

## CHAPTER V CONCLUSION

### 5.1. CONCLUSION

Avoidance is a particularly drastic and incisive remedy, releasing the parties from their contractual obligations and putting an end to the maxim *pacta sunt servanda* for the contract. Under the CISG, the concept of avoidance is similar to termination of a contract where such a remedy could only be invoked in cases of fundamental breach and, thus, the *ultima ratio* of remedies. The concept of avoidance under the CISG thus presupposes the existence of a valid contract. Meanwhile, under the UPICC, avoidance is a remedy granted in cases where the contract is invalid because of defective consent, such as a mistake or fraud. Failure to disclose certain information may amount to mistake or fraud when there is such a duty to disclose. There is no specific obligation to disclose under the UPICC as the UPICC delegates it to the parties' own circumstances based on the principle of good faith and fair dealing. Nevertheless, the following four factors will help in determining when such a duty is imposed: (1) a special expertise of the party with an alleged duty to disclose; (2) the ease with which the other party could have obtained outside information; (3) the nature of the contract; and (4) the type of relationship between the contracting parties.

In regard to the type of information to be disclosed, it is the generally accepted view that material information, whether intrinsic (pertaining to the item itself) and extrinsic (related to the market or environment), that might potentially impact the substance of the transaction, such as the price of the transaction, must be disclosed. While it can be argued that material information that is confidential should not be disclosed, if the parties involved in a transaction do not privately establish disclosure standards, all material information ought to be disclosed. As such, the existence of confidential information cannot be considered a justification for a party to withhold any material information from the counterparty. Failure to disclose such material information may result in a breach of duty to disclose.

A breach of duty to disclose may amount to mistake and fraud as concealing certain information may lead to an error of a party's understanding concerning the

transaction it is negotiating. However, the distinguishing factor when a breach of duty to disclose will amount to mistake or fraud is the intent to deceive. Under the UPICC, a breach of duty to disclose will amount to fraud when (1) the breaching party intentionally led the counterparty into error by not disclosing the information and (2) thereby gain advantage to the counter-party's detriment. Meanwhile, any breach of duty to disclose will generally amount to a mistake as such non-disclosure will most likely create a mistaken understanding of the transaction by the other party. The UPICC does not only prescribe the remedy of avoidance for a breach of duty to disclose, rather a remedy of damages is also available for such a breach. Specifically, for a breach of duty to disclose that only amounts to a mistake, the parties may have recourse to adaptation or rectification of the contract. Thus, avoidance of a contract is not the sole remedy in case of a breach of duty to disclose.

## 5.2. **RECOMMENDATION**

In sum, the author is of the opinion that in order to uphold the principle of good faith and fair dealing, parties to an international transaction must take due care in disclosing material information to their counterparties in order to avoid mistakes or claims of fraud in the transaction. Preventative action is always preferable, as disputes arising from mistakes or fraud will incur significant additional costs in time and money to resolve. However, it is acknowledged that international contract law is deficient in providing detailed explanations of the duty to disclose and the kinds of information to be disclosed. Consequently, a more nuanced examination of the obligation to disclose and the information that should be made available under international contract law is required to prevent any misapprehension or errors during negotiations.

The author aims to establish this thesis as a foundation for conducting further research and analysis on the duty of disclosure and its associated remedies. This thesis also serves to fill the gap in Indonesian law regarding its approach to fraud. As the nature of business in Indonesia is largely growing and expanding, there is an expected increase in the ways in which parties seek to gain profit in a fraudulent manner, including deceiving the counterparty in a subtle manner by not disclosing all information. The current provisions on fraud under the Indonesian

Civil Code have an obscure threshold, rendering it difficult for parties to invoke such provisions in cases of fraud by non-disclosure. It is therefore imperative that the Indonesian Civil Code is modernised to cover a wider range of aspects of contractual dealings. In particular, it is beneficial for the Indonesian Civil Code to amend the provisions relating to fraud to reflect the international standards for contractual transactions as crystallised in the UPICC. Furthermore, as the UPICC serves as a general principle of international contract law, the UPICC's provision on fraud as a ground for avoidance may serve as a supplementary interpretative means for Indonesian courts in interpreting the provisions of the Indonesian Civil Code relating to fraud. The compatibility of the UPICC and the Indonesian Civil Code may therefore promote the development of the Indonesian system and jurisprudence of contract law.

## BIBLIOGRAPHY

- Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned From the Caveat Emptor Doctrine*, 45 SLDR 79 (2008).
- Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *Journal of Legal Studies* 1 (1978).
- Argentinian Seller v. Chilean Buyer* [1997] Buenos Aires Ad hoc Arbitration.
- Ari Korpinen, *On Legal Certainty regarding Timely Notification of Avoidance of the Sales Contract*, *Nordic Journal of Commercial Law* (2005)
- Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, in: *Pace Review of the Convention on Contracts for the International Sale of Goods* (Kluwer, 1999-2000).
- Award No. 10504 [2000] ICC International Court of Arbitration, Case No. 10504.
- Bank Notes case [1999] ICC International Court of Arbitration (Paris), Case no. 9474.
- Boileau v. Records & Breen* [1913] Iowa, Case no. 144 N.W. 336.
- Bzhar Abdullah Ahmed & Hassan Hustafa Hussein, *Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis*, 61 *J.L. Pol'y & Globalization* 126 (2017).
- Chengwei Liu, *Effects of Avoidance: Perspectives from the CISG, UNIDROIT Principles and PECL and case law*, *Nordic Journal of Commercial Law* (2005).
- Christopher T. Wonnell, *The Structure of a General Theory of Nondisclosure*, 41 *W. Res. L. Rev.* 329 (1991).
- Coil winding machine case* [2002] Court of Appeal Karlsruhe, Case No. 19 U 8/02.
- Darren Peacock, *Avoidance and the Notion of Fundamental Breach under the CISG: An English Perspective*, 8 *ITBLR* 106 (2003).
- Denis Tallon in: Cesare Massimo Bianca & Michael Joachim Bonell eds. *Commentary on the International Sales Law: The 1980 Vienna Sale Convention* (Milan, 1987).
- Designer Clothes case* [2002] Court of Appeal Cologne, Case No. 16 U 77/01.
- Dr. Fabian Tross, Sebastian Braun, *BGH: Seller's disclosure obligations in the due diligence process (LPA GGV, 2023)* accessed at <https://lpa-ggv.de/wp->

content/uploads/2023/09/LPA-Smart-News\_Sellers-disclosure-obligations-in-the-due-diligence-process\_230921.pdf.

E. Allan Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217 (1987).

Ernst A. Kramer, Contractual Validity According to the UNIDROIT Principles, 1 Eur. J.L. Reform 269 (1999).

Fabre-Magnan, Muriel, Defects of Consent at in Contract Law, in: Hartkamp/Hesselink/Hondius, Towards a European Contract Code, (2nd edn, The Hague, 1998).

Floating Center case [1995] Commercial Court Canton Zurich, Case HG 920670.

Folke Schmidt, The International Contract Law in the Context of Some of Its Sources, 14 Am. J. Comp. Law 1 (1965).

French Civil Code.

G.E. Fisher, Remedies for Breach of Contract Under the International Sales Convention, 1 Mac, LR 236 (1997).

German Civil Code.

German sportswear case [1995] District Court Landshut, Case no. 54 O 644/94.

GH Jones and Peter Schlechtriem, Breach of Contract in: A von Mehren (ed), International Encyclopedia of Comparative Law, vol VIII Contracts in General (2008).

Hein Kötz, European Contract Law (2nd edn., Oxford University Press, 1997).

Helen Elizabeth Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 YJIL 1 (1993).

Huala Adolf, Dasar-Dasar Kontrak Internasional (3rd edn, PT Refika Aditama, 2010).

Hugh Beale, Pre-Contractual Obligations: The General Contract Law Background, 14 Juridica International 42 (2008).

Hugh Beale, Benedicte Fauvarque-Cosson, Jacobien Rutgers & Stefan Vogenauer, Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law (3<sup>rd</sup> edn., Hart Publishing, 2019).

Hugh Collins, Implied Duty to Give Information during Performance of Contracts, 55 Mod. L. Rev 556 (1992).

Hungarian injection moulding tool case [2014] German Supreme Court, Case no. VIII ZR 394/12.

Indonesian Civil Code.

Indonesian Penal Code.

Ingeborg Schwenzer, Christina Fountoulakis, Mariel Dimsey, *International Sales Law* (Taylor & Francis, 2007).

Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press, 2012).

International Institute for the Unification of Private Law (UNIDROIT Study Group), *Text and Explanatory Report of Chapter 3: The Substantive Validity of International Contracts* (1983).

International Institute for the Unification of Private Law, *The UNIDROIT Principles of International Commercial Contracts*, (UNIDROIT, 2016).

Italian Civil Code.

Italian fabrics case III [1994] Court of Appeal Düsseldorf, Case no. 6 U 119/93.

Italian shoes case VI [1991] District Court Frankfurt am Main, Case No. 3/11 O 3/91; Fabric case [1999] Appellate Court Bamberg, Case No. 3 U 83/98.

J Ghestin, *The pre-contractual obligation to disclose information, 1: French report in: Donald Harris, Denis Tallon eds., Contract Law Today: Anglo-French Comparisons* (Clarendon Press, 1993).

John Cartwright, *The Rise and Fall of Mistake in the English Law of Contract in: Ruth Sefton-Green*.

John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3 edn. Kluwer Law International, 1999).

Joseph Lookofsky in: J. Herbots, R. Blanpain, *The 1980 United Nations Convention on Contracts for the International Sale of Goods Suppl. 29 International Encyclopaedia of Laws - Contracts* (Kluwer Law International, 2000).

J Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian—Buku I* (Citra Aditya Bakti, 1995).

Judgment No. 03-16.794 [2005] French Court of Cassation, Case No. 03-16.794.

Judgment No. V ZR 77/22 [2023] German Federal Court of Justice, Case no. V ZR 77/22.

Kalev Saare, Karen Sein, Mari-Ann Simovart, Differentiation of Mistake and Fraud as Grounds for Rescission of Transaction, 12 *Juridica International* 142 (2007).

Key press case [1995] German Supreme Court, Case No. VIII ZR 18/94.

Lantera Nadew, Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of Their Effects, 2 *Mizan Law Review* 91 (2008).

Larry A. DiMatteo, *International Sales Law: A Global Challenge* (Cambridge University Press, 2014).

Macquarie International Health Clinic Pty Ltd v. Sydney South West Area Health Service I [2010] Supreme Court of New South Wales - Court of Appeal, Case no. [2010] NSWCA 268.

Melvin Eisenberg, Disclosure in Contract Law, 91 *Cal. L. Rev* 1645 (2003).

Michael Bridge, Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods, 59 *Int'l & Comp. L.Q.* 911 (2010).

Michael Joachim Bonell, Policing The International Commercial Contract Against Unfairness Under The UNIDROIT Principles, 3 *Tul J Int'l & Comp L* 73 (1995).

Muhammad Rifky Wicaksono, Defects of Consent: Fraud and Mistake in Indonesian Contract Law in: Mindy Chen-Wishart, Hiroo Sono, & Stefan Vogenauer eds., *Studies in the Contract Laws of Asia IV: Invalidity* (Oxford University Press, 2022).

Nials Jansen, Reinhard Zimmerman, *Commentaries on European Contract Laws* (Oxford Academic, 2018).

Nicola W. Palmieri, Good Faith Disclosures Required During Precontractual Negotiations, 24 *Seton Hall L. Rev.* 70 (1993).

Qian Binzhen v. Huhhot Economic Technology Development Zone Mengniu Wine Co., Ltd [2005] Beijing Haidian District People's Court, Case No. (2005) HaiMinChuZi no. 10353.

Partition panels case [1999] Austrian Supreme Court, Case no. 1 Ob 74/99k.

Perkins Manufacturing Company v. Haul-All Equipment Ltd. [2020] US District Court for the Northern District of Illinois, Case No. 19 cv 03769.

Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (4th edn, International Commercial Law, 2016).

Pierre Legrand 'Pre-Contractual Disclosure and Information: English and French Law Compared' 6 OJLS 322 (1986).

Pig Farm Case [1974] French Court of Cassation, Case No. 73-11901.

Plasticos de Exportacion Expoplast C.A. v. Reg Mac s.r.l. [2001] Tribunale di Busto Arsizio, CLOUT No. 1192.

Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition.

Reinhard Zimmermann, The Unwinding of Failed Contracts in the UNIDROIT Principles 2010, 16 Unif. L. Rev. 563 (2011).

Richard Craswell, Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere, 92 Va. L. Rev 565 (2006).

R Subekti, Hukum Perjanjian (12th edn, Intermasa, 2002).

Russian Seller v. Swedish Buyer [1999] International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Case No. 302/1997.

Ruth Sefton-Green, Mistake, Fraud and Duties to Inform in European Contract Law (Cambridge University Press, 2005).

Sarah Anderson, Federal Court of Justice (BGH) tightens duty of disclosure of real estate sellers (Taylor Wessing, 2023) accessed at <https://www.taylorwessing.com/en/insights-and-events/insights/2023/11/bgh-tightens-duty-of-disclosure-of-real-estate-sellers>.

Saul Litvinoff, Vices and Consent, Error, Fraud, Duress and an Epilogue on Lesion, 50 La. L. Rev. 1 (1989).

Seating set case [1995] Court of Appeal Olderberg, Case no. 11 U 64/94.

Severine Saintier, Defects of Consent in English Law: Protecting the Bargain? in: Larry DiMatteo, Martin Hogg (eds), Comparative Contract Law: British and American Perspectives (Oxford Academic, 2016).

S Gautama, Indonesian Business Law (3rd edn, Citra Aditya Bakti, 2006).

S.K. Verma, Legal Protection of Trade Secrets and Confidential Information, 44 Journal of the Indian Law Institute 336 (2002).

Smith v. Hughes [1871] Queen's Bench, Case no. LR 6 QB 596.



Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, Oxford University Press, 2014).

*Supermicro, Inc. v. Digitechnic S.A.* [2005] Court of Appeal Paris, Case no. 03/21335.

*The Principles of European Contract Law.*

Ulrich Drobnig, *Substantive Validity*, 40 ASCL 635 (1992).

Ulrich G. Schroeter, *Defining the Border of Uniform Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation*, 58 Vill. L. Rev. 553 (2013).

Ulrich Magnus, *The Remedy of Avoidance of Contract Under CISG – General Remarks and Special Cases*, 25 J.L. & Com. 423 (2005).

United Nations Convention on Contracts for the International Sale of Goods (“**CISG**”) (adopted April 11, 1980, entered into force January 1, 1988).

United Nations Commission on International Trade Law, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations, 2016).

United Nations Commission on International Trade Law, *Hague Conference on Private International Law, International Institute for the Unification of Private Law, UNCITRAL, Hague Conference and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales* (United Nations, New York, 2021).

*Used car case I* [1996] Court of Appeal Cologne, Case no. 22 U 4/96.

*Used CNC machine case* [2005] Court of Appeal Canton Valais, Case no. C1 04 162.

*Warren H. Smith v. National Resort Communities, Inc.* [1979] Supreme Court of Texas, Case no. B-8168.

William B. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 W. Res. L. Rev. 5 (1956)

Xiaohua Liu, *Termination Regime in CISG*, International Conference on Economics, Social Science, Arts, Education and Management Engineering (2015).

*Xie Hao v. Liu Xiaoyong* [2015] Chongqing Wanzhou District People’s Court.