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Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods

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I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") first came into force on January 1, 1988.[1] The CISG governs the sale of goods between private parties whose places of business are in different nations and whose nations are Contracting Parties to the CISG.[2] This Convention is a milestone in the movement to codify the private international law of the sale of goods and has achieved strong world-wide approval.[3]

Unless another source of law is expressly chosen to govern the transaction, parties to contracts involving the international sale of goods will need to consult **[page 113]** the CISG to determine their legal rights, duties, and remedies.[4] In cases where the parties are of equal bargaining strength and the choice of law either cannot be resolved or is deliberately left out of the contract, the provisions of the CISG will apply.[5] The CISG may benefit parties who are of unequal bargaining strength because it is forum neutral, and thus puts neither party at a disadvantage. The Convention will also benefit those parties who fear potential litigation under an unfamiliar foreign law.

Perhaps the most important provisions of the CISG are its remedy provisions. The CISG's remedy provisions are divided into sections providing exclusive remedies for the buyer for breach of contract by the seller,[6] exclusive remedies for the seller for breach of contract by the buyer,[7] and damages provisions for use by any aggrieved contracting party.[8] These provisions include monetary damages,[9] specific performance,[10] and contract avoidance.[11]

As can be imagined, contract avoidance is a powerful remedy which "releases both parties from their obligations under [the contract], subject to any damages which may be due."[12] One of the instances in which a party may avoid the contract and be relieved of performance is upon the occurrence of a "fundamental breach."[13] Article 25 defines the term "fundamental breach":

> "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the

party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a **[page 114]** result."[14]

Article 25 does not provide any examples of events that would constitute a fundamental breach. Instead, it defines fundamental breach in terms of the detriment to the injured party based on the injured party's contractual and other expectation interests.

The purpose of this comment is to explain the nature and meaning of fundamental breach. This comment also seeks to explain the consequences of a fundamental breach and to provide guidance to parties involved in transactions governed by the CISG on drafting contract clauses to protect their rights in avoiding performance. Following this introduction, a brief background is presented on the development of the CISG and the movement to unify the international law of sales. The discussion then explores the interpretation of the CISG itself and continues with an examination of the boundaries separating fundamental from non-fundamental breaches using CISG interpretation guidelines. This piece then analyzes the legislative history of the CISG, scholarly commentary, and case examples to shed further light on the concept of fundamental breach. Finally, the comment concludes with recommendations both on drafting contract clauses to define a fundamental breach and on procedures to be taken in the event of such a breach.

II. BACKGROUND AND HISTORICAL DEVELOPMENT OF THE CISG

The movement to unify international sales law began in 1929 under the direction of the International Institute for the Unification of Private Law ("UNIDROIT").[15] The work towards developing a convention on the international sale of goods continued up to, and after, the Second World War.[16] Two draft conventions on the international sale of goods were written and distributed to the governments participating in their drafting in 1956 and in 1964.[17] At the same time, another draft convention on the formation of contracts for the international sale of goods was written and circulated in 1958.[18] These early draft conventions led to the adoption of the Uniform Law on the International Sale of Goods [19] ("ULIS") and the Uniform Law on the Formation of Contracts for the International Sale of Goods [20] ("ULF") in 1964. Both ULIS and ULF came into force in 1972.[21] However, neither of them was widely adopted.[22]

Because of the need to promote uniformity in the international law of sales **[page 115]** and to adopt a more widely accepted convention, the United Nations Commission on International Trade Law [23] ("UNCITRAL ") appointed a working group to revise ULIS and ULF.[24] The working group then prepared draft conventions, which were revised in 1977 and 1978, combining the topics covered in ULIS and ULF.[25] The 1978 Draft Convention was then considered at a conference in Vienna, Austria in 1980.[26] The delegates adopted the 1978 Draft Convention after revision; the draft became known as the United Nations Convention on Contracts for the International Sale of Goods.[27]

III. INTERPRETING CISG PROVISIONS: ARTICLE 7

The rules on construction and interpretation of CISG provisions must first be understood in order to properly define fundamental breach under Article 25. CISG Article 7 provides the rules concerning the Convention's interpretation:

> "(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> "(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."[28]

Article 7(1) bases the rules of interpretation on the "international character" of the CISG, the promotion of uniformity in application, and on "good faith in international trade."[29] Article 7(2) is a gap-filling interpretation rule which relies on the general principles upon which the CISG is founded to resolve situations that are not expressly settled within its text.[30] Article 7(2) is concerned with issues governed by the CISG that

have not been expressly stated.[31] By a plain meaning interpretation of Article 7(2), it is possible to conclude that if the **[page 116]** CISG's text governs a matter, and it can be settled by resorting to the express provisions of the CISG, then interpretation should be restricted to the rules under Article 7(1).

Article 7(1)'s interpretive rules -- "international character," "promotion of uniformity," and "good faith" -- are basic rules which themselves have been interpreted by commentators.[32] The "international character" component generally means that judicial, arbitrative bodies, or a conciliator [33] interpreting the CISG, can resort to its legislative history and cannot base any interpretation on any particular domestic law.[34] The terms being interpreted must also be read as they are presented in the context of the CISG.[35]

The principle of uniformity of application supports the notions that interpretations based on domestic law should be avoided and that the CISG's legislative history may provide guidance to assure uniformity of application. Uniformity of application also requires tribunals to take into consideration both the decisions and interpretations made by like bodies as well as the analyses provided by scholarly commentary.[36] **[page 117]**

The last interpretative rule is the requirement that the international trade standard of good faith be observed.[37] Again, commentators agree that the good faith element should not be construed using notions of good faith in domestic laws.[38] Beyond these basic grounds of agreement there are no other specific conclusions drawn with respect to the good faith standard to be applied. Examples, however, have been given to demonstrate the contexts in which the good faith element may arise in interpretation of CISG provisions and the notion of "reasonableness" in usages of trade has been suggested as a means to view the good faith requirement.[39]

Notwithstanding the ambiguous nature of Article 7(1)'s good faith element, Article 7 provides clear guidance with respect to the interpretation of CISG provisions. Article 7(1) allows for the use of legislative history and scholarly commentary to shed light on the meaning of CISG terms. It requires that case law construing CISG terms be used and uniformly applied. Article 7(1) also may allow the use of international trade standards for guidance in the interpretation of CISG terms.

IV. THE MEANING OF ARTICLE 25 IN LIGHT OF ITS STRUCTURE, LEGISLATIVE HISTORY, AND CASE LAW

A. Structure and Legislative History of Article 25

Legislative history and literary structure lay the groundwork for gaining an understanding of the meaning of Article 25.[40] The definition of a fundamental breach under Article 25 has two main components. The first is the detriment/expectation component and the second is the foreseeability component. Although the detriment/expectation component is what makes a breach "fundamental," liability for such a breach is limited by the affirmative defense of foreseeability.[41] For a breach to be "fundamental," the breach must cause a **[page 118]** "detriment" that substantially deprives the non-breaching party of its reasonable expectations.[42] This detriment concept developed out of what were perceived weaknesses of the revised text of the ULIS.[43] Those weaknesses were replaced by a substantial detriment test for fundamental breach.[44]

The CISG does not contain any definitions for the term "detriment." It also does not give any examples of a detriment that rises to the level of a fundamental breach. However, the unofficial commentary to the early drafts created after the development of the substantial detriment test does provide significant guidance as to its meaning and application.

The drafters' commentary stated that "[t]he determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the **[page 119]** injured party."[45] From this comment, it is possible to conclude that the drafters simply and naturally intended the word "detriment" to be synonymous with monetary injury or harm, or of a consequential harm, and that the determination of a fundamental breach was to be made on a case-by-case basis.[46]

This commentary also provides factors to look for in determining whether an injury is substantial enough to amount to a fundamental breach, specifically, the contract's overall value, the monetary loss suffered by the non-

breaching party, and the interference caused to the non-breaching party's operations or activities. These factors were set out prior to the inclusion of the expectation interest of Article 25. However, what the injured party was entitled to expect under the contract is directly related to these objective factors.

A contract for the international sale of goods will minimally contain the type of goods involved, the quantity of the goods involved, and the price of the goods being sold.[47] Therefore, the parties to the contract will not only expect a specific type and quantity of goods to be sold, but will also have some fixed monetary value set for the transaction. In addition, the parties involved will be non-consumers, i.e., merchants,[48] whose business activities will either benefit or suffer from engaging in a particular sale and whose interests and activities outside of the contract in dispute will most likely be identifiable.

The expectation interest term of Article 25 is central to determining whether a breach is fundamental. It is the object of the inquiry into whether the non-breaching party suffered a substantial injury. Expectation interest developed out of the drafters' perceived need to add an objective criterion to define substantial detriment.[49] The extent to which a party suffers an injury to its expectations will be found not only in the language of the contract but in the circumstances surrounding the contractual relationship of the parties. Since the parties' expectations **[page 120]** dictate the degree to which they will suffer harm if a breach occurs, it is very important that both parties be aware of their respective interests, both monetary and non-monetary.

The second part of Article 25 is its foreseeability component. The foreseeability component developed out of the former Article 10 of ULIS which completely based fundamental breach on the foreseeability of events.[50] Article 25 adds objectivity into the determination of whether a breach is fundamental by asking two questions: (1) did the party in breach foresee the substantial detriment (i.e., loss of expectation interest) it caused to the non-breaching party; and (2) would a "reasonable person of the same kind in the same circumstances" foresee that the breach of contract would cause the non-breaching party substantial detriment.[51] These two questions will require a finder of fact to view the transaction from the subjective perspective of the party-in-breach, as well as from the objective perspective of the reasonable merchant in the breaching party's position. In addition, the finder of fact will have to determine whether the non-breaching party's expectation interests were and would be substantially injured by the breach.

Based on an analysis of the legislative history of the CISG, the burden of proving the foreseeability of loss is on the breaching party.[52] The drafters did not wish to include language in Article 25 which would raise questions of civil procedure and, therefore, did not incorporate express language, other than the word "unless," that would indicate a shift of the burden of proof.[53] However, there was a consensus that this burden should be on the party in breach because of the logical difficulty of requiring the non-breaching party to prove what the party in breach actually foresaw or a party in its position could have foreseen.[54] Once the party alleging breach establishes that it has suffered a substantial loss of expectation interests, the breaching party can respond affirmatively. The first requirement for negating the claim for breach under Article 25 is purely a **[page 121]** subjective one that focuses solely on whether or not the party in breach actually foresaw the harm done by the breach. The actual foreseeability of the detriment caused by the breach will depend on the breaching party's knowledge of the facts surrounding the transaction.[55] Factors such as the breaching party's (in)experience, level of sophistication, and organizational abilities should be considered in showing foreseeability of harm.[56] These factors demonstrate the breaching party's ability to anticipate and recognize problems in the transaction. The non-breaching party's experience, or lack thereof, may also be relevant. The manner in which the non-breaching party performs may affect the ability of the breaching party to perform properly. It is possible that the non-breaching party may not have provided material information or simply withheld such information which was crucial to properly completing performance.

The second requirement under Article 25 for negating the claim for breach is an objective one requiring the breaching party to show that a reasonable person of the same kind in the same circumstances would not have foreseen the injuries to the non-breaching party. Since parties to contracts involving international sales are presumed to be merchants,[57] a "reasonable person" may be construed as a reasonable merchant. A reasonable merchant would, therefore, encompass all merchants that satisfy the standards of their trade and that are not intellectually or professionally substandard.[58] The phrase "of the same kind" refers to a merchant in the same

business, doing the same functions or operations as the party in breach.[59] The requirement that the reasonable merchant be "in the same circumstances" refers to the market conditions, both regional and world-wide.[60]

A party alleged to be in breach has a difficult burden but if it can meet both **[page 122]** requirements then the party claiming breach will not be able to avoid performance of the contract. If the alleged party in breach can prove that it did not foresee the substantial loss of expectation interest the breach caused the non-breaching party, and can prove that a reasonable merchant facing the same market conditions would not have foreseen that the breach would cause a substantial loss of expectation interests, then there is no fundamental breach.[61]

Article 25 does not address the point at which foreseeability is measured. Are facts and circumstances arising after the conclusion of the contract relevant for determining foreseeability?[62] Or is the focus only on the facts and circumstances that occurred up to the conclusion of the contract?[63] The drafters apparently believed that by leaving the timing issue open that Article 25 maintains its flexibility because of the varieties of circumstances that could arise and that relevant information may have been provided after contract formation.[64] Parties to a contract may clarify the ambiguity surrounding the timing of foreseeability by expressly specifying the point at which information pertaining to the performance of the contract will no longer be considered.[65] If the parties to the **[page 123]** contract do not specify the timing, then in the event of litigation they will be leaving the determination to a tribunal.

B. Article 25 and Case Law

UNCITRAL has devised a system for compiling CISG cases.[66] The collection system depends on the cooperation of the Contracting States to select a "national correspondent" to gather court and arbitral decisions and then have them sent to the Commission's Secretariat.[67] After the collection of the cases, they may be reported through a commercial publisher.[68] As of May 1992, there has been no official reporter published containing CISG cases. Of the four cases in the United States that refer to the CISG, none deal specifically with fundamental breach.[69]

There has been, however, at least one reported case in Germany dealing with fundamental breach.[70] In that case, an Italian seller contracted to manufacture and deliver shoes to a German buyer.[71] The seller delivered the shoes in March 1989 and the buyer refused to pay.[72]

The German civil court of appeals had to address several issues. The court **[page 124]** had to determine whether Italian or German law, and whether the CISG or the Hague Sales Convention, applied to the transaction. The court also had to resolve whether the buyer properly refused to pay by declaring a fundamental breach and whether the buyer gave proper notice of avoidance to the seller. Because the plaintiff-seller had his principal place of business, and performance was due, in Italy, the court of appeals determined that Italian law applied to the transaction.[73] The court of appeals also concluded that the CISG applied to the transaction and not ULIS.[74] The court of appeals made this conclusion because the CISG had been in force in Italy since January 1, 1988,[75] rendering the ULIS inapplicable.[76] Since CISG Article 1(b) allows the rules of private international law of one Contracting State to dictate that the CISG will apply,[77] the German court reasoned that the CISG was applicable to the entire transaction even though the CISG did not come into force in Germany until January 1, 1991.[78] The court of appeals noted that Italy had not made a reservation under CISG Article 95 to the choice of law rules under Article 1(b).[79]

The final issues which the court of appeals resolved centered on the question of whether a fundamental breach had occurred and whether the buyer had properly declared the contract avoided as per CISG Article 49(2)(b).[80] Unfortunately, the court of appeals made only a conclusory judgment as to whether a fundamental breach had actually occurred; the court provided no analysis as to what defects the shoes had that justified the buyer's avoidance of the contract. The court of appeals boldly concluded that the seller had not properly performed a contractual duty and that that breach amounted to a fundamental breach.[81] Hopefully, in future cases, tribunals will present their decisions on **[page 125]** CISG cases with greater emphasis on the analysis used to support their conclusions so as to provide guidance for other litigants.

The court of appeals did however provide guidance with respect to the type of declaration that must be made in order for CISG contracts to be avoided. First, the court by implication recognized the use of telex or fax as a proper means to declare avoidance since the buyer had used one of these forms of communication to deliver his declaration to the seller.[82] Second, and more significantly, the court concluded that a party declaring a CISG contract avoided need not use exact language, such as, "I hereby declare our contract avoided." Rather, the court acknowledged a more pragmatic form for declarations of avoidance, that is, that the communication must contain language which clearly operates to place the breaching party on notice that the non-breaching party will no longer perform.[83] In this case, the buyer had stated to the seller that the shoes remaining to be made would be made by another Italian company and that their joint venture had ended.[84] This notice was sufficient for an effective declaration of avoidance.

Lastly, the court of appeals decision provides some guidance with respect to the timing of a declaration of avoidance with respect to a breach that has occurred after goods have been delivered to a buyer. In this case, the buyer had the goods for approximately five days [85] but declared the contract avoided one day after the shoes had been displayed.[86] The court of appeals found that the buyers declaration of avoidance was timely made; the declaration was made within a reasonable time because it came only one day after the buyer became aware of the breach.[87] At a minimum, therefore, it is possible to assume that buyers injured by a fundamental breach for reasons other than delivery may be able to hold goods like shoes or apparel for several days without becoming aware of some defect in them and thereafter still be able to declare the contract avoided within the next day.
[page 126]

V. A ROADMAP FOR CASES OF FUNDAMENTAL BREACH

The first analysis for parties involved in an international sales contract dispute governed by the CISG is to determine: (1) whether a breach of contract has occurred; and (2) whether the breach was fundamental,[88] The determination of whether a breach has occurred will require the parties to review their respective contractual obligations as well as their obligations imposed by the provisions of the CISG; the seller's obligations are specified in Articles 30 through 44 [89] and the buyer's obligations are specified in Articles 53 through 60.[90]

A. The Injured Buyer's Guide to Fundamental Breach

Article 45 states the general remedies available for an injured buyer when the "seller fails to perform any of his obligations under the contract or [under the CISG]."[91] In the case of a buyer injured by a fundamental breach, the buyer will have the following options:[92]

> (1) require the seller to perform his obligations **[page 127]** and fix an additional reasonable period of time for the seller to perform;[93]
>
> (2) require the seller either to deliver substitutes if the goods are nonconforming [94] or to repair the nonconforming goods;[95]
>
> (3) avoid the contract if the seller fails to perform any obligation amounting to a fundamental breach;[96]
>
> (4) avoid the contract if the goods have been either partially delivered or delivered but nonconforming [97] and
> (i) the buyer does avoid within a reasonable time after the buyer knew or should have known of the breach, [98] or
> (ii) the seller fails to perform after the buyer fixes an additional reasonable time for the seller to perform, [99] or
> (iii) the seller offers and fails to cure by the time indicated in the buyer's reply;[100]
>
> (5) declare the contract avoided if the goods have been delivered late and such declaration is made within a reasonable time after the buyer was aware that the delivery was made;[101] and
>
> (6) accept delivery and reduce the price to be paid for the nonconforming goods.[102]

Buyers injured by fundamental breach should carefully consider their options before declaring the contract avoided; once a buyer has declared the contract avoided, both parties will be relieved of their duties to perform and the buyer's only resort will be damages. [103] Before declaring the contract avoided, **[page 128]** the buyer must determine whether there is sufficient evidence to support the occurrence of a fundamental breach, otherwise the seller alleged to be in breach may sue to enforce its rights both under the CISG and the contract and thereby place the buyer in the position of facing protracted litigation.

The injured buyer must also consider what the impact of avoidance will be on future relations with the seller. The occurrence of a fundamental breach will destroy the contractual expectation interests of the buyer. However, the injured buyer who is in a position to resort to an alternative remedy, particularly to setting an additional period for the seller's performance, will be able to postpone avoidance without giving up the legal right to avoid the contract in the future -- at the same time, the buyer will be able to preserve the business relationship with the seller if the seller is able to perform.

The injured buyer must also keep in mind that requiring the seller to perform its obligations within a specified period of time does not necessarily mean that the buyer will have to sue for specific performance. Article 46 does not state that suit must be brought for the buyer to enforce his right to performance. The buyer may send oral or written notice to the seller of his intent to have the seller perform as agreed.[104] Practically, the seller who does not wish to perform may only perform after legal action is taken, in which case the buyer must consider the remaining options. The length of time set by the buyer must be reasonable.[105] What is a reasonable length of time for the seller to perform will depend on the facts and circumstances of the transaction and may require the buyer to evaluate such factors as the consequences of an extended delay, the seller's ability to deliver, and the buyer's own special needs.[106] The notice the buyer sends the seller should be unequivocal in its terms;[107] it should either give a specific date or should give a specific duration of time for performance.[108]

Nondelivery situations which injure the buyer call for special attention. Again, the buyer must assess whether nondelivery in and of itself amounts to a fundamental breach. The buyer must also consider whether it is practical to receive a delayed shipment from the seller. In the event that the buyer is in a position to take a delayed shipment, the buyer should fix a reasonable period of time for the seller to perform.[109]

By doing so, the buyer will not be open to a suit by the seller for declaring the contract avoided, and in the event the seller is still unable to perform by the date set, the buyer can avoid the contract without the need to worry about **[page 129]** whether the circumstances amounted to a fundamental breach.[110] If the buyer fixes the date for performance, and the seller declares that he will not perform within the specified period, the buyer can still declare the contract avoided without regard to whether the circumstances amount to a fundamental breach.[111]

In cases where the buyer has received delivery of nonconforming goods whose nonconformity amounts to a fundamental breach of contract, the buyer must act within a reasonable time after he knew or should have known of the breach in order to declare the contract avoided.[112] If, however, the buyer is in a position to accept substitute goods for the nonconforming ones, the buyer should send notice to the seller of his request for replacement goods.[113] This notice must specify the nature of the lack of conformity and must be sent w)thin two years after the buyer received the goods.[114]

If it is not unreasonable for the goods to be repaired, the buyer may request the seller to repair the goods at the seller's own expense.[115] Again, the buyer must give notice to the seller of the lack of conformity and must give the notice within two years from the date that the goods were handed over to the buyer.[116] It should be noted that it is possible for a buyer to request both substitute goods and the repair of goods depending on the circumstances. For example, the seller may only be able to supply a portion of replacement goods but is in a position to repair the remainder of the defective goods.

In addition, a buyer who has received defective goods whose nonconformity amounts to a fundamental breach may extend the time that the seller may perform.[117] Again, if the buyer is in a position to wait for the seller to perform as agreed the buyer will still be able to declare the contract avoided if the seller fails to perform by the date fixed by the buyer.[118] If the buyer chooses to fix another date and the seller refuses to perform, again, the buyer will maintain the option of declaring the contract avoided.[119]

In some cases of fundamental breach, a seller who has delivered defective goods may offer to cure the defects at his own expense.[120] The seller facing a fundamental breach situation, however, may attempt to cure only if: (1) the remedy does not cause unreasonable delay, inconvenience, or uncertainty of reimbursement for expenses advanced by the buyer;[121] and (2) the buyer does not **[page 130]** reject the offer to cure.[122] When a buyer receives an offer to cure from the seller, the aggrieved buyer will have to determine whether he will allow the seller to cure at all. The buyer will have to determine whether it is inconvenient to allow the seller to cure. When a seller makes an offer to cure and requests the buyer to let him know whether he will accept performance, the buyer should respond quickly by either allowing the performance or rejecting the offer to cure outright. If the buyer fails to respond within a reasonable time after the seller's request, the injured "buyer may not, within that period of time, resort to any remedy which is inconsistent with performance by the seller."[123]

The last option available to a buyer injured by a fundamental breach is price reduction.[124] The remedy of price reduction is available in cases where the seller delivers nonconforming goods but the buyer decides to keep them. The buyer by using price reduction can in some cases avoid having to sue the seller for damages since it is a private arrangement. It is irrelevant in cases of price reduction whether the fundamental breach is caused by the nonconforming goods themselves or for some other reason such as late delivery. By resorting to the remedy of price reduction the injured buyer may however relinquish the right to avoid the contract. It would seem to be inconsistent for the buyer to accept the defective goods, reduce the contract price due, and then attempt to avoid the contract.[125]

The remedy of price reduction is recommendable in cases where the market price of the nonconforming goods rises disproportionately to the price of conforming goods at the time of the conclusion of the contract.[126] The buyer will be receiving goods of inferior quality as compared to those originally contracted for but the value of the nonconforming goods will approximate or equal the value of the conforming goods. The injured buyer will also have the right to claim damages in addition to price reduction.[127] If the amount of the price reduction is less than the damages which the buyer may ordinarily claim, the buyer should first reduce the price and sue for the remaining damages. If the amount of the price reduction is equal to or greater than the damages which the buyer would ordinarily be able to claim, the buyer should reduce the price and not claim any damages.[128] In such a case, the buyer gets an extra monetary remedy without having to sue for damages. **[page 131]**

Partial avoidance of contract is also open to a buyer injured by a fundamental breach, although nowhere in the CISG is partial avoidance mentioned.[129]

Article 51 stands as a policy reminder that the CISG drafters sought to protect as much of an international sales contract as possible, and therefore, only in cases of fundamental breach can the entire contract be avoided.[130] However, the remedy of partial avoidance raises several issues. First, under what circumstances will the injured buyer be able to partially avoid the contract? The typical circumstance will be where the buyer has received delivery of goods, the substantial portion of which are defective. Second, what is the effect of partial avoidance on the duties of the parties? Arguably, the effects of partial avoidance would be the same as those of total avoidance, i.e., the release of both parties from their obligations under the contract.[131] Presumably, the buyer would be able to accept the conforming goods and by avoidance, reject the defective ones. Beyond these basic issues, the practicalities and procedures of partial avoidance are unclear.

B. The Injured Seller's Guide to Fundamental Breach

Article 61 states the general remedies available for a seller injured by a buyer's failure to perform any obligations under the contract or under the CISG.[132] In the case of a fundamental breach, an injured seller will have the following options:

> (1) "require the buyer to pay the price, take delivery or perform his other obligations"[133] (i.e., specific performance);
>
> (2) set an additional reasonable period of time for the buyer to perform; [134]

(3) declare the contract avoided within a reasonable time if the buyer has paid the contract price, and the fundamental breach is caused by something other than late performance after
(i) the seller knew or should have known of the breach,[135] or
(ii) the buyer failed to perform within any additional reasonable period of time fixed by the seller, or
(iii) the buyer declared he would not perform during the additional period;[136]

(4) declare the contract avoided if the buyer has paid the contract price, performed late, and if such declaration is made before the seller became aware of **[page 132]** the buyer's late performance;[137] and

(5) declare the contract avoided without further conditions if the buyer has not paid the contract price. [138]

The first analysis the injured seller must undertake is to determine whether the buyer has breached the contract or its obligations under the CISG. The second analysis is to determine whether the breach is fundamental. After concluding that the breach is fundamental, the seller must decide which remedy to pursue.

The first remedy available to the injured seller is to demand or sue for specific performance.[139] Article 62 grants the injured seller the right to require the buyer to perform both the contractual obligations as well as the obligations imposed by the CISG. The seller's ability to exercise this right is dependent on two factors: (1) how cooperative the buyer is, and (2) whether the law of the jurisdiction governing the contract allows specific performance as a remedy. Where a buyer refuses to perform after the seller makes the demand, the seller may be forced to bring suit. However, in order for the injured seller to be successful the law of the jurisdiction in which the seller is able to bring suit must allow for specific performance.[140] Otherwise, the seller will have to consider an alternative remedy.

Setting an additional reasonable period of performance is advisable to an injured seller who is in a position to wait for the buyer's performance and who is uncertain whether a fundamental breach has actually occurred. By fixing a reasonable date by which the buyer must perform, the patient seller retains the ability to avoid the contract if the buyer either fails to perform by the set date or declares that he will not perform.[141]

In cases where the buyer has not paid the contract price and a fundamental breach has occurred, the injured seller may unequivocally avoid the contract;[142] the seller need not give the buyer a second opportunity to perform. Thus, avoidance becomes a very practical tool for a seller no longer wishing to perform and not concerned with the potential business consequences that avoidance may cause.

The seller must carefully and quickly handle cases where the buyer has paid the contract price up front. When a fundamental breach occurs because of late payment or some other form of late performance, such as a failure to take delivery of the goods, the seller will be able to declare the contract avoided before becoming aware of the buyer's late performance.[143] Therefore, the seller injured by a fundamental breach due to late performance must declare the contract **[page 133]** avoided immediately otherwise a buyer who has performed late will likely argue that the seller was aware of the late performance.

In cases where the buyer has paid the contract price and a fundamental breach occurs for some reason other than late performance, the seller is limited as to when a contract can be avoided.[144] As a general rule, the injured seller must declare the contract avoided within a reasonable time after the seller knew or should have known of the breach.[145] If the injured seller has set an additional period of time for the buyer to perform and the buyer does not perform in time, the seller will retain the right to declare the contract avoided or may set another period for the buyer to perform.[146] Lastly, where the seller has set an additional period of time and the buyer declares nonperformance, the seller can automatically avoid the contract [147] and should do so when the buyer is completely uncooperative.

The CISG does not address the issue of partial avoidance of a contract by sellers. Countervailing arguments exist for allowing a seller to partially avoid a contract. There are two arguments against allowing sellers the remedy of partial avoidance: (1) the absence of an express provision or language which supports partial avoidance by sellers, and (2) the policy that sellers are in a better position than buyers to prevent losses as sellers maintain

control over the goods and can resell if a breach occurs. Buyers have no control over undelivered goods and are forced to make business decisions as to whether they will cover for loss when faced with breach.

There are also at least two arguments which support a seller's exercise of partial contract avoidance:[148] (1) fairness -- a buyer should not be entitled to a remedy under the CISG which is not available to the seller, and (2) practicality -- transactions involving the sale of specialized goods are situations in which a seller could possibly use partial avoidance. For example, if a buyer and seller contract for the sale of specialized pieces of equipment and after delivery of the first piece of equipment the buyer refuses to act cooperatively, the seller may wish to avoid performing the remainder of the contract.

C. Installment Sales Contracts and Fundamental Breach

Parties involved in installment sales contracts will have to analyze their situations in much the same way as buyers and sellers do for single delivery contracts. The first analysis for buyers or sellers is to determine whether the other party's failure amounts to a fundamental breach with respect to the installment in question.[149] If it does amount to a fundamental breach, the injured party has the option of declaring the contract avoided with respect to that particular installment or exercising its above mentioned remedies for that particular **[page 134]** installment.[150] Buyers and sellers injured by a fundamental breach are also given rights to declare the entire contract avoided, if a fundamental breach of one installment occurs, and are also entitled to the above mentioned remedies. In order for the buyer to declare the entire contract avoided, the following conditions must be satisfied:

(1) each installment must have been interdependent;[151]

(2) the buyer must have declared the contract avoided with respect to the particular installment after the fundamental breach of one installment occurred; and

(3) the buyer must declare the past and future installments avoided.[152]

A seller or buyer may avoid future installments after a fundamental or nonfundamental breach occurs in respect of the other party's performance of a single installment if the aggrieved party has "good" grounds to believe that a fundamental breach will occur with respect to future installments.[153] If the aggrieved party chooses to declare the future installments avoided, it must do so within a reasonable time after the failed performance of a single installment.[154]

D. Declaring the Contract Avoided; Article 26 Notice, the Effects of Avoidance, and Statutes of Limitation

Once an injured buyer or seller has made the decision to declare the contract avoided either partially or entirely, Article 26 governs the manner in which the declaration of avoidance is made. Article 26 states that "a declaration of avoidance of the contract is effective only if made by notice to the other party."[155] Article 26 makes the declaration process quite simple -- the party declaring breach need only give notice to the other party that the contract is being declared avoided due either to a fundamental breach or failure to perform within a specified period after a breach.[156] No other specifics or examples are provided as to what the notice should include. It is recommended, however, that the notice include the reason for the declaration of the breach and that the declaration be made in writing.[157] **[page 135]**

Once the contract is declared avoided, both parties are released from their contractual duties.[158] Damages or restitution may be recovered after avoidance.[159] If the contract is declared avoided, avoidance will not affect contractual provisions specifying the parties remedies available upon avoidance or the settling of their dispute.[160]

Restitution [161] is available to the party who declares the contract avoided as well as the party alleged to be in breach.[162] Restitution, however, is limited to the amount of goods the seller supplied or to the amount of money the buyer has paid.[163] In other words, "[e]ach party must give up that which he has received under the contract."[164]

A buyer will lose his right to declare the contract avoided in cases where restitution is impossible for him, or if he cannot make restitution of the goods in substantially the same condition in which he received them.[165] There are three exceptions to this general rule. First, the buyer will not lose his right to declare the contract avoided if the reason for the impossibility or inability to return the goods in substantially the same condition is not due to the buyer's negligence or deliberate actions.[166] Second, the buyer will not lose his right to declare the contract avoided if the goods perished because of the required examination of the goods under Article 38.[167] Lastly, the buyer wi1l not lose his right to declare the contract avoided if the goods have been sold or consumed in the normal course of the buyer's business before the buyer discovered or ought to have discovered the defect giving rise to the breach.[168]

If the contract is declared avoided, the seller may be required by the buyer to refund any money the buyer has paid as restitution.[169] In addition, the seller will also have to pay interest on the money paid starting from the date the price **[page 136]** was paid.[170] Similarly, if the seller has delivered the goods to the buyer and the contract is thereafter declared avoided, the buyer may have to account to the seller for all benefits he has derived from the goods.[171] The buyer is required to account for the benefits derived from the goods if he must make restitution of them or if he has declared the contract avoided or has required the seller to deliver substitute goods and it is otherwise impossible for him to make a proper restitution.[172]

In addition to the above mentioned procedural rules on declarations of avoidance, parties must also be mindful of the limitation periods for filing claims for fundamental and non-fundamental breaches. UNCITRAL has put forth a Convention on the Limitation Period in the International Sale of Goods ("Limitation Convention").[173] However, as of February 12, 1992 only twelve countries have become Contracting States to the Limitation Convention.[174] Therefore, it is incumbent upon the parties entering into an international sales contract to determine whose law will govern the limitations period.

For those to whom the Limitation Convention is applicable, and in the event that it becomes more widely adopted, parties who are in a position to declare a fundamental breach should consider the following rules. Under the Limitation Convention, the limitation period is four years.[175] Generally there are two events which will cause the limitations period to run. The first is the date on which breach of contract occurs.[176] The second event relates to defective goods or goods whose tender is refused by the buyer. In cases where goods are defective or where tender is refused by the buyer, the period begins to run on the date the goods are actually handed over to the buyer.[177]

Article 12 of the Limitation Convention deals specifically with cases where a party has the right to declare the contract avoided.[178] If one party exercises **[page 137]** his right to declare the contract avoided before performance is due, the limitation period with respect to the claim will begin to run on the date the declaration of avoidance is made.[179] If a party declares the contract avoided after performance was due, the limitation period will have commenced as of the date the performance was due.[180]

Article 12 of the Limitation Convention also addresses the start of limitations periods with respect to installment contracts.[181] The limitation period with respect to each individual installment commences on the date on which the particular breach occurs.[182] If a party has the right to declare the installment contract avoided and exercises this right, then the limitation period with respect to all the installments begins to run on the date on which the declaration is made.[183]

Unfortunately, the drafters to the Limitation Convention, when preparing Article 12, seemingly overlooked the possibility of declaring a single installment, avoided, which Article 73(1) of the CISG permits. In a case where a single installment is declared avoided, it is possible to base the commencement of the limitation period on: (1) the date on which the declaration of avoidance was made;[184] (2) the date on which performance was due;[185] or (3) the date on which the particular breach occurred.[186] However, the most logical date for the commencement of the limitations period in such a case is the date on which the declaration of avoidance is made. This reasoning is consistent with the general rule of Article 12 on installment contracts which sets the running date as the date on which the declaration is made.

E. Claiming Damages in Cases of Fundamental Breach

With respect to damages, there are two types of parties injured by fundamental breaches -- those who have declared their contracts avoided and those who have not. Parties injured by fundamental breach that have not declared the contract avoided are entitled to damages under Article 74.[187] Article 74 allows an injured party to recover damages equal to the loss suffered as a consequence of the breach plus lost profit.[188] These damages, however, are limited to the **[page 138]** extent that the loss suffered was reasonably foreseeable to the breaching party at the time of the conclusion of the contract.[189] What was actually foreseeable or reasonably foreseeable will depend on the actual knowledge of the breaching party and what objective merchants in the breaching party's position would have known.

In cases where the contract has been avoided there are three possible formulas for calculating damages: (1) substitute transaction damages ("cover" damages); (2) "current" or market-based damages; and (3) "unique" goods damages. In order for an injured party to recover substitute transaction damages after the contract has been avoided, the resale or replacement purchase of the goods must have occurred in a reasonable manner and within a reasonable time after avoidance.[190] Whether the injured seller's resale or the injured buyer's replacement purchase occurred in a reasonable manner and within a reasonable time after avoidance will depend on the particular facts and circumstances of the individual case. The object for the injured party to maintain the commercial reasonability of the substitute transaction is for the buyer to obtain the lowest priced comparable good and for the seller to obtain the highest sale price for his goods.[191] The substitute transaction damages will equal the difference between the contract price and the substitute transaction price plus incidental and consequential damages, including lost profit less any expenses saved.[192]

An injured party who has not engaged in a substitute transaction after the **[page 139]** contract has been avoided and has not "taken over the goods" after declaring the contract avoided, may recover the difference between the contract price and the "current" price of the goods at the time of avoidance plus incidental and consequential damages, including lost profit less any expenses saved.[193] If an injured party (usually the buyer) has "taken over the goods," i.e., taken physical possession of them or has control over them, and thereafter declares the contract avoided, that party may recover the difference between the contract price and the current price of the goods at the time they took possession of them plus incidental and consequential damages, including lost profit less any expenses saved.[194]

The current price of the goods is equal to the "price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for difference in the cost of transporting the goods."[195] Therefore, in most cases, the current price will be the market place of the goods at the place of delivery. If there is no market for the goods at the place of delivery then the current price will be based on the market price in a substitute market less excess delivery expenses. The last measure of damages in cases of avoidance involves sales of unique or specially manufactured goods for which there is no market and therefore no current price. Article 76 does not address this problem. In cases where the buyer has sought to buy specialized or unique goods and the seller commits a fundamental breach of contract, the buyer may wish to sue for specific performance under Article 28.[196] However, the injured buyer may wish to resort to damages instead. The problem is how to measure the buyer's damages where there is no market for the goods, and therefore, no possible substitute transaction for the buyer to enter into. One way of measuring the buyer's damages is suggested by Article 74. Under Article 74, the damages a party normally receives are equal to the difference between the market price and the contract price plus incidental and consequential damages less expenses saved.[197] In these circumstances, arguably, the market price and the contract price are the same, therefore, the buyer will only be able to recover his incidental and consequential damages. There will be no expenses saved because the buyer cannot engage in an alternative transaction.

Article 76 also fails to address the damages for a seller who has produced, or is contracted to produce, a special or unique good for which there is no current price, where the buyer commits a fundamental breach, and where after the seller avoids the contract. Again, one may resort to Article 74. Under Article 74, a seller who has not yet manufactured the good would be entitled to recover any incidental and consequential damages under the analysis provided above for an injured buyer. On the other hand, a seller who has completed manufacturing **[page 140]** the good is entitled not only to lost profits, and incidental and consequential damages, but the seller

should also be entitled to the price for the good. A seller who has manufactured the good prior to the buyer's breach should be allowed to recover the price for the goods because they have expended time, effort, and costs in the manufacturing process for which they would not otherwise be compensated. The only way to place such a seller in the position he would have been in if the contract was performed is to allow for recovery of the contract price.[198]

VI. DRAFTING INTERNATIONAL SALES CONTRACTS: PREVENTING PROBLEMS WITH FUNDAMENTAL BREACH

UNCITRAL has not yet prepared any official commentary or guidelines for the drafting of contracts governed by the CISG. Contracts involving the international sale of goods should, therefore, be drafted with reference to the principles announced in the CISG.[199]

A. Which Law Should Govern the Transaction? National Law or CISG?

Parties to international sales contracts governed by the CISG will face some basic issues each time they enter into a contract. One such issue is the language in which the contract is to be drafted. Another issue is whether the parties actually wish to have their contract governed by the CISG. As previously discussed, parties whose contracts are governed by the CISG must expressly exclude its application; otherwise the CISG will apply.[200]

The factors involved in determining whether the parties should adopt the CISG or one of their own countries' laws include: (1) a party's knowledge of the other's commercial laws; (2) the practicability of litigating a dispute in a foreign legal system; and (3) the benefits of either law. By choosing the CISG, the parties will, in effect, be choosing a neutral body of law to govern their transaction. Either party could then bring suit in their home country depending on the personal jurisdiction requirements. Alternatively, the parties could choose a neutral forum by choosing to settle disputes through international commercial arbitration. In any case, these matters should be handled before the contract is concluded because neither side should leave to chance the question of whose law governs.

B. Preparing for Fundamental Breach

When parties choose the CISG to govern their contract, issues with regard to fundamental breach should be specifically addressed in the contract. In **[page 141]** particular, the following issues should be considered: (1) what circumstances would substantially deprive you (or your client) of your contractual expectation interests such that you would want to avoid the contract; (2) at what point should foreseeability of the harm of a fundamental breach be measured -- at the time of formation, at the time of breach or some time after formation but prior to performance; and (3) who would be a "reasonable person," i.e., reasonable merchant, against which the foreseeability standard would be applied.

In considering the circumstances that would justify avoiding the contract, parties must also consider the good faith obligations which are indirectly imposed by Article 7. It would not be proper for a party to draft a "fundamental breach" clause that provides for avoidance for any deviation from the contract no matter how trivia1.[201] The purpose of a "fundamental breach" clause is to allow not only the parties, but also any court involved in a dispute over the contract, to analyze facts and circumstances which the parties in their own contemplation believed to be so significant that they would no longer want to perform. By setting forth in writing facts and circumstances which the parties consider so detrimental to their interests, the parties are recognizing in their agreement that if the specified events were to occur they would not expect the other party to perform.

The circumstances the parties should consider include: the length of delay in performance; the types and degrees of defects in the particular goods; the underlying use for the goods; and the effect of bankruptcy or insolvency on performance. As discussed previously, what constitutes a fundamental breach will depend on both monetary and nonmonetary interests. Therefore, these factors are by no means meant to be an exclusive list of concerns for the parties.

The date on which foreseeability is measured can mean the difference between a successful or unsuccessful claim for fundamental breach. It is therefore important for parties to contemplate the dates for measuring foreseeability. If foreseeability is measured from the date of contract formation, then any information which the breaching party became aware of after the date of formation is irrelevant for purposes of determining the degree of harm the party actually knew or a reasonable person would have known. In such a case, the focus would be on the information the breaching party was aware of up to the time of formation.

On the other hand, measuring foreseeability up to the point of the breach would allow a court to consider all information the breaching party was aware of and information a reasonable person would have been aware of up to the time of the breach. This measure allows for the greatest amount of factual examination into the breaching party's course of performance and would also look to information provided by the non-breaching party subsequent to formation.

A measure between the formation and breach standards is one that looks to information the breaching party was aware of between contract formation and **[page 142]** the date of performance. This is a flexible standard because it allows information which the breaching party may have received after formation but prior to performance to be considered in the fundamental breach equation. Unlike the breach standard of measure, however, it does not inquire into the breaching party's entire course of performance and does not permit factual inquiries into what a reasonable person would have done during the course of performance.

The last drafting issue parties should consider is determining who would be a reasonable buyer and seller of the same kind, and under the same circumstances, as the contracting parties. As discussed previously, the reasonable person standard under Article 25 refers to a reasonable merchant. The features that may characterize reasonable merchants include: (1) the merchant's degree of skill and professional qualifications (for example specialized licenses); (2) the merchant's professional associations or affiliations which may set competency standards; (3) the length of the merchant's business experience; and (4) the geographic region in which the merchant does business.

By addressing the reasonable person standard prior to formation, the parties will be better able to confront problems with fundamental breach should they arise. It is unclear what the precise legal effect of an express provision defining who a reasonable buyer or seller would be in the event of litigation. However, Article 8 does provide that "statements made by ... a party are to be interpreted according to his intent where the other party knew ... what that intent was."[202] Therefore, where parties expressly state and agree upon a definition for a reasonable buyer and seller of the same kind, a judicial tribunal should give affect to their intent by using that definition if Article 25 is triggered.[203]

VII. CONCLUSION

This comment is not meant to be an exclusive analysis of the question of fundamental breach under Article 25. This comment is, however, an attempt to bring into perspective the factors for determining whether a fundamental breach has been committed, what the contracting parties options are in the event of a fundamental breach, and how to "head off" problems with Article 25's definition before they arise.

It is clear that as the number of CISG Contracting States increases the use and application of the CISG will increase. As a consequence, it is important that practitioners in commercial law and judges alike are aware of the CISG's content, application, and ramifications. It is hoped at a minimum that this comment will enlighten those who are uninformed and will be a starting point for critical analysis for those who are counseling parties to international sales contracts. **[page 143]**

FOOTNOTES

1. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, S. TREATY Doc. No.98-9, 19 LL.M. 671 (codified at 15 U.S.C. § 5528 (1992) [hereinafter CISG] (entered into force Jan. 1, 1988).

2. CISG, *supra* note 1, art. 1, S. TREATY Doc. 98-9 at 22, 19 LL.M. at 672. Article 1(1) states:

> This Convention applies to contracts of sale of goods between parties whose place of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.

Id. Article 2 excludes particular transactions or sales of particular types of goods from the operation of the CISG. This article provides:

> This Convention does not apply to sales:
>
> (a) of goods bought for personal, family or household use, unless the seller, at any time bet ore or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
> (b) by auction;
> (c) on execution or otherwise by authority of law;
> (d) of stocks, shares, investment securities, negotiable instruments or money;
> (e) of ships, vessels, hovercraft or aircraft;
> (f) of electricity.

Id. art 2.

3. Sixty-two countries participated in the drafting of the CISG. Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods,* 23 INT'L LAW. 443, 444 (1989). As of February 12, 1992, thirty-four countries have approved, ratified, accepted or acceded to the CISG. UNITED NATIONS, COMMISSION ON INTERNATIONAL TRADE LAW, STATUS OF CONVENTIONS (1992) [hereinafter STATUS OF CONVENTIONS]. These countries and the date the CISG has or will enter into force for them are: Argentina, Jan. 1, 1988; Australia, Apr. 1, 1989; Austria, Jan. 1, 1989; Bulgaria, Aug. 1, 1991; Belarus, Aug. 1, 1991; Canada, May 1, 1992; Chile, Mar. 1, 1991; China, Jan. 1, 1988; Czechoslovakia, Apr. 1, 1991; Denmark, Mar. 1, 1990; Ecuador, Feb. 1, 1993; Egypt, Jan. 1, 1988; Finland, Jan. 1, 1989; France, Jan. 1, 1988; Germany, Jan. 1, 1990; Guinea, Feb. 1, 1992; Hungary, Jan. 1, 1988; Iraq, Apr, 1, 1991; Italy, Jan. 1, 1988; Lesotho, Jan. 1, 1988; Mexico, Jan. 1, 1989; Netherlands, Jan. 1, 1992; Norway, Aug. 1, 1989; Romania, June 1, 1992; Spain, Aug. 1, 1991; Sweden, Jan. 1, 1989; Switzerland, Mar. 1, 1991; Syrian Arab Republic, Jan. 1, 1988; Uganda, Mar. 1, 1993; Ukraine, Feb. 1, 1991; Union of Soviet Socialist Republics, Sept. 1, 1991; United States of America, Jan. 1, 1988; Yugoslavia, Jan. 1, 1988; Zambia, Jan. 1, 1988. *Id*. Ghana, Poland, Singapore, and Venezuela have each signed, but have yet to officially ratify, approve, or accept the CISG. *Id*.

4. CISG, *supra* note 1, art. 6, S. TREATY Doc. No.98-9 at 23, 19 LL.M. at 673. Article 6 states: "The parties may exclude the application of this Convention or, subject to [A]rticle 12, derogate from or vary the effect of any of its provisions." *Id*.

5. *Id*. *See also* Peter Winship, *International Sales Contracts Under the 1980 Vienna Convention,* 17 UCC L.J. 55,65 (1984) (acknowledging possible party argument that the CISG is nonoperable by implication and suggesting that parties explicitly exclude the CISG within their contract language should another governing body of law be desired).

6. CISG, *supra* note 1, arts. 46-52, S. TREATY Doc. No.98-9 at 31-33, 19 LL.M. at 681-85. *See* in particular *id*. art. 45 (delineating the rights the buyer may exercise upon a seller's breach).

7. *Id*. arts. 62-65. *See* in particular *id*. art 61 (delineating the rights of the seller upon breach of contract by the buyer).

8. *Id*. arts. 74-77. Article 78 allows parties to recover interest on sums in arrears by a party who fails to pay on time, whether or not the aggrieved party chooses to claim other damages. *Id*. art. 78. Article 79, however, does

provide defenses for breach of contract claims. *Id*. art. 79.

9. *Id*. arts. 74-76.

10. *Id*. arts. 46(1), 62 (providing for the right of both buyer and seller, respectively, to compel performance). *See also id*. art. 28 (preventing a party from obtaining specific performance in a forum or jurisdiction which does not allow relief in the form of specific performance).

11. *Id*. arts. 49, 64 (specifying the grounds for contract avoidance for the buyer and seller respectively).

12. *Id*. art. 81.

13. *Id*. arts. 49(1)(a), 64(l)(a). Article 49(1)(a) states: "The buyer may declare the contract avoided: if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. ..." *Id*. art. 49(1)(a). Article 64(l)(a) states: "The seller may declare the contract avoided: if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract. ..." *Id*. art. 64(l)(a).

14. *Id*. art. 25.

15. C.M. BIANCA ET AL., COMMENTARY ON THE INTERNATIONAL SALES LAW 3 (1987).

16. E. Allan Farnsworth, *The Vienna Convention: History and Scope,* 18 INT'L LAW. 17 (1984).

17. *Id*. at 18.

18. *Id*.

19. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107,3 LL.M. 854 [hereinafter ULIS].

20. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964,834 U.N.T.S. 169,3 LL.M. 864 [hereinafter ULF].

21. *See* BIANCA, *supra* note 15, at 4.

22. Only nine nations ratified ULIS and ULF: Belgium, Gambia, Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom. *Id*.

23. UNCITRAL was established by G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 99, U.N. Doc. A/6316 (1966), *reprinted in* [1970] I Y.B. INT'L TRADE L. COMM'N 65, U.N. Doc. A/CN.9/SER.A/1970.

24. The United Nations created UNCITRAL in order to promote "the progressive harmonization and unification of the law of international trade." *Id*.

25. *See* BIANCA, *supra* note 15, at 5.

26. *Id*.

27. *See* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES 54-56 (1991).

28. CISG, *supra* note 1, art. 7, S. TREATY Doc. No.98-9 at 23-24, 19 LL.M. at 673.

29. *Id*.

30. *Id*. The reliance of Article 7(2) on general principles underlying the CISG prevents a judicial or administrative body from resorting to domestic law to fill-gaps; it requires them to look to the CISG's international background and development for answers. BIANCA, *supra* note 15, at 78.

31. Matters that are not within the scope of the CISG are to be resolved by existing non-unified national laws. BIANCA, *supra* note 15, at 75. Examples of matters not governed by the CISG include the capacity of the parties to contract, or the authority of a third-party to contract, on behalf of another. *Id*. at 76. Article 41imits the CISG's overall scope to contract formation and the rights and duties of the parties to the contract. CISG, *supra* note 1, art. 4, S. TREATY Doc. No.98-9 at 23, 19 LL.M. at 673.

32. The Vienna Convention on the Law of Treaties, *done on* May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention") has been regarded as customary international law with respect to treaty construction. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 121 (5th ed. 1984). The Vienna Convention's rules govern the interpretation of treaties which deal with obligations of the signatory states. It is limited, therefore, to interpretation of treaty language which establishes the rights and duties between the signatory states themselves. *See* HONNOLD, *supra* note 27, at 158. Articles 1 through 88 of the CISG specify the rights and duties of private parties to a contract which is governed by the CISG, not the rights and duties of the Contracting states themselves. In light of Article 7, which expressly establishes the rules of interpretation for Articles 1 through 88, only Articles 89 through 101 which deal with the rights and duties of the Contracting states may be subject to interpretation under the rules of the Vienna Convention. *Id*.

33. Within each international state, municipal or local courts may be forums for CISG litigation. However, there has been a growing trend for contracting parties to request commercial arbitration and conciliation to resolve contract disputes. *See* INTERNATIONAL CHAMBER OF COMMERCE, 3 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 5 (1992). A statistical survey compiled by the International Chamber of Commerce ("ICC") in 1991 also showed that of 736 cases before the ICC International Court of Arbitration, 27 percent of them involved the sale of goods. *Id*.

Both the ICC and UNCITRAL have their own rules of conciliation and arbitration. *See* INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES OF CONCILIATION AND ARBITRATION (1991); UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL ARBITRATION RULES (1977); UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL CONCILIATION RULES (1981).

34. *See* BIANCA, *supra* note 15, at 72-73 (discussing the requirement to avoid interpretation based on domestic law); HONNOLD, *supra* note 27, at 137 (stating that "international character" refers to legislative history, termed a law's "genetic background").

35. BIANCA, *supra* note 15, at 74 (pointing out that the CISG drafters did not intend to have the terms they compromised over interpreted in the context of any domestic law).

36. HONNOLD, *supra* note 27, at 142-43; V. Susanne Cook, Note, *The Need for Uniform Interpretation of the* 1980 *United Nations Convention of Contracts for the International Sale of Goods,* 50 U. PITT. L. REV. 197, 198 (1988) (advocating United States' courts recognition of foreign decisions involving CISG).

At the UNCITRAL Congress on *Uniform Commercial Law in the 21st Century* held between May 18-22, 1992 at the United Nations Headquarters in New York, Professor Louis B. Sohn presented a proposal for an international tribunal to handle private international law cases. Louis B. Sohn, *Proposals for an International Tribunal to Interpret Uniform Legal Texts, in* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, SUMMARY OF STATEMENTS OF THE UNCITRAL CONGRESS 124 (1992). Professor Sohn argued that an international tribunal could provide a forum for uniform interpretation, prevent forum shopping, and cut the costs of litigation. *See id*.

37. Article 7(1)'s good faith element does not specifically impose an obligation of good faith on the parties to the contract. The good faith element of Article 7(1), although not an express duty on parties, may be an implied

obligation. *See* BIANCA, *supra* note 15, at 85 (suggesting that good faith is an underlying principle of the CISG and therefore may impose additional positive duties on contracting parties).

38. *Id*. at 86; *but see* HONNOLD, *supra* note 27, at 147 (stating that although the international convention objects to using local definitions to construe international text, this does not apply to "good faith" principles that reflect a consensus -- a "common core of meaning" -- in domestic law).

39. *See* HONNOLD, *supra* note 27, at 148 (Professor Schlechtriem has suggested that reasonableness is a means of determining what is acceptable in international trade with regards to the good faith requirement).

40. This Comment is based upon the official English version of Article 25. The other official languages are Arabic, Chinese, French, Russian, and Spanish. CISG, *supra* note 1, art. 101, S. TREATY Doc. No.98-9 at 43, 19 LL.M. at 695.

41. *See infra* notes 54-60 and accompanying text. The commentary to Draft Article 9 on fundamental breach stated that in order for a breach to be fundamental there must be not only a substantial injury to the non-breaching party but the party in breach must have foreseen or had reason to foresee the injury. *Commentary on the Draft Convention on the International Sale of Goods,* U.N. GAOR, 31st Sess., Supp. No.17, at 6, U.N. Doc. A/CN.9/116, annex II (1976), *reprinted in* [1976] 7 Y.B. Int'l Trade L. Comm'n 96, U.N. Doc. A/CN.9/SER.A/1976 [hereinafter *Commentary on Draft*].

42. CISG, *supra* note 1, art. 25, S. TREATY Doc. No.98-9 at 27, 19 LL.M. at 677.

43. Article 10 of the Uniform Law on the International Sale of Goods provided the following definition of fundamental breach:

> For purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

ULIS, *supra* note 19, art. 10, 834 U.N. T.S. at 127, 3 LL.M. at 857. *See also* the United Nations Yearbook for the *Revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the UNCITRAL Working Group on the International Sale of Goods at its first five sessions,* U.N. GAOR, 29th Sess., art. 10, Annex I, Supp. No.17, at 5, U.N. Doc. A/CN.9/87 (1974), *reprinted in* [1975] 6 Y.B. Int'l Trade L. Comm'n 53, U.N. Doc. A/CN.9/SER.A/1975. The drafting party considered the revised text of ULIS Article 10 unsatisfactory since it relies on a test that requires the breaching party to anticipate whether the non-breaching party would have entered into the contract had they foreseen the breach. *See id*. at 77-78 (Mexican representative presents the weaknesses of ULIS Article 10) and 95 (noting the criticisms of ULIS Article 10 and providing a proposed revision of Article 10 based on how the breach impairs the value of performance).

44. Article 10 of ULIS was replaced by draft Article 9 of the Draft Convention on the International Sale of Goods. *Id*. at 64. Draft Article 9 states: "A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result." *Id; see id*. at 77-78 (Mexican representative advocates an objective test for fundamental breach and proposes another definition).

As negotiations over fundamental breach continued, draft Article 9's foreseeability feature was taking shape but the substantial detriment test remained intact. Draft Article 9 in 1976 stated: "A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result." Draft Convention on the International Sale of Goods, U.N. GAOR, 31st Sess., Supp. No.17, U.N. Doc. A/CN.9/116, annex I (1976), *reprinted in* [1976] 7 Y.B. Int'l Trade L. Comm'n 90, U.N. Doc. A/CN.9/SER.A/1976. Draft Article 9 was later renumbered as draft Article 8 -- the draft retained the substantial detriment test but revised the foreseeability component. *Report of the United*

Nations Commission on International Trade Law on the work of its tenth session, U.N. GAOR, 32d Sess., Supp. No.17, at 5, U.N. Doc. A/32/17, annex II (1977), *reprinted in* [1977] 8 Y.B. Int'l Trade L. Comm'n 16, U.N. Doc. A/CN.9/SER.A/1977 [hereinafter *Tenth Session Report*].

45. *Commentary on Draft, supra* note 41, at 101.

46. *See id.; see also* BIANCA, *supra* note 15, at 211.

47. *See* CISG, *supra* note 1, art. 14, S. TREATY Doc. No.98-9 at 25, 19 LL.M. at 674 (specifying the elements for contract formation).

48. *Id*. art. 2 (excluding transactions involving individual or consumer sales).

49. The representatives of the Federal Republic of Germany first proposed to amend draft Article 23 on fundamental breach so that the determination of whether or not a detriment was substantial would be determined by the express or implied contract terms themselves. *United Nations Conference on Contracts for the International Sale of Goods: Report of the First Committee,* U.N. GAOR, 1st Comm., at 99, U.N. Doc. A/CONF.97/11 (1981) [hereinafter *First Committee Report];* United Nations Conference on Contracts for the International Sale of Goods, U.N. GAOR, 12th mtg, at 300, U.N. Doc. A/CONF.97/C.1/SR.12 (1981) [hereinafter Twelfth Meeting]. Their amendment was criticized by the Australian representative as too narrow since the only focus would be on the contract itself. *Id*. at 301. The German representatives responded that the expectations of the parties as found in the contract provided an objective test for measuring substantial detriment but that this amendment would not exclude the circumstances of the case. United Nations Conference on Contracts for the International Sale of Goods, U.N. GAOR, 18th mtg., at 329-30, U.N. Doc. A/CONF.97/C.l/SR.18 (1981). Based on the discussion over expectation interest, the following text was adopted by a vote of 22 to 18:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as will substantially impair his expectations under the contract, unless the party in breach did not foresee and had no reason to foresee such a result.

Id. at 330.

50. *See supra* note 43.

51. *See* CISG, *supra* note 1, art. 25, S. TREATY Doc. No.98-9 at 27, 19 LL.M. at 677.

52. In the comments to the Draft Convention on the International Sale of Goods, the drafters noted their dissatisfaction with the idea that the non-breaching party somehow had to foresee what was going to happen and sought to shift the burden of proof to the breaching party by including the phrase, "unless the party in breach did not foresee and had no reason to foresee such a result." *Tenth Session Report, supra* note 44, at 31. The Philippine delegation made it clear that the breaching party will always claim that they did not foresee the loss of expectation the breach had caused and therefore sought to exclude the above quoted phrase. *Comments by Governments and International Organizations on the Draft Convention on the International Sale of Goods,* U.N. GAOR, 32d Sess., Supp. No. 17, U.N. Doc. A/CN.9/125, A/CN.9/125/Add.1-3 (1977), *reprinted in* [1977] 8 Y.B. Int'l Trade L. Comm'n 127, U.N Doc. A/CN.9/SER.A/1977.

53. The Egyptian delegation sought to amend Draft Article 23 on fundamental breach by including express language indicating a shift in the burden of proof. Their amendment read as follows:

> A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach *proves that he did not foresee such a result and that a reasonable person of the same kind in the same circumstances would not have foreseen it*.

First Committee Report, supra note 49, at 99 (emphasis in original).

54. *See* Twelfth Meeting, *supra* note 49, at 295-301.

55. *See* BIANCA, *supra* note 15, at 217. Bianca suggests that whether a breaching party actually failed to foresee the substantial detriment caused to the non-breaching party will be evaluated in light of Article 74. *Id*. Article 74 deals with monetary damages for breach of contract and basically limits damages to those which were foreseeable at the time of the conclusion of the contract. CISG, *supra* note 1, art. 74, S. TREATY Doc. No. 98.9 at 37, 19 LL.M. at 688. Foreseeability of the damages is itself limited by the "facts and matters" which the party in breach knew or should have known at the time of formation. *Id*.

56. BIANCA, *supra* note 15, at 217. See *infra* note 59 for a list of other relevant factors to consider.

57. *See* CISG, *supra* note 1, art. 2(a), S. TREATY Doc. No.98-9 at 23, 19 LL.M. at 672.

58. BIANCA, *supra* note 15, at 219.

59. *Id*. It has been argued that the reasonable merchant's business practices, socio-economic background, religion, and language should also be taken into consideration. *Id*. This argument is based on the French version of Article 25 and its phraseology -- "de même qualité." *See* Twelfth Meeting, *supra* note 49, at 261 (Egyptian representative notes the difference between the English draft wording "acting in the same capacity" and the French version).

60. BIANCA, *supra* note 15, at 219. The political climate, including legislation (pending or proposed), may be relevant for determining the type of circumstances the party in breach was facing. *Id*. One commentator has also suggested that "all relevant circumstances of the case" be considered to determine the intent of a reasonable person, basing this argument on Article 8(3) of the CISG. *Id;* Article 8(3) provides specific examples of the types of relevant circumstances to be considered when determining a parties intent including: negotiations, established practices between the parties (prior course of dealing), trade usage, and subsequent conduct of the parties (course of performance). CISG, *supra* note 1, art. 8(3), S. TREATY Doc. No.98-9 at 24, 19 LL.M. at 673.

61. During the debate over "substantial detriment," the Swedish representative provided two examples of situations which he believed did not constitute fundamental breach:

> There could be no fundamental breach if the party in breach was unaware of certain circumstances of which the buyer had not informed him. For example, if the contract mentioned a specific delivery date such as 1 December, because it was important for the buyer to have the goods available for Christmas, the seller should be informed of the fact. If not, in the event of late delivery, he could not know that substantial detriment had resulted for the buyer and could not be considered to have committed a fundamental breach of the contract. The same applied to the quality of the goods; the contract might specify the dimensions of the goods, to which the seller might not attach importance, whereas those specifications were essential to the buyer; in such a case it was incumbent upon the latter so to inform the seller.

Twelfth Meeting, *supra* note 49, at 297.

62. Professor Honnold believes that information received after formation but prior to performance can be relevant and can be within the scope of Article 25. HONNOLD, *supra* note 27, at 183-84 (giving example of situation where information sent by buyer to seller after formation but prior to performance allowed for conclusion that seller's noncompliance with contract terms amounted to fundamental breach).

63. When the former Article 9 on fundamental breach was being drafted, two views on foreseeability emerged -- one view relied on ULIS Article 10 which referred to "the time of the conclusion of the contract," and the second view believed that foreseeability should be determined based on the time the breach was actually committed. *Tenth Session Report, supra* note 44, at 31.

64. At the 1980 Vienna Drafting Conference, the representatives from Czechoslovakia and the United Kingdom both sought to introduce amendments which would expressly state when foreseeability is measured. The

Czechoslovak amendment allowed "information disclosed [to the party in breach] at any time before or at the conclusion of the contract" to be considered. *First Committee Report, supra* note 49, at 99. The U.K. amendment also measured foreseeability at the time of the conclusion of the contract. *Id*. When the U.K. amendment was proposed, it was opposed by Norway, Finland, and Hungary. Twelfth Meeting, *supra* note 49, at 302. The opposition contended that the "*information provided after the conclusion of the contract* could modify the situation as regards both substantial detriment and foresight." *Id*. (emphasis added). Neither amendment was adopted. *First Committee Report, supra* note 49, at 99.

65. See *infra* notes 209-11 discussing drafting contract provisions on breach.

66. *Report of the United Nations Commission on International Trade Law on the work of its twenty-first session,* U.N. GAOR, 43d Sess., Supp. No.17, U.N. Doc. A/43/17 (1988), *reprinted in* [1988] 19 Y.B. Int'l Trade L. Comm'n 15-16, U.N. Doc. A/CN.9/SER.A/1988.

67. *Id*.

68. *Id*. at 16.

69. In three of the cases, the CISG did not play any substantive role: Interag Co. Ltd. v. Stafford Phase Corp., No.89 Civ. 4950, 1990 U.S. Dist. LEXIS 6134, at .11 (S.D.N. Y. May 22, 1990); Orbisphere Corp. v. United States, 726 F. Supp. 1344, 1355 n.7 (1989) (Ct. Int'l Trade); Promaulayko v. Amtorg Trading Corp., 540 A.2d 893, 897 n.2 (N.J. Super. Ct. App. Div. 1988). The fourth case, although involving substantial reference to the CISG, was involved primarily with the interpretation of an arbitration clause, not fundamental breach. Filanto v. Chilewich Int'l Corp. 789 F. Supp. 1229 (S.D.N. Y. 1992).

70. -- OLGZ -- ( ) (Oberlandesgericht, Frankfurt a.M., Urteil vom 7.9.1991 -- 5 U 164/90). The Oberlandesgericht ("OLG") is a German court of civil appeals. The Italian seller won at the trial level; the German buyer, however, prevailed on appeal. *See id*. All interpretations of this case are the author's own.

71. In its opinion, the German civil court of appeals ("OLG") distinguished between a "Werklieferungsvertrag" and a "Kaufvertrag." *Id*. The court of appeals explained that the contract between the German buyer and the Italian seller was a "Werklieferungsvertrag" and not a "Kaufvertrag." *Id*. A "Werklieferungsvertrag" is a contract which requires the obligor to procure the components, manufacture them, and deliver the finished goods contracted for HERMANN AVENARIUS, KLEINES RECHTSWORTERBUCH 519 (1988). A "Kaufvertrag," on the other hand, is a simple contract for the sale of goods. *Id*. at 227.

Because a "Werklieferungsvertrag" also involves a services component, the court of appeals stated a "Werklieferungsvertrag" is within the scope of the CISG based on Article 3 of the CISG. -- OLGZ -- ( ) (Oberlandesgericht, Frankfurt a.M., Urteil vom 7.9.1991 -- 5 U 164/90). Article 3(1) states that contracts involving the manufacture of goods "are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production." CISG, *supra* note 1, art. 3(1), S. TREATY Doc. No.98-9 at 23, 19 LL.M. at 672.

72. "Die Klagerin steht aus abgetretenem Recht der Firma X. s.r.l. entgegen der Ansicht der Vorinstanz kein Anspruch gegen die Beklagte auf Bezahlung der am 2.3.1989 an sie ausgelieferten Schuhe zu." (Contrary to the opinion of the trial court, the plaintiff has no claim to payment against the defendant for shoes delivered to the defendant on 3/2/89). -- OLGZ -- ( ) (Oberlandesgericht, Frankfurt a.M., Urteil vom 7.9.1991 -- 5 U 164/90).

73. "Das bedeutet, dass italienisches Recht anwenbar ist, weil die Zedentin ihre Hauptverwaltung in Italien hatte und von dort such ihre Leistung zu erbringen war." *Id*.

74. *Id*.

75. "Da Italien Vertragstaat der CISG ist und das Übereinkommen in Italien seit dem 1.1.1988 gilt wird es flir die Rechtsbeziehungen der Vertragsparteien über Art. 1 Abs. lb CISG wirksam." *Id*. (citations omitted).

76. "Auf die ab dem 1.1.1988 geschlossen deutsch-italienish Kaufverträge kann das EKG [ULIS] deshalb nicht mehr angewendet werden, weil dessen Art. 1 Abs. 1 voraussezite, dass sich die Niederlassungen der Vertragsparteien in vershiedenen Vertragsstaaten befanden, Italien zu dieser zeit nich mehr 'Vertragsstaat' war." *Id*. (citations omitted).

77. CISG, *supra* note 1, art. l(b), S. TREATY Doc. No.98-9 at 22, 19 LL.M. at 672.

78. "Da das UN-Übereinkommen über den internationalen Warenkauf erst am 1.1.1991 für die Bundesrepublik Deutschland in Kraft getreten ist, kann es allerdings über Art. 1 Abs. la CISG nicht schon unmittelbar als Bestandteil der deutschen Rechtsordnung wirksam werden. Die Anwendbarkeit der CISG resultiert aber daraus, dass das deutsche internationale Privatrecht auf das Recht eines Vertragsstaates verweist, der auf den zu beurteilenden Sachverhalt die CISG anwenden wurde." *Id*. (citations omitted).

79. "Einen möglichen Vorbehalt nach Art. 95 CISG, der die Anwendung des Art. 1 Abs. lb CISG ausschlösse hat Italien nicht erklärt." -- OLGZ -- ( ) (Oberlandesgericht, Frankfurt a.M., Urteil vom 7.9.1991 -- 5 U 164/90).

80. *See id*. See *infra* notes 107-10 and accompanying text for a discussion of Article 49.

81. The court of appeals stated: "Die Beklagte hat zu Recht mit rechtsgestaltender Erklärung im Femschreiben vom 7.3.1989 gegenüber der Zedentin die Aufbebung des Verträges erklärt, weil diese eine ihr gegenüber nach dem Vertrag obliegende Pflicht nicht erfüllt hat und sich dies als eine wesentliche Vertragsverletzung darstellt." -- OLGZ -- ( ) (Oberlandesgericht, Frankfurt a.M., Urteil vom 7.9.1991 -- 5 U 164/90).

82. *See id*. The court of appeals referred to the buyer's transmission as having been made by "Fernschreiben" which is a form of electronic communication. *Id*.

83. See id.

84. "Dem Fernschreiben der Beklagten corn 7.3.1989 kommt die Wirkung einer Erklärung der Vertragsaufhebung zu, weil die Beklagte der Zedentin darin unmissverständlich mitgeteilt hat, dass sie die Schuhkollektion nunmehr mit einem anderen italienischen Hersteller fertigen lassen werde und sie die mit der Zedentin begonnen Zusammenarbeit ab sofort beenden werde." See id.

85. Delivery was made on March 2, 1989 and the buyer sent notice to the seller of a breach on March 7, 1989. *See id*.

86. "Die Beklagte hat das Fernschreiben, das die AufhebungsErklärung enthielt, einen Tag nach Beendigung der Messe, auf der ihr die Vertragsverletzung der Zedentin bekannt wurde, abgesandt." *Id*.

87. *Id*. The court of appeals also analogized the requirement under CISG Article 49(2)(b), which requires buyer's to declare breach with respect to delivered goods within a reasonable time after the breach becomes known ("innerhalb einer angemessenen Frist"), to the German civil code requirement of unnecessary delay ("unverzüglich"). *Id.; see* AVENARIUS, *supra* note 71, at 457.

88. Similarly, to resolve an anticipatory fundamental breach, the parties should determine (1) whether it is "clear" prior to the date of performance that the other party will commit a breach and (2) whether the anticipated breach will amount to a fundamental breach. *See* CISG, *supra* note 1, art. 72(1), S. TREATY Doc. No. 98.9 at 36, 19 LL.M. at 688. If a buyer or seller clearly finds that an anticipated breach is fundamental, then it may declare the contract avoided. *Id*. A "clear" finding connotes certainty of occurrence. BIANCA, *supra* note 15, at 528.

The buyer or seller "intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of performance." CISG, *supra* note 1, art. 72(2), S. TREATY Doc. No. 98.9 at 36, 19 LL.M. at 688, This notice need not be given in two circumstances. First, the buyer or seller intending to declare the contract avoided need only provide notice "if time allows." *Id*. It is unclear what this phrase means. Does it mean that notice need only be given if there is enough time to serve it prior to

performance or that notice can be served after the time required for performance and just before the time a party anticipates a fundamental breach? It is possible for one party to conclude just prior to performance that the other party will commit a fundamental breach although the actual breach may not come for some time.

Second, the buyer or seller intending to declare the contract avoided need not serve notice "if the other party has declared that he will not perform his obligations." *Id*. art. 72(3).

89. *Id*. arts. 30-44.

90. *Id*. arts. 53-60.

91. *Id*. art. 45(1). Under such failure,

> (1) ... the buyer may:
> (a) exercise the rights provided in articles 46 to 52;
> (b) claim damages as provided in articles 74 to 77.
>
> (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
>
> (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Id.

92. The options on contract avoidance are based on the assumption that a seller's offer to cure is not Superior in right to a buyer's right to avoid performance. The relationship between the seller's right to offer to cure under Article 48 and the buyer's right to avoid the contract is unclear and is open to interpretation. *See* BIANCA, *supra* note 15, at 348.49. Until there is case law supporting the view that a seller's right to offer to cure prevails, the more logical construction of this relationship is that the buyer's right to avoid for fundamental breach prevails. *See id*. at 356-57.

93. CISG, *supra* note 1, arts. 46(1), 47(1), S. TREATY Doc. No.98-9 at 31, 19 LL.M. at 682. If the buyer sets an additional reasonable time for the seller's performance, the buyer will still have the option to declare the contract avoided if the seller fails to perform by the time fixed. However, the buyer may not resort to any remedy for breach of contract during the fixed period unless the buyer receives notice that the seller will not perform. *Id*. art. 47(2).

94. *Id*. art. 46(2) (notice must be given to seller). Under Article 82(1), "[a] buyer loses his right ... to require the seller to deliver substitute goods if [the buyer cannot] make restitution of the goods substantially in the same condition in which he received them." *Id*. art. 82(1). See *infra* notes 159- 72 and accompanying text for a discussion of restitution.

95. *Id*. art. 46(3).

96. *Id*. art. 49(1)(a). In the specific case of nondelivery, if the buyer has fixed an additional reasonable period of time for the seller to deliver the goods, but the seller has failed to deliver, the buyer may declare the contract avoided. *Id*. art. 49(1)(b). *See also id*. art. 51(2) (stating that the buyer can only declare the contract avoided entirely in cases where nondelivery or delivery not in conformance with the contract amounts to fundamental breach).

97. A buyer who has received shipment of goods must maintain them properly. *See id*. art. 86 (buyer's duty to preserve goods). *See also id*. art. 77 (mitigation of damages).

98. *Id*. art. 49(2)(b)(i).

99. *Id*. art. 49(2)(b)(ii).

100. *Id*. art. 49(2)(b)(iii).

101. *Id*. art. 49(2)(a).

102. *Id*. art. 50. The amount by which the buyer may reduce the price is limited to the ratio between the value of the nonconforming goods actually sent at delivery and the value of conforming goods had they been delivered at that time. *Id*. In equation form, the reduced price will equal the product of value of the delivered nonconforming goods and the contract price divided by the value of the conforming goods:

$$\text{reduced price} = \frac{\text{value of nonconforming goods} \times \text{contract price}}{\text{value of conforming goods}}$$

BIANCA, *supra* note 15, at 372.

The seller's right to offer a cure is superior in right to price reduction. CISG, *supra* note 1, arts. 48, 50. However, the buyer may refuse the seller's offer to cure, in which case the buyer may not reduce the price. *Id*. art. 50.

103. *Id*. arts. 81, 45(1)(b).

104. *See id*. arts. 27 (allowing communications made that are reasonable under the circumstances) and 11 (allowing contract to be evidenced by writing or witnesses).

105. *Id*. art. 47(1).

106. B1ANCA, *supra* note 15, at 345.

107. *Id*.

108. Words such as "hope to receive the goods soon" should not be used because they are open to doubt. *Id*.

109. CISG, *supra* note 1, art. 47(1) (stating that buyer cannot resort to any remedy for breach of contract during the period).

110. *Id*. art. 49(1)(b) (stating that buyer may declare a breach of contract if the seller fails to deliver during the time period).

111. *Id*.

112. *Id*. art. 49(2)(b)(i).

113. *Id*. art. 46(2).

114. *Id*. art. 39(1), (2).

115. *Id*. art. 46(3).

116. *Id*. art. 39(1). (2).

117. *Id*. arts. 47(1). 49(2)(b)(ii). See *supra* notes 85-86 and accompanying text for fixing a

reasonable time for performance.

118. CISG. *supra* note 1. art. 49(2)(b)(ii).

119. *Id*.

120. *See id*. art. 48 (granting seller the right to cure).

121. *Id*. art. 48(1).

122. *Id*. art. 48(2).

123. *Id*.

124. *See id*. art. 50. See *supra* note 102 for the price reduction calculation.

125. Article 50 does not address whether the buyer has the right to change his mind after deciding to reduce the price. CISG, *supra* note 1, art. 50, S. TREATY Doc. No.98-9 at 32, 19 LL.M. at 683. This matter should be expressly stated in the contract.

126. The seller is given the option to cure defects and by doing so prohibits the buyer from reducing the price. *Id*. The buyer is also prohibited from reducing the price if the buyer refuses to accept the seller's request to cure. *Id*.

127. BIANCA, *supra* note 15, at 372. "It is up to the buyer to decide which is more advantageous for him: price reduction, or damages, or price reduction and damages. Damages in this context are not additional losses of the buyer, but the difference ... between the goods contracted for and those delivered." *Id*. at 373.

128. *Id*.

129. *Id*.

130. CISG, *supra* note 1, art. 51, S. TREATY Doc. No.98-9 at 32, 19 LL.M. at 683.

131. *See id*. art. 81(1).

132. Article 61 states:

> (1) If the buyer fails to perform any of his obligations under the contract or this convention, the seller may:
> (a) exercise the rights provided in articles 62 to 65;
> (b) claim damages as provided in articles 74 to 77.
>
> (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
>
> (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Id. art. 61;

133. *Id*. art. 62.

134. *Id*. art. 63(1).

135. *Id*. art. 64(2)(b)(i).

136. *Id*. art. 64(2)(b)(ii).

137. *Id*. art. 64(2)(a).

138. *Id*. art. 64(l)(a).

139. *Id*. art. 62.

140. *Id*. art. 28.

141. *Id*. arts. 63(1), (2), 64(1)(b). In such a case, the seller need not worry whether the breach was actually fundamental because Article 64(1)(b) does not require an event of fundamental breach but only the fixing of the additional period and the buyer's noncompliance. *Id*. art. 64(1)(b).

142. *Id*. art. 64(1)(a).

143. *Id*. art. 64(2)(a).

144. *Id*. art. 64(2)(b).

145. *Id*. art. 64(2)(b)(i).

146. *Id*. art. 64(2)(b)(ii).

147. *Id*.

148. If a seller attempted to invoke the remedy of partial avoidance, based on these arguments, the seller should follow the procedures under Section D, *infra* notes 155-86 and accompanying text.

149. *See* CISG, *supra* note 1, art. 73(1).

150. *Id*.

151. Whether installments are "interdependent" Upon each other will depend on the type of goods involved. The basic test provided by Article 73(3) is whether future deliveries "could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract." *Id*. art. 73(3).

152. *Id*. The buyer may at the same time he declares the single installment avoided, declare the whole contract avoided. *Id*.

153. *Id*. art. 73(2). It is not clear what constitutes "good" grounds to conclude that a fundamental breach will occur in the future. Possibilities include the filing of a bankruptcy petition or imminent bankruptcy, the insolvency of the other party, or a declaration of the party not to perform his future obligations.

154. *Id*.

155. *Id*. art. 26.

156. *Id*.

157. Article 27 governs the manner in which notice is given and states that the notice may be given "by any means appropriate in the circumstances." *Id*. art. 27. The contract itself may allow for the declaration to be made orally or in writing. If the notice is delayed in transit or if it completely fails to arrive, the party declaring breach still has the right to rely on the communication it made. *Id*. Because accidents may occur in transmission or by some other form of telecommunication, notice should also be made in writing.

158. *Id*. art. 81(1).

159. *Id*. art. 81(2).

160. *Id*. art. 81(1).

161. *Id*. art. 81(2). Restitution is traditionally an equitable remedy at common law. Neither Article 81 nor Article 28 on specific performance address the manner in which restitution must be pleaded.

162. Nothing in Articles 81(2) or 84 on restitution, or Articles 74, 75, or 76 on damages, prevents a party from claiming both damages and restitution. *See id*. arts. 74, 75, 76, 81(2), 84.

163. *Id*. art. 81(2).

164. BIANCA, *supra* note 15, at 605. This commentary explains that restitution may be affected by the jurisdiction's approach to equitable remedies, such as specific performance. *Id*. at 604-05.

165. CISG, *supra* note 1, art. 82(1), S. TREATY Doc. No.98-9 at 38, 19 LL.M. at 690.

166. *See id*. art. 82(2)(a).

167. *Id*. art. 82(2)(b); *see also id*. art. 38 ("The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.").

168. *See id*. art. 82(2)(b). Because contract avoidance can occur in fundamental and non-fundamental breach situations, the breach caused by the defect may be fundamental or non-fundamental. This can produce a strange result in cases where the buyer cannot make restitution of the goods but the buyer has set a reasonable period of time for the seller to perform according to the contract. In such a case, the buyer could possibly lose his right to declare the contract avoided after having set a reasonable time for performance with which the seller fails to comply.

169. *See id*. art. 84(1).

170. *Id*. Neither Article 84 nor any other CISG provision explains what rate of interest is to be paid or how it is to be calculated. Article 84 also does not explain how interest is to be computed in partial payment situations. Does interest accrue from the date of the first partial payment? Or does interest begin to accrue only after the entire contract price has been paid?

171. *See id*. art. 84(2).

172. *See id*. art. 84(2)(a)

173. Convention on the Limitation Period in the International Sale of Goods, U.N. Sales No. E.74.V.8 (1974), *reprinted in* [1974] 5 UNCITRAL Y.B. 210, U.N. Sales No. E.75.V.2 (1975) [hereinafter Limitation Convention]. *See also* Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, U.N. Doc. A/CONF.97/18, annex II (1980), *reprinted in* [1980] II Y.B. UNCITRAL 162, U.N. Doc. A/CN.9/SER.A/1980.

174. STATUS OF CONVENTIONS, *supra* note 3. Argentina, Czechoslovakia, Dominican Republic, Egypt, Ghana, Guinea, Hungary, Mexico, Norway, Uganda, Yugoslavia, and Zambia have ratified the Limitation Convention. *Id*. The United States of America has not ratified the Limitation Convention nor is it a signatory thereto. *See id*.

175. Limitation Convention, *supra* note 173, art. 8.

176. *Id*. art. 10, para. 1.

177. *Id*. art. 10, para. 2. A third possible triggering event which may start the limitations Period is a claim asserting fraud. Claims based on fraud accrue on the date on which the fraud was or could have reasonably been discovered. *Id*. art. 10, para. 3.

178. *See id*. art. 12, para. 1. Article 12 does not specifically use the term "avoidance," rather it uses the verb "terminate." *Id*. It is the author's contention that these terms should be used interchangeably. Termination of contract and avoidance of performance represent the same principle, namely, that the parties need no longer perform.

179. *Id*.

180. *See id*. ("If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due").

181. *Id*. art. 12, para. 2.

182. *Id*.

183. *Id*.

184. *See id*. art. 12, paras. 1, 2.

185. *See id*. art. 12, para. 1.

186. *See id*. art. 12, para. 2.

187. CISG, *supra* note 1, art. 74, S. TREATY Doc. No.98-9 at 37, 19 LL.M. at 688.

188. *See id*. Specific examples of cases of contractual breaches in the Official Commentary provide a framework for developing a mathematical formula for calculation damages. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat,* U.N. GAOR, at 59, U.N. Doc. A/CONF.97/19 (1981). From these examples the following calculation can be drawn: damages = market price or cover price - contract price + incidental damages + lost profit + consequentional damages - expenses saved. *Compare* U.C.C. ¬¬ 2-706(1) (allowing seller to make resale if done in good faith and in a commercially reasonable manner; and allowing seller to recover the difference between resale price and the contract price plus incidental damages less expenses saved), 2-708(1) (allowing seller to recover damages for buyer's repudiation or non-acceptance equal to difference between market price at the time and place for tender and the unpaid contract price plus incidental damages less expenses saved), 2-712(2) (allowing buyer to "cover" and recover damages equal to the difference between the cost of cover and the contract price plus incidental or consequential damages less expenses saved), 2-713 (allowing buyer to recover on seller's repudiation or non-delivery damages equal to difference between the market price at the time when buyer learned of the breach and the contract price plus incidental and consequential damages less expenses saved).

In cases where a buyer injured by a fundamental breach has accepted the goods, his damages will be equal to the difference between the value of the goods had they been as contracted for and the value of the goods accepted plus any incidental damages. *See First Committee Report, supra* note 49, fat 59. *Compare* U.C.C. ¬2-715 (setting forth buyer's incidental and consequential damages).

There is no calculation given to determine lost profit. *See generally* BIANCA, *supra* note 15, at 544 (discussing possible calculations of lost profits).

189. CISG, *supra* note 1, art. 74, S. TREATY Doc. No.98-9 at 37, 19 LL.M. at 688.

190. *Id*. art. 75.

191. "For the substitute transaction to have been made in a reasonable manner within the Context of Article 75, it must have been made in such a manner as would be likely to bring the highest price on resale reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible." BIANCA, *supra* note 15, at 550.

192. CISG, *supra* note 1, art. 75, S. TREATY Doc. No.98-9 at 37, 19 LL.M. at 689. The substitute transactions damages formula presupposes that an injured buyer had to buy goods at a price higher than those under the contract and that an injured seller sold the goods for a price less than the contract price. *See* BIANCA, *supra* note 15, at 550.

193. *See* CISG, *supra* note 1, art. 76(1), S. TREATY DOC. No.98-9 at 37, 19 LL.M. at 689.

194. *See id*.

195. *Id*. art. 76(2).

196. *See id*. art. 28.

197. *See id*. art. 74.

198. *Compare* U.C.C. § 2-709 (seller's action for the price of the goods).

199. This comment does not address the relationship between the CISG and the ICC Incoterms of 1990. The ambiguous relationship between these two documents was raised by Professor Jan Ramberg at the UNCITRAL Congress held May 18-22, 1992 at United Nations Headquarters in New York. *See* Jan Ramberg, *Novel Features of the ICC Incoterms* 1990, *in* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, SUMMARY OF STATEMENB OF THE UNCITRAL CONGRESS (1992).

200. *See supra* notes 4-5 and accompanying text.

201. The CISG does contain a perfect-tender rule under Article 35. *See* CISG, *supra* note 1, art. 35, S. TREATY Doc. No.98-9 at 28, 19 LL.M. at 679. On an imperfect tender the seller is granted very liberal rights of cure under Article 37. *See id*. art. 37.

202. *Id*. art. 8(1).

203. *See id*. By considering the characteristics and background of the other contracting party, it is possible to also find out the international trade usages that may be impliedly applicable to the contract. *See id*. art. 9.

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