Finding an Ideal Contract Law Regime for the International Sale of Goods

A Comparative Study on the Remedy of Termination for Breach of Contract under the United Nations Convention on Contracts for International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC) and The Gambia Sale of Goods Act

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Abstract

Parties enter into contracts for obtaining specific contractual benefits, and, as a result, they engage in risk allocation hoping that each will keep to its promise. These expectations are sometimes shattered by a breach by one of the parties. The contract at times provides remedies for breach of contract. However, in most cases, the parties' contract leaves the regulation of the breach to the governing law of the contract. The efficiency of a remedial rule can be judged from the balance that it has put in place in ensuring the risks involved in international transactions are not skewed against the breaching party just because it is in breach. This article thus makes a comparative study between the United Nations Convention on Contracts for International Sale of Goods (CISG), UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts (the PICC) and Sales Act (Act No. 4 of 1955) of The Gambia (GSGA) on the right of a creditor to terminate a contract to elucidate the similarities and the differences among the three regimes and to determine which of the regimes provides a suitable contract law model for the international sales of goods. The article reviews and analyses the legal instruments, case law and academic writings under the regimes and concludes that the CISG provides the most suitable contract law model for the international sale of goods.

Keywords: contracts, termination of contracts, CISG, International Sale of Goods, Unidroit Principles, the Gambia, comparative law.

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A Introduction

The remedy of termination, otherwise known as avoidance, is a powerful weapon in the hands of a creditor to a contract. Its nature and effect sharply contradict the fundamental notion of *pacta sunt servanda*, a legal conception that connotes that contracting parties have to respect their respective bargains. The exercise of the right of termination has the effect of interfering with the very foundation of the parties' contract by abruptly bringing it to end without the parties realizing the benefits of their bargain. Due to the nature of this remedy and the complexity, cost and the risk involved in international sale of goods transaction, the article seeks to determine which of these legal regimes, the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980, UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts (PICC) 2016 and Sale of Goods Act, (Act No. 4 of 1955) of The Gambia (GSGA), provides the most suitable approach to the remedy of termination for international contracts. The article intends to achieve this by critically comparing how the remedy of termination is available and exercised in the three legal regimes. The article first provides a detailed explanation of the right of termination for non-adherence to contractual timeline, non-conforming delivery and anticipatory breach under the CISG, the PICC and the GSGA. This is followed by a comparison of the three legal regimes' approach to termination of a contract in case of non-adherence to contract timeline, non-conforming delivery and anticipatory breach. It further proceeds to make critical examinations of the different approaches to determine which of the regimes provide a more suitable contract law regime for the international sale of goods.

The article highlights the similarities and some of the significant divergences among the three regimes in the areas stated and finds out that the triviality of the breach triggers a different reaction from the three legal regimes. This article thus concludes that the United Nations Convention on the International Sale of Goods provides the most suitable approach. This conclusion is supported by the fact that the CISG favours performance of contract than termination, which has the effect of minimizing the costs and risks associated with contract termination.

B Termination under the CIS

The CISG was prepared under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) and approved in 1980. It intends to provide a modern, uniform and fair regime for the international sale of goods.[1] The convention applies to the sale of goods contract between parties from two different contracting states or if the rules of private international law of a contracting country led to the application of the law of a contracting state, unless excluded by the parties.[2]

1 https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg.
2 Art. 1 of the CISG.

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It is said to be a widely successful international instrument largely due to the number of countries that are signatory to it, including the major trading countries.[3] Among the notable absence of participating countries to the convention are the majority of African states, including The Gambia. This absence is not fully explained, but it could be associated with the regional integration efforts that African countries seek to achieve independently.

Among the reasons leading to the success of the convention is said to be how the remedies under the convention are structured, which looks at the consequence of the breach instead of its origin.[4] The convention has a unitary approach to breach of contract, which is, the failure of a party to perform its contractual obligation is judged independent of any fault on its part. A debtor is therefore in breach of contract if it does not perform what the contract required of it regardless of any fault.[5]

The CISG avails a creditor the right to terminate a contract, but severely limits its availability and exercise. The convention introduces the term 'fundamental breach' as the benchmark for the right of termination to be exercised. The convention favours the performance of a contract by making it difficult for a party to avoid a contract. It ensures that contracts are kept in force in order to avoid the costs and necessities of unwinding the contract if performance is possible.[6] In essence, it makes the remedy of termination as a remedy of last resort. How these favours or burdens international sale contracts is seen later.

I Remedy of Avoidance for Failure to Respect Contractual Timeline under the CISG

The CISG gives a creditor the right to terminate a contract where another party failed to adhere to the timeline stipulated by the contract for the delivery of goods or payment of purchase price, but severely restricts its availability and exercise. The convention introduces the term 'fundamental breach' as the benchmark for the right of termination to be exercised. The convention favours the performance of a contract by making it difficult for a party to avoid a contract by ensuring that contracts are kept alive to avoid the costs and necessity of unwinding the contract where performance is possible.[7] In essence, it makes the remedy of termination as a remedy of last resort.

The remedy of avoidance is provided for by Articles 49 (in case of the seller in default of its contractual obligation) and 64 (in case of a buyer in default of taking delivery or payment of the price). Article 49(1) provides the conditions under

3 CISG Advisory Council Declaration No. 1, available at www.cisgac.com/cisgac-declaration-no1, *see* Fountoulakis C, Remedies for Breach of Contract under the United Nations Convention on the International Sale of Goods. ERA Forum, Vol. 12, 2011, pp. 7-23. There are currently 93 participants (countries that acceded to the convention), among which are the major world trading nations China, United States, Germany, Japan, the Netherlands, Switzerland, Singapore, etc. *See,* for top 20 trading nations, available at www.wto.org/english/res_e/statis_e/wts2019_e/wts2019_e.pdf. Last accessed 15 September 2020.

4 Fountoulakis C, Remedies for Breach of Contract under the United Nations Convention on the International Sale of Goods, p. 8.

5 *See* Arts. 45 and 61 of the Convention.

6 Huber, *in* Ferrari F & Gillette PC, International Sale Law Vol II, Cheltenham, Edward Elgar Publishing Limited, 2017, p. 400.

7 *Ibid.*, p. 400.

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which a buyer may declare a contract avoided for the breach by the other party.[8] Under this provision, a buyer may avoid the contract if the breach occasioned by the seller amounts to fundamental breach[9] or in case of non-delivery of the goods within an additional period fixed as per Article 47 if the non-adherence does not amount to a fundamental breach.[10] Article 64(1), on the other hand, avails the seller with the right to avoid the contract if the buyer committed a fundamental breach concerning its payment obligation or fails to pay the purchase price within an additional fixed period in accordance with Article 63.[11]

The aforementioned articles make the remedy of avoidance available to the creditor if the other party is in breach of his contractual obligations and that breach is fundamental or if it fails to render performance within the additional period granted by the creditor (this second procedure for avoiding a contract is also called *Nachfrist*).[12] This shows that the availability of the remedy of avoidance under Articles 49(1) and 64(1) is subjected to the severity of the breach or repeated failure after being given a chance to rectify the default.

II Notion of Fundamental Breach

Fundamental breach has been defined by Article 25 of the Convention as:

> 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.

Article 25 provides a two-tier test for determining whether a breach is fundamental. First, the failure to perform must cause a detriment which substantially deprives the creditor what it is entitled to expect under the contract and that the deprivation of benefit was not or could not have been reasonably foreseen by the defaulting party. The detriment here is not pertaining to the magnitude of economic loss suffered by the creditor; rather, the importance of the interest which

8 Schwenzer I, Fountoulakis C & Dimsey M, International Sales Law: A Guide to the CISG, 3rd Ed, Oxford, Hart Publishing, 2019.

9 Art. 49(1)(a) of the CISG.

10 Art. 49(1)(b) of the CISG; *see also* Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 49, p. 438.

11 Art. 64(1)(a) & (b) of the CISG; *see* Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 64, p. 532.

12 It is a concept that is found in German law [and which is of Roman law origin] which requires the giving of an additional period for performance to a breaching party in certain circumstances: *see also* Fountoulakis C, Remedies for Breach of Contract under the United Nations Convention on the International Sale of Goods, p. 17.

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the contract or the party has created for the debtor.[13] The fact that the creditor has suffered a detriment as a result of the breach will not amount to fundamental breach if the debtor did not foresee and a reasonable person could not have foreseen the prejudice caused to the creditor.[14] The debtor's intention to breach the contract is irrelevant in considering whether a fundamental breach is committed or not. The standard for assessing whether a breach is fundamental is objective, which is separate from the motive or the intention of the debtor.[15]

Thus, fundamental breach presupposes that the creditor must be substantially deprived of its expected benefits under the contract. However, the determination of whether a fundamental breach has occurred is not limited to the objective assessment of deprivation suffered by the creditor; rather, it includes a holistic consideration of entire circumstances in the case, including the preparedness of the debtor to remedy the breach.[16]

The convention avails a seller the right to cure the non-performance. This right entails the subsequent performance of the seller's contractual obligation even after the time stipulated for delivery has passed provided it is reasonable for the buyer.[17] The CISG gives a seller the right to remedy its breach at its own expense if the subsequent performance can be made without delay and the purchaser will not be unreasonably inconvenienced. However, the CISG has subjected the seller's right to cure to the buyer's remedy of avoidance under Article 49.[18] The clear wording of the convention subjecting the right of cure to the buyer's right of avoidance seems to have settled the matter that once the requirements for avoidance are met under Article 49, the buyer is entitled to avoid the contract. However, it is not the case that the possibility of curing the initial breach is discountenanced in the determination of whether the buyer is entitled to the right of avoidance under Article 49.

13 Schroeter, *in* Schlechtriem P & Schwenzer I, editors, Commentary on the UN Convention on the International Sale of Goods, 4th Ed, Oxford, Oxford University Press, 2016, Art. 25, n°21; the author stated that it is not a condition that the creditor suffers a financial or economic loss by the breach of the contract. *see also* Bridge M. G, Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods. The International and Comparative Sale of Goods, Vol. 59, no. 4, 2010, pp. 911/-990, available at www.jstor.org/stable/4083610.

14 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, *Art. 25, n°26.*

15 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°19; on the same line of reasoning, *see* Ferrari F, Fundamental Breach of Contract under the UN Sales Convention, 25 Years of Article 25 CISG (2006), available at https://heinonline.org/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/jlac25&men_hide=false&men_tab=toc&kind=&page=489 Last accessed 03 June 2021. where the author provides that "it must be observed that the breach of an obligation is not necessarily 'fundamental' only because that breach is malicious...fundamental character of the breach is not linked to the importance of the breach, but rather to the impairment of an (important) interest of the creditor".

16 Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 48, n°15; for an alternative view on the matter, *see* Michael Will, *in* Bianca CM & Bonell MJ, Commentary on the International Sales Law, The 1980 Vienna Sales Convention, Gruffer Milan, 1987, *Art. 48, n° 3.2.1-3.2.2.*

17 Art. 48 of the CISG: Huber, *in* Kröll S, *et al.*, UN Convention on Contracts for the International Sale of Goods, A Commentary, 2nd Ed, Müchen, C.H. Beck, 2018, *Art. 48, n°5.*

18 *See* the wording of Art. 48(1) of the CISG.

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Some case law authorities[19] and a majority of scholars[20] on the matter suggested that if the breach can be cured timely in any way possible without causing unreasonable inconvenience to the buyer, the breach should not be considered a fundamental breach. I submit that this position is an accurate reflection of the general objective of the convention as it ensures maintenance of contracts where better performance is possible and helps the parties avoid incurring unnecessary transaction costs.

III Termination for Fundamental Breach and Nachfrist

The failure to perform contract obligations in the time stipulated by the contract does not ipso facto amount to a fundamental breach.[21] However, delay in performance may, in certain circumstances, constitutes a fundamental breach.[22] This is so if the parties agreed that timely performance is of the essence to their contract.[23] Thus, if the time fixed for the performance of the obligation of delivery or the payment of the purchase price is of fundamental importance to the party and is made known to the other party, the non-compliance to the time requirement will constitute a fundamental breach.[24] Where the parties have not specified that time is of the essence to their contract, time is of the essence to the parties' contract is considered from the entire circumstances.[25] The factors to be considered are numerous, which include the communication of the parties[26] and the cause of dealing of

19 *See, e.g.,* Handelsgericht des Kantons Aargau, 5 November 2002, Internationales Handelsrecht (IHR) 2003 CISG online 719; Oberlandesgericht Koblenz, 31 January 1997, CISG online 225.

20 Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, *Art. 48, n°15;* Fountoulakis, Remedies for Breach of Contract under the United Nations Convention on the International Sale of Goods, p. 12; P Huber, *in* Huber P & Mullis A, The CISG, A New Textbook for Students and Practitioners, Zutphen, European Law Publishers, 2007, Art. 48, pp. 222-223; Brunner/Akikol/Bürki, *in* Brunner C & Gottlieb B, Commentary on the UN Sales Law (CISG), Alphen aan den Rijn, Kluwer Law International B.V., 2019, *Art. 48, n°10.*

21 ICC Court of Arbitration 8128/1995; Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 49, n°5; Art. 25, n°65; Mohs, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 64, n°7; *see also* Schwenzer I, Hachem P & Kee C, Global Sales and Contract Law, New York, Oxford University Press, 2012, p. 740.

22 In the case of Oberlandesgericht Hamburg, Germany, 28 February 1997, CLOUT case No. 277, the court ruling on a late delivery under CIF contract held that although delay in time is not generally considered as a fundamental breach of contract, it can constitute a fundamental breach if delivery within a specific time is of special interest to the buyer, which must be foreseeable at the time of the conclusion of the contract.

23 Schwenzer, Hachem & Kee, Global Sales and Contract Law, p. 740; Mohs, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 64, n°8.

24 Corte Di Appello Di Milano (Italy), 20 March 1998, CISG online 348.

25 Mohs, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 64, n°8.

26 For a case where the buyer indicates to the seller his obligations to his customers, *see* CISG BGer 15 September 2003, CISG online 1436.

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the parties.[27] On the buyer's duty to pay the purchase price, a strong fluctuation in the market if the buyer should make payment in its or if the goods are subject to strong price fluctuations are factors to be considered in determining whether a breach amounts to a fundamental breach.[28]

The general rule under the convention is that the failure to comply with the performance timeline does not in itself constitute a fundamental breach.[29] If non-adherence with the stipulated timeline is considered a fundamental breach, the creditor can avoid the contract without granting an additional time.[30]

On the other hand, if the non-compliance with the stipulated time is not considered a fundamental breach, the creditor can only avoid the contract if the debtor failed to perform within the *Nachfrist period*.[31] The length of the *Nachfrist* time has to be reasonable for performance to be made within it.[32]

Thus, a creditor under the CISG has two possibilities to avoid a contract due to non-adherence to the contractual timeline, *i.e.*, avoidance as a result of fundamental breach or on the expiry of the *Nachfrist* period. Considering that the mere failure to perform on the specified contractual timeline does not ipso facto amount to a fundamental breach, it is prudent for a creditor to fix an additional period for performance unless it is certain that the breach is fundamental.[33]

As indicated above, CISG takes a strict approach to termination of a contract by subjecting it to substantial deprivation requirements. This shows the underlying policy, which is the preservation of contractual relationships at all costs unless continuous enforcement will be commercially senseless to the creditor.

The fundamental breach benchmark may be difficult in practice, not from a judicial interpretation standpoint but how contracting parties are to make the objective assessment on their own before terminating the contract, because the circular definition of 'fundamental breach' can only be put into practical context by considering the circumstances of each case from an objective point of view. Notwithstanding, the CISG's *Nachfrist* mechanism may be of help for creditors to bypass the dilemma of having to determine whether the non-adherence to contractual timeline constitutes a fundamental breach or not.

27 Where the buyer is accustomed to taking delivery despite delays in the cause of the parties' dealings, 23 October 2007, *Macromex Srl. v. Globex International Inc*, CISG online, available at http://www.cisg-online.ch/content/api/cisg/display.cfm?test=1837 where the tribunal held that "provided that the delay here was within the scope of the course of business of the Seller and Buyer and/or their industry, then Seller's actions could not be found to constitute a fundamental breach." *See also Alero Marketing & Supply Company v. Greeni Oy & Greeni Trading Oy*, CISG online, available at http://www.unilex.info/cisg/case/1106.

28 Mohs, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 64, n°8.

29 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°27; Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, p. 439; *see also* Oberlandesgericht Karlsruhe (Germany), 15 February 2016, CISG online 2740.

30 Bell, *in* Kröll, *et al.*, UN Convention on Contracts for the International Sale of Goods, *Art. 64, n°6.*

31 *See* Arts. 49(1)(b) & 64(1)(b) CISG, Oberlandesgericht Celle (Germany), 24 May 1995, CISG online 152; *see also* Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, pp. 439-441.

32 *See* Arts. 47 and 63 of the CISG.

33 Fountoulakis, Remedies for Breach of Contract under the United Nations Convention on the International Sale of Goods, pp. 16-17.

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IV Right of Termination for Delivery of Non-conforming Goods under the CISG

A creditor may terminate a contract for the delivery of non-conforming goods if the non-conformity amounts to a fundamental breach.[34] The non-conformity of the goods must be serious enough to substantially deprive the creditor of the commercial utility of the goods. This requirement is to favour the performance of the contracts[35] as it constrains the right of termination to non-conformity that frustrates the buyers' expectations under the contract.[36] The case law guidelines require a very strict test in determining fundamental breach in cases of defective delivery.[37] According to the Bundesgerichtshof (Germany),[38] the severity of the defect is not a conclusive factor in determining the fundamentality of the breach. Consideration should be given to whether the buyer's interest in the transaction ceases due to the severity of the breach and the utility of the goods delivered.[39] Delivery of defective goods amounts to fundamental breach if the defective goods are useless for the buyer, *i.e.* if they cannot be used for the purpose that they are bought for or for another purpose or sold in the ordinary course of business without disproportionate efforts from the buyer.[40] If the defect can be remedied either by the seller or the buyer itself, the defectiveness is not likely to be considered fundamental even whereas it is severe.[41] Schroeter has pointed out that there is no initial fundamental breach if the seller can repair the goods, deliver substitute goods or remove the defect within a reasonable time without prejudicing the buyer's interest in the contract.[42] As per Oberlandesgericht Stuttgart,[43] even delivery of a different kind of good does not ipso facto amount to a fundamental breach. A buyer is only entitled to terminate the contract where the delivery of a different kind of good meets the requirement under Articles 49 and 25. However, if the buyer has stipulated what it

34 *See* Art. 25 of the CISG.

35 *See* Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°51, where the author, indicating why a higher threshold for fundamental breach is imperative for delivery of non-conforming goods, states that "...the underlying policy is to prevent the unnecessary unwinding of contracts or delivery of substituted goods, which would cause additional cost and in international trade additional risk for they would be stored and transported back to the seller."; Brunner/Leisinger, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 49, n°2.

36 Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, p. 42.

37 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°51.

38 Landgericht Zweibrücken, 24 September 2014, CISG online 2545; *see also* Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, p. 429.

39 *See also* Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 49, n°7.

40 Bundesgerichtshof (Switzerland), 28 October 1998, CISG online 413. *See also* Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°53.

41 *See* Bundesgerichtshof (Germany), BGH, 09/24/2014(Cobalt sulphate case), available at https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=24.09.2014&Aktenzeichen=VIII%20ZR%20394%2F12.

42 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°48.

43 Germany, 12 March 2001, CISG online 841.

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considers to be the essence of the contract, a seller in breach of such stipulations cannot put forward that the detriment that occurs to the buyer was not foreseen.[44]

Regarding documentary sale contracts, a buyer may be able to terminate a contract for defective delivery if the seller delivers defective documents wherein the correct delivery of a contractual stipulated document is essential to the contract.[45] The delivery of defective documents will be judged on the basis of Article 25 of the Convention as to whether it substantially deprives the buyer of what it is entitled to expect under the contract.[46] Delivery of defective documents may be regarded as a fundamental breach if the buyer is prevented from using the goods for the purpose for which he contracted for their delivery, reselling them in the ordinary course of business or reasonably utilizing them for other purposes because of delivery of defective documents.[47] In this regard, consideration should be given both to the defective documents and to whether the goods could be used by the buyer. Thus, if the defects in the documents can be remedied without difficulty by obtaining a correct document and the goods which are the subject of the contract can be used without grave defects in the goods themselves, the defect in the documents is not fundamental to justify termination.[48]

From the analysis above, a buyer under CISG may terminate a contract for the delivery of defective goods if it is deprived of any commercial utility in the delivered goods. The mere non-conformity will not suffice, and the buyer has to resort to other remedies if the breach is not fundamental because the *Nachfrist* period does not apply to the non-conformity of delivered goods.

A buyer who acquires the right to terminate the contract for non-conforming delivery may be able to terminate the contract only if it gives notice of the defect to the seller within a reasonable time after becoming aware of the defect.[49] The failure to notify the seller of the defect in goods will eliminate all the remedies available to it by the convention including the remedy of avoidance, because it will lose the right to rely on the defect as it will be deemed to have waived its right to enforce adherence to contractual stipulations of goods.[50] The notice of defectiveness may be in any form.[51] However, a seller is barred from relying on this rule of notification if it knew or ought to have known of the defect and failed to disclose that fact to the buyer.

44 Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, p. 43.

45 Bundesgerichtshof (Germany), 3 April 1996, CISG online 135.

46 The decision in the case of Germany: Bundesgerichtshof; VIII ZR 51/95 (*Cobalt sulphate case*) 3 April 1996, Supreme Court, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V97/217/09/PDF/V9721709.pdf?OpenElement, has lucidly pointed the position that the mere deviation of the contract document and the goods themselves would not give rise to right of termination if the buyer could sell the goods in any way possible.

47 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on Art. 25, n°62, the International Sale of Goods,

48 *Ibid.*, Art. 49, n°23.

49 Art. 39(1) of the CISG.

50 Art. 39(2) of the CISG.

51 Art. 7(2) of the CISG. The notification may be made in writing, orally (District Court in Komarno, Slovakia, 24 February 2009, available at http://www.cisg.sk/en/5Cb-114-2006-final.html by email (No. 867 (Tribunale di Forlí), Italy, 11 December 2008, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V09/839/75/PDF/V0983975.pdf?OpenElement, or impliedly.

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V Termination for Anticipatory Breach under the CISG

As per Article 72 of the Convention, a creditor has the right to make an early reaction to disturbances of a contract before the due date for performance,[52] and may avoid a contract if it is clear that the debtor will commit a future fundamental breach of the contract. The rule of the convention is said to be modelled on the Anglo-American rule of anticipatory breach of contract.[53] It encourages efficiency by allowing an early reaction to impending non-performance to enable the non-breaching party to free itself from the bondage of a contractual relationship that has a clear indication of no commercial essence.[54] For the creditor to be able to exercise this right of termination, there must be a clear indication that the debtor will commit a future fundamental breach.[55] This right of termination is an option available to a creditor, and it may decide to exercise the right or wait until performance is due to resort to other contractual remedies or suspend the contract in accordance with Article 71.[56]

Article 72 of the Convention works in cases where the performance of a contractual obligation(s) is not due but obligations to perform have been already undertaken by the parties. For the creditor to have the right to treat the contract as avoided, it must be clear that the debtor will commit a fundamental breach of its future obligation(s).[57] Thus, the threatened breach of contract in question has to be a breach of an existing obligation which has to be performed on a later date.[58]

The standard of clarity of the threatened breach of future obligation has not been set by the convention; however, in the case of *Schiedsgericht der Börse für Landwirtschaftliche Produkte-Wien*,[59] it was held that a higher strict standard is to be applied than required under Article 73(2). For CISG scholars, the standard of probability required is a higher degree of probability than the one required under

52 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 3.

53 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 5; Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 72, p. 572.

54 Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 72, p. 572.

55 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 3.

56 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 4; Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 72, p. 572.

57 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 9; Saidov, *in* Kröll, *et al.*, UN Convention on Contracts for the International Sale of Goods, Art. 72, n°1; Qiao Liu, *in* DiMatteo LA, Janssen A, Magnus U, & Schulz R, editors, International Sales Law, Contract, Principles & Practice, 1st Ed, Munich, Hart, Nomos, Beck, 2016, Arts. 72 and 54; Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 72, p. 572.

58 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 72, n° 10; Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), p. 496.

59 Austria, 10 December 1997, CISG online 351; *see also* Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, p. 581.

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Article 71.[60] The requirement of clarity is not only limited to the creditor's awareness of the circumstances relevant to the interference, but also includes a high degree of probability that a breach will actually occur.[61]

The likelihood of future fundamental breach of contract does not ipso facto give the creditor the right to terminate the contract.[62] The creditor who intends to avoid the contract is required to give reasonable notice to the breaching party if time permits to allow it to provide adequate assurance to the creditor of his performance. This requirement is to establish clarity and prevent the creditor from dissociating itself from the contract prematurely.[63] The creditor is only required to communicate to its debtor permitting it to furnish adequate assurance where it is reasonable from an objective standpoint that a future fundamental breach will occur and time allows the sending of a notice.[64] It is not required where the debtor has unequivocally announced that it will not perform its obligation(s).[65] The requirement to give the notice to have the assurance is mandatory so far as it is possible and reasonable for the creditor.[66]

However, there is no unanimity among scholars on the consequence of a creditor's failure to adhere to the notice requirement. According to Fountoulakis, the requirement of notice is a precondition for the right of termination if time allows the giving of a notice. Accordingly, any termination without first giving the debtor notice requesting adequate assurance is of no effect if time would allow the giving of notice under the circumstances.[67] But Brunner & Altenkirch advanced that the obligation to give notice is not a requirement of the right of avoidance, and a breach of it might only expose the breaching party to the liability of damages for missing notification.[68]

It is submitted that having a holistic view of Article 72, which has differentiated right of termination for an anticipatory breach into two categories, one requiring the sending of notice prior to termination, if time allows, and the other not

60 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 14; Huber, *in* Huber & Mullis, The CISG 2007, Art. 72, p. 345; *see also* Brunner/Altenkirch, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 72, n°5.

61 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 13.

62 *Ibid.*, n° 16.

63 *Ibid.*, Art. 72, n° 16.

64 A creditor may disregard the requirement of notice if time will not allow the giving of notice or if giving notice will be a useless exercise. *See* Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 23 & n° 25. A notice will be a useless formality and unreasonable if assurance could not be provided or if assurance cannot change the fact that there is a future anticipatory breach.

65 *See* Art. 72(3) CISG; *see also* Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 17. The author, at n° 17, pointed out that the rationale behind the rule is to avoid the useless formality of notification if the breaching party unequivocally makes it clear that it will not perform its obligation(s) when it falls due.

66 Huber, *in* Huber & Mullis, The CISG 2007, Art. 72, p. 347.

67 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 18 ... Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 72, p. 573.

68 Brunner/Altenkirch, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 72, n°9.

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requiring the sending of notice, indeed shows that the sending of notice is a precondition for enforcing one's right to termination for future fundamental breach. The imposition of an obligation to send a notice in one scenario, not in the other, signifies that the legislative intent was to establish the obligation as a precondition rather than as an independent obligation.

The convention does not define the term if time allows or what the reasonable notice entails. According to Schwenzer, Fountoulakis & Dimsey, reasonable notice means "communication in an adequate way and giving the debtor a real chance to provide adequate assurance."[69]

If the debtor has provided adequate assurance, the creditor has to accept it and cease carrying out its intention of avoiding the contract.[70] Otherwise, it may be held liable for the breach instead of the debtor. If the assurance is not adequate from an objective standpoint or the debtor fails to furnish any assurance, the creditor may terminate the contract.[71]

VI Declaration of Avoidance and Consequence under the CISG

Termination under the convention may only be exercise by notification[72] as the convention does not recognize automatic avoidance.[73] No form is prescribed for the declaration of avoidance; it can be made in writing, orally or even impliedly, but the notification must be clear and unambiguous.[74]

The convention makes the debtor bear the risks associated with the communication of the notification by prescribing that the notification takes effect once dispatched regardless of the actual reception.[75] Notwithstanding, the creditor is only bound to its declaration of avoidance when the notification reaches the debtor.[76] The question of whether the creditor can revoke declaration is answered differently by scholars. According to some scholars, the fact that declaration of avoidance takes effect when the notification is dispatched does not mean the creditor is unable to revoke the declaration. They argued that considering the underlying principles in Article 16(2)(b) and 29(2) of the convention, a declaration of avoidance should be revocable so long as the debtor has not adjusted itself to the termina-

69 Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, Art. 72, p. 573.

70 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 72, n° 31.

71 *Ibid.*, Art. 72, n° 32.

72 Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 49, n°23.

73 Kantonsgericht Zug, 14 December 2009, CISG online 2026; Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 49, n°23; "Even if the breach is fundamental and unambiguous, it never leads to ipso facto avoidance of the contract"; Brunner/Leisinger, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 49, n°7.

74 Notification is sufficient if the word or conduct of the creditor clearly indicates it intends to avoid the contract: Kreisgericht Werdenberg Sarganserland, 7 January 2017, CISG online 2938; Oberster Gerichtshof (Austria), 28 April 2000, CISG online 581; Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 26, n°3 & n°6; *see also* Brunner/Leisinger, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 49, n°7.

75 Art. 27 of the CISG.

76 Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 49, n°43.

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tion.[77] Other scholars argued that the creditor cannot revoke a declaration of avoidance once the declaration has been dispatched. According to this position, declaration of avoidance is a right; and once exercised, it cannot be undone.[78] From the analysis of the competing claims, it occurs to me that the former argument is in line with the spirit of the convention. Having considered that Article 27 refrained from prescribing the binding effect of a declaration of avoidance and only limits itself to the allocation of risks of communication, it is submitted that the said provision does not deprive the creditor of the right to revoke a declaration if the debtor has not adjusted itself to the information. From the wording of Article 27, the creditor's right to rely on the notification is exercisable in proving that the contract indeed comes to an end by termination and is not a right of termination in itself. This is in line with the general spirit of the convention which is to favour the subsistence of the contract in order to realize the intended benefits of the contract. It is thus submitted that the creditor should be able to revoke a termination where the prior attempt did not alter the original position of the parties with respect to their contractual obligations.

The creditor could notify the defaulting party of his intention to declare the contract avoided within the same notification, fixing an additional time for the performance.[79] In such a case, the declaration of avoidance would take effect only if the additional period elapsed without being used by the defaulting party. The declaration of avoidance is a unilateral act of the creditor which does not require judicial action.[80] The notification of the termination is not meant to seek the consent of the debtor, but to inform the debtor about the status of the contract.

For a breach of the contractual timeline with respect to delivery of goods, the contract can be avoided before delivery of goods,[81] but if the goods are delivered albeit late, the termination must be made within a reasonable time.[82] Concerning the seller's right of avoidance, Article 64(2) of the convention imposes a time limit for declaration. Article 64(2)(a) provides that the seller will lose its right to avoid the contract if it does not avoid the contract before becoming aware of the buyer's late payment. If it has knowledge of the buyer's late payment, it will lose the right to terminate the contract even though the buyer rendered performance after the stipulated time.[83] If the purchase price has not been paid at all by the buyer, the seller maintains its right to avoid the contract without a time limit.[84] If the buyer is

77 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 26, n° 12.

78 Brunner, Art. 26, n°6.

79 *See* Brunner/Leisinger, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 49, n°7.

80 Fountoulakis, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 26, n°3.

81 Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 49, n°27; Brunner/Leisinger, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 49, n°9.

82 Müller Chen, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 49, n°28.

83 Mohs, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, 2016, Art. 64, n°28.

84 *Ibid.*, n°29.

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in breach of other contract stipulations aside from payment, the seller can avoid the contract within a reasonable time after becoming aware of the breach.[85]

With regard to termination for non-conforming delivery, the buyer has to exercise its right to terminate the contract within a reasonable time; otherwise, it would be deemed to have waived its right.

Concerning termination for anticipatory breach of contract, the creditor who acquires the right to terminate the contract must do it before the due date of performance.[86] Aside from exercising his right to terminate before the due date for performance, a party is not restricted by any time of exercising the right to avoid. However, in light of the requirement to mitigate one's loss as per Article 77, a party who intends to declare a contract avoided has to do so within a reasonable time to avert aggravating the loss it might suffer as a result of the breach.[87]

Avoidance under the convention releases the parties from the performance of their contractual obligations. However, the avoidance does not absolve the seller from its responsibility to pay for damages caused as a result of the breach. Any dispute resolution clause in the parties' contract will not be affected by the avoidance of the contract. Other clauses of the parties' contract will not also be affected by termination if those clauses are intended to survive termination.[88]

C Termination of Contract under the PICC

The PICC is a contract instrument prepared by UNIDROIT with the main objective of harmonizing global private law, especially in the field of commercial law. UNIDROIT had its first edition of PICC in 1994, the second edition in April 2004, the third edition in 2010 and the last and current edition of the Principles was promulgated in 2016.[89] Unlike the CISG and national laws, the PICC is a non-binding codification of general international commercial law.[90] It only applies if parties opt in for it by designating it as the governing law of their contract or by incorporating it in their contract.[91] It also has a unitary view of breach of contract and provides a creditor with the remedy of termination in case of fundamental non-performance, which entails a lack of performance or improper performance.

I The Creditor's Right of Avoidance for Non-adherence to Contractual Timeline under the PICC

The PICC, similar to the CISG, avails a creditor under Article 7.3.1(1) the right to avoid[92] a contract in cases of failure to adhere to the contractual timeline if failure

85 Art. 64(2)(b) of the CISG.
86 Brunner/Altenkirch, *in* Brunner & Gottlieb, Commentary on the UN Sales Law (CISG), Art. 72, n°7.
87 *Ibid.*
88 *See* Art. 81(1) of the CISG; *see also* Schwenzer, Fountoulakis & Dimsey, A Guide to the CISG, p. 670.
89 Vogenauer S, Commentary on the Unidroit Principles of International Contracts (PICC), 2nd Ed, Oxford, Oxford University Press, 2015, Introduction, n° 26 *et seqs.*
90 Available at www.unidroit.org/contracts#UPICC.
91 Vogenauer, Commentary PICC, Preamble I, n°33-36.
92 The remedy is referred to as termination under the PICC.

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constitutes a fundamental non-performance.[93] The right of termination is independent of the fault of the debtor.[94]

The PICC under Article 7.3.1(2) stipulates factors to be considered in determining fundamental non-performance. These factors are (1) substantial deprivation, (2) strict compliance, (3) intention, (4) loss of reliance[95] and (5) disproportionate loss. These factors are regarded as non-exhaustive.[96] The basic notion of fundamental non-performance is anchored on the severity of the non-performance (the breach has to be material).[97]

The PICC's substantial deprivation factor, which is based on the impact of the breach on the creditor's interest, is similar to the fundamental breach requirement under the CISG. The PICC, unlike the CISG which provides one broad consideration for determining fundamental breach, stipulates other factors for determining whether non-performance is fundamental. Under the PICC, a creditor who shows the subsisting of any of these factors may be entitled to avoid the contract. Similar to the CISG, the mere non-performance on the contract stipulated timeline does not ipso facto amount to fundamental non-performance.[98] However, if timely performance is essential to the contract, the aggrieved party will be able to terminate a contract for fundamental non-performance.[99] Whether time is of the essence is determinable from the parties' contract or the specific circumstances of each case.[100] These circumstances include the nature of goods (are they perishable or seasonal goods?), the commercial background of the transaction and the express and implied agreement of the parties.[101] The parties' contract provides the first

93 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°8; Art. 7.3.1 applies to all kinds of non-performance, including the failure to adhere to contractual timelines as Art. 7.1.1 defines non-performance as "non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance."

94 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°10.

95 *Ibid.*, 2016, pointed out that the factor of loss of reliance is relevant when considering whether the non-performance of the breaching party gives reason to the creditor to believe that it cannot rely on the future performance of the debtor. According to the author, this factor helps in determining under which circumstances the creditor may take a particular non-performance as the ground for terminating the whole contract. Thus, this factor looks at the present conduct and its likely impact on the future contract obligation; Art. 7.3.1, n°48-49.

96 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°12, on the non-exhaustive nature of the factors to be considered by determining whether a breach amounts to fundamental breach, the author stated that each case will be determined on its specific circumstances and by weighing different criteria. The factors provided under Art. 7.3.1(2)(A)-(C) should be put into consideration when relevant, notwithstanding other factors may also be considered.

97 Official Comment on Art. 7.3.1 provides that "...an aggrieved party may terminate the contract only if the non-performance of the other party is 'fundamental', *i.e.*, material and not merely of minor importance." p. 254.

98 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°65.

99 *Ibid.*

100 *Ibid.*, Art. 7.3.1, n°39-42, it is considered that whether time is of essence may be gauged from two typical scenarios which are 1, The parties agreement of the relevant of time (either expressly or impliedly), 2. the circumstances of the case (see the Official Commentary indicating that time should be an essence for terms regarding open a letter of credit and in commodities transactions): Brödermann EJ, Unidroit Principles of International Commercial Contracts, Alphen aan den Rijn, Kluwer Law International B.V., 2018, Art. n°5.

101 Brödermann, UNIDROIT Principles of International Commercial Contracts, Art. 7.3.1, n°5.

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point of reference to determining what weight they have attached to timely performance.[102] However, parties' agreement on timely performance does not generally mean non-adherence constitutes fundamental non-performance. It is pointed out by Huber that it should not be assumed that there is a presumption that time is of the essence in every commercial case.[103]

Similar to the CISG, the creditor under the principles may also terminate the contract for the debtor's failure to adhere to the contractual timeline by employing the *Nachfrist* mechanism. A creditor may terminate a contract if the debtor failed to render performance within the additional time fixed by the creditor for performance.[104] Termination under this mechanism does not require a prior fundamental non-performance.[105] If the creditor fixes an additional period for performance, he can only terminate the contract after the elapse of the additional time without performance.[106] If the debtor performs its outstanding obligation within the additional period, the creditor is bereft of its right to terminate the contract.[107]

II Right of Termination for Delivery of Defective Goods under the PICC

A buyer has the right to avoid the contract for the delivery of defective goods if the defect constitutes a fundamental non-performance under the principles.[108] It must be borne in mind that the use of the phrase fundamental non-performance does not only signify the absence of performance; rather, it includes defective delivery.[109] As indicated above, the PICC enumerated factors to be considered in determining fundamental non-performance, and these factors may be considered in each case to determine whether the delivery of defective goods constitutes a fundamental non-performance. According to the official commentary, the defect has to be material for it to constitute fundamental non-performance. A minor defect will not suffice. Like the CISG, the fundamental question under the PICC in determining fundamental non-performance for defective delivery is whether the buyer could make reasonable use of the defective goods or not. If the buyer can make reasonable use of the goods, subject to other conditions, the buyer cannot terminate the contract.[110] However, delivery of defective goods may be fundamental even whereas the buyer is not substantially deprived; if the defect in the goods

102 Huber, *in* Vogenauer, Commentary (PICC), Art 7.3.1, n°25.
103 *Ibid.*, n°68.
104 *See* Arts. 7.1.5 &7.3.1(3) of the PICC, 2016.
105 Huber, *in* Vogenauer, Commentary (PICC), Art 7.3.1, n°88; *see also* Brödermann, UNIDROIT Principles of International Commercial Contracts, Art. 7.3.1, n°8.
106 Huber, *in* Vogenauer, Commentary (PICC), Art 7.3.1, n°91.
107 *Ibid.*, n°89.
108 *See* Art. 7.3.1 of the PICC.
109 *See* Official Comment on Art. 7.3.1 of UNIDROIT Principles, 2016; Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°8.
110 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°75.

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amounts to a breach of an essential contractual obligation,[111] or if it was intentional, reckless and/or the buyer cannot rely on its future performance.[112]

Regarding delivery of defective documents, Huber pointed out that the main criteria for judging whether the delivery of defective documents can lead to the termination of the contract are the seriousness of the breach and the reasonable use test.[113]

III Termination for Anticipatory Breach under the PICC

The right to terminate a contract for anticipatory breach is also provided under the PICC. Article 7.3.3 sets out the first instance under which the right of avoidance is available to a creditor for anticipatory breach. The said provision provides that:

> Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.

Similar to the CISG, this provision avails a creditor the right to terminate a contract if there is a clear manifestation that the debtor will commit a future fundamental non-performance. As in the CISG, the right of avoidance under Article 7.3.3 is only available to a party prior to the actual date of performance. A creditor who wants to terminate the contract for the likelihood of a future fundamental breach must be ready and willing to perform its obligation under the contract when it falls due. This is considered an additional requirement on the creditor before it can terminate the contract.[114]

The threat of a future fundamental non-performance, similar to the CISG, has to be clear, and the standard is a very high degree of probability, which is obvious to everyone.[115] PICC, however, differs from the convention as the creditor, under this article, need not give reasonable notice to the debtor to permit it to provide adequate assurance before it can terminate the contract.[116] Thus, the right of termination accrues to the creditor without any further requirement.

Unlike the CISG, the PICC has a second route for terminating a contract for anticipatory breach where the likelihood of a future fundamental non-performance

111 *Ibid.*, n°77.

112 Art. 7.3.1 of the PICC; *see also* the case of Arbitral Award, ICC International Court of Arbitration, Geneva 9797, *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Society Cooperative*, 28 July 2000, where the Tribunal considering whether a breach amounts to fundamental non-performance held that the respondent has committed a fundamental non-performance by its failure to perform its obligation to coordinate the member firms' practice, which the tribunal held that it had substantially deprived the claimants, it was a breach of an obligation which is of essence to the contract, the claimants have reason to believe that they cannot rely on the respondent's future performance and no disproportionate loss will be caused if the contract is terminated; *see* Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°82.

113 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°86.

114 *Ibid.*, Art. 7.3.3, n°7.

115 *Ibid.*, n°5; Brödermann, UNIDROIT Principles of International Commercial Contracts, Art. 7.3.3, n°1.

116 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.3, n°10.

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has not reached the high standard required under Article 7.3.3.[117] Under this rule, a creditor can terminate a contract if it has a reasonable belief that the debtor will commit a future fundamental non-performance, but this termination right can only be exercised upon demand of adequate assurance from the debtor and the same is not furnished within a reasonable time.

IV Declaration of Avoidance and Consequence under the PICC

Similar to the CISG, the principles also do not recognize automatic termination. A creditor who acquires the right to terminate the contract may only do so by notifying the debtor of its intention.[118] The notification may be made by any means appropriate; it may be made in writing, orally or even impliedly.[119] Unlike the CISG, the notification becomes effective after it reaches the debtor.[120] The declaration of avoidance must be made within a reasonable time after the creditor becomes aware of the breach.[121]

Termination under the principles has the effect of relieving the parties of their respective obligations subject to the right to claim damages or any settlement of dispute obligations or other terms of the contract intended to survive termination.[122]

V Limitation on the Right of Termination

Like the CISG, the PICC recognizes the right of a debtor to cure its non-performance.[123] It allows the breaching party to render performance even after the time of performance provided it notifies the creditor, cure is appropriate, and the creditor has no legitimate interest in refusing the cure.[124]

D Termination of Contract under The Gambia Sale of Goods Act

The GSGA[125] is the law that governs contracts for the sale of goods subject to The Gambia law. It was enacted in 1955. The GSGA is complemented by the principles of Common Law and Equity which continue to apply in The Gambia by virtue of Section 7 of the 1997 Constitution of The Gambia, and these principles of common law apply to all sales of goods matters which are not covered by the Act. Thus,

117 *See* Art. 7.3.4 of UNIDROIT.

118 *See* Art. 7.3.2 of the PICC; *see* Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.2, n°1. It is stated that the purpose of this requirement is to prevent the creditor from speculating on the market and postponing its decision on whether or not to terminate. It also allows the debtor to avoid losses related to any uncertainty as to whether the creditor will avoid the contract or not. *See also* Bonell JM, editor, The UNIDROIT Principles in Practice, 2nd Ed, Ardsley, New York, Transnational Publishers, Inc, 2006, Art. 7.3.1, p. 382, Para. 1.

119 *See* Vogenauer, Commentary (PICC), Art. 1.10, n°6.

120 Art. 1.1.0 of the PICC; *see also* Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.2, n°3.

121 Art. 7.3.2 of the PICC.

122 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.4, *Ibid.*, n°16.

123 Art. 7.1.4 of the PICC.

124 *See* Huber, *in* Vogenauer, Commentary (PICC), Art. 7.1.4, n°11-12.

125 Sale of Goods Act, {Act No. 4 of 1955}, CAP 89:01, Vol 14 Laws of The Gambia, 2009.

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where there is a lacuna in the Sale of Goods Act concerning an issue in a sale contract, the principles of Common Law will apply to regulate that matter.[126]

The Gambia Sale of Goods Law, which comprises both the GSGA and the rules of Common Law, also has a unitary approach to breach of contract and provides the remedy of avoidance or termination to a creditor for a breach of the contract regardless of the fault of the breaching party. It provides an easy route to termination as it allows termination of contract based on the classification of contract terms. The breach of contract terms that are designated as conditions gives a creditor the right to terminate the contract.[127] Breach of innominate terms or intermediate terms will entitle a creditor to terminate the contract only if the creditor is substantially deprived of the whole benefit which it expects to obtain from the performance of the contract.[128]

In addition to the right to treat a contract as repudiated (terminated), the Act also recognizes the buyer's right of rejection. The GSGA does not define the concept of rejection of the goods and case law has not made any determination of the relationship between the right of termination and the right of rejection. It is not clear whether the right of rejection is the same, equivalent or separate from the right of termination. The Act only provides that the buyer has a right to reject goods that do not conform to the quantity of the contract (either less or more) and that buyer has no responsibility to return the goods if it exercises its right of rejection[129] without further clarifying whether this rejection amounts to termination or not. Section 12(3) joined the two concepts of rejection and termination together. The said section provides that:

> Where the contract is not severable... The breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there is a term of the contract, express or implied to that effect.[130]

It seems from the said section that the right of termination and rejection are the same, but such a position is relatively unclear considering that the Act provides different situations on the applicability of the respective concepts.[131] However, from a review of literature on the Pari Materia section of the English Sale of Goods Act, rejection of goods goes hand in hand with the termination, making them effec-

126 Section 59 of the GSGA provides that the rules of common law including the law of merchants continue to apply to sale of goods unless they are inconsistent with the provisions of the Act.
127 Section 12 of the GSGA.
128 *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* (1962) 2 Q B 26.
129 *See* Section 32 of the GSGA.
130 Section 12 of the GSGA.
131 The Act recognizes the right to termination in respect of breach of condition in Sections 12, 14 and 15, whilst the right of rejection is recognized in the context of wrong quantity under Section 30.

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tively one remedy rather than a separate remedy.[132] Therefore, the creditor's rejection of the goods is tantamount to termination of the contract.

I Termination for Failure to Adhere to Contractual Timeline

A creditor may terminate a contract under the GSGA if the debtor is in breach of a condition of the contract. The GSGA just made a broad categorization of two stipulations of the contract, which are condition and warranty, and the legal effect of the breach of those stipulations without defining a condition of contract.[133] Section 12 (2) provides that:

> Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated depends in the case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.

The right to terminate under GSGA depends largely on the term breached by the debtor. If the debtor is in breach of a term classified either by the parties' contract or the Act as a condition of the contract, then the creditor is entitled to terminate the contract.[134] If the breach affects a warranty, the creditor cannot terminate the contract; instead, the creditor has to result to a claim of damages.

Aside from the two broad categorizations of terms, the Common Law defying the rigid classification of the Act developed what is now referred to as an intermediate or innominate, which applies when it is not discernible whether a particular contract is a condition or warranty.[135] The breach of this term only gives rise to the termination right if the breach substantially deprives an aggrieved party of the whole benefit of the contract.[136]

Contract stipulation of time is a condition of the contract if time is of the essence, determinable from the terms of the contract. However, stipulations as to time of payment are not deemed to be of the essence of a contract unless the contract appears to manifest the contrary.[137]

132 *See, e.g.*, Bridge MG, The International Sale of Goods, 3rd Ed, Oxford University Press, 2013, p. 409, Mckendrick E, Sale of Goods/Ewan Mckendrick, London, LLP Professional Pub, 2000, 10-004 *et seqs*; Sir Guenter Treitel, Benjamin Sale of Goods 19-144, *et seqs*., 20-105 *et seqs*. *see also* Smith J. C., The Law of Contract, 4th Ed, London, Sweet & Maxwell, 2002.

133 Section 12(2) of the Sale of Goods Act.

134 *See, e.g.*, the English case of *Bunge Corp v. Tradax Export SA* (1981) 1 WLR 711, where the House of Lords considered a term in a FOB sale contract, "Buyer shall give at least 15 days' notice of readiness of vessel." as a condition of the contract and entitling the innocent party to terminate the contract.

135 The classification was first considered in the case of *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* (1962) 2 Q.B 26 and then later confirmed in sale of goods case *Cehave NV v. Bremer Handelsgesellschaft mbh. (The Hansa Nord)*; *see* Benjamin Sale of Goods 10-31 to 10-33, pp. 527-528.

136 *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* (1962) 2 Q.B 26.

137 Section 11 of the GSGA. The said section provides that Section 11 of the Act provides that: "unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of a contract of sale, but whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

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The failure of a breaching party to perform its contractual obligation on the time fixed by the contract will amount to a breach of a condition if time is of the essence, no matter how slight the breach is.[138] What matters is the intent the parties expressly attached to the timely performance of the contract. *Savage v. Socea-Balency Soboa SA* made this position clear by indicating that the legal consequence of a breach of contract can be determined by first looking at the terms of the contract, and if the contract expressly or by implication provides that a breach of one of the terms will go to the root of the contract (as a condition of the contract) and accordingly amount to repudiation entitling a creditor to terminate the contract.[139] However, where the contract does not make such a stipulation, the determination of whether the breach goes to the root of the contract is based on the practical results of the breach.[140]

It is not required for the word 'time is of the essence' to be expressly stated in the contract, but any indication of the importance of time to the contract will suffice.[141] The creditor is entitled to terminate the contract even for a minor breach.[142] Determining whether the parties considered timely performance as essential (conditional term of the contract), the words used in the parties' contract is important in finding whether the time so fixed by the parties is of the essence. If the contract clearly expresses the intention of the parties in making time as essential, the Gambian Courts are ready to hold the parties to such terms regardless of the consequence of the breach.[143] This is in line with the Common Law rule that created a presumption of the essentiality of timely performance in commercial contracts.[144]

A creditor may also avoid a contract if the failure to perform on time is a breach of an innominate term (a breach that goes to the root of the contract).[145] The determination of whether the breach goes to the root of the contract is an objective

138 *Bunge Corporation v. Tradax Export SA* (1981) 1 WLR 711.

139 *Savage v. Socea-Balency Soboa SA* (1960-1993) GR 330, at pp. 335-336.

140 *Ibid.*

141 *See* Section 11 (1) of the Act; *see also Savage v. Socea-Balency Soboa SA.*

142 This is the difference from what is obtainable in England, as the English Sale of Goods introduced a section (15A) which curbs the right to terminate a contract where the breach is slight that it would be unreasonable for the buyer to terminate the contract (on the Impact of 15A of the Sale of Goods Act 1979 (England), *see* Mckendrick, Sale of Goods, p. 611). Under The Gambia Sales law, no such amendment was carried out; it thus maintained the old common law strict classification of terms at least expressly agreed by the parties or provided by the Act itself.

143 This was clearly indicated in the case of *Greengold Ltd v. Kombo Poultry Farm Ltd* (2002-2008) GLR 319 where the Supreme Court of The Gambia held "it is an inveterate and hallowed principle of interpretation that the intention as conveyed by the words used must be gathered from the written instrument itself. The Court cannot substitute its own intention and wishes for the expressed intention of the parties. It does not lie within the jurisdiction of a Court to rewrite an agreement for the parties by reading into it terms or words that are not stated therein"; *see also* Armanti *Co. Ltd v. D.H.L. International (Gambia) Lt* (2002-2008) 1 GLR 194, *Mamadi Jabbai v. The Gambia Red Cross Society (2002-2008)* 2 GLR 233.

144 In *Bunge Corporation v. Tradax*, Megaw LJ stated that, "I think it can fairly be said that in mercantile contracts stipulations as to time not only be, but usually are to be treated as being 'of the essence of the contract', even though this is not expressly stated in the words of the contract."

145 Socea-Balency Soboa SA; A breach of innominate term will only lead to termination if the creditor is substantially deprived of the whole benefit of its bargain.

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reasonable man test, which looks at the effects of the conduct of the debtor on a reasonable person in the shoes of the creditor.[146]

A mechanism similar to that of *Nachfrist* is also available to a creditor under The Gambia Sale of Goods Law. The creditor can terminate a contract if, upon the default of the debtor, it makes the time of performance of the essence by putting the debtor on notice to make performance within the additional period and the debtor fails to make use of the additional time to perform its obligation.[147] The additional time has to be reasonable to allow for the performance of the debtor.[148] The Gambian courts are yet to discuss this issue, and its practical application is yet to be fathomed despite its abstract presence as a principle of law.

II The Right of Avoidance for Delivery of Defective Goods

Under The Gambia Sale of Goods Law, a buyer may terminate a contract for the delivery of defective goods if the defect amounts to a breach of a condition[149] or an intermediate (innominate) term of the contract.[150] As indicated above, whether a term is a condition of contract or not is based on the construction of the contract. However, the GSGA implied certain contractual terms as conditions. These include description,[151] the quality and fitness of the goods.[152] In the absence of any agreement by the parties classifying the terms of description, quality or fitness for purpose of the goods as a warranty, the buyer may terminate the contract for breach of those terms regardless of the magnitude of the defect. The buyer may also terminate the contract and reject the goods supplied if the seller supplied a wrong quantity of goods.[153] If the defect amounts to a breach of other contract stipulations of the goods, a buyer may terminate the contract if the defect constitutes a breach of a condition or a serious breach of an innominate term.

The GSGA provides an easy route to a buyer to discharging itself from the contract for the delivery of defective goods. Aside from breach of intermediate terms, the buyer can terminate the contract for the delivery of defective goods even whereas the defect in the goods is minute or has not prejudiced the economic interests of the buyer.

The GSGA is quiet on whether a buyer can terminate a contract for the delivery of defective documents. However, the buyer has the right under Common Law to reject non-conforming documents, but whether this will translate into the termination of the contract is determinable by considering the essentiality the parties place on the supply of proper contractual documents (whether the failure to supply proper document constitutes a breach of a condition of the contract or substantially deprives the buyer of its expectation under the contract).[154]

146 *West Coast (No2) v. Gambia Civil Aviation* (No. 2) (1997-2001) GR.
147 Lord Simon, *United Scientific Holdings v. Burnley Borough Council* (1978).
148 *Ibid.*
149 Section 12 (2) of the GSGA.
150 *Savage v. Socea-Balency Soboa SA*; *see also* the Hong Kong Fir Shipping case.
151 Section 14 of the GSGA.
152 Section 15 of the GSGA.
153 Section 30 of the GSGA.
154 *See* Mckendrick, Sale of Goods, 13-059 *et seq.;* Sir Guenter Treitel, Benjamin Sale of Goods 19-144; 19-147.

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III Termination for Anticipatory Breach under The Gambia Sale of Goods Law

The remedy of termination for anticipatory breach under The Gambia Sale of Goods regime is not specifically regulated by the GSGA. It is governed by the general Common Law rules on contracts. The concept of anticipatory breach was established in the case of *Hochster v. De la Tour*.[155] A creditor may terminate a contract if from a reasonable man's standpoint there is any indication(s) that the debtor will not perform in some essential respect or be unable to perform its obligation at the due date.[156] The right to terminate a contract for anticipatory breach requires the repudiation that goes to the root of the contract. In *West Coast Air Ltd (No 2) v. Gambia Civil Aviation Authority (No 2)*,[157] it was held that:

> The kind of conduct by a party which will justify the other party in treating a contract as repudiated for actual or anticipatory breach, the common principle is that to amount to repudiation, a breach must go to the root of the contract.

Whether a threatening breach will go to the root of the contract, the court in the West Coast Air case citing the English case of *Decro-Wall International SA v. Practitioners in Marketing Ltd*[158] held that:

> How is the legal consequence of a breach to be ascertained? Primarily from the terms of the contract itself. The contract may state expressly or by necessary implication that the breach of one of its terms will go to the root of the contract and accordingly amount to repudiation. Where it does not do so, the courts must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract[159]

The required test is the effect of the threatening breach on a reasonable person in the shoes of the non-breaching party; but, if it shows that the conduct was inspired by the motive of putting an end to the contract relationship, the court may find the test satisfied.[160] Thus, a creditor may be able to terminate a contract if the threatening breach will affect a condition of the contract or will amount to a serious breach of an innominate term of the contract. There is no requirement to send adequate assurance notice.[161]

IV Declaration of Avoidance and Consequence

A creditor has to timely exercise his right to terminate the contract by notifying the debtor within a reasonable time; otherwise, he would be considered to have waived his right to termination and affirm the contract. In *Ali Jacobs Ltd v. S.S. Ceesay Construction Ltd*, The Gambia Court of Appeal held reasonable time had elapsed where

155 (1853) 118 ER 922.
156 Mckendrick, Sale of Goods.
157 (1997-2001) GR 420.
158 (1971)2 All ER 216, at 221-222.
159 *West Coast Air Ltd (No 2) v. Gambia Civil Aviation Authority (No 2)* (1997-2001) GR 431.
160 *Ibid.*
161 *Savage v. Socea-Balency Soboa SA supra.*

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the buyer waited almost four months after delivery to indicate to the seller it had rejected the goods supplied.[162] Aside from the delay in communicating its declaration of termination, a creditor may also lose the right to terminate the contract, whereby its conduct leads the debtor to believe that it will not insist on its right to terminate the contract.[163] The Gambia Court of Appeal held in *Sissoho v. Northern Assurance Co Ltd* that:

> If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.[164]

The declaration of avoidance has no formal requirements. It is sufficient if there is a communication either by words or conduct that the contractual bond has been severed by the creditor. And it is not required for the creditor or its agent to make the communication of the termination. It is sufficient if the breaching party receives communication from any source.[165] The buyer is required to reject and terminate the contract within a reasonable time; otherwise, it would be considered to have accepted the goods and barred from terminating the contract.[166]

If the creditor has validly terminated the contract between it and the debtor, the parties are relieved from further performance of their contractual obligations. They are to be restored to the *status quo ante,* their former position before the contract.[167] However, this does not mean the defaulting party cannot be held liable to pay for damages occasioned by his failure to perform per the contractual time stipulation.[168]

E Comparison of the Approaches

The CISG and the PICC provide two clear separate systems of the remedy of termination in case of failure to adhere to the contractual timeline, which is, the right to termination in the event of fundamental breach and the *Nachfrist* mechanism. The Gambia Sale of Goods Law, on the other hand, provides three mechanisms of terminating a contract. These are where timely performance is a condition of a contract, where the failure to adhere to the timeline amounts to a breach of an intermediate term of contract, which deprived the creditor of the benefit of the whole contract, and the notice making the term of the essence. For the right of avoidance at first, the CISG and the PICC consider the harm occasioned by the failure to perform on the contractually fixed date. Thus, these regimes look at whether the ag-

162 (1995/96) GR 404, at 406-407.
163 This is regarded under common law as estoppel. *See* Mckendrick, Sale of Goods, 10-009, p. 489.
164 (1960-1993) GR 267.
165 *See* Heyman case; *see also* The Michalis Angelos (1971) 1 QB164, and Chitty on Contracts, at p. 1706.
166 Section 30 of the GSGA; *Ali Jacobs Ltd v. S.S. Ceesay Construction Ltd* (1995/1996) GR 404.
167 *Alhaji Momodou Jobe v. Alhaji Abdoulie Dandeh Njie* (2014/2015) SCGLR.
168 *United Scientific Holdings v. Burnley Borough Council* (1978).

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grieved party is substantially deprived of what it expects from the contract. It is true that where time is stipulated as essential to a contract under these regimes, a breach may attract the option of termination. However, a minor default is not likely to give rise to an outright right of termination on the mere stipulation that time is of the essence. The GSGA, on the other hand, provides an easy route to termination by focusing on what the parties have stipulated regarding the essentiality of timely performance rather than the deprivation caused by the breach. Under the GSGA, a party has the right to terminate a contract for non-adherence to the contractual timeline even for minor breach as long as the time of performance is made essential at the beginning of the contract.

At first sight, from the use of the word fundamental in the CISG and the PICC, one may assume that there is a common meaning across the two instruments. However, this proves not to be the case concerning the factors that need consideration in determining fundamental breach. The PICC provides more factors that may be considered in determining whether a breach amounts to a fundamental non-performance than the CISG. This superficial difference between the CISG and the PICC may at first be considered a major divergence among the two regimes. It must, however, be noted that these factors listed by the PICC are at times considered under the CISG in determining whether a fundamental breach occurs or not.[169] Thus, these factors, though not expressly listed by the CISG, are sometimes considered in determining whether a breach is fundamental. As pointed out by Schroeter, the fundamental importance of timely delivery can be followed from the contract terms or the circumstances of the case.[170] This consideration is similar to the strict compliance with contractual terms under the PICC. Therefore, though the CISG does not expressly provide factors like strict compliance, disproportionate loss, etc. as factors to be considered in determining whether a breach is fundamental, these factors seem to be truly relevant in practice in determining whether a breach is fundamental under the convention.[171] Notwithstanding, it must be noted that under the CISG, the requirements for fundamental breach are clearly set out under Article 25 as substantial deprivation and foreseeability. In determining whether these requirements are met, other factors may be put into consideration depending on the specific circumstances of each case. I believe that the factors list-

169 *See* the case of *Oberlandesgericht* Hamm, 12 November 2001, available at www.cisg-online.ch/content/api/cisg/urteile/1430.pdf the tribunal state in respect of fundamental breach of the following: "A fundamental breach of contract will be assumed if the parties have expressly concluded a firm deal because in this case the parties have a common intent that the transaction as a whole be dependent on the compliance with the designated time limit of delivery.....Non-compliance with a specified time for delivery forms a fundamental breach of contract only if exact compliance with that time is of particular interest to the buyer."

170 Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°39.

171 For example, *see* Schroeter, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods, Art. 25, n°39; *see also* CISG Advisory Council Opinion No. 5(1)(7); *see* Handelsgericht Zürich, 5 February 1997 (CLOUT) Abstract no. 214, available at www.cisg-online.ch/content/api/cisg/urteile/2660.pdf where the court held that the buyer is entitled to avoid a contract due to the seller's failure to perform its delivery obligation which gives the buyer grounds to believe that further instalment will be fundamentally breached. This is similar to the reliance factor list under the PICC. They are relevant in respect to anticipatory breach.

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ed by the PICC are meant to help in determining whether a breach is fundamental. This is the position advanced by Huber when he stated that there is no sharp distinction among the factors so listed by the principles and the factors listed are not meant to provide a precise and conclusive definition of fundamental performance. The author went further to assert that the factors listed are not even exhaustive.[172]

Moreover, the CISG and the PICC (in general) take a very rigid approach to termination. The creditor cannot terminate a contract for minor breach, even if the term breached is regarded as essential in the parties' contract. This is lucidly manifested in the standard required by the convention and the principles. These regimes work in a way aimed at preserving the parties' contract if the same is capable of preservation. For this reason, the convention and principles avail the creditor a second chance to terminate the contract for minor breach (a non-fundamental breach) through the *Nachfrist* mechanism. The rationale for this, as aptly pointed out by Bridge, is to avoid economic waste.[173]

The GSGA, on the other hand, has a soft approach to termination. It allows termination based on the classification of the contract terms. This, in essence, favours contract termination if it is discernible from the contract that timely performance of obligations is of the essence. A creditor terminating a contract even if the breach is minor, inasmuch as timely performance is designated as a condition of the contract. The rationale of this approach is said to encourage commercial certainty in the sale of goods transactions. Whether the rule has achieved that is subject to debate since the classification is not based on concrete criteria but on the construction of the terms expressed or implied in the contract.

Although it is difficult to terminate a contract under the CISG and the PICC, it cannot be fathomed what the convention and the principles require a trader to actually consider before terminating a contract for fundamental breach or non-performance. The circular nature of the definition in Article 25 makes it more difficult for any practical certainty as to when such a right can be accrued to a creditor. Though the CISG has case laws in this regard, it is still controversial as to whether

172 Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°12 & 14.

173 Bridge MG, A Law for International Sales *Hong Kong Law Journal, Vol. 37, p. 17,* (2007), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431467. Last accessed 3 June 2021; *see also* Schwenzer, Hachem & Kee, Global Sales and Contract Law, Para. 47.129.

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the convention provides clear criteria for determining fundamental breach.[174] The same can be said for the PICC also as it listed factors without clear indication how such factors will be considered. The lack of precise criteria creates burden and risk for the creditor to make the objective evaluation of whether the breach in question is fundamental. This burden and risk are however mitigated to some extent by the *Nachfrist* mechanism.

With respect to the right of termination for non-conforming delivery, the CISG requires the defect in the goods to amount to a fundamental breach before the buyer can terminate the contract. It focuses more on the detriment occasioned on the buyer by the breach. Thus, the legal authorities under the convention unanimously confirmed that where the defect is minor or can be cured, the buyer cannot terminate the contract. Case law even introduced the concept of the reasonable use of the goods. If the goods can be used or sold in the market without disproportionate responsibility, effect or cost on the buyer, termination cannot be justified under the convention. The convention considers the severity of the defect, its accompanying effect on the buyer and the foreseeability of the deprivation, and, thus, termination is not possible if the deprivation is not foreseen or could not have been reasonably foreseen by the seller.

The PICC, similar to the CISG, allows termination for delivery of defective goods if the defects constitute a fundamental non-performance. However, in contrast to the CISG, the PICC enumerates factors to be considered in determining whether the defect amounts to fundamental non-performance and these factors go beyond the substantial deprivation requirement under Article 25 of the CISG. The PICC, based on these factors, allow for termination if the defect constitutes a breach of a term considered as of the essence, or if the seller was intentional or reckless in delivering defective goods (fault). Thus, it is possible under the PICC for a contract to be terminated for a lesser standard than required by the CISG. The severity of the breach may not matter if the breach was intentional or reckless. However, the official commentary on Article 7.3.1 states that "it may, however, be contrary to good faith (see Art. 1.7) to terminate a contract if the non-performance, even though committed intentionally, is insignificant."[175]

174 *See, e.g.*, Michael Will, *in* Bianca & Bonell, Commentary on International Sales Law, 1987 Art. 25, pp. 205-212, where the author stated that "defining fundamental by substantial.....leaves an impression of playful tautology."; *see also* Grebler E, Fundamental Breach of Contract Under the CISG: A Controversial Rule. Proceedings of the Annual Meeting (American Society of International Law), Vol. 101, March 28-31, 2007, pp. 407-413, Cambridge University Press, available at www.jstor.org/stable/25660231, p. 409. The author argued that "The meaning of the first part of Article 25 seems inconclusive, for the concept of fundamental breach depends upon the concept of substantial deprivation, but a definition of the latter is not found in the provision, leaving the interpreter without a benchmark as to the extent of deprivation required to constitute a fundamental breach. As it has been argued, 'defining fundamental with substantial, to begin with, leaves an impression of playful tautology.' The middle segment of Article 25 is also confusing to the mindset of lawyers in many countries, as it refers to the deprivation of what the party is entitled to expect under the contract, rather than to what the party in breach promised to deliver under the contract. In doing so, the CISG shifts the focus of the dispute, as the interpreter must decide on what the aggrieved party had the right to expect from the contract, instead of deciding on whether or not the contractual obligation was comply [*sic*] with by the party in breach."

175 Official Commentary on Para. 2 (C) of Art. 7.3.1 of the PICC.

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The Gambia Sale of Goods Law fundamentally differs from the above legal regimes as it has a formal classification of contract terms, and a breach of a condition will justify avoidance of the contract. On this basis, the Gambia Sale Goods Law allows termination even for a minor defect. With regard to the quality, quantity, description and fitness of the goods in the absence of a contrary agreement, the buyer has an unfettered right to avoid the contract (reject the goods) if the goods delivered deviate from the contract stipulations no matter how slight.

The right of termination based on a breach of an innominate term of the contract under The Gambia Sale of Goods Law is similar to the CISG and the PICC as it also requires substantial deprivation. A buyer will, in such a case, have the right to avoid the contract if the defect concerns an innominate term of the contract and the breach substantially deprived it of the whole benefits it is entitled to expect under the contract.

In general, it is harder to terminate a contract for defective goods under the CISG and PICC, but it is easy under the GSGA. This manifests the underlying policies behind the three legal regimes. The CISG and the PICC are aimed at preserving parties' contracts by any means possible, whilst the GSGA favours termination of contracts.

Another fundamental difference is the requirement of notification of the defect to the seller. The CISG considers the notification of the defect in the goods a condition precedent to the right of termination. The PICC does not expressly impose an obligation on the buyer to notify the seller of the defect in goods.[176] The GSGA does not impose any such requirement. Thus, once the goods are at variance with the contract stipulations, the buyer may terminate by notifying the seller of its rejection of the goods without the need to notify the seller of the defect.

Furthermore, unlike legal regimes that do not recognize the remedy of termination for anticipatory breach,[177] the three legal regimes allow for an early reaction to a contract where there is a threat of breach in the future.

By way of similarity, all the three regimes provide prognostic assessment thresholds at which point a creditor can exercise the right of avoidance for anticipatory breach. However, they differ in the standards required; the CISG and the PICC's Article 7.3.3 require a high likelihood of the breach. It is not clear what this high likelihood (higher probability) standard entails, but it is said to be less than virtual certainty.[178] The GSGA requires a prognostic assessment of reasonableness, an objective test of whether a reasonable person in the shoes of the creditor will conclude that a breach will occur in the future. It is not noticeably clear whether there is any significant practical difference between the two prognostic assessment tests, but, in principle, it appears that the standard required under the CISG and

176 Official Comment on Art. 1.7, n°3, Illustration 7 of the PICC. It is indicated that "under a contract for the sale of high-technology equipment the purchaser loses the right to rely on any defect in the goods if it does not give notice to the seller specifying the nature of the defect without undue delay after it has discovered or ought to have discovered the defect..."

177 The legal systems that do not recognize termination for anticipatory breach are France, Middle Eastern and Arab jurisdictions, Global Sales and Contract Law, p. 744.

178 *See* (German) Landgericht Berlin, 30 September 1992, CISG-Online No. 70 where it was held that the standard was rather a very high degree of probability which is obvious to everyone. *See also* Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.3, n°5.

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the PICC is higher than the one under The Gambia Sale of Goods Law. This is supported by Article 7.3.4 of the PICC which provides another route to termination for anticipatory breach requiring a lesser standard, which is, reasonable belief. The PICC, unlike the CISG and The Gambia Sale of Goods Law, has two standards of prognosis. One like the CISG requires a higher probability, and the other requires reasonable belief.

In all the regimes, the threatened breach must be significant for the creditor to acquire the right of termination. The CISG requires a fundamental breach, which is based on how the creditor has been deprived of its expectations under the contract. The PICC differs with the CISG on the wordings as it requires the breach to amount to fundamental non-performance. Aside from the semantic difference, it is obvious from the commentaries on the PICC that the fundamental non-performance greatly leans on the substantial deprivation concept and the strict adherence of contractual indications.[179] Thus, the gravity of the threatened breach under the PICC is similar to the CISG, which has to be serious enough to amount to fundamental breach or fundamental non-performance. Notwithstanding, the PICC considered other factors that can be considered in determining whether a fundamental non-performance is likely to occur. These factors go beyond what is envisaged under Article 25 of the Convention. Thus, the CISG and the PICC are different in their respective consideration of what factors need to be considered in determining fundamental breach. The PICC takes a more liberal view by considering other factors that permit termination for anticipatory breach regardless of the magnitude and consequence of the breach on the creditor's expectations.

The Gambia Sale of Goods Law, on the other hand, also requires the breach to go to the root of the contract. This is not entirely similar to the standard required by the CISG and the PICC. The concept of a breach going to the root of the contract is not strictly akin to the fundamental breach or fundamental non-performance under the CISG and the PICC, respectively. The breach going to the root of the contract, on the one hand, does not mean the breach has to be severe; instead, if the threatened breach concerns a condition of the contract, the creditor will be able to terminate the contract. On the other hand, if the threatened breach concerns an innominate term of the contract, the creditor can terminate if the threatened breach is serious enough to deprive it of the whole benefit it expects from the contract.[180] The standard required under the second circumstance is similar to fundamental breach requirements under the CISG and the PICC as it requires deprivation of the creditor of what it is entitled to expect under the contract.

Another major divergence among the three regimes is the requirement of notice permitting adequate assurance of due performance. The CISG, under its unitary approach to termination for anticipatory breach of the whole contract, requires the creditor to give notice to the breaching party permitting adequate assurance to be given by the debtor. This is contingent on the availability of time, but it is, in principle, an obligation on the creditor to give notice for adequate performance before exercising its right to termination for anticipatory breach. Thus,

179 *See* Huber, *in* Vogenauer, Commentary (PICC), Art. 7.3.1, n°15.
180 *West Coast Air Ltd. (No 2) v. Gambia Civil Aviation Authority (No 2)* (1997-2001) GR 431.

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under the CISG, even if the creditor perceives that the other party will commit a fundamental breach, it is required to get a confirmation from the debtor that the indication of a breach as subjectively assessed by the creditor will, in fact, occur or not. Notice is not required where there is a clear declaration from the debtor that performance will not be forthcoming.[181] The PICC, on the other hand, does not require giving notice for adequate performance where it is clear to the creditor that the breaching party will not perform. The PICC differs from the CISG in that respect. However, the PICC requires the demand for adequate assurance where the prognostic assessment standard is 'reasonable belief'.

The GSGA differs from the CISG and Article 7.3.4 of the PICC as it does not require the creditor to give notice requisitioning adequate assurance of performance. Thus, under The Gambian Sales Law, what is required is the subjective assessment, on the bases of reasonable objective test, that the threatened breach will affect a condition or innominate term of the contract. The creditor need not give an opportunity to the debtor to clarify whether it is committed to the contract or not. Thus, under Article 7.3.3 of the PICC and the GSGA, it is sufficient for the creditor to rely on its own speculation, subject to required prognosis to exercise the right to terminate the contract without giving the debtor the benefit of the doubt.

Is there any utility in having to establish a very high standard of certainty for a creditor to terminate a contract on the apprehension of a breach of contract considering international sale contracts involve parties that trade across jurisdictions? The answer to that requires a thorough interrogation of the effect of termination of contracts. Termination has the effect of bringing a contractual relationship to an end, thereby extinguishing the respective future rights and obligations of the parties under the contract save for a few obligations like dispute resolution obligation and obligation to pay damages. Thus, there is efficacy and substance in ensuring the aggrieved party exercising the right to avoid the contract has an overwhelming certainty that a breach will occur. This will avoid the unnecessary interruption of the contract.

Aside from the above commonalities and differences, all three regimes recognize that the creditor has no automatic right to termination. A creditor wanting to bring the contract to end has to do so by notification. The regimes differ on the time when the notification of declaration takes effect. The CISG requires a departure rule, whilst the PICC[182] and The Gambia Sale of Goods follow the recipient rule.

On the time limit for declaring a contract avoided, the three regimes are similar in providing that the declaration of avoidance shall be made within a reasonable time if performance has been made, albeit late. However, the CISG provides that in case of late payment, the seller loses its right to avoid the contract if it did not do so before becoming aware of the late payment. This rule is unique to the CISG in this aspect. It is different from the PICC and the GSGA, which regimes do not deny the seller its right to declare a contract as avoided if it becomes aware of the late payment. It must be noted that under both the PICC and the GSGA, the seller must declare the contract avoided within a reasonable time even in case of late payment.

181 *See* Art. 72(3) of the CISG.
182 *See* Art. 1.10 of the PICC.

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However, the seller does not lose the right to terminate just because the buyer has paid the price and it has knowledge of such payment.

Another difference between the three regimes is the debtor's right to cure. Under the CISG and the PICC, as discussed above, a creditor cannot terminate the contract if the breach can be cured. The difference between the CISG and the PICC on the right to cure is that the PICC expressly provided that the right to cure is not precluded by a notice of termination. As discussed above, this is not a significant difference as the possibility of cure is a relevant factor in determining whether a breach is fundamental under the CISG. On the other hand, the debtor has no general right to cure the breach under GSGA. The creditor can terminate the contract even though the breach is curable if the breach is a breach of a conditional term of the contract.

F The Most Suitable Regime for the International Sale of Goods Contracts

The International Sale of Goods contracts, contractual relationships set up among parties that reside in two or more different jurisdictions, manifests inherent complexities regarding distance and risks involved in the trade. It is inherently complex because the parties living in different countries have to first take initial steps utilizing time and resources in cementing the contractual relationship, and this arrangement is an exercise of allocation of risk, where the parties have all the latitude, subject to the mandatory legal rules, to define the arrangement of the allocation.[183] Where the parties make no provision for the affairs of the contract, it befalls on the governing sales law to provide default rules that balance the competing rights and risks involved.

Should the default law provide a very high standard for avoiding a contract involving two parties trading in goods from different jurisdictions?

When a breach of contract occurs, the parties are faced with new risks, the risk of having to bear the responsibility for salvaging the goods[184] in cases where delivery has occurred or the risk of losing the contractual benefits that a party bargain for in cases of non-payment of the purchase price or non-delivery of goods and the risk of having to be exposed to liabilities to downstream contracts for the buyer or other third party without any benefit from the contract. The law must provide a very fair balance of the risks involved in the transaction where the parties make no mention of the risk allocation.

If a breach has occurred and no avoidance is made, the non-defaulting party in case of goods already delivered has to take the responsibility of delivery despite the

183 Smith SA, Contract Theory, Oxford, Oxford University Press, 2004, available at https://books.google.ch/books?id=0M1MAgAAQBAJ&pg=PA97&lpg=PA97&dq=Stephen+A.+Smith,+Contract+Theory+(2004)&source=bl&ots=gdrJjdYDTD&sig=ACfU3U1VOLtfXVnOTdqY3WrMt9FTzmg5Vg&hl=en&sa=X&ved=2ahUKEwiXrfPk78LpAhXQwKQKHUI-Bt8Q6AEwCnoECBEQAQ#v=onepage&q=Stephen%20A.%20Smith%2C%20Contract%20Theory%20(2004)&f=false. Last accessed 20 May 2020.

184 Gillette CP & Walt St D, UN Convention on Contracts for International Sale of Goods: Theory and Practice, 2nd Ed, New York, Cambridge University Press, 2016.

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breach and be responsible for the disposal or adoption of the goods to its use.[185] It may be entitled to other remedies under the law like damages, price reduction or repair, as the case may be. Where the contract is terminated after the breach, the breaching party has the risk for the disposal of the goods or their adaptation to its own use.

There is the risk that the injured party may not be adequately compensated for its loss if it takes delivery of the goods despite the breach. On the other hand, there is a risk on the seller that the buyer may act in an opportunist manner to receive more from the seller. These counterbalancing risks require a compromise in international sales contracts where numerous time and resources are normally employed to have contract relations in motion.

Where the costs for the seller to take back the goods or sell to another buyer with all the attending expenses incurred as a result of the breach are higher than the costs of having the buyer taking the goods and claim other remedies to balance the equation, it is necessary for the sales law to consider this fact before allowing or denying termination.

Furthermore, the ex-ante transaction cost involved in the CISG shows the need for a default rule that minimizes the ex-post transaction cost. The ex-ante cost involves the cost of negotiations and the drawing of the contractual frameworks between the parties with all its attending expenses, whilst the ex-post cost involves the dispute settlement expenses.[186] The approach of the law that minimizes the ex-ante and ex-post transaction costs in some way would be the best approach to international contracts. This is based on the idea of what most merchants would like if they were to make rational choices without having been contaminated with the influence of a particular legal culture.

The CISG and the PICC ensure that goods which are delivered are put to use by the buyer even though they deviate from the contractual stipulations insofar as they have commercial utility. Thus, this rule protects a seller of the goods from having to bear the cost of returning the goods or taking responsibility for their disposal and later pays for the damages to the creditor. It imposes the obligation on the creditor to accept the performance and later claim other remedies to minimize the costs. Even with the attending cost of having to take delivery of goods that did not conform to the contract, the buyer is not put in a situation worse than he would have been in if it has to reject the goods and negotiate a new contract with another seller, which also involves huge ex-ante expenses and taking measures to recover damages from the seller. All the expenses incurred by the buyer from the first contract to the cover contract may not be recoverable from the first seller. Thus, the buyer is put in a situation of losing rather than gaining if it terminates the contract and later makes a claim to recover from the seller.

Having a high standard of this nature safeguards the defaulter from being subjected to opportunistic behaviour of the creditor. This is so because the creditor is

185 *Ibid.*

186 Eric B & Jean MG, The Economic of contracts: Theory and Application, Cambridge, Cambridge University Press, 2002, p. 111.

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obliged to make use of the non-conforming goods as long as the goods have commercial utility.

Thus, from all indications, it can be fairly concluded that the default rule of the CISG and the PICC provides a more suitable approach to the remedy of termination in case of delivery of non-conforming goods as it minimizes economic waste on the side of both parties and puts in place a protective mechanism against opportunistic buyers.

The same conclusion is valid for the remedy of termination due to the failure to render performance within the stipulated timeline. It must be borne in mind that the regimes in discourse require no proof of fault on the part of the defaulter who failed to adhere to the contractual timeline. Thus, default sales law rules need to pursue the equal treatment of the parties in that regard. As postulated by Georges Rouhette, a contract being a cumulative act must normally establish reciprocal obligations that must be equal for both sides.[187] This is also a valid assessment of what the default rules should endeavour to achieve between the parties. The GSGA gives a creditor the option to terminate a contract if the debtor fails to adhere to the stipulated timeline if the non-adherence amounts to a breach of a condition. The CISG and the PICC, on the other hand, allow the termination where time is of the essence, but have the ultimate standard of termination based on substantial deprivation of the creditor.

Based on the minimization of the ex-post cost in the transaction being what the majority will prefer, it could be said that the CISG deprivation requirement provides a more suitable remedy. Yet it can be argued that the GSGA and the PICC's strict compliance rules requiring effective adherence to contract timeline is to ensure minimization of risk that a creditor (buyer) may be exposed to for its downstream contracts. Notwithstanding this dilemma, avoiding the contract does not provide a better protective mechanism than giving the defaulting party the chance to remedy the defect, if possible, as, in any case, the downstream contracts may be breached even if the buyer has to negotiate with another seller to have new goods and satisfy its customers. The creditor can minimize the loss by allowing performance within a timeline that will not expose him to higher risks and afterwards claim from the defaulting party the damage suffered. This is more so where the buyer is responsible for nominating the ship for the carriage FOB Incoterm (Free on Board International Commercial Term) and the nomination has been made by the buyer. The seller is also exposed to the same risk in case of CIF (Cost, Insurance and Freight) contract if he has already nominated a carrier but falls short of effecting delivery on the agreed date. Thus, the CISG and the PICC's substantial deprivation requirement has placed a fair balance between a creditor and a defaulting party by entertaining minor delays which have no potential huge effect on the creditor. On the other hand, the GSGA and the PICC's strict contractual adherence seem to have put the creditor in a position of dominance without any safeguard against opportunism.

In addition, all three regimes provide for the anticipatory breach, and the threatened breach standard is subject to the same analysis as above. Notwithstand-

187 *Ibid.*

ing, there is another substantial divergence among the three regimes, which relates to the prognosis test to be made before the termination right may be exercised. The CISG and Article 7.3.3 of the PICC, on the one hand, require a prognosis of a high likelihood of a breach which is more than mere reasonable speculation, whilst Article 7.3.4 of the PICC and the GSGA require a lesser prognostic standard of reasonable belief.

The effect of termination is to set aside the bargain of the parties due to a breach occasioned by one party. It is therefore imperative for the creditor to have adequate speculative bases for his subjective assessment before a contract can be terminated. It must be noted that the assessment of whether a breach will occur is given to the victim of a breach yet to materialize. Thus, requiring a reasonable standard prediction of a breach is not something that appeals to sound commercial sense. What is a reasonable standard? Would a creditor be entitled to terminate due to missing delivery obligation? Would a creditor consider what a third party told him about the conduct of the defaulting party? These dilemmas question the appropriateness of this prognostic standard.

Does the higher likelihood prognosis under the CISG and the PICC's Article 7.3.4 provide a better approach? I believe it does, considering the fact that the victim of the breach yet to materialize is empowered to pass judgement on its contracting party's conduct which has not yet clearly crystallized. Thus, the need for higher certainty is a measure that appropriately responds to the need to avoid unilateral disturbance of contractual bonds without just cause.

Furthermore, the regime differs on whether the creditor has to notify the defaulting party and require adequate assurance of performance. The CISG and the PICC's Article 7.3.4 require notice requiring adequate assurance of performance, whilst the GSGA does not require any notice for assurance.

Since the creditor is to assess on its own as to whether the debtor will commit a future breach, it is imperative that a higher prognosis be made before a creditor can declare the contract avoided. Thus, the prognosis provided by the CISG and the PICC's Article 7.3.4 is the most appropriate standard. It will ensure that creditors avoid unnecessarily disturbing the contract because they have reasons to believe the future performance will be impaired.

Notwithstanding, it may be argued that the CISG, having put in place a standard of prognosis that required a higher likelihood of the breach, puts a duty on a creditor to send notice requesting adequate assurance, and, as such, it, in essence, creates an unnecessary burden on a creditor having to comply with the procedure of adequate assurance where it is highly likely that there will be a future fundamental breach. Such a requirement could not be fathomed if the breaching party is going under insolvency proceeding. There is no logical conclusion in having to know of that fact and having yet to send notice to the defaulting party requiring adequate assurance of performance. However, it must be noted that since the parties may be separated by distance, the adequate assurance will help the creditor by making it categorically clear whether a future fundamental breach will, in fact, occur or not. Thus, the procedure provided under the CISG and Article 7.3.4 of the PICC is more suitable for international sale contracts by providing the need to send

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notice requesting adequate assurance before the right of termination can be exercised.

Another important determinant on the suitability of the termination approach is the interplay between the right of cure and termination. It is seen above that there is no right of cure under the GSGA, whilst the CISG and the PICC expressly provide for it.

It should be noted that the CISG allows termination only when there is a fundamental breach, *i.e.*, when the creditor is substantially deprived of its expected contractual benefit. The case law under the convention indicates that the remedy of termination will not be available if the breach can be cured in some way without unreasonable inconvenience to the creditor.[188] Thus, under the CISG, the creditor will only be able to terminate the contract if cure is not possible. If the breach can be cured without unnecessarily burdening the debtor, the breach will not constitute a fundamental breach, and the creditor cannot terminate based on that breach. Although the PICC expressly provides that the right of avoidance is subject to the right of cure, it is submitted that there is no practical difference between this approach and the approach under the CISG, because under both approaches, there will be no termination if cure is possible and appropriate. The GSGA, on the other hand, provides no right of cure and as such deviates from the mechanism of the real world of commerce and the customs and mores of the merchants.

It is, therefore, my position that the CISG provides the most suitable approach to the remedy of termination in international contracts of sale of goods from the consideration of risk allocation approach, the distance between the parties and the desire to give utmost regard to the contractual relations of parties. This is so as it ensures that the parties' bargain is always protected and enforced unless enforcement does not make any more commercial sense to the creditor. This is the logic of trade. Merchants enter into a contract not to have their contracts avoided; instead, they aim to realize their contractual benefits or expectations. Thus, sales law needs to consider these factors and put in place measures that respond to the needs of merchants internationally. The PICC, on the other hand, does not have much divergence from CISG, but differs from its mechanisms in specific areas that may also erode the very sanctity of contracts and economic efficiency for allowing termination where the total costs of maintaining the contract is less than the cost that will be incurred if the contract is terminated.

G Conclusion

The article has indicated the differences and similarities of the three legal regimes. The CISG allows for avoidance of the contract in cases of non-adherence to contract timeline if the breach amounts to a fundamental breach, or through the employment of *Nachfrist*. Termination under the convention is not automatic. The PICC also provides the remedy of termination on the occasion of fundamental non-per-

188 Oberlandesgericht Koblenz, 31 January 1997 (Germany), CISG online; also, in Landgericht Regensburg, 24 September 1998, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V99/903/75/PDF/V9990375.pdf?OpenElement.

formance or through *Nachfrist*. Termination is only possible through notification. On the other hand, the GSGA provides for the termination in such cases if the breach affects a condition of a contract. With this mode of termination of contracts, there is no need for the creditor to be substantially deprived. It also allows termination in case of substantial deprivation if the breach affects an innominate term of the contract.

Concerning defective goods, the CISG provides for termination only if the breach is fundamental, *i.e.*, if the delivered goods are rendered commercially useless. The creditor is obliged to notify the breaching party of the defect before it can terminate the contract. The PICC also provides a similar mechanism for termination but provides factors to be considered in determining fundamental non-performance. The GSGA provides an easy termination where breach entitles a creditor to terminate the contract regardless of the magnitude of the breach if the breach affects a condition of contract. There is no ipso facto termination of contracts. There is no requirement to notify the breaching party of the defect.

In reference to an anticipatory breach, the CISG allows termination only if the anticipated breach will constitute a fundamental breach. It thus requires the creditor who wants to terminate the contract to be clear in his assessment that a fundamental breach will occur. It requires requesting adequate assurance before termination if time permits. The PICC provides similar termination requirements, but it provides for two different mechanisms for termination; however, all of the mechanisms require the threatened breach to be fundamental. One mechanism provides for termination if it is clear that a fundamental non-performance will be committed. There is no need to require adequate assurance. The other mode provides for termination if the creditor has a reasonable belief that a fundamental non-performance will be committed; and in this mode, the creditor is required to notify the breaching party of its apprehension and request adequate assurance of its performance. Under the GSGA, a creditor can terminate a contract for anticipatory breach if it has a reasonable belief that a condition of the term will breach, or the breach will go to the root of the contract. There is no requirement of requesting adequate assurance from the debtor.

From a critical comparison of the three legal regimes, it has been highlighted that the regimes share some major commonalities but have significant divergence in respect of some matters of detail. The major divergence is the standard required before a creditor can terminate a contract. The two international instruments leaned towards favouring the continuous adhering to contractual obligations if the creditor has not been substantially deprived of what it is entitled to expect from the contract. The GSGA favours contractual termination by focusing on the term breached rather than on the consequence of the breach on the creditor. With respect to anticipatory breach, whilst the CISG and PICC try to put more safeguards against the arbitrary exercise of the power of bringing an entire contract to an end, the GSGA allows for a seemingly easy approach to termination without any safeguard mechanism.

It is submitted that CISG offers the most suitable approach to international contracts of sale of goods as it considers the transaction cost, the risks involved in the international sales transaction and the opportunistic behaviour of some credi-

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tors; and it also arranges balance protection of both parties in cases of an anticipatory breach as the creditor's interest in regaining its freedom of disposition is respect whilst giving a chance to the debtor to demonstrate its readiness to perform its obligations as it falls due. The PICC, which is remarkably similar to the CISG, provides additional factors that may undermine the very notion of minimizing transaction cost and opportunistic behaviours. But it thus provides more protection and safeguards in international contracts for the sale of goods than the GSGA.

On that basis, it is hereby recommended that it will be beneficial to The Gambia to either accede to the CISG or reform its sales law by modelling it on PICC.