*, vol.29, p.403; Al-Zuhayli W, (2007), *op.cit.*, vol.1, pp.60-1.

²⁰¹ This is an opinion of the Hanbali school; see Al-Husain A, *op.cit.*, vol.2, p.281.

²⁰² This is a prophetic report forming a legal maxim and a basic principle; there is also a similar rule to this, *al-ghunm bil-ghurm*, which provides the rationale and the principle of profit-sharing in speculation arrangements. Earning profit is legitimized only by engaging in an economic venture, risk-sharing, and thereby contributing to the economy, see Al-Husain A, *op.cit.*, vol.2, p.281.

goods while they are still in the seller's premises, it is emphasized that the risk in this case is on the buyer, even though the goods have not been transferred to them.²⁰³

Some commentators do not consider this correlation²⁰⁴ as an overriding rule suggesting that there are other reasons for not allowing the buyer to dispose of the goods before delivery. This prohibition prevent hazard (*gharar*), where the second sale is constructed upon a contract which may be avoided,²⁰⁵ or if the seller may deny the sale or refuse delivery, particularly when the buyer gains more profit;²⁰⁶ thus the contract will not be completed until delivery takes place. This opinion can be supported by one case wherein the prophetic tradition points out that, in the sale of fruit on their trees (without selling the trees), the risk is on the seller. As a result it seems that the buyer has the right of disposal of the fruit but the risk remains on the seller.²⁰⁷ However, according to the first opinion, the buyer in this case does not have full rights of disposal, which would correlate with liability for risk, as the fruit in most such cases is not yet fully ripe at the time of the contract. Therefore some jurists have said that, in the sale of fruit on the tree, the buyer is not permitted to resell them until they are picked.²⁰⁸

As discussed above, the meaning of delivery requires giving full access and permission to the buyer according to the custom for the same type of good

²⁰³ For this purpose, some jurists consider that if the buyer does not gain profit from the disposal, such as by reselling goods at a lower price or giving them to charity, then the disposal is correct even before delivery. This view was attributed by Ibn 'Uthaymeen to Ibn Taymiyyah, although the former criticised it because the reasoning is not sufficient to interpret the meaning of the prophetic reports, since there are other potential reasons behind the prohibition of disposal before delivery. For example, Ibn Abbas said that if the buyer resells the commodity before receiving it, that means he sells money by money and the involvement of the commodity is meaningless, rendering this a type of usury rather than a sale of commodities. See Ibn 'Uthaymeen M, *op.cit.*, vol.8, pp.368-70.

²⁰⁴ This is another opinion within the Hanbali school; see Al-Husain A, vol.2, p.281.

²⁰⁵ See Al-Jnco 'A, *op.cit.*, p.238.

²⁰⁶ Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.369; Al-Jnco 'A, *op.cit.*, p. 239.

²⁰⁷ Ibn Taymiyyah A, *Fataua*, *op.cit.*, vol.29, p.590.

²⁰⁸ *Ibid.* vol.29, p.592.

2.4 COMPATIBILITY BETWEEN THE CISG AND SAUDI LAW IN THE OBLIGATION OF DELIVERY

2.4.1 Meaning of delivery

Before examining the compatibility of Saudi law with the individual provisions of the CISG in the obligation of delivery, it is important to compare their approaches by identifying the essence of delivery and its effects on the transfer of possession and property, which may occur at the time of concluding the contract, the time of delivery, or the time of the completion of the contract.

The definition of delivery under Saudi law means *al-takhliyah* (giving full access and permission). Because the law does not differentiate between the sales of goods and unmovable objects (e.g. real estate) there have been many different views identifying the requirements of this concept of delivery and whether constructive delivery is sufficient or if it has to be actual. Analysing these views shows that reference has to be made only to custom and the nature of the goods, which play an important role in identifying this concept. Looking at the delivery rules of the CISG shows that no particular definition of delivery is given; instead, Art.31 refers to the seller's acts that discharge him from his duties. From the different three places mentioned in the CISG (first carrier, place of the goods, and seller's place of business) it can be inferred that delivery takes place when the seller gives up his control²⁰⁹ over the goods in a situation which enables the buyer to take control of them. From this it can be said that, in both systems, the function of delivery is to transfer the possession of the goods, which means the intentional physical control of the goods. This control can be achieved under both systems by actual or constructive delivery with or without the buyer's cooperation (unilateral).²¹⁰ In this regard, Saudi law and the CISG

²⁰⁹ Having said that, it does not release the seller from the responsibility for preserving the goods, which is part of his duties according to the CISG's section on the preservation of goods (Arts.85-88).

²¹⁰ See section, 2.2.2.2.

are similar in recognizing constructive delivery as effective, which allows the person in control to exercise his legal rights, such as using and reselling the goods. However in applying this concept there is a slight difference between the two systems. The CISG identifies actual delivery to include the carriage of goods and the constructive delivery in other cases whether at the place of the goods or the seller's place of business, in Saudi law custom is the only available reference. In practice both systems provide the same requirement. Under Saudi law if the contract calls for delivery to a particular place the seller has to physically move the goods (actual delivery) and if there is no requirement of delivery the seller's duty of delivery is governed by the custom for the goods. In this regard, if custom requires the seller to identify them to the contract (fungible, transferable commodity), the seller has to specify the goods as discussed above in actual delivery. In other cases, under Saudi law the seller is not required to take any action apart from placing the goods at the disposal of the buyer. This is the same as the practice of the CISG, where Art.32(1) requires the seller's effective delivery to identify the goods if required according to their nature.

2.4.2 The place of delivery

Contractual agreement and custom concerning the place of delivery is given priority in both systems to identify the place. For example if the parties to a contract apply one of customary terms incorporated with its custom Saudi courts will provide similar decisions to those of the United States Federal Court²¹¹ since the prevailing custom will be given priority in interpreting the contract as discussed above in the concept of custom in Islamic contract law.²¹²

²¹¹ See chap.2, fn: 31.

²¹² See section: 1.3.2.3.5.

In the absence of contractual agreement and custom, legal practice in Saudi law differs from the CISG, as under the latter delivery has to be made to one of three different places. The first is the seller's place of business, which is considered by default to be the place of delivery if there is no contrary indication. The second place of delivery is where the goods are stored or are going to be manufactured at the time of concluding the contract, if that place is known to the parties at that time. The third place is the place of the first carrier to the buyer if the obligation of carriage does not include the final destination. In Saudi law, according to JLR, reference is made to the place where the contract was concluded; however, as in Hanafi legal thought, the place of delivery is the place where the goods were at the conclusion of the contract. By comparing the approaches of the two legal systems it can be said that, whereas the CISG recognises the place of business as the default place, there is no consideration of this place in Saudi law or in the legal tradition of Islamic law. Both the CISG and the second legal view in the Islamic literature refer to the known location of the goods to be the place of delivery, but the JLR does not ascribe any importance to the place of the goods and considers the place of the contract instead. Saudi law is similar to the CISG in giving priority in specifying the place of delivery to the parties' agreement. Both laws indicate the seller's duty to carry the goods if the contract requires their delivery to a certain place; however Saudi law does not mention the case of delivering the goods to the first carrier if the obligation of carriage does not specify a particular place.

Turning to the question of the compatibility of Saudi law with the CISG, and whether these differences may affect its ratification by the Saudi government, one can note that the main interest in the rules of delivery in Saudi law is to ensure the certainty and stability of the contract in the absence of the parties' agreement. In addition, these rules are derived from custom and reasonableness, rather than the teachings of Islamic primary sources; in other words they are not

imperative, which means that parties to a contract may either expressly or implicitly agree otherwise on the place of delivery. Furthermore, the absence of recognition of the place of business and the place of the first carrier in Saudi law can be explained by the fact that these rules have been adopted to meet the needs of contemporary developments in commerce which were unheard of in classical Islamic literature. Therefore, it can be said that Art.31 is compatible with Saudi law, and its implementation could be considered as an important development of custom.

The provisions in respect of the carriage of goods in Art.32 are identical with those in Saudi law. As mentioned above, the obligation of identifying the object of sale is considered to be of the essence of the contract in Saudi law. The duties of the seller to arrange for the carriage of the goods and to provide the buyer with the necessary available information to affect insurance in respect of the carriage of the goods are dealt with in Saudi law under the subject of freedom of contract and the right of the parties to add terms and conditions in their contract.²¹³ Thus, by ratifying the CISG, these rules would become part of the parties' agreement. Regarding the requirement of providing insurance information, this should not raise any conflict with the Islamic position on insurance since this service is available in Saudi in compliance with Islamic principles.

2.4.3 The time of delivery

The role of Art.33 Paras. (1) and (2) in the CISG is to emphasise the contractual agreement in respect of the fixed date or the fixed period of delivery to be fulfilled according to the contract. This is indistinguishable from Saudi law, which indicates the obligation of delivering the goods

²¹³ See sections: 1.3.2.3.1 and 1.3.2.3.5

at the contractual agreements.²¹⁴ The third paragraph of CISG Art.33 identifies a time for delivery in the case of the absence of contractual agreement, which is defined as within a reasonable period after the conclusion of the contract. This approach is similar to Saudi law in cases of the absence of contractual agreement, which obliges the seller to deliver the goods immediately if there is no link between payment and delivery in the contract. Saudi law in general presupposes the correlation of payment and delivery in one session, where the seller has to perform his duty before the buyer hands over the payment.

2.4.4 Handing over of documents

Although neither laws include provisions requiring the seller to deliver any particular documents, the CISG requires the seller to fulfil their contractual obligation regarding documents and allows the seller to cure an early delivery of defective documents, as stated in Art.34. Under Saudi law this rule should not make any difference in practice. For example, in the case of the sale of canned fruit where the seller failed to deliver the correct documents correspondent to the amount and value of the goods, Saudi judges will consider the relevant documents to be included as part of what the seller has to deliver with the goods. These are among all the things needed for the object of the sale or which are considered for its benefit by custom, as stated clearly by Art.298 of the JLR. Thus under Saudi law the seller is bound deliver the relevant documents which fall under this criterion regardless of whether or not the contract calls for it.

2.4.5 Transfer of risk

As far as delivery is concerned it is worth mentioning that under both systems the passage of risk is one of the most important effects of delivery, and it has been associated in broad

²¹⁴ See section: 2.3.2.6.

conceptual terms with the time of delivery.²¹⁵ The impact of the similarity in this effect is very important in demonstrating that the effect of the application of the delivery rules in Saudi Arabia will not make any noticeable difference in court practice. Moreover, the approach of Islamic law linking the passing of risk with the right of disposal is similar to the practice of the principle of good faith, which is violated by one party speculating at the other's expense.²¹⁶

From the above discussion one may note that delivery rules in Saudi law are governed by custom and, as this study explains Islamic jurists discuss methods and requirements of delivery according to their customs. Therefore applying the CISG in Saudi law could be an appropriate opportunity to develop the customs of delivery in international trade. This development should be seen as an important step towards the general aim of promoting certainty and preventing disputes over contracts. Thus one may conclude that, by applying the rule of *ijtehad*, jurists would be in favour of accepting rules that establish certainty and stability such as the CISG's rules of delivery.

²¹⁵ The link between the pass of risk and delivery as Ponell pointed out is one of the "provisions which were virtually unknown at the time to most, if not all, traditional domestic sales laws." Bonell M, (2008) 56 *A.J.C.L.*, p.4.

²¹⁶ See Honnold J, (2009), *op.cit.*, p.136.

CHAPTER THREE: CONFORMITY OF GOODS TO CONTRACT UNDER THE CISG AND SAUDI LAW

3.1 INTRODUCTION

The aim of this chapter is to consider the compatibility of Saudi law with the CISG by studying the basic theme of the legal nature of conformity under the CISG and Saudi law in order to identify the similarities and the impact of differences between the two systems in this obligation.

Generally speaking, when delivery takes place, as discussed in the previous chapter, discharging the seller from his duties requires that the delivered goods have to meet the parties' expectations of conformity regarding quantity, quality and description. By fulfilling these expectations, the effects of the contract are completed and the transaction is over, provided that there is no involvement of third party rights.¹

The framework of the expectation of conformity under the CISG is wide to the extent that, to be covered, not only are conformity to express contractual agreement and the avoidance of delivery of defective goods required, but also positive measurement of the fitness of the goods for their ordinary or particular purposes; and that they are packaged and contained appropriately are needed. However, the corresponding measurement of conformity in Saudi law takes a different approach since sale contract law in general was constructed differently. Thus, the term 'conformity' is not provided as an obligation; instead, the law is based upon the hypothesis that the goods being sold should be specific, which means that they exist and are at the seller's disposal and the buyer should view them before concluding the contract. However, if the sale

¹ The discussion of third party rights is made in chapter four.

involves unascertained goods, or those which need to be manufactured, then the relevant rules are discussed in a particular type of sale contract law; namely, the rules of *Salam* (forward contract) where the law impose some restrictive rules for the validity of *salam* contract. The rules of *salam* require a sufficient description of the goods to allow an acceptable level of certainty of both parties' expectations.² The question then becomes whether the expectations of the buyer regarding conformity under Saudi law will protect his rights in the modern trade, and to what extent the Saudi law hypothesis reflects similarities with the approach of the CISG.

The impact of the nature of Saudi law to be derived from Islamic *Shari'ah* rules is to leave some issues concerning the needs of modern transactions, not addressed expressly or clearly. In this regard, Saudi law fails to provide specific rules in relation to the packaging and containment of goods. In addition, there is no indication towards how long conformity should last for. Moreover, the law also fails to set a rule for the duty of the buyer to examine the goods after receiving them.

Whereas the parties to a contract have, for the obligation of conformity, similar expectations under the different national laws, a divergence between Saudi businesspeople and those applying the CISG can be seen in their expectations about the impact of conformity on the validity of the contract. While under the CISG, parties to a contract consider the conformity of the goods to be a key point for validity; Saudi businesspeople must agree to the imperative Islamic rules which require certainty in defining quality, quantity and description at the time of concluding the contract. Under Islamic law the contract is invalid if the contractual agreement cannot determine the sold goods specifically. In this regard, the critical question for compatibility between Saudi sale contract law and the CISG would relate to the impact of the influence of Islamic rules regarding conformity. Therefore, it is necessary to study the approach of Saudi law to the

² See section, 1.3.1.2.

obligation of conformity and its requirements before concluding the contract and after delivering the goods to see to what extent they are similar to the approach of the CISG.

Since there is no guideline or previous studies for establishing the link between the rules of contract under Saudi law and the concept of conformity as a general term, as previously mentioned, inclusive consideration through the Saudi contract law is required to gather all relevant rules in order to provide general understanding the approach of Saudi law in conformity and then to examine the extent of its compatibility with the CISG. The first part of this chapter is devoted to studying the scope of conformity obligations under the CISG in six main areas: conformity required by contract; implied requirement; the duration of the seller's liability; the seller's right to cure defects; examination of the goods and notice of lack of conformity.

The counterpart obligation of conformity in Saudi law is discussed in the second part of this chapter, where the scope of rules relating to conformity is dealt with under three distinct headings. These are: the obligation of determining the object of sale; methods of knowing the goods and the seller's obligation of conformity. After establishing the approaches of the CISG and Saudi law, the third part of this chapter considers the potential compatibility between them and whether the approach of the CISG can be an acceptable alternative in the Saudi legal system.

3.2 PART ONE: CONFORMITY OF GOODS UNDER THE CISG

In the CISG the buyer's expectations regarding the features of goods are defined in Arts.35 and 36 these include the parties' agreement, a series of objective standards by which performance must be judged,³ and the period within which these requirements apply. Other CISG provisions concerning conformity provide procedures that apply when the goods are not in conformity; the seller's right to cure (Art.37), and the buyer's obligations to examine the goods and notify the seller of defects (38 - 40), as well as the buyer's excuse for failing to notifying the seller (Art.44).

3.2.1 Conformity required by contract

In order to determine whether the delivered goods are in conformity, a significant factor is the contractual agreement. Therefore standards of conformity are not based, in the first place, on objective elements of quantity, quality and description, but rather on the requirements of the parties in their contract.⁴ In this respect, the determination of conformity in Art.35 begins with the expressed contractual requirement. The first part of Art.35 makes this clear as follows:

(1) the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

³ Conformity in Art.35 has been described as a unitary concept, because any claim for defective goods must be based on this article. It covers quantity, quality, description and fitness for purpose. Also there is no difference between warranties and conditions, as in common law. Furthermore there is no difference between latent and visible defects. The CISG finally does not differentiate between lack of conformity and delivery of a different kind of goods (note that there is a different view regarding totally different delivery see: chap.3 fn 13). See: Maley K, 'The Limits to the Conformity of Goods in the United Nations CISG on Contracts for the International Sale of Goods (CISG)' (2009) 12 *I.T.B.L.R.*, p.95; Henschel R, *The Conformity of Goods in International Sales* (Copenhagen: Thomson/GadJura, 2005), 149; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.155.

⁴ Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.104; Schlechtriem P, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods*, (Manz: Viennar, 1986) p.67.

According to this article, a seller is required to deliver goods that meet the specifications of the contract in terms of description, quality, quantity, and packaging. In a case between a German seller and a Syrian buyer, for the sale of steel bars in lots, the contract permitted a weight variation of 5%, but because some of the delivery fell outside this range it was held that the seller had clearly breached their obligations under Art.35 (1) to deliver steel bars according to the contractual requirements of quality and description.⁵

The questions of whether the contractual agreement includes the seller's descriptions of the goods in the offer, the reference to an advertisement illustrating the goods and their quality, or the descriptions made by the buyer in requesting the goods should be answered in the light of Arts.8 and 11. According to these articles these requirements are binding without need of a specific promise or being in writing,⁶ unless the seller raises objections to the buyer's request.⁷ Even though the CISG includes no version of the parol evidence rules,⁸ many articles of the CISG, mainly, Arts.8 and 11, reveal that "statements and other relevant circumstances are to be considered when determining the effect of a contract and its terms."⁹ To decide what quality is required by the contract, one should consider the expectations latent in any description of the

⁵ ICC: Court of Arbitration, (26/3/1993), No. 6653, available online at:

<http://cisgw3.law.pace.edu/cases/936653i1.html> a similar case between a Turkish seller and a German buyer to deliver 1,000 tons of fresh cucumbers illustrated the requirement of contract quantity as part of conformity. The seller, however, delivered less than that amount. Despite that, the buyer lost the case because of late notice that the seller was in breach of contract; delivery of less than 1,000 tons is considered as lack of conformity: Germany: OLG Düsseldorf (Provincial CA), (8/1/1993), No.17 U 82/92 available at: <http://cisgw3.law.pace.edu/cases/930108g1.html>.

⁶ According to Art.11, writing is one of many ways to express a contract's terms and interpretations; see CISG-AC, Opinion No 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004, opinion: 3 and comments: para. 2.2, available at: <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=145&sid=145>.

⁷ See: Lookofsky J (2008), *op.cit.*, p.75; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.90; Schwenzer I, Articles 35-44 in Schlechtriem P/Schwenzer IH, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn.) (English) (Oxford: Oxford University Press, 2005), p.413.

⁸ Ferreri S, 'Remarks Concerning the Implementation of the CISG by the Courts (the Seller's Performance and Article 35)' (2005-06) 25 *J.L.&Com*, p.233-6.

⁹ CISG-AC, Opinion No 3, *op.cit.*, comments: para. 2.1; Lookofsky J (2008), *op.cit.*, pp.74-5. This rule is very similar to the purpose of the contract principle in Saudi law as discussed in section: 1.3.2.3.4, and also under the final part of the freedom of contract principle in section: 1.3.2.3.1.

goods.¹⁰ In addition, the level of quality can be determined using the general rule on contract interpretation in Art.8, which emphasises what a reasonable person can understand from such statements.¹¹

The question of whether or not the seller performs his obligation of delivery when the goods fail to conform to the requirements of the contract is treated in the CISG as performed delivery, even if the performance is defective,¹² as long as the goods meet the same name of the agreed product.¹³ The importance of the distinction between non-delivery and defective delivery, as Bianca has indicated, is to oblige the buyer to examine the goods in the case of defective performance and give immediate notice of the lack of conformity.¹⁴

Delivering goods containing less than the quantity specified in the contract is considered as lack of conformity under Paragraph (1) of Art.35. In a German case of delivering acrylic blankets, the buyer gave notification of lack of quality and claimed that five blankets were missing. The court held that lack of conformity comprises both a lack of quality and a lack of quantity; however, the buyer lost the claim of non-conformity because the buyer's notice did not specify the design to enable the seller to remedy the non-conformity (since there was more than one design in the

¹⁰ Art.35 (2)(a)(b).

¹¹ See: Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.108-11; Honnold J, (2009), pp.330-331. In general, Arts.8 and 9 provide rules and standards for determining a party's intent, and rules of usages and practices to which the parties are bound. See also UNCITRAL digest CLOUT on Art.35, p.3, available online at:

<http://daccessdds.un.org/doc/UNDOC/GEN/V04/551/63/PDF/V0455163.pdf?OpenElement>; Ferrari F, 'Warranties and "Lemons" under CISG Article 35(2)(a)' (1/2010) *Internationales Handelsrecht*, p.10.

¹² Under ULIS Art.33(1) the delivery obligation is not fulfilled if the seller handed over goods that failed to conform to the requirements of the contract; see section: 2.2.2.1.

¹³ See Secretariat's Commentary, O.R. p.32,(2); Ferreri S, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.233, the author discussed this issue from the Italian perspective, however she pointed out that the recent approach includes delivery of different things under Art.35; Schlechtriem P, (1986), *op.cit.*, p.67. However, another opinion does not differentiate between defective delivery and delivery of totally different goods; see Huber/Widmer in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.352; Maskow/Enderlein, *op.cit.* p.142-3. The first opinion would be more appropriate, since false delivery should not have any effect on the contract, and the seller's breach should be considered as non-delivery.

¹⁴ Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.21; Bianca C, in Bianca-Bonell, *op.cit.*, p.270.

delivery).¹⁵ Although the buyer's claim in this case of non-conformity was not upheld, the court clearly stated that lack of quantity is treated as non-conformity.

3.2.2 Implied Requirements:

Art.35(2) states that:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they ...

It continues to determine requirements with regard to the quality of the goods to be applied when the parties have not expressly specified the quality and packaging of the goods, and observes that "even a carefully prepared contract will often fail to express the most basic expectations ... because the parties assume that these points are so obvious that they go without saying."¹⁶

It should be noted that, if the parties have agreed otherwise, then the provisions of (a) and (b) in Art.35(2) will not apply in the contract, e.g. given an indication of the expression *caveat emptor* [let the buyer beware].¹⁷ Additionally, usages applicable to the contract may also determine the content of the seller's obligations.¹⁸

The criteria of conformity in the CISG are designed in a positive way, indicating four defining standards to be applied to clarify whether the seller fulfils their obligation, whereas the ULIS confines its rule to the criteria of breaching the obligation of conformity.¹⁹

¹⁵ Germany: Oberlandesgericht (CA), (31/1/1997), No.2U31/96, available online at: <http://cisgw3.law.pace.edu/cases/970131gl.html>; see also the above German case: chap.3: fn: 5.

¹⁶ Honnold J, (2009), *op.cit.*, p.331.

¹⁷ Lookofsky J in Herbots/Blanpain, *op.cit.*, p.91; however, there are some restrictions on such disclaimer rules: see *Ibid.* pp.96-8.

¹⁸ See Art.9 and Bianca C, in Bianca-Bonell, *op.cit.*, p.272.

¹⁹ Bianca C, in Bianca-Bonell, *op.cit.*, p.269.

3.2.2.1 Fitness for general purposes

The first criterion states that:

The goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used

Under the CISG, sellers undertake, at the minimum, this obligation of Art.35(2) (a),²⁰ especially when there is no indication to the seller of what the buyer intends to use the goods for. Thus this provision plays the most important role in the seller's implied obligation regarding quality.²¹

In this provision, the delivered goods must be fit for the usual use required by the contract when they have the normal qualities and are free from defects normally not expected in such goods,²² irrespective of the seller fault,²³ such as for instance, if the material used in the goods is compromised by a lack of proper features or provides abnormally deficient results.²⁴ Under this criterion in a French case for the sale of ceramic ovenware which, was insufficiently ovenproof, the French Supreme Court held that the unfitness of the sold goods for their ordinary use represented a lack of conformity to the contract within the general meaning given to those terms by the provision of the CISG.²⁵

The standard of ordinary use is different according to the type of the goods. For instance, when it comes to perishable food products, the ordinary use is different from that of durable goods such

²⁰ See for the reason of this requirement: Ferrari F, (1/2010) *Internationales Handelsrecht*, *op.cit.*, p.4-7.

²¹ Lookofsky J (2008), *op.cit.*, p.75; in common law this rule is related to the warranty of merchantable quality and it is similar to the UK Sale of Goods Act 1979 s14(3) which requires "reasonable fitness"; see Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.20; Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.112.

²² Ferrari F, (1/2010) *Internationales Handelsrecht*, *op.cit.*, p.8. the author includes the reflection of the price on the goods for the buyer's expectation. p.13-4.

²³ Maley K, (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.96.

²⁴ See Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-21.

²⁵ France: Cour de Cassation (SC), (17/12/1996), No. Y95-20.273, available at: <http://cisgw3.law.pace.edu/cases/961217fl.html#1>

as washing machines and automobiles. Thus, the latter is not fit for ordinary use unless it remains durable for an ordinary period of time. However, no precise period can be expected, because the determination will vary depending on the nature of each type of goods.²⁶ In one relevant case, a French appeal court held that the seller of a refrigeration unit breached its obligation. The court found that Art.35 (2) (a) of the CISG was applicable with regard to the defects of the refrigeration unit, noting that “the unit had broken down within a short period of time after it was first operated.”²⁷ The early breakdown of the machine in this case constituted lack of conformity in the good to be used for ordinary purposes.

One controversial question here is whether the fitness of goods for ordinary use refers to the seller’s place of business or to the place where the buyer is going to use or resell them. The problem becomes even more complex when the buyer’s country implements public law standards that are different from those in the seller’s country.²⁸ For instance, if a buyer from Saudi Arabia ordered 50 cars (manufactured in Britain) from a British seller, the British seller knows that the cars will be fit for their ordinary use if the position of the driver’s seat is on the right. Does the seller have to know whether the cars are fit for their purpose and ordinary use in Saudi Arabia, where the traffic system is designed with the driver’s seat on the left?²⁹

In the view of some commentators, ordinary usage generally must be determined by the seller’s place of business, since the seller cannot be supposed, in normal circumstances, to know about

²⁶ Lookofsky J (2008), *op.cit.*, p.79

²⁷ France: CA Grenoble, (15/5/1996), No.94/0258, abstract available at:
<http://cisgw3.law.pace.edu/cases/960515f1.html>

²⁸ Ferreri S, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.236-7.

²⁹ Under ‘public law standards’ in some countries there are specific rules to protect, for example, consumers, the environment and workers.

specific requirements for ordinary use of the goods in other countries.³⁰ Enderlein and Maskow explain that “the CISG stipulates nothing with respect to *qualitative prerequisites* which may be *mandatory* in the buyer's country or *in the country of destination*.”³¹ Support for this view can be seen in a popular German case of the sale of mussels containing cadmium levels which exceeded the recommendations of the buyer's national law. The court held that “high cadmium composition did not constitute lack of conformity of the mussels with contract specifications under CISG 35(2), since the mussels were still fit for eating.”³² The court indicated that the standards in the importing jurisdiction would have applied if the same standards existed in the seller's jurisdiction, or if the buyer had pointed out the standards to the seller and relied on the seller's expertise.³³ In this case, since there was no contractual agreement for the level of quality, the standard of conformity was judged according to ordinary use in the seller's county, regardless of the buyer's claim based on the standards of his country.

Ferrari justified this decision on the ground that “quality warranties should apply only where sellers enjoy an informational advantage”³⁴

However, on the other hand, some writers would argue that reference should be made to the place where the goods are to be used, because the actual purpose of the goods in such contracts is to be fit for use in the place where they will be used. Schlechtriem pointed out that “it has to be

³⁰ See for this opinion Bianca C, in Bianca-Bonell, *op.cit.*, p.274; Maskow/Enderlein, *op.cit.*, p.144; Hyland, R. *Conformity of Goods to the Contract Under the United Nations Sales CISG and the Uniform Commercial Code* in Schlechtriem, P (ed.), *Einheitliches Kaufrecht und nationals Obligationenrecht* (Baden-Baden: Nomos, 1987), p.317.

³¹ Maskow/Enderlein, *op.cit.*, p.144.

³² Germany: OLG Frankfurt [Provincial CA], (20/4/1994), No. 13U51/93 available at: <http://cisgw3.law.pace.edu/cases/940420g1.html>. This Court decision was confirmed by the German Bundesgerichtshof (SC), (8/3/1995), No.VIII ZR159/94, available at: <http://cisgw3.law.pace.edu/cases/950308g3.html>; Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.97-8; Flechtner described this case of been well-known, and been highly influential. Flechtner II, in Erauw/Taelman (2009), *op.cit.*, p.546; Ferreri S, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.237.

³³ See UNCITRAL Digest Art.35 para. 9.

³⁴ Ferrari F, (1/2010) *Internationales Handelsrecht*, *op.cit.*, p.7.

added, however, that 'ordinary use' will be defined by the standards of the country or region in which the buyer intends to use the goods."³⁵ An American case between an Italian seller (claimant) and an American buyer (defendant) concerned the sale of medical equipment which did not comply with American public law used this approach. The court held that the required quality in the public law of buyer's country is determinative, in that the seller in this case had reason to know the existence of that legal requirement.³⁶

Between these two contrary views, there is a third suggestion for determining the place of ordinary use, based on the CISG's rules for interpreting sale contracts, as Honnold pointed out:

These rules are set forth in Article 8, supplemented by the practices of the parties and trade usages Article 9. Under these rules the relevant facts are: Which party drafted the description? ... What, under Article 8(2), would be "the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances"? ... Article 8(3) directs attention to all relevant circumstances including "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."³⁷

Therefore, in order to use the CISG's general rules to solve the problem of contract interpretation, one should consider the circumstances of each transaction to determine whether the place of the seller or of the buyer controls the provision of Art.35(2) (a).³⁸ Schwenger provided some suggestions for determining the ordinary purpose, including the existence of international usage, as to particular characteristics of the goods and standards which apply both

³⁵ Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-21.

³⁶ U.S. District Court (Eastern District of Louisiana), (17/5/1999), No. 99-0380, available at: <http://cisgw3.law.pace.edu/cases/990517u1.html>

³⁷ Honnold J, (2009), *op.cit.*, p.333. A similar approach was suggested by Schwenger, confirming that "the question of the relevant standard is a matter of the interpretation of the contract" Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.418-9; Lookofsky considered this trend as an academic theory supported by the CISG general principle of reasonableness; Lookofsky J (2008), *op.cit.*, p.81; Ferreri S, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.237-9.

³⁸ Ferrari F, (1/2010) *Internationales Handelsrecht*, *op.cit.*, p.8. the author in this regard referred to 'the rule of merchantability'.

in the buyer's and in the seller's state.³⁹ However, in the case where the buyer's country only provides standards restrictions, Schwenger in this case would support the first opinion which requires the seller to deliver the goods in conformity with the seller's state, as the seller cannot be expected to be aware of those particular requirements.⁴⁰ Schlechtriem criticised this approach by stating that when the seller becomes aware of the country where the goods will be used, the seller should "not only accommodate the characteristics required for the actual use of the goods in this country, but also observe the applicable public law provisions." However in the case where the seller neither knew nor could have been aware of a particular public law in the goods destination, he added that "then it will usually not be demonstrable that the buyer relied, or was reasonably able to rely on 'the skill and judgement of the seller'."⁴¹

From the foregoing debate it can be suggested that referring to the CISG's rules is the accurate answer to the question of determining a place of ordinary use as suggested in the third approach. The use of reasonableness, as stated in many of the CISG's articles,⁴² and the relevant usage would provide a better interpretation of the contract's provisions. In this respect it can be said that, in the introductory example, the seller of 50 cars to a Saudi buyer should reasonably have known of the existence of different driving systems in the UK and Saudi Arabia, if the seller is a manufacturer or expert dealer. Furthermore, if the seller is a middleman who is not an expert in this kind of trade it would not be reasonable to expect them to be aware of the rules of the Saudi driving system. The trend of not including the fitness of goods to the public law standards of the

³⁹ For example, both states are member of the EU. However, if the buyer's country in the Union is less strict in applying the standards and the price of the incompatible goods is reduced, for example, the ordinary sue cannot refer in this case to the Union standards. Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.419.

⁴⁰ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.421.

⁴¹ *Ibid*, p.420.

⁴² See 1.2.2.5.

country of the goods' destination,⁴³ as ordinary purpose seems unreasonable. There are no clear differences between referring to the usage and the public law standards as the rationale for the seller to be aware of the public law standards of the buyer's country would be more reasonable to be known than many other standards including usage. This is true, especially, when the particular law is known widely or the traders in the relevant business are familiar with, such as environmental laws in the oil trade. It can be concluded that there should be no default reference either to the buyer's place or to the seller's place, since the circumstances affecting whether the seller knew or should have known about ordinary use of the buyer's country vary from case to case.

3.2.2.2 Fitness for a particular purpose

The second criterion states:

The goods do not conform with the contract unless they ... (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.

This standard only applies if and when a buyer displays the intention to use the goods for a particular purpose, which is expressly or implicitly made known to the seller⁴⁴ unless the seller can prove that the buyer does not rely on the seller skills and judgements, for example if the seller is intermediary.⁴⁵ However, being an expert or specialist for the supply or production of

⁴³ See Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.418-9; she referred to the seller's place in the case where the buyer's public law standards would object to the goods, and in the case of general standards she referred to the circumstances of specific cases, pp.419-20.

⁴⁴ A proposal of requiring an express term of the particular purpose in the contract was rejected at the CISG Diplomatic Conference. (A/CONF.97/C.I/L.73), O.R. p.104.

⁴⁵ Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.116-7; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.421.

goods with the particular purpose is sufficient for reliance on the seller's judgement.⁴⁶ In this standard the goods must be fit for the required purpose.⁴⁷ In a court decision it was found that a seller of skincare products delivered non-conforming goods according to Art.35(2) (b), as the products did not preserve specified levels of vitamin A throughout their shelf life. The court found that with regard to the specified vitamin levels which the buyer intended to be contained in the products, "the special purpose ... was known [by the seller] with sufficient clarity."⁴⁸

However, the last part of Art.35 (2) (b) states that the particular purpose rule does not apply in the case where the skill and judgement of the seller are not reliable for the buyer, or if it is unreasonable to rely on them concerning the qualities required for their particular use. For this reason, in the above case, the court added that "the buyer counted on the seller's expertise in terms of how the seller achieves the required vitamin A content and how the required preservation is carried out."⁴⁹ The burden of proof in the case of dispute is on the seller,⁵⁰ and situations must be ascertained case-by-case and cannot be specified in advance.⁵¹ For example in the above case of purchasing mussels whose cadmium levels exceeded the standard of the buyer's national law,⁵² the court held that the seller did not breach the provision of Art.35 (2) (b), as there was no evidence that the seller was informed of such regulations. In addition the court stated that, in the usual case, a buyer cannot reasonably rely on the seller's knowledge of the buyer's country importing public law requirements or administrative practices relating to the goods, unless the buyer has pointed out such requirements to the seller.

⁴⁶ *Ibid*, p.119.

⁴⁷ *Ibid*, p.421.

⁴⁸ Finland: Helsinki CA, (30/6/1998), No.S 96/1215, available at: <http://cisgw3.law.pace.edu/cases/980630f5.html>

⁴⁹ *Ibid*.

⁵⁰ Honnold J, (2009), *op.cit.*, p.337.

⁵¹ Hyland R in Schlechtriem P, *op.cit.*, pp.320-1, and see: Bianca C, in Bianca-Bonell, *op.cit.*, p.275

⁵² See chap.3, fn: 32.

This provision of Art.35 (2) (b) can be in conflict with Art.35 (1) in a case where the buyer, for example, orders goods with a particular description and the seller recognizes that such descriptions are not suitable for the buyer's special purpose. The Secretariat's Commentary supposes that the seller has a duty of good faith to inform the buyer in such a case.⁵³

3.2.2.3 Conformity with sample or model

The final criterion of quality of Art.35 is that:

The goods do not conform with the contract unless they ... (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model.

When the contract indicates that goods must conform to the model or the sample, the seller is then bound to deliver goods of the same quality as in the sample, since samples are the same as using words to describe the goods.⁵⁴ In a German case of plastic (PVC), to be used to manufacture rods destined for roll-down shutters, the court found that the goods contained a lower percentage of a certain substance than the percentage agreed upon, as the parties had agreed that the goods would have the same qualities as those of the buyer's former supplier; therefore, the seller had breached its obligation to deliver conforming goods.⁵⁵ In this case the buyer was qualified to claim for the damage, according to the quality required by the contract (paragraph 35 (2) (c)); it may have been difficult for the buyer to rely only on the condition of the window blinds for a claim of lack of conformity if there had been no specific indication of the sample, since the delivered goods still fit for the standard of the same kind of products if

⁵³ See Secretariat's Commentary O.R. p.32,(9); Honnold J, (2009), *op.cit.*, pp.336-7.

⁵⁴ See Lookofsky J (2008), *op.cit.*, p.82.

⁵⁵ Germany: LG Paderborn (District Court), (25.6.1996) No.70147/94, available online at: <http://www.cisg.law.pace.edu/cases/960625gl.html>

there is no expressed or implied promise in the contract to the given sample or model,⁵⁶ Schwenzer, pursuant to the wording of Art.35(2) (c) “held out”, suggested that if the sample or model is provided without obligation they are not binding.⁵⁷ In one court decision it was pointed out that the seller’s obligation of conformity to the sample applies only if there is an expressed agreement in the contract of the parties thereupon.⁵⁸ Analysing this discussion one may suggest that Art.8 should be conceded in this circumstances as discussed above.⁵⁹

Ultimately, when there is reference to a sample or a model, the application of Art 35 (a) and (b) is excluded, as the need for these criteria is only to determine the parties’ intentions and purposes of the contract, hence, sample and model are more precise in expressing what the parties want in their agreement.⁶⁰ The seller must clearly express his intention, if a model is presented only to point out ‘some’ quality of the goods or to give an approximate description of the goods offered to the buyer.⁶¹

3.2.2.4 Packaging and containing

In Art.35(2), the CISG inserts the duty of packaging and containing the goods in the concept of conformity as follows:⁶²

⁵⁶ ULIS Art.33(c) did not oblige the seller to deliver goods conforming to the standards of a sample or model if the seller had submitted it without any express or implied undertaking that the goods would conform therewith.

⁵⁷ Schwenzer I, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.423.

⁵⁸ Germany: LG Berlin (District Court), (15/9/1994), No. 52 S 247/94, available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=218&step=Abstract>

⁵⁹ For support of this view see: Bianca C, in Bianca-Bonell, *op.cit.*, p.276; Lookofsky J (2008), *op.cit.*, p.74. See also the similar discussion above regarding contractual agreement and the opinion of CISG-AC, chap.3, fn 6, and 11.

⁶⁰ Bianca C, in Bianca-Bonell, *op.cit.*, p.276; Schwenzer I, in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.424. She provided an interesting explanation derived from Art.35 itself: “in this respect, the buyer places no reliance on the seller’s skill and judgment.”

⁶¹ Honnold J, (2009), *op.cit.*, p.337; Schwenzer I, in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.423.

⁶² ULIS does not contain a similar provision.

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

This provision points out that the delivery obligation includes duties which allow the buyer to receive the goods in a satisfactory condition. In Incoterms the seller is usually responsible for providing the packaging at his own expense, which is required for the transportation of the goods; to the extent that circumstances relating to transport are made known to the seller before the contract of sale is concluded.⁶³ In the CISG packaging the goods is articulated as part of conformity, and thus the wide range of remedies of non-conformity are also available for the buyer when the seller has not packed the goods properly.⁶⁴

The 'usualness' of determining how the goods have to be contained or packaged is the manner conforming with usage normally used for such goods in the seller profession, and if it is differently contained or packaged from place to place, then reference must be made to the international trade's usual manner, and then to the usual manner in the seller place of business.⁶⁵ Consideration to the purpose of packaging should be made to decide what is normal and thus, it is consistent with "ordinary use," in the approach of Art.35(2) (a).⁶⁶

In a French case of cheese orders, the court held that the failure to mark the contents of the goods on the packaging caused them to be non-conforming with the meaning of article 35(2) (d).⁶⁷

The provisions of this article include the case where there is no usual manner for containing or packaging the goods (e.g. when the goods are a new kind of product). In this event, adequate

⁶³ Gabriel H, 'The ICC Incoterms 1990: A guide to their usage' (1999) 3 *V.J.I.C.L.A.*, p.64.

⁶⁴ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.424.

⁶⁵ Hyland R, in Schlechtriem P, *op.cit.*, p.317; Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.424

⁶⁶ Honnold J, (2009), *op.cit.*, pp.337-8.

⁶⁷ France: CA Grenoble, (13/9/1995), No.93/4126, available at: <http://cisgw3.law.pace.edu/cases/950913fl.html> ; Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.424, the latter author considered the marking and instructions "may also be 'usual' for the packing in question".

preservation and protection of the goods must be ensured. Adequate preservation and protection of the goods must be sufficient after they have been handed over by the seller to the carrier or to the buyer with regard to their destination, if the seller knows or ought to know of this destination.⁶⁸

3.2.3 Limitation on the liability of the seller for non-conformity

The last paragraph of Art.35 provides that:

(3) The seller is not liable under sub-paragraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

This provision is quite clear; the seller is not liable for lack of conformities which are apparent, as long as the buyer knows or ought to know the kind of goods the seller will deliver. This knowledge means that the buyer agreed to the seller's proposal as determined by the effective state of the goods.⁶⁹ The additional rule where one "could not have been unaware" is to lighten the burden of proving that those facts that were before the eyes must have reached the mind, whereas the facts one "knew or ought to have known" may impose a duty of investigation or inquiry.⁷⁰

Art.35 (3) is applicable to the sale of specific goods, where the buyer can inspect and then agrees to purchase.⁷¹

⁶⁸ Bianca C, in Bianca-Bonell, *op.cit.*, p.277. The nature of the goods, climatic condition and type of transportation have to be taken into account. Schwenzer I, in Schlechtriem/Schwenzer, (2005) *op.cit.*, p.425.

⁶⁹ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.160.

⁷⁰ Honnold J, (2009), *op.cit.*, p.339.

⁷¹ *Ibid.*

In the Swiss case of the sale of a second-hand bulldozer (cited above), the court found that the buyer's claim for damages for non-conformity was illegitimate, since the buyer had tested the bulldozer at the seller's premises before the contract was concluded. The presumption is that a person who buys goods in spite of obvious defects intended to accept the seller's offer as stated by Art.35(3).⁷² In the present case the buyer has no excuse, as the seller had expressly informed him about the current state of the second-hand bulldozer which the buyer had even tested prior to purchasing it.

3.2.4 Duration of seller liability for conformity

The question of defining the time for the conformity of the goods to be judged is answered in Art.36. Paragraph (1) provides a general reference to this time period, and paragraph (2) deals with cases that do not fall into that general rule. Art.36(1) states that:

The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

Art.36(1) determines the time that the seller remains liable for the conformity of goods in the sense of Art.35, is until the time of the passing of risk.⁷³ Thus, the seller complied with the contract if the goods conform to the contract when the risk passes to the buyer.

Passing of risk in the CISG normally takes place at the point in time when the goods are delivered by the seller.⁷⁴ In many cases, the risk passes to the buyer upon the handing over of the goods to the first carrier as stated in Art.31 (a) which is considered as the seller's primary

⁷² See above: chap.2, fn: 80.

⁷³ Värvi A, and Karu P, 'The Seller's Liability in the Event of Lack of Conformity of Goods' (2009) XVI *Juridica International* p.91.

⁷⁴ Rules regarding the passing of risk are set forth in Articles 66-70; see above chapter two: 2.2.6.

obligation under CISG contracts and, therefore, this is the appropriate event to determine conformity.⁷⁵

Although the risk passes to the buyer when the seller hands the goods over to a carrier for transmission to the buyer, in most cases it is difficult for both the carrier and the buyer to inspect goods at that very moment. In practice the normal time to detect defects is after examining the goods or actually using them. Therefore, the second part of Art.36(1) makes it clear that any non-conformity which becomes apparent only after the risk has passed to the buyer is still under the seller's liability,⁷⁶ provided that the cause of the defect already existed at the time when the risk passed.⁷⁷ The virtue of this provision, as Honnold indicated, is that it "would protect the buyer when a latent defect appears at a later date, including a failure to comply with the requirement of Article 35(2) (a) that the goods be 'fit for the purposes for which goods of the same description would ordinarily be used'."⁷⁸

A controversial question is whether or not the seller should be responsible for the duration of quality for a certain period of time.⁷⁹ The CISG provides the answer in Art.36(2) as follows:

The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods

⁷⁵ Lookofsky J (2008), *op.cit.*, p.99. Under the FOB clause, the risk passes when the goods have effectively passed on board the ship.

⁷⁶ See: Enderlein F, in Sarcevic/Volken, *op.cit.*, p.161; Lookofsky J (2008), *op.cit.*, p.84.

⁷⁷ See: Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.435.

⁷⁸ Honnold J, (2009), *op.cit.*, p.346; Värvi A, and Karu P, (2009) XVI *Juridica International*, p.91; Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.99. In the CISG there is no direct indication of guarantee against latent defects, the expression of latent defects is a characteristic feature of civil codes. However, Art.35(2) includes the meaning of that term. See Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.20.

⁷⁹ There was a dispute about the 1978 draft CISG provision that required "express guarantees" for a "specific" time, which was criticised by a proposal that suggested that the Conference adopt "implied warranties" of suitability for ordinary purposes for a reasonable period as the case may be. Though the proposal failed, the word "express" (guarantees) was, in the end, deleted. See Schlechtriem P, (1986), *op.cit.*, p.68.

will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Unlike the provision of paragraph (1), paragraph (2) of Art.36 does not require the buyer to prove that there was a non-conformity when risk passed.⁸⁰ This provision includes both expressed and implied warranty.⁸¹ In the case of an expressed warranty, the seller remains liable for the quality of the goods for the specified period of warranty. An expressed warranty can be part of the contract or a promise made by the seller, e.g. a guarantee that the goods will perform for two years or 20,000 miles.

It should be clear that, even in an expressed warranty, the seller is not liable for all late defects, since these may include defects caused by a fault of the buyer such as lack of observation of maintenance instructions or if they use inapplicable feedstuffs.⁸² In addition, the seller will be not liable for late damage caused by a third party's negligent act.⁸³

However, without having an express guarantee, the seller is still liable for an implied warranty beyond the time the goods have been accepted.⁸⁴ This concerns the durability and suitability for ordinary purposes which may follow from the nature of the goods or from usage.⁸⁵ As already discussed in Art.35, where the goods must be fit for ordinary use including the requirement to

⁸⁰ Honnold J, (2009), *op.cit.*, p.347.

⁸¹ See: Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.437; Honnold J, (2009), *op.cit.*, p.347.

⁸² See: Enderlein F, in Sarcevic/Volken, *op.cit.*, p.162

⁸³ See: Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.101; Honnold J, (2009), *op.cit.*, p.347.

⁸⁴ See section: 3.2.2.

⁸⁵ See the above discussion in Art.35 (2) (a) at: 3.2.2.1; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.163; Honnold J, (2009), *op.cit.*, p.347.

remain fit for a reasonable time (implied guarantee), so the provision of Art.36(2) emphasises the seller's obligation for this 'implied' period of warranty.⁸⁶

The time for determining the period of durability is stated only in the CISG as "a period of time", thus in the event of the absence of express warranty, a court must consider what a reasonable person would have agreed in similar circumstances⁸⁷ in the light of the general approach of the CISG of using objective judgement.

3.2.5 Seller's right to cure prior to date for delivery

A seller who delivers non-conforming goods becomes legally responsible for breach of contract pursuant to the CISG provisions dealing with the buyer's remedies. However, Art.37 provides certain rights for the seller to cure the breach. Article 37 reads as follows:

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Although Art.37 is under the seller obligations section, it considers the seller's rights rather than obligations. However, it follows the obligation of conformity, to give the seller in the situation of

⁸⁶ This rule has been criticised as being an impractical rule, because any late discovery of a defect must be a result of non-conformity as of the first date when the risk passed. Lookofsky J, in Herbots/Blanpain, *op.cit.*, p101. He stated this argument also in his recent work: Lookofsky J (2008), *op.cit.*, p.84.

⁸⁷ See: Schwenzer I, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.438; and Art.8 (2) for the general principle of referring to a "reasonable person"; Schlechtriem P, (1986), *op.cit.*, p.68.

early delivery the right to limit the damage of non-conforming goods;⁸⁸ a similar right has also been given to the seller for handing over non-conforming documents.⁸⁹

When the seller wishes to cure the defects under this article, it must take place before the date of delivery which was fixed by the contract, provided that the buyer accepts the early delivery;⁹⁰ or before the end of a period for delivery, when it is up to the seller to deliver the goods at any time within that period of delivery.⁹¹ The seller's right to cure any non-conformity is limited to the period between the actual delivery and the fixed date or up to the end of the period. Thus, under this article, the seller does not have a right to cure any lack of conformity once the contract date for delivery has expired.⁹² At the same time the buyer cannot exercise any remedies for non-conformity until the fixed time has passed,⁹³ or when it has become clear that the seller will not cure the lack of conformity (Art.72).⁹⁴

Moreover, the right of the seller to cure cannot be applied unless it does not cause unreasonable inconvenience or expense to the buyer. For instance, in a FOB clause, if the buyer has chosen a date for the ship to take delivery at the port at that date, it may be difficult for him to provide another ship at a later date for missing goods.

The important question in this regard concerns measuring the reasonableness of inconvenience and expense. Inconvenience can be decided in the light of each case, as each case is unique according to individual circumstances. However, although the CISG uses the notion of

⁸⁸ Sellers under Art.48 are also authorized to cure after the date for delivery in some certain cases. See the discussion of Art.48 in section: 5.2.2.4.2.

⁸⁹ See the discussion of Art.34 in section: 2.2.5.

⁹⁰ Art.52(1).

⁹¹ Art.33(b); see Maskow/Enderlein, *op.cit.*, p.152.

⁹² This rule is subject to the discussion of Art.48; see below, section: 5.2.2.4.2.

⁹³ It should be noted that the buyer is still entitled to the right to claim for damages, which is a result of the cure, as stated in the last para. of Art.37.

⁹⁴ Honnold J, (2009), *op.cit.*, p.349, 351; Bianca C, in Bianca-Bonell, *op.cit.*, p.293.

'unreasonable' in both inconvenience and expense, inconvenience and expense are not the same, since even with reasonable expenses the buyer is entitled to recover all the expenses he might have borne.⁹⁵

Although the CISG does not require the seller to notify the buyer of his intention to cure the lack of non-conformity, this would be considered as unreasonable inconvenience, and therefore it would be necessary for the buyer to be informed in advance in order for the seller to protect their right of practising the cure.⁹⁶

In contrary, according to Arts.38 and Art.39, it is the buyer's responsibility to examine the goods and to notify the seller of any defects. This duty takes place shortly after receiving the goods, even if the date of delivery in the contract has not transpired.⁹⁷ If the buyer refuses to allow the seller to cure the non-conformity, the buyer loses the right to claim a defect.⁹⁸

3.2.6 Examination of the goods

The requirement of examining the goods under Art.38⁹⁹ is connected to Art.39 as prefatory to giving notice of non-conformity within a reasonable time after the discovery of the defect.¹⁰⁰ The issue of examining the goods and giving notice is one of the most important issues of the

⁹⁵ See: Bianca C, in Bianca-Bonell, *op.cit.*, p.293; Honnold J, (2009), *op.cit.*, p.352; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.164,166.

⁹⁶ Maskow/Enderlein, *op.cit.*, p.153.

⁹⁷ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.164, and see: Maskow/Enderlein, *op.cit.*, p.152.

⁹⁸ See: Bianca C, in Bianca-Bonell, *op.cit.*, p.294.

⁹⁹ In some national legislation, the principle of this article was only mentioned implicitly by requiring the buyer to give notice of non-conformity in a short period: Bianca C, in Bianca-Bonell, *op.cit.*, p.296.

¹⁰⁰ Secretariat's commentary, O.R. p.34,(2); Honnold J, (2009), *op.cit.*, p.353.

CISG.¹⁰¹ Rules in relation to defining the concept of reasonability of timely examination and how soon the buyer 'must examine' the goods are provided for in Art.38 as follows:

(1) the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) if the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or re-dispatch, examination may be deferred until after the goods have arrived at the new destination.

3.2.6.1 Purpose of examination

Despite the fact that the article beginning by stating that "the buyer must," this does not constitute a real obligation on the buyer; it only means that the burden of examination is the buyer's responsibility. Therefore, it is decisive for buyers to examine the goods in order to retain their rights and give notice of non-conformity, and thereby it is not a breach of contract if the buyer does not examine the goods.¹⁰²

Art.38 seeks to clarify, in a speedy fashion, whether the seller has properly implemented the contract.¹⁰³ The Secretariat's commentary specified the purpose of the buyer's notice of non-conformity, which is the result of examination; it is to protect the seller's right to remedy the lack

¹⁰¹ Ferrari F, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing', (1995) 15 *J.L.&Com*, available online at: <http://www.cisg.law.pace.edu/cisg/biblio/2ferrari.html>; CISG-AC, Opinion No.2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, June 2004, Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York: comment: para.1, available at: <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=144&sid=144>.

¹⁰² Maskow/Enderlein, *op.cit.*, p.154; CISG-AC, Opinion No. 2, *op.cit.*, Art.38, para.1, it states that: "there is no independent sanction for failure to do so. However, ... the notice period in article 39 commences from the time the buyer "ought to have discovered it".

¹⁰³ UNCITRAL Digest of Case Law on the United Nations CISG on the International Sale of Goods, A/CN.9/SER.C/DIGEST/CISG/38 (2004) para.4, available online at: <http://daccessdds.un.org/doc/UNDOC/GEN/V04/552/05/PDF/V0455205.pdf?OpenElement>; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.167.

of conformity, and to conduct his own examination of the goods, in order to preserve his right in any dispute with the buyer over the alleged non-conformity.¹⁰⁴ On the other hand, the seller may also want to know whether the buyer is satisfied with the goods or will press claims.¹⁰⁵

The reason for examination was also linked, in a Netherlands court decision, to the principle of good faith, as the objective notion of Art 7(1) requires the buyer to examine the goods and discover defects before selling them to foreign customers.¹⁰⁶

As the purpose of examining the goods and giving notice to the seller is mainly to protect the seller's rights, the balance between parties should be considered as well. It can be argued that it is difficult to adhere to the requirement of examination in all of cases, because in some cases the purpose of this article will not apply. Therefore, it would create imbalance between the parties to implement this harsh sanction, as described by some commentators,¹⁰⁷ without considering the actual and real consequence of this for both parties, whereas one of the purposes of the establishment of the CISG is to seek balance among traders from different countries.¹⁰⁸ In addition, it can be argued that using good faith to protect the seller's right of requiring examination and notice may apply to protect the right of the buyer who fails to examine goods

¹⁰⁴ See Secretariat Commentary, O.R. p.35,(4); Lookofsky J, (2008), *op.cit.*, p.87; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, pp.462-3; Sono K, in Bianca-Bonell (ed.) *Commentary on the International Sales Law* (Milan: Giuffrè, 1987), p.309.

¹⁰⁵ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.167; Germany: LG Kassel (District Court), (15/2/1996), No. 11O4185/95, available at: <http://www.cisg.law.pace.edu/cases/960215g1.html> (here it was held that the requirement of the notice is also – besides being the final clearing of the transaction - to give the seller the opportunity to undertake measures, to the actual damages). In a similar case of the sale of a used car, it was held that the reason for requiring early notice is to allow the seller to refute any claim by a third party as soon as possible: Germany: Bundesgerichtshof (Federal SC), (11/1/2006), No. VIII ZR 268/04, available at: <http://cisgw3.law.pace.edu/cases/060111g1.html>

¹⁰⁶ Netherlands: Arrondissementsrechtbank Zwolle, (05.03.1997), No. HAZA 95-640, abstract available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract>

¹⁰⁷ See: Lookofsky J (2008), *op.cit.*, p.326

¹⁰⁸ See the General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966) <http://www.uncitral.org/uncitral/en/about/origin.html>

and give proper notice.¹⁰⁹ In other words, the buyer's fault in failing to examine the goods contrasts with the seller's fault in sending defective goods.

3.2.6.2 Timely examination

The principle of determining when the goods have to be examined is based on the fundamental idea of reasonableness: "within as short a period as is practicable in the circumstances."¹¹⁰

Regarding the beginning of period, Para. (1) of Art.38 does not specify a time at which the period begins. It can be suggested that the start of a short period of examination should take place upon delivery, when the buyer has physical possession of the goods.¹¹¹

Unlike Para. 38(1), in Paragraphs 38(2), (3) the beginning of the short period to run was determined in two cases; the first case, as stated in Para. (2) is where the goods have to be carried in order to be delivered to the buyer. In this case, the period for examination does not begin to run until their arrival at the contractual destination.¹¹²

The second case of a specific time for the period of examination to begin is provided in paragraph (3), which covers two different cases; the case of redirection in transit, when the buyer resells the goods before they have been handed over in the first place. The other case is that of redispaching the goods: when the buyer sends the goods after receiving them at the place of delivery for further carriage to the place of destination. In these circumstances the period of examination begins to run when the goods have arrived at their new destination.

¹⁰⁹ The decision in the used car case (above chap.3, fn: 105) was criticised for depriving the buyer of his right, as Flechtner argued "it did not (as mandated by Article 7(1)) have regard for promoting "the observance of good faith in international trade." Flechtner H, (2008) 26 *B.U.I.L.J*, *op.cit.*, p.19.

¹¹⁰ In ULIS Art.38(1) the required examination is to be made promptly. It was often determined in civil law codes that the time for examination is fixed precisely. See Bianca C, in Bianca-Bonell, *op.cit.*, p.299.

¹¹¹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.455.

¹¹² *Ibid*, p.456.

However, in such cases it is necessary, according to paragraph (3) of Art 38, that “at the time of concluding the contract the seller knew or ought to have known of the possibility of such redispach or redirection.”¹¹³ Moreover, the buyer has to be unable to have “a reasonable opportunity for examination” at the time of first delivery.¹¹⁴ However, a German case involving the sale of used shoes was not decided according to this rule. The court held that the buyer had lost its right to avoid the contract or any remedy because of late examination and an untimely notice of defects. Even though the buyer gave notice of non-conformity only one day after examining the goods, the court considered that the time of examination should have began when the buyer received the bill of lading “FOP Mombasa-Kenya” not the place where the buyer received the goods in Uganda which was more than three weeks later.¹¹⁵ This case was criticised as representing, as Flechtner argued, “an almost wilful misreading of the notice requirements of the CISG, and a gross miscarriage of justice.”¹¹⁶

As can be seen in this decision, the main problem is when the court considers “the time when the buyer received the bill of lading” to be the beginning of the examination period, without considering the difficulties placed upon the buyer to inspect the goods at that very moment. In this respect it can be suggested that this contradicts the requirement to observe good faith in international trade.

The length of the reasonable period of examination may vary depending on the commercial practice. One of these factors is the nature of the goods,¹¹⁷ and in practice courts differentiate

¹¹³ Enderlein F, in Sarcevic/Volken, *op.cit.*, pp.169-70.

¹¹⁴ See Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, pp.456-7; Bianca C, in Bianca-Bonell, *op.cit.*, p.300.

¹¹⁵ Germany: LG Frankfurt (District Court), (11/4/2005), No. 12/26O264/04, available at: <http://cisgw3.law.pace.edu/cases/050411gl.html>

¹¹⁶ Flechtner H (2008) 26 *B.U.I.L.J.*, *op.cit.*, p.21.

¹¹⁷ CISG-AC, Opinion No.2, *op.cit.*, Art.38, para.2.

among cases on this basis. For instance, in a case involving the sale of flowers the court held that in the international flower trade it is reasonable for a buyer to inspect on the day of receiving the goods.¹¹⁸ In another case where a buyer of rolled metal sheets gave notice five weeks after the delivery of the goods, it was held that this period is timely under the CISG, “having regard to the heavy handling which the sheet metal required”.¹¹⁹ In a similar case regarding the sale of complex equipment designed to produce plastic gardening pots, it was held that it is not practical to inspect and notify within a matter of weeks.¹²⁰ Lookofsky validates the buyer’s right, pointing out that:

Articles 38 and 39 should guard against misuse by sellers not actually prejudiced by their buyers’ failure to provide prompt notice; we should not deprive buyers of their legitimate rights where the sellers have not been prejudiced by defect-notification ‘delay’.¹²¹

Besides the nature of the goods, the nature of defects should also be considered including whether or not the defect is latent.¹²² In many cases, the time period for inspection is expanded when there is a requirement of enlisting an expert.¹²³ Andersen asserted that:

reasonable time does not start to run until the expert report is published, as this is then the time at which the non-conformity ought to have been discovered.¹²⁴

¹¹⁸ Germany: OLG Saarbrücken (Provincial CA), (3/6/1998), No. 1U703/97-143, available at: <http://cisgw3.law.pace.edu/cases/980603gl.html>

¹¹⁹ France: Cour de Cassation (SC), (26/5/1999), No. p.97-14.315, available at: <http://cisgw3.law.pace.edu/cases/990526fl.html>

¹²⁰ U.S: District Court (Northern District of Illinois), (28/5/2003), No.01C4447, available online at: <http://cisgw3.law.pace.edu/cases/030528ul.html>

¹²¹ Lookofsky J (2008), *op.cit.*, p.87.

¹²² CISG-AC, Opinion No.2, *op.cit.*, Art.38 para.3; Bianca C, in Bianca-Bonell, *op.cit.*, p.298; Germany: Bundesgerichtshof (SC), (3/11/1999), No. VIII ZR 287/98, available at:

<http://cisgw3.law.pace.edu/cases/991103gl.html>; UNCITRAL Digest of Case Law Art.38, para.16.

¹²³ ICC: Court of Arbitration, (1989) No. 5713, available at: <http://cisgw3.law.pace.edu/cases/895713i1.html>, see also UNCITRAL Digest of Case Law of the CISG Art.38 para. 15; Germany: Bundesgerichtshof (Supreme Court) No. VIII ZR 287/98 [3/11/1999] available in English at:

<http://cisgw3.law.pace.edu/cases/991103gl.html>

¹²⁴ Andersen, C. *Reasonable Time in Article 39(1) of the CISG*, para. II, 1.3.1 available online at: <http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>

Therefore, the time for an expert to deliver a report will be determined according to the nature of the test requirement, which is then the time when non-conformity normally “ought to have been discovered”. Finally, the personal circumstances of the buyer should be taken into account when assessing the reasonable time for inspection.¹²⁵

3.2.6.3 Method of examination

If there is no agreement for the type of examination, the CISG does not expressly state how to examine the goods.¹²⁶ In spite of this, it can be deduced from Arts.38 and 39 that the buyer must take reasonable measurement to examine the goods in such a way as to achieve the purpose of discovering any defects that may be present.¹²⁷ The nature of examination can be illustrated in the above case of the German district court¹²⁸ holding that the defective composition of the PVC could only be discovered by virtue of special chemical analyses, which the buyer was not bound to have conducted. In similar case where the examination required some extra inspection, the court held that the buyer did not need to conduct special chemical analyses of a plastic compound.¹²⁹ In contrast, in a Dutch case for the sale of frozen cheese, the court held that even though the cheese was delivered frozen the buyer was still responsible for making a timely examination by defrosting a portion of the cheese.¹³⁰ In the above case of surface protective

¹²⁵ Schwenzer I, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.455; Austria: Oberster Gerichtshof (SC) (27/8/1999) No. 1 Ob 223/99x available at: <http://cisgw3.law.pace.edu/cases/990827a3.html>. The court held that “this time frame varies according to the circumstances, e.g. the size of the firm of the buyer, the kind of goods and their complexity”. In another case of surface protective film, the capabilities of the typical buyer was one criterion to determine the type of inspection: Germany: OLG Karlsruhe (Provincial CA), (25/6/1997), No.1U280/96, available at: <http://www.cisg.law.pace.edu/cases/970625g1.html>; Switzerland: Obergericht des Kantons Luzern (CA), (8/1/1997), CLOUT No.192, available at: <http://cisgw3.law.pace.edu/cases/970108s1.html>.

Also see: UNCITRAL Digest of Case Law of the CISG Art.38, paras.14-15.

¹²⁶ Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.103.

¹²⁷ Secretariat’s commentary, O.R. p.34,(3).

¹²⁸ See above chap.3 fn: 55.

¹²⁹ *Ibid.*

¹³⁰ Netherlands: Arrondissementsrechtbank Roermond, (19/12/1991), No.900336, available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=34&step=Abstract>; Germany: LG Stuttgart (District Court),

film,¹³¹ the buyer was required to undertake specialist examination. The buyer was required to carry out spot-checks and test treatments since the hidden defects in adhesive film would have become evident only upon use. Lookofsky evaluated this decision, stating that it “seem[s] overshoot the market.”¹³²

In analysing the foregoing cases it is important to note that examination in the CISG is intended to be developed from the CISG itself at the international level, rather than to be conducted according to the law or usage of the country where examination takes place.¹³³ Moreover, the examination should not have to be more in-depth than those possessing reasonable skill levels could conduct to disclose recognizable defects.¹³⁴

It is irrelevant whether the goods are examined by the buyer and his own employee or, as stated in Art 38 (1), has “cause them to be examined” by a third persons, e.g. a specialist in the goods.¹³⁵

3.2.7 Notice of lack of conformity

(31/8/1989), No.3 KfHO97/89, available online at: <http://www.cisg.law.pace.edu/cases/890831g1.html>. The court in this case held that the buyer should have examined carefully all shoes of the second contingent, because he was already aware of defects in the first contingent when his customer complained about the same defects.

¹³¹ See above: chap.3, fn: 125.

¹³² Lookofsky J, (2008), *op.cit.*, p.87; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.451, the latter author suggested that the need for the engagement of an expert in some cases should not be exaggerated to a level which can be considered as unreasonable.

¹³³ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.451; Honnold J, (2009), *op.cit.*, p.356; Bianca C, in Bianca-Bonell, *op.cit.*, p.297. In ULIS Art.38 (4) the method of examination was made, in the absence of contractual agreement, by the law or usage of the place where the examination is to be effected. The CISG omitted this provision for the purpose of applying international practices and usages applicable to international trade. Honnold J, (2009), *op.cit.*, p.356.

¹³⁴ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.451. Bianca C, in Bianca-Bonell, *op.cit.*, p.298; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.168; Germany: OLG Stuttgart (Provincial CA), (12/3/2001), No. 5U216/99, available at: <http://cisgw3.law.pace.edu/cases/010312g1.html>

¹³⁵, Bianca C, in Bianca-Bonell, *op.cit.*, p.297

Besides the provision of Art.38, which imposes a general obligation on buyers to examine the goods in order to retain their right to claim non-conformity; Art.39 continues by setting forth rules regarding the buyer's duty to give notice when the examination reveals that the goods do not conform to the contract. The article specifies the consequences of the buyer's failure to give such notice of a 'discoverable' defect. Art.39 provides that:

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

The purpose of such obligations, as mentioned earlier regarding Art.38, is to require buyers to provide sellers with specific notice of non-conformity in order to retain their rights.¹³⁶

3.2.7.1 Requirement of a buyer's notice

Notice of non-conformity, in this article, relates to quality, quantity and the description of the goods,¹³⁷ as well as false deliveries¹³⁸ and defects in documents.¹³⁹ Notice of third-party rights and claims are dealt with in Art.43(1).

¹³⁶ There was a controversial discussion about this article during the preparation work of UNCITRAL and at the Vienna Conference. Many delegations from developing countries considered the loss of all buyer's rights of remedies, because of failure to give notice in the right time, unjustifiable, whereas other delegations were in favour of the provision as the short period of notice had stood the test of time in their countries, and there is also no reason was seen for the buyer not to notify the seller of the defects. See O.R. pp.320-1; Schlechtriem P, (1986), *op.cit.*, p.69. The result of this discussion was the introduction of Art.44, which was not contained in the 1977 draft.

¹³⁷ Art.35.

¹³⁸ Honnold J, (2009), *op.cit.*, p.368-9; Maskow/Enderlein, *op.cit.*, p.158. Under English Law, it is only required to give notice if the buyer wants to avoid the contract. See SGA 1979 s35(1)

¹³⁹ Honnold J, (2009), *op.cit.*, p.367.

It is important in such a notice to specify the available essential nature of the lack of conformity to an extent that allows the seller to have the opportunity to know exactly what defects are in the goods, as discussed in the obligation of examination.¹⁴⁰ In the acrylic blankets case cited above, the court held that the buyer lost the claim of non-conformity because his notice did not specify design, which would have enabled the seller to resolve the non-conformity (as there was more than one design in the delivery).¹⁴¹

The failure to give notice within a reasonable time results in the loss of the buyer's rights to rely on a lack of conformity for the various remedies provided under the CISG. These rights may include those of claiming damages Art.45 (1)(b), requiring substitute delivery, repairing the defects Art.46(2)(3), declaring avoidance of the contract Art.49, or reducing the price Art. (50).

Also, as a result of failing to give notice, the buyer has to retain the goods and pay the price of the non-conforming goods unless Arts.40 and 44 apply.¹⁴²

The issue of whether the buyer or the seller bears the risk of transmission if the buyer's notice does not reach the seller in time or at all was dealt with in Art.27 of the CISG, which states that it "does not deprive that party of the right to rely on the communication" as long as the notice deliver "by means appropriate in the circumstances".

¹⁴⁰ CISG-AC, Opinion No. 2, *op.cit.*, Art.39, para.4; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.462,463; Sono K, in Bianca-Bonell, *op. cit.*, p.309; Honnold J, (2009), *op.cit.*, p.366; see also in the above discussion in the method of examination: 3.2.6.3.

¹⁴¹ See chap.3: fn: 15.

¹⁴² Enderlein F, in Sarcevic/Volken, *op.cit.*, p.171. Further discussion for the exemption in these articles will be given later.

3.2.7.2 Time for notice

Under Art.39(1) the buyer must give notice specifying the lack of conformity “within a reasonable time.” It should be emphasized that, in order to determine what a reasonable time is, one has to consider all relevant circumstances, including whether the buyer intends to reject the goods or keep them and claim damages.¹⁴³ For the beginning of the period of reasonable time, it is important to differentiate between whether the buyer has examined the goods and discovered defects or not.¹⁴⁴ If the buyer discovers or should have discovered the defects, the time begins to run from that moment of discovery of the non-conformity even before completing the examination.¹⁴⁵

However, in practice there are several cases where the beginning of the period of giving notice and the beginning of the period of examination have not been clearly distinguished.¹⁴⁶ In the used car case cited above¹⁴⁷ the approach of the court’s decision was criticised for representing “neither fairness nor confidence in the international commercial system” because the buyer ended with nothing for what it paid the seller; while at the same time, there was no evidence that the seller suffered from failing to receive earlier notice.¹⁴⁸

¹⁴³ Maskow/Enderlein, *op.cit.*, p.160. This has been criticised as contradicting the provision in the article “within a reasonable time.” However, one would suggest that there is no contradiction since the remedy being sought was part of the factual purpose of requiring reasonable time.

¹⁴⁴ Girsberger, D, ‘The Time Limits of Article 39 CISG’, (2005-06) 25 *J.L.&Com*, p.241.

¹⁴⁵ CISG-AC, Opinion No. 2, *op.cit.*, Art.39, para.1; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.469; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.106; Maskow/Enderlein, *op.cit.*, p.160; Austria: OLG (Provincial CA) (1994) No. 4 R 161/94 available at: <http://cisgw3.law.pace.edu/cases/940701a3.html>, Here, because the defect could be discovered within a few days after delivery it was held that the buyer had lost his right to allege lack of conformity because he failed to raise it within a reasonable time.

¹⁴⁶ Girsberger D, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.241.242; Austria: Oberster Gerichtshof (SC), (21/3/2000), No. 10 Ob 344/99g available at: <http://cisgw3.law.pace.edu/cases/000321a3.html>; for the importance of the distinction between these periods see: CISG-AC, Opinion No. 2, *op.cit.*, Art.39, para.2.

¹⁴⁷ See chap.3, fn: 105.

¹⁴⁸ Flechtner H, (2008) 26 *B.U.I.L.J*, *op.cit.*, p.19.

These criteria for different circumstances which affect the notion of reasonable time to be extended or limited can be used as the starting point of a fixed period, as Girsberger suggested.¹⁴⁹

In an attempt to resolve this, there have been proposals to promote guidelines for the determination of reasonable time as the starting point of a fixed period; this is approximately one month, as Schwenger pointed out, which should be defined to avoid discrepancies in international practice.¹⁵⁰

In this one-month period, as examined by Andersen in her comprehensive study of case law, more uniform results would ensue greater predictability for both buyer and seller in the determination of when a notice of non-conformity is due.¹⁵¹ In practice, many courts have adopted this rule as standard.¹⁵²

It can be said that the approach to the reasonable time for giving notice to be fixed to the period of a month as a starting point is an important step in developing the unification of the practice of the CISG to meet its aim of unifying the law of the sale of goods and, expressly stated in Art.7(1), to increase the stability and harmony among traders. However, it should be taken into account that this fixed period may not be the same from region to region. In some countries the laws of trade have not developed to the level of international standards.¹⁵³ Hence, the matter of dispute about Art.39(1) between the developed and developing countries which was revealed in

¹⁴⁹ Girsberger D, *op.cit.*, p.243.

¹⁵⁰ Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.465; see also the author's elaborated examinations of the CISG case law under different systems: Schwenger I, 'The Noble Month (Articles 38, 39 CISG) The Story Behind the Scenery' (2006) VII 3/4 *E.J.L.R.*, p.353.

¹⁵¹ Andersen C, *Reasonable Time*, *op.cit.*, para. VI.

¹⁵² Girsberger D, (2005-06) 25 *J.L.&Com*, *op.cit.*, pp.244-5; Germany: Federal SC (above chap.3 fn:122), in this case it was held that the "noble month" standard should be adopted.

¹⁵³ Although the approach of fixing the period would be more compatible with the concept of certainty in Saudi law than the general term of reasonable time, the differences between cultures and systems may affect the level of certainty where the parties' expectations do not match the fixed month. Therefore regard should also be given to the custom of the trade.

the diplomatic conference during the preparation of the CISG, should be considered here.¹⁵⁴ It is important for the practice of the determination of reasonable time to give notice to take into account the different usages and customs between countries and cultures.¹⁵⁵

3.2.7.3 Time limit

Despite the estimated period of reasonable time under Art.39 (1), Paragraph (2) of Art.39 provides a maximum period of a two-year time limit for the notice to be given. Such provision applies to further the right of the buyer to give notice¹⁵⁶ in cases where the defects were not discoverable upon a proper examination, and it may also apply when the buyer has a reasonable excuse for failing to give notice in the proper time.¹⁵⁷ The reason for the cut-off period is to minimize the difficulty in deciding whether the defects were caused by a breach of an obligation of the seller or by other factors such as wrongful use or normal wear and tear.¹⁵⁸ On the other hand, it serves the seller in rendering the transaction as completely finished at a certain point in time.¹⁵⁹

¹⁵⁴ See the discussion during the preparation work of the CISG, chap.3: fn: 136.

¹⁵⁵ CISG-AC, Opinion No. 2, *op.cit.*, Art.39, para.3; Akaddaf F, (2001) 13 *P.I.L.R*, *op.cit.*, pp.12-15.

¹⁵⁶ Even though the expression of Art.39 (1) "within a reasonable time after he has discovered it or ought to have discovered it" does not state any requirement for the period of giving the notice, it should be read within the meaning of Art.38(1) for the examination time to be "within as short a period as is practicable in the circumstances." In this context, the need to provide a long fixed period, as Art.39 (2) does, is very important in cases where short period may arguably not cover them (such as in durable goods where the defect may only occur after a certain period of time). Duhl G, 'International Sale of Goods' (2009) 64 *The Business Lawyer*, p.1289-90.

¹⁵⁷ Schwenger in Schlechtriem/Schwenger, (2005), *op.cit.*, p.470.

¹⁵⁸ Sono K, in Bianca-Bonell, *op. cit.*, p.307. In many national laws, including in Germany Switzerland, Austria and Mexico, this cut-off period is much shorter than in the CISG, for example in Mexico the period is five days in quantity and apparent defects, and 30 days for inherent defects. Therefore substantial disputes occurred during the drafting of the CISG; Honnold J, (2009), *op.cit.*, p.374.

¹⁵⁹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.471.

The time for the two-year period to begin to run is provided in paragraph 39(2): “from the date on which the goods were actually handed over.”¹⁶⁰ Art 39(2) provides an exception to the rule of the two-year period if it “is inconsistent with a contractual period of guarantee,” which means that it can be extended or shortened.¹⁶¹

3.2.8 Exceptions to the requirement of the buyer’s notice

3.2.8.1 Seller’s knowledge of defect

Under Art.39(1), buyers who fail to give timely notice will lose the right to rely on the lack of conformity against the seller. Arts.40 and 44 provide an exception to the buyer’s obligation to give notice to retain the right to claim non-conformity. Art.40 states that:

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

According to this article the seller cannot rely on the protection of the buyer’s notice to escape liability for a lack of conformity if he knew or could not have been unaware of it,¹⁶² since there is no reasonable basis for the seller to require the buyer to notify them of such facts.¹⁶³

In order to require the buyer to examine the goods and to give notice within reasonable time, the seller has to disclose to the buyer any defects which may affect the CISG principle of good faith

¹⁶⁰ If the goods are redispached, there are different views regarding the relevant date: when the goods are handed over to the buyer or at the final destination. Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.471; Maskow/Enderlein, *op.cit.*, p.161.

¹⁶¹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.471, Sono K, in Bianca-Bonell, *op. cit.*, p.311. This two-year time limit under Art.39(2) is different from the limitation on periods for bringing legal action before the courts. For legal proceedings, under Arts.8 and 10 of the UN Convention on the Limitation Period in the International Sale of Goods, the buyer has to commence judicial proceedings against the seller within four years of the date when the goods are actually handed over, see the UNCITRAL web:

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974CISG_limitation_period.html

¹⁶² Domestic rules governing fraud may apply in such a case; see Honnold J, (2009), *op.cit.*, p.376, fn: 43.

¹⁶³ Lookofsky J, in Herbots/Blanpain, *op.cit.*, p109.

as a result of the seller's deceit.¹⁶⁴ In addition, the provision also concerns the case of the gross negligence of the seller.¹⁶⁵ This obligation to disclose includes defects which may only occur after the goods have left the seller's place.¹⁶⁶

The seller's knowledge of non-conformity covers the case when the seller "could not have been unaware." The meaning of this phrase has been subject to disagreement between commentators and tribunals.¹⁶⁷ It was described as "being a little bit less than cunning and a little bit more than gross negligence,"¹⁶⁸ which means in fact that it must involve an obvious lack of conformity.¹⁶⁹ Another view defined it as the same as gross negligence.¹⁷⁰ Enderlein criticises these views as representing efforts to protect the seller following domestic law: "The wording of the CISG itself would, in our view, include simple negligence, which could also be described as a violation of customary care in trade."¹⁷¹ This view seems more appropriate to serve the purpose of Art.40 since its aim is to balance between the seller's and buyer's duties regarding the awareness of the defects.

¹⁶⁴ Art.7 (1); see Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.109, Maskow/Enderlein, *op.cit.*, p.163; Andersen C, 'Exceptions to the Notification Rule -- Are They Uniformly Interpreted?' (2005) 9 *V.J.I.C.L.A.*, p.27; Akaddaf F, (2001) 13 *P.I.L.R.*, *op.cit.*, pp.32-3.

¹⁶⁵ Schlechtriem P, (1986), *op.cit.*, p.70; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.479.

¹⁶⁶ *Ibid*, p.480. Even though the goods are not under the seller's control, the seller's awareness may occur as a result of the discovery of defects according to other customers or a new finding from the seller's examination of the product; for example, if a car's manufacturer received a complaint from one of their customers who bought a certain type of car, and after studying this customer case they found that all cars of the same type have the same defect.

¹⁶⁷ Andersen C, (2005) 9 *V.J.I.C.L.A.*, p.27.

¹⁶⁸ Maskow/Enderlein, *op.cit.*, p.163, referred in this statement to Peter Huber.

¹⁶⁹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.478.

¹⁷⁰ Schlechtriem P, (1986), *op.cit.*, p.70

¹⁷¹ Maskow/Enderlein, *op.cit.*, p.164.

3.2.8.2 Excuse for failure to give notice

Further exception has been given to the buyer under Art.44,¹⁷² granting a limited "excuse" for failing to notify, providing that:

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

This provision of Art.44 was not included in the 1978 draft CISG which was submitted to the Diplomatic Conference, and also cannot be found in any national law.¹⁷³ The addition of this provision¹⁷⁴ was to balance the consideration of the seller's right to be given prompt notice under Art.39(1) and the right of the buyer who fails to give timely notice.¹⁷⁵ Furthermore the requirement of examining the goods and giving notice may not exist in domestic law and practice.¹⁷⁶

Art.44 only applies when the buyer has a reasonable excuse for failure to give the required notice under Art.39(1), in order to minimise some of the harsh consequences of that provision.¹⁷⁷ However, the effect of Art.44 is limited to within the two-year cut-off period (Art.39(2)); the buyer loses all of his rights if notice was given after more than two years.¹⁷⁸

¹⁷² Andersen C, (2005) 9 *V.J.I.C.L.A.*, p.17; Honnold J, (2009), *op.cit.*, p.364-5.

¹⁷³ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.186

¹⁷⁴ Art.44 was jointly proposed by Finland, Ghana, Kenya, Nigeria, Pakistan and Sweden, and explicitly supported by the United Kingdom. See: 1980 Vienna Diplomatic Conference, *Chronological Record of Proceedings*, available at: <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting21.html>.

¹⁷⁵ Canellas A, 'The Scope of Article 44 CISG' (2005/06), 25 *J.L.&Com*, pp.262-3; Huber U/ Schwenger I, 'Article 44' in Schlechtriem P/Schwenger I, (eds.) *Commentary on the UN Convention on the International Sale of Goods* (CISG) (Oxford: Oxford University Press, 2005), p.513.

¹⁷⁶ Under English Law and many common-law countries, for example, there is no duty to examine the goods and give notice. See: Benjamin, P/Guest A, *Benjamin's Sale of Goods* (London: Sweet and Maxwell, 1997), para.12-081; Bridge MG, (2007) *op.cit.*, p.581.

¹⁷⁷ Honnold J, (2009), *op.cit.*, p.378.

¹⁷⁸ See: Enderlein F, in Sarcevic/Volken, *op.cit.*, p.186; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.114.

In addition, the application of Art.44 is limited to providing the buyer only with certain remedies, namely:

- a) reduction in price as provided in Art.50;
- b) recovery of damages,¹⁷⁹ except for loss of profit, which the buyer would have achieved if the goods had conformed to the contract.

These are the only available remedies for the buyer. Accordingly, buyers who fail to give notice within a “reasonable time” (Art.39(1)) still face serious consequences, as they may not longer:

- a) require delivery of substitute goods (Art.46);
- b) avoid the contract (Arts.49 and 73);
- c) require the seller to repair non-conforming goods;¹⁸⁰ or
- d) rely on non-conformity as a basis for delaying the passage of the risk of loss (Art.70).¹⁸¹

A difficult question arising from Art.44 is to what extent the “reasonable excuse” can be used to relax the rule of Art.39(1). To answer this question, one must consider the criteria for interpreting “reasonable excuse.” It has been argued that Art.44 will rarely be applied, since a buyer who discovers or ought to have discovered the non-conformity can hardly be excused for

¹⁷⁹ The recovery of damages should only be claimed in cases of foreseeable losses; see Art: 74. According to some commentators Art.77 may deprive the buyer of claiming damages if the seller would have been able to cure the defect if he was informed of it; see discussion in: Huber/Schwenzer, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.516; Sono K, in Bianca-Bonell, *op.cit.*, p.327; Honnold J, (2009), *op.cit.*, p.382.

¹⁸⁰ See: Enderlein F, in Sarcevic/Volken, *op.cit.*, p.187; Huber/Schwenzer, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.511; Flechtner H (2008) 26 *B.U.I.L.J.*, *op.cit.*, p.24; Sono K, in Bianca-Bonell, *op.cit.*, pp.326-7. Under the UK Sale of Goods Act there is a similar consequence of the buyers’ failure to give notice, which may prevent buyers rejecting the goods but allows them to claim for damages; Honnold J, (2009), *op.cit.*, p.382 fn: 51.

¹⁸¹ *Ibid*, pp.378-9.

not giving proper notice.¹⁸² In practice, there have been many cases where the buyers' excuses were rejected.¹⁸³

Some legal writers include in "reasonable excuse" cases where the notice given did not specify the nature of the non-conformity, as Art.39 (1) requires, because of the difficulty of making such a specification.¹⁸⁴ Enderlein criticised this view, pointing out that: "I don't believe that the buyer would lose his rights under Para. 1 of Art.39 so quickly."¹⁸⁵

Ferrari rightly proposes a practical method for how the provision of reasonable excuse can be applied:

regard will be had to the need to reach equitable results,¹⁸⁶ a goal which can be reached by, among other means, resorting to more individualized considerations than would otherwise be relevant under Article 39(1).¹⁸⁷

Canellas explained, in more detail, this approach to applying Art.44 in relation to the application of Arts.38 and 39, pointing out that: "Article 44 is useful when the circumstances of delay of notice are not objective, but subjective."¹⁸⁸

¹⁸² See: Huber/Schwenzer, in Schlechtriem/Schwenzer, (2005), *op.cit.*, pp.512-3; Honnold J, (2009), *op.cit.*, p.382; Lookofsky J (2008), *op.cit.*, p.90. The CISG-AC has indirectly admitted that Article 44 was not really necessary; see CISG-AC, Opinion no. 2, *op.cit.*, comments: para: 4.3, 4.7. For more detail of how the provisions of Arts.38, 39 and 40 include the meaning of Art.44 see Canellas A (2005/06), 25 *J.L.&Com*, *op.cit.*, pp.264-5.

¹⁸³ See: Andersen C, (2005) 9 *V.J.I.C.L.A.*, p.39; Canellas A (2005/06), 25 *J.L.&Com*, *op.cit.*, p.271, where he points out that "the practice of the courts and tribunals is disappointing. Judges and arbitrators do not apply Article 44 ...". For instance in the used shoes case the court held that "the lack of a timely notice of non-conformity has not been supported by an acceptable excuse by the buyer (Art. 44 CISG)." Flechtner rightly criticised this decision for not complying with the requirement of promoting good faith in international transactions. Flechtner II, (2008) 26 *B.U.I.L.J.*, *op.cit.*, p.26.

¹⁸⁴ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.187.

¹⁸⁵ *Ibid*, p.187.

¹⁸⁶ See also, for the necessity to reach a decision that is equitable in the circumstances, Huber/Schwenzer, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.513.

¹⁸⁷ Ferrari F, (1995) 15 *J.L.&Com*, *op.cit.*, p.7.

¹⁸⁸ Canellas A (2005/06), 25 *J.L.&Com*, *op.cit.*, pp.265-6.

In this regard Art, 44 can be understood as an excuse for subjective matters only, such as the personal circumstances of the buyer. In any event, as Canellas pointed out: “the more time for notice that has passed the less probability of convincing the judge to apply the reasonable excuse of Article 44.”¹⁸⁹

Even if this differentiation between subjective and objective excuses may be an acceptable solution at the theoretical level, it does not necessarily represent the actual meaning intended by the drafters of the CISG. Therefore, it can be said that, in order to determine the meaning of reasonable excuse, it is fundamentally necessary to include any acceptable excuse that cannot be accepted as timely, as the addition of this article was meant to mitigate the harsh consequences of Art.39(1).¹⁹⁰

¹⁸⁹ *Ibid*, p.268.

¹⁹⁰ Honnold highlights the need to understand and apply the provision of Art.44 within its legislative history; see Honnold J, (2009), *op.cit.*, pp.378-9.

3.3 PART TWO: THE SELLER'S OBLIGATION OF CONFORMITY IN SAUDI LAW

In Saudi contract law and Islamic law generally there are no particular rules for the seller's obligation of conformity; however, this obligation occupies significant discussions in Islamic literature and it has been dealt with in numerous ways within different sections in the sales contract law. In order to ensure the delivery of conforming goods, Islamic law differentiate between whether or not the goods exist at the time of contract.¹⁹¹ In the section on sale conditions, one of the sale conditions for existed goods is that the object of sale has to be determined, and known to the parties.¹⁹² If the contract calls for goods that do not exist at the time of concluding the contract or are not owned by the seller at that time, the relevant conditions are made in the sale of *salam* and *Istisna'*.¹⁹³ These requirements which can be seen as pre-contractual obligations of conformity were made to fit with the general principle of certainty and avoiding the *gharar* sale which is one of the main prohibited transactions.¹⁹⁴ The function of the pre-contractual certainty is to require the sufficient awareness of object of sale. Besides these pre-contractual obligations, judging the required quality and the condition of the delivered goods are dealt with under the options in the contract, namely the description, defect, misrepresentation and sale at higher priced options. Finally, the rules of custom and usage in the contract play significant roles in the obligation of conformity.¹⁹⁵ Thus, this part aims to investigate the Saudi law's rules that correspond to the obligation of conformity as discussed by the CISG as follows; in the first section the condition of determining the object of sale will be explained, examining the required ascertainment. The second section discusses how the identification of the object of

¹⁹¹ See section: 1.3.1.2.

¹⁹² See below, chap.3, fn: 196.

¹⁹³ See section: 1.3.1.2.

¹⁹⁴ See section: 1.3.2.4.2.

¹⁹⁵ See section: 1.3.2.3.5.

sale can be achieved. The final section defines the required conformity, highlighting the impact of the quality of the goods on the options of description, defect and misrepresentation in Saudi law.

3.3.1 The obligation of determining the object of sale

3.3.1.1 Significance of knowing the object of the sale

As the goods are considered to be the subject matter of the contract, the law stipulates a number of conditions for the sold item in the sale of goods contract in order to protect the contract and enhance the transaction.¹⁹⁶ The condition relevant to the obligation of conformity is the condition of the goods to be ascertained and known to both parties.

Art.269 of JLR states that “It is a condition that the sold item should be known to both buyer and seller ... selling an unknown object is null.” The significance of this article is that an object of sale has to be made known to the buyer; not merely as a contractual duty, but as a pre-contractual obligation, as the law prohibits an uncertain sale (*gharar*).¹⁹⁷ Thus, if such an object of sale is unknown to the buyer, the sale is avoided.¹⁹⁸ This obligation applies to the seller when the buyer is unaware of the condition of the goods, either if there is insufficient information about the goods available to them, or if the buyers themselves are unable to inspect the goods.¹⁹⁹ This may

¹⁹⁶ These conditions are as follows: 1. mutual consent; 2. the capacity of the parties to conduct such a contract; 3. the legality of the subject matter; 4. ownership by the seller; 5. the seller's capability to deliver the goods; 6. determination of the subject matter and making it known to the buyer; and 7. the price has to be made known to the parties. See: Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 pp.49-173.

¹⁹⁷ See more detail about *gharar* in section: 1.3.2.4.2.

¹⁹⁸ Al-Mardawi A, *Al-Insaf fi Marifat Al-Rajih min Al-Khilaf*, (Beirut: Dar Ihia Al-Turath, 1999), vol.4, p.404; Abu Husain A, *Il-tizamat Al-Bai' fi Al-Ta'qud Bewsail Al-Itisal Al-Hadithah* (Alexandria: Manshat Al-Ma'arif, 2009), p.110.

¹⁹⁹ Al-Hattab M, *Maoahib Al-Jalil fi Sharh Mukhtaser Khaleel*, (Damascus: Dar Al-Fikr, 1992), vol.4 p.472; Mabrok M, *Daor Al'Ilm Bilmabee' Oa Tatbikath*, (Cairo: Al-Maktab Al-Fani Lilisdarat Al-Qanoniah, 2000), p.317; Abu Husain, A., *op.cit.*, p150.

occur if the buyer has not seen the goods before and there is no description of them available, or if the buyer cannot achieve the required capacities or skills to inspect the goods. In addition, the seller's responsibility is limited to what they are aware of, or should have been aware of.²⁰⁰

3.3.1.2 Scope of the required awareness

As the level of knowing the goods varies and it is difficult to obtain full determination of every aspect of the goods, it is important to determine the required level of awareness and to have criteria that can distinguish between definite and indefinite goods. There is agreement among jurists to forbid major dimension of uncertainty but to allow trivial uncertainty.²⁰¹

Controversy may arise if the goods are partly identified to the buyer, but cannot clearly fall in one of these categories. Here jurists established a criterion to identify disqualified uncertainty,²⁰² based on the effect of uncertainty which has the potential for creating disputes between the parties. Thus if the contract involves selling an indefinite object which leads to a dispute, the contract is not valid.²⁰³ Examples are given of what leads to such dispute: one is a difference in price, as when the seller sells, at a fixed price, one of his two objects of the same kind without specifying it, one of which is worth £10,000 and the other £1,000. Another example is if uncertainty prevents the delivery of goods, such as if the seller says 'I will sell you something'.²⁰⁴ Ibn Taymiyyah pointed out a more accurate reference to what is accepted in awareness of the object of the sale, suggesting that the required identification of the object of

²⁰⁰ Al-Nawawi E, *Al-Majmo'*, *op.cit.*, vol.11 p.300; Mabrok M, *op.cit.*, p.317.

²⁰¹ Al-Saifi A, *Al-Jahalah wa Athroha fi 'Aoqod Al-Mo'awadat* (Amman: Dar Al-Nafais, 2006), pp.39-40. Examples of these cases are given in the following discussion of methods of knowing the goods.

²⁰² These criteria are inferred from some of the prophetic reports prohibiting certain existent sales at the time of revelation; see: section: 1.3.2.4.2; also see: Ibn Qudamah A, *Al-Mogani*, *op.cit.*, vol.6, p.298; Deah A, *op.cit.*, p.203.

²⁰³ Al-Sarkhasi M, *Al-Mabsot*, (Beirut: Dar Al-M'arifah, 1986), vol.13, p.55; Al-Kasani A, *op.cit.*, vol.4 p.180; Al-Saifi A, *op.cit.*, p.37. A legal maxim in relation to this criterion states that: "Any uncertainty in the contract which may lead to a dispute invalidates the contract." See: Deah A, *op.cit.*, p.187.

²⁰⁴ *Ibid*, pp.194-5.

sale has to be referred to those who are experts in the market, rather than to jurists. Thus, if the traders are satisfied with the available definition of the object, that will be sufficient and lawful even if others, including jurists, do not approve of it.²⁰⁵ The merit of this opinion is the emphasis on custom and market practice, which is an important source of commercial transactions in Islamic law.²⁰⁶ Moreover, as objects of sale are diverse and each may require different definitions, it can be said that the best way to meet the required ascertainment is the market itself and what is accepted among traders.

3.3.1.3 Elements to be declared

In order for the sale to be legally identified, some elements of the offered goods have to be made known to the buyer, including the classification of the goods by announcing their names in order to distinguish between sold goods and unsold goods. This avoids ambiguity, such as if the seller says I will sell something in my home without classifying the goods as animals, material or cars. The second element is the type of goods when there is more than one type. For example, if the contract is for the sale of a Toyota car, the seller must define which type of car, as there are many different cars in the Toyota range. The third is the quality and description of the goods (more details on this are given later).²⁰⁷ The final element of the goods that has to be declared is the quantity of the goods, as an indefinite quantity may lead to great dispute between the parties and hinder the delivery.²⁰⁸ The quantity of goods have been discussed widely in the literature, providing rules for cases where specifying the amount of the sold objects cannot be achieved

²⁰⁵ Ibn Taymiyyah A, *Fataua*, *op.cit.*, vol.29 p.493.

²⁰⁶ See the principle custom in Islamic contract law: section: 1.3.2.3.5.

²⁰⁷ See section: 3.3.2.

²⁰⁸ Al-Saifi A, *op.cit.*, pp87-89; Deah A, *op.cit.*, pp.191-3; Abu Husain A, *op.cit.*, pp.175-6.

accurately, as some goods can be sold in bulk whereas sometimes the goods are shared in common. These issues are elaborated in the following paragraphs.

In cases where the seller shares with a partner an undividable commodity, either of them can sell their own known common share (e.g. a quarter, third, or half) of the commodity, even before distributing the shares, and even if the seller's partner does not approve it.²⁰⁹ In this regard, Art.294 of JLR provides that "Selling a common share is valid, even without the approval of the seller's partner." However, if the seller's portion is unknown, the contract is avoided; for instance, if the seller sells a share of a container of corn without specifying the amount of their portion.²¹⁰

In some sales (such as sale by bulk) the quantity of the goods is undetermined and identifying them cannot be achieved easily where the goods are sold in bulk. For instance, in the sale of crops after harvesting, it is easier for the farmer to sell them in bulk rather than measuring their quantity. The law permits this sale as an exception from the general principle of knowing the actual quantity of the goods, with some conditions. The reason for this exception is to avoid inconvenient obligation.²¹¹ Art.306 of JLR provides that "the sale of what can be measured by approximate estimation is valid if it has been seen by the parties." This means that commodities which are estimated by measurement, scale, and number, may be sold in bulk instead of measuring them, provided that the buyer has seen the whole of the bulk to estimate its quantity.²¹²

²⁰⁹ The right of the partner in the company was dealt with under the *Shofa'h* rules, which gives the partner the right to take over the goods instead of the third party, provided that the property is not divisible. See: Ibn Qudamah A, *Al-Mogni*, *op.cit.*, vol.5 pp.459-553.

²¹⁰ Ashosh A, pp.76-7; Ibn Qasim A, *Hashiat*, *op.cit.*, vol.4 p.367.

²¹¹ Deah A, *op.cit.*, p.219.

²¹² *Ibid*, pp.217-9; Al-Saifi A, *op.cit.*, pp.90-2.

Similar to the sale in bulk, selling each quantity of objects against a specified amount of money is valid. Accordingly, Art.307 of JLR provides that it is legitimate to sell “what is contained in the bulk by measurement, e.g. each pound for a certain amount of money.”

Selling in bulk may lead to the question of excluding a proportion of the sold item, and a legal rule in this issue was provided by Art.310 of JLR stating that: “Excluding a known proportion of a known sale is valid.” If the excluded part is unknown, Art.311 of the JLR provides that “it is invalid to exclude an unknown proportion of a known bulk, for instance, if the seller sells the entire herd except one unknown goat; sale is invalid.”²¹³

It is important to mention here that excluding part of the object of sale is only allowed if that part of the object can be valid for the sale individually. However, if that item is invalid for sale individually, the part is not permitted to be excluded from sale, since it is considered a substance subsidiary of the sale, so that if such a subsidiary is excluded, the sale becomes invalid. For instance, in the sale of a living goat, it is not permitted to exclude its leather or leg or, if the seller sells a house, it is not permitted to exclude the wood in the roof. However, selling a car allows the seller to exclude driving it to its destination, or in the sale of house the seller can exclude some known furniture (Art.312 JLR).²¹⁴

3.3.2 Methods of knowing the goods

3.3.2.1 Introduction

As the identification of the goods is considered a condition for the validation of the contract, access to the goods and knowing their quality, quantity, and description depends on whether they

²¹³ Ibn Qasim A, *Hashiat*, *op.cit.*, vol.4 p.357; ‘Ashosh A, *op.cit.*, p.80; Deah A, *op.cit.*, p.229.

²¹⁴ Ibn Qudamah A, *Al-Mogni*, *op.cit.*, vol.6 p.174; ‘Ashosh A, *op.cit.*, p.80; Deah A, *op.cit.*, pp.227-38.

are of specific goods or fungible (generic). Knowing specific goods can be achieved either by view or by description and fungible goods can be known only by description. The law provides rules related to these ways explaining how the goods can be identified for certainty. In the following sections, the viewing and description of the goods is examined.

3.3.2.2 The Viewing of goods

In the sale of specific existing goods, seeing them is considered in Saudi law as the essence of achieving their legitimate recognition.²¹⁵ View, in this regard, means the physical awareness of the goods, whatever its approach, which may be achieved by not only viewing but also by touch, smell, and taste, since all of these are analogous to seeing, whereby awareness is achieved.²¹⁶ Accordingly, Art.272 of JLR provides that “identifying the goods by touching, smelling or tasting what is identifiable by these senses, is valid as the same as the case of seeing, so, in these types of goods a blind person can buy and sell pursuant to these senses.”

Thus, pointing out the object of sale, which is present in the session of the contract, is enough to identify the goods, e.g. if the seller says to the buyer that I sell you this car or goods.

Even though viewing is the fundamental method of obtaining the required identification about the specified existing goods, there is debate amongst jurists²¹⁷ regarding whether the view itself is sufficient, or whether the seller should give more details about quantity and description. In one opinion²¹⁸ there is no need for providing the buyer with the quantity and description of the

²¹⁵ See more detail about the legality of identifying the goods by description in the next section.

²¹⁶ Al-Saifi A, *op.cit.*, p.129.

²¹⁷ *Ibid*, p.131.

²¹⁸ This is the opinion of the majority of jurists; see Ibn Nojaim Z, *Al-Bahr Al-Raig Sharh Kanz Al-Dakaik*, (Beirut: Dar Al-Ma'rifah, n.d.), vol.6 p.175; Al-Hattab M, *op.cit.*, vol.4, p.516; Al-Shirazi I, *Al-Mohathab*, (Beirut: Dar Al-Fikr, n.d.), vol.1 p.300; Al-Mardawi A, *Al-Insaf, op.cit.*, vol.5, p.106.

goods, as long as they are seen by the buyer. In an alternative opinion, the seller has to specify the description and the quantity of the goods; this is because the contract may be avoided later for any reason, whereupon it is important to know the right quantity and description to allow the return of the correct goods.²¹⁹ Between these two opinions, there is a third view²²⁰ supporting the obligation of informing the buyer of the quantity of the goods only if they are sold as unascertained goods²²¹ (fungible) which may lead to a dispute if they are sold without the required description. In other cases, viewing the goods is enough for the validity of the sale as the buyer has already seen them. From this discussion it can be said that viewing the goods should unrepentantly be accepted as a method of knowing the goods except where seeing the goods cannot achieve the purpose of identifying them.

The sale may be concluded based on a model, but the question is whether the buyer's view of the model is as sufficient and satisfactory as viewing the original. The JLR does not approve of selling by models. Art.308 states that "Model sale is invalid, when the seller shows the buyer a model of a stack and sells the whole of it as being the same as what the buyer has seen, whether it is identical to the model or not." The reason for not allowing sale by model concerns the condition for the buyer to see the whole of the goods, and in the case of a model, the buyer has seen only a sample of it.²²²

However, this opinion is not supported by the majority of jurists, who believe that seeing a model is sufficient to demonstrate the product. The buyer has the option to avoid the contract if

²¹⁹ This is an opinion in the Hanbali school; see: Al-Buhoti M, *Al-Rod Al-Morbl'* (Riyadh, Maktabat Al-Riyadh Al-Hadethah, 1970), vol.2, p.145.

²²⁰ This is the Hanafi view; see: Ibn Nojaim Z, *op.cit.*, vol.6, p.175.

²²¹ The difference between unascertained and ascertained goods, according to this view, is that ascertained goods can be identified easily as the buyer has an interest in them specifically, and in unascertained goods, even if the buyer has seen them, his interest is in any equivalent goods. Therefore in the latter situation identifying their quantity is needed as there is major uncertainty.

²²² This is the Hanbali opinion; see Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, p.163.

the delivered goods do not conform to the model, and if the goods were in conformity with the model, the buyer will no longer be able to avoid the contract by practising his right of the view option.²²³

From this discussion, it seems that the model should be sufficient for the purpose of achieving the required awareness of the goods; especially in contemporary trading where obtaining a full view of all goods can be practically difficult. Moreover, models of contemporary products are virtually identical to the product, whereas those in the past (for example hand-made products) were non-identical in most cases. Moreover, validity of a model sale can be supported by analogy with the approach of the JLR in seeing only part of the goods in the following paragraph.

In a similar case to sale by model, there is the question of whether it is sufficient for the buyer to see only part of the goods, or if they have to see the goods in their entirety, such as in the sale of crops. According to Art.270 of the JLR, in order to achieve a valid view of the goods the buyer should see the entire sold item if it is in numerous parts, since full identification cannot be achieved through looking at some of the object only. However, if the sold item consists of equal parts (fungible goods), it is sufficient to see some parts thereof. For instance, it is sufficient to see some folded cloth of one measure of textile of equal parts.²²⁴ This rule also applies to the case of

²²³ This is known in jurisprudence as *Khiyar AlRo'aih*, the option of viewing, which grants the buyer who has not seen the goods before the choice to continue with the transaction or avoid it, provided that the buyer should not have seen them before and the object in the contract should be specified such as a house or a car. See: Al-Jul'ood A, *Ahkam Lozoom Al'aqd* (Riyadh: Dar Konoz Eshbelia, 2007), pp.342-51. The viewing option is not recognised by some jurists, including the opinions of Hanafi, Maliki and Shafi'i; see Ibn Nojaim Z, *op.cit.*, vol.6, p.32.; Al-Drdeer, *Al-Sharh Al-Kabeer*, (printed with Al-Dasoqi's commentary) (Beirut: Dar Al-Fikr, n.d.), vol.3, p.24; Al-Nawawi E, *Al-Majmo'*, *op.cit.*, vol.9, p.361. Some Hanbalis support this view; see Al-Mardawi A, *Al-Insaf*, *op.cit.*, vol.4 p.295.

²²⁴ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.196; Saiyd S, *Al'Ilm Bilmabe'* (UAE, Maktabat Al-Sahabah, 2008), p.32; 'Ashosh A, *op.cit.*, p.78.

selling only an unidentified part of particular goods, e.g. anyone of five different cars²²⁵ and it is not valid unless the parts are identical, e.g. one unknown 1 kg of a present bulk crop.²²⁶ Even though in the latter case there is uncertainty about which part of the crop will be taken, this is considered to be a trivial uncertainty; however, it is considered a major uncertainty if the seller sells one of his cars without specifying its type and description, as cars are different in their brand, quality and price.

It is required for the legal viewing of the goods to accompany the contract or precede it by such a time that does not permit variation in the goods. In this regard, Art.271 of the JLR states that viewing “shall accompany or precede the contract in a proper time so the object that the buyer has seen is not changed physically, however, if viewing has preceded the contract within a period during which variation took place or there is a doubt about variation in the sold item; then, the sale is invalid.”

3.3.2.3 Sale by description

Besides viewing, the description of the goods is another way of defining them in the sale contract. In Islamic contract law, description is required mainly for the sale of *salam*,²²⁷ however, in the sale of existing goods there is wide discussion among jurists²²⁸ on whether or not it is permissible to conclude the contract according to the goods’ description, or if the contract will not be valid until the buyer sees the goods. The JLR approves the sale of existing goods by describing them if they are fully described. Art.269 states that “the object of sale must be fully identified by both parties by appropriate means such as seeing them or describing them as in

²²⁵ This case does not apply to brand new cars of one type, as they are not particular goods (fungibles).

²²⁶ The JLR Art.285.

²²⁷ See section: 1.3.1.2.

²²⁸ See: Al-Saifi A, *op.cit.*, p.135-142.

salam; selling unknown objects is not valid.”²²⁹ This view was supported by an analogy to the sale of *salam*, which was explicitly permitted by a prophetic report. The sale of absent goods has the same feature and the same need of *salam* sales where the goods do not exist at the time of contract.²³⁰ On the other hand, another view is that the contract is nullified in the absence of the goods whether they are described or not. The main grounds of this view relate to specific prophetic reports prohibiting sales where goods were not seen and involved a certain *gharar* (hazard).²³¹ There is a third view allowing the concluding of the contract of unseen goods even without any description; however, the buyer will not be bound by such a contract until he sees the goods.²³² This opinion is based on the prophetic report: "He who buys something which he has not seen has the option upon seeing it either to accept it or to reject it." From this report the contract is valid and until viewing the goods the buyer retains the option to confirm or cancel it.²³³

In analyzing the foregoing debate one may notice that allowing sale by description is compatible with the legal maxim whereby unlawful unawareness is that which may lead to a dispute.²³⁴ Therefore a description may provide more details about the goods than would be achieved by seeing them. Moreover the prophetic report which gives the buyer the option to avoid the contract if they do not see the goods is not considered to be one of the authentic reports.²³⁵ Even if this report were correct, its meaning could be understood to give the buyer the option to avoid the contract if they found that the goods were different from the description.

²²⁹ This is a popular view in the Hanbali and Maliki schools; see Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, p.164.

²³⁰ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, p.163.

²³¹ This view is supported by some Shafi'i scholars; see Al-Shirazi I, *op.cit.*, vol.1, 263. According to this view, *Salam* sale is limited to cases where the contract cannot be made by existent goods.

²³² This is the Hanafi view; see Ibn Nojaim Z, *op.cit.*, vol.6, p.28.

²³³ See above, chap.3, fn 223.

²³⁴ Deah A, *op.cit.*, pp.150.

²³⁵ It was criticised since some of those who delivered this narrative are not reliable. See Al-Saifi A, *op.cit.*, p.140.

If the goods are identified by description, the question is what kind of description is required. It has been said that the seller has to describe the goods to such an extent so as to distinguish their function from others and to specify what affects their prices.²³⁶

As far as the description of goods is concerned, it should be mentioned that jurists of all schools nullify the sale of non-existent objects (Art.266 of JLR).²³⁷ This is based on prophetic reports prohibiting certain kinds of sale such as of the offspring of the offspring of an animal and the sale of fruits before they appear. Jurists include sales where the existence of the object of sale is not certain, such as the sale of milk in an udder or pearls in shells. According to this view, the permissibility of *salam* was made an exception to this rule as a special license permitted for people to facilitate their daily lives and to meet society's economic needs.²³⁸ This view was rightly criticised by Ibn Taymiyyah²³⁹ and Ibn Al-Qayyim,²⁴⁰ who suggested that if the future existence of the goods is known by custom, Islamic primary sources do not prohibit the transaction even by the companion of the prophet. The prophetic reports in this matter were concerned with sales with excessive risk and uncertainty which may prevent delivery, such as the sale of a runaway horse. Moreover, explicit permission of the sale of non-existent goods has been reported. This view has gained wide support among contemporary jurists.²⁴¹ So, according to this reasonable view, the sale of non-existent goods is not an exception as long as its future existence is known, and therefore there should not be restrictions when applying this kind of sale.

²³⁶ See: Saiyd S, *op.cit.*, p.74; Abu Husain A, *op.cit.*, p.174; More detail about description was given in section: 3.3.1.2.

²³⁷ Al-Nawawi E, *Al-Majmo'a*, *op.cit.*, vol.9, p.258.

²³⁸ Al-Zuhayli W, (2007), *op.cit.*, vol.1, pp.25, 238.

²³⁹ Ibn Taymiyyah A, *Fataua*, *op.cit.*, vol.20, pp.542-52.

²⁴⁰ Ibn Al-Qayyim M, *op.cit.*, pp.27-34.

²⁴¹ Al-'Ayashi F, *op.cit.*, pp.25-6; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.76.

In sum, the above discussion concerning the requirement that goods should be ascertainable and known to the contracting parties reveals the approach of Saudi law regarding the certainty as of the essence of sale contracts. However, as quoted from Ibn Taymiyyah²⁴² argument, custom should be the main reference for what is required for certainty. So what jurists have said in this regard should be understood as relating to their customs, and can be seen here only as directive examples of how to avoid falling in *gharar*. Although some of the descriptions are not relevant to the question of the compatibility of Saudi law with the CISG in terms of conformity, they show the main interest of Saudi contract law concerning how the principle of prohibiting *gharar* has been dealt with in the literature, which is an important ground for the comparison.

3.3.3 Defining required conformity

In Saudi law, as discussed above, there is no specific section concerning the duty of conformity. However, the requirements of this duty are provided in different places in the law. The duty of the seller to deliver conforming goods, in general, includes two types of obligations: conformity with the specification of the contract imposed by the parties, and the compliance of the goods with the criteria which are provided by the law as implied terms of the contract.²⁴³ Essentially, these duties were mainly dealt with in Saudi law as two different subjects within the options of sale (the right to avoid the contract): in the option of description and the defect option. In the light of this the next section will discuss conformity with contractual and implied agreement in Saudi law.

²⁴² See chap.3, fn: 205.

²⁴³ This classification is the CISG's method of defining conformity, and in order to facilitate the comparison between the CISG and Saudi law it is necessary to examine the approach of Saudi law within the context of the CISG structure to determine whether or not the Saudi law is compatible with the CISG.

3.3.3.1 Contractual agreement

As previously discussed, it is an obligation, at the time of concluding the a contract, that the object of sale should be made known and specified to the buyer in quality and quantity, either by viewing (in the sale of specific goods) or by description; or it can be made by both viewing and description. As a general rule,²⁴⁴ in order for the seller to fulfil the duty of performing the contract, the goods have to be delivered in the same conditions that were agreed upon at the time of concluding the contract. This duty is stated in more than one article of the JLR. Art.349 states “the seller is liable for the sold goods ... until the buyer receives them.” Similarly, in Art.423, “any defect that appears in the goods between the time of contracting and the time of receiving them is considered an old defect.”

In the description option of the JLR (Arts.459-462), the seller is required to deliver the object of sale according to the contractual agreement in order to fulfil his obligations. If one of the desired descriptions of the object of sale becomes absent, the buyer may resort to the option of description.²⁴⁵ In this regard Art.459 states that:

If the buyer finds the sold goods which have been described or previously seen (during a period in which the sold goods would normally not have changed or seem to changed) is different from the description or having lost one of their characteristics, or different from the condition in which he previously saw them; then he has the option of termination. If there is dispute over description, the buyer has to swear an oath.²⁴⁶

²⁴⁴ Al-Kasani A, *op.cit.*, vol.5, p274; Ibn Qudamah A, *Al-sharh Al-kabeer*, (Beirut: Dar Alkitab Alarabi, 1992), vol.11, p.376.

²⁴⁵ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.166.

²⁴⁶ The requirement of swearing means the burden of proof is the seller's responsibility, and if the seller cannot bring sufficient proof, the buyer's argument will prevail provided that he accept swearing the oath. Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.235.

Because the mutual consent of parties to the contract was related to the specific condition of the goods at the time of concluding the agreement,²⁴⁷ an agreed description of the sold goods is required, and a lack of any part of them provides the buyer with the right to avoid the contract. Lack of description, which may discourage the buyer from accepting the object of sale, is treated the same as a defect in the object. Therefore some jurists consider this option to be part of the defect option.²⁴⁸

The practice of description option relates to sales where the object of sale was not seen at the contract session (sale by description). For instance, in selling a car based on the description that it is a fast car, and then it is found to be very slow; or if the description of the sale of a watch stated that it includes diamonds, but these turned out to be artificial imitations, then the buyer is entitled for the available remedies.

The question of whether the buyer can practise the right of avoidance with regard to any missing characteristic or only in reasonable characteristics was answered by stipulating three conditions to be met in order for the buyer to claim this right of avoidance. The description has to be legally permissible, and includes what is usually desired.²⁴⁹ If the characteristic is not considered customarily to be desired then the sale is rendered valid without an option if they are missing.

The other criterion for the desired description is based on the difference in the use of the object of sale with and without the characteristic, so if the named function²⁵⁰ will be affected then, in the absence of the description, there is a breach of the contract (e.g. if the buyer requests the

²⁴⁷ *Ibid*, p.228; 'Ashosh A, *op.cit.*, p.182.

²⁴⁸ See: Othman F, *Ahkam Al-Rujo'a fi Al-Fiqh Al-Islami*, (Riyadh: Konozi Eshbilia, 2006) vol.1, p.252; , *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.157; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.168.

²⁴⁹ *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.159; Saiyd S, *op.cit.*, p.125

²⁵⁰ Some jurists suggested that if the seller delivers something else then the contract is invalid. *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.161. This is similar to the discussion in the CISG about the impact of delivering something different from the contract. See sections: 2.2.2 and 3.2.1.

meat to be from goats and the seller delivers sheep meat). However, if the named function of the required description still applies to the commodity, then there is no right for the buyer to avoid the contract (e.g. if the buyer requests a dog to be trained to hunt, so if the named function of hunting dog applies to it then there is no option for the buyer to avoid the contract even if the dog has the lowest level of skill in hunting).²⁵¹ Finally, the desired description should not be an ambiguous one that leads to uncertainty in the contract which may, in turn, result in disputes (such as a requirement to produce a hundred litres of milk per day).²⁵² If the object of sale is popular with a specific character then it becomes part of the contract even without express indication to it, jurists provide the example of selling a dog which is known for its skill of hunt, if the dog loses its skill the buyer is entitled for the option.²⁵³

In sum, the contractual requirements under Saudi law are given the priority to be fulfilled and the seller is in breach if his goods do not include the desired description, no matter whether the missing characteristics have been agreed by viewing or descriptions. Therefore, it can be said that for the purpose of compatibility of these rules with the CISG there should be no concern about the conformity with contractual agreement since Saudi law provides the parties with the full right to conclude their contract freely with any condition they may wish.²⁵⁴

3.3.3.2 Implied obligations of conformity

As stated above, no particular express requirement of implied requirement of conformity, instead Saudi law provides the aggrieved party with the right to avoid the contract (*Khiyarat*) in certain cases. These cases can be used here as bases for the purpose of examining the Saudi law's

²⁵¹ Saiyd S, *op.cit.*, p.125; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.159.

²⁵² Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.169.

²⁵³ *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.160.

²⁵⁴ See section: 1.3.2.3.1.

counterpart rules to those under the CISG. Three relevant *Khiyarat* explore the required conformity imposed by the law as standard in the case of absence of contractual agreement. The major rules for implied conformity are provided in the defect option. The other two are the misrepresentation option and the option of fraud reference.

3.3.3.2.1 Defect option

A) Defining the defect

Arts.211 - 213, and Arts.423 - 446 of the JLR address the option of defects in sale contracts. Art.211 defines a defect as a “shortfall of the merchandise or what may reduce its value.” Thus any uncommon attribute that constitutes reduction in the object of the sale or its value, or which may prevent a valid use of the object, is considered a defect.²⁵⁵ This includes physical and apparent defects in part of the object of sale or changes in its nature as well as non-appearing defects which may affect the function of the object.²⁵⁶

The difference between the defect option and the description option is that the former is an emergent deformity affecting the object, whereas the description option concerns a failure to meet an additional condition not required by the nature of the object.²⁵⁷

Identifying the criteria for defect which allows the buyer to practice the option of defect has been discussed widely in the literature and it can be said that the main criteria include three types of defects. First is the reduction of the goods in value because of the defect, so that if the price of the goods is affected because of the defect, then the buyer is entitled to this remedy. However, if

²⁵⁵ Al-Qassar A, *Khyar Al- 'Aib wa Tatbiqatuh Al-Mu'asirah*, (2004) 28 *Journal of Law* (Kuwait), p.17; Abu Husain A, *op.cit.*, pp.359-60; Deah A, *op.cit.*, pp.271-2.

²⁵⁶ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.200.

²⁵⁷ 'Ashosh A, *op.cit.*, p.192.

the reduction is merely a result of a high price being paid by the buyer, he is not entitled to this option. Knowing the difference between the price of defective goods and sound ones can be achieved with reference to specialists in the market.²⁵⁸ The second criterion is that any diminution in the goods themselves, or the benefit arising from them are included in the defect option. This includes a missing part of the object, such as if the animal tail was cut off, or if the normal benefit of the object is affected such as the animal being lame.²⁵⁹ This is a subjective approach which can be identified easily. The third criterion is if the goods are not fit for the desired purpose of the buyer. Here jurists have given an interesting example of the sale of a sheep for the purpose of sacrifice.²⁶⁰ In this example if the animal does not fit for this purpose (by failing to meet some conditions for sacrifice), even if its value as an animal still the same as the sound one, this is considered as a defect entitles the buyer for this option.²⁶¹ Ibn Uthaymeen, a contemporarily prominent jurist, suggested regarding the options of the contract *Khiyarat* that the main principle of offering options is when the purpose of the contract was not met.²⁶² Thus, any missing customarily required purpose is considered as a defect, since the concept of defect is extended to include everything required by the buyer in addition to soundness of the goods, whether agreed expressly or implicitly.²⁶³

²⁵⁸ Mar'i A, *Khiar Al-'Aib Derash Moqaranah* (1996) 4 (2) *Journal of Security and Law* (issued by Dubai's police college in Arabic), pp.15-9; Abu Husain A, *op.cit.*, pp.379-80; Al-Qassar A, (2004) 28, *Journal of Law* (Kwuit), *op.cit.*, p.17.

²⁵⁹ Al-'Ajlani A, *Al-'Aib wa Atharoh Fi Al-'Aqood*, (Riyadh: self-published, 2002), p.19.

²⁶⁰ This is a religious celebration where people slaughter specific animals to specific standards.

²⁶¹ Abu Husain A, *op.cit.*, p.381; Al-'ajlani A, *op.cit.*, p.19; Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.310; see also above the example of the sale of a skilful dog: chap.3 fn:253. Shafi'is have discussed the option of defects more than other schools: Al-'ajlani A, *op.cit.*, p.18

²⁶² Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.365.

²⁶³ 'Azam T, *Athr Al'aib fi Almu'amalat Almaleeah*, (Amman: Dar AlNfais, 2009), pp.102-3; Al-Qassar A, (2004) 28 *Journal of Law* (Kuwait), pp.30-1; Mar'i A, *op.cit.*, p.19.

b) Conditions for applying the option

In order for the buyer to exercise the option of defect rights, the following conditions have to be met:²⁶⁴

1. The defect should be considered an old defect which existed before delivery, (Art.424 of JLR). However, if the late occurrence of the defect is a result of an old defect then the seller is still responsible for it. For example, if the defect in the engine of a sold car appears only after a few days of using it, this defect is considered as an old defect since the cause cannot have arisen after delivery.²⁶⁵
2. Continuity of the defect after the delivery until the time of avoidance. Art.442 of the JLR provides that “if the buyer incurs damage from the defect and the defect disappears by itself the buyer has to return the compensation.” In this regard, if the seller offers the buyer to repair the defect before returning the goods without harming the buyer, the buyer loses the right to the defect option.²⁶⁶
3. The buyer must be unaware of the existence of the defect at the time of concluding the contract and at the time of delivery. If they were aware of the defect before delivery, there is no such option, since this indicates implicit acceptance (Art.428 of the JLR). This condition applies even if the defect is not hidden, although the buyer has to prove ignorance of the defect.²⁶⁷

²⁶⁴ See for the conditions in general: Mar'i A, *op.cit.*, pp.20-1; Al-'Jlan A, *op.cit.*, pp.65-79; 'Azam T, *op.cit.*, pp.102-124.

²⁶⁵ Al-'Ajlan A, *op.cit.*, p.67; Mar'i A, *op.cit.*, p.21.

²⁶⁶ Othman F, (2006) *op.cit.*, vol.1, p.339; 'Azam T, *op.cit.*, p.118, Ibn Qudamah A, *Al-Moghl*, *op.cit.*, vol.4, p.117; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, pp.121, 144.

²⁶⁷ 'Azam T, *op.cit.*, pp.112-3; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.123.

4. The norm by custom for similar merchandise is that they be free of such defects. This can be illustrated by the example of the sale of a new car and a used one. In the latter the average quality of the car is not as high as in the former; therefore, the buyer should not expect the car to be free from the effects of use.²⁶⁸
5. The state of the defect is not so minor that it can be removed easily without side effects. Al-buhoti said in this regard: "there is no avoidance for the buyer if the defect is trivial by custom, such as dust in crops."²⁶⁹ Determining what is considered trivial is subject to the above criteria for defining defects in goods.²⁷⁰
6. The absence of the buyer's acceptance of taking the defective goods. According Art.426 the buyer loses the right of defect if they accept the goods with the defect either explicitly or implicitly by any kind of disposal of them.²⁷¹

c) Disclaimer of liability

Some jurists²⁷² consider the absence of a condition in the contract of a disclaimer of liability for defects to be an important factor to allow the buyer to practise their rights. Accordingly, if the buyer agrees to this condition there is no option. The JLR, on the other hand, does not approve of this condition, and considers the state of the contract to be valid without giving any force to such a condition.

²⁶⁸ Al-Zuhyli, (2007) *op.cit.*, vol.1, p.201.

²⁶⁹ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, p.119.

²⁷⁰ See section: 3.3.3.2.1(a).

²⁷¹ Othman F, (2006) *op.cit.*, vol.1, p.325; Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.323.

²⁷² This opinion is held by the Hanafi and Maliki schools; see Al-Zuhayli, (2007) *op.cit.*, vol.1, p.212.

Alongside these two opinions there is another held by the majority of jurists, which permits the condition, provided that the seller is not aware of any defects during the conclusion of the contract. In this view the seller is not acting in bad faith or trying to cheat the buyer.²⁷³

From this discussion it can be suggested that the awareness of the seller of the defect must be considered an important factor in the avoidance of dishonesty and the performance of prohibited transactions. Therefore the third opinion seems more accurate.

3.3.3.2.2 Khiyar –al-tadlis (the option of misrepresentation)

This option is given when the state of object of sale was deliberately concealed, it applies to two cases: a defect that was concealed by the seller and to objects that being presented in fake desirable appearance that raises the price,²⁷⁴ even if the object is no defective²⁷⁵. In both types, the buyer is entitled to return the object if he was not already aware of the defect (Art.420 of JLR).²⁷⁶ The function of this option seems to protect the parties' expectations of their contract which can be seen as a practice of the CISG's concept of conformity with the particular and ordinary purpose of the object of sale since the option was given when the fake desirable purpose was not met.

3.3.4 Notice of non-conformity

In the sale contract there are no particular provisions concerning the buyer's duty to give the seller notice of defects²⁷⁷ however Art.427 of the JLR states that "the option of defect is relaxed

²⁷³ Al-Qassar A (2004), 28 *Journal of Law* (Kuwait), pp.43-45.

²⁷⁴ Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.304; Al-'Umary M, *op.cit.*, p.183.

²⁷⁵ See section: 1.3.2.4.3. (*Al-Mussrah* sale).

²⁷⁶ See JLR Arts.417-422; Al-Buhoti M, *Kashaf, op.cit.*, vol.3 pp.213-4.

²⁷⁷ See section: 5.3.2.4 for a similar approach of the JLR regarding the declaration of avoidance.

in its time delay; it would not be abolished with running time or by remaining silent.” A similar rule is given in the description option (Art.460). According to these articles, if the buyer becomes aware of a defect and does not return the goods immediately, he still retain his right to the defect option as there is no time limit for giving notice in the case of the non-conformity of the goods.²⁷⁸ This view is supported by the purpose of options, which is to avoid detriment to the buyer, also by analogy with the criminal law procedure where a late claim of the victim can be accepted.²⁷⁹ Nevertheless, under this view in Art.418 there is only one exceptional rule related to a case of *Al-mussrah* in misrepresentation option where the buyer is given only three days to give notice which allows the milk to come back in the animal udder.²⁸⁰ In any case, according to this opinion, the period has to be no longer than which is accepted by custom and common public sense or if the delay harms the seller.²⁸¹ In addition, the buyer can no longer claim the right if they have accepted defective goods explicitly or implicitly, such as by using goods after becoming aware of the defect.²⁸²

Conversely, there is an alternative view which obliges the buyer to return the goods immediately after discovering the defect in order to preserve their rights.²⁸³ In this regard, immediate notice should be understood within the customary sense, considering delays due to eating a meal or because of sickness or other reasonable excuses. Some jurists suggests only two days as an accepted custom.²⁸⁴ This opinion is based on the original status of the sale contract of being binding, and the reason for the option is to prevent negative financial consequences for the

²⁷⁸ This is the opinion of the Hanafis and Hambalis; see Mar'i A, *op.cit.*, p.21; 'Azam T, *op.cit.*, p.79.

²⁷⁹ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.206.

²⁸⁰ This exception was specifically provided by a prophetic report. For more detail about this case, see chap.1, fn: 181.

²⁸¹ Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.322.

²⁸² See section at: 3.3.3.1.2(b).

²⁸³ This is the opinion of the Shafi'is, Malikis and some Hanbalis; see Al-Shirazi I, *op.cit.*, vol.1, p.284; Mar'i A, *op.cit.*, p.21; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.128.

²⁸⁴ This is the opinion of the Maliki school; see *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.128.

aggrieved party. Moreover, short notice should apply by analogy with *shof'ah*.²⁸⁵ Where only a short period is allowed.²⁸⁶

It appears that the second view is the prevailing opinion, since the reason for this option is to protect the aggrieved party. A short period of time is sufficient to obtain this protection, whereas allowing the buyer to claim his right at any later time may harm the seller and constitute an uncertainty in the sale. Thus it is unreasonable to protect the buyer by harming the seller.

3.3.5 Conclusion

It can be concluded from the aforementioned discussion that the duty of the seller towards the goods themselves stresses on the principle of certainty. For this purpose, among others,²⁸⁷ the sale contract is divided according to whether or not the goods exist at the contractual time to provide certain requirement of certainty for each. These contracts regarding conformity involves two steps; the first being the obligation to knowing the object of sale before concluding the contract. This obligation necessitates rules concerning how to determine the goods in their quantity, quality and description in order for the contract to be valid and enforceable. The main interest in these rules is to prevent disputes in consequence of uncertainty as to the goods which are the subject matter of the contract. When the contract identifies the goods, the second step is the provided judgement by the relevant options (*Khiyarat*) to ensure that the seller has delivered the goods in accordance with the contract or with the implied rules of the law in the absence of contractual agreement.

²⁸⁵ See above chap.3, fn: 209.

²⁸⁶ *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.128.

²⁸⁷ See section 1.3.1.2.

The relevant options of the sale – relating to description, defect and misrepresentation are designed to provide standard criteria for the buyer's right to avoid the contract given a certain level of non-conformity. The point that deserves emphasis here is that custom and the normal practice of traders play important roles in determining the rights and obligations of the parties. In addition, the function of Islamic imperative rules does not provide any particular rules apart from stressing the contractual agreement, obliging the parties to enter the contract with a full awareness of what they are bargaining for. However, the development of contract law in the early Islamic literature considered the state of the objects of sale and their availability at the contractual time as the cornerstone for shaping the contract. The required certainty for the objects of sale was associated closely with their custom of identifying them. Although the practice of contract law was based on custom and the parties' autonomy, early Islamic opinions considered the sale of *salam* (forward sale) as an exception to the prohibition on sales of non-existent objects. This may provide an explanation for the slow development of Saudi domestic law to moulit to other laws as well as the difficulty of understanding Islamic contract law for those who trained under different legal systems.

3.4 COMPATIBILITY BETWEEN THE CISG AND SAUDI LAW IN THE OBLIGATION OF CONFORMITY

As a general result of concluding the contract, the seller has a duty to deliver goods in conformity with the parties' contractual agreement regarding quantity quality and description; the delivery of non-conforming goods is a breach of contract. This general rule applies to contracts under all legal systems, including the CISG and Saudi law. However, Saudi law regarding the parties' expectation requires for the validity of the contract that the object of sale must be identified specifically to the contract. Extensive discussion in the literature was conducted to ensure the certainty of the quantity, quality and description of the goods. For these purpose jurists in the early literature restrict the sale of non-existent goods to be allowed only in few cases as exceptions. Since these restrictive rules have no basis in the primary sources the correct view, which has become prominent, would accept the sale of non-existent goods if their future existence is known, as part of the general permissible sale, (not an exception). Although the CISG does not concern the validity of contract (Art.4 CISG), the consequence of the absence of pre-contractual requirements may render the contract null under Saudi law rather than resorting to the available standard requirements of conformity under the CISG (fitness for general or particular purposes). As discussed above, the required level of certainty is associated with whether or not uncertainty leads to dispute according to the custom for the goods in their forum, and the prohibited uncertainty does not relate to whether or not the goods exist at the contractual time, rather it relates to *gharar* (risk) whose prohibition is consistent in all cases involving *gharar* such as selling a runaway horse. Thus it can be said that applying Art.35(2) of the CISG in Saudi courts will not affect the general required level of certainty, for example, in

the sale of ceramic ovenware,²⁸⁸ even though the parties fail to identify its quality, Saudi judges will not find it difficult to validate the contract since the *gharar* here does not lead to uncertainty because the identification can be made by reference to the well-known customs in the use of the goods which are the same as the ordinary purpose reference under the CISG. In this context it can be suggested that applying the rule of Art.35(2) is not only compatible with Saudi law but can be used to improve the establishment of the custom for the form in Saudi law as an accepted legal reference. The result is the increase in certainty in contracts.

Besides the explicit contractual terms, many issues can then be dealt with only by the law, and different legal systems may vary in their approach, including imposing implied terms to fill the gap and to ensure a minimum level of protection for the performance of contracts.

Therefore this section compares the interventions of the CISG and Saudi law in establishing criteria for conformity and the legal procedures in cases of non-conformity, including the seller's right to cure, the buyer's responsibility to examine the goods and to inform the seller of non-conformity, the timing of doing so, the impact of the awareness of the buyer and the seller on the defect, and the duration of their warranty

3.4.1 Criteria for conformity

Regarding the criteria of quality, Saudi law requires the goods to be in conformity with the contractual description and quality. However there are no explicit rules for the obligation of conformity to fitness for ordinary and particular purposes. Although the only terms concerning implied terms in the law are that the goods have to be free from defects in order to avoid the

²⁸⁸ See chap.3, fn: 25.

options of defect and misrepresentation, the expression of fitness for purpose is not unfamiliar in Saudi law since one of its principles of contracts is the consideration of purpose.²⁸⁹

Thus, comparing the definition of defects in Saudi law and the required quality for conformity in the CISG can show that they are similar in their result, which is to ensure the delivery of goods that meet the parties' expectation of the goods. Despite this, there are references in Saudi law to three criteria for non-conforming goods: difference in value between the same goods, physical diminution in the goods, and unfitness for the buyer's purpose. These provide a similar result to the CISG criteria which are fitness "for the purposes for which goods of the same description would ordinarily be used" as well as fitness for any particular purpose expressly or implicitly made known to the seller at the time of concluding the contract. Thus the criteria in Saudi law concerning the value of the goods and their appearance result in the same protection for the buyer to receive intact goods suiting their ordinary purpose, since noticeable diminutions and big differences in price between the delivered goods and the market price will certainly affect the goods' fitness for their purposes. However, it can be said that, even though the approach of Saudi law gives more detail, the CISG may provide more precise and easier measurement, particularly in international trade where referring to the price of the goods may not be achieved easily.²⁹⁰ In addition, the CISG takes positive measures to identify the required conformity; whereas Saudi law identifies the lack of conformity. Identifying what is required for conformity is much better than identifying what is considered as its lack. Because defects may result from different causes, it is difficult to identify them; however, the more straightforward method is to focus on identifying the required conformity as the CISG does. The approach of the CISG and Saudi law

²⁸⁹ See section: 1.3.2.3.4.

²⁹⁰ Ferrari however viewed that Art.35(2)(a) is "necessarily and inherently ambiguous", Ferrari F, (1/2010) *Internationales Handelsrecht*, op.cit., p.3.

are similar in the case of particular purposes which have been made known to the seller, as in both systems conformity means to deliver goods that are fit for that particular known purpose. In this regard the illustrative examples in Islamic literature of the sales of a dog known for its hunting and of animals for sacrifice²⁹¹ provide the same requirement as in the case of skincare products under the CISG,²⁹² where the particular purposes are known to the parties.

Although the option of misrepresentation under Saudi law has no counterpart in the CISG, the function of this option is included in the comprehensive concept of fitness for particular and general purposes. Here a faked desirable character represents a failure to meet the known particular purpose. If the misrepresentation relates to a concealed defect, then the goods are not fit for their ordinary purpose. In addition, the protection of the option of misrepresentation under Saudi law closely resembles the protection under Art.8 of the CISG, where the statements and conduct of a party and all relevant circumstances have to be taken into account in determining the intent of the parties. Thus if sellers misrepresent goods, they will be liable for what a reasonable person will understand in similar cases.

Regarding the above discussion of the concept of conformity as one of the two main obligations of the seller in the CISG, one should note that the impact of different expressions used to identify this obligation can be seen as a barrier which may widen the gap between the CISG and Saudi law. Whereas in practice Saudi law achieves the same results by way of detailed rules and duties as discussed above.

²⁹¹ See chap.3 fn:261.

²⁹² See chap.3 fn:48.

Unlike the CISG's allowance of sale by model or sample, the JLR does not recognize such sales. However, the most prominent views among jurists support this sale, and so there is no contradiction between the CISG and Saudi law in this respect.

In the CISG there are special requirements for goods to be packaged or contained. This obligation has no counterpart in Saudi law. However, Saudi law welcomes this issue, because the purpose of such rules is to ensure the safe dispatch of the goods which is an essential part of international trade. Nonetheless, the question which arises here is whether or not the seller is free from this obligation under Saudi law. Since the packaging of goods has become part of customary international trade practice, the seller should be required to fulfil this duty even if the law and the contract are silent about it. Moreover, jurists specifically include in the scope of delivery²⁹³ the obligation of delivering things needed for the object of sale or considered for its benefit by custom even though they are not part of the object.

3.4.2 Time of conformity

The timing of the seller's liability for non-conformity in both laws is the time of passing the risk, including any lack of conformity that becomes apparent only after that time. The question of the seller's liability in the case of giving a guarantee that the goods will remain free from defects for a certain period of time has been dealt with expressly by the CISG, where this condition extends the seller's liability for conformity to cover that period. In Saudi law, there is no corresponding provision. However, under Saudi law the seller is responsible for any defect if it is apparent only after using the goods, or if the cause of a new defect is a result of a hidden defect (old defect). It can be inferred from these rules that the seller is already obliged by the contract to meet this

²⁹³ See section: 2.3.2.5.

condition, so the parties' agreement for a period of time for the goods to be free of defects is merely an emphasis on this obligation to avoid any uncertainty about bearing this duty.²⁹⁴ Nevertheless, if this warranty is to satisfy particular purposes, the buyer in this case under both systems has to express this term in the contract.

3.4.3 Right to cure

The right of the seller to cure defects is granted explicitly in the CISG, whereas Saudi law is not clear in offering the seller the right to cure and there is no specific indication of this right. However, the potential recognition of this right can be inferred from one of the conditions for applying the defect option; the continuity of the defect until the time of avoidance. In this regard the law does not state the mode of removing defects, and thus it can be removed by itself or by the seller's cure as long as there is no harm for the buyer in doing so.

3.4.4 Inspection and notice of defect

Inspection of the goods and giving notice of non-conformity to the seller are significant duties upon the buyer in the CISG, as they have to examine the goods and give the seller notice in the case of non-conformity. The obligation of inspection has to be carried out within a short period of time, which should be short to the extent that the only allowed delay is given in cases where the contract involves carriage of goods or if the seller knew that the goods may be redirected.

Only in such cases is the buyer allowed to delay inspection until the goods reach their destination. In Saudi law, there is no counterpart to the buyer's obligation of inspection,²⁹⁵ although the obligation of the time allowed to give notice has been discussed. Whereas the JLR

²⁹⁴ Even under the CISG it was suggested that there is no need for Art.36(2); see chap3, fn:86.

²⁹⁵ Abu Husain A, *op.cit.*, p.388.

allows a long time for this notice the prevailing opinion requires immediate notice. This is consistent with the CISG. In this regard it is important to note that these are not imperative rules, and the parties are free to stipulate these obligations in their contract. Moreover, if there is a custom in the market to allow only a short period then there is no argument about obliging the buyer to comply with this period, even under the JLR rules. Similarly, if the government applies the provision of short periods of examination and notice, then reference will be made to the law as part of the parties' agreement. In this regard it can be said that, by merit of custom, the 'noble month' as described by some courts applying the CISG²⁹⁶ will not introduce major changes into Saudi courts. Nevertheless one must admit that, under Saudi law, the customary period of notice given in certain cases would be longer than that given by the German court.²⁹⁷

3.4.5 Party's awareness of the defect

The impact of advance awareness of the defect by either the seller or the buyer plays a significant role in that party's rights in both systems. In the CISG the buyer loses his right to claim lack of conformity if he knew about the defect at the time of the conclusion of the contract. Likewise, in Saudi law, it is a condition that in order to claim his rights in the case of non-conformity, the buyer should be unaware of the defect at the time of delivery. Given the seller's awareness of non-conformity, the CISG discharges the buyer from his duty to examine the goods and to give notice. In Saudi law the seller's awareness of the defect is considered a sin, and he will be responsible for it even in the case of a disclaimer of liability.

Having examined conformity between the CISG and Saudi law, a final conclusion can be drawn here suggesting that both systems share very important common interests regarding the

²⁹⁶ See chap.3, fn: 125.

²⁹⁷ See chap.3, fn:115; this case was criticized by some of the CISG's commentators, (fn: 116.)

obligation of certainty in sale contracts. The approach of Saudi law is to oblige the parties to come to their contract with the fullest possible certainty. The CISG has the same requirement, but at the end of the contract requires the buyer to examine the goods and provide notice within a short period. By fulfilling this requirement, the contract will end with the same result of certainty as that required by Saudi law. Therefore by applying the CISG in Saudi Arabia the target of certainty is achieved at the beginning and at the end of the contract.

4. CHAPTER FOUR: THIRD PARTY RIGHTS

4.1 INTRODUCTION

Protecting the buyer from a third party is an accepted principle alongside the obligation of conformity to the right quantity, quality and description, as discussed in the previous chapter. In this regard, the normal expectation of the buyer under different legal systems is to have full disposal of the received goods without intervention of the seller or a third party. In comparing the protection of *bona fide* buyers under the CISG and Saudi law, there seems to be differences in the concept of protection against third parties. In Saudi law delivering the goods free from the third party was discussed as a pre-condition of the contract to be fulfilled at the time of its conclusion, whereas in the CISG the discussion of the third party right was dedicated only to the seller duty. Moreover, the question whether the protection covers only the right or includes the claim as well was not addressed clearly in Saudi law. Similarly, the seller's expectation for time of the buyer's notice of the third party right was not discussed in Saudi law.

Unlike the rest of the contract law's provisions which have been derived from the Islamic jurisprudence, the IP law was regulated and derived within the current international development, thus the expectations of the buyer towards the protection from industrial and intellectual right under Saudi law have taken similar approach to those under the CISG.

This can be seen as an encouragement point for this comparison where Saudi law and the CISG are derived from similar environments. The following chapter aims to examine the legal protection provided for the buyer against the seller in the case of involvement of third party under the CISG and Saudi law whether the claim was made for the possessing the goods or if the

third party right related to the IP right. Comparison remarks between both laws will be made in the conclusion section.

4.2 PART ONE: THIRD PARTY RIGHTS TO THE GOODS UNDER THE CISG

4.2.1 Third party rights in general

In addition to the seller's obligation in Art.30 to deliver the property of the goods, the seller must also deliver goods without there being any right or claim from third parties. Art.41 provides that:

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

The scope of this article is limited to protecting the buyer's rights, in transferring the ownership of the goods, against the seller. Therefore, the right of the buyer as a *bona fide* purchaser against the third party and the nature of the property, which has been transferred, are not governed by the CISG.¹ Thus, issues related to the transfer of the title in goods² and their acquisition in good faith or free from hindrances are not dealt with by the CISG. Such instances are governed by domestic law, pursuant to the private international law of the jurisdiction.³ Therefore, the applicable law must be checked to determine whether or not the seller has fulfilled the obligations of Art.41.⁴ In addition, if the third party right or claim is based on industrial or other intellectual properties, the relevant article is Art.42.

¹ See Flechtner H (2008) 26 *B.U.I.L.J*, *op.cit.*, p.6.; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.178; Honnold J, (2009), *op.cit.*, p.385; Lookofsky J (2008), *op.cit.*, p.93.

² See chap.2, fn: 125 for the time of transfer of title in Saudi law.

³ Schwenzer I, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.483; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.179; see Art.4 stating that the CISG "is not concerned with ... (b) the effect which the contract may have on the property in the goods sold".

⁴ Flechtner H (2008) 26 *B.U.I.L.J*, *op.cit.*, p.6. Honnold explained that although the convention does not address validity (Art.4, a) it "cannot be read to mean that the convention is not concerned with problems (like the seller's lack of title) that the convention does directly address in Article 41" Honnold J, (2009), *op.cit.*; (p.389).

4.2.1.1 Third party rights

Art.41 provides protection of the buyer's right to transfer the ownership of the goods when the seller is not able to do so for any reason, such as selling goods which they do not own, or when the goods sold are encumbered by a third party right. Thus, the third party right must have an impact on the buyer.⁵ This right plays a noteworthy role, particularly if the domestic law does not provide sufficient rules of acquisition of title for *bona fide* purchasers.⁶

The third party right can be a right *in personam* or *in rem*.⁷ Thus, the right includes cases where the possession of the goods, or their use or disposal, are restricted by the third party,⁸ e.g. in renting or leasing if the third party was given possession of the goods under certain contracts. The security interests to the creditors of the seller are also considerable in practice, as in many cases the seller operates under the condition to pay the full price to the supplier in order to pass the title of the goods.⁹ A defect in the title can occur if the delivered goods are pledged to a third party.¹⁰

If the right of the third party hinders the delivery from taking place, then the relevant article is Art.31. The defect in title is only applicable when the delivery has already taken place.¹¹ In a

⁵ Maskow/Enderlein, *op.cit.*, p.165.

⁶ In most legal systems, a bona fide buyer should be protected. The correspondent obligation can be found in section 12 of the English Sale of Goods Act, in the US under UCC section 2-312(1) and Arts.434 and 439 (1) of the German Civil Code.

⁷ See Mullis A, in Huber/Mullis (2007) *op.cit.*, p.170; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.483. The difference between rights *in rem* and *in personam* is that *in rem* the right imposes an obligation on persons generally to include all the world or to exclude certain determinate persons, which means that if A has a right to exclude all others from using the goods it is a right *in rem*. The right *in personam* imposes an obligation on a definite person rather than the commodity itself, so if A agrees to pay £100 to B, the right of B to the sum is against A; see Rapalje S/Lawrence R, *A Dictionary of American and English Law* (New Jersey: The Lawbook Exchange, 1997), p.1130.

⁸ Maskow/Enderlein, *op.cit.*, p.165.

⁹ *Ibid.*

¹⁰ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.179.

¹¹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.484.

case between an Austrian buyer (claimant) and a German seller (defendant) for the sale of propane,¹² the seller was not able to deliver the goods because the seller's own supplier made the delivery subject to an export limitation. The court found that, as a consequence of the provision of Art.31, the buyer was entitled to expect the goods to be put at their unrestricted disposal. Additionally, the court did not accept the seller's defence that the supplier had prohibited exportation to Benelux countries, holding that the seller had breached its obligation under Art.41 to deliver goods free from any right or claim of a third party.¹³

This decision was referred to as an application of Art.41, since the court rejected the seller's reliance on its supplier's restriction.¹⁴ However, this case shows that in practice the buyer was not affected directly by the third party right or claim, because the delivery itself was not performed. Therefore, it can be observed that the main issue in this case is non-delivery, and it should consequently be associated with Art.31.

4.2.1.2 Third party claim

The obligations in Art.41 include the claim of a third party¹⁵ to protect a buyer who should not be expected to be hindered in the use of the goods or to deal with the third party,¹⁶ particularly as the claim is controlled by domestic law which is normally the seller's state law. Honnold

¹² Austria: Oberster Gerichtshof (SC), (6/2/1996), No. 10 Ob 518/95 available at: <http://cisgw3.law.pace.edu/cases/960206a3.html>.

¹³ See: Posch W/Petz T, 'Austrian Cases on the UN Convention on Contracts for the International Sale of Goods', (2002) 6 (1) *V.J.I.C.L.A.*, p.13.

¹⁴ Lookofsky J (2008), *op.cit.*, p.92, said about this case that it "is an interesting application of the article 41 rule"; Honnold J, (2009), *op.cit.*, p.386.

¹⁵ Lookofsky J, (2008), *op.cit.*, p.92.

¹⁶ See: Secretariat Commentary, O.R. p.36,(3); Enderlein F, in Sarcevic/Volken, *op.cit.*, p.180.

explained that the seller has to be responsible for such a claim, in order to “protect the normal expectation of a buyer that he is not purchasing a lawsuit”.¹⁷

The important question is whether the seller will still be liable for an unfounded claim, since under Art.41 the claim gives rise to a seller’s responsibility. Some commentators consider that sellers should not be liable for claims below a certain level of seriousness;¹⁸ however, it is not always possible to decide how frivolous a claim is. Even if it is possible for the buyer to assess the claim, it is still the seller’s responsibility to engage in defeating it; therefore, some writers argued that in practice the seller has to deal with the claim. If it is frivolous, then it will be easy for the seller to tackle the claim without delay; and consequently the buyer’s right will not be affected so as to amount to a fundamental breach. Simultaneously, the seller has to compensate the buyer for any cost resulting from that claim.¹⁹

It can be speculated that, in order to implement Art.41 to protect the buyer’s rights as a *bona fide* purchaser the seller must bear the third party’s claim regardless of the basis of such a claim, rather than leaving the claim to be assessed by the buyer. However, it is important to note that if the third party’s claim is a result of a conspiracy between the third party and the buyer, the seller cannot be liable for the claim or any damages arising.²⁰

¹⁷ Honnold J, (2009), *op.cit.*, p.386.

¹⁸ See: Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-32; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.487, fn: 34 mentioned the same of non-English writers: Herber/Czerwienca, Soergel, Heilmann and Niggemann.

¹⁹ See Secretariat’s Commentary, O.R. p.36,(4); Lookofsky J, (2008), *op.cit.*, p.92; Mullis A, in Huber/Mullis (2007), *op.cit.*, p.172; Honnold J, (2009), *op.cit.*, p.388; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.487 the latter author considers this view to be correct.

²⁰ Schlechtriem P, in Galston/Smit, *op.cit.*, pp.6-32; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.487.

Although the wording of Art.41 deals with the rights of the third party and claims, it also covers the seller's own rights, such as the security interests for the payment of the price of goods if the seller reserved them in breach of contract.²¹

4.2.1.3 Time for the existence of the right or claim

The time of delivery rather than the time of the conclusion of the contract, is the time for the goods to be assessed as free from third party rights or claims.²² Art.41 expressly indicates that the seller "must deliver goods".²³ However, if the seller is required to deliver the goods "ex-work or at the board", and then the goods, at some point in transit, are seized in the seller's state by creditors, the seller will still be responsible for the third party right and his liability cannot be limited to that early time of delivery if the origin and the cause of such a claim developed before the time of delivery.²⁴

4.2.1.4 Exclusion of the seller's liability

In order to exempt the seller from title defects, it is insufficient for the buyer to be aware of the third party's right. The buyer also must agree to accept the goods encumbered with such a right or claim, whether explicitly or implicitly.²⁵ For instance, it is not enough to take into consideration the buyer's knowledge of a lien or other security over the goods owned by the carrier or warehouses, or that the seller is indebted to a third party. However, according to some commentators, definite knowledge of the buyer of the rights or claims is sufficient to meet the

²¹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.488.

²² Enderlein F, in Sarcevic/Volken, *op.cit.*, p.178.

²³ Maskow/Enderlein, *op.cit.*, p.165.

²⁴ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.488; Mullis A in Huber/Mullis (2007), *op.cit.*, p.173. This is unlike many domestic laws where the existence of the third party claim is required for liability; Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, pp.486, 489. In English law the issue is not clear, see SGA 1979 Art.12.

²⁵ See: Mullis A in Huber/Mullis (2007), *op.cit.*, p.173; Schlechtriem P, in Galston/Smit, *op.cit.*, p.6-31; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.485; Honnold J, (2009), *op.cit.*, p.389. (added by the editor.).

requirements of Art.41 if they accept the goods without reservation of their right against that third party.²⁶ In considering this opinion, one should note that the provision of Art.41 requires the buyer's agreement. Therefore, the buyer's explicit or implicit consent to take the goods subject to the third party right is necessary. This can be proved by recognising the difference between the wordings of Art 41, "unless the buyer agreed to take the goods subject to that right or claim", and the wording of Art.35 "the buyer knew or could not have been unaware of such lack of conformity." It is clear from the language of these provisions that Art.41 requires more than mere knowledge of it. This difference is not surprising, since the removal of non-conformity is much more unexpected than the removal of third party rights which is usually resolved soon after delivery. In any case, the rule of Art.8 should play an important role in defining whether or not the buyer has agreed to have the goods subject to the third party's right.

It is important to mention that, unlike in Art.42, whether or not the seller knew about the defect in title at the time of concluding the contract does not affect their liability in Art.41.²⁷

4.2.1.5 The role of domestic law

The CISG excludes the validity of the contract from its application (Art.4 (a)), which is instead left to domestic law. However, if the domestic law considers the contract to be 'void' as result of a third-party right, and therefore gives the buyer different remedies from those of the CISG (e.g. if the domestic law states that if the seller does not own the goods, the contract is avoided²⁸), then the important question is whether or not the domestic law will supersede the buyer's rights

²⁶ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.179.

²⁷ Lookofsky J, (2008), *op.cit.*, p.92; Honnold J, (2009), *op.cit.*, p.385.

²⁸ See, for example, France Civil Code Art.1599, which states that: "The sale of the thing of another is avoided; it may give rise to damages when the buyer did not know that the thing belonged to another"; there is a similar provision in Saudi Law.

given by Art.41.²⁹ In order to answer this question, it is necessary to consider the purpose of Art.4 of the CISG, which “is not concerned with the validity of the contract” According to Honnold, the application of the provision of Art.41 is intended to avoid authorizing the sale of goods that domestic law prohibits.³⁰ Thus, the interest of the CISG and domestic law are the same in this regard; namely to offer remedies to the buyer when the seller fails to transfer the title of the goods. Therefore, it can be observed that the CISG rules on the buyer’s remedy should control the transaction rather than those of domestic law, particularly since the CISG is designed to serve international transactions as well as to unify international rules.³¹

It should be noted that any restriction by domestic law which is related to issues of taxes and duties (not quality of the goods)³² is considered a defect in title if the costs are to be paid by the seller.³³ The seizure of the goods because of the third party’s right is also considered as a defect in title, as in a case where a second-hand car was seized in the buyer’s country (Italy) on suspicion of being stolen. The court held that “According to Art.41 CISG, the seller is liable for defects in title ... Even if the disclaimer applied, it would not cover the seller’s duty to perform”.³⁴

²⁹ The CISG’s rules in this regard include the buyer’s obligation to notify the seller of the defect in the title (Art.43). The buyer’s remedy is to require performance by removing the third-party right, or to deliver substitute goods.

³⁰ Honnold J, (2009), *op.cit.*, p.388; Schlechtriem also supported this conclusion: Schlechtriem P, (1986) *op.cit.*, p.73.

³¹ Honnold J, (2009), *op.cit.*, p.388.

³² If the restriction is related to a defect of goods then Art. 35 is the relevant rule and the agreement of the buyer is not required. Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p. 485.

³³ *Ibid*, p.485-6.

³⁴ Germany: LG. Freiburg (District Court), (22/8/2002), No 8075/02, available at: <http://cisgw3.law.pace.edu/cases/020822g1.html>

4.2.1.6 Buyer's remedies

No special remedies are given for defects in title, so reference should be made to the remedies available in the convention following from Arts.45 to 52.³⁵ The buyer is also entitled to claim damages for any expenses or loss caused by the defect in title (Art.74), such as the cost of defending the third party's claim.³⁶ However, the right to avoid the contract cannot be applicable unless the defect in title amounts to a fundamental breach (Art.25), such as in cases where the third party prevents the buyer from using the goods.³⁷

4.2.2 Third party claims based on intellectual property

Whereas Art.41, as discussed above, deals with the general obligation to deliver goods free from third party rights in title, Art.42 provides restricted obligations on the seller for third party rights or claims based on industrial or intellectual property.³⁸ Art.42 reads as follows:

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

³⁵ It is not clear whether the buyer can still exercise remedies related directly to non-conforming goods for the defect in title, such as Art.46(2)(3) and Art.50; see also Secretariat's Commentary, O.R. P.36,(7)(8); Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.491; Lookofsky J, (2008), *op.cit.*, p.93.

³⁶ Honnold J, (2009), *op.cit.*, p.388.

³⁷ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.491.

³⁸ In the United States' UCC there is a similar provision, Section 2-312: "... the goods shall be delivered free of any rightful claim of any third person by way of infringement or the like"; there is also a similar provision in German law. In the ULIS there is no particular obligation or article on intellectual property rights, which led to disagreement on whether Art.52 ULIS includes such rights or not. See Enderlein F, in Sarcevic/Volken, *op.cit.*, p.180.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

4.2.2.1 Application of the right

The concept of industrial or intellectual property should be understood in a general sense according to the international standard,³⁹ especially as far as intellectual property is concerned,⁴⁰ to include all rights that owe their existence to the activity of a human mind "resulting from intellectual activity in the industrial, scientific, literary, or artistic fields."⁴¹ This includes any rights relating to copyrights, patents, trademarks, industrial design, trade secrets and commercial names.

When a third party right exists, the seller will be in breach of its obligation even without any claim by the third party.⁴² This obligation applies even for the mere contention of such a right or claim,⁴³ since in practice the third party may expect a similar trademark to be a protected mark of their own, which requires the involvement of the seller (not the buyer) in defeating the claim.

³⁹ Art.7(1) of the CISG requires taking account of international characteristics for interpreting its rules.

⁴⁰ As the meaning of intellectual property includes industrial property. See Janal R, 'The Seller's Responsibility for Third Party Intellectual Property Rights under the Vienna Sales Convention' in Andersen/Schroeter, p.207; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.181; Maskow/Enderlein, *op.cit.*, p.168; ; Beline T, 'Legal Defect Protected by Article 42 of the CISG: A Wolf in Sheep's Clothing' (2007) 7 *U.P.J.T.L.P.*, p.8, available at <http://cisgw3.law.pace.edu/cisg/biblio/beline.html#i>.

⁴¹ This is the World Intellectual Property Organisation's (WIPO) definition according to Art.2(viii), which also states that: "intellectual property shall include the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition". The full text of the WIPO convention is available online at: http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html#P50_1504

⁴² Janal R, in Andersen/Schroeter (2008), *op.cit.*, p.208,211. The impact of the third party's claim will only affect the extent of remedies open to the buyer (p.208).

⁴³ See the relevant discussion in section: 4.2.1.2.

Nevertheless, if the claim is unfounded, it is unlikely that the seller will be aware of it, which may release them from liability under Art.42(1).⁴⁴

The rights of the third party are not covered by Art.42, since the CISG aims only to govern the relationship between buyer and seller. In order to determine whether or not the third party can assert its right in relation to the goods against the buyer, reference has to be made to the applicable domestic law.⁴⁵

4.2.2.2 Limitation of the seller's liability⁴⁶

4.2.2.2.1 Seller's knowledge:

Whereas Art.41 does not differentiate between the seller knowing of the defect in title or not,⁴⁷ in Art.42 (1) the awareness of the seller at the time of the conclusion of the contract about industrial or intellectual rights in the state where the goods are going to be resold or used is required.⁴⁸

Art.42 (1) determines this requirement of knowledge as that "the seller knew or could not have

⁴⁴ Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.498; Lookofsky J (2008), *op.cit.*, p.93; Mullis A, in Huber/Mullis (2007), *op.cit.*, p.173; Janal R, in Andersen/Schroeter (2008), *op.cit.*, p.209. For more detail about whether the claim is serious or not, see section: 4.2.1.2.

⁴⁵ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.* p.495. In the CISG the question of whether third party rights to personality or names (not trade names) fall under the heading of general defects in title (Art. 41), or is more associated with specific defects of intellectual property (Art. 42), is subject to some interesting academic discussion. See Mullis A, in Huber/Mullis (2007) *op.cit.*, p.174; Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, pp.497-8; Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.91; Rauda C/Etier G, 'Warranty for Intellectual Property Rights in the International Sale of Goods' (2000) 4(1), *V.J.I.C.L.A.*, *op.cit.*, pp.34-5.

⁴⁶ By comparing the limitation of the seller's liability in Art.42 with those in Arts.41/35, Janal pointed out that: "This is owed to the fact that both a lack of conformity [Art.35] and the existence of general third party rights [Art.41] find their root in events prior to the delivery and in the seller's sphere. In contrast, intellectual property rights result from domestic public law in the state the goods are eventually destined for and are consequently difficult to foresee and not open to change on the part of seller." Janal R, in Andersen/Schroeter (2008), *op.cit.*, pp.206-7.

⁴⁷ Also in Art.35, the seller is responsible for the non-conformity even in the case of lack of knowledge. See Honnold J, (2009), *op.cit.*, p.395. This extra restriction of the seller's responsibility in Art.42 can be justified by considering that the intellectual right is not a defect everywhere as some countries may not recognise the alleged intellectual property right. In this regard it can be suggested that this right is the same as the obligation of conformity to the buyer's specific purpose (Art.35 (2) (b)), which only applies when that purpose was made known to the seller.

⁴⁸ Lookofsky J (2008), *op.cit.*, p.93; Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.92; Beline T, (2007) 7 *U.P.J.T.L.P.*, p.10.

been unaware” of. Commentators are in disagreement as to whether or not the meaning of the phrase “could not have been unaware” in Art.42 includes an affirmative duty. According to one view,⁴⁹ the seller has to conduct an investigation to the registration of such intellectual rights in the state where the goods will be resold or used whenever the registry was made public, since the seller is in a better position to know about the product and the possible foreseeable infringements. Only if he does so and no relevant rights are revealed can the seller begin to assert that he was unaware of that right.⁵⁰ This viewpoint was supported by secretariat’s commentary, stating that: “the seller ‘could not have been unaware’ of the third-party claim if that claim was based on a patent application or grant which has been published in the country in question.”⁵¹ An opposing view considers this to constitute an additional heavy obligation on the seller without being required by the wording of Art42 (1).⁵² Therefore the meaning of the article should apply only when the seller was guilty of “maliciously keeping silence with regard to third party rights.”⁵³

Assessing the two views, Mullis⁵⁴ suggested that the seller should be required to be aware of obvious aspects of easily accessible information in relation to intellectual rights and not to be grossly negligent. Thus the seller cannot be liable for the registration of third party rights unless

⁴⁹ See for the support of that view: Maskow/Enderlein, *op.cit.*, p.168; Rauda C/Etier G, (2000), 4(1) *V.J.I.C.L.A.*, pp.30,45; Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*; she considers that the seller’s limitation in their responsibility in Art.42(1) is less significant than it may appear, as “The seller is obliged to research whether third parties have any intellectual property rights in the goods in the state where the goods are to be used” p.92.

⁵⁰ Rauda C/Etier G (2000) 4(1) *V.J.I.C.L.A.*, *op.cit.*, p.47.

⁵¹ Secretariat’s Commentary, O.R. p.37,(5)(6).

⁵² See: Honnold J, (2009), *op.cit.*, pp.395, 338; Shinn A ‘Liabilities under Article 42 of the U.N. Convention on the International Sale of Goods’ (1993) 2 *M.J.G.T.*, pp.115-125; Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.501-2; Janal R, in Andersen/Schroeter (2008), *op.cit.*, pp.214-5. For more details on this discussion: Beline T, (2007) 7 *U.P.J.T.L.P.*, 11.

⁵³ Maskow/Enderlein, *op.cit.*, p.168

⁵⁴ Mullis A, in Huber/Mullis (2007) *op.cit.*, p.176

the buyer can prove that there is gross negligence.⁵⁵ Janal criticised the duty of investigation as a general requirement, offering some specific criteria similar to Mullis suggestion.⁵⁶

In order to evaluate this argument, it can be suggested that the first view seems to be a more appropriate interpretation of Art.42. The seller may otherwise, in most cases, escape from liability by claiming that they were unaware of the unexpected third party right at the conclusion of the contract. Therefore it is important to require the seller to conduct an investigation into intellectual rights giving Art.42 sufficient power to ensure that the seller acts accordingly.

Moreover, as stated above, the seller is in a better position to investigate details of the components of goods and possible violations of rights. Finally it is not reasonable to equate the duties of the seller and buyer in this respect⁵⁷ since the seller's general obligation in the sale of goods contract is to sell goods fit for general and particular known purposes (Art.35 (2)). At the same time the buyer's duty to examine the goods cannot expand to the extent to share the seller their fault of not selling sound goods.

4.2.2.2.2 Relevant Time:

The seller will not be liable for any rights of third parties that may occur between the time of concluding the contract and the time of delivery, as long as they were not aware of the right at the time of concluding the contract. Art.42 (1) expressly specifying the timing of the seller's

⁵⁵ *Ibid*; a similar suggestion by Honnold gave an example of expanding the seller's responsibility for what they "could not have been unaware" by the example of using the internet to research for registered intellectual property rights: Honnold J, (2009), *op.cit.*, p.396.

⁵⁶ Janal added an interesting criterion based on whether or not the seller has approached the buyer in their country. The seller is liable if their offer was made publicly in the buyer state as they are, themselves, responsible in the case of infringing intellectual property rights. Janal R, in Andersen/Schroeter (2008), *op.cit.*, pp.215-7.

⁵⁷ One of the Janal's arguments against the seller's duty to investigate is that both the seller and buyer are subject to an identical obligation, "meaning that if the seller is held to research intellectual property in the target market, so is the buyer, and a failure by both of them to live up to this standard will preclude liability under Article 42 CISG"; Janal R, in Andersen/Schroeter (2008), *op.cit.*, pp.214.

liability as being that "at the time of the conclusion of the contract the seller knew or could not have been unaware" of the relevant information.⁵⁸ In contrast to this interpretation of Art.42, Shinn argued that, in order to implement Art.42, the seller's liability has to extend to include claims which have arisen after delivery, regardless of whether or not the seller knew of the claim at the conclusion of the contract Shinn pointed out that:

the alternative would make the entire article meaningless except when the goods are imported *before* the sales contract is made This interpretation would also come close to violating the canon that a legal provision should not be interpreted so as to deprive it of all meaning. It is unlikely that the drafters intended to impose liability only in such exceptional cases⁵⁹

This argument may be more practical and logical, as the nature of intellectual claims is intangible and not predictable in most cases and their appearance normally only occurs during the delivery of goods particularly while on their way to their destinations in the buyer's country. However, it should be considered that the seller's responsibility for intellectual rights is not the same as their responsibility for non-conformity. In the latter the seller is responsible for the goods to be free from defects at the time of passing risk,⁶⁰ and one obvious difference is that intellectual rights may be associated with particular states and they can be resold and used in other states.⁶¹ In addition, it is difficult to claim Art.42 "is meaningless," because it can be practised so as to require the seller to take positive action to ensure that they are not aware of third party rights.⁶²

⁵⁸ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.181; Maskow/Enderlein, *op.cit.*, p.169.

⁵⁹ Shinn A, (1993) 2 *M.J.G.T* p.127.

⁶⁰ See Art.36; section: 3.2.4

⁶¹ See chap.4, fn:66.

⁶² See chap.4, fn: 55.

As far as timing is concerned, as stated in Art.41, the delivery time should be the time at which it is the seller's responsibility for the goods to be free from third party rights.⁶³ The seller may resolve such rights prior to the time of delivery.⁶⁴ Thus, in the case of the existence of a third party right, the buyer cannot exercise his rights under Art.42 until delivery takes place. It should be noted that, if the delivery of the goods takes place in the seller's country (e.g. ex works), the time for judging the existence of intellectual property rights is the country of use, and the buyer has to prove that such rights existed at the time of delivery.⁶⁵

4.2.2.2.3 Territorial restrictions:

Art.42 limits the relevance of laws of intellectual or industrial property rights to only one country.⁶⁶ According to the wording of Art 42 (1)(a), it is extraordinarily difficult for the seller to obtain information about the probable existence of these rights and what relevant regulations are in different countries.⁶⁷ Art.42(1)(a, b) determines one of two places where the seller is liable under its law of intellectual property: the first place is where the goods are going to be resold or otherwise used,⁶⁸ and if there is insufficient evidence of any place to be considered,⁶⁹ the

⁶³ Janal R, in Andersen/Schroeter (2008), *op.cit.*, p.210.

⁶⁴ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.499.

⁶⁵ *Ibid*; see above: 4.2.1.3.

⁶⁶ Art.35 (2)(b) requires a similar rule for the conformity of the goods to a particular purpose, as the goods "(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract".

⁶⁷ See Secretariat Commentary, O.R. p.37,(4); Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.* p.495.

⁶⁸ Austria: Oberster Gerichtshof (SC), (12/9/2006), No. 10 Ob 122/05x, available at:

<<http://cisgw3.law.pace.edu/cases/060912a3.html>>. In this case of the sale of recordable and rewritable compact disc (CD-R and CD-RW). the Supreme Court held that the first instance court "had failed to determine the State in which the goods would be resold or used as contemplated by the parties at the time of the conclusion of the contract.

⁶⁹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.* p.506; Beline T, ' (2007) 7 *U.P.J.T.L.P.*, *op.cit.*, p.11; Mullis A, in Huber/Mullis (2007) *op.cit.*, p.175, Mullis refers to the buyer only to get the proof of contemplated place, whereas the burden of proof can be as well on the seller in some cases if they contemplates another place; see Maskow/Enderlein, *op.cit.*, p.169.

reference then must be made, as alternative, to the state of the buyer's place of business.⁷⁰ This liability is to protect the buyer against their own customers,⁷¹ and it is not required for the place to be expressly agreed upon as long as it was contemplated by the parties at the time of concluding the contract.⁷²

4.2.2.2.4 Knowledge of the buyer:

According to Art.42 (2) (a) the buyer may bear the risk of the third party's intellectual rights if, at the conclusion of the contract, they knew or could not have been unaware of that right.⁷³

The requirements of the buyer regarding awareness are not so clear.⁷⁴ However, the buyer's duties should not be the same as those of the seller,⁷⁵ because in many cases they are "absolutely unaware of any details regarding the goods or their construction",⁷⁶ unless the parties have agreed that the buyer should inspect those rights in their country.

The buyer's liability for intellectual rights in Art 42 (2)(a) is more similar to the rights under Art 35 (3) concerning the lack of conformity of goods than those concerning the general liability for defects in title under Art.41. In Arts 35 (3) and 42 (2)(a)⁷⁷ there is no need to have the consent of

⁷⁰ In the case where the buyer has more than one place of business, determination of the relevant place is provided by Art.10., which states that "(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract; (b) if a party does not have a place of business, reference is to be made to his habitual residence."

⁷¹ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.*, p.500.

⁷² Janal R, in Andersen/Schroeter (2008), *op.cit.*, p.220. Since the parties have the right of autonomy (Art.6), they are free to add several countries. Also, usage and statements or conduct of the parties may be decisive in identifying what was contemplated by the party in Art.42 (1)(a).

⁷³ Honnold J, (2009), *op.cit.*, p.397; Maley K (2009) 12 *I.T.B.L.R.*, *op.cit.*, p.92; Janal R, in Andersen/Schroeter (2008), *op.cit.*, p.219. See section: 3.2.3.

⁷⁴ See Maskow/Enderlein, *op.cit.*, p.170.

⁷⁵ See: Enderlein F, in Sarcevic/Volken, *op.cit.*, p.183; Maskow/Enderlein, *op.cit.*, p.170.

⁷⁶ Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, p.503.

⁷⁷ *Ibid.*

the buyer as long as they are aware of the defects or rights whereas in Art.41 the consent of the buyer to take the goods subject to the title's defect is required.

4.2.2.2.5 Technical requirements provided by the buyer:

If the buyer provides the seller with technical requirements that infringe third party rights, then it is presumed that the buyer is aware of the situation of intellectual property rights in their country.⁷⁸ According to Art 42 (2)(b), the buyer is liable for third party rights⁷⁹ even if they are completely ignorant of the existence of others' rights.⁸⁰ However, providing general information and specific requirements should be clearly differentiated. As Schwenger rightly highlighted, "general information provided and wishes expressed by the buyer, which leave the seller room to exercise discretion ... cannot release the seller from his liability."⁸¹ So, the buyer will only be responsible as stated in Art. 42 (2)(b) if they are precise about their request which infringe others' intellectual right.

At the same time, even when the buyer's technical requirements infringe intellectual property rights, the seller must notify him of third party rights which they are aware of. This is required by the general rules of good faith, although in this case the seller is not obliged to carry out any research.⁸²

4.2.3 The buyer's obligation to give notice

⁷⁸ This is similar to the case under Art.35(2)(c), whereby the seller is obliged to deliver the goods according to the sample or model provided. See Maley K (2009), 12 *I.T.B.L.R.*, *op.cit.*, p.92.

⁷⁹ This provision specifies the general principle of Art.80, which requires that a party cannot rely on another party's breach to the extent that this breach was caused by the act of the first party. See Janal R, in Andersen/Schroeter (2008), *op.cit.*, p.223.

⁸⁰ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.184.

⁸¹ Schwenger I, in Schlechtriem/Schwenger, (2005) *op.cit.*, pp.503-4.

⁸² See: Maskow/Enderlein, *op.cit.*, p.170.

As with the buyer's obligation under Art.39 to give notice of the non-conformity of the goods with regard to quality and quantity, the buyer similarly is required to notify the seller about third party rights in order to retain their rights under Arts.41 and 42. The first paragraph of Art.43 states that:

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

The buyer loses his rights provided under Arts.41 and 42, if they fail to notify the seller of the defect in title. Losing these rights may prevent him from practising the available remedies: to claim damages (Art.45 (1)(b)); to request performance (Art.46); to give an additional period for the seller to perform their obligation (Art.47); and to declare the contract avoided (Art.49).⁸³

In order for the buyer's notice to be accepted, he has to specify the nature of the right or claim so that the seller can refute it.⁸⁴ The buyer should, for the purpose of Art.43, identify the steps already undertaken by the third party. If no such claim has been made, and the buyer seeks remedies relying on the existence of the third party's right's, the buyer should be expected to provide the seller with a detailed definition of the alleged right, such as the registration number of the third party.⁸⁵

⁸³ Lookofsky J, (2008), *op.cit.*, p.93.

⁸⁴ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.* p.508; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.184

⁸⁵ Janal R, in Andersen/Schroeter (2008), *op.cit.*, pp.224.

4.2.3.1 Time of notice

The time when the buyer has to give notice is the same as that in Art.39. "Reasonable time" depends upon the circumstances of each case.⁸⁶ A reasonable time was clarified by Enderlein, "it may include a certain period for contemplation by the buyer, for inquiry into the legal situation by consulting his lawyer. The buyer should not delay the notice beyond a time that could no longer be regarded as reasonable."⁸⁷ So, the buyer has to act when they become aware of the third party right in a way which cannot be considered as careless.

The phrase "ought to have become aware" does not necessitate the buyer investigates possible claims, as searching for third party rights is not a practical or reasonable duty to be placed on the buyer. It means only that the buyer cannot close their eyes to concrete warnings of a third party right.⁸⁸ For instance if the buyer was a member of a trade association or subscribed to a trade journal where the relevant third party rights were published, it would be become difficult for them to prove that they were not aware of such rights. Whereas Art.39 gives the buyer a maximum of a period of two years for giving notice, Art.43 does not provide such limits.⁸⁹

The buyer's excuse that timely notice was not given preserves some of the buyer's remedies, as discussed under Art.44.⁹⁰

⁸⁶ Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.* p.508; see the discussion of the meaning of reasonable time in section: 3.2.7.2.

⁸⁷ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.185

⁸⁸ Shinn A (1993) 2 *M.J.G.T.*, p.141.

⁸⁸ Maskow/Enderlein, *op.cit.*, p.168

⁸⁹ Honnold J, (2009), *op.cit.*, p.400. As the CISG does not provide any time limit, reference should be made to the applicable law under private international rules: Schwenger I, in Schlechtriem/Schwenger, (2005), *op.cit.* p.509.

⁹⁰ See section: 3.2.8.2.

4.2.3.2 Seller's knowledge of the right or claim

The second part of Art.43 retains the buyer's right in spite of failure to give notice if the seller knew of the third party right. It provides that:

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it."

This paragraph is identical to the rule in Art 40⁹¹ except for the phrase "or could not have been unaware and which he did not disclose to the buyer" which is only present in Art.40. In Art.43 the seller's definite knowledge of third party rights is required for his right to be lost, whereas it was enough that the seller could not have been unaware the non-conformity of the goods.

The discussion above of the CISG rules regarding third party rights may show that the rights related to defects in titles are closer to those of defects in goods, where similar rules apply if goods are not fit for ordinary purposes regardless of their knowledge of that right. However, in the case of IP rights, the CISG took an approach similar to the obligation of fitness for a particular purpose known to the parties, and thus the knowledge of the seller is required at the time of concluding the contract. Also the technical requirement is the same as with conformity to the contractual descriptions. The scope of the CISG in Arts.41-43 shows that it does not engaged with neither the right of the third party nor the validity of the contract.

Understanding the approach of the CISG is important in facilitating a discussion of the relevant rule in Saudi law, in order to determine to what extent the two systems are compatible.

⁹¹ See section: 3.2.8.1, for more details.

4.3 PART TWO: THE SELLER'S OBLIGATION TO DELIVER GOODS FREE FROM THIRD PARTY RIGHT UNDER SAUDI LAW

In order for the sale of goods to be executed legally, the goods have to be delivered free from any obstacles of third party rights. This obligation is part of the general approach of Saudi law regarding certainty⁹² and has been dealt with in Saudi law under the conditions for the executability of the sale; namely, the conditions of ownership and the condition of delivering the goods free from any third party rights.⁹³ Apart of these conditions there is no further discussion in the Islamic literature regarding the rules related to the buyer's rights in cases of third party rights or claims. However, Saudi IP rights have recently been updated to meet international protection requirements, and in this regard the protections of IP rights under the CISG and Saudi law now share the same approach. The general approach of Saudi law regarding the condition of delivering the goods free from third party rights, their effect on the contract, and IP laws are discussed below.

4.3.1 Conditions for executability:

4.3.1.1 Ownership

Ownership is, as Al-Zuhayli described, "the possession of an item where the possessor is alone capable of freely using it in the absence of legal constraints."⁹⁴ Accordingly, the seller has to be in a position of owning legal control of the goods without any legal impediment. For instance, if an underage child or insane person is considered the owner, they may not freely use the objects

⁹² See section: 1.3.2.4.2.

⁹³ See chap.3, fn: 196 for the general conditions of the sale contract..

⁹⁴ See Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.26.

because of the legal constraint of being under another person's guardianship.⁹⁵ In this regard, the guardian of an underage child or an insane person, albeit not considered an owner of that person's property, by law can act as the owner. Thus, guardianship (*wildya*) can be original if it is for the person himself, whereas an agent guardian acts for those who cannot stand for themselves legally.

As stated in Art.268 of the JLR, it is a condition of sale contracts that at the time of concluding the contract the seller owns the object of sale or is authorised legally to sell it. This condition is related to the sale of existing particular goods. However the second part of Art 268 provides that if the sale is related to unascertained fungible goods defined by description, as in *salam* sales the seller does not have to own the goods at the time of concluding the contract.

As discussed above in delivery, the sale of existed particular goods either fungible or non-fungible requires the full ownership by actual or constructive delivery.⁹⁶ The sale of non-specific goods (generic) (as in *salam*) is permitted as the seller's liability is not attached to particular goods but to deliver goods according to the contractual description.⁹⁷

The condition of ownership or guardianship raises the question of the validity of sales by uncommissioned agents (*al-fiduli* sale).⁹⁸ There is no argument that such a sale is not executable, due to lack of ownership or legal agency. However, the concern here is about the validity of the

⁹⁵ Mosa M, *Al-Amwal wa Nadriyat Al'aqd* (Cairo: Dar Al-Fikr Alarabi, 1996), p.165.

⁹⁶ See section 2.3.3.2.

⁹⁷ See section: 3.3.2.3 Sale by description

⁹⁸ An uncommissioned agent sale (*al-fiduli*) is a sale by a person who neither owned the object of the sale nor had the legal authority to do so. Thus, when someone sells or buys for another, or rents on behalf of another, without being a legal proxy, agent or guardian with the right to make such a contract, and without obtaining permission, they are a *fiduli*. There are some common examples of this, such as the sale of property by a husband or wife without the other partner's permission, or sale by an unauthorized employee. The seller in these cases does not act as an owner but as an agent, because if they contracted as the owner, the deal would be considered as selling what they did not own, which is prohibited. See Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.27.

contract, with the condition that the real owner has the option to make the sale executable or to avoid it.

The JLR⁹⁹ suggests that ownership or legal agency is a condition for concluding the contract, and thus the transactions of an uncommissioned agent (*faduli*)¹⁰⁰ are nullified even if the contract is ex-post approved by the owner.¹⁰¹ In this regard Art.240¹⁰² states that "The dealings of an uncommissioned agent are invalid, even if approved ex-post." This opinion is supported by the prohibition of selling what someone does not own.¹⁰³ The reason for this prohibition is to avoid *gharar* (hazard) in the sale, as the seller in this case is not able to deliver the goods at the time of concluding the contract, and this may result in disputes. However, according to this opinion, if obtaining permission is impossible due to not knowing the owner's identity or if there is a necessity to make the transaction during the absence of the owner, sales in these cases can be approved.¹⁰⁴

Another view¹⁰⁵ hold that a *faduli* sale is deemed valid but suspended pending the approval of the owner. According to this view, it can be an exception to the prohibition of sales of what one does not own.¹⁰⁶ This opinion is founded on the main principle of trade, which is that it is permissible, and there is no difference between the ex-post and ex-ante permission or legal representation, as long as the contract will not be executed without the seller's permission (i.e.

⁹⁹ This is the view of Shafi'i and Hanbali; see Al-Buhoti M, *Kashaf*, vol.2 pp.11-13; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.30.

¹⁰⁰ See: Al-Kasani A, *op.cit.*, vol.5, p.148.

¹⁰¹ The only exception for the *faduli* contract to be valid is when they act as a buyer who himself purchases in the contract with the intention of buying for another person, because the uncommissioned agent becomes the buyer for himself if the unmentioned party does not approve it. Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.29.

¹⁰² See also Art.268 of the JLR.

¹⁰³ As the prophet said in a report "Do not sell what you do not have" (narrated by Abu Daoud and Tirmithi).

¹⁰⁴ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.30.

¹⁰⁵ This is the Hanafi and Maliki view. See Al-Kasani A, *op.cit.*, vol.5, p.148,9; Ibn Rushd, M, *op.cit.*, Vol,2 p.171.

¹⁰⁶ Besides the main principle of prohibiting the sale of what one does not own, there are a few exceptions such as the *Salam* sale (forward sale). See section: 1.3.1.2.

there is no coercion between the contracting parties).¹⁰⁷ In addition, accepting such a transaction is more appropriate than nullifying it, as long as the uncommissioned agent is in a good mental state and the contract may bring benefit to the owner, since the real owner has the option to avoid the contract if it is not beneficial for them. This view was supported by some prophetic reports¹⁰⁸ wherein the prophet gave someone money to buy a lamb, but the agent bought two lambs for the same money then sold one of them and returned to the prophet with one lamb and the money he was given for this sale. The prophet accepted the deal despite not having ordered the second lamb to be either bought or sold.

Analysing this discussion can show that in *faduli* transactions there may still be uncertainty, which is not compatible with the contract's principle of being binding and avoiding *gharar* (hazard). Even if this uncertainty may not affect the seller, it may be detrimental to the buyer. The latter may not be aware of the interference of the third party, as the seller may keep to the contract if the goods' price increases and reject it in the case of a decline in the market. Furthermore, the case mentioned above where the prophet approved the deal, cannot be sufficient evidence since the man who bought the lamb seems to be acting as an unrestricted legal agent for the prophet. Thus, it can be suggested in this regard that the *fuduli's* sale may be accepted if there is a real need to sell property while the owner is away and cannot be reached.

4.3.1.2 Delivering the goods free from third party rights

At the time of concluding the contract, the ownership of the object of sale and its usufruct must be freed from any third party legal rights. Thus if anyone other than the owner has a legal right to own the object of sale or its usufruct, the validity of the contract may be affected.

¹⁰⁷ Al-Kasani A, *op.cit.*, vol.5, p.155.

¹⁰⁸ Al-Bukhary, No.2368.

The origin of third party rights can be a result of any legal right in connection to the goods. In some cases in Saudi law the third party may have a right upon the object of sale that hinders the transfer of the goods from the seller to the buyer.

One of the cases where the sale is nullified because of third party rights is the sale by a bankrupt seller whose properties have been seized.¹⁰⁹ However, they can sell and buy by forward sale, as delivery is to be in the future.¹¹⁰ Before the official seizure of the bankrupt's properties, their contract is valid.¹¹¹

The third party can be the creditor of pawned goods who is authorized to hold the control of the title of the pawned object as an insurance against the debt. In this regard, according to one view,¹¹² the contract is suspended pending the approval of the creditor, as in the sale by *faduli* (uncommissioned agent).¹¹³ However, the JLR, as mentioned above,¹¹⁴ holds in Art.992 the view that this sale is nullified since the creditor of the pledge will be deprived of this security contract. Thus, it is invalid by analogy to the avoidance of the contract by an individual party.¹¹⁵

Another case of third party rights is sale at the moment of serious illness, which can be considered as a fatal illness if the buyer is one of the seller's inheritors and the price is less than the average value of the goods.¹¹⁶ A plausible reason for this restriction is to protect the right of

¹⁰⁹ See Art.1512 of JLR.

¹¹⁰ See Art.1515 of JLR.

¹¹¹ Ibn Qudamah A, *Al-Mogani*, *op.cit.*, vol.4 p.485. Another view in the Hanbali school suggests that the sale is not valid even before the official seizure. See: Al-Mardawi A, *Al-Insaf*, *op.cit.*, vol.5 p.282.

¹¹² See Art.992 of JLR.

¹¹³ This is the Hanafi opinion, according to which view the value of the pawned object becomes immediately the new pawn, even without indicating this. See Al-Kasani A, *op.cit.*, vol.6, p.146; Al-Sarkhasi M, *op.cit.*, vol.11, p.13.

¹¹⁴ In the *faduli* sale (uncommissioned agent).

¹¹⁵ Ibn Qudamah A, *Al-Mogani*, *op.cit.*, vol.4 p.410; Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.334.

¹¹⁶ See Arts.238/239 of the JLR.

the other inheritors.¹¹⁷ However, if the buyer is not an inheritor the law allows him to do what he wants with only a third of his wealth, and the other two-thirds have to be protected for the benefit of his legal inheritors. Furthermore any transaction will not be approved if favours of someone other than the inheritors (collectively).¹¹⁸

The third party can be the tenant of a property, and in this regard the lessor can sell the property without the tenant's permission. However, the tenant's contract is not affected by the change of ownership.¹¹⁹ The buyer of the rented property has the right to avoid the contract if they were not aware of the occupation of the property by the tenant.¹²⁰

4.3.2 Effect of third party rights

The effect of the right of a third party, whose claim is proved, is to transfer the ownership of the object of sale from the buyer to the third party.¹²¹ However, according to the Hanafi view,¹²² this entitlement need not avoid the contract since the third party may permit the sale, which is therefore suspended pending their approval or avoidance. In this opinion, the contract would be avoided only if, when becoming aware of the third party right, the buyer decides to withhold the contract and clearly demands the compensation of their payment.¹²³ The Hanbali and Shafi'i

¹¹⁷ There is a particular inheritance law for dividing the wealth of a deceased, which is an imperative and there is no flexibility to adjust the portions of each member of the family, therefore, the law restricts the owner's control of this wealth if they intend to benefit one of their inheritors more than others. See: Ibn Qudamah A, *Al-Mogni, op.cit.*, vol.5 p.320.

¹¹⁸ This provision is derived from the Islamic rules in wills and inheritance, whereby a person is entitled, if they wish, to write their own will disposing of a third of their wealth arbitrarily. The other two-thirds have to be distributed based on *Shari'ah* provisions. See: Al-Mardawi A, *Al-Insaf, op.cit.*, vol.7, p.171.

¹¹⁹ See Arts.557/587.

¹²⁰ See: Al-Buhoti M, *Kashaf, op.cit.*, vol.4, p.24; Ibn Qasim A, *Hashiat, op.cit.*, vol.5 p.335.

¹²¹ This is the view of the Hanbalis and Shafi'is; see, *Al-Moso'ah Al-Kuwaitiah, op.cit.*, vol.4, p.90.

¹²² See for the full discussion of this view section: 4.3.1.1 on the sale by *fadull*.

¹²³ See the JLR Art.472, it provide the buyer with the right to avoid the contract if the seller cannot deliver the goods.

schools consider the contract to be nullified, since at the time the parties concluded the contract it had no legal grounds.¹²⁴

In Islamic literature little discussion has been made for the rules of protecting the buyer against the right of the third party or the claim. The protection of the buyer right against the seller requires two conditions; first, the entitlement of the third party has to be a result of a legal transfer of the ownership of the object from the seller to the third party thus the buyer is not protected against rights that occur only while the object is under the buyer's ownership or if the claim does not transfer the ownership to the third party. Secondly, the absence of settlement between the buyer and the third party, if the third party pays the buyer for the object not vice versa (the buyer pays the third party).¹²⁵ Regarding the claim of the third party Al-zarqa pointed out that "it is well established that Islamic law does not protect the buyer against the seller concerning the third party unless that right is proved"¹²⁶ and the buyer is the only legal person to defend that right if the delivery has taken place.¹²⁷ Thus, as stated above, the law and classical Islamic literature do not concern themselves with the rules of the third party claim and it seems that the reason for not protecting this claim is related to the fact that in the past the effects of claims were trivial on the buyer (cost and the time to defend); ultimately, in this context there is no need to protect the buyer. However, since refuting the third party claim can be so expensive consideration has to be made to ensure the implementation of fairness and equity in the contract. It should be noted here that even though the claim of the third party is not explicitly protected,

¹²⁴ See chap.4, fn:99. It should be noted that this discussion is related to the sale of specific goods (non-fungible), and if the contract calls for non-existent goods (by description, as in *Salam*), then the seller may deliver other goods.

¹²⁵ Al-Zuhayli W, (1985), *op.cit.*, vol.6, p.225; Al-Zarqa M, (1999) *op.cit.*, p.129.

¹²⁶ Al-Zarqa M, *A'qd Al-bay' wa Al-muqaidah*, (Damascus: Dar Al-Kalam, 1955), p.175.

¹²⁷ Ibn 'Abdeeen M, *Hasheah ala Al-Dor Al-Mokhtar* (Beirut: Dar Al-Fikr, n.d.), vol.5, p.330; Al-Zarqa M, (1999), *op.cit.*, p.127.

the protection of the buyer is granted against the third party claim if the goods cannot be delivered because of that claim.¹²⁸

If the third party right is related to a partial entitlement, the buyer has to accept the remaining part for its share of the price as long as delivery takes place and the partitioning is harmless.¹²⁹

If the object of sale has been transferred in a chain of sales, the right of the third party applies to the owner of the object of sale. Each buyer is only entitled to claim payment after the subsequent buyer down the chain has demanded compensation from them. The purpose of this rule is to prevent some of the buyers from collecting payment twice for the same items of sale.¹³⁰

According to the Hanbalis, an innocent buyer who has been deceived by a seller has the right to be compensated for any expenses associated with the merchandise, such as developing the function of the goods or adding extra cost. Because financial loss is not clearly recognized in Islamic law, this exception is provided only to the seller who is aware of the third party rights.¹³¹

If the third party right was only proved by the buyer's acknowledgement, or if they refuse to defend their ownership, they cannot claim for the price from a seller who denies this claim. This is derived from the legal maxim which suggests that the acknowledgement of a claim can only affect the claimant and cannot be extended to affect others.¹³²

¹²⁸ Al-Buhoti M, *Kashaf, op.cit.*, vol.3 pp.149-173. The seller's capability to deliver the goods is one of the sale conditions; see: chap.3 fn: 196. For example, Art.55 of the Regulation for Implementation of Patent Law allows the seizure of the goods in the case of a claim.

¹²⁹ See section: 5.3.2.2.6; Al-Zuhayli W, (2007), *op.cit.*, vol.2, p.272.

¹³⁰ *Ibid*, p.268.

¹³¹ Al-Buhoti M, *Kashaf, op.cit.*, vol.3, p.216, vol.4, p.112. See the decision of the International Islamic Fiqh Academy, chap:5, fn:270; Al-Senhori A, *Masadir Al-haq fi Al-fiqh Al-Islami*, (Beirut: Dar Ihia Al-turath, 1997), vol.6, p.118-24.

¹³² Al-Zuhayli W, (2007), *op.cit.*, vol.2, p.268; *Al-Moso'ah Al-Kuwaitiah, op.cit.*, vol.4, p.91.

4.3.3 Intellectual property law in Saudi Arabia

Apart from the reference to Islamic literature in sale contract, Saudi law is engaged with the international development of IP laws, and a number of regulations have been created within the past thirty years in similar manner and structure of western legal systems of IP laws. In this regard the provisions of the CISG in IP (Art.42) should not materially alter the law in Saudi Arabia; instead it can be seen as an important point for the laws to learn from each other.

4.3.3.1 Domestic Laws

Intellectual property laws were partly introduced at the early stage of the country's legal system;¹³³ however, prior joining the WTO in 2005, there was substantial enlargement and many of the laws in relation to intellectual property have been revised to meet WTO standards. The following paragraphs explore the present laws in relation to intellectual property, including copyrights, trademarks, patents, industrial design rights and trade names.

1. 1988 saw the first legislation for patents,¹³⁴ which in September 2004 was amended to cover more aspects of the subject under the title of 'Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs'. Its Regulation for implementation was issued in December 2004.¹³⁵

¹³³ In 1939 the Law of Trade Mark was issued, and in 1988 there was the first attempt to legalize patent rights. In 1989 the copyright law was issued. All of these laws have been modified recently, as mentioned above.

¹³⁴ Al-'Aqeel K, Al-himaih Al-qhanoniah Libaraiat Al-Ikhtra', in Naif Arab University for Security Sciences', *Hoqoq Al-Mulkeah Al-Fekreah*, (Riyadh: Naif Arab University Publications, 2004), p.157.

¹³⁵ Issued by Royal Decree No. 27/M in 1425/5/29 (17/7/2004) see:
<http://www.kacst.edu.sa/ar/innovation/patents/pages/regulations.aspx> and English version:
<http://www.kacst.edu.sa/en/innovation/patents/pages/regulations.aspx>

2. In 1989 the Law of Copyright was issued,¹³⁶ and then in 2003 a new law replaced it.¹³⁷ This new law was followed by its Implementation Regulations (2004).¹³⁸

3. The first trademark law¹³⁹ was issued in 1984.¹⁴⁰ Another law in August 2002¹⁴¹ updated the law on trademark, followed by its Implementing Regulations in October 2002.¹⁴²

4. The Law of Trade Names of 1999¹⁴³ was followed by its Implementing Regulations in 2000.¹⁴⁴

5. The Law of Geographical Indications (2002).¹⁴⁵

It should be mentioned here that the movement towards the protection of intellectual property rights was supported by the Council of Senior Scholars of Saudi Arabia, suggesting that intellectual property should be protected as much as any other private property.¹⁴⁶

¹³⁶ See for more detail about copyright law: Najeeb A, *Hoqoq Al-Moalif fi Al-Dual Al-Arabcah* (Naif Arab University of Security Sciences), in *Hoqoq Al-Mulkeah Al-Fekreah*, op.cit., pp.235-9.

¹³⁷ Issued by Royal Decree No. M/41, in 2/7/1424H (30/08/2003); see for full version: <http://www.uqu.edu.sa/page/ar/1042> and <http://www.info.gov.sa/copyrights/>; see for English version <http://www.wipo.int/clea/en/details.jsp?id=3593>

¹³⁸ Issued by the Ministry of Culture and Information Regulation No. 1688/1/O/M, in 29/05/2004; see <http://www.info.gov.sa/copyrights/caseForm.aspx>; for English version see: <http://www.wipo.int/clea/en/details.jsp?id=3594>

¹³⁹ See for more detail about the law: Arafah M, *Al-Himaiah Al-Qanoniah Lila'lamat Al-Tijarecah fi Al-Mmlakah Al-A'rabiya* in *Hoqoq Al-Mulkeah Al-Fekreah* (Riyadh, Naif Arab University Publisher, 2004), p.285.

¹⁴⁰ 'Aoad M., *Hoqoq Al-Milkeeh Al-Fikreah wa Himalatha Qanona*, in *Hoqoq Al-Mulkeah Al-Fekreah* (Riyadh: Naif Arab University Publications, 2004). p.23.

¹⁴¹ Issued by Royal Decree No. M/21, in 07/08/2002; for the full version of the law, see: <http://www.commerce.gov.sa/circular/12-3.asp>, for English version see: <http://www.wipo.int/clea/en/details.jsp?id=3595>

¹⁴² Issued by Ministry of Commerce and Industry Regulation No. 1723 in 5/10/2002, for the full version of the law see: <http://www.commerce.gov.sa/circular/12-5.asp>, for the English version see: <http://www.wipo.int/clea/en/details.jsp?id=3603>

¹⁴³ Issued by Royal Decree No. M/15 20/11/ 1999, for the full version of the law see: <http://www.commerce.gov.sa/circular/02-l-01.asp>, for English version see: <http://www.commerce.gov.sa/english/moci.aspx?Type=8&PageObjectId=726>

¹⁴⁴ Issued by Ministry of Commerce and Industry Regulation No.2015 in 26/3/2000, for full version of the law see: <http://www.commerce.gov.sa/circular/02-bl-01.asp>, for English version see: <http://www.commerce.gov.sa/english/moci.aspx?Type=8&PageObjectId=727>

¹⁴⁵ Issued by Royal Decree No. 15/M in 25/6/2002, see: <http://www.commerce.gov.sa/active/articles04.asp>

¹⁴⁶ See the Decision of the council No.18453, in 20/5/1996. This decision was given in relation to the issue of the illegal copying of computing software. Similarly, the International Islamic Fiqh Academy suggested that IP becomes

4.3.3.2 International Treaties

Besides the national regulation of intellectual property rights, at an international level Saudi Arabia has committed itself to various international treaties. In 1982, it ratified the WIPO,¹⁴⁷ and in 1995 the government decided to ratify the TRIPS convention and formed a working group from different ministries to study the requirements of ratification.¹⁴⁸ As a result of the study, many of the domestic intellectual property regulations were modified. In 2004 Saudi Arabia became a member of the TRIPS agreement (1994).¹⁴⁹ This ratification was a necessary requirement for joining the WTO, and its signing can be seen as the passage between two historical eras of intellectual property regulations in Saudi Arabia. This convention covers a wide range of aspects of intellectual property rights, referring to the main international organisations,¹⁵⁰ namely the Paris Convention for the Protection of Industrial Property,¹⁵¹ the Berne Convention for the Protection of Literary and Artistic Works,¹⁵² the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations,¹⁵³ and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits.¹⁵⁴

by custom a part of private protected properties: decision No.5 in 10-15/12/1988, (1988) 5 (3) *J.I.I.F.A.*, p.2579. For different view see: Al-husain S, 'Hal Litaalif Haq Mali', (9/2002) 15 *Al-adal (Justice) journal*, published by Ministry of justice, pp10-31.

¹⁴⁷ See: Al-'Aqeel K, op,cit., p.172; and <http://www.commerce.gov.sa/news/displaynews.asp?id=325>

¹⁴⁸ See: Royal Decree No.1239 in 12/7/1995: <http://www.commerce.gov.sa/active/articles04.asp>

¹⁴⁹ The ratification of TRIPS was effected in 11/3/2004:

<http://www.commerce.gov.sa/news/displaynews.asp?id=325>

¹⁵⁰ See for more detail about the TRIPS: 'Aoad M, op,cit., pp.31-34; for English see: http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

¹⁵¹ It is available at: <http://www.wipo.int/treaties/en/ip/paris>.

¹⁵² It is available at: <http://www.wipo.int/treaties/en/ip/berne>.

¹⁵³ It is available at: <http://www.wipo.int/treaties/en/ip/rome>.

¹⁵⁴ It is available at: <http://www.wipo.int/treaties/en/ip/washington>.

4.4 COMPATIBILITY BETWEEN THE CISG AND SAUDI LAW OBLIGATION REGARDING THIRD PARTY RIGHTS

The obligation to deliver goods free from third party rights has been recognized in both legal systems as an essential part of the seller's obligations. Similar to its approach in the obligation of conformity, Saudi law requires the delivery of goods free of third party rights as a pre-contractual obligation which is part of the Saudi general principle of certainty. Thus, according to the prevailing view of the JLR, if the goods involve a right of a third party then the contract is null.¹⁵⁵

Although this condition may restrict the movement of trade, it plays an important role in preventing the interference of third party rights in the sold goods, for instance if a buyer who has not yet received the goods from his supplier resells them before having legal possession of them.¹⁵⁶ Here risk and uncertainty in the contract are more likely if the first contract is interrupted. This restrictive rule should not affect compatibility, since the CISG's application does not govern the validity of the contract (Art.4). The JLR Art.240 suggests that the time for the goods to be owned by the seller has to be at the time of concluding the contract. This is different from the CISG, where the delivery time is the point of this obligation. However, according to the Hanafi and Maliki view, sale by *al-faduli* is valid pending the approval of the owner. Also it should be noted that this requirement of the JLR takes place only in the sale of determined goods. If the contract calls for fungible goods then the time in both systems is the same (at delivery when the risk passes). Although the types of third party rights under Saudi law do not relate to the international sale of goods, these examples include rights in rem and personam, which are the same as the commentators on the CISG explain. So, for example, in the

¹⁵⁵ See section: 1.3.2.4.2 Gharar

¹⁵⁶ This prohibition is related to the sale of specific goods; see chap.4, fn: 124.

case of the sale of propane, delivery under Saudi law will not take place if the buyer cannot have the full disposal of the goods. On these grounds Saudi courts will apply the same rules that were applied under the CISG by the Austrian court as mentioned above.¹⁵⁷ In this regard the advantage of applying the CISG in Saudi Arabia is that judges and lawyers will engage with the development of current international trade, where the rights of the third party have become more complicated (for example in environmental restrictions).

The question of whether or not Saudi law protects the buyer against third party claims, as the CISG does, is not addressed in Saudi law or the Islamic literature. However it seems that there is no particular rule in Islamic law which prevents this protection, which should be welcomed if such claims will affect the buyer. In any case, if the buyer's disposal of the goods is affected, then there is no problem since the law explicitly requires delivery of the goods without any restrictions.

According to the CISG the seller is not responsible if the buyer is aware of the IP right, but agreement is required in the case of defects in title. Under Saudi law there are no comparable rules. However, the CISG considers the different nature of goods and custom related to third party rights as in most of these cases defects in title can be removed promptly, which is not the case with IP rights. On this basis Saudi law's pursuit of the principle of custom, and consideration of the parties' purposes in their contract¹⁵⁸ means that this division should be acknowledged.

The approaches of the CISG and Saudi law to intellectual property rights are similar. In both systems these are considered as private properties which are protected by the law. *Shari'ah* law

¹⁵⁷ See chap.4, fn:12.

¹⁵⁸ See section: 1.3.2.3.

did not provide specific rules for intellectual property, since the development of IP laws has taken place only in the last two centuries. So, specific laws have been issued in Saudi Arabia to meet the requirements of international agreements. In this regard ratification of the CISG could be beneficial for Saudi judges and lawyers to become involved in the international practice of these laws, especially since they have no background in Islamic literature.

Under the CISG, knowledge of the seller about the third party rights and the place where they apply are required only with IP rights (and not in defects in title). Since the CISG is an international organisation and the right of IP may be protected in one state and not in another, it seems that rights related to IP laws are treated in the same manner as the fitness for a particular purpose where the seller has to be aware of that purpose, Fitness for particular purpose in this regard would be compliance with the IP law of the country where the goods are going to be delivered to or according to the buyer's technical requirements. This explanation may justify the absence of such rules under Saudi law. This can be illustrated by the case of selling CD-Rs and CD-RWs,¹⁵⁹ where the Supreme Court required the contractual determination of the place where the goods would be resold or used in order to accept the buyer's claim of the violation of the third party's IP. In Saudi Arabia this would be not the case, since the country is governed by one law. However if the same case was tried in a Saudi court the place of using the goods would be considered as fitness for a particular purpose.

As mentioned in the discussion of the obligation of conformity, although the JLR allows an unrestricted time for notice, the prevailing opinion requires immediate notice. This is compatible with the CISG. In this regard it is important to note that these are not imperative rules, and the parties are free to stipulate these obligations in their contract. Moreover, if there is a custom in

¹⁵⁹ See chap. 4, fn:68.

the market allowing only a short period for notice, then there is no argument about obliging the buyer to comply with this short period even under JLR rules.

CHAPTER FIVE: REMEDIES FOR BREACH OF CONTRACT BY THE SELLER IN THE CISG AND SAUDI LAW

5.1 INTRODUCTION

This chapter studies the remedial system which relates to the seller's breach of any contractual obligations. The approach of the CISG and Saudi law are discussed and compared. While dealing with remedies, which are a critical part of the contract, it is of significance to bear in mind that the CISG was drafted with the goal of creating a new convention to be acceptable by different legal, social, and economic systems. Thus, its provisions have been borrowed from different legal systems, mainly from within civil and common law backgrounds. However, because Saudi law is derived from the entirely different legal environment of Islamic *Shari'ah* law, comparison may be more difficult. In addition, the framework of remedies in Saudi law was built differently. They have been dealt with under the title of 'options section'; where the contract becomes optional for the aggrieved party who may have the right to avoid the contract. However, although under Saudi law the aggrieved party is expressly given several reasons for entitlement to these options, other remedies are not examined; namely, specific performance and reductions in price as general remedies separate from the options for avoidance.

Unlike with the CISG, Saudi law also does not discuss the concept of the fundamental breach as a general principle which plays a significant role in practicing the remedies in the CISG. So the buyer may not be able to resort to some remedies for the seller's breaches if they are not deemed fundamental.

The buyer's expectations concerning remedies under Saudi law have been affected by Islamic principles of and restrictions to trade, including the prohibition of interest and the requirement of particular levels of certainty in the contract. These expectations are not the same as for those whose contract is governed by the CISG where the main interest is to encourage trade between countries. Here the requirements of modern business developments are prioritised, where the consequence of any breach may involve major financial detriment to the aggrieved party.

Therefore, the roots of the generation of and approach to the remedies are significantly different between the CISG and Saudi law. Nevertheless, the most critical question should concern the results which both laws aim to achieve in practice; such criteria should be used to determine the extent of these differences and their reflection on the performance of the contracts. In this context, this chapter is designed to identify the available remedies for the seller's breach in the CISG in order to find their counterpart in Saudi law and to examine the compatibility of Saudi law with them. Due to the limitation of the research discussion, this chapter focuses on the buyer remedies under Arts.46-52 and its counterpart of Saudi law as follows:

The first part of this chapter explores the CISG's remedial articles starting with those relating to specific performance, its limitation and the effect of late performance. The subsequent remedy is avoidance, and the CISG's requirement for resorting to this remedy is studied along with how its procedure works. Finally, the application of a reduction of price, how such reductions are calculated and limitations to the use of this remedy are discussed.

The counterpart to the CISG of the three main remedies in Saudi law is then examined. This part starts with avoidance remedy as the main available remedy in Saudi law, considering the legal cause for termination, with further explanation of *Khiyarat* (options) which are the major cause

of avoidance. Withholding performance is also discussed under the avoidance. Next section introduces the concept of specific performance, and the seller's right to cure non-conformity.

The final part in this chapter examines the similarities between the CISG and Saudi law and highlights the potential differences between them, in order to analyse the likely compatibility of the two systems.

5.2 PART ONE: REMEDIES FOR BREACH OF CONTRACT BY THE SELLER IN THE CISG

5.2.1 Remedies in general

Understanding the rules on remedies and uniform application of them are considered as the backbone of unifying the law of sale internationally.¹ The remedial system of the CISG provides a separate section on remedies for each party set forth after the obligations of the other party and then it followed by the common provisions for both parties.² This study attempts to explore the section which specifically looks at buyer remedies to provide a clear understanding of their approach in order to compare it with their counterparts in Saudi law. Generally speaking the CISG's remedies for breach of contract are designed to cover all failures of a party to perform any of their obligations.

For the seller's breach of contract obligations,³ Art.45 summarises all the buyer's remedies and the links between them:

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

- (a) exercise the rights provided in articles 46 to 52;
- (b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitration tribunal when the buyer resorts to a remedy for breach of contract.

¹ Schlechtriem P, (x/2005) 10 *Juidica International*, *op.cit.*, p.31; Bridge MG, (2007) 37 *H.K.L.J*, *op.cit.*, p.34. This author considers the area of remedies to include the most important differences between the CISG and the English Sale of Goods Act.

² The seller's remedies are set out in Arts.61-65. Art.61 sums up the seller's remedies in the same way as Art.45. for the buyer's remedies. The common provisions for both parties are drawn in Arts.71-88.

³ Compare this approach with the ULIS structure of remedies, whereby each breach was followed by its remedy; see Schlechtriem P, in Schlechtriem/Schwenzer, (2005) *op.cit.*, pp.3-4.

In the event of a breach of contract due to the seller's failure to perform his obligations⁴ under the contract and the CISG, according to Art.45 (1) (a) the buyer has the right to practice the available remedies detailed in the CISG, mainly in Arts.46 to 52. Moreover, details related to some of these remedies can be found in other parts of the CISG.⁵

The main remedies under the CISG can be divided into three basic types: specific performance, which includes repair and the delivery of substitutes in cases of non-conformity (Art.46); avoidance of the contract (Art.49); and reduction in price (Art.50). The other provisions referred to in the buyer's remedies section are merely supplementary rules. Art.47 deals with an additional period of time for performance and Art.48 governs the right of the seller to cure defects. Partial breaches are dealt with in Art.51; early delivery in Art.52(1) and the delivery of extra quantities in Art.52(2).

In addition, claiming damages is a supplementary remedy for both buyer and seller. Art.45(1)(b) forms the basis of the right of the buyer to claim damages and according to its language, the buyer may claim damages even if the seller is not at fault for failing to perform his obligations.⁶

⁴ Muller-Chen M, *Articles 45- 52* in Schlechtriem P/Schwenzer I, (eds.) *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Oxford University Press, 2005), p.521; the buyer cannot seek any remedy before the performance is due except in the case of anticipatory breach (Art.72) or early delivery (Art.52).

⁵ For example: how the declaration of avoidance can be practised and the requirement for breach of contract, Arts.25-26; restriction on the remedy of specific performance, Art.28; damages, Arts.74-77/79; and for anticipatory and instalment breach, Arts.71-73. Muller-Chen claimed that Art.45 (1)(a) is not complete, because reference to these articles was missing: Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.520. However, as pointed out by Huber, these provisions do not create new remedies; rather, they modify existing ones: Huber P, 'CISG - The Structure of Remedies' (2007) 71 *R.Z.A.I.P.*, p.14, available at: <http://www.cisg.law.pace.edu/cisg/biblio/huber1.html#ij>

⁶ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.522; Honnold J, (2009), *op.cit.*, p.404.

The calculation of damages, and their limitations, and mitigation are then dealt with in Arts.74-77.⁷

Under Para. 45(2) it is expressly indicated that practising the right to claim damages can be an exclusive remedy or a cumulative remedy in addition to other remedies requiring performance, reducing the price or avoiding the contract.⁸ Art.45(2) gives the buyer the advantage in demanding damages even if the use of other remedies is rejected.⁹ Having said that, this study does not attempt to examine the rules of damage (Art.74-77) as they are outside the scope of the research (which is the buyer remedies' section).¹⁰

The aim of Para. 45(3) is to exclude the influence of various domestic national laws which may permit the courts or arbitral tribunals to delay the practice of the buyer's remedies.¹¹ This provision is important in protecting international trade and avoiding judicial discretion which may favour one party at home.¹² The rights of the buyer in the case of a breach of contract are applicable immediately at the time of the breach and cannot be deferred by a court or arbitration panel.

⁷ Art.45 (1)(b) gives the grounds for the damage remedy and the rules of damages in the CISG merely specify how the damage should be implemented without granting the aggrieved buyer this remedy. See: Flechtner II, 'Buyers' Remedies in General and Buyers' Performance Oriented Remedies' (2005-06), 25 *J.L.&Com*, 339 p.340

⁸ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.190; Honnold J, (2009), *op.cit.*, p.406. This cumulative approach was denied in the early common law world, wherein the buyer who rescinded the contract could not resort to the compensation for damages (p.405). The buyer's recovery for damage "depends on which other remedy has been resorted to by the buyer"; see UNCITRAL Digest, Art.45, available at:

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V04/552/70/PDF/V0455270.pdf?OpenElement>

⁹ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.528.

¹⁰ Although the claim of damages is one of the important parts of the CISG's to receive broad academic discussion, this remedy is not addressed clearly under Saudi law. However, this does not necessarily mean that claiming damages contradicts Saudi law. See the decision of the International Islamic Fiqh Academy: chap.5, fn: 270; for more details see also: Al-Senhori A, *op.cit.*, vol.6, p.118-24.

¹¹ This refers to some civil law systems. See Art.1184(3) of French civil law.

¹² Honnold J, (2009), *op.cit.*, p.406; Schlechtriem P, (1986), *op.cit.*, p.75.

As stated above, the CISG system of remedies covers all failures, and thereby each remedy can serve every breach of the obligations even if the failures differ in nature from one another.¹³ However, in order to be practically applied, some remedies require more criteria to be satisfied than others.

5.2.2 Specific performance

5.2.2.1 Nature of the remedy

In the event of breach of the contract by the seller, the CISG entitles the buyer to require the seller to perform or to complete the performance of any of his obligations undertaken under the contract.¹⁴ Art.46 provides for the aggrieved buyer one of three forms of remedies as follows:

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

It is readily available as a primary remedy for breach of contract to force the party in breach to fulfil its obligations, to deliver the goods as agreed or to repair defective delivery. This seems to be the natural remedy as long as its performance is possible.¹⁵

¹³ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.520; Schlechtriem P, *Uniform Sales Law: The Experience with Uniform Sales Laws in the Federal Republic of Germany* (Stockholm: Juridisk Tidskrift vid Stockholms Universitet, 1992) pp.6-7.

¹⁴ In the seller's remedies, Art.62 provides a parallel rule to specific performance, as the seller may "require the buyer to pay the price."

The approach adopted by the CISG to this remedy is similar to that followed by many civil law systems.¹⁶ In common law, this remedy is regarded as an exceptional remedy to be implemented at the court's discretion when alternative remedies are inadequate, whereas claiming for damages is the immediate remedy.¹⁷

This remedy provides a right for the buyer in the event of breach of contract to bring a court case against the seller to order such performance to be enforced by the means available to it under the court's law.¹⁸ Subject to Art.28, (as discussed below) the court has no discretionary power to refuse his request.¹⁹

Regarding late delivery, it is sometimes difficult to decide whether or not the buyer, by demanding late performance, wants to practise Art.46(1) for specific performance or whether he voluntarily offers the seller a modified contract according to Art.29. In this case, reference should be made to the interpretation of the buyer's demand.²⁰ If the buyer's intention is not clear, the declaration ought to be interpreted as requiring performance under Art.46, since non-delivery is a breach in itself and the buyer's demand for performance is one of its remedies.

¹⁵ Lookofsky J, (2008), *op.cit.*, p108

¹⁶ Honnold J, (2009), *op.cit.*, pp.298,408-9.

¹⁷ DiMatteo L et al., *op.cit.*, p.133; for more detail about English law see Treitel G, *The Law of Contracts* (12th ed), (London: Treitel, 2007); Lookofsky J, (2008), *op.cit.*, p.112.

¹⁸ Secretariat's Commentary, O.R. p.38,(8)

¹⁹ Walt S, 'For Specific Performance Under the United Nations Sale Convention' (1991) 26 *Tex. Int'l L. J.* p.214; Lookofsky J (2008), *op.cit.*, pp.110-1, the latter author mentioned that for the demand of this remedy in practice, it is not likely that the buyer will seek to compel the non-performing seller, because most commercial buyers have little time to wait for additional time to deliver, and thus after the expiry of this period they are likely to avoid the contract.

²⁰ If it is modification of contract, no damages can accrue to the buyer. See Secretariat's Commentary, O.R. p.38,(5)(6); Will M, in Bianca-Bonell, *op.cit.* p.340.

5.2.2.2 Requirements for substitute goods and repair

Beside the original remedy of performance in Art 46 (1), the right of the buyer to demand cure of non-conforming goods may be exercised in the form of requiring the seller to deliver substitute goods or to repair defects. Art.46 (2) and (3) specify particular extra requirements for practising each of these remedies. Even though these two alternative remedies are separate, both can be resorted to simultaneously since the parties may agree to substitute some of the goods and repair the rest of them.

Since the shipping of a second delivery of goods and disposing of the non-conforming goods already delivered may cost the seller considerably more than the buyer's loss from having non-conforming goods, the application of the substitute remedy is restricted to cases where "the lack of conformity constitutes a fundamental breach" as in Art.46 (2). The buyer has to have suffered a detriment which substantially deprived him of what he was entitled to expect under the contract. If the breach cannot be proved to be fundamental, then the buyer may be entitled to the remedy of repair.²¹

The performance remedy is designed for generic goods because under a contract for specific goods the seller has not undertaken any duty other than to deliver the particular goods.²²

The last part of Art.46 (2) provides a further requirement; it suggests the buyer must request a supply of substitute goods in conjunction with notice, which is required by Art.39, or within a short time after the submission of the notice.²³

²¹ Lookofsky J, (2008), *op.cit.*, p113.

²² Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.540. In ULIS this issue has been dealt with expressly under Art.42 which provides that the buyer could only require the seller to deliver substitute goods where the sale related to unascertained goods.

As far as the requirements for substitute delivery are concerned, Art.82(1) requires that the buyer must be able to return the non-conforming goods which he has received from the seller in order to require the seller to deliver substitute goods.²⁴

However, in order to protect the buyer where delivered goods were defective and the breach is not fundamental Art.46(3) entitles him to require repair which is not reliant upon the concept of fundamental breach.²⁵ The requirement for repair in Art.46(3) is different from the seller's right to cure defects in Art.48, since the right of the seller to cure applies in order to limit the buyer's right to avoid the contract.²⁶ Although repair does not require fundamental breach, it is still restricted to cases where it would be reasonable for the seller to repair the defect, having regard to all the circumstances, as in Art.46 (3). Therefore, these circumstances should include not only the nature of the defect, but also the technical difficulties involved, the characteristic of the goods and any other circumstances.²⁷ If the cost to repair the defect is disproportionate to the price of the goods or acquiring a substitute, it would be unreasonable for the seller to repair. Moreover, a claim for repair could be unreasonable if the seller is a dealer who does not have the means for repair, or if the repair can be achieved by the buyer at the least cost.²⁸ In general, it is unreasonable for the seller to be obliged to repair if there is no reasonable relationship between the cost of this and the advantage that the buyer may gain from such a repair.²⁹ In an Austrian

²³ DiMatteo L et al., *op cit.*, p.133. See the discussion of notice under Art.39 in section: 3.2.7.

²⁴ The strict requirement requiring the returning of the goods in the same condition as the buyer received them does not apply in three cases, as stated in Art.82 (2) (a) (b)(c).

²⁵ The rule of repair is in line with the respective rules in the European Consumer Sales Directive; however the rule of substitute performance with the notion of fundamental breach is unknown in this directive. See Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees: O.J.L 171/ 12; Huber P (2007) 71 *R.Z.A.I.P.*, *op.cit.*, p.15.

²⁶ Lookofsky J (2008), *op.cit.*, p.114.

²⁷ Maskow/Enderlein, *op.cit.*, p.180.

²⁸ Will M, in Bianca-Bonell, *op.cit.*, p.339; Maskow/Enderlein, *op.cit.*, p.180; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.549-450; See UNCITRAL Digest Art.46 para. 18.

²⁹ O.R., p.336, No.35,37

case of a cooling system the court held that “the expenses for such a repair may be compensated only insofar as they are reasonable in relation to the intended use of the sold goods taking into account all the circumstances of the case (urgency, time needed to replace the faulty device, claims from the main contractor)”³⁰ This case, as Flechtner confirmed, represents “helpful guidance”³¹ for the requirement of performing the remedy of repair.

The last part of Art.46 (3) repeats the requirement of the buyer notice in 46.(2).³²

Having discussed the requirements for substitute delivery and repair, the question is whether or not the buyer can demand the substitute remedy if the seller chooses to repair the defect. If the seller offers to repair within the period required in Art.48(1), the buyer cannot resort to the substitute remedy because in this case a fundamental breach has not yet occurred.³³

5.2.2.3 Limitations

In spite of the general meaning of Art.46, the buyer’s right to performance is subject to some significant limitations. One of the two main limitations is provided in Art.46 and the other in Art 28. Alongside these articles there are other general limitations to performance remedy.

The first major limitation is expressed by Art.46 itself. It instructs the buyer to not “resort to a remedy which is inconsistent with this requirement.” Even though Art.46 (1) does not specify which remedies are inconsistent with the remedy of specific performance, exercising the right of

³⁰ Austria: Oberster Gerichtshof (SC), 14 January 2002, CLOUT no. 541 available at: <http://cisgw3.law.pace.edu/cases/020114a3.html>

³¹ See: Flechtner H (2005-06) 25 *J.L.&Com*, *op.cit.*, p.347.

³² DiMatteo L et al., *op cit.*, p.133. See the discussion of the notice under Art.39 in section: 3.2.7.

³³ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.548.

declaring the contract avoidance³⁴ or reduction in price³⁵ would certainly be inconsistent with this remedy. .

The question of whether or not a claim for damages should be judged to be inconsistent can be answered by drawing a distinction between the case of a claim for late delivery and that of failure to perform.³⁶ If the buyer claims damages for late delivery, he would not be pursuing a remedy inconsistent with the requirement of performance.³⁷ However, a claim for damages for failure to perform would be inconsistent with requiring performance,³⁸ since such a claim can only be brought if the contract is avoided because the damages would be based on proportionality to the market price.³⁹

Although this restriction is provided under Art.46 Para. (1), para. (2) and (3) should also be subject to the same limitation.⁴⁰

The second important limitation derives from Art.28, which states that:

...a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

³⁴ Lookofsky J, (2008), *op.cit.*, p110; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.537. It should be noted that the mere rejection of the goods for their defects does not prevent the buyer from resorting to the performance remedy as Art.46 (2) entitles the buyer to return the goods in the case of fundamental breach and demand substitute goods; Honnold J, *op.cit.*, p.412. See more details about the effect of the contract in CISG-AC, Opinion No. 9, *Consequences of Avoidance of the Contract, Rapporteur*, Professor Michael Bridge, London School of Economics, London. Adopted by the CISG-AC following its 12th meeting in Tokyo, Japan on 15 November 2008. Available at: <http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=185>; Schlechtriem P, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations' (x/2005) 10 *Juidica International*, p.32.

³⁵ See: Secretariat Commentary, O.R. p.38,(5)(6); Honnold J, (2009), *op.cit.*, p.411.

³⁶ Walt S (1991) 26 *Tex. Int'l L. J.*, p.214. no11.

³⁷ Maskow/Enderlein, *op.cit.*, p.178.

³⁸ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.537.

³⁹ Maskow/Enderlein, *op.cit.*, p.178.

⁴⁰ Lookofsky J, (2008), *op.cit.*, pp.113-114; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.540.

The main reason for this provision is to take into account domestic laws where the availability of specific performance is not recognised. Accordingly, the court of the contracting state is not bound to grant the litigation for a performance remedy unless it would implement the same remedy in respect to similar contracts of sale not governed by the CISG.⁴¹ The question of whether or not the limitation on specific performance under Art.28 covers all three cases set forth in Art.46 - 1. requiring the seller to perform his original obligation; 2. delivery of substitute goods; 3. repair - or works only in the first case has been subject to some discussion.

According to one view, this limitation in Art.28 includes cases requiring either substitute goods or repair, as both are part of the more general right to demand performance largely unknown to common law courts.⁴² Thus if the breach is fundamental or if repair is reasonable in the circumstances, the buyer cannot resort to the right of requesting substitutes or repair unless the court would do so under domestic law. A contrary argument is that the impact of Art.28 is linked only to the entitlement of performance (the first case). Honnold defends this approach, stating that, "Article 28, standing alone, seems to say that domestic law will prevail but this conclusion would overlook the specificity and nuanced character of the rules of Article 46 (2) and (3)

⁴¹ This limitation was to achieve a compromise between civil law and common law. See Honnold J, (2009), *op.cit.*, p.409; Walt S (1991) 26 *Tex. Int'l L. J.*, 211, p.218. Despite the differences between these two systems in this remedy, Flechtner pointed out an interesting conclusion on his study of relevant law cases, considering the absence of controversy over the provision of Art.28 and the availability for requiring performance under Art.46 to be "an area ripe for a rapprochement between the approaches of the civil law and common law traditions. Such a compromise could result in the removal of what has been a significant but, it turns out, almost entirely theoretical irritant in the search for universal commercial law principles." Flechtner II (2005-06) 25 *J.L.&Com*, *op.cit.*, pp.344-5; see also for a similar conclusion: Honnold J, (2009), *op.cit.*, p.409-410. It was suggested that under some civil law codes, performance remedy is much less used than the official doctrinal text would say, in which regard Katz affirmed that in practice, however, this dichotomy between common and civil law is probably overstated; Katz A, 'Remedies for Breach of Contract Under the CISG' (2005) 25 *I.R.L.E.*, p.384.

⁴² Walt S (1991) 26 *Tex. Int'l L. J.*, 211, p.218; Lookofsky J, (2008), *op.cit.*, p.113.

governing these precise situations Articles 46(2) and (3) should be regarded as *lex specialis* qualifying the general provisions of Article 28”.⁴³

In analysing this debate one may note that the second approach focuses on the importance of broadening the application of the CISG’s provisions and achieving the practice of the remedial system. However, the first view is considerably more accurate, since it is not reasonable to apply the limitation made by Art.28 to the first part of Art.46 while the meaning of specific performance in Art 28 covers all three provisions of Art.46.⁴⁴ Moreover, for the purpose of unifying the application of the CISG’s remedies, it can be suggested that there should be no great concern about different practical applications of the remedies. This is because the implementation of the Art.28 limitation only has a very low impact in case law.⁴⁵

If national law provides discretionary power to accept or refuse the buyer’s request for performance the court is not bound to practise Art.46 pursuant to the legislative history of adopting the word “would” in Art.28, instead of “could” in the 1978 draft to preserve the common law approach.⁴⁶ This limitation can be illustrated by one of the few cases for the remedy of specific performance decided by a US court. It was found that “the complaint stated sufficient facts to justify an order of specific performance under article 46 (1) CISG and domestic law, which the Court found to be relevant by virtue of article 28 CISG.”⁴⁷ The court, as

⁴³ Honnold J, (2009), *op.cit.*, p.416.

⁴⁴ Lookofsky rightly suggested that the remedy of repair is “best understood as a species of the more general right to demand performance as agreed.” See Lookofsky J, (2008), *op.cit.*, p.114.

⁴⁵ See chap.5: fn: 41.

⁴⁶ Some of the common law countries, including the UK, were opposed to the wording “could”. If a court “could” grant specific performance, it would be obliged to give such a judgment if that was, under the CISG, the appropriate remedy. In other words, the word “could” will force the court to implement Art.46 if the specific performance is allowed even rarely, whereas under the word “would” a court is not required to order specific performance, unless its domestic law applies specific performance without giving the court discretionary power. O.R., pp.76,100, 304-5.

⁴⁷ U.S. District Court for the Northern District of Illinois, (7/12/1999), CLOUT No. 417, available at: <http://cisgw3.law.pace.edu/cases/991207u1.html>

Lookofsky affirmed,⁴⁸ rightly implemented the provision of Art 46 (1) in conjunction with the rule of Art.28. Even though the US system is part of the common law community, the buyer was granted the right of performance since the court would recognise this right under its domestic law in similar cases.

In addition to these two express limitations, other some general limitations in the CISG which should also be considered⁴⁹ are the obligation of mitigating the damage (Art.77) and the duty to preserve the goods or dispose of them (Arts.85, 86, 88(2)). These may prove to be significant in limiting the buyer's right to require specific performance.⁵⁰

There is no provision under the CISG which defines how the court should employ the specific performance remedy to order the seller to perform what was agreed upon by the contract. In fact, it was deliberately intended to leave such matters to the procedure of the applicable law.⁵¹

5.2.2.4 Additional period

5.2.2.4.1 Buyer's additional period for performance

In cases where the seller delays delivery, Art.47 offers the buyer provision for fixing an additional final period for delivery as follows:

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

⁴⁸ Lookofsky J, (2008), *op.cit.*, p112.

⁴⁹ Most of these limitations are, generally speaking, similar to many national laws with some difference in the degree of the limitations. See Huber P (2007) 71 *R.Z.A.I.P op.cit.*, p.15.

⁵⁰ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.539; Huber P, (2007) 71 *R.Z.A.I.P, op.cit.*, p.15; Honnold J, (2009), *op.cit.*, p.415. See also chap.5, fn: 24 for the restriction of substitute delivery.

⁵¹ Honnold J, (2009), *op.cit.*, p.417.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

The right of the buyer to fix an additional period may exist without the need of particular legal authorisation.⁵² However the function of Art.47 is to provide a balance between the buyer who wants to get out of the contract and the seller whose interest is to keep to it. Art.47 permits the buyer to set a time for performance of the essence of the contract by fixing an additional period of reasonable time for the seller's performance.⁵³ In this regard one of the two grounds for avoidance set forth in Art. 49 is when the seller fails to deliver the goods "within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47".⁵⁴

Moreover, an additional period can be used to demonstrate the buyer's interest in performance, since resort to declaring the contract avoided is not always the best solution for the buyer.⁵⁵

Setting an additional period of time is optional for the buyer, and is not a precondition for avoiding the contract if a fundamental breach already exists. The buyer may also still require performance even when the additional period has expired.⁵⁶

For the purpose of Art.47, it is required that the additional period is specified, and it is unacceptable for the buyer to ask for goods to be delivered as soon as possible.⁵⁷

⁵² Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.554.

⁵³ The CISG does not regard time as being automatically of the essence: Lookofsky J, (2008), *op.cit.*, p.122.

⁵⁴ See section 5.2.3.1.2 for more detail of the role of the additional period in avoiding the contract.

⁵⁵ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.194.

⁵⁶ *Ibid*, p.193.

⁵⁷ Secretariat commentary, O.R. p.39,(7) ; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.194; Honnold J, (2009), *op.cit.*, p.420, went further by requiring a warning to be given that a deadline has been fixed. Since the reason for the specific additional period is to make the time of delivery of the essence it seems that the seller has no excuse to ignore the day of delivery as long as it has been identified by the parties for a second time. See Germany: OLG Nürnberg (Provincial CA), (20/9/1995), No. 12U2919/94, available at: <http://www.cisg->

The other requirement under Art.47 is that the additional period should be of reasonable length with respect to the buyer's discretion: "the innocent party who faces breach by the seller", as Honnold describes.⁵⁸ However, according to an alternate view, objective measurements should be taken into account, such as the effect of the delay on the buyer, and the possibility of a certain time needed by the seller for delivery.⁵⁹ In analysing a reasonable time in this regard, consideration should be given to whether or not the breach of the seller can be fundamental without this additional period. Thus, if the buyer is not entitled to avoid the contract without specifying the additional period, the objective measures should apply. In other cases, the discretion of the buyer should be taken into account. This can be illustrated by a case of a German seller who failed to deliver a used printing press to an Egyptian buyer after an additional period of 11 days was fixed by the buyer. The court found that this period was significantly too short. However, because the buyer avoided the contract after only seven weeks, it was held that the buyer's actual avoidance was reasonable.⁶⁰

In any case, if the period is too short the buyer cannot avoid the contract on the grounds of Art.47.⁶¹ In this case as Lookofsky expressed, "the Article 49 (1) (a) clock continues to tick,"⁶² which means the buyer is unable to avoid the contract unless the delay amounts to a fundamental breach.

online.ch/cisg/urteile/267.html, where the court considered the wording "we kindly ask you for settlement by 25. 2. 93" sufficient notice,

⁵⁸ Honnold J, (2009), *op.cit.*, p.420.

⁵⁹ Muller-Chen, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.556, explains that several matters should be taken into account; this view is also mentioned in DiPalma M, *op.cit.*, p.33.

⁶⁰ Germany: OLG Celle (Provincial CA), (24/5/1995), No. 20U76/94, available at: <http://cisgw3.law.pace.edu/cases/950524g1.html>

⁶¹ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.557.

⁶² Lookofsky J, (2008), *op.cit.*, p122.

The seller also has to be informed of the new specific period.⁶³ Once the additional period has been fixed by the buyer, according to Para. 47(2), he is not allowed to exercise any of his other remedies during this new period unless the seller declares that the delivery of the goods will not be performed within that period then.⁶⁴

In any case, whether or not the seller performs during the additional period, the buyer's right to damages is granted by Art.47 (2) for late performance, including any damages occurring during the additional period. The significance of this provision is to put an end to any argument that the buyer's agreement to the new period may include waiving his right to claim damages.⁶⁵

5.2.2.4.2 Seller's additional period for cure

As mentioned earlier, the seller is provided with certain rights in Art.37 to cure any defective performance up to the date for delivery. However, a more limited possibility for the seller to cure defects after the date of delivery is provided, in similar rules to those of Art.37, under Art.48 which states that:

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

⁶³ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.194.

⁶⁴ Honnold J, (2009), *op.cit.*, p.422; Secretariat's Commentary, O.R. p.39,(9); Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.559-60; DiMatteo L et al., *op.cit.*, p.134.

⁶⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.560; Honnold J, (2009), *op.cit.*, p.423.

Art.48 grants the right to the seller to cure any type of failure⁶⁶, since in international trade errors may happen with some of the goods delivered. They may not conform to the contract, documents may be defective or a third party's claim may appear to cause conflict. In such cases, allowing an effective remedy by the seller to cure failure can be preferable to avoidance for both parties.⁶⁷

To enable the seller to practise this right, Art.48(1) provides conditions which have to be met. The first is related to Art.49, to which this right of the seller is subject.⁶⁸ According to Art.49 the buyer can declare the contract avoided in two cases: (a) of a fundamental breach has occurred⁶⁹ and (b) after the expiry of any additional period of time for performance provided by Art.47.⁷⁰ However, in the case of a fundamental breach, the relationship between the buyer's right to avoid the contract and the right of the seller to cure is unclear.⁷¹

According to one view, the right of the buyer to avoid the contract pursuant to Art.49 should be given priority, so that once the buyer resorts to avoiding the contract, the seller cannot cure his failure to perform.⁷² Thus, the seller may cure his breach only as long as the contract is not declared avoided by the buyer.

⁶⁶ Since the delay of delivery cannot be recalled when the time has elapsed for the purpose of cure, Honnold suggested that if the delay does not fall under Art.49(1) there is no need for 'cure' and the damage is the only right remedy: Honnold J, (2009), *op.cit.*, p.425.

⁶⁷ Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.121

⁶⁸ In the 1978 Draft of the Art.44 (which became Art.48 in the CISG) began with the wording "unless the buyer has declared the contract avoided in accordance with Article 45" (later 49). In this regard the clause "unless" in the 1987 draft is very clear in giving the buyer the right to avoid the contract without affording the seller the right to cure. However, the new clause "subject to" is arguably unclear. Lookofsky J, (2008), *op.cit.*, p.121; Honnold J, (2009), *op.cit.*, p.426-7; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.563. The effect of this uncertainty is discussed in the following paragraph.

⁶⁹ Honnold J, (2009), *op.cit.*, p.425.

⁷⁰ The buyer under Art.47 may use the time of extension to limit the seller's right to cure after the expiry of the extension period. DiMatteo L et al., *op.cit.*, p.134; See also the above discussion in section: 5.2.2.4.1.

⁷¹ Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.31; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.122; Huber P in Huber/Mullis (2007) *op.cit.*, pp.217,221-2; see also chap.5, fn: 68 on the cause of this uncertainty.

⁷² Enderlein F, in Sarcevic/Volken, *op.cit.*, p.194.

The prevailing view, however, appears to be that the seller should not be deprived of the opportunity to cure the breach, even in the case of a fundamental breach in accordance with Art.48(1).⁷³ The justification for this is, as Lookofsky suggests:

the existence of a 'dynamic' relationship among Arts.25, 48 (1) and 49, the idea being that when a given non-conformity can be cured without great inconvenience to the buyer, then that non-conformity should not be regarded as a fundamental breach.⁷⁴

This view provides an interesting interpretation regarding the conduct of the seller, if a quick cure can be an element in preventing the existence of fundamental breach.⁷⁵ In a case between a Swiss buyer and Italian seller, the court held that, because the buyer refused the cure offered by the seller, the buyer was not entitled to avoid the contract.⁷⁶

Bridge asserts that the right of the seller to cure "will generate more academic interest than practical outcome," because of the "imperfect transplantation of an idea (cure) from a national law legal system [U.S. uniform law]."⁷⁷

In evaluating these opinions, one may consider that granting the right of the seller in all cases may discourage him from delivering conforming goods, relying on the second chance to cure the defects or the buyer examination; who has paid to receive sound goods. Moreover, in international sales goods are likely to be subject to fluctuating prices, particularly in the

⁷³ Schlechtriem P, 'Subsequent Performance and Delivery Deadlines: Avoidance of CISG Sales Contracts Due to Non-conformity of the Goods', (2006) 18 *P.I.L.R* 83-98, p.88.

⁷⁴ CISG-AC, Opinion No.5, *op.cit.*, para.3; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.122. See also the same author, *Understanding the CISG*, p.121; Honnold J, (2009), *op.cit.*, pp.426-7; Will M, in Bianca-Bonell, *op.cit.*, p.351; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.568; UNCITRAL Digest Art.48 paras. 2/5.

⁷⁵ Huber P, in Huber/Mullis (2007) *op.cit.*, pp.217, 221-2; CISG-AC, Opinion no 5, *op.cit.*, comments: para. 4.4; Honnold J, (2009), *op.cit.*, 427. During the preparatory Diplomatic Convergence there was widespread agreement that deciding whether the breach is fundamental or not should be considered in the light of the seller's offer to cure and the right of the buyer in Art.49 (1) (avoidance) should not prevent the seller's right to cure. See: Honnold J, *Documentary History*, *op.cit.*, p.686-7,562-564, 572; see below chap.5, fn: 84, (Secretariat's Commentary).

⁷⁶ Switzerland: District Court, (27/4/1992), No.6252, available at: <http://cisgw3.law.pace.edu/cases/920427sl.html>; see also chap.5 fn: 111 (the case of the U.S. Federal Court of Michigan.)

⁷⁷ Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.31.

international commodities trade.⁷⁸ Therefore, one may suggest that, in order for the cure to comply with Art.49 and to ensure that the cure does not cause the buyer any inconvenience, the right of the seller should be an exception which requires the seller to prove that the cure will be made without infringing the buyer's rights. If it is unclear whether or not the cure may cause inconvenience to the buyer, then buyer's right of avoidance should be given priority.⁷⁹

The second requirement is that such a cure by the seller should not cause the buyer any unreasonable inconvenience, such as when the repair requires extensive intervention in the buyer's business.⁸⁰ For example, in a case between an Italian seller of chemicals and a German buyer, the seller's non-conformity caused the buyer's customer disruption in productions. Since the seller's cure could not be made without causing the buyer unreasonable inconvenience, the buyer was granted the cost incurred from the purchase price.⁸¹ Thirdly, the cure has to be within a reasonable time. It has been proposed that this time should begin from the time when the buyer discovers the defect.⁸² If the length time to cure the defect is delayed to a degree amounting to a fundamental breach, as seen from the buyer's point of view, the seller's right to perform can be rejected.⁸³ Finally, the seller has to bear all expense for curing the defects.

⁷⁸ See for more detail about their special characteristics: Takahashi K, 'Right to terminate (avoid) international sales of commodities' (2003) *J.L.B.*, pp.102-31.

⁷⁹ In practice, however, as Schlechtriem suggested: "not much is gained with this concretization of the time factor as a relevant element for avoidance. Especially for commerce in markets with fluctuating prices, where the buyer requires prompt certainty regarding further action ... this merely offers the buyer stones rather than bread." Schlechtriem P, (2006) 18 *P.I.L.R.*, p.90. The author pointed out that it is questionable to order the buyer to pay for non-conforming goods, and thus he suggested developing the right of withholding performance using the general rule of Art.7(2) as a gap filler. This suggestion shows the importance of balancing between the buyer's right of avoidance against the right of the seller to cure. See also a similar suggestion at: CISG-AC, Opinion no.5, *op.cit.*, comments: para. 4.18.

⁸⁰ Secretariat's Commentary, O.R. p.40,(10)

⁸¹ Germany: Amtsgericht München, 23/6/1995 abstract available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=147&step=Abstract>

⁸² Secretariat's Commentary, O.R. p.40,(12). Reasonable time here is the same as the reasonable time for examining the goods and giving notice by the buyer. See above: 3.2.6.2.

⁸³ Secretariat's Commentary, O.R. p.40,(12); Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.122.

The last part of para. (1) of Art.48 stresses the buyer's right to claim damages. Commentators differ in how to implement this remedy. According to one view the right of the buyer is limited to the original breach which can no longer be cured by the seller's subsequent performance, which includes delay, inspection, cover for reshipment and so on, that because the right to claim damage "lapses insofar as the seller has remedied the damages by subsequence performance."⁸⁴ Also the buyer cannot cure the defect himself and ask for damage before first seeking the seller's willingness to remedy.⁸⁵ This view has been criticised as being in violation of the principle of good faith (Art.7 (1)).⁸⁶ Flechtner stresses that "treating this implied relationship as an inflexible legal rule, however, may not be the best approach or the most in keeping with the intentions of the drafter".⁸⁷ For example, if the defect can be readily corrected, it is reasonable for the buyer to correct it, and it can be a duty for the buyer to correct it in order to mitigate the damage, according to Art.77.⁸⁸ Analysing these views, one may note that depriving the buyer of the remedy for the original damage if the seller cures the defect could be inadequate since the impact of the original damage may still exist even after the cure. So for example, a sub-buyer may refuse to buy goods which have been cured. Thus, as quoted above, flexibility in applying the remedies is necessary in order to take into account all relevant circumstances in assessing the damage.

Paras. (2-4) of Art.48 discuss the legal effects of the communication between the parties regarding to the seller's request to cure the defects. They read as follows:

⁸⁴ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.570; in the Secretariat's Commentary it was stated that "the original damage will, of course, be modified by the cure" O.R., p.40,(9).

⁸⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.570.

⁸⁶ Honnold J, (2009), *op.cit.*, p.429

⁸⁷ *Ibid*, (this comment has been updated by the editor).

⁸⁸ *Ibid*. The editor suggested that the best answer to this case is to consider the cost of what the buyer paid and if the seller could have cured at a lower price, the buyer should then be compensated according to the seller's price.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

The seller's request to the buyer as to whether or not he will accept the cure must specify the period needed in order to rely on that notice.⁸⁹ Once the proper request, which clearly expresses the seller's intention of performance (Art.48(3)), has been received, the buyer is under an obligation to inform the seller of his response. However, if he does not respond, Para. (2) considers silence as implied acceptance.⁹⁰ Consequently, the buyer cannot, during the period requested, exercise any remedies inconsistent with performance. Thus, the only available right would be to damages.⁹¹

In order for the seller's notice to have legal effect, it must have been received by the buyer. This rule, however, is not subject to Art.27, where it is enough for the notice to be sent by an appropriate means in the circumstances. Thus, the seller incurs the risk of loss or error in the communication of notice.⁹²

The above discussions of Arts.46-48 aim to protect the parties' agreements by keeping the contract alive through either the remedy of specific performance or the rules for an additional period offered by the buyer or the seller. These provisions take into account the economic effects

⁸⁹ Huber P in Huber/Mullis (2007) *op.cit.*, pp.220-1.

⁹⁰ DiMatteo L et al., *op cit.*, p.134.

⁹¹ Honnold J, (2009), *op.cit.*, p.426.

⁹² Huber P in Huber/Mullis (2007), *op.cit.*, p.221.

and the principles of equity and good faith. In this respect the buyer is entitled to demand the fulfilment of the agreement. At the same time the buyer cannot request substitute goods unless the defect is fundamental; however, the repair of defect is granted even if the defect is not fundamental because substitution in international trade can be more costly. The buyer's additional period plays an important role in increasing the certainty in contracts, helping to avoid conflicts and misunderstandings regarding the time of delivery. The same can be said regarding the requirement of timely notice in Arts.46 (2, 3) and 48 (2-4). Providing the seller with a certain right to cure in Art.48 may prevent the occurrence of fundamental breaches and encourages cooperation and accommodation between the parties in order to fulfil their duties. This approach promotes good faith and friendly relations between parties where this is reasonable without detriment to the buyer.

These general approaches of the CISG should be seen as an important bridge for the compatibility between the CISG and Saudi law in the buyer's remedy as these approaches are recognised by both systems.

5.2.3 Buyer's right to avoid the contract

Although the injured buyer is entitled to resort to the avoidance remedy of the contract under the CISG, this right cannot be used for all breaches⁹³ and it does not automatically applied.⁹⁴

⁹³ Unlike in some domestic contract law, such as English and American law, whereby the injured party is entitled to avoid for any breach; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.123.

⁹⁴ Maskow/Enderlein, *op.cit.*, p.190-1; Lookofsky J, (2008), *op.cit.*, p.115; According to Art.81, by avoiding the contract parties terminate the performance of their obligations except for those designed to take effects on avoidance, such as the dispute resolution rules or for damages; see Yovel J, 'Buyer Right to Avoid the Contract: Comparison between provisions of the CISG and the counterpart provisions of the PECL', in Felemegas J (ed.) p.397. For more detail about the effect of avoidance, see CISG-AC, Opinion no. 9, *op.cit.*

The main characteristic of the remedies in the CISG are to protect the contract by keeping it alive as far as is possible.⁹⁵ Even in cases where the conditions are met, avoidance can take place only through a particular process. Furthermore, the buyer is not required to avoid the contract, and may insist on retaining his right to demand performance according to Art.46.

It is assumed that avoidance is a harsh remedy and an expensive waste, particularly in international trade, and therefore restrictions on practicing this right may be necessary to prevent parties from resorting to immediate cancellation for any breach. That situation would generate uncertainty in international commercial relations.⁹⁶

5.2.3.1 Preconditions for avoidance:

Under the CISG there are two grounds whereby the buyer is entitled to avoid the contract.⁹⁷ One of these is based on the CISG concept of fundamental breach, and the other identifies the time of avoidance in the case of non-delivery:

(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

5.2.3.1.1 Avoidance for fundamental breach:

The most important instrument used in the CISG to save the contract is the notion of fundamental breach⁹⁸ as a condition to entitle the aggrieved party to access remedies which are

⁹⁵ Huber P in Huber/Mullis (2007) *op.cit.*, p.181; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.527.

⁹⁶ Honnold J, (2009), *op.cit.*, p.435; Lookofsky J, in Herbots/Blanpain, *op.cit.*, p123; Maskow/Enderlein, *op.cit.*, p.192.

⁹⁷ Avoidance may comprise national concepts of rescission as well as termination; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.196.

not available with ordinary breaches.⁹⁹ The concept of fundamental breach is not affected by the degree of importance of obligations, and there is no distinction between obligations derived from the CISG, from the contract, or from customary usage.¹⁰⁰ Under the CISG a breach of contract is considered fundamental if the breach falls within the provision of Art.25, which states that:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

In order to decide whether or not a breach is fundamental, Art.25 forms three criteria. Firstly, the breach must be of detriment to the other party, the assessment of which includes both subjective and objective measures. For the former, the buyer must suffer an actual detriment without referring to a person in the same circumstances. The objective elements are that the actual detriment has to be a result of the seller's breach obligations, and such a detriment is based only on the buyer's expectation.¹⁰¹

The second element of fundamental breach is the substantial deprivation of what the aggrieved party is entitled to expect under the contract. Thus, the detriment has to contain of a degree of

⁹⁸ The level of seriousness for the breach to qualify the aggrieved party for the avoidance remedy in civil law and common law is slightly different from the level in the CISG. Civil law systems recognise the concept of *actio redhibitoria*, which allows the buyer to avoid the contract even when the breach is minor. Similarly in common law the concept of so-called perfect tender rule is still practised, which allows the rejection of goods that are not fully in conformity with the contract. However, avoidance in the CISG, as discussed in this section, is allowed only with very serious breaches; Schlechtriem P, (x/2005), 10 *Judica International*, *op.cit.*, p.31; CISG-AC, Opinion No.5, *op.cit.*, comments: para. 2.1-2.2; Bridge MG (2007), 37 *H.K.L.J.*, *op.cit.*, p.33, he compared English law with the CISG in some of these aspects; Dutton K, (2005) 7 *E.J.L.R.*, p.261.

⁹⁹ Reference to fundamental breach was made in the CISG in the following Arts.: 46 (2) the buyer's right to require delivery of substitute goods; 49(1)(a) avoidance of contract for fundamental breach; 51(2) the right of the buyer to avoid the entire contract; 64(1)(a) the seller's right to avoid the contract where the buyer committed a fundamental breach; 70 passage of the risk; 72 avoidance for foreseeable breach; 73(1/2) fundamental breach in the case of contract of delivery by instalment.

¹⁰⁰ Enderlein F, in Sarcevic/Volken, *op.cit.*, p.188.

¹⁰¹ Bijl M, 'Fundamental Breach in Documentary Sales Contracts The Doctrine of Strict Compliance with the Underlying Sales Contract'(2009) 1 *European Journal of Commercial Contract Law*, p.24; Maskow/Enderlein, *op.cit.*, p.113.

seriousness the result of which will deprive the other party of what he was expected by the contract. In other words, if the seriousness of the breach does not relate to what the buyer expects, then there is no fundamental breach. The same consequence ensues if the buyer was deprived of what they expected, but this does not reach substantial level.¹⁰²

Finally, when these two conditions are met the breach is considered fundamental unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result.¹⁰³

Fundamental breach, therefore, may result from various different breaches, including delivery of non-conforming goods, defects in title or documents,¹⁰⁴ and any other breach which can be objectively considered as fundamental.¹⁰⁵ Court decisions show, for example, that it is a fundamental breach to deliver a second hand machine which falls far short of “the digital pictures, as ‘good-as-new’”¹⁰⁶ Similar judgments followed when a seller delivered machinery for recycling plastic bags that was not fit for the particular purpose,¹⁰⁷ and when pressure cookers were sold which were dangerous to use and had been withdrawn from the market.¹⁰⁸

It should be mentioned here that since avoidance in international contracts is considered to be a severe and exceptional remedy, many courts are unwilling to allow injured buyers to practise this

¹⁰² Bijl M (2009), *op.cit.*, p.25; Honnold J, (2009), *op.cit.*, p.281; Lookofsky J, (2008), *op.cit.*, p.115.

¹⁰³ Schlechtriem P, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.287.

¹⁰⁴ This is particularly for documents related to the sale by documents and payment by documentary credit; other accompanying documents such as certificates of origin, insurance and certificates of inspection depend on the seriousness of the breach. See, for more different circumstances for the breach to be fundamental: Schwenzer I, ‘Avoidance of the Contract in Case of Non-conforming Goods’ (2005-06) 25 *J.L.&Com*, *op.cit.*; Bijl M (2009), *op.cit.*, p.27; CISG-AC, Opinion No.5, *op.cit.*, opinion: para5 and comments: para. 4.7-17.

¹⁰⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005) *op.cit.*, pp.576-580; See for more different circumstances for the breach to be fundamental: Schwenzer I, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.438.

¹⁰⁶ Switzerland: Tribunal Cantonal Valais (CA), (21/2/2005), No.C104162, available at: <http://cisgw3.law.pace.edu/cases/050221sl.html>

¹⁰⁷ Italy: District Court Busto Arsizio, (13/12/ 2001), available at: <http://cisgw3.law.pace.edu/cases/011213i3.html>

¹⁰⁸ France: CA Paris, (4/6/2004), No.2002/18702, available at: <http://cisgw3.law.pace.edu/cases/040604fl.html>

right¹⁰⁹ which is regarded as a last resort.¹¹⁰ For example, in a U.S. Federal Court case between a Greek seller and an American buyer, the court found that the buyer had several legitimate complaints regarding his claim of breach of warranty. However, it was held that this breach did not amount to a fundamental breach because the buyer was successfully able to operate the equipment with the assistance of the seller.¹¹¹ Therefore it can be said that the CISG does not recognize the “perfect tender rule”¹¹² that allows the buyer to avoid the contract and reject goods which fail to conform exactly to the contract’s description.¹¹³ Thus, in order for the buyer to have complete certainty about being entitled to practise the avoidance remedy, rather than the general rule of Art.49, he may be advised to specify in the contract his duty to pay for the goods only upon conditions of particular conformity or a punctual time.¹¹⁴

As previously discussed concerning Art.48, the effect of the seller’s offer to cure a fundamental defect without causing the buyer unreasonable delay or inconvenience, results in the breach being not yet fundamental; therefore the buyer may not yet avoid the contract.¹¹⁵

¹⁰⁹ Lookofsky J, (2008), *op.cit.*, p117.

¹¹⁰ It was held by the German Federal Supreme Court that “As the Court of Appeals correctly stressed, avoidance of contract is only supposed to be the [buyer]’s last resort to react to a breach of contract by the other party”: Germany: Bundesgerichtshof (Federal SC), (3/4/1996), No. VIII ZR 51/95, available at:

<http://www.cisg.law.pace.edu/cases/960403g1.html> ; Schlechtriem P, in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.296.

¹¹¹ U.S. Federal District Court (Michigan), (17/12/2001), No.1:01-CV-691, available at:

<http://cisgw3.law.pace.edu/cases/011217u1.html> ; in a similar case, the Swiss Supreme Court did not consider the delivery of fatty frozen meat whose price fell by a quarter from the conforming goods to be fundamental, because the buyer was able to process or re-sell at a lower price, and it was held that the seller’s breach was not significant enough to entitle the buyer to avoid the contract: Switzerland: Bundesgericht (SC), (28/10/1998), No. 4C.179/1998/odi, available at: <http://cisgw3.law.pace.edu/cases/981028s1.html>

¹¹² This rule is recognised under the common law system; see chap.5, fn:98; see also Schlechtriem P, *Interpretation, Gap Filling and Further Development of the UN Sales Convention*, available online at: <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem6.html>

¹¹³ Yovel J, *op.cit.*, pp.400-1.

¹¹⁴ Schwenzer I, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.437; Lookofsky J, (2008), *op.cit.*, p.117; CISG-AC, Opinion No. 5, *op.cit.*, para.1 and comment: para. 4.2.

¹¹⁵ Schwenzer I, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.439; CISG-AC, Opinion No.5, *op.cit.*, opinion para.3. For more detail see section: 5.2.2.4.2.

Although the failure of the seller to deliver the goods on time is dealt with in Para. (b)(1) of Art.49, the buyer is entitled to avoid the contract under Para. (a)(1) of Art.49 if it was set forth in the contract as remedy for the delay, or if the delay constitutes fundamental breach. In the above US case where the ship arrived at its destination two days after the fixed date. Seeing as there was no fundamental breach of contract under Art.49(1)(a), the court held that the buyer was only entitled to damages resulting from the two-day delay.¹¹⁶ However in an Italian case the Court of Appeals held that the contract was governed by CISG and decided that since the seller had failed to deliver the goods at the date fixed by the contract as required by Art.33 of the CISG, the buyer was entitled to declare the contract avoided on the grounds of Arts.45(1) and 49(1) CISG.¹¹⁷ In this case, failure of delivery in the fixed time of delivery was considered a fundamental breach for the buyer when he contracted with the seller.

Late delivery can be a fundamental breach in the case of the sale of seasonal goods,¹¹⁸ or in the delay of delivering documents in the commodity trade where "string transactions prevail and prices are subject to considerable fluctuations."¹¹⁹

If the buyer discovers the non-conformity of the goods before they have been delivered, it has been suggested that the buyer is entitled to avoid the contract even if the defect is not fundamental, unless the seller corrects the defect.¹²⁰

¹¹⁶ See above chap.2, fn: 70.

¹¹⁷ Italy: CA Milano, (20/3/1998), available online at: <http://cisgw3.law.pace.edu/cases/980320i3.html>.

¹¹⁸ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.577; Lookofsky J, (2008), *op.cit.*, p.118; Honnold J, (2009), *op.cit.*, p.437.

¹¹⁹ Schwenzer I, (2005-06) 25 *J.L.&Com*, *op.cit.*, p.439; Bijl M (2009), p.28.

¹²⁰ Honnold J, (2009), *op.cit.*, p.436 [editor comment]; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.581-2. See the reason for this rule, which was expressed in the Diplomatic Conference. chap.5, fn:121.

5.2.3.1.2 Avoidance for non-compliance with additional period for performance:

Once the seller, for example, delays performing his obligations after the contractual time, it may be uncertain whether or not the seller's delay amounts to a fundamental breach, as the CISG does not automatically regard time to be of the essence.¹²¹ Therefore, as discussed in relation to Art.47(1), the buyer can avoid such ambiguity by using an additional period of performance (a so-called *Nachfrist*). This entitles the buyer to avoid the contract without the need to prove that the delay constitutes a fundamental breach, if the seller has not delivered the goods by the end of the additional period of performance given to him by the buyer, or if the seller declares that he will not so perform.¹²²

Whereas Art.47 appears to cover any obligations under the Convention and the contract, Art.49(1)(b) only refers to cases where the seller has failed to deliver the goods.¹²³ Accordingly, the buyer cannot resort to the "additional period rule" to avoid the contract if the seller has delivered non-conforming goods.¹²⁴ In addition, commentators have indicated that partial delivery cannot allow the application of Art.49(1)(b), since partial performance is not non-performance.¹²⁵ Having said that, if the seller's breach in these cases for non-conformity, or part delivery amounts in itself to the level of a fundamental breach, the aggrieved buyer is not deprived of the right to avoid the contract.

¹²¹ Lookofsky J, (2008), *op.cit.*, p118; Honnold J, (2009), *op.cit.*, p.437. During the preparatory diplomatic conference the limitation on avoidance for late delivery was expressed on the grounds of "the importance of the typical contract and the waste resulting from reshipment and redispotion after shipment abroad" O.R. p.354-6, Honnold J, *Documentary History*, *op.cit.*, pp.575-7.

¹²² Honnold J, (2009), *op.cit.*, p.437; Yovel J, *op.cit.*, p.406.

¹²³ Honnold J, (2009), *op.cit.*, p.418-9; Lookofsky J, (2008), *op.cit.*, p123; UNCITRAL digest Art.74 paras. 1, 3. Extension of the application of Art.47, for the procedure of the purpose of avoidance, to include cases where the seller fails to deliver conforming goods, was rejected at the Diplomatic Conference. UNCITRAL grounds for this rejection were that "the notice-avoidance procedure could be abused to convert a trivial breach into a ground for avoidance"; Honnold J, (2009), *op.cit.*, p.419; Honnold J, *Documentary History*, *op.cit.*, pp.147-8,155, 339.

¹²⁴ Honnold J, (2009), *op.cit.*, p.439; Maskow/Enderlein, *op.cit.*, p.193. This rule of "Nuchfrist" under German law applies to non-delivery and delivery of non-conforming goods.

¹²⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.581; Yovel J, *op.cit.*, p.407.

By analogy the application of Art.49(1)(b) includes the failure to transfer documents of title.¹²⁶

This can be justified on the basis of the fact that the parties in an international sale of goods normally bargain for documents, and without them the buyer cannot legally access or resell the goods.¹²⁷ Thus the same logic of the provisions for cases of the non-delivery of goods should exist in the case of failure to transfer the documents of title.

5.2.3.2 Procedures of Avoidance

When the buyer is entitled to avoid the contract for fundamental breach of any obligation or for non-performance after the expiration of the additional period, the CISG requires the buyer to practise this right by following a particular procedure. Art.26 and Art.49(2) provide rules for the declaration of this right and the time limit for avoidance.

5.2.3.2.1 Notice of avoidance

Even in the case of an obvious breach, a buyer who decides to avoid the contract must inform the seller of his wish, according to Art.26 which provides that:

A declaration of avoidance of the contract is effective only if made by notice to the other party.

The requirement for such notice is a normal aspect of commercial relationship etiquette. It is significant in the case of avoidance to reduce effects on the seller such as the suspension of

¹²⁶ Bijl M (2009), p.26; Schlechtriem P, (1986), *op.cit.*, p.78

¹²⁷ Yovel J, *op.cit.*, p.406; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.582: In the sale of warehoused goods or goods in transit Muller-Chen differentiates between the documents that the buyer requires in order to dispose of the goods, and the case of other documents such as insurance policies and certificates of origin, which cannot entitle the buyer to dispose of the goods, thus the application of Art.49(1)(b) can extend to the former case only, and defects in the latter can be dealt with under the provision of Art.49(1)(a).

manufacturing, packing or shipping operations concerning the goods, and in cases where the goods have already been delivered and must be repossessed.¹²⁸

Declaration must also be clear to the extent that the other party implicitly understands the buyer's intention to avoid the contract. To a certain extent this differs from one case to the next according to the circumstances.¹²⁹ For instance, the buyer's refusal to take late delivery is sufficient to show the buyer's interest in avoiding the contract. However this declaration would be unclear in the case of rejection after delivery of the goods, because this rejection can be understood as a demand to repair or deliver substitute goods.¹³⁰

There is no duty for the buyer to give the defaulting seller prior notice of the proposed avoidance or to give him an opportunity to provide an assurance of performance.¹³¹ In addition, according to Art.45(3), there is no requirement for the purpose of avoidance to resort to a court's judgment,¹³² and a court or arbitration tribunal cannot give a period of grace to the defaulting seller.¹³³

¹²⁸ Secretariat's commentary, O.R. p.27,(1-3).

¹²⁹ Karollus M, *op.cit.*, p.65.

¹³⁰ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.585; Secretariat's commentary, O.R. p.27,(4).

¹³¹ This is subject to the anticipatory avoidance Art.72(2), whereby the party who intended to declare the contract avoided is required to "give" reasonable notice to the other party in order to permit him to provide adequate assurance of his performance".

¹³² Schlechtriem P, (x/2005), 10 *Juidica International*, *op.cit.*, p.32; Honnold J, (2009), *op.cit.*, p.435.

¹³³ Honnold J, (2009), *op.cit.*, p.435; Maskow/Enderlein, *op.cit.*, p.192.

5.2.3.2.2 Time limits for avoidance:

As a general rule, the buyer can practise his right to declare the contract avoided without any limitation as to the period of time.¹³⁴ However, if the goods have already been delivered, Para. (2) of Art.49 provides some timely restrictions as follows:

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

The buyer may lose his right to avoid the contract when such a reasonable time has expired, and there are two different cases for when this time begins:

If the seller delivers the goods after the expiration of the contractual time of delivery, the reasonable time runs from the moment when the buyer becomes aware that delivery has been made (Art.49(2)(a)). This may be at the time of receiving a notice of dispatch or transport

¹³⁴ DiMatteo L et al., *op cit.*, p.135; Maskow/Enderlein, *op.cit.*, p.193; Honnold J, (2009), *op.cit.*, p.439. However, as Muller-Chen suggested, if the buyer fails to declare the contract avoided for a long period, he may retain his right to avoid but loses the right to damages under the principle of good faith; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.586. Under the USA UCC, the buyer's right to avoid the contract is limited to "within a reasonable time after their delivery or tender" UCC 2-206(1); "revocation of acceptance must occur with reasonable time after the buyer discovers or should have discovered the ground of it." UCC 2-608(2).

documents.¹³⁵ However, this does not prevent the buyer from using his right to avoid more promptly so long as the delay constitutes a fundamental breach even before delivery.¹³⁶

In the case of any breach other than late delivery, the time runs either from the moment when the buyer knew or ought to have known of the breach.¹³⁷ However, if the buyer has given notice under Art.47(1) requiring the seller to perform within a reasonable period of time, it is from the expiration of that period or from the seller's declaration that he will not perform his obligation within that time. If the seller intends to investigate or remedy the defect, the reasonable time will not commence until the inquiry ends or by the failure to repair.¹³⁸

One question that needs to be asked, however, is whether or not the buyer can (within the reasonable time of Art.49(2)(b)(i)¹³⁹ after the expiration of the additional period) extend the period instead of declaring avoidance of the contract. According to one view, the buyer can extend the additional period several times, which will thereby extend his right to avoid the contract after the expiration of the new period.¹⁴⁰

¹³⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.587.

¹³⁶ Honnold J, (2009), *op.cit.*, p.439.

¹³⁷ DiMatteo L et al., *op.cit.*, p.135. In a case between a Danish seller and a French buyer for the sale of Christmas trees, the Western High Court decided that the buyer lost his right to declare the contract avoided under Art.49 (2) on the grounds that the buyer failed to give notice within a reasonable time after the defect was discovered or should have been discovered the defects; Denmark: Western High Court, (10/11/1999), No.B-29-1998, available at: <http://cisgw3.law.pace.edu/cases/991110d1.html> . The time when the buyer should have been aware of the breach is dealt with under the buyer's obligation to examine the goods, in Art.38.

¹³⁸ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.590.

¹³⁹ When the reasonable time has expired (49 (2)(b)) there is no argument that the buyer will lose his right to avoid the contract. In this regard Muller-Chen stressed that "if he [the buyer] remains inactive during this period and demands neither performance nor avoidance of the contract, then he permanently loses these rights (Article 46(2) and (3) or Article 49 (2)(b)(i) [substitute, repair and avoidance] ... since the seller is no longer obliged to remedy the defect" "he [the buyer] must state the fixing of the second additional period of time within a reasonable period after the first additional period of the time has expired": Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.591-2.

¹⁴⁰ Will M, in Bianca-Bonell, *op.cit.*, p.365; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.583-4.; Maskow/Enderlein, *op.cit.*, p.194, stated that: "Instead of declaring the contract avoided upon the expiration of the first *Nachfrist*, the buyer could set a second *Nachfrist* without losing the right to avoidance"

This view, however, has been heavily criticised as being founded “on a flawed understanding of the purpose of the *Nachfrist* [additional period] and they would undermine the purpose of the time limits in article 49(2)(b).”¹⁴¹ Justifying this criticism, Flechtner assumed that:

A buyer that fails to avoid the contract within a reasonable time after he knew or ought to have known of the lack of conformity, or within a reasonable time after the seller has failed to cure the non-conformity after one *Nachfrist* period, should keep the goods and look to damages or price reduction¹⁴²

In analysing these different views it is vital to identify exactly the issue in dispute is. It seems that the focus of the second view is on the case where the buyer “fails to avoid”. However, considering the first view one may note that its approach is merely to offer the buyer the right to choose (during the period of reasonable time under Art.49 (2)(b)(ii)) between avoidance and the option of continuing the contract by providing an additional period. However, if the buyer “fails” to declare his choice within the time required by Art.49 (2), the first opinion shares with the second view the rejection of the buyer’s right to avoid the contract.¹⁴³ In this regard, it can be said that the first view does not violate the rules of Art 49 (2).

Yet another problematic issue arises here regarding the consequence of extending the additional period several times. The return of non-conform goods to the seller after a certain time “becomes a wasteful, overly complex exercise.”¹⁴⁴ Rather than countenance this practical problematic consequence, it has been suggested that entitling the buyer the

¹⁴¹ Honnold J, (2009), *op.cit.*, p.441 [editor’s comment]; DiMatteo L et al., *op cit.*, p.135.

¹⁴² *Ibid.*

¹⁴³ Since this view was presented by Muller-Chen and Enderlein and Maskow, see chap.5, fn: 139, 140 for their express view regarding the timely notice.

¹⁴⁴ Honnold J, (2009), *op.cit.*, p.441 [editor’s comment]

right to demand a second period for performance would be consistent with the general principle of the CISG remedial system to uphold the contract.¹⁴⁵

Considering the foregoing discussion one may suggest that a distinction should be drawn between, on the one hand, the legal right which the CISG offers for the parties and, on the other, individual exceptional cases which require exceptional rules.¹⁴⁶ Therefore, providing the injured buyer with the right to extend the additional period of performance would benefit both parties and the seller who does not want the buyer to continue with another new period may, according to Art 49 (2)(b)(ii): “declare[s] that he will not perform his obligation within such an additional period.” In this context, an extra additional period cannot survive by unilateral enforcement, and therefore the first opinion would be more appropriate.

Another crucial question concerning the time limits for the buyer to declare avoidance is the fact that Art.49 (2) does not take into account the impact of the seller’s knowledge of the defect if the buyer fails to declare the contract avoided in a timely manner.¹⁴⁷ According to one view, the seller’s awareness of the defect removes the time limits for declaring avoidance. Will’s view was that here it would be “absurd” to allow the seller to rely on the time limits for avoidance stated by Art.49 (2).¹⁴⁸

¹⁴⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.592.

¹⁴⁶ For example if the length of the period may affect the goods, according to the rule of mitigation (Art.77), the damage should apply in this regard, or the rule of good faith if it is clear that the buyer intends to make the seller suffer.

¹⁴⁷ According to Arts.40 and 43(2), the seller’s knowledge exempts the buyer from giving timely notice of defect as required by Arts.39 and 43(1).

¹⁴⁸ Will M, in Bianca-Bonell, *op.cit.*, p.380. He made this comment in relation to Art.43 and it should apply also to Art.40’s exemption.

This view was not welcomed by other commentators. Honnold expressed reservations, demonstrating that the rules on notice with respect to defects are different from those related to the time for avoidance. Firstly, the reason for requiring the notice of a claim of defects is to allow the seller to find out the facts by sample or inspection of the goods before the evidence is lost. In this regard the seller's awareness of the defect reasonably excuses the buyer of failure to give notice.¹⁴⁹ Secondly, delays in avoidance may "create risks of needless cost and risk with respect to the care and return of the goods ... [and the] chance to speculate at the seller's risk". Therefore it is necessary to limit the time of avoidance rather than opening it up to be governed by the domestic law covering the limits of such periods.¹⁵⁰

From these opinions it may be suggested that the second view rightly differentiates between the purpose of notice for defects and that for avoidance. However, it is not sufficient to deprive the buyer of his right of avoidance after the expiry of a reasonable time when the seller was aware of the fundamental breach or refused to comply with the additional period.¹⁵¹ Even though the buyer may resort to other remedies,¹⁵² according to the principle of good faith (Art.7 (1) the seller's dishonesty in hiding the defect should not grant him this privilege. Having said that, allowing the full time limit of national law, which may be years, is not reasonable. But it is also not reasonable to deprive the buyer of his right to avoid the contract only a few weeks after the expiry of the "reasonable

¹⁴⁹ Honnold J, (2009), *op.cit.*, p.442.

¹⁵⁰ *Ibid*; see a similar comment in: DiMatteo L et al., *op cit.*, p.135.

¹⁵¹ See section: 5.2.3.1.

¹⁵² For the justification of not exempting the buyer's late declaration of avoidance if the seller is aware of the defect, Honnold stressed that the buyer's failure to give notice may result in depriving him of most or all of his rights if he has a reasonable excuse. Therefore, he should be exempt from mitigating the loss if the seller is aware of the defect. Honnold J, (2009), *op.cit.*, p.442. This justification does not seem enough to protect the seller who was aware of the defect from the buyer's right to avoid the contract.

time". Thus, comparing the buyer's failure to give timely notice and the seller's failure to comply with good faith may show that the CISG approach to good faith and Arts.40 and 43 (2) do not treat the seller in this case in the same way as one who was unaware of the defect. In this context one may suggest that the seller's awareness should provide the buyer with a right to avoid the contract even after the expiry of the reasonable time period, provided that the consequence of using this right does not violate other principles of the CISG such as those concerning good faith¹⁵³ or the mitigation of damage.

The notion of reasonable time here basically means immediately, in order to avoid additional costs and risks. However, in practice reasonable time should be understood in the light of a wide range of circumstances such as the nature of the goods. So perishables are different from durables, and potential market movements have varying effects depending on the commodity involved.¹⁵⁴

In sum, the examination of the avoidance remedy under the CISG shows that fundamental breach and the expiration of the additional period are the only tunnel for the buyer to avoid the contract. The criteria of fundamental breach focus on the result of depriving the buyer of his expectations under the contract. An account for requiring fundamental breach is given to the fact that delivery of the goods between countries should restrict the return of the goods back to their point of origin. In this context, the CISG applies this rule for requiring substitute goods and the rejection of whole contract if it is partly defected.¹⁵⁵ Restricting the return of goods cross borders in the CISG is a fundamentally important point to be considered in the comparison between the CISG

¹⁵³ See chap.5, fn:134 for a similar approach regarding late avoidance in the case of non-delivery.

¹⁵⁴ Honnold J, (2009), *op.cit.*, p.440; Yovel J, *op.cit.*, p.402; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.587-8.

¹⁵⁵ As discussed above, the buyer may avoid the contract even for non- fundamental breach if the buyer discovers the defect before the delivery of the goods.

and Saudi law, where the law does not intend to serve international sales. This restriction can be seen in the procedure of avoidance which applies only if the goods have been delivered. In this respect the buyer has to declare avoidance after being aware of the delivery; aware of the defect; or after the expiration of the additional periods; or after the seller declaration of non-performance. The reason for this time limit, in the case when delivery has been made, is to allow the seller to arrange for their return cross borders. This function should also be taken into account in the compatibility of Saudi law with the CISG where the law deals with the trade which is conducted locally.

For the purpose of the comparison between the CISG and Saudi law it should be noted that avoidance can be resorted to according to the applicable national law since the CISG does not concern with the validity of the contract, for example, in instances, for the effects of misrepresentation, duress, or fraud.¹⁵⁶

5.2.4 Reduction in price

Besides the specific performance remedy and the remedy of avoidance, the buyer is entitled under the CISG to the remedy of a reduction in price. The CISG adopted civil code to treat the remedy of reduction in price as an adjustment of the contract.¹⁵⁷ This is a different kind of remedy from one for damages.¹⁵⁸ However, the application of this remedy under the CISG has its own rules. Art.50 provides that:

¹⁵⁶ Lookofsky J, in Herbots/Blanpain, *op.cit.*, p.123; Schwenger excluded from the validity rule in Art. 4 any case that has been dealt with in the CISG, e.g. the sale of goods that the seller does not own. Schwenger/Hachem (2009) 57 *A.J.C.L*, *op.cit.*, p.472-3. However, the explicit rule of Art.4 should prevail.

¹⁵⁷ Schlechtriem P, (x/2005) 10 *Juidica International*, *op.cit.*, p34.

¹⁵⁸ See: Honnold J. (2009), p449. In common law systems this remedy is replaced by the right to claim damages: Muller-Chen in Schlechtriem/Schwenger, (2005), *op.cit.*, p.596; Schlechtriem P, (x/2005) 10 *Juidica International*, *op.cit.*, p34.

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

5.2.4.1 Application of the remedy.

The price reduction remedy applies only when the buyer accepts the contract and intended to keep the non-conforming goods,¹⁵⁹ and it is only available if “the goods do not conform with the contract”.¹⁶⁰ Thus, as provided by Art.35, the goods will not be in conformity with the contract if they do not conform with the contract in quality, quantity¹⁶¹ and description or are not packaged in the method mandated by the contract. However, a reduction in price is not applicable if the breach is related to the obligations of delivery (Arts.31-34) and also does not apply given the existence of third party claims (Art.42,43).¹⁶²

It should be noted that Art.50 gives the buyer the right to reduce the price regardless of whether or not the seller is responsible for the defect or if he can be exempted from the damage remedy under Art 79 (impediment),¹⁶³ or even whether or not the buyer has paid the price.¹⁶⁴ The reduction in price is a unilateral remedy without the need to bring an action for it to have its

¹⁵⁹ Honnold J, (2009), *op.cit.*, p.447; Lookofsky J, (2008), *op.cit.*, p126. When the buyer requires performance under Art.46, or declares the contract avoided under Art.49, he is not entitled to the reduction remedy.

¹⁶⁰ At the Diplomatic Conference, Norway suggested an amendment to include a reduction of the price in the case of the goods being subject to third-party rights or claims; however there was no agreement on this proposal and it was withdrawn. See Honnold J, (2009) *op.cit.*, p.451.

¹⁶¹ The defect in quantity is dealt with in special rules under Art.51(1) and Art.52, which “take priority over Article 50”: Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.597.

¹⁶² See *Ibid*, p.600; Honnold J, (2009), *op.cit.*, p.451.

¹⁶³ *Ibid*, p.447.

¹⁶⁴ DiMatteo L et al., *op cit.*, p.138. The UNCITRAL Working Group pointed out that the price is often paid in advance or by letter of credit; that is why they believed that the buyer should have this right in all cases. See: Honnold J, *Documentary History*, *op.cit.*, p.106. However, in practice, there is no indication of records of cases where reductions in price were used in a situation where the price had been paid.

effect.¹⁶⁵ However, the buyer cannot change his declaration of reduction in price to other remedies if the seller changes his position after relying on the buyer's declaration.¹⁶⁶ In the case of disputes over the value of delivered and conforming goods, the burden of proof is on the buyer.¹⁶⁷

In addition to the remedies under Arts.46-52, Art.45 (1)(a) and (b) offers the aggrieved buyer the remedy of damages under Art.74. Thus the buyer may combine the two remedies of a reduction in price and damages (such as the cost of an expert's report), provided that he does not receive double compensation for the same loss,¹⁶⁸ or in the case of impediments where the seller is exempted from the remedy of damages as mentioned above.¹⁶⁹

The buyer is not entitled to reduce the price if the seller has offered the buyer a cure for the non-conformity according to Arts.37 and 48. Under Art.50 the latter rules take express priority over the right of reduction in price.¹⁷⁰ This restriction highlights the importance of the buyer's duty to mitigate damages according to Art.77.¹⁷¹

¹⁶⁵ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.598; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.198. However, the buyer must give the seller notice of lack of conformity as required under Art.39.

¹⁶⁶ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.599; Honnold J, (2009), *op.cit.*, p.448.

¹⁶⁷ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.604; Piliounis P, 'The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) under the CISG: Are these Worthwhile Changes or Additions to English Sales Law' (1999) 12 *P.I.L.R.*, available at: <http://www.cisg.law.pace.edu/cisg/biblio/piliounis.html>

¹⁶⁸ Flechtner H, (2005-06) 25 *J.L.&Com*, *op.cit.*, pp.341; DiMatteo L et al., *op.cit.*, p.138; Honnold J, (2009), *op.cit.*, p.448. He referred to Art.45, which offers the buyer, beside the remedies under Arts.46-52, and so the remedy of damages under Art.74, "should not be construed to permit double recovery based on the reduced value of the goods"; see also,; UNCITRAL Digest Art.50; Australia: SC of Western Australia, (17/1/2003), available at <http://cisgw3.law.pace.edu/cases/030117a2.html>. Here it was held that the buyer is entitled to damages beyond the reduction in price.

¹⁶⁹ See chap.5 fn:163; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.605.

¹⁷⁰ DiMatteo L et al., *op.cit.*, p.139.

¹⁷¹ Honnold J, (2009), *op.cit.*, p.450.

5.2.4.2 Calculating the Reduction in Price.

The method of calculating reduced prices is according to the different proportions in value¹⁷² (not in the contractual price) between what the conforming goods would have been worth at the time of delivery and the actual value of the non-conforming goods at that time (which should be understood according to Art.31).¹⁷³ For example, if at the time of delivery the conforming goods were worth £100 and the non-conforming goods worth £80, the proportion of the reduction in price will be one-fifth of their original price. The appropriate formula can be derived from the following:¹⁷⁴

$$\frac{\text{Reduced price}}{\text{Contract price}} = \frac{\text{Value of the goods delivered}}{\text{Hypothetical value of conforming goods}}$$
$$\text{Reduced price} = \frac{\text{Value of the goods delivered} * \text{Contract price}}{\text{Hypothetical value of conforming goods}}$$

As far as the calculation is concerned, Art.50 does not specify where the assessment should occur. It is therefore proposed, in view of the close connection between the date and place of delivery, that this should be the place where the buyer takes delivery.¹⁷⁵

In conclusion, the reduction in price is the third remedy for the aggrieved buyer and because this remedy does not require the return of the goods it is not essential for the breach to reach the level

¹⁷² This position is different from the 1978 draft of the CISG as the time used in calculating the reduction was the time of the conclusion of the contract which took the Roman position. The reason for the CISG drafters' change from the contractual time to the time of delivery was explained by Honnold "This change avoided constructing a theoretical value for defective goods that might not exist at the time of the contract." Honnold J, (2009), *op.cit.*, p.450; O.R. p.357-8; Honnold J, *Documentary History*, *op.cit.*, p.578-9.

¹⁷³ DiMatteo L et al., *op cit.*, p.139.

¹⁷⁴ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.600; Honnold J, (2009), *op.cit.*, pp.446-8.

¹⁷⁵ DiMatteo L, *op cit.*, p.139; Enderlein F, in Sarcevic/Volken, *op.cit.*, p.198.

of fundamental, to resort to this remedy. However, for the purpose of encouraging cooperation between the parties, the right of the seller to cure is given the priority over the right of reduction in price. This approach can be seen as an application of good faith where each party should fulfil their duty (the seller to deliver conform goods and the buyer to pay the full agreed price). This explanation of this remedy's approach under the CISG facilitate the examination of its counterpart under Saudi law in the following part of this chapter concerning the extent of the similarity of this remedy with the concept of *arsh* under Saudi law.

5.2.5 Specific cases

5.2.5.1 Partial Avoidance

The approach of the CISG to avoidance remedy of upholding the contract arises out of the concern regarding the possibility of dividing the delivered goods into parts in order to limit the avoidance remedy to defective parts and to keep the contract alive for the other conforming parts

Art.51 addresses this issue, providing that:

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

The application of these provisions is designed to cover cases where goods can be delivered in parts.¹⁷⁶ The first rule under Art.51 is concerned with the remedy of the buyer regarding non-conforming parts; the following paragraphs deal with both cases:

It offers the buyer the full right¹⁷⁷ to practise the remedial system in Arts 46-50 with respect only to the non-conforming part, "as if it were the subject of a separate contract".¹⁷⁸ Regarding Art.49, for example, the availability of avoidance is with respect to that part exhibiting non-conformity with the contract.¹⁷⁹

Secondly, in order for the buyer to avoid the entire contract, the consequence of the non-conforming part of the contract (missing or defective goods) must cause a fundamental breach on the other, conforming, part of the contract, and therefore on the entire contract.¹⁸⁰ Thus when the division of the contract, pursuant to Art.25, deprives the buyer of what he has expected under the contract, then the buyer is entitled to avoid the contract.

The question of whether or not the buyer, in partial non-conformity, can avoid the contract on the grounds of the expiration of the additional period as in Art 49 (1)(b), is answered by the statement of Art.51 (2): "only if the failure ... amounts to a fundamental breach." In this regard, the buyer cannot provide the seller with an additional time to perform his obligations, and then

¹⁷⁶ Art.51 does not apply to cases where a single item is composed of various components and one of the components is missing or defective. See Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.607.

¹⁷⁷ Provided that the conditions to satisfy each remedy are available and requirements for these remedies have been dealt with under the discussion of each. For instance, as the defect is related to non-conformity the buyer has to give the seller notice of the defect within a reasonable time; Art.39(1).

¹⁷⁸ Honnold J, (2009), *op.cit.*, p.454; Maskow/Enderlein, *op.cit.*, p.199.

¹⁷⁹ Lookofsky J, (2008), *op.cit.*, p119. Art.51 is closely connected with Art.73 (instalments contract); the main difference is that the latter applies when the contract is an instalment contract where there are different series of deliveries on different dates, whereas the former applies only when a single delivery is defective in that part or the delivery is not completed. Thus, the buyer in instalment contract, by analogy, may resort to the remedy of Art.51 if a single instalment is partly defective or uncompleted: See Kee C, 'Remedies for Breach of Contract Where Only Part of the Contract has been Performed: Comparison between provisions of CISG (Articles 51, 73) and counterpart provisions of the Principles of European Contract Law', in Felemegas J, (ed.) pp.415-6.

¹⁸⁰ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.611.

avoid the entire contract due the seller's failure to perform within that period.¹⁸¹ Some commentators consider that it "appears flawed,"¹⁸² to prevent the buyer from resorting to the additional period procedure¹⁸³ in order to establish grounds for avoiding the entire contract in the above case (non-delivery of part of the goods). This is due to the fact that the purpose of the additional period rule is to relieve the buyer of a long wait for the seller to perform. Furthermore, in partial delivery, the seller may deliver insignificant portions of the goods in order to deprive the buyer of the chance to avoid the entire contract by setting an additional period.¹⁸⁴

However the analysis of Art.51 (1)(2) reveals that the buyer experiences little difficulty under Art.51(2). Essentially, a buyer who has not suffered a fundamental breach in the contract as a whole resulting from the missing part can keep the conforming goods, since they can be used or resold separately from the missing parts. For the missing part the buyer can apply the additional period, and avoid that particular part if the seller fails to perform by the set time. For example, if the seller delivers only one car of the one-hundred agreed by the contract, if there is no fundamental breach for the buyer having only one car, he is entitled to apply the additional period procedure for the other 99 cars and avoid them once that period expires. In addition, the right of the buyer to avoid the contract when the seller has already delivered part of the goods should not be treated the same as when the seller does not deliver at all, since the seller's effort to deliver part of the goods restricts the buyer's right to avoid the delivered part.

¹⁸¹ Honnold J, (2009), *op.cit.*, p.456.

¹⁸² *Ibid.* [editor's comment]

¹⁸³ For the avoidance remedy, as discussed above, Art.49(1) provides two grounds for avoidance; fundamental breach and the expiry of the additional period if the seller fails to perform; see section: 5.2.3.1.

¹⁸⁴ Honnold J, (2009), *op.cit.*, p.456.

5.2.5.2 Early Delivery

Although late delivery is the normal form of a seller's breach of time limits, early delivery is equally a breach of contract.¹⁸⁵ In this regard Art.52(1) of the CISG states that:

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

The main principle of Art.52 (1) is that, unless there is an agreement or usage, the seller is not entitled to deliver the goods before the contractual time.¹⁸⁶

If the buyer accepts the early delivery,¹⁸⁷ he is entitled to any damages arising, and he does not have to examine the goods and pay the price before the original delivery time.¹⁸⁸ According to Art 52 (1), the buyer is not required to demonstrate the existence of inconvenience or a fundamental breach in practising this right.¹⁸⁹ However, an unreasonable refusal may be inconsistent with good faith in international trade (as in Art.7(1)). In the secretariat's commentary it was stated that: "It does not depend on whether early delivery causes the buyer extra expense or inconvenience". However, a footnote added that the buyer must have a reasonable commercial need to refuse.¹⁹⁰ Muller-Chen pointed out that the right of rejection "may not be exercised vexatiously." He added that "the buyer does not need to give any reasons for the rejection."¹⁹¹

¹⁸⁵ Ying, C, p.363; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.613.

¹⁸⁶ *Ibid*, p.612.

¹⁸⁷ It was suggested that the buyer should express reservation of any of his rights, since his acceptance can be seen as an amendment of the contract. See Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.614.

¹⁸⁸ *Ibid*.

¹⁸⁹ Honnold J, (2009), *op.cit.*, p.458.

¹⁹⁰ O.R. p.44,(3); Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.613; Lookofsky J, (2008), *op.cit.*, p119, n90.

¹⁹¹ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.613; For a similar comment, see: Will M, in Bianca-Bonell, *op.cit.*, p.380.

The good faith principle could also be the basis for the buyer's rejection. The seller's premature delivery can be inconsistent with the principle of good faith which requires the parties to fulfil their obligations according to their agreement. Moreover it can be argued that the observation of good faith is limited to the interpretation of the contract.¹⁹²

5.2.5.3 Excess quantity

It is a breach of contract if the seller delivers a quantity larger than that in the contract agreement (Art.35 (1)).¹⁹³ Art.52(2) provides the buyer with the right to accept all the delivery, part of it, or just the contractual quantity, as follows:

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Accepting the excess quantity represents the agreement of the buyer to modify and amend the contract, and so "the breach of the contract is cured with retroactive effect"¹⁹⁴ and the price paid for the excess goods should be "at the contract rate"¹⁹⁵

In some cases, the buyer cannot accept and pay for the contractual quantity, for example if the seller tenders a bill of lading made out for 150 cars whereas the contract quantity was 100 cars. The buyer in this case cannot practise Art.52, since the bill of lading cannot be divided. In this regard, the option is to accept the whole quantity or to reject it in whole. The right of the buyer to

¹⁹² Ying, C, p.364.

¹⁹³ Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.614.

¹⁹⁴ *Ibid*, p.617.

¹⁹⁵ If the seller qualifies a volume discount under his price practice, it was suggested that the buyer should consult the seller as to which rate he must pay. See: Honnold J, (2009), *op.cit.*, p.460-1. Pursuant to Arts.8/9, the surrounding circumstances should be taken into account, and therefore if the volume discount is well known for both parties the contract rate should refer to the well established rate.

avoid the contract in this case occurs only if the delivery of the correct quantity cannot be made within a reasonable time.¹⁹⁶

In sum, these three specific cases as listed by the end of the buyer remedy, demonstrate in the first case, the partial avoidance, the general approach of the CISG of upholding the contract where there is no fundamental breach by keeping the conforming part. In early delivery and excess quantity the approach of the CISG is to emphasise on the contractual agreement by giving the buyer the right to accept them or not. For the compatibility of this rule with Saudi law, the question which should be asked is whether or not the buyer is entitled to divide and modify the contract.

¹⁹⁶ Will M, in Bianca-Bonell, *op.cit.*, p.381; Muller-Chen in Schlechtriem/Schwenzer, (2005), *op.cit.*, p.616; Honnold J, (2009), *op.cit.*, p.459. The author added that if the excess is trivial or usage permits it the buyer has to accept it.

5.3 PART TWO: THE BUYER'S REMEDIES IN SAUDI LAW

5.3.1 Introduction

Consideration of the general approach of Islamic jurisprudence, from which Saudi law is derived, and the way the law addresses the matter of a seller's breach of his duty in the sale contract, demonstrates that the major discussion concerns the right of termination. The notion of the right of the buyer to terminate the contract is known in Saudi law and Islamic jurisprudence as *Khiyarat* (options) rights. This is the main remedy which has been discussed widely and, even though other types of remedies are mentioned, they have not been addressed as separate remedies. The right of requiring specific performance is not mentioned at all as one of the buyer's remedies; whereas the right to withhold performance is indicated in relation to the procedure of delivery. Reduction in price has only been discussed briefly within the options remedies. The approach of Saudi law regarding the sale contract considers that the contract is binding and cannot be avoided unilaterally because the contract becomes part of *shari'ah* rules and its avoidance is a sin.¹⁹⁷ For this reason, jurists broadly discussed the lawful ways for the contract to be optional through the remedies of *Khiyarat* (options).

Since this study is principally concerned with the compatibility of Saudi law and the CISG, the following discussion explores the buyer's remedies in Saudi law by highlighting the counterparts to the CISG's remedies, which are available for the buyer under Saudi law. The subsequent sections discuss firstly the remedy of terminating the contract in order to protect the aggrieved party as the main available remedy. The second section examines the recognition in Saudi law of the concept of specific performance as remedy. The third section identifies the concept of the

¹⁹⁷ See above chapter one: 1.3.2.3.3.

remedy of reduction in price in Saudi law. The outcome of exploring these remedies in Saudi law should provide a better understanding for judging whether or not Saudi law is compatible with CISG's remedies.

5.3.2 Avoidance of the contract

The role of Islamic law in contract is mainly intended to maintain and empower the parties' agreement.¹⁹⁸ This role is emphasized by various Quranic verses as well as by the prophetic traditions.¹⁹⁹ Therefore, once a contract has been concluded, the chance for each party to avoid the contract is restricted to certain circumstances. This section discusses the concept of the remedy of avoidance in Saudi law by exploring, firstly, the causes of a contract becoming unbinding for either or both parties. This is followed by an investigation of the options (*Khiyarat*) as the main remedy for the aggrieved party in binding contracts. Finally, the right of the buyer to withhold the contract is examined.

5.3.2.1 Legal causes for termination

5.3.2.1.1 Termination by Aliqalah (mutual consent)

Parties to a contract are encouraged²⁰⁰ to terminate it, if one party is not interested in performing their obligations.²⁰¹ So, when both parties agree to put an end to their contract, it is returning to its condition before it was entered into. Arts.255 to 265 of the JLR provide the rules allowing such termination, including the importance of mutual consent in rendering the contract legally

¹⁹⁸ See Al-Zuhayli, W., (1985) *op.cit.*, vol.4, p.649; see also section: 1.3.2.2.

¹⁹⁹ See Qur'an, 5:1; 17:34.

²⁰⁰ Some prophetic reports encourage the parties to allow each other to avoid the contract if one party is no longer interested in carrying it out; see section: 5.3.2.1.1; Al-Zuhayli W, (1985), *op.cit.*, vol.4, p.713.

²⁰¹ The meaning of *Igalah* in Arabic is associated with forgiveness.

avoided (Art.260). The nature of this agreement is, according to Art.255, a termination of the contract; whereas in the view of a minority of jurists this agreement represents a new sale contract rather than a termination.²⁰²

5.3.2.1.2 Termination by *Al-Khiyarat* (options)

This is the foremost legal way for the contracting parties to avoid the contract, giving the aggrieved party the *Khiyar* (option) to make the contract no longer binding on his side. Because of the importance of this remedy further details are given below.

5.3.2.1.3 Termination due to the impossibility of contractual performance

This can be a result of an impediment or natural disaster beyond human control, such as the destruction of the specific goods. Art.315 provides for this termination of the contract if the goods have not been delivered yet.²⁰³ It also includes unforeseen changes in the circumstances of the contract, such that the contractual obligations become more burdensome and difficult than what was expected at the time of concluding the contract.²⁰⁴

5.3.2.2 *Al-Khiyarat* (the options)

Introduction

Termination in contract law is based on a complex system of *Khiyarat* (options). Under this heading, various cases have been examined in which an aggrieved party may be entitled to terminate the contract. These cases differ from one set of literature to another. However, it seems

²⁰² See Al-Kasani A, *op.cit.*, vol.4 p.594; Ibn Rushd M, *op.cit.*, vol.2, p.113; Al-Nawawi E, *Al-Majmo'*, *op.cit.*, vol.9, p.200; Ibn Qudamah A, *Al-Mogani*, *op.cit.*, vol.4 p.225.

²⁰³ See section: 2.3.3.1.2.

²⁰⁴ Decision 7 in the Fifth Round, Makkah, Muslim World League, (1985), *Majma' Al-Fikh Al-Islami*, pp. 99-104. This rule is similar to the concept of frustration in common law; Islam M, (1998) 13 *Arab L.Q.*, *op.cit.*, p.343.

that the difference, in the most cases, is in the classification of the options rather than in granting the aggrieved party different rights to terminate the contract. As previously mentioned, the *Khiyarat* (options) are the only area of the Islamic jurisprudence which are designed to provide the aggrieved party with the relevant remedies. Thus it is important for the comparison between the CISG and Saudi law to have a general picture of the various circumstances cited. Three options have already been introduced in the obligation of conformity; namely, *Khiyar takhaluf al-wasf* (discretion option),²⁰⁵ *Khiyar al-'ayb* (option of defect) and *Khiyar al-tadlis* (misrepresentation option). Besides these three options the following paragraphs identify the remaining causes of the options in the Islamic literature.

5.3.2.2.1 *Khiyar al-majlis* (the option of the contractual session)

The session of a contract between the parties before the communication between them is disconnected is the time of *khiyar al-majlis*.²⁰⁶ Thus, if they meet in one place, it refers to the time before they separate (Art.372 of the JLR) or, if they are communicating by phone, it refers to the time before they hang up according to the decision of the International Islamic Fiqh Academy.²⁰⁷ The option of the session provides the right of a party to avoid the contract prior to the end of this period. The aim of this right, is to give a party who may have agreed without due consideration an opportunity to reconsider the contract. However this right must be exercised during the session, and otherwise it will not be considered.²⁰⁸

²⁰⁵ See above chapter three: 3.3.3.1.

²⁰⁶ See the related prophetic report in section: 1.3.2.3.3; Nu'aim A, *Nadreat Faskh Al'uqud fi Al-fiqh Al-Islami*, (Amman: Dar Al-Nafaes, 2006), p.94.

²⁰⁷ Decision No. 54 (3/6) in 14-20/3/1990 of the International Islamic Fiqh Academy under the Organisation of the Islamic Conference (OIC) (1990) 6 (2) *J.I.I.F.A*, p.1265-8.

²⁰⁸ See: the JLR Arts.372-390; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.10; Al-Buhoti M, *Kashaf, op.cit.*, vol.3 pp.199-203.

5.3.2.2.2 *Khiyar al-shart* (the condition option)

According to Art.391 of JLR *khiyar al-shart* an option whereby one party or both stipulate for themselves or for someone else the right to avoid the contract within a certain period, for instance, if the parties to a contract agree at the contractual session that the contract is optional for the buyer within three days. Once this period is over, the contract becomes binding (Art.394). The result of this option is that the contract is initially non-binding during the stipulated period.²⁰⁹

5.3.2.2.3 *Khiyar Al-ghabn* (the option of sale at higher price)

This option is based on the occurrence of deception related to unfair prices,. It considered by some jurists as the fraudulent deception option.²¹⁰ This option was not recognised by all schools of thought.²¹¹ According to Maliki and Hanbali, the aggrieved party has the right to avoid the contract if the degree of price unfairness is major.²¹² Art.407 of the JLR refers to the custom of the forum for the major unreasonable assessments of the value of the object.²¹³ There are three categories for applying the option: in the case of meeting the caravans outside the city to buy from them (Art.408); price hiking (*Al-najash*) by a third party who bids-up the price without any intention of buying, even without cooperation with the seller (Art.410);²¹⁴ and sales involving unsound judgment (Art.409).²¹⁵ This option is based on the concept of giving the principle of good faith priority over the contractual agreement, which may arouse some concerns with regard

²⁰⁹ See: the JLR Arts.391-406; see also: Mansuri, M., *Islamic Law of Contracts and Business Transactions* (New Delhi: Adam Publishers, 2006), p.164; Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, pp.202-10.

²¹⁰ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.172; Nu'aim A, *op.cit.*, pp.97-8.

²¹¹ According to the Hanafi and Shafi'i schools, the buyer is not entitled to this option. See Al-Sarkhasi M, *op.cit.*, vol.12, p.220; Al-Nawawi E, *Al-Majmo'*, *op.cit.*, vol.9, p.791.

²¹² Ibn Rushd M, *op.cit.*, vol.3, p.223.

²¹³ Al-'Umary M (2006), *op.cit.*, p.178.

²¹⁴ Al-Silmi A, *op.cit.*, vol.1, p.22; Al-Mesry R, *op.cit.*, p.153.

²¹⁵ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3, pp.211-3.

to international trade where certainty in upholding the contract is one of the principles of the CISG.

5.3.2.2.4 *Khiyar al-khiynah* (betrayal option)

This option is related to trust sales, such as sales at-cost, partnerships, cost-plus, or below-cost sales, if the seller does not inform the buyer of the actual price.²¹⁶ If the seller's statement is false by proof or confession, the buyer has no option according to Art.447.²¹⁷ Instead he has the right to reduce the price by the actual rate to compensate for the misrepresentation by the seller.²¹⁸

5.3.2.2.5 *Khiyar* for non-performance

If the seller does not deliver the goods or the buyer does not pay the price, the aggrieved party is entitled to this option. In the case of insolvency Art.467 of the JLR suggests that the aggrieved party has the right to terminate the contract and withdraw the object of sale, in the case of the seller, if it is still reachable under the control of the buyer.²¹⁹ However, in the Hanafi view the aggrieved party cannot resort to avoidance of the contract, but can instead withhold performance of his duty in order to ensure the ability of the other party to perform. Thus, by not resorting to the right to withhold, he waives his right and becomes a creditor.²²⁰

If the refusal of performance is a result of procrastination, Art 469 provides the seller with the right to terminate the contract. Art.472 provides the buyer with a similar right if the seller cannot

²¹⁶ Nu'aim A, *op.cit.*, p.98.

²¹⁷ The option is available in other cases in these kinds of sales, such as if the price is correct but the seller does not disclose the reason for that special offer (Art. 450).

²¹⁸ See JLR Arts.447-453. Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.175.

²¹⁹ Nu'aim A, *op.cit.*, pp.125-7; Ibn Qudamah A, *Al-Mugni*, *op.cit.*, vol.4, p.457.

²²⁰ See Al-Kasani A, *op.cit.*, vol.4, p.511; Ibn Qudamah A, *Al-Mogni*, *op.cit.*, vol.4, p.456; Al-Zuhayli, W., (1985), *op.cit.*, vol.4, p.695.

deliver the object of sale.²²¹ The JLR differentiates between whether or not the price is available locally. Art.468 allows the seller to avoid the contract if the price is far away from the place of performance (outside the city) to avoid unreasonable waiting as Ibn Qudamah suggested.²²² However, if the price is available locally the seller according to Art.471 cannot avoid the contract and the buyer is forced by the court to pay.²²³ Ibn Taymiyyah in this case rightly argues that the seller is entitled to terminate the contract to avoid the difficulty of allegation.²²⁴ Some jurists discussed the time period for the buyer to avoid the contract, and most of such discussions for this option related to the right of the seller to payment. Nevertheless these rules are applicable to both parties and show the approach of Islamic law regarding delays in performance. The time period during which the buyer is entitled to resort to the avoidance remedy is not clear; however, some jurists ruled that if the seller took a period of time which is considered too long by custom to move his property from the sold house, the buyer is entitled to avoid the contract.²²⁵

5.3.2.2.6 *Khiyar tafarruq al-safqa* (sale partition option)

If the object of sale is partitioned the buyer is entitled to this option. In this regard the buyer may resort to the avoidance remedy or may accept the remainder of the object of sale.²²⁶ The JLR addresses this option in Art.466 by differentiating between whether or not the conforming part is affected by the partition. If the contract is affected the sale is valid and the option is granted for both parties.²²⁷ However, if the partition does not affect it the buyer is not entitled to avoid the

²²¹ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.187.

²²² Nu'aim A, *op.cit.*, p.91.

²²³ Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.240. In this case the problem becomes one of specific performance, which is discussed in the relevant section later.

²²⁴ *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.23, p.136; This is also the view of Ibn 'Uthaymeen, Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.264.

²²⁵ Ibn Qasim A, *Hashiat*, *op.cit.*, vol.4 p.458; Al-buhoti M, *Kashaf*, *op.cit.*, vol.2, p.44.

²²⁶ Nu'aim A, *op.cit.*, p.99; Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.175.

²²⁷ They have to be unaware of the defect in the other part. Ibn 'Uthaymeen M, *op.cit.*, vol.8, p. 183.

conforming part. In this regard the last sentence of Art.466 provides that, in the case of excess quantity, it belongs to the seller and, in the case of shortfall, the buyer has to pay only the price of the conforming goods according to the contract rate.²²⁸ Art.430 applies a similar rule if only part of the goods is defective. This rule also serves the buyer who pays only part of the price. According to Art.330, the buyer is entitled to receive goods equal to the price he has paid if the partition of them has no effect.

5.3.2.3 Withholding performance

As discussed above, Islamic law restricts the right to terminate the contract to certain cases and otherwise prohibits breaches of the parties' duties. On the other hand, since the contract is based on commutative nature,²²⁹ the law tolerates the use of the right of withholding performance. However, this right allows the parties to withhold the performance of their duties in order to ensure the performance of the other party. Consequently the use of this right is limited to situations before delivery of the goods or before payment. The difference between this right and the right of termination is that the aggrieved party who resorts to it is still under the obligations of the contract, and his practise of this right occurs only to force the other party to perform his duty.²³⁰ However, despite the fact that the right to withhold is granted for an aggrieved party, the position of the right to withhold performance as a general right is unclear. The important question here is that of who should be granted the right to withhold. In other words, who should perform first in the case of the absence of contractual agreement? Does the buyer have the right to retain the payment until the goods are fully delivered? These questions are dealt with next.

²²⁸ Al-buhoti M, *Kashaf*, *op.cit.*, vol.2 p.66; Ibn 'Uthaymeen M, *op.cit.*, vol.8, p. 183.

²²⁹ Al-Zuhayli W, (1985), *op.cit.*, vol.4, p.651.

²³⁰ Al-Zuhayli W, (2007), *op.cit.*, vol.1, p.63.

According to the JLR, the type of object and the price play important roles in deciding who delivers first. In this regard, Art 328 states that if the sale involves the exchange of non-fungibles²³¹ (specific goods) in return for other non-fungibles, then delivery of the two elements must be mutual. This mutual delivery is necessary to ensure equal compensation to the two parties, neither of whom deserves to receive their part of the exchange first.²³² For example, barter contracts involve an exchange between the seller's and the buyer's goods. The same applies if the sale involves the exchange of fungibles for fungibles, such as in currency exchange transactions. The practical way to achieve this equality as suggested by Art.328 of JLR is to appoint a trusted person to take the goods and their price and conduct the delivery.²³³

If the price is due as a liability on the buyer (not specified),²³⁴ and the object of sale is specified (non-fungible), the JLR Art.329 provides that the seller has to deliver the object of sale first, because the buyer has a right to the specific non-fungible object of sale, whereas the right of the seller is a liability on the buyer himself rather than a particular object.²³⁵

However, in contrast, Ibn 'Uthaymeen suggested that the seller should be allowed to withhold the commodity until receipt of the price,²³⁶ and if the buyer is worried about receiving the goods there is no need to force either party to deliver first. The practical solution is then to appoint a trusted third party to take charge of the goods and payment to ensure delivery by both parties.²³⁷

²³¹ The difference between fungible and non-fungible here is that the former is undetermined goods, and the duty of the party is to find the object which fits the agreed description; however in non-fungible goods the duty is to deliver the particular object which was nominated by the parties.

²³² Ibn 'Uthaymeen M, vol.8, p.361

²³³ *Al-Moso'ah Al-Kuwaitiah*, op.cit., vol.15, p.45; Ibn 'Uthaymeen M, vol.8, p.361.

²³⁴ In the past, gold and silver used for payment could be specified (non-fungible).

²³⁵ See: Ibn Qudamah A, *Al-Mogani*, op.cit., vol.4, p.198; Al-Shrbiny M, op.cit., vol.2, p.74. The views of the Hanafis and Malikis suggest the opposite; see Al-Sarkhasi M, op.cit., vol.13, p.192; Ibin Joza M, op.cit., 247.

²³⁶ This opinion can be supported in that the seller is in the same position as a pawn-broker, who withholds the object and does not have to deliver it until he receives the price. Al-Zuhayli W, (2007), op.cit., vol.1, p.63.

²³⁷ Ibn 'Uthaymeen M, op.cit., vol.8, p.364.

This approach seems to represent an appropriate way to deal with daily transactions, whereas waiting for the intervention of the court to force the other party to perform may take a much longer time.

The above rules are related to cases where both the object of sale and its payment are present at the exchange session. However, if one of them is not present, the right to withhold is granted to the other party who is ready to perform. In this regard, Art.329 states that "... the seller has no right to withhold the goods unless the payment is absent from the session. In such a case he may resort to the right to withhold pending the receipt of the price". Similarly, the buyer has the same right to withhold payment if he perceives a risk that delivery of the object of sale will be delayed.²³⁸ This right is emphasized implicitly by Art.331, which states that "if the parties agree on postponing the payment of the price, the seller has no right to withhold the commodity".

Even though the right to withhold performance attempts to ensure the fulfilment of the parties' duties, it states neither whether or not this action is a remedy nor the impact of practising this right if the other party fails to perform their contractual duties. In other words, the connection between withholding performance and the remedy of avoidance is not clear.²³⁹

5.3.2.4 Declaration of avoidance

When a party to a contract decides to resort to the remedy of avoidance, the JLR does not require the declaration of this remedy. Art.405 explicitly provides that in 'condition option' avoiding the contract does not need the consent or awareness of the other party. Similar provision is given for

²³⁸ Al-Shrbiny M, *op.cit.*, vol.2, p.75; Ibn Qudamah A, *Al-Mogni*, *op.cit.*, vol.4 p.198; Al-Zuhayli, W., (1985) *op.cit.*, vol.5, p.70;

Al-Moso'ah Al-Kuwaitiah, *op.cit.*, vol.15, pp.45-8.

²³⁹ See section 5.2.3.1.2 for the impact of giving an additional period to perform the contract under the CISG.

the defect option (Art.432). This approach represents the view of the majority of jurists²⁴⁰ considering that the other party who has no option, the remedy of avoidance does not rely on his awareness in analogy with the agency contract where the owner does not have to inform the agent of his intention to sell.²⁴¹ However for the Hanafi school, avoidance does not take its effect unless the other parity is aware of it.²⁴² According to some Hanbalis, the return of the object is a condition of avoidance.²⁴³ From these opinions it can be said that requiring the declaration is necessary in contemporary trade, and the reasoning in the first opinion does not consider the dramatic financial loss of not notifying the other party. This is especially serious in international trade where shipping and packaging may be involved. As discussed above, although the JLR does not require a short period for notifying the prevailing view requires a short period for the notice in order to practise these rights.²⁴⁴

It should be noted here that according to some Saudi commercial regulations some periods have been set. In the Commercial Documents Regulation Art.48, allegations regarding past due bill has to be within three years. Similar period is given in companies' law (Art.226 of Company Law). According to Art.27 of Commercial Court Law the allegation against shippers has to be made within three months for domestic shipments and one year for the international. These periods are related to contract other than sale contract, nevertheless they show the development of Saudi law to adopt the necessary rules for commercial activities despite the fact that they have no reference in classical Islamic jurisprudence. In this regard the adoption of the CISG should be seen as a development of Saudi law as long as its rules are compatible with Islamic law.

²⁴⁰ This is the view of Maliki, Shafi'i and Hanbali. See: Al-nawawi, E, *Almajmo'*, *op.cit.*, vol.9 p.200; Ibn Qudamah, A., *Al-Mogni*, *op.cit.*, vol.3 p.529; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.109.

²⁴¹ *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.20, p.109.

²⁴² Ibn Nojaim Z, *op.cit.*, vol.6 p.18; Al-kasani A, *op.cit.*, vol.5, p.273; Nu'aim A, *op.cit.*, p.111.

²⁴³ Al-mardawi A, *Al-Al-insaf*, *op.cit.*, vol.4 p365..

²⁴⁴ See section: 3.3.4.

5.3.3 Specific performance

5.3.3.1 State of the remedy

As indicated above, there are certain cases where the contract can be avoided, and if the refusal to perform the contractual duties does not fall within these permissible cases then avoidance is unlawful and is considered sinful.²⁴⁵

This general rule has been encouraged by some Quranic verses and prophetic reports that order contractors to fulfil their contracts, and point out that the contractual obligations must be respected unless performance would amount to a violation of the Islamic code of conduct.²⁴⁶

Although the term specific performance is not mentioned as a remedy for an aggrieved party, it is recognised amongst jurists²⁴⁷ that the defaulting seller can be forced to perform his obligations in accordance with the contract.²⁴⁸ The only difference between jurists is that some hold that the buyer's primary remedy in such circumstances is to require the seller specifically to perform.

²⁴⁵ See section: 1.3.2.3.3.

²⁴⁶ Nu'aim A, *op.cit.*, pp.62, 85.

²⁴⁷ JLR Art.260 states that: "individual avoidance by *Al-Iqalah* (mutual consent) is not valid without mutual consent thus there is no force to this termination if one party does not want it". This article implies meaning of the specific performance, as the parties cannot avoid the contract individually by their own will. In addition Art, 470 empowers the seller by the court to force the affluent buyer to pay the price, or the court may sell the commodity and force him to pay its price. This article also provides that if the buyer is bankrupt the seller can avoid the contract.

²⁴⁸ Al-Senhori A, *op.cit.*, vol.6, p.153.

The entitlement of termination is only available if the buyer cannot receive what he expected by the remedy of requiring performance. This view follows the main principle that the contract should be fulfilled so long as the seller's performance is possible.²⁴⁹

An alternate view suggests that the seller's mere refusal to perform gives the buyer the option either to keep the contract alive and require him to perform his contractual obligations or to terminate the contract.²⁵⁰ This opinion is supported by analogy with bankruptcy cases in which the aggrieved party is allowed to avoid the contract if the other party is bankrupted, because in both cases the aggrieved party will suffer the same detriment.²⁵¹

Analysing the theory of specific performance under Islamic law may suggest that the approach of keeping the contract alive and enforcing its duties by authority has both advantages and disadvantages. It has a positive effect in protecting the contract and increasing certainty in trade, since the contractual duties become part of *shari'ah* rules which oblige its followers to fulfil their contracts.²⁵² However, there are differences between the contract's duties and the *shari'ah* rules. The former were established by the mutual consent of the parties, and the latter established by the *shari'ah* itself, such that no interference by individuals to adjust them is allowed. Thus it can be argued that in contractual obligations there should be more flexibility according to the parties interests. So, for instance, an aggrieved party may prefer to avoid the contract rather than requiring performance. This may be true, especially in contemporary trade where the value of time and the cost of court action as well as the difficulties in conducting trials in foreign courts. On this ground, giving the aggrieved party the chance to reassess the benefit of keeping to the

²⁴⁹ This is the Hanafi view; see Al-Kasani A, *op.cit.*, vol.4, p.511.

²⁵⁰ This is the view of a majority of jurists; see: Nu'aim A, *op.cit.*, pp.90-3.

²⁵¹ *Ibid*, pp.90-3.

²⁵² *Ibid*, pp.62-6.

contract or avoiding it, would be a more appropriate solution which complies with the general rule of the freedom of the contract. In addition, upholding the contract where the seller does not fulfil his duty of delivery is not reasonable. Upholding the contract in this case may encourage the seller to rely on such protection and consequently not perform in a timely manner.

5.3.3.2 Scope of the remedy

The application of this remedy has a wide scope and may be invoked in a wide variety of circumstances. The buyer may resort to the specific performance remedy when the seller fails to procure, produce or deliver the purchased goods or part of them. This includes the failure to perform an obligation to take a positive action such as to deliver at a particular port or on a date provided by the contract, or in preparing and handing over shipping documents, or all other actions he may undertake to do or refrain from doing under the contract. All of these duties and any other contractual obligations can be enforced by the court as long as performance is possible and achievable.²⁵³ The question of whether the seller is required under Saudi law to deliver substitute or to repair the defect, as the CISG does, is only discussed regarding the delivery of substitute goods. The remedy of delivering substitute goods is granted in all four schools of thought if the contract is not related to specific goods.²⁵⁴ If the contract concerns generic goods, the seller's liability is not associated with particular objects therefore the fulfilment of his duties requires the delivery of any conforming goods.²⁵⁵ However, repairing the defect is not

²⁵³ See: Al-Mardawi A, *Al-Insaf*, *op.cit.*, vol.6, p.269; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.23, p.136.

²⁵⁴ Othman F, (2006), *op.cit.*, vol.2, p.583.

²⁵⁵ Ibn Qudamah A, *Al-mogni*, *op.cit.*, vol.6, p.101.

considered as a primary remedy; for example in the defect option the available options are avoidance or reduction in price.²⁵⁶

5.3.3.3 The seller's right to cure non-conformity

Requiring specific performance in Saudi law is a default remedy to protect the contractual agreement from any breach. Therefore, the question here is whether or not the seller can be granted the right to cure a defect if he offers this to the buyer.

The question of whether or not the seller has a general right to cure defective performance is not addressed directly in Saudi law. Instead, jurists have suggested that if the defect in goods was removed before terminating the contract, the buyer's right to avoid the contract is no longer available. An illustrative example has been given in this case, suggesting that if a sick animal is sold which becomes healthy again before the contract is terminated the buyer is not entitled to terminate the contract. Art.442 goes further, ordering the buyer to refund the seller who has paid for the defect to be if it is removed immediately. Commentators make the continuity of the defect up until the time of avoidance a condition for termination.²⁵⁷ This condition can be justified because the right of the buyer to terminate the contract is granted in order to remove the detriment. When the defect no longer exists, there is no reason to resort to termination, and thus the buyer can no longer rely on the defect option as its legal cause does not exist.²⁵⁸ On this ground it can be suggested that an offer by the seller to cure the defect should be given the same

²⁵⁶ See section 3.3.3.2.1 on the discussion of the defect option, and section 5.3.4 on the right of reduction in price.

²⁵⁷ See Othman F, (2006), *op.cit.*, vol.1, p.339.

²⁵⁸ See Al-Shirazi I, *op.cit.*, vol.1 p.284; Al-buhoti M, *Sharh op.cit.*, vol.2, p.174. Malikis require that the buyer should not be in a state of fear of finding the defect again, otherwise avoidance is still available for the buyer. See Othman F, *op.cit.*, vol.1, p.339.

value as its natural removal; and therefore, it cannot be refused as long as there no detriment to the buyer result.

5.3.4 Claim of *arsh* (reduction in price)

The JLR provides the buyer with one of two remedies; avoidance of the contract or reduction in price if the object of sale is defective (Art.424) or not in conformity with the contract (Art.463).²⁵⁹ This remedy is granted to the buyer without the consent of the seller, provided that the buyer was not aware of non-conformity at the time of concluding the contract.²⁶⁰

The method by which the price is reduced is called *Arsh*, which can be defined as the percentage difference in value between sound and defective examples of the same object at the time of concluding the contract. An example would be if a car is bought for the price of £25,000 and it is later found that the gear box is defective. In this case, if experts in that trade suggest that the value of that type of sound car is £20,000²⁶¹ and the defective one is worth £15,000, so the percentage difference between them equals a quarter of the car's value. The calculation of *arsh* in this case would be a quarter of the price paid for the car which is £6,250.²⁶²

²⁵⁹ The remedy of *Arsh* (reduction of price) is not agreed by all schools of thought. Hanafis and Shafi'is do not recognise this right, as they suggest that resorting to the *Arsh* is a new contract which needs the agreement of both parties, as the seller may not accept the reduction, since the price was for the whole of the commodity which cannot be divided into the sound and defective parts. The buyer in this regard can avoid the contract if he is not happy with the condition of the commodity. However, if the seller was aware of the defect at the time of concluding the contract, the buyer can resort to the remedy of reduction in price. This opinion was supported by Ibn Taymiyyah and Ibn 'Uthaymeen; see: Ibn 'Uthaymeen M, *op.cit.*, vol.8, p.319; vol.9, p.374 and vol.10, p.75; *Al-Moso'ah Al-Kuwaitiah*, *op.cit.*, vol.31, pp.90-4.

²⁶⁰ Othman F, (2006), *op.cit.*, vol.1, p.218.

²⁶¹ It is not necessary that the price of the object is the same as the transaction price, since the price in a contract is subject to different factors, some of which are not relevant to the goods themselves, such as the relationship between the parties or additional service in the commodity. Ibn Qudamah, A., *Al-Mogni*, *op.cit.*, vol.4, p.259.

²⁶² Al-Buhoti M, *Kashaf*, *op.cit.*, vol.3 p.218; Ibn 'Uthaymeen M, *op.cit.*, vol.8, 318.

In cases where the goods delivered to the buyer are found to have new damage caused by the buyer, Arts.430 and 441²⁶³ of the JLR, provide the buyer that he can avoid the contract and pay *arsh* for the new defect. Alternatively, the goods may be kept without claiming *arsh* since the defects were caused by both parties and it is not reasonable to transfer the detriment from one party to the other when they share the responsibility for the defect. According to this view, if the buyer chooses to avoid the contract the reduction in price should be the difference in the value of the goods before and after the new damage.²⁶⁴ Thus, if the value of the goods before the buyer's damage was £100, and £80 after, the buyer must pay £20 *arsh* to the seller in order to reject the goods.

Another opinion²⁶⁵ however, suggests that avoidance in this case is no longer available to the buyer, because the current defect was caused by both parties and so it is not reasonable to move the detriment from one party to the other. In addition, the object of sale has changed in its substance and value. Thus the buyer has to keep the goods and claim for *arsh* (a reduction in price). However, the former opinion is more accurate, since the seller's responsibility in the contract is to deliver the goods in conformity with the contract and the seller should be aware of the state of the goods before delivering them. In addition the new defect caused by the buyer in most cases occurs as result of the buyer's right to use the object of sale. Therefore paying the seller for the new defect should be enough to allow the buyer to avoid the contract.²⁶⁶

²⁶³ This is the opinion of the Malikis and Hanbalis; Ibn Qudamah A, *Al-Moghl*, *op.cit.*, vol.4, p.260.

²⁶⁴ This method is different from the one where the buyer wants to keep the goods and asks for a reduction in price, because the damage of the contract is under the buyer's control, whereas the request for the reduction of the contract value is related to the contractual time. See Ibn Qudamah A, *Al-Moghl*, *op.cit.*, vol.4, p.260.

²⁶⁵ This is the Hanafi and Shafi'i' view; see *Ibid.*, vol.4, p.260.

²⁶⁶ *Ibid.*, vol.4, p.260.

It should be mentioned here that if the goods have been completely damaged by the buyer alone, Art.434 provides that the buyer can only resort to the remedy of reduction in price (*arshi*)²⁶⁷

From the study of Saudi law regarding the buyer's remedies it can be concluded that the contract of sale in Saudi law is designed to cement the parties' contractual agreement through two important principles. First, at the conclusion of the contract, full certainty regarding the obligations involved is required for its validity. This includes the requirement of clear identification of the object of the sale²⁶⁸ and its existence under the seller's control.²⁶⁹ When the contract is concluded the second principle concerns the protection of the agreement by prohibiting the parties from avoiding the contract unilaterally. The legal causes of avoidance show that, without mutual agreement of avoidance, impediment and *Khiyarat* (options), an individual party cannot avoid the contract. The role of options is to draw the line between binding and optional contracts. The criteria in these options consider the principle of the mutual consent at the time of concluding the contract. When the contract does not represent the parties' consent the contract becomes optional. Because the non-performance option violates the parties' consent some jurists are reluctant to offer this option. Some opinions provide the buyer only with the remedy of specific performance. In the same approach to protecting the contract, Saudi law recognises the right of withholding the contract as an alternative to avoidance. This right is based on the commutative nature of the relation between the parties and its role is to keep the contract alive.

In the light of this general approach it can be inferred that specific performance is the main ground for available remedy, and the aggrieved party is entitled to force the other party to

²⁶⁷ Al-Buhoti M, *Kashaf, op.cit.*, vol.3 p.223.

²⁶⁸ See section: 3.3.1.

²⁶⁹ See section: 4.3.1.1.

perform or to replace the defective goods. Reduction in price is an optional remedy for the buyer under the JLR. According to some jurists this remedy institutes a new contract which requires the agreement of both parties.

Classic Islamic literature does not pay great attention to procedures in contracts. In this regard, the right to withhold is not a condition for avoidance, and neither is establishing a time period of the essence of performance as in the CISG additional period. Furthermore, giving notice of defect, and declaring avoidance are obligations, according to some jurists, although the JLR does not specify this.

Although this study does not attempt to examine claims of damages, it should be borne in mind that there is not much recognition of this remedy in the early Islamic studies because of the lack of certainty in calculating damages. However, a recent decision of the international Islamic Fiqh Academy approves this remedy for actual damages.²⁷⁰

²⁷⁰ Decision No. 109 (3/12) in 23-28/9/2000 of International Islamic Fiqh Academy under the Organisation of the Islamic Conference (OIC) (2000) 12 *J.I.I.F.A.*, p.303-6; Al-Senhori A, *op.cit.*, vol.6, p.118-24. Claims for damages would require further separate study to assess the extent of the Islamic recognition of this remedy.

5.4 COMPATIBILITY BETWEEN THE CISG AND SAUDI LAW IN THE BUYER'S REMEDIES

5.4.1 Introduction

In general it can be said that the environments where Saudi law and the CISG were generated are reflected in their respective remedies. Whereas the CISG was designed to serve international trade taking into account the transfer of goods between countries, contract law in Saudi Arabia was drawn up mainly to regulate sales contracts where the goods existed at the time of making the contract.²⁷¹ In addition, the contract reflects the requirements of Islamic doctrine. This difference does not necessarily lead to any incompatibility between them, but it may explain their approaches. One clear example of this is the requirement to give notice in several of the CISG's remedies (ten times), whereas in Saudi law giving notice is not considered as a duty in performing remedies.

Both systems share an interest in keeping the contract alive, but they are different in their approaches. The concept of fundamental breach plays an important role in limiting the aggrieved party's access to certain CISG remedies.²⁷² In Saudi law mutual consent and good faith are the principles for obligating the parties to fulfil their duties.²⁷³ Saudi commentators are not familiar with the expression 'fundamental breach'. Transferring goods across borders may justify this requirement under the CISG.²⁷⁴ Even though there are criteria for non-conformity in Saudi law, where minor breaches do not allow the aggrieved party to practise some remedies, no clear guidelines are provided as to what is minor and what is not. Mutual consent and good faith in contracts in Saudi law reflect the influence the doctrine of *shari'ah*. More priority is given to

²⁷¹ *Salam* sales and *Istisna'* deal with contracts if the goods do not exist at the contractual time; see section: 1.3.1.2.

²⁷² This includes delivery of substitute goods, avoidance and avoidance of the contract if they are partly defective.

²⁷³ See sections: 1.3.2.3.2 and 5.3.2.1.

²⁷⁴ Before delivery the buyer is allowed to avoid the contract even if the is not fundamental. See chap.5, fn: 120, 121.

these principles over economic efficiency. In this regard options in contracts include criteria that are not available under the CISG, such as sale at a higher price, betrayal and misrepresentation. Judges under the CISG should have no difficulty in recognising certain levels of these criteria since the interpretation of the CISG requires the observation of good faith (Art.7 (1)), and Art.8 refers to the parties' intentions taking into account all circumstances. Economic efficiency plays an important role in the CISG's remedies by requiring fundamental breach for remedies that require the return of the goods. For the same purpose, the buyer is required to give timely notice of avoidance only if the goods have been delivered. In Saudi law there is no clear reference to these requirements. Nevertheless since the doctrine of *shari'ah* regarding contracts is based on reasons and people benefits, as discussed above²⁷⁵ Saudi courts will not ignore these clear economic implications as long as they do not violate specific rules in the Qur'an or the prophetic traditions. In particular this would be true since the custom of trade requires the economic sufficiency.

A consideration of the examination of the CISG's main three remedies, of specific performance, avoidance and reduction in price, shows that they all have counterparts in Saudi law.

5.4.2 Specific performance

Both sets of laws recognise the buyer's right to request that the other party performs their contractual obligations by delivering the agreed goods. Although there is no particular provision for a specific performance remedy in Saudi law, it can be said that this remedy is a basic right of the buyer. After all, contract law in Saudi Arabia was designed to empower the contractual agreement where the parties cannot avoid performance except when *Khiyarat* (options) remedies

²⁷⁵ See section: 1.3.2.2; for different view: Foster N, (II)(4/2007), *R.P.A, op.cit.*, p.14.

apply, which include the right to require substitute goods. Unlike the CISG, as stated above, there is no specific requirement of fundamental breach in order to apply substitute remedy. However, the question of the buyer's right to require repair is recognised only in the CISG as part of the right to specific performance. In Saudi law it is not clear whether the right of performance includes the right to request repair in the case of non-conformity. Since Saudi law does not require a fundamental breach in the contract, this should not be a problem for the buyer who is entitled to substitute goods. Nonetheless the seller can protect his right of choosing to repair the defect rather than deliver substitute goods by including this right in the contract. It would become part of the contract by default as a customary condition if Saudi Arabia ratifies the CISG.

The buyer's right in the CISG to give an additional period for the seller to perform has a counterpart in Saudi law under the right to withhold performance. In both laws the buyer can suspend the contract pending the performance of the other party. However, it should be borne in mind that, despite the fact that they are similar in the actions to be taken, the additional period itself has different functions. The main function of withholding performance in Saudi law is to ensure the intention of the other party to perform their duties, but the CISG's approach is to make the time of delivery of the essence of the contract, thus allowing the buyer to avoid the contract immediately at the end of the additional period. For the purpose of compatibility, it can be said that the ultimate goal of both approaches is to encourage the other party to perform and to enable putting an end to the contract at a certain point of time if the other party fails to fulfil their obligations. In addition, it seems that the approach of the CISG increases the certainty in contracts by making the time of delivery of the essence.

There should be no potential contradiction between Saudi law and the CISG rule of the seller's right to cure (Art.48).²⁷⁶ Saudi law requires for the buyer's right to resort to the defect option that the defect should remain until the remedy takes place, even for a short period after resorting to the remedy as stated by Art.442. This was intended to cover cases where the cure may occur without the intervention of the seller, such as in the recovery of sick animal. If the cure is provided by the seller, the situation should be more acceptable, given the requirement to not cause inconvenience to the buyer. Saudi law considers that silence, where a response is required and expected implies consent,²⁷⁷ which is compatible with the CISG Art.48 (2). The CISG provision concerning the seller's request to cure should be seen under Saudi law as a condition increasing certainty in the contract.

5.4.3 Avoidance

The CISG's approach to avoidance is to restrict it to fundamental breaches detrimental to the other party and depriving him of what should have been expected of the contract, or after the expiry of the additional period in the case of non-delivery. Saudi law does not have such restrictions. Nonetheless the application of fundamental breach under the CISG should not lead to different results from the practice of avoidance in Saudi courts, because here the concept of fundamental breach is flexible according to the court's discretion. . Similar decisions to those in CISG cases will be given under Saudi law with respect to the principle of considering the purpose of the contract and the criteria for the option of defect. For example, Saudi judges will apply a similar rule to the above case of the US Federal Court, because the ability of the buyer can operate the equipment with the assistance of the seller to cure the defect within a short time,

²⁷⁶ The rule of Art.48 as Ponell pointed out is one of the "provisions which were virtually unknown at the time to most, if not all, traditional domestic sales laws." See chap.2, fn:215.

²⁷⁷ This is a legal maxim in Islamic law. Al-nnadoy A, *op.cit.*, vol.2, p.150.

as stated by Art.442 of JLR. However the decision of the Swiss Supreme Court, to not consider the breach as fundamental when the price of fatty frozen meat fell by a quarter, will not be recognised under Saudi court. Instead the buyer has to first to request the seller to deliver substitute goods, to reduce the price or to avoid the contract. Due to the court's discretionary power to consider that ability to re-sell the goods at a lower price prevents a fundamental breach which is not necessarily the accurate interpretation of fundamental breach.²⁷⁸

Under Saudi law a breach of the timing of delivery, according to some jurists, does not entitle the buyer to avoid the contract if performance is achievable. Also, withholding the contract keeps it alive even after the expiry date for delivery. These opinions may suggest that the time of delivery in Saudi law is not always of the essence, which is the same approach as the CISG.

The CISG requires the right of avoidance should be practised within a reasonable time after becoming aware of the breach. Saudi law does not similarly restrict the time to practise the right. Although the JLR suggests a flexible period for resorting to the avoidance remedy, the majority of jurists require immediate practice of the remedy. Declaration of avoidance is a condition for avoidance only in the Hanafi School. Having said that, the procedure of the CISG regarding avoidance is not unfamiliar to Saudi jurists and can be recognised in Saudi court decisions.

5.4.4 Reduction in price

The reduction in price has been accepted as a remedy in both systems, and the method for calculating it is, perhaps surprisingly, almost identical except for the timing of the evaluation of the price. The difference between delivery time in the CISG and the contractual time in Saudi law is not, however, significant. Both laws explicitly indicate that the reduction in price cannot

²⁷⁸ See section: 5.2.3.1.1.

be allowed if the breach has been cured, and this remedy cannot be resorted to for breaches other than non-conformity.

5.4.5 Specific cases

In respect of avoiding the contract in its entirety, both laws hold the same approach. The buyer cannot avoid the conforming part unless the goods cannot be partitioned.

The early delivery and excess quantity rules under the CISG merely refer to the contractual agreement, and the rule that the price of excess goods should be at the contract rate has its counterpart in Saudi law (Art.307 of the JLR).²⁷⁹

In the light of the above analysis, it can be concluded that the remedial system of Saudi law is compatible with the counterpart buyer's remedies in the CISG. Nevertheless, Saudi lawyers will probably encounter difficulties in applying remedies of the CISG, not because conflicts between the two systems but because they are unfamiliar with the expressions and structure used in the CISG. Therefore, it can be said that the ratification of the CISG by Saudi Arabia would be an important step in the development of the law regarding the need of international trade to melt Saudi contract law into the wider legal system of the CISG which its rules and language would ease the communication between nations.

²⁷⁹ See section: 3.3.1.3.

CHAPTER SIX: CONCLUSION

6.1 INTRODUCTION

The main task of this study has been to examine the question of Saudi Arabia ratifying the CISG. In order for the Saudi authorities to recognise this convention, it is necessary to consider whether it conflicts with Saudi national law. The Saudi constitution disallows the adoption of rules which oppose the principles of Islamic law, and hence assurance of the absence of contradictions between the CISG and Islamic contract law will remove the main barrier to the ratification of the CISG. In proving compatibility between the two systems, two significant areas have been investigated: their rules on the seller's obligations and the buyer's remedies. Demonstrating compatibility here should provide solid grounds to encourage the progress of ratifying the CISG. To achieve this purpose requires, first, the identification of similarities between their approaches and detailed provisions, and second, a demonstration of whether or not any dissimilarities may hinder ratification or whether if they are compatible with the boundaries of Islamic law. The findings of this study are presented below, starting with the approach of the CISG and Saudi contract law followed by detailed findings concerning compatibility in the seller's obligations of Arts.30-52 of the CISG and its counterpart in Saudi law.

6.2 FINDING OF THE RESEARCH

6.2.1 Compatibility in approach

Contract law in Saudi is not codified law, as it is in western societies where the law tends to be publicly known as sets of formal, objective and compulsory rules in the form of published legislation or the decisions of courts. Instead, Islamic classical literature is the main source of

Saudi contract law. Two important consequences of this are that, first, frequent updates are not characteristic of Saudi contract law, where new transactions require reference to relevant discussions of the Islamic literature. Second, the reference to various discussions in the literature itself shows that contract law is not rigid. If correctly applied in line with its original rules, *ijtihad* welcomes and recognises flexibility and novelty as long as Islamic principles are not contradicted. In this context the CISG can be studied through the process of *ijtihad*, and jurists who study different opinions from different schools of thought should have no problem considering the CISG as part of this variety.

Saudi flexibility in contract law can also be seen in the principle of the freedom of contract and the role of custom in responding to changes in society and the markets. It is apparent that, whereas the law is fixed and restricted regarding aspects of worship,¹ the main principle of monetary transactions is that they are permissible and lawful, and thus no particular form of contract law has to be followed. Accordingly, if any rule in the CISG is claimed to be in contradiction with Islamic law, the burden of proof shifts to the one who claims impermissibility.² This flexibility can be clearly seen in the principle within Islamic contract law which recognises custom and market usage, where the parties to a contract are implicitly obligated to adopt any well established customs as part of their contract. Based on these principles, it can be said clearly that, whilst greater similarity between the two laws would facilitate and encourage ratification, the CISG cannot be rejected by Islamic law on the ground of being not derived from Islamic law or because its provisions have no existence in Islamic law.

¹ This includes rules related to performing prayers, fasting and giving to charity.

² See section: 1.3.2.3.1

The well established principle of certainty and avoiding *gharar* (risk) in Saudi law regarding mutual consent and awareness of contractual duties may provide some common ground between the two systems which may facilitate the recognition of the CISG approach in Saudi courts. It can be argued that many of the rules concerning the seller's obligations and buyer's remedies in the CISG increase the level of certainty regarding the contractual agreement by reducing the chances of conflict between parties and misunderstandings. Different places of delivery, timely notice for examining conformity after delivery and additional periods for performance are examples of the CISG's approach to establishing certain and stable grounds for contracts. Nevertheless it can be said that the concept of certainty in the Islamic perspective is not concerned with promoting the growth of trade or facilitating unifying law pertaining to contracts.

The intervention of Islamic rules in contract law is limited to the purpose of protecting the rights of contractual parties and society, which is no different from the overall aim of UNCITRAL and the CISG. This can be proved by considering that prohibited transactions are limited to certain areas, namely usury, hazard (*Gharar*) and deception. It was clearly stated in the Islamic primary sources that these kinds of transactions are prohibited in order to benefit the contracting parties and to prevent animosity between people, rather than serve to religious ends. Although the good faith principle in Saudi law is derived from the moral rules of Islam, the CISG also recognises this principle in interpreting contracts. Therefore Saudi judges should have no difficulties with this principle, which they already apply. Nevertheless, one has to admit that this principle may not be applied to the same extent in the two systems, since Saudis would give it priority over economic efficiency. Yet the ratification of the CISG in Saudi Arabia would be in the interests of both systems. Saudi law may consider economic efficiency in terms of the purpose of increasing certainty in international trade. On the other hand, the application of the CISG in Saudi courts

may provide interesting material for the discussion of case law and of interpretations of the good faith principle.

Besides the above key points, both laws recognise the main principles of contracts, namely; 1) an objective measures in cases of conflict, 2) the parties' autonomy, and 3) their approaches to keeping the contract alive as far as possible.

Focusing on the similarities in principles is very helpful in dismissing the myth that difficulties in finding a common approach are inevitable due to the fact that Islamic law was generated from neither common nor civil law, which is the background of the CISG.

Therefore the main concern here should be narrowed, to prove that individual articles of the CISG differing from Saudi law are not necessarily obstacles to the ratification of the CISG but, rather are compatible with and acceptable to the principles and practitioners of Islamic law.

6.2.2 Compatibility in respect of the seller's obligations

In both the CISG and Saudi law delivery has been recognised as the transfer of control from seller to buyer so that the latter can exercise his property rights as owner of the sold goods. The CISG identifies different actions constituting effective delivery by the seller (Art. 31), whereas Saudi law has left the question of practical effective delivery to custom and trade usage whether practised by actual or constructive methods. In constructive delivery both systems require the seller to identify the goods specifically to the contract. There should be no conflict between the CISG and Saudi law regarding the transfer of the risk since both systems locate this at the time of delivery. The link between the passage of risk and the right of disposal in Saudi law is similar to

the commentators' consideration of any action which contradicts good faith if one party speculates at the other's expense.

In both systems reference to the time and place of delivery are given in the contractual agreement and custom. In the absence of contractual agreement they are similar, requiring the seller to deliver the goods without delay after the conclusion of the contract. However, the CISG provides more detail according to whether or not the place of the goods at the contractual time of delivery is identified. This is the same as the *Hanafi* School approach, which differs from the JLR's reference to the place of contractual agreement. By ratifying the CISG, the places mentioned in Art.31 become customary places. This should be seen as an important step towards the general aim of promoting certainty and preventing disputes over the place of delivery, which is better than deeming the contract null as suggested by some jurist. Although the Islamic literature does not discuss delivery of documents, scope of delivery as suggested by JLR proves that the delivery of documents is required just as in CISG.

The general approaches of the CISG and Saudi law regarding conformity are the same. Both prioritise the certainty in contracts. Whereas the approach of Saudi law is to oblige the parties to come to their contract with the full possible certainty, this requirement can be seen in the CISG at the end of the contract in the buyer's obligation to examine the goods and to give notice within a short period. By fulfilling these requirements, the contract will end with the same result of certainty. Applying the CISG in Saudi will achieve the target of certainty at both the beginning and end of the contract.

Since priority is given to the parties' agreement about the quantity, quality and description of the goods in both the CISG and Saudi law, there is no conflict between them in the matter of

obliging the seller to deliver the goods according to the contractual agreement, and of considering the failure to comply with this to be a breach which gives the buyer the right to claim the relevant remedies. Saudi law goes further by considering the pre-contractual quantity, quality and description as conditions for the validity of the contract. This requirement follows the principle of certainty in contracts where *gharar* (risk) is prohibited. The impact of this requirement should not affect compatibility, since the reference for certainty is the custom of the trade. Also it can be said that the validity question is out of the CISG's scope. The question of the compatibility for the legal criteria of conformity of the goods in the case of the absence of any agreement regarding their quality and descriptions is answered in both systems. The criteria for conforming goods is dealt with in Saudi law in a passive way, indicating criteria for defective goods which allow the buyer to reject them such as difference in value, diminution in the goods and unfitness for the buyer's purpose. However the CISG employs an active method by identifying criteria for conforming goods: they must be fit for ordinary purposes or the particular purpose, the seller being in breach if he does not comply. It seems that the CISG's approach is preferable, since it offers an objective measure which makes it much easier to meet the buyer's expectations. Although the two approaches differ slightly in measuring conformity, they provide same protection to the buyer to receive goods according to their expectations.

The position of the JLR in not recognising sale by model or sample does not create obstacles to compatibility, as the majority of legal jurists are not in favour of this. The JLR's reason for its position is to avoid non-conformity between the sample and the delivered goods, where goods were in the past produced mainly by hand. This position would be resolved if the JLR were to be reformed to cover contemporary goods manufactured accurately according to their samples. The requirement of the CISG for the delivered goods to be packaged or contained should be the same

under Saudi law, since the scope of delivery includes items connected to the object of sale for its benefit. Also this requirement has become part of the custom of international trade.

As for the timing of conformity, the laws have the same provisions linking the time of the seller's liability for non-conformity to the time of passing on the risk, even if the defect becomes apparent only after that time. The silence in Saudi law concerning a guarantee for the goods to remain free from defects for a certain period should not cause any problems, since the parties are free to add such conditions to their contract.

The seller's right to cure is granted to the seller in both laws, as long as this does not cause harm to the buyer.

The obligation of examining the goods and giving notice of non-conformity is emphasised by the CISG. In Saudi law, less importance is given to this as there is no reference to the obligation of examination, and the JLR is more relaxed about the time notice of defects should be given to the seller. The prevailing legal view, however, obliges the buyer to give prompt notice in order to preserve his rights. In addition the rules regarding examination and giving notice are not mandatory principles. On these grounds the CISG's rules regarding examination and giving notice are compatible with Saudi law.

Under both systems the parties' awareness has an important impact on their rights. The buyer's knowledge of a defect at the time of concluding the contract deprives him of the remedy. Similarly, under the CISG the seller's awareness of a defect will discharge the buyer from his duty to examine the goods and to give timely notice, and in Saudi law the disclaimer of liability will not excuse a seller who was aware of the defect.

The protection of the buyer against a third party is granted in both the CISG and Saudi law, with the extra Saudi requirement of precautionary measure obliging the seller to own the goods before reselling them. Under the CISG the time of delivering the goods is the time for them to be free from third party rights. This is the same according to some jurists' views under Saudi law allowing the sale of *faduli* pending the approval of the owner, which is different from the JLR where the relevant time is the time of concluding the contract. The absence of particular rules in Saudi law regarding third party claims does not preclude the buyer's rights if he cannot have full disposal of the goods as discussed in the delivery obligations. Thus there should be no difference in practice between the CISG and Saudi law in this regard.

Both laws consider infringement of intellectual property rights as a breach of the contract. Nevertheless, the CISG approach to IP rights can be understood within the concept of conformity with fitness for a particular purpose which the seller has to be aware of. The reason for this approach is that IP rights can be protected only in particular countries. This rule is necessary because the CISG is an international convention, which is not the case in Saudi law.

Keeping the contract alive is the central approach of both systems. Nevertheless the CISG protects the contract using the concept of the fundamental breach, whereas principles of mutual consent and good faith are important in Saudi law. The remedial system of Saudi law was laid down only under the rules of the options, which are counterparts of avoidance remedy in the CISG. However, two other buyer's remedies in the CISG, specific performance and reduction in price, are also recognised by Saudi law as rights of the aggrieved buyer.

The major potential differences in the remedies between Saudi law and the CISG concern the specific performance remedy and the concept of fundamental breach.

The contract of sale in Saudi and Islamic law gives priority to specific performance over other remedies. So difficulties may arise in cases where the applicable law does not recognise this remedy, as in systems based on common law. Given that the rules of remedies are not imperative and the parties have the right to agree otherwise, by choosing to adopt the CISG the parties implicitly waive their rights according to its provisions. The same can be said regarding the right to claim repair, which is not addressed in Saudi law. The right of the buyer to give an additional period and the seller's right to cure is addressed similarly by both laws. Nonetheless the CISG provides clearer guidance for resorting to these rights where the additional period is required to make the time of delivery of the essence and specific rules govern the seller's notice of cure in order to prevent misunderstandings between parties whose places of business are in different countries.

Although the term fundamental breach does not exist in Saudi and Islamic law, its function is served by some of the Saudi rules, such as the requirement that claims for the defect option should not be trivial and the principle of considering the purpose of the contract

Saudi law is not definitive on the role of the timing of performance, due to its guiding principle of serving basic aspects of contracts rather than to promote trade and enhance the international movement of goods. This being the case, and bearing in mind the right of withholding the contract and the emphasis on performance, the adoption of the CISG's restrictive rules about avoidance with regard to the time of delivery should not lead to noticeable differences from the current system. The procedure of avoidance under the CISG regarding the rule of time limits and the declaration of avoidance is already within the acceptable opinions to jurists in Saudi Arabia.

The remedies of a reduction in price and avoiding part of the goods, excess goods and early delivery are encouraging examples for the compatibility between the CISG and Saudi law, as both systems are similar in their rules.

From the findings of this study it can be concluded that, if Saudi were to adopt the CISG, the rules on the seller's obligations and the buyer's remedies should not materially alter or introduce major changes into Saudi law. They are already either recognised in all or some of the main schools of thought in Islamic jurisprudence, or are among the permissible rules under the principle of freedom of contract. In this respect the role of the CISG in Saudi law is to "modify the traditional *opinion juris* rule to make it easier to establish a binding international usage" as Goode suggested regarding the role of the CISG with national laws.³

On the basis of the legal justification for ratifying the CISG, the following section gives some recommendations in respect of this finding.

6.3 RECOMMENDATIONS

This study attempt to bridge the gap between Saudi law and the CISG has shown that although the CISG is derived from civil and common law, whose origins differ widely from the Islamic background of Saudi law, the two systems share much common ground in one of the major parts of sales of goods contracts; namely, the seller's obligations and the buyer's remedies.

In the light of these findings, ratification of the CISG by the Saudi authorities should be considered. Saudi traders, lawyers and academics should consider the CISG as an important alternative for international contracts. In recommending the ratification of the CISG and

³ Goode R, (2005) 54 *I.C.L.Q. op.cit.*, p.563.

applying its rules in Saudi Arabia, attention should be paid to the state of current Saudi law and the advantages of the CISG.

Since Saudi contract law was not derived from the *internationally recognised systems* (civil and common law), ratifying the CISG could escape its isolation from the international trade community, as well as to avoid withdrawal from the application of Saudi domestic law under national courts where sale contracts involve international parties. In addition, Saudi contract law is not codified law thus the CISG can be recommended on the grounds of the necessity of having clear and definite laws which can respond properly to international sales contracts where certainty and clarity are highly required.

It can be suggested that by participating in the CISG, groundless stereotypes about the legal system of Saudi Arabia being unduly rigid would be removed as they are in many cases due to a lack of communication.

The success of the CISG of gaining wide recognition in the international community represents in many cases, especially with regard to the concepts and expressions used in contracts, as a development of the trade customs and usage which are binding under Islamic and Saudi law. Therefore it can be said that considering the CISG may become an Islamic duty to meet the required stability and certainty in contracts,⁴ taking in account that the CISG leaves wide range of contract's rules to national laws including the rules of validity. Therefore it can be confirmed that ratification of the CISG will add a new dimension to the historical system of Islamic contract law, without abandoning its spirit.

With regard to interest, which is out of the scope of the thesis, it can be suggested that the CISG was designed to serve the international community with recognition of social and cultural differences, therefore to raise concern about this conflict may encourage the UNCITRAL's effort to modify the rule of interest to be implemented only if the national law would apply it in other cases.⁵

Beside the recommendation of ratifying the CISG, the findings of this study would be of the interest for arbitral tribunals⁶ and individuals including Saudis and others who seek for compatible transactions with Islamic law to use the CISG as the applicable law in their contracts. Since the CISG is not in conflict with Islamic law and has gained wide recognition internationally, it would be the practical instrument to be used with a foreign party who may not be familiar with Saudi law. It is the writer's belief that this recommendation would protect the parties from being guided by private international law to an applicable law which may be unfamiliar to them, or in conflict with Islamic principles.

Regarding the development of Saudi law it is crucial that the Ministry of Justice publishes the judicial decisions and makes them easily accessible for the public.⁷ In addition, novelty in classical Islamic literature in sale contracts has to be considered, jurists and judges should apply the *ijtihad* tools to provide rules responding to the contemporary international contracts. To achieve this target, jurists who trained under *shari'ah* systems should engage in studying

⁵ It should be noted that at the preparatory stage Saudi Arabia did not participate, and although there were a number of Middle East representative countries in the drafting committee, such as Egypt, Iraq and Libya, the main concern of some of these countries was to protect the interests of developing countries against industrial nations, rather than to represent Islamic law.

⁶ It is very common for CISG to be implemented through arbitration. See for example: Shulman M, and Singh L, 'China's Implementation of the UN Sales Convention through Arbitral Tribunals' (2010) 48 (2) *The Columbia Journal of Transnational Law*; Gruber P, 'The Convention on the International Sale of Goods (CISG) in arbitration' (2009) 1 *International Business Law Journal*, pp.15-34.

⁷ The Jurisdiction law in Art.89 requires the publication of courts' decisions.

international law including the well established rules of sales of goods under the CISG. More academic studies of the CISG and its numerous case laws and elaborated commentaries are necessary for a better understanding of their functions and their state in Islamic law. It is hoped that the modest findings of this thesis could provoke many more comparative academic studies between the CISG and Islamic jurisprudence.

This study demonstrates that in the specific area of the seller's obligation there is no legal barrier to the ratification of the CISG by Saudi. However, in order to establish full compatibility of the CISG with Saudi law, a series of similar studies concerning other issues covered by the CISG is required.

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