The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)

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To Olya

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ABSTRACTS

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The concept of fundamental breach plays a crucial role within the remedial system of the U.N. Convention on Contracts for the International Sale of Goods (CISG), because the remedies available to the parties to a contract of sale depend on the character of the breach. The Thesis analyzes the concept. It canvasses the different approaches employed by scholars and courts in determining fundamental breach and examines whether they can be justified by the rules of interpretation under the CISG. This examination shows that none of the approaches can be applied to all potential situations of fundamental breach and that their concurrent application is likely to produce concflicting results. This Thesis introduces a new methodology, which is based on a single concept applicable in all circumstances. Such methodology would also provide greater certainty and predictability to international sales transactions as required by the needs of the business world.

RÉSUMÉ

Le concept de la «contravention essentielle» joue un rôle crucial au sein du régime des sanctions prévu à la *Convention sur la vente internationale de marchandises* (C.V.I.M.) puisque les recours mis à la disposition des parties contractantes dépendent de la nature de la contravention. Cette thèse analyse ce concept. Elle étudie les différentes méthodes employées par les auteurs et les tribunaux afin de déterminer s'il y a contravention fondamentale, et examine si ces méthodes sont compatibles avec les règles d'interprétation prévues par la C.V.I.M. Cette analyse montre qu'aucune des méthodes n'envisage toutes les situations possibles de «contravention essentielle»; cet examen montre aussi que l'application simultanée de plusieurs méthodes donnerait probablement lieu à des résultats contradictoires. Cette thèse introduit une nouvelle méthodologie fondée sur un seul concept applicable à toutes les circonstances. Cette nouvelle méthodologie rendrait également plus certaines et plus prévisibles les transactions internationales de vente et répondrait ainsi mieux aux besoins du monde des affaires.

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A.C.	Appeal Cases
Act.Jur.Hung.	Acta Juridica Academiae Scientiarium Hungaricae (Hungary)
All E.R.	All England Law Reports
Am.J.Comp.L.	American Journal of Comparative Law
Ariz.J.Int'l & Comp.L.	Arizona Journal of International and Comparative Law (USA)
Aust.Bus.L.Rev.	Australian Business Law Review
BB	Der Betriebsberater
BGB	Bürgerliches Gesetzbuch (Germany)
Bus.Law	The Business Lawyer (USA)
Cah.de Dr.	Les Cahier de Droit (Canada)
C.L.J.	Cambridge Law Journal (UK)
Can. Bus.L.J.	Canadian Business Law Journal
ch.	Chapter
CIF	cost, insurance, freight (Incoterm)
Cir.	Circuit
CLOUT	Case Law
CISG	Convention on Contracts for the International Sale of Goods (U.N. Doc. A/CONF.97/18, Annex I)
CMR	Convention relative au Contrat de transport international de marchandises par route/Convention on the Contract for the International Carriage of Goods by Road
C.V.I.M.	Convention des Nations Unies Sur Les Contrats de Vente Internationale de Marchandises (U.N. Doc. A/CONF.97/18, Annexe I)
Doc.	Document(s)
Colum.L.Rev.	Columbia Law Review (USA)
Cornell Int'l.L.J.	Cornell International Law Journal (USA)
Cornell L.Rev.	Cornell Law Review (USA)
Dig.Com.L.	Digest of Commercial Laws of the World (USA)
ECJ	Court of Justice of the Eurocan Communities
E.C.R.	European Court Reports
ed(s)	editor(s)/edition
e.g.	*exempli gratia* (Lat.=for instance)
et seq.	*et sequen(te)s* (Lat.=and the following page(s))
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Germany)
EwiR	Entscheidungen zum Wirtschaftsrecht (Germany)
F.	Federal Reporter (USA)
F.3d	Federal Reporter, Third Series (USA)
Fed. Ct. Rep.	Federal Court Reporter (Australia)
Fed. Supp.	Federal Supplement (USA)
Fordham L. Rev.	Fordham Law Review (USA)

Rec. Dall. Sir.	Receuil Dalloz Sirey (France)
RSDIE	Revue suisse de droit international et de droit européen (Switzerland)
SGA	Sales of Goods Act 1979
SZIER	Schweizerische Zeitschrift für Internationales und Europäisches Recht (Switzerland)
Stan.J.Int'l L.	Stanford Journal of International Law (USA)
Temple Int'l & Comp. L. J.	Temple International and Comparative Law Journal (USA)
Tex.Int'l.L.J.	Texas International Law Journal (USA)
Tul.J.Int'l & Comp.L.	Tulane Journal of International and Comparative Law (USA)
UCC	Uniform Commercial Code (USA)
UCC L.J.	Uniform Commercial Code Law Journal (USA)
U.Chic.L.Rev.	Uniform of Chicago Law Review (USA)
U.N.	United Nations
U.N. Doc.	U.N. Documents
UNIDROIT	Institut International pour l'Unification du Droit Privé/International Institute for the Unification of Private Law
Uniform L.Rev.	Uniform Law Review (UNIDROIT, Rom)
U.Pa.J.Int'l.Bus.L.	University of Pennsylvania Journal of International Business Law (USA)
U.Pitt.L.Rev.	University of Pittsburgh Law Review (USA)
Wash.L.Rev.	Washington Law Review (USA)
Wash. U.L.Q.	Washington University Law Quarterly (USA)
W.L.R.	Weekly Law Reports (UK)
Yale L.J.	The Yale Law Journal
YB	UNCITRAL-Yearbook, New York: United Nations Publications (1971 et seq.)
ZeuP	Zeitschrift für Europäisches Privatrecht (Germany)
ZIP	Zeitschrift für Wirtschaftsrecht (Germany)

Ga.J.Int'l & Comp.L.	Georgia Journal of International and Comparative Law (USA)
Harv.Int'l.L.J.	Harvard International Law Journal (USA)
Harv.L.Rev.	Harvard Law Review (USA)
Hastings Int'l & Comp.L.Rev	Hastings International and Comparative Law Review (USA)
ICC	International Chamber of Commerce
Incoterms	Incoterms 1990. International Commercial Terms of the ICC. ICC publication no. 460.
i.a.	*inter alia* (Lat.= among others)
id.	*ibidem* (Lat.=in the same place)
Int'l.Bus.Law.	International Business Lawyer (UK)
Int'l & Comp.L.Q.	International and Comparative Law Quarterly (USA)
Int'l Law.	The International Lawyer (USA)
I.L.M.	International Legal Materials (ed. American Association of International Law, Washington D.C.)
Int'l Tax & Bus.Law.	The International Tax & Business Lawyer (USA)
Int'l Trade & Bus. L. A.	International Trade & Business Law Annual (Australia)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Germany)
J.L.& Com.	Journal of Law and Commerce (USA)
J.Bus.L.	The Journal of Business Law (UK)
J.D.I.	Journal de Droit International (France)
JuS	Juristische Schulung (Germany)
JZ	Juristenzeitung (Germany)
Limitation Convention 1974	Convention on the Limitation Period in the International Sale of Goods (U.N. Doc. A/CONF./63/15), YB V (1974), 210-215.
L.Q.R.	The Law Quarterly Review (UK)
NJW	Neue Juristische Wochenschrift (Germany)
N.J.L.	New Law Journal (UK)
1978 Draft Convention	UNCITRAL Draft, 11th Plenary Session (New York 30 May-16 June 1978), YB IX (1978), 14-21
N.	Number(s)
No.	Number(s)
Nw.J.Int'l L. & Bus.	Northwestern Journal of International Law & Business (USA)
N.Y.St.B.J.	New York State Bar Journal (USA)
N.Y.L.J.Int'l & Comp.L	New York Law School Journal of International and Comparative Law (USA)
Ohio St.L.J.	Ohio State Law Journal (USA)
O.J.	Official Journal of the European Communities
Pace Int'l L.Rev.	Pace International Law Review (USA)
Q.B.	Law Reports, Queen's Bench Division (UK)
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (Germany)
RCDIP	Revue critique de droit international privê (France)
Rev.jur.Univ.Puerto Rico	Revista jurídica de la Universidad de Puerto Rico (USA)
RIW	Recht der Internationalen Wirtschaft (Germany)

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Introduction

Judging by the number of states that have approved it, there is no doubt that the United Nations Convention on Contracts for the International Sale of Goods[1] is one of the most successful examples of unification in the area of international commercial law.[2] Since 1980, when the Convention was unanimously adopted at a diplomatic Conference with representatives from 62 States and 8 international organizations, 52 states from five continents, including almost all the major trading nations, have approved, ratified, accepted, or acceded to the Convention.[3]

However, using such superficial criteria to evaluate the Convention's success does not seem to be the right approach. Of at least equal importance is whether uniform commercial law has been generally accepted by the business world whose interest it is primarily meant to serve.[4] Until now, the Convention lacks of such wide acceptance,

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[1] Hereinafter "the Convention". Articles without any further designation refer to the Convention. The official United Nations text of the Convention is contained in Conference for the International Sale of Goods, U.N. Doc. A/CONF. 97/18; reprinted in 19 I.L.M. 668 (1980). For the English version of the text of the Convention, see Appendix I. The English, French and Spanish version are available at http://www.un.or.at/uncitral/[english][french][spanish]/texts/sales/salescon. htm#top.

[2] To the same effect, see Boneli, 26 Uniform L.Rev., at 26 (1996); Ferrari, 15 J.L. & Com. 1, at 13 (1995); Diedrich, RIW 1995, at 353; Brand/Flechtner, 12 J.L. & Com. 239 (1993). According to the Financial Times, September 21, 1993, Business Section 1, the Convention represents the "biggest success so far achieved by inter-governmental attempts at unification of commercial laws".

[3] These countries and the date the Convention has or will come into force for them are: Argentina, Jan. 1, 1988; Australia, Apr. 1, 1989; Austria, Jan. 1, 1989; Belarus, Aug. 1, 1991; Belgium, Nov. 1, 1997; Bosnia-Herzegovina, Mar. 6, 1992; Bulgaria, Aug. 1, 1991; Canada, May 1, 1992; Chile, Mar. 1, 1991; China, Jan. 1, 1988; Croatia, Oct. 8, 1991; Cuba, Dec. 1, 1995; Czech Republic, Jan. 1, 1993; Denmark, Mar. 1, 1991; Ecuador, Feb. 1, 1993; Egypt, Jan. 1, 1988; Estonia, Oct. 1, 1994; Finland, Jan. 1, 1989; France, Jan. 1, 1988; Georgia, Sep. 1, 1995; Germany, Jan. 1, 1991; Greece, Feb. 1, 1999; Guinea, Feb. 1, 1992; Hungary, Jan. 1, 1988; Iraq, Apr. 1, 1991; Italy, Jan. 1, 1988; Latvia, Aug. 1, 1998; Lesotho, Jan. 1, 1988; Lithuania, Feb. 1, 1996; Luxembourg, Febr. 1, 1998; Mexico, Jan. 1, 1988; Moldavia, Nov. 1, 1995; Mongolia, Jan. 1, 1999; Netherlands, Jan. 1, 1992; New Zealand, Oct. 1, 1995; Norway, Aug. 1, 1989; Poland, Jun. 1, 1996; Romania, Jun. 1, 1992; Russian Federation, Sept. 1, 1991; Singapore, Mar. 1, 1996; Slovakia, Jan. 1, 1993; Slovenia, June 25, 1991; Spain, Aug. 1, 1991; Sweden, Jan. 1, 1989; Switzerland, Mar. 1, 1991; Syrian Arabian Republic, Jan. 1, 1988; Uganda, Mar. 1, 1993; Ukraine, Jan. 1, 1991; United States of America, Jan. 1, 1988; Uzbekistan, Dec. 1, 1997; Yugoslavia, Jan. 1, 1988; Zambia, Jan. 1, 1988.

Ghana and Venezuela have each signed, but have yet to officially ratify, approve or accept the Convention. For relevant information on the status of the Convention, see: http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/x_boo/x_10.html.

[4] The Convention does not apply to consumer sales. See article 2(a).

See Cook, 16 J.L. & Com. 257, at 258 (1997)(emphasizing that the business community and legal practitioners "will cast the final decisive votes by either embracing, or opting out of, the Convention"); Kritzer, Cornell CISG Review, at 147 (1995)(stating that the Convention is designed to foster

which can best be seen by the limited number of published decisions interpreting the Convention.[5] Even if one considers that not all decisions have yet been published or reported and that arbitration awards are often not published at all, in relation to the actual number of sales transactions having taken place since the Convention entered into force in 1988, the number of reported Convention cases seems to be very small and gives rise to the assumption that the Convention has often been excluded by the parties.[6]

Any attempt to explain why the Convention has been excluded is, in the absence of empirical data, a rather speculative exercise. From the present writer's own personal and professional experience as a practicing attorney in Germany, however, parties often exclude the Convention for two main reasons: First, simply because the parties, as well as their lawyers, neither know the Convention nor are they interested in becoming acquainted with it.[7] For such persons, it is more convenient to confine themselves to their well-known domestic rules than to learn a completely new set of rules.[8] Second,

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world trade by acting as a bridge to improved understanding in business dealings between persons from different countries and cultures).

[5] In the database of the University of Freiburg, see *infra* note 101, as of 18 August 1998, 335 cases on the Convention has been registered. According to Professor Michael R. Will of the University of Geneva, who has established a network of correspondents for the purpose to share knowledge on citations to scholarly writings and case law on the CISG, courts and arbitral tribunals have rendered approximately 444 decisions. See Will, "The First 444 or so Decisions".

[6] For similar statements, see Piltz, in: Uniform Commercial Law in the Twenty First Century, at 85 (stating that "surprisingly, only a very limited number of Sales Convention cases – in Germany as elsewhere – has been reported now"); Cook, 16 J.L. & Com., at 257 (1997) (calling the fact that only two U.S. cases interpreting the Convention have been reported yet as "a stunning result considering the broad scope of the Convention's application").

See Kritzer, Cornell CISG Review 147, at 148 (1995)(stating that there are many attorneys who are not aware of the CISG); Hancock, 67 N.Y. St. Bar J., at 21 (1995)(emphasizing that on the one hand all lawyers appreciate the significance of such widely acclaimed achievements in international economic cooperation as GATT and NAFTA but know little if anything of the Convention); Witz, Rec. Dall. Sir.143, 144 (1995)(stating that "les juges et avocats... n'aient pas encore suffisamment pris conscience de ce que les contrats dont ils ont à connaître sont régis par la Convention de Vienne").

[8] See also Lavers, Int'l Bus.L., at 10 (1993) (stating that lawyers following the maxim "[t]he devil you know is better than the devil you do not know" tend to opt out of the Convention); Vis, in: Uniform Commercial Law in the Twenty First Century, at 16 (pointing out that "[t]raders, merchants, bankers and lawyers will accept UNCITRAL texts only if they conclude that it is to their advantage to have their international transactions governed by such rules"); Karollus, JuS 1993, at 378; Posch, International Sale, at 8-9.

some very important provisions of the Convention contain of vague terms that cause uncertainty and unpredictability, since their interpretation is not yet clear.[9]

This thesis will deal with one of those vaguely drafted provisions, namely the concept of fundamental breach of contract in Article 25. This concept plays a crucial role within the remedial system of the Convention, because the remedies available to the buyer and the seller depend on the character of the breach. Generally speaking, only if one of the parties' failure, either the seller or the buyer, to perform his contractual obligations amounts to a fundamental breach, will the other party be entitled to declare avoid the contract as of right (*de pleno jure*).[10] Fundamental breach is further prerequisite for the right of the buyer to demand substitute delivery if the goods delivered do not conform to the contract.[11] Finally, fundamental breach is important in the transfer of risk.[12]

The concept of "fundamental breach" is defined in article 25, according to which a breach 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 result.[13]

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[9] For similar conclusions. see Ziegel, 18 Can.Bus.L.J. 1, at 15 (1991) (stating that some lawyers will treat the uncertainties and untested Convention provisions as sufficient reason to exclude the Convention entirely); Cook, 16 J.L. & Com. 257, at 258 (1997); Note, 97 Harv. L. R. 1984, at 1986 (1984).

See also Sher, in: Uniform Commercial Law in the Twenty First Century, at 95, where the author comments on the practical implications of the Convention for the practice of law in New York, from the perspective of members of the New York bar, as follows: "The uncertainty of the interpretation, and hence of the application, of the Sales Convention makes the New York practitioner wary, and thus reluctant to utilize the Sales Convention. The New York practitioner elects to opt out of the utilization of the Sales Convention in favor of a law with which he or she is more familiar, and therefore more comfortable. There is a tendency of the New York practitioners to opt out even in those situations where the likely outcome under the unsettled law of the Convention may be more favourable to the position of the practitioner and his or her client than the likely outcome under the settled law of the familiar Uniform Commercial Code".

[10] See articles 49(1)(a), 51(2), 64(1)(a), 72(1), 73 (1)(2).

[11] See Article 46(2).

[12] See Article 70.

[13] A similar emphasis on the actual effect of the breach was given by Diplock and Upjohn L.JJ. in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q. B. 26; [1962] All E.R. 474, where a similar formula to article 25 was established:

Article 25 does not provide any examples of events, which would constitute such a fundamental breach.[14] Instead, general terms and phrases are used to define fundamental breach, such as "detriment", "substantial deprivation", and "foreseeability".[15] These terms hardly allow the parties to a sales contract, in case of dispute, to determine *ex ante*, i.e. before one of the parties deems the contract avoided, whether a breach was fundamental.[16] Notwithstanding any issue of fundamental breach, there is a need for certainty and predictability since contract avoidance or continuance demands completely different measures from the parties.[17]

For example, in cases of fundamental breach of any of the seller's obligations, once the buyer avoided the contract, the seller must immediately take back the goods supplied, which necessarily involves risks of damage or loss and expenses such as costs for transports and storage.[18]

It is true, however, that the uncertainty created by the definition of fundamental breach, can be avoided through a more specific avoidance regime negotiated by the

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> Does the occurrence of the event deprive the party... of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain...?

The formula was applied to contracts of the sale of goods in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.*, [1976] Q.B. 44, [1975] All E.R. 739, at 747, 755-757, 765. See also Sutton, Austr. Bus. L.R. 269, at 287 (1976)(commenting on an early draft of article 25).

[14] For a determination of the term "breach of contract", see *infra* Part III. A. 1.

[15] See Kritzer, Guide to Practical Application, at 211.

[16] For a similar statement, see Will, in: Bianca/Bonell, Art. 48, at 3.2.2. (emphasizing that the buyer bears the risk of evaluating the degree of non-conformity); Boggiano, Uniform Law, at 35; Magnus, Art. 49 N. 20; Herber/Czerwenka, Art. 49 N. 6; v. Hoffmann, Gewährleistungsansprüche, at 300 (all emphasizing that in the absence of an express agreement, it will be very often not clear whether or not a breach amounts to a fundamental one; and that the seller runs the risk to commit a fundamental breach himself if he declares the contract avoided and a court later does not find for fundamental breach.); Vilus, Common Law Institutions in the CISG, at 1450 (stating that businessmen, legal profession and judges of the civil law system will face difficulties in that the principle according to which liability is to be assessed in relation to the contract is unknown to them).

See also paragraph 2 of the Secretariat Commentary on article 45 of the 1978 Draft Convention (=article 49 of the Official Text) (pointing out that uncertainty still exists as to whether the conditions for contract avoidance had been met); for a harsh criticism on the 1978 Draft article 23 [=article 25 of the Official Text], see Huber, 43 RabelsZ 413, at 524 (1979)(stating that the definition of fundamental breach is "meaningless, ambiguous and imprecise" and therefore "in general useless for practitioners").

[17] The mercantile need for predictability and certainty is emphasized by Randall/Norris, 71 Wash. U.L.Q. 599, at 609 (1993).

[18] See Koch, RIW 1996, 98, at 99 (pointing out that the seller has practically no choice to take immediate possession of the goods delivered and/or try to sell them to a third party once the buyer has avoided the contract).

parties[19] or by making use of the "*Nachfrist*"-avoidance-mechanism provided for under articles 49(1)(b), 64(1)(b).[20] These opportunities, however, do not end the uncertainty inherent in the definition of fundamental breach. Moreover, the buyer and seller can not anticipate every problem that might arise. It thus begs the question of under what circumstances can a breach be regarded as fundamental.[21]

Plan & Purpose of this Paper

This paper will attempt to elucidate the concept of fundamental breach. Its purpose is to replace the various approaches introduced by the courts and scholars with a methodology, which would provide the parties to a sales transaction, governed by the Convention more assistance in being able to determine whether a fundamental breach has occurred. To that end, the different approaches taken by scholars and the courts in defining fundamental breach will be critically examined. As mentioned above, article 25, drafted in general terms must be interpreted. Therefore, before examining the different approaches, it is necessary to identify the methods of interpretation under the Convention. Consequently, Part I deals with the Convention's rules of interpretation. It will be shown that these rules require first and foremost an autonomous interpretation of the terms of the Convention in order to ensure their uniform application and that the traditional rules of interpretation in civilian legal systems serves that goal best. Based on the premise that uniform application, in the absence of a supranational court endowed with the exclusive jurisdiction to interpret the Convention, requires consid-

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[19] For a similar statement, see Ziegel, Report, Comment on article 25, at 3 (emphasizing that the parties are always free to make arrangements with respect to the consequences of a breach); Stein, Impact of the CISG on the U.S. Business, at 79 (stating the parties are advised to specify performance characteristics or testing procedures that "enable each side to make a more objective determination of whether a breach has occurred").

[20] See articles 49(1)(b) and 64(1)(b), which enable the aggrieved party to declare the contract avoided if there is a delay in performance and if this breach of contract is not remedied within a reasonable time after notice in accordance with articles 47(1) or 63(1), respectively, has been given. The procedure authorized by these particular articles has a certain parentage in the German procedure of "*Nachfrist*" and the French procedure of a "*mise en demure*", although in its current form, as emphasized in para. 7 of the Secretariat Commentary on 1978 Draft article 43 [= article 47 of the Official Text] (Original Records, at 39; Doc. History, at 429), it does not partake of either one. In the commentaries on the Convention the procedure is usually referred to as *Nachfrist*. See, *e.g.*, Will, in: Bianca/Bonell, Art. 49, at 2.1.3.; Honnold, Uniform Law, at § 305. See also *infra* note 27.

[21] See Ziegel, Report, comment on article 25, at 3.

eration of case law and doctrine, Part II analyses legal writing and the reported case law on fundamental breach. It will become clear that both legal writers and courts basically employ the same approaches in determining whether a fundamental breach has been committed. Part III examines whether the employment of the different approaches can be justified by means of the Convention's rules of interpretation. Special emphasis will be given to the Convention's legislative history and the context of fundamental breach within the Convention. Part IV critiques the different approaches as far they can be justified by the Convention's rules of interpretation. It will be shown that first, the remaining approaches cannot be applied to all situations of fundamental breach, past, present and future; secondly, that some of them are not applicable to the remedy of substitute delivery, and finally, that their concurrent application is likely to produce conflicting results. Part V introduces a new methodology to determine fundamental breach, which further elaborates an approach that has recently been employed by the German Supreme Court. This new methodology is based on a single concept and takes account of the various concerns against the existing approaches. It incorporates a test, which asked whether the purpose of the contract is frustrated due to the breach, and whether the aggrieved party needs the remedy of avoidance or substitute delivery in determining fundamental breach.

Part I - Rules of Interpretation and Construction under the Convention

The objective of Part I is to identify the rules of interpretation and construction under the Convention.

A. Interpretation Autonomous to the CISG or in the Light of Domestic Law

When interpreting uniform international law, whenever the meaning of a certain word, term or phrase is subject to various meanings, it is first necessary to determine whether that term or phrase must be interpreted "autonomously", or applied as interpreted in domestic law.[22] Within the scope of the Convention and except for those cases where express reference is made to the *lex fori*, such as under articles 1(1)(b) and 28, it follows from paragraph (1) of article 7, that in interpreting the Convention an "autonomous" interpretation is required. According to the latter provision regard shall be had to its international character, the need to promote uniformity in its application, and the observance of good faith in international trade.[23]

Respecting the "international character" of the Convention and "the need to promote uniformity" requires an autonomous interpretation of its terms and concepts in the context of the Convention itself, and not by referring to any meaning under a particular domestic legal system.[24] The articles and concepts of the Convention cannot be

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[22] See Schlechtriem, Unification, at 136. A good example of the co-existence of both theories – interpretation autonomous to the Convention and interpretation in the light of domestic law – can be found in a decision of the European Court of Justice, Oct. 6, 1976, 12/76, Tessili/Dunlop, E.C.R. 1976, 1485, regarding the interpretation of the 1968 Brussels "Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters", where the Court stated: "The Convention frequently uses expressions and terms from the field of Civil, Commercial and Civil Procedure Law whose meaning may differ in the several member states. Consequently, the question arises as to whether these expression and terms must be seen as autonomous – and thus common to all member states –, or as reference to the substantive provisions of that law which is applicable on the basis of conflict-of-laws rules of the court at first concerned with the matter".

[23] Article 7 (1) provides:

> 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.

[24] This point has been emphasized by Bonell, Methodology, at 45; Schlechtriem, Unification, at 137; Diedrich, 8 Pace Int'l L.Rev. 303, at 313 (1996); Hartnell, 18 Y. J. Int'l L. 1-93, at II.C.1.a. (1993).

regarded as a species of domestic legislation, even after its incorporation or implementation into domestic law.[25] To do otherwise the result would not only lead to a lack of uniformity, but would also promote forum shopping.[26]

However, where a term in the Convention has been taken from one or several legal systems, such as the *Nachfrist* requirement[27], a critical consideration of its domestic interpretation is not necessarily excluded by the reference to the international character of the Convention and its primary aim of promoting uniformity.[28] Nor can one conclude that domestic interpretive techniques are excluded by that reference, provided that their application leads to results which are persuasive and conform to the goals of the Convention in general as well as of the specific provision in particular.[29] Only the uncritical recourse to the domestic interpretation of a given term or interpretive technique is incompatible with article 7(1).[30]

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[25] Bonell, in: Bianca/Bonell, Art. 7, at 2.2.1.; Kastely, 8 Nw. J.Int'l L. & Bus. 574, at 601-602 (1988); Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 43.

[26] This point has been emphasized by Ferarri, 24 Ga.J.Int'l & Comp.L. 183, at 199 (1994), and 15 J.L. & Com. 1, at 9 (1995); the danger of forum shopping as a result of divergent interpretations has also been pointed out by Honnold, Uniform Law, at § 92, where the author states that "(t)he settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention".

[27] The *Nachfrist* requirement has its origin in German law and requires the creditor to give the debtor a notice requiring him to perform within a stated time (*Nachfrist*). This principle is stated with regard to obligation to make reparation in BGB § 250; with regard to cases where a decision for performance has been rendered against the debtor in BGB § 283; and with regard to reciprocal contracts in BGB § 326; see Treitel, Remedies, at 16-149. See also *supra*, note 20.

[28] For similar conclusions, see, for example, van der Velden, Interpretation by Dutch Courts, at 21, 31-34 (stating that where a source of uniform law is a specific provision of national law recourse to its domestic interpretation is a logical aid to interpretation of the uniform law); Mann, 1993 L.Q.R. 376, 383 (stating that "[i]t is simply common sense that if the Convention adopts a phrase which appears to have been taken from one legal system ... where it is used in a specific sense, the international legislators are likely to have had that sense in mind and to intend its introduction into the Convention"); Volken, Scope, at 40 (emphasizing that recourse to domestic interpretation theories is admissible as long as the ultimate goal of uniform application remains unchallenged); Ferarri, 24 Ga.J.Int'l & Comp.L. 183, at 209 (1994) (stating that recourse to the study of foreign concepts is admissible when "either the legislative history or the Convention itself leads to the conclusion that the drafters referred to concepts peculiar to a specific domestic legal system"); Magnus, in: Staudinger, Art. 7 N. 13 (stating with regard to the foreseeability requirement under article 74 that recourse to its English roots is admissible).

For somewhat different conclusions, see, however, Bonell, in: Bianca/Bonell, Art. 7, at 2.2.1. (stating that "[t]o have regard to the 'international character' of the Convention means first of all to avoid relying on the rules and techniques traditionally followed in interpreting ordinary domestic legislation"); Audit, Vienna Sales Convention, at 154; Eörsi, General Provisions, at 2-5/6; Ferrari, 24 Ga.J.Int'l & Comp. L. 183, at 201-202 (1994); Povrzenic, Interpretation and Gap-Filling, at 3(A).

[29] For similar affirmations, see, Enderlein, Uniform Laws Application, at 331-333.

[30] The need for *critical* consideration of domestic legal concepts when interpreting uniform law has been pointed out by a decision of the German Supreme Court (*Bundesgerichtshof*) of 14 July 1983, RIW 1984, 153, on art. 29 CMR (Convention on the Contract for the International Carriage of

For example, having regard to the former "doctrine of fundamental breach" under English law[31] is not permissible, since that concept was developed to enable an aggrieved buyer to escape contractual provisions denying the buyer's right when goods are defective.[32] It would be equally inconsistent with the Convention's objectives to interpret its provisions narrowly, as is the case in most of the common law jurisdictions, where statutes are traditionally interpreted narrowly so as to limit their interference with the law as developed through jurisprudence.[33] Moreover, in contrast to common law legislation[34], reference to (equitable) rules previously governing matters

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Goods by Road), where the carrier's liability depends on how the words "wilful misconduct" in the English version and "faute...qui...est considéré comme equivalent au dol" in the French version were construed. After exhaustive consideration of foreign cases and analyses, the court came to the conclusion that in view of the linguistic ambiguities, regard should be had to "the Convention's legislative history as well as to its underlying policy and objective; in doing so, one must take care not to borrow domestic legal concepts *without closer inspection* as this might endanger the intended unification". [emphasis added].

A translated summary of the decision is reprinted in Schlechtriem, Unification, at 139 n. 34.

[31] The doctrine of fundamental breach was introduced in *Smeaton Hanscomb v. Sassoon I Setty* [1953] 2 All E.R. 1471; *Spurling v. Bradsbau* [1956] 2 All E.R. 121; *Karsales (Harrow) Ltd. v. Wallis* [1956] 2 All E.R. 866. These decisions established the principle that it was a rule of law that a party to a contract could not be allowed to rely on an exclusion or exemption clause if he was guilty of a fundamental breach of that contract. This doctrine was put to rest by the House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale*, [1967] A.C. 361, where the rule of law concept was rejected in favor of an approach based on the true construction of the contract. See also *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827, and the comments by Clarke, 43 C.L.J. 32 (1984), and 10 Can. Bus. L. J. 80 (1985).

[32] For a similar conclusion, see New Zealand Law Commission, Report, at ¶ 56; Honnold, Uniform Law, at § 181.1.

[33] For a similar affirmation, see Bonell, in: Bianca/Bonell, Art. 7, at 2.2.1. (stating that "there is no valid reason to adopt a narrow interpretation"); Audit, Lex Mercatoria, at 153.

Historically, much of the common law world adhered to the doctrine of English courts that statutes must be given a literalistic reading, whereas in most civil law countries the judge may examine the preparatory works (*travaux préparatoires*) in pursuit of the subjective intention of the legislature. As for the interpretation of international conventions, however, the *House of Lords* in 1980 made a significant departure from the strict English approach with respect to treaty interpretation (see *Fothergill v. Monarch Airlines*, [1980] 2 All ER 696, where four of five law lords made reference to the legislative history in order to interpret a provision of the Warsaw Convention on the liability of air carriers). Recently, the *House of Lords* has further relaxed the traditional approach in respect of domestic legislation (s. 63(1) of the Finance Act 1976). It held that

> the rule prohibiting courts from referring to parliamentary material as aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (b) the material relied on consisted of statements by a minister or other promotor of the Bill which lead to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied on were clear.

See *Pepper v. Hart*, [1993] 1 All ER 42, at 43; [1992] 3 W.L.R. 1032, at 1033.

[34] See, *e.g.*, UCC § 1-103 which provides:

> Unless displaced by the particular provision of this Act, the principles of [common] law and equity, including the law merchant... shall supplement its provisions.

within the Convention's scope, whether deriving from statute or case law, is also excluded by article 7(1).[35]

The traditional rules of interpretation in civilian legal systems, such as the grammatical, historical, systematical and teleological rules, on the other hand, make allowance to the Convention's international character and its primary goal, namely to promote uniform application.[36] If the meaning of a word or terms in a statute is clear, it is not arguable that grammatical interpretation serves best both requirements.[37] The same is generally true with the historical, systematical or teleological interpretation, since their application requires no recourse to domestic law, but only to the provisions, the legislative history and goals of the Convention as a whole, as well as the provisions concerned in particular.[38] Should the meaning of a statute be ambiguous, article 7(1) requires, therefore, the application of these methods of interpretation.[39]

In the following section the suitability of these traditional methods in interpreting the Convention will be examined in greater detail.

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[35] See Diedrich, RIW 1995, 11, at 13, and 8 Pace Int'l L. Rev. 303, at 319 (1996)(stating that recourse to common law rules is not admissible).

[36] For similar affirmation, see, Enderlein, Uniform Laws Application, at 331-333; Darkey, 15 J.L. & Com. (1995) 139, at 141 (stating that "since the CISG is a code, it is a logical assumption that a civil law approach to interpretation is favored"); Schlechtriem, Unification, at 149 (stating that in "the interpretation of uniform law of sales just as in the interpretation of domestic law, the grammatical/verbal, the systematic, the historical and the teleological methods are distinguished").

[37] See, *e.g.*, Underlain, Uniform Law Application, at 331 ("any interpretation must start from the wording of a legal text"); Van der Velden, Interpretation by Dutch Courts, at 24; Diedrich, 8 Pace Int'l Rev. 303, at 328 (1996).

[38] Though concerned with the interpretation of treaties between states, the 1969 Vienna Convention on the Law of Treaties (U.N. Doc. A/CONF.39/27, *reprinted* in 289 I.L.M. 679 (1969)) confirms this point. Article 31 of that Convention provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 32 of that Convention further provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

[39] For similar conclusions, see, e.g., Diedrich, 8 Pace Int'l. L. Rev. 303 at 321 (1996); Enderlein, Uniform Law Application, at 333-334; Van der Velden, Main Items, at 58; see also Schlechtriem, From The Hague to Vienna, at 134 (stressing with regard to the teleological interpretation the importance of the teleological method to preserve and further uniformity).

B. The Four Classical Methods of Interpretation

1. Grammatical Interpretation

With regard to the Convention's overriding objective, the promotion of uniformity, the first and foremost guide to interpretation is the ordinary meaning of the words used in the Convention.[40] If their meaning is evident, either in their ordinary connotation or in some special sense appropriate to a particular context, then the task for the national judge in interpretation generally ends there. In the event of ambiguities or obscurities in one of the several equally authentic language versions of the Convention, however, the plurilingual dimension of the Convention requires an examination of the other versions in order to see whether they present the same linguistic uncertainty.[41] If, after such comparison the exact meaning cannot be ascertained, or if it reveals disparities between the authentic texts[42], then the grammatical interpretation must be supported by other methods of interpretation since no single language may prevail.[43]

2. Legislative History

Interpretation by way of legislative history seeks to resolve inherent ambiguities by considering the drafters' motives and deliberations, as evidenced in the officially pub-

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[40] Enderlein, Uniform Law Application, at 331; Van der Velden, Interpretation by Dutch Courts, at 24; Diedrich, 8 Pace Int'l Rev. 303, at 328 (1996).

[41] See Schlechtriem, Unification, at 138 (observing that "numerous volumes [of decisions by German Courts] could be filled with similar decisions on uniform law created by international conventions: all of these decisions attempt to find a solution by analyzing the wording with regard to the several original languages..."); Enderlein, Uniform Law Application, at 331.

The UNIDROIT Principles article 4.7, see *infra* note 67, provides that preference should be given to the version in the language in which the contract was originally drawn up.

[42] Several disparities in wording and content between the various language texts, mostly between the English and the French version, have been reported. See, *e.g.*, Curran, 15 J.L. & Com. 175, at 180 (1995)(referring to differences in terminology between the French and the English version of articles 3(1), 71 and 72); Audit, Vienna Sales Convention, at 154 (referring to the differences between the English and the French version of article 39 which refers to the "non-conformity of the goods" whereas the French text speaks of "*défault de conformité*" in general terms); van der Velden, Interpretation by Dutch Courts, at 25 (asserting that the English and French enumerations under article 2 d) are not identical in all details); Rosett, 45 Ohio St. L.J. 265, at 302 (1984) (analyzing the problems of translation when drafting and interpreting multilingual legal texts with reference to article 46).

[43] See, *e.g.*, Cook, 50 U.Pitt.L.Rev. 197 at 212 (1988); van der Velden, Interpretation by Dutch Courts, at 25; For somewhat different conclusions, see, Diedrich, 8 Pace Int'l Rev. 303, at 328 (1996) (asserting that in case of disparities article 33 of the Vienna Convention on the Law of Treaties has to

lished *travaux préparatoires*.[44] At the national level, such materials connected with the preparation of the law are parliamentary debates, minutes of meetings of commissions etc. At the international level, such materials include the records of diplomatic conferences, and all documents, which formed the basis for the work of the conferences such as (un)official commentaries, drafts proposed by working groups, deliberations within such groups and comments of governments which participated in the drafting process.[45] Consequently, not only the acts and proceedings at the Vienna Conference and the summary records of the previous deliberations within UNCITRAL should be referred to, but also the Convention's predecessors, the 1964 Hague Sales Conventions[46], must be examined, since the deliberations in UNCITRAL started with an analysis of the 1964 texts.[47]

Moreover, the unofficial commentary prepared by the UNCITRAL Secretariat as an aid to the delegates to the 1980 Vienna Diplomatic Conference on the Convention must also be considered.[48] This commentary summarizes relevant conclusions derived from the legislative history of the Convention prior to the Conference and was used extensively by the delegates to the Conference as a guide to the meaning of the 1978

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be applied, which provides that the real or normative intention of the final diplomatic conference is decisive, and concluding that only the French and English texts have to examined).

[44] In the eyes of some scholars interpretation by means of legislative history is only one way of historical interpretation (see, *e.g.*, Enderlein, Uniform Law Application, at 333; van der Velden, Interpretation by Dutch Courts, at 28). They contrast between interpretation by means of *legal* history and by means of *legislative* history. They are apparently of the opinion that the latter method does not allow consideration and analysis of the law as it was before the enactment of a statute. This is not true as far as the previous law was subject of the drafters' deliberations and the starting point for amendments. Besides, reference to previous provisions is not allowed if such reference is aimed at justifying an interpretation different from the one, which can be found in the officially published preparatory works. Thus only when these works are silent on the reasons for amendments or the drafters expressly referred to previous provisions reference to them is admissible.

[45] See Schlechtriem, Uniform Sales Law, at 19; Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 45.

[46] Convention Relating to a Uniform Law on the International Sale of Goods ("ULIS"), July 1, 1964, 834 U.N.T.S. 107 (1972); 3 I.L.M. 854; also available in full text at http://www.cisg.law.pace.edu/cisg/text/ulis.html; and Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFC"), July 1, 1964, 834 U.N.T.S. 169 (1972); 3 I.L.M. 864; also available in full text at http://www.cisg.law.pace.edu/cisg/text /ulf.html.

[47] See Honnold, Uniform Law, at § 88, and Uniform Words, at 130 (stating that where the Hague text was retained, modified or rejected the discussions shed light on the common understanding of the Hague solution and the reasons for its retention or for the change); Samson, La vente: C.V.I.M., at 238 ("Pour s'assurer que l'interprète devra prendre connaissance de l'historique du mouvement d'uniformisation du droit de la vente internationale de marchandises qui constitute le contexte dans lequel la C.V.I.M. a été adoptée").

[48] Hereafter Secretariat Commentary.

Draft Convention provisions they considered. Where the Official Text of a provision is close to or identical with the 1978 Draft version of that provision, it is said, that the Secretariat Commentary is perhaps the most persuasive citation.[49]

The interpretation of an international convention by way of legislative history presents some difficulties.[50] First, unlike at the national level, preparatory materials of a diplomatic conference are often neither very widely known nor available.[51] This, however, is not true for the Convention because the deliberations of the Vienna Diplomatic Conference are well documented.[52]

Secondly, it is difficult to determine the opinion of a diplomatic conference.[53] Like other international agreements, the Convention was not established unilaterally but was negotiated, and one of the features of negotiation is that the negotiating parties do not always reveal their true intentions.[54] Moreover, it is not with respect to the intentions of the contracting parties that agreement is reached rather the final text. Accordingly, agreement on a text does not necessarily imply agreement as to the intentions of the delegates to a conference.[55] Divergent or even conflicting intentions may well underlie a given text.[56]

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[49] To the same effect, see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/guide/8-2.htm (explaining the function of the Secretariat Commentary).

However, it is important to keep in mind that the Secretariat Commentary is a commentary on the 1978 Draft Convention, not on the official text that was eventually adopted by the 1980 Diplomatic Conference.

[50] See, *e.g.*, van der Velden, Interpretation by Dutch Courts, at 28.

[51] See Enderlein, Uniform Law Application, at 333.

[52] The documents embodying this legislative history are reproduced in Volumes I-X of the UNCITRAL Yearbooks and in the Official Records of the 1980 Diplomatic Conference. Furthermore, the relevant documents are reproduced and introduced and references in the documents' margins to the final articles of the Convention for which the legislative deliberations were relevant are provided by Honnold's excellent Documentary History of Uniform Law for International Sales.

[53] See Enderlein, Uniform Law Application, at 333.

[54] See Note, 97 Harv. L. R. 1984, at 1989 (1984)(criticizing the negotiation procedure at the Vienna Conference and stating that "[t]he delegates may have accepted compromises simply because they regarded the portions reflecting their own national laws to be the essence of the new formulations"); Sevón, Method of Unification, at 22 (stating that the reasons for introducing or supporting a provision do not necessarily reveal the background of that provision).

[55] See Bonell, in: Bianca/Bonell, Art. 7, at 3.1.3. (stating that even when the arguments put forward in favor of the adoption of a given provision were not controversial they are not necessarily decisive).

[56] For a similar statement, see Sevón, Method of Unification, at 22 (stating that the reasons for introducing or supporting a provision given by one or a few delegates not necessarily reveal the background of that provision).

These concerns, however, may be equally raised with respect to national legislation and simply show that caution is needed in approaching legislative history in general. In the present writer's view, where proposals had been turned down by clear majorities and, provided that the official records reveal the prevailing understanding of the delegates, legislative history creates a binding interpretation of the Convention, i.e. those proposals should not be admissible evidence in any dispute.[57]

3. Systematic Interpretation

There are two ways of interpreting law systematically.[58] One seeks to discover the meaning of a statutory provision by looking at its context and interpreting it in relation to other provisions of a given instrument.[59] This approach, both at the domestic and the international level, is an important method to avoid conflicting interpretations of identical or similar terms within a complex legal text, in which each detailed provision is to be understood as a part of a more general analytic system.[60] Even though international conventions sometimes lack the coherent structure that exists in a national code[61], in general, this variant of the systematic interpretation promotes the uniform application of rules within a uniform statute, such as the Convention.[62]

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[57] For a similar conclusion, see, Enderlein, Uniform Law Application, at 333; for a somewhat different conclusion, see Maskow, Interpretation, at 14.

[58] See van der Velten, Interpretation by Dutch Courts, at 27, and Enderlein, Uniform Law Application, at 332 (both stating that systematic interpretation has two aspects). Sometimes systematic interpretation is also called logical interpretation. It seems that these terms are used interchangeably when used to describe interpretive techniques and do not in fact differ.

[59] See van der Velden, Interpretation by Dutch Courts, at 27, and Enderlein, Uniform Law Application, at 332.

[60] The importance of the systematic approach to interpretation within the Convention is emphasized by Schlechtriem, Unification, at 139; Maskow, Auslegung, at 10 (stating that "the unity of the national legal system forms the prerequisite to systematic interpretation"); see also Kastely, 8 Nw. Int'l L. & B. 574, at 604 (1988)(stating with regard to the systematical interpretation that it follows from Art. 7 (1) that the Convention is to be interpreted as a "complex legal text, in which each detailed provision is to be understood as a part of a larger analytic system, given coherence by an underlying set of values"); Honnold, Uniform Law, at § 186 (as to the term "Fundamental Breach" in context); Babiak, 6 Temple Int'l & Comp. L.J. 113, at 117 (1992); Mann, 99 L.Q.R. 376, at 382 (1983); Magnus, in: Staudinger, Art. 7 N. 34; Dannemann, German Civil and Commercial Law, at 4 (stressing that the unified structure of [German] law requires that legal provisions must be interpreted in such a way that they do not contradict each other).

[61] For a similar statement, see Hobhouse, 106 L. Q. R. 530, at 534 (1990).

[62] The controversy over whether the lack of a definite price term in an offer leads to the failure of the offer shows the practical significance of the systematic interpretation under the Convention. To determine the validity of an offer that neither fixes the price nor makes provision for determining the price, the relationship between Article 14 and Article 55 needs to be examined to avoid discrepancy. For an overview and detailed discussion of the controversy, see, Amato, 13 J.L. & Com. 1 et seq.

The second approach to systematic interpretation is to look at a certain provision within a legal system as a whole.[63] Unlike at the domestic level, however, at the international level, as yet exists no international legislator and thus no legal order, which requires consideration of one statute's relationship to other statutes and interpretation of similar provisions in such a way that they do not contradict each other.[64] In addition, the purpose of each convention usually differs, as with special statutes for particular issues under domestic law. For these reasons, as long as a general system of uniform laws has not been established, it would be arbitrary and therefore contrary to the purpose of unification to compare international conventions with each other in order to systematically interpret their provisions.[65] Only when a convention expressly refers to the another convention should reference to the latter be permissible. Under the Convention, however, there is no such reference and, therefore, other international conventions should not generally act as a source for its systematic interpretation.[66]

It has recently been suggested that the UNIDROIT Principles of International Commercial Contracts[67] should be used as a means of interpreting the Convention,

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(1993) (commenting on early interpretations of the open price term by Hungarian Courts); Eörsi, in: Bianca/Bonell, Art. 55, at 2.2.2.

[63] See van der Velden, Interpretation by Dutch Courts, at 27; Enderlein, Uniform Law Application, at 332.

[64] See Diedrich, 8 Pace Int'l L. Rev. 303, at 335 (stating that systematic comparison with other conventions is dogmatically inadmissible since there is no international uniform law that could serve as justification for the principle of legal unity within one system of law that presupposes a methodical and dogmatic consistency of its laws); van der Velden, Interpretation by Dutch Courts, at 27; Enderlein, Uniform Law Application, at 332.

[65] See Diedrich, 8 Pace Int'l L. Rev. 303, at 335 (stating that as long as the international legislator is generally not identical it would be questionable to "transplant definitions or legal maxims from one convention to another unless these were explicitly or obviously adopted by the international legislator with the same specific meaning for the convention in question"); see also van der Velden, Interpretation by Dutch Courts, at 27, where the author points out as follows: "...once we try to interpret a provision by considering its relation to other statutes, we are on a slippery slope. Then we have to decide the question, what relationship exists between the various uniform statutes. Are they to be considered part of a general system of uniform law that is still in *statu nascendi*, part of a *lex mercatoria moderna*?"

[66] For somewhat different conclusions, without further explanation, however, see Enderlein, Uniform Law Application, at 332; Maskow, Auslegung, at 11 (both asserting that different uniform laws, such as the 1974 Limitation Convention for International Sale of Goods, should be compared and used for systematic interpretation).

[67] Hereinafter "UNIDROIT Principles". The UNIDROIT Principles were approved in May 1994 by the UNIDROIT Governing Council of the International Institute for the Unification of Private Law. They do not have the force of law and can be best compared to Restatements of the law published in the United States. To an extent, the Principles are modeled on the Convention. The Principles are, however, far broader in scope since they are, unlike the Convention, not limited to contracts for the sale of goods and furthermore also deal with the question of contract validity. The UNIDROIT Prin-

provided that the relevant provision of the UNIDROIT Principles serves the same purpose as its corresponding provision in the Convention, which needs to be interpreted.[68] The objections to resorting to other international conventions, however, also apply to this new approach. In addition, there is another argument against the employment of the UNIDROIT Principles, namely the very existence of another uniform law project within the framework of the Commission on European Contract Law, called the Principles of European Contract Law.[69]

Although the European Principles address basically the same issues of general contract law and are very similar to the UNIDROIT Principles in terms of formal presentation[70], the existence of competing instruments to interpret the Convention *per se* contradicts the purpose of the Convention to unify international sales law. More important than this theoretical argument, however, is the fact that the two intruments do

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ciples are divided into seven chapters ("General Provisions", "Formation", "Validity", "Interpretation", "Content", "Perfor-mance" and "Non-Performance") and preceded by a Preamble defining their scope of application.

For an overview of the UNIDROIT Principles, see Perillo, 63 Fordham L. Rev. 281 et seq. (1994); Ferrari, 69 Tul.L.Rev. 1225 et seq. (1995). The text of the Black Letter Rules of the UNIDROIT Principles is also available at http://www.unidroit.org/english/principles/princ.html.

[68] See Bonell, 69 Tul.L.Rev. 1121, at 1142-1143 (1995); Perillo, 63 Fordham L. Rev. 281, at 283 (1994); Ferrari, 69 Tul.L.Rev. 1225, 1232-1235 (1995); Garro, 69 Tul.L.Rev. 1149, at 1152-1155 (1995); Baptista, 69 Tul. L. Rev. 1209, at 1218 (1995); Magnus, The General Principles of the CISG, 3 Int'l Trade & Bus. L. A. (Austr.) 33-56), at 6.(b)(1997); Amissah, The Autonomous Contract, at 33 et seq.; Maskow, Interpretation, at 11 (all stating that the UNIDROIT Principles could play a role in interpreting and supplementing international instruments); as to the relationship between the UNIDROIT Principles and the Convention in general, see Hartkamp, The UNIDROIT Principles for International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods.

[69] Hereinafter "European Principles". Like the UNIDROIT Principles, the European Principles do not have the force of law. To date, the European Community has no legislative competence in the area of sales law. This lack of jurisdiction, however, does not exclude that, at a future date, the European Principles may be set in place as an instrument that has the force of law in the European Community, such as the 1980 (Rome) Convention on the law applicable to contractual obligations (1980 O.J.E.C. L.266; *reprinted* in 8 I.L.M. 1492 (1980). Referring to the desirability of "a common European Code of Private Law", this goal is set forth in the Resolution of 6 May 1994 of the European Parliament that set in place the Commission on European Contract Law that authored the Principles of European Contract Law. See Hillman, Cross-References Article 7(1), footnote 18. For an account of the efforts made in order to create the "European Contract Law", see, *e.g.*, Lando, 31 Am.J.Comp.L. 653, 653-655 (1983). As for the relationship between the UNIDROIT Principles, the Convention and the European Principles, see Bonell, 26 Uniform L.Rev. 229-246 (1996).

There are two versions of the European Principles. The English text of the first version is available at http://www.ufsia.be/ ~estorme/PECL1en.html. The completed and revised English text of the second version is available at http://www.ufsia.be/ ~estorme/PECL2en.html.

[70] To this effect, see Bonell, 26 Uniform L.Rev. 229, at 245 (1996).

not entirely coincide as to their content.[71] Since the territorial scope of the European Principles is formally limited to the Member States of the European Union, while the UNIDROIT Principles 1994 are universal, it is to be expected that the courts and tribunals outside of Europe or in commercial transactions involving non-Europeans would apply the UNIDROIT Principles to interpret the Convention, while within the European Union or in purely intra-European contracts the European Principles would be applied.[72]

Such a scenario would clearly jeopardize the objectives of this Convention and, therefore, courts and arbitral tribunals should not apply either instrument as a means of interpreting ambiguous terms in the Convention.[73] Critical consideration of concepts and criteria to be used in properly interpreting the Convention offered by those instruments, however, should be permissible. In this respect, the same restrictions pertinent to the use of the domestic interpretation of a given Convention term apply to

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[71] The practically most important example for a significant divergence in the remedial system between the two instruments concerns the non-performing party's right to cure. While the UNIDROIT Principles grant the non-performing party such right even if the aggrieved party has rightfully terminated the contract (see article 7.1.4), according to the European Principles, the non-performing party may cure only where the time of performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance (see article 8:104 [ex article 3.104]).

For further examples of divergences, see Bonell, 26 Uniform L.Rev. 229, at 236-241 (1996).

[72] See Bonell, 26 Uniform L.Rev. 229, at 245 (1996)(envisaging that "outside Europe or in commercial transactions involving non-Europeans, it will be the UNIDROIT Principles that apply, while within the European Union or in purely intra-European contracts, especially between merchants and consumers, it will be the European Principles that prevail").

[73] The future existence of two similar sets of "Principles" has led some commentators make "doomsday". Parties and arbitrators, it is argued, will be faced with two competing, instruments and the need to choose between them is seen as a veritable "nightmare scenario". See in particular Raeschke-Kessler, UNIDROIT Principles for International Commercial Contracts, at 174-175; Kessedian, RCDIP 1995, 641, at 669.

The few reported cases where courts have applied the UNIDROIT Principles do not concern the interpretation of the Convention but fillings gaps in the Convention, namely three arbitration awards – two rendered by the International Court of Arbitration of the Federal Chamber of Commerce of Vienna, [Award No. 4318 and Award No. 4366 of 15 June 1994] (for an English translation see UNILEX, third release (1997), E.1994-13 and E.1994-14; for extracts of the original German version, see RIW 1995, 590 et seq.) and one by the Court of Arbitration of the International Chamber of Commerce [ICC Award No. 8128 of 1995] (an abstract of which has been published in J.D.I. 1996, 1024). They all deal with the determination of interest rates, the amount of which is not ascertainable under the Convention.

There is also a national court decision, which applied the UNIDROIT Principles in order to confirm a result already reached under the Convention. In determining the place of performance of the seller's obligation to return part of the price unduly paid by the buyer, a Swiss court stated that monetary obligations are to be performed at the promisee's place of business, which could be extracted not only from Art. 57(1), but also from Art. 6.1.6 of the UNIDROIT Principles (see *Cour d'appel de Grenoble*, 23 October 1996, unpublished; a summary is published in the Uniform L.Rev. 1997,1).

those instruments.[74] In other words, resorting to the principles and criteria under the UNIDROIT Principles or any other uniform law project should only be permissible when their application can be justified by the legislative history and the underlying purposes of a given provision in the context of the Convention itself.

4. Teleological Method of Interpretation

The teleological method of interpretation attempts to resolve uncertainties and bridge lacunae in legislation by looking at the objectives and underlying policies of the text in question.[75] There are two different aspects to teleological interpretation; namely the object and purpose of the particular provision the terms of which require interpretation, and the object and purpose of the statute as a whole.[76] Determining and effecting the legislator's intent requires the use of *travaux préparatoires*.[77] As far as it concerns the interpretation of a single provision, the teleological approach thus faces the same problems as the interpretation by legislative history. As regarding the object of the Convention as a whole, however, the drafting parties' intent is more easily discernible. That intent is laid out in the Convention's preamble[78] and reinforced by the directive in Article 7(1) for regard to be had to its "international character" and the need to "promote uniformity".[79] In practice, this means that regard must be had to the way the Convention is interpreted in other countries by the courts, scholars, and practitioners.[80]

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[74] See *supra* Part I. B. 1.

[75] See Schlechtriem, Unification, at 141; Ryan, 4 Tul.J.Int'l & Comp.L. 99, at 117 (both emphasizing the importance of the interpretation of the Convention by way of the teleological method).

[76] See Mann, 99 L.Q.R. 376, at 383 (1983).

[77] See, *e.g.*, Honnold, Uniform Words, at § 88 (underlining the link of legislative materials to realize the purpose of the legislation).

[78] See Article 31(2) of the United Nations Convention on the Law of Treaties (see *supra* note 38), which specifically mentions the preamble of a treaty as being part of the context for the purpose of the interpretation of a treaty.

[79] See, the third clause of the Convention's preamble which reads (see Official Records, at 178; Doc. History, at 766):

> *Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

[80] For similar conclusions, see Audit, Vienna Sales Convention, at 154; Boneli, in: Bianca/Bonell, Art. 7, at 3.1.3.; Mann, 99 L.Q.R. 376, at 383-384 (1983); Diedrich, 8 Pace Int'l. Rev. 303, at 321 (1996); Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 45-46; Babiak, 6 Temple Int'l & Comp. L.J. 113, 117 (1992).

5. Prevailing Method in Case of Conflicting Results

Although there is much scholarly writing on the Convention's interpretive techniques, the problem of which technique prevails in the event of conflicting results has not yet been discussed. As discussed later in this Paper, this question becomes pertinent in determining fundamental breach in the context of the seller's right to cure a defect under article 48(1) and the buyer's right to avoid the contract under article 49(1)(a). The point at issue is whether it is permissible to replace the grammatical, historical and contextual interpretation by a teleological approach.[81]

In the absence of a supranational tribunal endowed with the exclusive jurisdiction to interpret the Convention's provisions, it seems to be contrary to the principle of uniform application, as embodied in the Convention, to allow national courts to disregard the plain wording in order to give effect to what it deems the overriding purpose of a single provision.[82] Only where the plain meaning of one provision contradicts that of another, as for example article 14 and article 55[83], recourse to other interpretive methods is permissible, since such contradictions endanger the Convention's overall goal to promote uniformity.

For a discussion of the role of doctrinal writing in the unification of law, see Bodenheimer, 43 Am. J. Comp. L. 67 (1986).

[81] See *infra* Part II. B. 1. f.

[82] For a similar reasoning and conclusion, see Magnus, in: Staudinger, Art. 7 N. 32; for a somewhat different conclusion, see Boncll, in: Bianca/Boncll, Art. 7, at 2.2.1. (stating that courts are expected to look whenever it is possible to the underlying purposes and policies of individual provisions as well as the Convention as a whole instead of sticking to their grammatical meaning).

[83] According to article 14 a proposal "is sufficiently definite if it ...expressly or implicitly fixes or makes provision for determining ... the price. On the other hand, article 55 provides that "where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned". To resolve this controversy it has been argued that article 55, in Part III of the Convention dealing with the obligations of the buyer, was designed for use only where a Contracting State made a declaration under article 92(1) that it will not be bound by Part II of the Convention on contract formation. For an overview on and detailed discussion of the controversy, see, Amato, 13 J.L. & Com. 1, at 8 (1993) (commenting on early interpretations of the open price term by Hungarian Courts); Farnsworth, Formation of Contract, at 3-8/9.

C. Observance of Good Faith in International Trade

Article 7(1) requires that, in the application of the Convention, attention be paid not only to the need to promote uniformity but also to "the observance of good faith in international trade". There is no definition in the Convention as for what content and scope should be given to "good faith" as an aid to interpretation, and there are as yet no published decisions which apply that principle.[84] With regard to its scope, scholars find themselves in disaccord as to whether good faith operates simply as an additional criterion in interpreting the Convention or is also directed to the conduct of the parties to an individual contract of sale.[85] There is, however, a general consensus of opinion that the use of domestic definitions and concepts is barred by the reference to "international trade", which reinforces the Convention's goal "to promote uniformity".[86]

The controversy over the scope of the concept of "good faith" seems to be of purely academic character. In practice, it appears to be nearly impossible to apply this principle to the interpretation of the Convention without also applying it to the parties'

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[84] See Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 43.

The vagueness of the concept of good faith has been criticized, for instance, by Rosett, 45 Ohio St.L.J.265, 289 (1984), where the author points out "the multiple meanings of good faith and the differing connotations the doctrine possesses in different legal systems". See also Farnsworth, 7 Dig. Com. L. 3, at 18 (1980), where the author draws attention to the disadvantages of the good faith term due to its vagueness.

Its incorporation into the Convention has been welcomed, *inter alia*, by Ndulo, 38 Int'l & Comp. L.Q. 1, at 9 (1989)(asserting that the good faith principle gives the courts the flexibility which is needed by any code to make it work in practice since it allows courts to avoid an over-literal interpretation which would provide inequitable results not intended by the drafters, and could prevent a too hasty resort to domestic law).

[85] Bonell, in: Bianca/Bonell, Art. 7, at 2.4., points out that the "good faith" requirement represents a compromise between the views of those representatives "who would have preferred a provision imposing directly on the parties the duty to act in good faith, and those who in the contrary were opposed to any explicit reference to the principle of good faith in the Convention".

However, the compromise did not end the controversy between the divergent views and it is now in dispute how the reference to the interpretation of the Convention is to be understood. Some authors insist on the literal meaning of Article 7(1) and conclude that the principle of good faith is just an additional criterion to which judges must make reference in the interpretation of the Convention; see, *e.g.*, Hillman, Cross-References Article 7(1), para. 3; Farnsworth, Convention, at 18; Winship, 17 UCC L.J. 55, at 67 (1984); 8 Nw. J. Int'l L. & Bus. 623, at 631 (1988); Eörsi, 31 Am.J.Comp.L 333, at 349 (1979). Others take the view that "the need to promote... the observance of good faith in international trade" is also necessarily directed to the parties to each individual contract of sale; see, *e.g.*, Bianca, in: Bianca/Bonell, Art. 7, at 84; Rosett, 45 Ohio St.L.J.265, 290 (1984); in substance see also Schlechtriem, Uniform Sales Law, at 39; Maskow, Perspective of the Socialist Countries, at 54-57; Garro, 23 Int'l Law. 443, at 467-468 (1989); Jones, 17 Int'l Bus. Lawyer 497, at 499 (1989).

[86] For similar statements, see, *e.g.*, Bianca, in: Bianca/Bonell, Art. 7, at 2.4.2.; Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 43; Maskow, Interpretation, at 18.

conduct.[87] Moreover, there are several provisions in the Convention, which are directed at the parties' conduct and which undeniably represent a particular application of the good faith principle.[88] Hence, the requirement of good faith can be considered as one of the "general principles" upon which the Convention is based. As such, it is not being limited to the interpretation of the Convention itself, but also governs the parties' conduct.[89] The reference to general principles underlying the Convention as a

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[87] For similar affirmations, see Maskow, Interpretation, at 18 (pointing out that the dispute is of no practical relevance because "in the relationship between the parties the principle of good faith must be observed because in case of a subsequent examination of their conduct by an arbitration board this principle would be revoked anyhow in interpreting the Convention"); Eörsi, General Provisions, at 2-9 (arguing that interpretation of the contract and the Convention cannot be separated "since the Convention is also necessarily interpreted by the parties"); Herber, in: Schlechtriem, Art. 7 N. 16 (stating that any differentiation is impossible because the interpretation of the Convention is to promote conduct that accords with good commercial practice).

[88] For a list of applications of the good faith principle in particular provisions of the Convention, see Secretariat Commentary on Draft article 6 [= article 7 of the Official Text], Official Records, at 18; Doc. History, at 408., where it is stated that

> [a]mong the manifestations of the requirement of good faith are the rules contained in the following articles:
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> - article 14(2)(b) [=article 16(2)(b) of the Official Text] on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;
> - article 19(2) [=article 21(2) of the Official Text] on the status of late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;
> - article 27(2) [=article 29(2) of the Official Text] in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;
> - articles 35 and 44 [=articles 37 and 48 of the Official Text] on the rights of a seller to remedy non-conformities in the goods;
> - article 38 [=article 40 of the Official Text] which precludes the seller from relying on the fact that notice of non-conformity has been given by the buyer in accordance with articles [=articles 38 and 39 of the Official Text] if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;
> - articles 45(2), 60(2) and 67 [=articles 49(2), 64(2) and 82 of the Official Text] on the loss of the right to declare the contract avoided;
> - articles 74 to 77 [=articles 85 to 88 of the Official Text] which impose on the parties obligations to take steps to preserve the goods."

See also para. 4 of the Secretariat Commentary on Draft article 73 [=article 77 of the Official Text], Official Records, at 61, Doc. History, at 451, which reads in part:

> The duty to mitigate applies to an anticipatory breach of contract under article 63 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and take measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise.

[89] Similar statements can be found in Schlechtriem, Uniform Sales Law, at 39; Maskow, Auslegung, at 18 (suggesting that "good faith" calls for "conduct as is normal among tradesmen"; Honnold, Uniform Law, at § 95 (asserting that this approach is analogous to and supported by Article 9, which provides that contractual obligations include "practices established by the parties and usages... in the particular trade").

whole in turn best ensures the uniform interpretation of the good faith requirement, since this reference secures an interpretation based on principles found *within* the Convention, such as the concepts of reasonableness[90] and the principle of mitigation.[91] The latter, for example, is contained in article 50. This provision limits the availability of the remedy of price reduction in that the buyer is not permitted to reduce the price, if he does not permit the seller to remedy any failure on his part in respect of any of his obligations under the contract.[92]

It should be noted, however, that the Convention's good faith principle does not permit the courts to introduce a general principle of fairness and equity. In other words, a national court may not replace the effects of a *statutory provision*, contrary to its plain wording and the legislative intent, by an outcome, which it believes to be more

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A similar linkage can be found in (U.S.) UCC 1-203 (1978) ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement"). See Dore & Defranco, 23 Harv. Int'l L.J.49, at 61 (1982), where the authors state that the good faith requirement provision does not constitute a mere instrument of interpretation, but rather, it "appears to be a pervasive norm analogous to the good faith provision of the U.C.C.".

[90] For similar conclusions, see Maskow, Interpretation, at 18 (asserting that "[i]n determining what observance of good faith means, one has to proceed, from the Convention itself, i.e. its individual principles and rules, being an expression of this principle" and concluding that "the principles of the Convention concretize each other"); Honnold, Uniform Law, at § 95 (stating that interpreting the Convention to promote the observance of good faith is related to the general principles on which the Convention is based); Schlechtriem, Uniform Sales Law at 39 (stating that "good faith in international trade" is of the general principles and should be construed in the light of the Convention's many references to standards of reasonableness).

For references to reasonableness or the reasonable person, see the following overview in Honnold, Uniform Law, at § 95, note 28: Articles 8(2) (reasonable person), 8(3) (same), 16(b) (reasonable reliance), 18(2) (reasonable time), 34 (unreasonable inconvenience or expense), 35(2)(b) (unreasonable to rely), 37 (unreasonable inconvenience or expense), 38(3) (reasonable opportunity for examination), 39(1) (reasonable time), 48(1) (unreasonable delay, inconvenience), 48(2) (reasonable time), 49(2) (reasonable notice), 60(a) (acts reasonably expected), 63(1) (reasonable time), 72 (reasonable time for notice), 75 (reasonable time and manner), 76(2) (reasonable substitute), 79(1) (reasonable expectations), 79(4) (reasonable time), 85 (reasonable steps), 86(1) (same), 86(2) (unreasonable inconvenience or expense), 88(1) (unreasonable delay), 88(2) (unreasonable expense; reasonable measures to sell). Honnold, *id.*, suggests determining what is "reasonable" by "ascertaining what is normal and acceptable in the relevant trade". Maskow, *id.*, refers to "a conduct as is normal among tradesmen".

[91] This principle is also considered one of the general principles of the Convention by Honnold, Uniform Law, at § 101; Samson, La vente: C.V.I.M., at 247; Audit, at 52; Ferrari, 24 Ga. J. Int'l & Comp. L. 183, 225 (1994); Rosenberg, Austr. Bus. L. Rev. 442, at 452 (1992).

[92] See footnote 2 of the Secretariat Commentary on art. 73, para. 3, Official Records, at 61; Doc. History, at 451; Bergstein/Miller, 27 Am. J. Comp.L. 255, at 265 (1979)(stating that although the mitigation principle of Draft article 73 [= article 77 of the Official Text] does not directly apply to the reduction of price the same result is achieved by Draft article 46 [=article 50 of the Official Text]; Magnus, The General Principles of the CISG, 3 Int'l Trade & Bus. L. A. (Austr.) 33-56), at 5.(b)(3), takes the view that the limitation under article 50 is an expression of the Convention's general principle of the prohibition of *venire contra factum proprium* (actions contrary to prior conduct).

fair and equitable.[93] Any other reading of the good faith principle cannot be justified by the legislative history and would endanger the uniform application of the Convention.[94] If, and to what extent this principle may take precedence over a *contract provision* will be discussed later in this Paper.[95]

D. Filing Gaps in the Provisions of the Convention

It is hardly possible at both the national and international level to draft a lengthy and complicated piece of legislation without any gaps whatsoever. Paragraph (2) of article 7 thus provides that questions which

> are not expressly settled in [the Convention] are to be settled in conformity with the general principles on which [the Convention] is based, or in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

The concept of fundamental breach, however, is expressly settled at article 25 and, consequently, its interpretation is restricted to the rules under paragraph (1) of article 7.[96]

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[93] There is a considerable difference between the legal systems as to how extensive and how powerful the penetration of the principle of good faith has been. At the one end of the spectrum figures a system where the principle has revolutionized the contract law and added a special feature to the style of that system (Germany). At the other end we find systems, which do not recognize a general obligations of the parties to conform to good faith in the performance of a contract, but which in many cases by specific rules reach the results which the other systems have reached by the principle of good faith (the Common Law of England). However, even in those systems where the principle of good faith is recognized, the courts are not generally permitted to establish a general principle of fairness and equity (see Lando/Beale, European Principles, at 56-58; as for Germany, see Staudinger, § 242 N. 4). Only the new Dutch civil code (*BW* articles 6:2 and 6:248(2)) goes further and, under exceptional circumstances, allows a court to replace the effects of a contract or statutory provision by an outcome, which it believes to be more fair and equitable (see Chorus/Gerver/Hondius/Koekkoek, Introduction to Dutch Law, at 95 to 97 (emphasizing that these new provisions adopts the view that statutory provisions and even express terms of contract can be set aside whenever their application or enforcement would be grossly unjust).

[94] See the discussion of the inclusion of a provision on good faith within UNCITRAL, Official Records, at 35; Doc. History, at 369. It is reported that the retention of the good faith requirement was criticized on the basis that the Draft Convention did not specify the consequences of a failure to observe the principles which were made binding on the parties, and consequently, no uniformity of sanctions would be achieved.

[95] See *infra* Part III, C.1.b., and E.2.a.

E. Conclusion (Part I)

The objective of Part I was to identify the rules of interpretation under the Convention. It was shown that the Convention's rules of interpretation require first and foremost an autonomous interpretation of the terms of the Convention in order to ensure their uniform application. We examined different methods of interpretation and reached the conclusion that the traditional rules of interpretation in civilian legal systems serves that goal best. We argued that in those cases in which the application of the different methods leads to conflicting results, the courts are not allowed to disregard the plain wording or the clear legislative intent in order to give effect to what they deem the overriding purpose of a single provision. With regard to the Convention's principle of good faith, we hold the view that it is not being limited to the interpretation of the Convention itself, but also governs the parties' conduct. Finally, we argued that this principle does not permit the courts to modify or replace the effects of a statutory provision, contrary to its plain wording and the legislative intent, by an outcome, which they believe to be more fair and equitable.

[96] For a similar conclusion, see Babiak, 6 Temple Int'l & Comp. L.J. 113, at 116-117 (1992).

Part II – Case Law and Scholarly Writing on Fundamental Breach

The principal objective of Part II is to identify the various factors employed by scholars and the courts in determining when a breach of contract is fundamental.

A. The Role of Case Law and Scholarly Writing (Doctrine) under the Convention

Unlike the Members of the European Union, the states participating in the drafting of the Convention were unwilling to transfer any of their sovereignty in order to establish a supranational court, such as the European Court of Justice, to ensure a unified interpretation of the Convention.[97] Furthermore, neither are decisions of foreign courts binding on domestic courts[98], nor are domestic courts required to consider foreign scholarly writing.[99] On the other hand, the Convention's requirement of having regard for "uniformity in its application" calls for courts to consider interpretations of the Convention in other countries.[100] Therefore, we will next canvas scholarly commentary (A) and case law (B) on fundamental breach.[101]

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[97] Within the European Union it is the European Court of Justice (ECJ) which has been given the jurisdiction to render, at the request of national courts, binding decisions on questions of interpretation relating to EU-law in the narrow sense, as well as to international conventions adopted by the member states, such as the 1968 Brussels Convention on Jurisdiction and Judgements and the 1980 (Rome) Convention on the Law applicable to Contractual Obligations. In theory, European national courts, in tune with civil law systems' rejection of *stare decisis*, are not bound by decisions rendered by the ECJ. In practice, however, courts follow the ECJ's rulings. See Mathijsen, European Union Law, at 98-99.

[98] See Diedrich, 8 Pace Int'l L.Rev. 303, at 338 (1996) (stating that there is no internationally binding rule that foreign judgements have the force of "binding precedents"); Enderlein, Uniform Law Application, at 348 (emphasizing that "the only force foreign decisions have is their persuasive effect"); Boggiano, Uniform Law, at 47 (stating that domestic courts should consider academic writings, *obiter dicta*, and decisions in previous cases, and the probability considered that other courts will follow such decisions).

For somewhat different conclusions, see, however, Ferrari, 15 J.L. & Com. 1, at 11-12 (1995) (asserting that if "the same-or analogous-issues have already been examined by other States' courts such decisions should have either the value of precedent 'if there is already a body of international case law', or a persuasive value").

[99] Like foreign decisions, scholarly writings have persuasive authority only. See Honnold's review, in: Uniform Words, at 125-127, as to the role of legal writing in different common and civil law jurisdictions. See also Bonell, in: Uniform Commercial Law in the Twenty First Century, at 37 (emphasizing the interaction between case law and comments by legal writing in the attempt to constantly improve the understanding of the legislative texts).

[100] See Bonell, in: Uniform Commercial Law in the Twenty First Century, at 35 (stating that the most effective way of ensuring uniformity in the interpretation of uniform law is to have regard to the way in which the single convention or uniform law is interpreted in the other countries); Maskow,

B. Scholarly Writing on Fundamental Breach

Following the statement of the unofficial secretariat commentary on the 1978 Draft Convention[102], a general consensus has been reached among scholars from different legal systems commenting on fundamental breach that the determination of whether a breach is fundamental must be made in the light of the circumstances of each case.[103]

Perspective of the Socialist Countries, at 54 (stating that the interpreter must consider "what others have already done"); Volken, Scope, at 45 (emphasizing that "[i]n order to achieve uniform application of the Convention, in addition to applying basically similar interpretation theories and taking other linguistic versions of the same provision into account, the courts of one country should be able to consult the judicial decisions and doctrine of another country").

For similar statements, see *inter alia*, Honnold, 8 J.L. & Com. 207-212, at III (1988); Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 45; Audit, Vienna Sales Convention, at 154-155; Cook, 50 U. Pitt. L. Rev. 197, at 226 (1988); Piltz, Internationales Kaufrecht, at 66; Kabik, 9 Int'l Tax & Bus. Law. 408, at 429 (1992); Patterson, 22 Stan.J.Int'l L. 263, at 283 (1986).

A variety of guides to and sources of information about the Convention are available. Based on a decision by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-first session (see U.N. Doc. A/43/17, at 98-109), the Secretariat has established a system of collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from the work of the UNCITRAL. The acronym for the system is "CLOUT" ("Case law on UNCITRAL texts")(see U.N. DOC. A/CN.9/SER.C/ ABSTRACTS/1 et seq. (1993 and later). The case abstracts are available as hard copy and on the Internet at http://www.un.or.at./uncitral/clout. Cites to CISG commentary and case law from around the world are also available through UNILEX, a commercial case collection system on CISG, published in paper and electronic form by Transnational Juris Publications, Inc., Irvington-on-Hudson, New York, Copyright: Italian National Research Council-Center for Comparative and Foreign Law Studies).

For comprehensive Internet databases devoted exclusively to the CISG, see the website of the Pace University School of Law (http://www.cisg.law.pace.edu): created by the Pace Institute of International Commercial Law, Albert H. Kritzer/Nicholas Triffin eds.; the CISG online website (http://www.jura.uni-freiburg.de/ipr1/cisg): created by the Institut für ausländisches und internationales Privatrecht (Director: Peter Schlechtriem, Albert-Ludwigs-Universität Freiburg) [special attention to German case law on the CISG]; the CISG - France website (http://www.jura.uni-sb.de/FB/LS/Witz/cisg.htm): Claude Witz ed. [special attention to French case law on the CISG].

Examples of other particularly valuable Internet databases containing information on the CISG or related to the CISG: the International Trade Law website of the Faculty of Law of Norway's University of Tromso (http://itl.irv.uit.no/trade_law/): Ralph Amissah ed. [the first WWW site dedicated to a given area of law on the Internet: international trade law (an important site for international trade law materials and links to related information on the "net")]; CISG Finland (http://www.utn.fi/oik/fdk/cisg/cisg/htm); CISG W3 Database de CISG Brazil (http://www.cisg3.law. pace.edu /galiudo-da-fouseca/brasil-uff/).

[102] See para. 3 of the Secretariat Commentary on the 1978 Draft article 23 [=article 25 of the Official Text], Official Records, at 26; Doc. History, at 416 (stating that "the determination whether the injury is substantial must be made in the light of the circumstances of each case, ...").

[103] See Honnold, Uniform Law, at § 181.2; Babiak, 6 Temple Int'l & Comp. L.J. 113, at 121 (1992); Eörsi, 31 Am.J.Comp.L. 333, 336 (1983) (emphasizing that "[i]n applying such concepts [fundamental breach] the judge forms an opinion, taking all circumstances into consideration whether (in this case) the breach of contract is so significant as to justify avoidance or not"); Grigera Naón, UN Convention, at 105; Sutton, 4 Austr. Bus. L.Rev. 269, at 286 (1976); Barbic, Uniform Law, at 19; Magnus, in: Staudinger, Art. 25 N. 3 (stating that the concept is as vague as flexible and that, in practice, its determination will depend on the context of each case where the distinction between a

There is no such agreement, however, as to which factors are decisive in determining whether an injury is substantial enough so as to amount to a fundamental breach and as to the point in time at which foreseeability is measured.

The section below first illustrates the different approaches as for the relevant factors in determining fundamental breach (1.) and the relevant point in time (2.). Then reference will be made to a very recent approach that involves the UNIDROIT Principles concerning non-performance in order to determine fundamental breach under the Convention (3.).

1. Relevant Factors in Determining Fundamental Breach

Because of its practical importance within the Convention's remedial system on the one hand, and its vagueness on the other, the concept of fundamental breach has generated much commentary by scholars and practitioners. They have employed several factors in determining whether a breach is fundamental, which may be roughly categorized under the following headings: nature of the contractual obligation (a.); gravity of the circumstances of breach (b.); remedy-oriented approach (c.); (in)ability of performance (d.); (un)willingness to perform (e.); no-reliance on the other party's future performance (f.); offer to cure (g.); possible cure (h.).

a. Nature of the Contractual Obligation

The nature of the contractual obligation is one factor in the determination of fundamental breach. Where the parties have expressly or implicitly agreed that in case of any breach by one party the other party may terminate the contract, strict compliance with the contract is essential and any deviation from the obligation is to be regarded as a fundamental breach.[104] Absent such an express provision the duty of strict compli-

fundamental and a non-fundamental breach is relevant); Görlitz, Wesentliche Vertragsverletzung beim Warenkauf, at 9; Melville, New L. J., March 27, 1980, 307, at 308.

[104] The right of the parties to indicate the circumstances under which an act or omission by one party entitles the other to avoid the contract follows from article 6, which reinforces the supremacy of the parties' agreement over the language of article 25. See para. 1 of the Secretariat Commentary on article 5 of the 1978 Draft Convention (=article 6 of the Official Text), Official Records, at 17; Doc.

ance may also be inferred from the language of the contract, the surrounding circumstances, custom, usage, or a course of dealing between the parties.[105]

For example, it has been argued that late performance amounts to fundamental breach where the parties have stipulated that performance should be effected at an exact time ("*Fixgeschäft*")[106], where the importance of timely performance flows from the nature of the goods[107] or from the circumstances of payment[108], or from the time the taking delivery of the goods was to be effected.[109]

History, at 407 (stating that the parties "may derogate or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention").

[105] See Welser, Vertragsverletzung, at 120; Herber/Czerwenka, Internationales Kaufrecht, Art. 47 N. 4; Holthausen, RIW 1990, 101 at 105; Karollus, in: Honsell, Art. 25 N. 32; Clausson, N.Y.L.Sch.J.Int. & Comp.L 1984, 113 et seq.; Schnyder/Straub, in: Honsell, Art. 49 N. 26; Magnus, in: Staudinger, Art. 46 N. 42.

[106] See Enderlein/Maskow, International Sales Law, Art. 25, at 3.4 (stating that the use of customary terms as "fixed", "absolutely", "precisely", "at the latest", indicates that late delivery is to be regarded as fundamental breach of contract); see also Huber, in: Schlechtriem, Art. 49 N. 5; Welser, Vertragsverletzung, at 120; Magnus, in: Staudinger, Art. 49 N. 10 (stating that the Incoterms CIF, FOB gives the buyer the right to avoid the contract in the event of late delivery); Holthausen, RIW 1990, 101, at 105; Herber/Czerwenka, Internationales Kaufrecht, Art. 47 N. 4.

Where the buyer has informed the seller that he needs for the goods at a certain date to fulfill his own obligations towards third parties, late delivery is to be considered fundamental breach. See, *e.g.*, Schlechtriem, in: Schlechtriem, Art. 25 N.18.

[107] Where the goods in question are of fashionable or seasonable character, or where they have a stock or market price, or where the prices are subject to sharp fluctuations, late delivery has been viewed as fundamental breach. See, *e.g.*, Schlechtriem, in: Schlechtriem, Art.25 N.18, and Uniform Sales Law, at 60 (stating that defaulted delivery of goods with a quoted market price is considered a fundamental breach); Magnus, in: Staudinger, Art. 49 N. 11 (stating that late delivery of fashionable or seasonable goods generally constitutes fundamental breach); Enderlein/Maskow, International Sales Law, Art. 25, at 3 (stating that in "the case of goods which have a stock or market price, untimely-delivery certainly constitutes a fundamental breach"). For a somewhat different conclusion, see, Huber, in: Schlechtriem, Art. 49 N. 5 (stating that late delivery of goods with a quoted stock or market price do not generally constitute a fundamental breach, but that a longer delay can turn into a fundamental breach even if no additional period of time has been fixed).

[108] The buyer's obligation to pay the price includes all of the measures required by the contract, such as the duties to provide a letter of credit, and to comply with relevant domestic laws to enable payment to be made; see, Schlechtriem, Uniform Sales Law, at 81; Honnold, Uniform Law, at § 354; para. 7 of the Secretariat Commentary on article 60 of the 1978 Draft Convention [=article 64 of the Official Text], Official Records, at 50; Doc. History, at 440.

Whether the failure to open a documentary credit within a fixed time constitutes a fundamental breach is disputed. While one author argues that the seller should always be allowed to declare the contract avoided if the buyer does not open a credit within a fixed time (see Hellner, Dubrovnik Lecturers, at 353), others take the view that a delay in opening a credit constitutes a fundamental breach only in such cases where payment was to be made by letter of credit against delivery of shipping documents (see Hager, in: Schlechtriem, Art. 64 N. 5; Enderlein/Maskow, International Sales Law, at 244).

[109] For example, a delay in taking delivery is to be regarded as fundamental breach in "just-in-time" contracts, when the goods are of perishable nature or where the goods cannot be stored; see Hager, in: Schlechtriem, Art. 64 N. 5; Magnus, in: Staudinger, Art. 64 N. 17; Posch, in: Hoyer/Posch, at 159; Magnus, in: Staudinger, Art. 64 N. 17.

Where the parties have expressly specified the quality of the goods, *e.g.* in case of an express warranty, any defect in quality constitutes a fundamental breach. Likewise, where the buyer has insisted that goods be fit for a particular purpose[110], or where he has notified the seller for what purposes he would need the goods and thus expressed his special interest that the goods be fit for that purpose, then any defect affecting this particular use is also to be regarded as a fundamental breach.[111]

b. Gravity of the Consequences of Breach

The gravity of the consequences of the breach is another factor in determining fundamental breach. Whether or not the consequences of the breach actually deprive the aggrieved party of the expectation under the contract is discussed under the following headings[112]:

(1) Contract's Overall Value and the Monetary Loss Suffered by the Aggrieved Party

There is some debate among scholars as to whether the monetary loss suffered by the injured party is a decisive factor in determining fundamental breach. Some authors

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For further examples where timely performance is essential, see, Schlechtriem, Uniform Sales Law, at 84 (stating that seller's need to clear his warehouse can make timely taking delivery an essential duty); Hager, in: Schlechtriem, Art. 64 N. 6; Enderlein/Maskow, International Sales Law, Art. 64, at 3, where the authors state that "time for performance can, for instance, in regard to fulfilment of the obligation to participate in the manufacture of goods, supply of drawings or sub-supply of material, be agreed as an essential date for the goods cannot be finished at another time because of different use of the facilities, planned changes in production, shutting-down of plant etc."

[110] See Schlechtriem, Uniform Sales Law, at 59-60 (stating that delivery of defective goods entitles buyer to avoid the contract only if the contract indicates that non-conformity is of special importance to him "such as in the case of an express warranty"); for a similar statement see Magnus, in: Staudinger, Art. 46 N. 42; see further Schlechtriem's example, *id.*, at 77: "[I]f the buyer has unmistakenly insisted on, but not received, chips suitable for the tropics, then the breach is fundamental and the buyer retains the right to demand substitute goods, even if the buyer can otherwise use the non-performing transistors without great loss".

[111] See, *e.g.*, Schlechtriem, in: Schlechtriem, Art. 25 N. 21; Kappus, NJW 1994, 985; Görlitz, Zur wesentlichen Vertragsverletzung beim Warenkauf, at 41 (with reference to the interrelation between the concept of fundamental breach in the Scandinavian countries and under the Convention).

[112] Where no detriment whatsoever has been caused or is expected to be caused by the breach of contract, it is undisputed among scholars that there is no right of avoidance

See Schlechtriem, Uniform Sales Law, at 60 N. 210 (stating that there is no fundamental breach where, despite the seller's failure to properly pack and insure the goods, they nonetheless arrived in good order and condition; if, however, the buyer has lost a chance to resell the goods, there would be a detriment); see also Will, in: Bianca/Bonell, Art. 25, at 2.1.1.2.; Magnus, in: Staudinger, Art. 25 N. 12; Karollus, in: Honsell, Art. 25 N. 14; Schnyder/Straub, in: Honsell, Art. 49 N. 23.

conclude from the Secretariat Commentary on the fundamental breach governing provision under the 1978 Draft Convention[113] that especially the contract's overall value and the loss suffered by the buyer as a result of the non-performance are to be considered in determining fundamental breach.[114] Most authors, however, take the view that damages are not the decisive factor. Rather, the aggrieved party's special interest as fixed by the terms of the contract in the performance of the particular obligation violated by the other party is the decisive factor in determining fundamental breach.[115]

(2) Frustration of the Purpose of the Contract

Many authors focus on whether or not the purpose of the contract has been frustrated by the breach in determining fundamental breach.[116] They argue that the buyer has purchased the goods for some purpose and consider those breaches as fundamental, which make the intended use of the goods impossible.[117] In their view, when the goods do not possess the features necessary for the purpose[118], or when a third party claims a right to possession or prohibits the use by virtue of a patent or other industrial

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[113] See para. 3 of the Secretariat's Commentary on article 23 of the 1978 Draft Convention [=article 25 of the Official Text], Official Records, at 25; Doc. History, at 416,where it is stated that "[t]he determination whether the injury is substantial must be made in the light of the circumstance 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 injured party". [emphasis added]

[114] See, Babiak, 6 Temple Int'l & Comp. L.J. 113, at 118 (1992); Sutton, 4 Austr. Bus. L.Rev. 269, at 286 (1976). A similar notion seems to be supported by Magnus, in: Staudinger, Art. 25 N. 11 (stating that the term "detriment" draws one's attention to the fact that the extent of the damages is a relevant factor in determining fundamental breach).

[115] See Schlechtriem, Uniform Sales Law, at 77 (stating that the objective damages will not be the decisive factor in determining fundamental breach but "whether the risk of the particular nonconformity was considered so serious by the parties that its existence would eliminate the buyer's interest in the performance of the contract concerning these goods"); Enderlein/Maskow, International Sales Law, Art. 25, at 3 (stressing that "[t]hough in commercial relations most things can be reduced to a damage, this is not the central issue"); for similar statements, see Will, in: Bianca/Bonell, Art. 25, at 2.1.1.2. (stating that detriment does not equal damages); Nicholas, L.Q.R. 1989, 218; Musger, Wesentliche Vertragsverletzung, at 7 et seq.; Karollus, in: Honsell, Art. 25 N. 16; Reinhart, UN-Kaufrecht, Art. 25 N. 5, 6; Herber/Czerwenka, Internationales Kaufrecht, Art. 25 N. 3, 8. See also Ziegel, Remedial Provisions, 9-16; Beinert, Wesentliche Vertragsverletzung, at 90.

[116] See Enderlein/Maskow, International Sales Law, Art. 25, at 3.4, where the authors state that to what extent non-fulfillment of an obligation is fundamental "depends on its relevance for the achievement of the *purpose of the contract*". [emphasis added]; similarly Karollus, in: Honsell, Art. 25 N. 22 (stating that the detriment is only relevant under the condition that the violated obligation is important and the terms of the contract are aimed at protecting the aggrieved party from the consequences of breach).

[117] See, *e.g.*, Karollus, in: Honsell, Art. 25 N. 21; Neumayer/Ming, Art. 25 N. 3; Enderlein/Maskow, International Sales Law, Art. 25, at 3.4; Schnyder/Straub, in: Honsell, Art. 46 N. 59.

[118] See Karollus, in: Honsell, Art. 25 N. 21.

or intellectual property right, a fundamental breach has been committed.[119] For example, the buyer's interest in reselling the goods is not protected if it was evident that he bought the goods for manufacturing purposes, but his interest in selling the proceeds is protected. Accordingly, only if the sale of the latter is not possible due to the defective delivery a fundamental breach is given.[120]

Where documents are necessary in order to dispose of the goods or take delivery of the goods at their place of destination, *e.g.* a bill of lading, the delivery of defective and incomplete documents constitutes a fundamental breach.[121] Delivery of short or damaged goods entitles the buyer to avoid the contract where complete and/or non-defective delivery was necessary for the use intended by the buyer.[122] Delivery of an *aliud* constitutes a fundamental breach where the merchandise delivered deviates so substantially from that ordered that the seller must view the buyer's acceptance as impossible.[123]

(c) Remedy-Oriented Approach

Concerning the delivery of non-conforming goods, the case-by-case oriented approach, which looks at whether the purpose of the contract has been frustrated, has been challenged by a more comprehensive one. Inspired by some recently rendered

[119] See Schlechtriem, in: Schlechtriem, Art. 25 N. 20; Enderlein/Maskow, International Sales Law, Art. 25, at 3.4; Magnus, in: Staudinger, Art. 49 N. 16; Holthausen, RIW 1990, 101, at 107.

[120] See Karollus, in: Honsell, Art. 25 N. 21.

[121] See Huber, in: Schlechtriem, Art. 49 N. 16; for the same conclusion, see, Schnyder/Straub, in: Honsell, Art. 49 N. 27; Enderlein/Maskow, International Sales Law, Art. 49, at 3 (stating that failure to hand over negotiable documents constitutes a fundamental breach).

[122] See Schlechtriem, in: Schlechtriem, Art. 25 N. 19; Enderlein/Maskow, International Sales Law, Art. 25, at 3.4 (regarding non-conforming delivery). As for partial non-delivery, see, Huber, in: Schlechtriem, Art. 51 N. 5, where the author with respect to article 51(2) holds the buyer to be entitled to avoid a contract to deliver computer systems, if the seller delivered only the hardware but not the software necessary to work with the computer; Honnold, Uniform Law, at § 317 (emphasizing that one factor of special significance with respect to avoidance as to the entire contract is "whether the non-conformity of some goods interferes with the *use* or *salability* of the remainder")[emphasis added].

[123] See, *e.g.*, Will, in: Bianca/Bonell, Art. 46 at 2.2.1.2 (stating that "[r]eceiving apples instead of pineapples satisfies the criteria of Article 25").

For somewhat different conclusions, see, Schlechtriem, in: Schlechtriem, Art. 25 N. 21 (stating that even the delivery of a totally different *aliud* not always impairs the fundamental contractual expectations of the buyer); Magnus, in: Staudinger, Art. 46 N. 39 (stating that an *aliud* delivery does not constitute *per se* a fundamental breach except when it is of no use for the buyer and it would demand

German court rulings[124], in determining fundamental breach this new approach asks whether it is reasonable for the buyer to retain the defective goods, make use of them and to then claim for damages for any loss suffered as a result of the breach.[125] In answering this question, the new approach considers the nature of the goods, the extent of the deviation from the agreed quality, for what purposes the buyer purchased the goods and the size of the buyer's business.[126]

According to this somewhat remedy-oriented approach, it is in general unreasonable for the buyer to run the risk of getting involved in a dispute with the seller as to whether he had sold the goods for a reasonable price and thereby observed his duty to mitigate losses.[127] Consequently, defective delivery generally constitutes a fundamental breach when the goods would not be marketable or a reasonable price could not be monetized.[128] Moreover, where the buyer is only a retailer, it is generally unreasonable for him to sell defective goods to his customers.[129]

If the defective goods were not purchased for resale but for other purposes, such as processing, it would also be unreasonable for the buyer to use the goods unless there were a market where the goods could be easily sold.[130] "*Aliud*" deliveries always constitute a fundamental breach where the goods in question are of a specific character, irrespective of whether they are unique or fungible.[131] Where the goods are generic, "*aliud*" deliveries are to be considered a fundamental breach when it is unreasonable

unreasonable measures to sell them); Enderlein/Maskow, International Sales Law, Art. 25, at 3.4 (stating that the right to immediate avoidance in any case of an *aliud* delivery cannot be justified).

[124] See infra Part II, C.2.c.

[125] See Huber, in: Schlechtriem, Art. 46 N. 35; Piltz, NJW 1996, 2768, at 2772.

[126] See Huber, in: Schlechtriem, Art. 46 N. 35, 42; Schlechtriem, in: Schlechtriem, Art. 25 N, 20.

[127] See Huber, in: Schlechtriem, Art. 46 N. 36 (stating that it is unreasonable to expect a buyer to resell the goods if there is a danger that, when calculating the loss, there will be a dispute with the seller regarding the reasonableness of the resale price or where there was a breach of the duty to mitigate loss).

[128] See Huber, in: Schlechtriem, Art. 46 N. 36 (stating that the goods must be marketable despite their lack of conformity and it must be forseeable that the buyer will receive a reasonable price).

[129] See Huber, in: Schlechtriem, Art. 46 N. 37 (arguing that a retailer can generally never be expected to sell goods outside his normal course of business).

[130] See Huber, in: Schlechtriem, Art. 46 N. 38 (arguing that a commercial buyer may be expected to resell the goods if there is a market on which the goods may be sold without great difficulties, that market is easily accessible for the buyer and likely to produce reasonable price).

[131] See Huber, in: Schlechtriem, Art. 46 N. 40.

for the buyer to resell them and to claim for damages.[132] In determining unreasonableness, the extent to which the delivered goods deviate from the stipulated description must be considered.[133]

c. (In)ability of Performance

Another consideration in the determination of fundamental breach is the party's (in)ability to perform at all, that is to say either to deliver the ordered goods or to pay the purchase price and to take delivery. Regardless of whether or not performance is due, non-performance is considered a fundamental breach where performance is objectively impossible, namely where the object of the transaction is unique and has been destroyed.[134] For example, if a party contracts to sell his Kandinsky and it has perished, performance is objectively impossible since no one could deliver the painting.[135] A fundamental breach has also been committed where only the party, which has yet to fulfill its obligation is unable to perform the contract (subjective impossibility).[136] If, in the foregoing example, the Kandinsky were not destroyed but stolen, the seller would only be subjectively prevented from performing, since the thief or any other person having bought the stolen painting from him would be able to deliver it to the buyer, if only theoretically.[137]

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[132] See Huber, in: Schlechtriem, Art. 46 N. 39 (stating that the question is whether it is reasonable to expect the buyer to dispose of the goods himself and to content himself with price reduction or damages).

[133] See Huber, in: Schlechtriem, Art. 46 N. 39 (stating that the "more blatant the dsicrepancy, the less it can be expected of the buyer to dispose of the goods"); see also Schnyder/Straub, in: Honsell, Art. 46 N. 59 (without differentiation between generic or specific goods).

[134] See Magnus, in: Staudinger, Art. 49 N. 13; Schlechtriem, in: Schlechtriem, Art. 25 N.17; Huber, 43 RabelsZ 413, at 504 (1979).

[135] For a similar example, see Marcantanio, 8 Hast. Int'l & Comp. L. R. 41, at 53 (1984) (commenting on the German concept of objective impossibility).

[136] See Schlechtriem, in: Schlechtriem, Art. 25 N.17; Sutton, 5 Austr. Bus.L.Rev. 92, at 93 (1977)(stating that failure to perform at all constitutes fundamental breach); Magnus, in: Staudinger, Art. 72 N. 11 (stating that insolvency of the buyer entitles seller to avoid the contract); for a somewhat different conclusion, see, Huber, in: Schlechtriem, Art. 49 N. 7 (stating that subjective impossibility only constitutes fundamental breach if the seller does not cure the defect within a reasonable time).

See also para. 2 of the Secretariat Commentary on article 63 of the 1978 Draft Convention [=article 72 of the Official Text], Official Records, at 53; Doc. History, at 443 (stating that a future fundamental breach "may be clear either because of the *words* or *actions* of the party which constitutes a repudiation of the contract or because of an *objective fact*, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary control which will render impossible future performance")[emphasis added].

[137] For further examples, see Marcantanio, 8 Hast. Int'l & Comp. L. R. 41, at 53 (1984) (commenting on the German concept of subjective impossibility).

d. (Un)willingness to Perform

The parties' (un)willingness to perform is another factor in the determination of fundamental breach. For example, one party's express refusal to perform his obligation, such as to pay for the goods or to take delivery of them, constitutes fundamental breach, except where the promisor is entitled to refuse to perform.[138] Making performance dependent on an unjustified counter-performance or additional guarantees also constitutes fundamental breach.[139]

e. No-Reliance on the Other Party's Future Performance

In determining fundamental breach, consideration is also given to whether the breach gives the aggrieved party reason to believe that he may not rely on the other party's future performance. It has been argued, for example, that even where the contractual term broken is minor and the consequences of the breach do not substantially deprive the aggrieved party of his expectations under the contract, he can nonetheless treat the breach as fundamental if it was intentional.[140] In addition, where one party can reasonably conclude from the other party's conduct that he will not perform a substantial part of his obligation, the former may ask the latter for an adequate assurance of performance, and failure to provide an additional guarantee is regarded as a fundamental breach.[141]

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[138] See, *e.g.*, Schlechtriem, in: Schlechtriem, Art. 25 N.17 (stating that seller's refusal to deliver before or at the time when performance is due constitutes fundamental breach); Hager, in: Schlechtriem, Art. 64 N. 6; Stoll, 52 RabelsZ 617, at 624 (1988); Magnus, in: Staudinger, Art. 64 N. 17 (stating that buyer's refusal to pay for the goods or to take delivery is to be considered a fundamental breach).

See also Huber, in: Schlechtriem, Art. 49 N. 6 (emphasizing that in practice, when the seller is not willing to perform, he often argues that the contract is not valid; the contract is avoided due to an alleged fundamental breach of contract on the side of the buyer; or invokes *force majeure* or article 71).

[139] See Magnus, in: Staudinger, Art. 72 N. 11; Stoll, 52 RabelsZ 617, at 625 (1988). Schlechtriem, Uniform Sales Law, at 95, notes that "the frequent cases in which a demand for new terms or alleged contract violations by the other side are used as a pretext for not performing one's own obligations" provide in most cases a basis for immediate avoidance.

For a somewhat different view, see Honnold, Uniform Law, at § 396 (stating that avoidance should not be "triggered" if one party informs the other one of the need to negotiate a modification of their agreement).

[140] See, *e.g.*, Karollus, in: Honsell, Art. 25 N. 2.

[141] See, *e.g.*, Bennett, in Bianca/Bonell, Art. 71, at 3.7; Honnold, Uniform Law, at § 394; Magnus, in: Staudinger, Art. 72 N. 12.

f. Offer to Cure

When one reads academic commentary on the drafting history of the Convention[142], there is much controversy among scholars as to whether fundamental breach should be determined in the light of an offer to cure. Many authors favor the consideration of such an offer in determining whether or not a fundamental breach has occurred.[143] Their position is that a breach is not fundamental as long as the requirements of article 48(1) are met, namely, that repair is possible within a reasonable time and without causing the aggrieved party unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. Consequently, the seller's refusal or failure to cure the defect within a reasonable time constitutes a fundamental breach.[144] The same is true where timely delivery is an essential term of the contract.[145] Moreover, a fundamental breach has been committed where it is unreasonable for the buyer to keep the repaired merchandise[146], or where the buyer reasonably cannot rely on the seller's ability[147] or willingness[148] to cure the defect within a reasonable time.

See also para. 2 of the Secretariat Commentary on article 63 of the 1978 Draft Convention [=article 72 of the Official Text]. Official Records, at 53; Doc. History, at 443 (stating that "failure by a party to give adequate assurances that he will perform when properly requested to do so under article 62 (3) [=article 72 of Official Text of the Convention] may help make it 'clear' that he will commit a fundamental breach").

[142] For the drafting history, see *infra* Part III. B.

[143] See Schlechtriem, in: Schlechtriem, Art. 25 N. 21; Honnold, Uniform Laws, at § 296; Ziegel, Remedial Provisions, at 9-22/3; Michida, 27 Am.J.Comp.L. 279, at 288 (1979); Farnsworth, Rights and Obligations of the Seller, at 88; Schneider, 7 Ariz.J.Int'l & Comp.L. 69, 102 (1989); Huber, in: Schlechtriem, Art. 48 N. 23; Herber/Czerwenka, Internationales Kaufrecht, Art. 48 N. 9; Kastely, 8 Nw.J.Int'l L. & Bus. 574, at 599 (1988); Mapp/Nicoll, N.Z.L.J. 316, 319 (1993); Karollus, ZIP 1993, 490, at 493-494; Diedrich, RIW 1995, 11, at 13.

[144] See Huber, in: Schlechtriem, Art. 49 N. 12; Magnus, in Staudinger, Art. 46 N. 40; Karollus, ZIP 1993, 490, at 496.

[145] See Karollus, ZIP 1993, 490, at 496.

[146] See Huber, in: Schlechtriem, Art. 49 N. 12; Karollus, ZIP 1993, 490, at 496 (stating that where a car has been seriously damaged a fundamental breach is given since it is unreasonable for the buyer to keep such car even if repaired).

[147] See Huber, in: Schlechtriem, Art. 49 N. 12.; Karollus, ZIP 1993, 490, at 496; Magnus, in Staudinger, Art. 46 N. 41 (stating that failure to remedy a defect often gives raise to doubt seller's general ability to cure and thus constitutes a fundamental breach).

[148] See Huber, in: Schlechtriem, Art. 49 N. 12; Karollus, ZIP 1993, 490, at 496 (both stating that fraudulent behavior on the part of the seller constitutes fundamental breach).

Some authors, on the other hand, believe that an offer to cure should not be considered in determining fundamental breach.[149] They are of the opinion that taking into account an offer to cure and the curability of a defect contradicts the opening words of article 48(1), according to which the seller's right to cure is "subject to article 49".[150] They conclude from that wording that the buyer's right to avoid the contract always prevails over the seller's right to cure and, thus, the question of whether the breach was fundamental for the purpose of avoidance cannot be answered in the light of an offer to cure.[151] Another argument advanced is that such an approach is incompatible with article 46(2), according to which the buyer can request substitute delivery if the lack of conformity constitutes a fundamental breach.[152] Defining fundamental breach in light of a feasible repair would practically bar the buyer from requiring substitute performance whenever the seller offers a cure.[153] The buyer's right to require substitute goods would be limited to those situations where repair is impossible.[154] Moreover, it has been argued, that consideration of a possible repair contributes to the further weakening of the concept of fundamental breach since it is not clear under what circumstances the buyer's right to cure would prevail.[155]

Those authors favoring consideration of an offer to cure in determining fundamental breach, with reference to the legislative history of article 48(1), defend their position on the ground that the opening words of that article do not clarify the exact relation-

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[149] See, *e.g.*, Will, in: Bianca/Bonell, Art. 48, at 3.2.1., 3.2.2.; Magnus, in: Staudinger, Art. 48 N. 30; Piltz, Internationales Kaufrecht § 4 N 66; Enderlein/Maskow, International Sales Law, Art. 25, at 10; Detzer/Thamm, BB 1992, 2369, 2373; Holthausen, RIW 1990, 101, at 103; Reinhart, UN-Kaufrecht, Art. 48 N. 2; Welser, in: Doralt, at 125; Enderlein, Rights and Obligations of the Seller, at 193; Babiak, 6 Temple Int'l & Comp. L.J. 113, at 127, footnote 92 (1992); Herber, Buyer's Remedies, at 123.

To protect the seller's right to cure, some authors suggest suspending the buyer's right to avoid "when a rightful offer to cure arrives" (see Will, *id.*, at 3.2.2.; Bitter/Bitter, BB 1993, 2315, at 2323; Audit, La vente internationale, at 133).

[150] See Holthausen, RIW 1990, 101, at 103.

[151] See Holthausen, RIW 1990, 101, at 103.

[152] See Will, in: Bianca/Bonell, Art. 48, at 3.2.1.; Schnyder/Straub, in: Honsell, Art. 49 N. 20.

[153] See Will, in: Bianca/Bonell, Art. 48, at 3.2.1.; Schnyder/Straub, in: Honsell, Art. 49 N. 20 (the latter arguing that determining fundamental breach in light of an offer to cure contradicts articles 48(1), 49, 72 and 73(2)).

[154] See Will, in: Bianca/Bonell, Art. 48, at 3.2.1; Schnyder/Straub, in: Honsell, Art. 49 N. 20.

[155] See Will, in: Bianca/Bonell, Art. 48, at 3.2.2., where the author argues that it is not clear what elements qualify a rightful offer and that leads to further burdening the buyer who already bears the risk of evaluating the degree of non-conformity.

ship between the seller's right to cure and the buyer's right to avoid.[156] It could not, therefore, be answered with certainty whether avoidance or cure should prevail.[157] Furthermore, they argue that the purpose of article 48(1) would be frustrated if the buyer were allowed to avoid the contract before giving the seller an opportunity to cure the defect.[158] As to the compatibility with article 46(2) they argue that the term fundamental breach must be interpreted differently, depending on whether the avoidance or the substitute delivery remedy is sought[159], or that, for policy reasons, the seller's right to cure should prevail over the buyer's right to request substitute delivery.[160]

g. Possible Cure

In an attempt to overcome some of the doctrinal concerns about the approach focusing on the existence of an offer to cure, some legal writers look at the curability of a given breach only.[161] They determine fundamental breach not in the light of an offer to cure by the seller, but by looking at whether cure is possible at all. In their view, there is no fundamental breach when the breach is curable.[162]

2. Foreseeability of Consequences of Breach

Most authors conclude from the wording and legislative history of article 25 that there is a presumption that the party in breach foresaw the far-reaching consequences

[156] See Will, in: Bianca/Bonell, Art. 48, at 1.3. (referring to the legislative history of article 48 and stating that the cross-reference to article 49 in article 48(1) is "enigmatic" and leaves the relationship to avoidance "open to interpretation"); Karollus, ZIP 1993, 490, at 495 (arguing that article 48(1) represents a compromise between those delegates at the Vienna Conference who feared that the seller's right to cure might be frustrated and those who preferred the priority of avoidance, and that the delegates wanted to leave the relationship of cure and avoidance open to interpretation)

[157] See Will, in: Bianca/Bonell, Art. 48, at 1.3.; Karollus, ZIP 1993, 490, at 495.

Honnold, Uniform Law, at § 296, goes even further. He takes the view that the legislative history of article 48(1) "leaves little room for doubt" that the right to cure prevails and that the cure provision of article 48(1) could be frustrated "by an unqualified application of article 49(1)".

[158] See Honnold, Uniform Laws, at § 296.

[159] See Karollus, in: Honsell, Art. 25 N. 11.

[160] According to Huber, in: Schlechtriem, Art. 48 N. 23, only the consideration of an offer to cure "does justice to the legal policy concerns underlying Article 48, namely that the seller should be given a 'right to cure' which is efficient and does not merely exist on the paper".

[161] See, *e.g.*, Huber, in: Schlechtriem, Art. 46 N. 42; Karollus, ZIP 1993, 490, at 493-494; Herber/Czerwenka, Internationales Kaufrecht, Art. 48 N. 9.

of the breach for the other party.[163] Consequently, they take the view that whether a breach is fundamental depends not only on its consequences but also on the foreseeability of those consequences to the other party.[164] For them, the foreseeability element hence has two functions: first, a substantive function, i.e. the breaching party's knowledge or foreseeability of the harsh consequences of the breach must be taken into account in determining whether a breach is fundamental[165]; secondly, a procedural function, since the element of foreseeability shifts the burden of proof to the party in breach when that party claims that neither he nor any reasonable person of a similar class[166] and in the same circumstances[167] could have foreseen the result.[168]

The actual foreseeability of a substantial detriment caused by the breach depends on all relevant circumstances of the case, including the negotiations and any practices, which the parties have established between themselves.[169] Where the parties, for instance, expressly or implicitly agreed that strict compliance with the contract terms is essential and any deviation from those terms is to be regarded as fundamental, the party in breach cannot invoke non-foreseeability. Under such circumstances the substantial detriment was foreseeable to a reasonable person of the same kind and in the

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[162] See Huber, in: Schlechtriem, Art. 46 N. 42; Karollus, ZIP 1993, 490, at 494.

[163] See, *e.g.*, Enderlein/Maskow, International Sales Law, Art. 25, at 4.1.; Will, in: Bianca/Bonell, Art. 25, at 2.2.2.; Schlechtriem, in: Schlechtriem, Art. 25 N. 11.

[164] See, *e.g.*, Schlechtriem, in: Schlechtriem, Art. 25 N. 11 (stating that knowledge or foreseeability of the aggrieved party's expectations are relevant for interpreting and assessing the importance of the obligation breached and its significance for the aggrieved party); Enderlein/Maskow, International Sales Law, Art. 25, at 4.1.

[165] For a somewhat different conclusion, see Babiak, 6 Temple Int'l & Comp. L.J. 113, at 118 (1992)(stating that the detriment/expectation component is what makes a breach "fundamental").

[166] It has been suggested that one should construe a "reasonable person" as a reasonable merchant encompassing all merchants that satisfy the standards of their trade and that are not intellectually or professionally sub-standard. See, Babiak, 6 Temple Int'l & Comp. L.J. 113, at 122 (1992)(stating that the phrase "of the same kind" refers to the standard merchant in the same business); Will, in: Bianca/Bonell, Art. 25, at 2.2.2.2.1 and 2.2.2.2.3. (stating that not only must it be examined how a "man with due diligence" must act in a certain sector of trade, but also the socio-economic background in which this party operates, including the language, religion and professional status).

[167] It has been argued that the requirement "in the same circumstances" refers to the market conditions, both regional and worldwide. See, Babiak, 6 Temple Int'l & Comp. L.J. 113, at 122 (1992); Will, in: Bianca/Bonell, Art. 25, at 2.2.2.2.2. (stating that this element refers to all circumstances such as legislation, political situation, climate, and also previous contracts and negotiations between the parties).

[168] For similar conclusions, see, *e.g.*, Will, in: Bianca/Bonell, Art. 25, at 2.2. et seq.; Schlechtriem, in: Schlechtriem, Art. 25 N. 11; Enderlein/Maskow, International Sales Law, Art. 25, at 4.1.; Honnold, Uniform Law, at § 183; Ziegel, Remedial Provisions, at 9-18/19.

same circumstances.[170] The same is true where the importance of the obligation breached follows from the terms of contract or from the negotiations between the parties, which preceded the formation of the contract.[171] For example, where the parties stipulated that performance should be effected at an exact time, or where the buyer had made known to the seller that he needed the goods by a certain date in order to fulfill his own obligations *vis-à-vis* third parties, the seller cannot argue in defense that he was unaware of the fact that his failure to deliver on time would result in substantial detriment to the seller.[172] Only when the particular importance of the violated duty has been neither established in the contract itself nor discussed during the contract negotiations, can foreseeability be relevant.[173]

With regard to the relevant point at which foreseeability is measured there are basically two different positions.[174] Relying on the fact that the definition of fundamental breach is focused on the injured party's expectations under the contract, some authors take the view that the time of the conclusion of the contract is relevant.[175] In their view, a contract in which the delivery time is not binding cannot be turned into a transaction where time is of the essence merely because the seller subsequently learns that the buyer needs the goods at a particular time.[176]

Furthermore, they argue that the relevant point at which foreseeability is measured must be evaluated in conjunction with article 74, which deals with monetary damages for breach of contract and limits the recovery of damages to those which were foreseeable "at the time of the conclusion of the contract".[177] They point out that it would be

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[169] See Will, in: Bianca/Bonell, Art. 25, at 2.2.2.1. (suggesting 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).

[170] For this conclusion, see Schlechtriem, in: Schlechtriem, Art. 25 N. 12.

[171] See Schlechtriem, in: Schlechtriem, Art. 25 N. 13.

[172] See Schlechtriem, in: Schlechtriem, Art. 25 N. 13.

[173] See Schlechtriem, in: Schlechtriem, Art. 25 N. 14.

[174] See Babiak, 6 Temple Int'l & Comp. L.J. 113, at 118; Michida, 27 Am. J. Comp. L. 279, at 284-285 (1979); Schlechtriem, in: Schlechtriem, Art. 25 N. 3, 15; Honnold, Uniform Law, at § 183; Will, in: Bianca/Bonell, Art. 25, at 2.2.; Ziegel, Remedial Provisions, at 9-18/19.

[175] See Schlechtriem, Uniform Sales Law, at 60; Van der Velden, Main Items, at 64; Ziegel, Remedial Provisions, at 9-20; Holthausen, RIW 1990, 101, at 105; Magnus, in: Staudinger, Art. 25 N. 19.

[176] See, *e.g.*, Schlechtriem, Uniform Sales Law, at 60.

[177] Article 74 provides:

anomalous if a buyer were allowed to avoid the contract because of the seller's breach while the grounds justifying avoidance were regarded as being too remote for the recovery of damages.[178]

This approach is opposed by those authors who want more protection to the aggrieved party. While some of them favor the time of the breach[179] or the period "before the time of the breach"[180], most of them, however, consider these interpretations as too far-reaching. They generally hold the time of the conclusion of the contract as the decisive point and want to take into account subsequent knowledge only in exceptional cases, where preparations in view of performance have not yet started so that the other party can still adapt itself to the new situation.[181]

3. UNIDROIT Principles

As mentioned above, some renowned scholars advocate making use of the UNIDROIT Principles as a means of interpreting ambiguous terms of the Convention.[182] They suggest employing them in the determination of fundamental breach of contract, arguing that both the UNIDROIT Principles and the Convention follow the

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Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of the contract.

[178] This point, in particular, has been emphasized by Ziegel, Remedial Provisions, at 9-20.

[179] See, *e.g.*, Bento Soarez/Moura Ramos, Compra e venda, at 128, footnote 83.

[180] See, *e.g.*, Feltham, J.Bus.L. 346, at 353 (1981); Gonzalez, 2 Int'l Tax & Bus. Law. 79, at 87 (1984) (stating that "a breach which becomes foreseeable after the conclusion of the contract, but before the time of delivery of the goods, may fall within the definition of fundamental breach"). A similar notion seems to be supported by Honnold, who believes that information received after formation but prior to performance can be relevant for the determining fundamental breach. See, Honnold, Uniform Laws, at § 183 (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).

[181] See Will, in: Bianca/Bonell, Art. 25, at 2.2.2.2.5.; Enderlein/Maskow, International Sales Law, at 112; Herber/Czerwenka, Internationales Kaufrecht, Art. 25 N. 9; Karollus, in: Honsell, Art. 25 N. 27; Aicher, in: Hoyer/Posch, at 133 ff.; Neumayer/Ming, Convention de Vienne sur les contrats, Art. 25 N. 8.

The Commentary on article 23 of the 1978 Draft Convention [=article 25 of the Official Text], however, seems to admit only the alternative "time of conclusion" or "time of breach". See para. 5 of the Secretariat Commentary on article 23, Official Records, at 26; Doc. History, at 416.

[182] See *supra* Part I B. 4.

same policy, namely to preserve the enforceability of the contract whenever feasible.[183] This approach would be reflected by offering the breaching party the possibility to cure[184], requiring the non-breaching party to provide an additional period of performance[185], and most importantly, by allowing the termination of the contract only when the breach or non-performance qualifies as "fundamental".[186]

The UNIDROIT Principles provide a more express guideline than does the Convention as to which the factors are relevant in determining fundamental non-performance, the counterpart of the Convention's fundamental breach.[187] In determining fundamental non-performance, the UNIDROIT Principles state that regard shall be had not only to whether the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract.[188] Other factors to be taken into account in each case are: whether strict compliance with the unfulfilled obligation is of essence under the contract[189]; whether the aggrieved party has reason to believe that it cannot rely on the other's party's future performance[190]; whether the non-performance is intentional or reckless[191]; and finally, whether the non-performing party would suffer a disproportionate loss as a result of the preparation or performance if the contract is terminated.[192]

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[183] See Garro, 69 Tul.L.Rev. 1149, at 1157 (1995)(stating that "the UNIDROIT principles may be resorted to in order to determine whether or not there has been a fundamental breach of contract"), and at 1185; Perillo, 63 Fordham L. Rev. 281, at 308-309 (1994); Bonell, Unidroit Principles, at 11 (suggests that the criteria laid down in article UNIDROIT Principles 7.3.1 may be used for a better understanding of article 25).

[184] Compare articles 37, 48 with UNIDROIT Principles, article 7.1.4.

[185] See UNIDROIT Principles, article 7.1.5 (requiring the aggrieved party to provide an additional period of time to perform upon expiration of which the aggrieved party may proceed with any of the remedial provisions available under the UNIDROIT Principles).

[186] Compare article 25 with UNIDROIT Principles, article 7.1.3; see Garro, 69 Tul.L.Rev. 1149, 1185 (1995).

[187] UNIDROIT Principles, article 7.1.1, defines non-performance as a failure to perform any obligation under the contract, and it includes defective performance or late performance. Non-performance under UNIDROIT Principles has thus the same meaning as "breach of contract" under the Convention. The difference between the two instruments is that the UNIDROIT Principles, unlike the Convention, do not refer to the remedies available to one party in case of a breach by the other, but provide a set of rules applicable to non-performance in general.

For the meaning of breach of contract under the Convention, see *infra* Part III, A.1.

[188] See UNIDROIT Principles, article 7.3.1 para. 2 (a).

[189] See UNIDROIT Principles, article 7.3.1 para. 2 (b).

[190] See UNIDROIT Principles, article 7.3.1 para. 2 (d).

[191] See UNIDROIT Principles, article 7.3.1 para. 2 (c).

[192] See UNIDROIT Principles, article 7.3.1 para. 2 (e).

With the exception of the last two enumerated factors, those applied by the UNIDROIT Principles in determining fundamental non-performance do not differ substantially from those employed by scholars and practitioners in defining fundamental breach under the Convention.[193] There is, however, another difference. Unlike under the Convention, the relationship between the seller's right to cure and the buyer's right to terminate is clear under the UNIDROIT Principles. The buyer's right to terminate is suspended provided that the seller's offer to cure is appropriate and the buyer has no "legitimate interest" in refusing an offer to cure.[194] Moreover, the seller's right to cure is not precluded by notice of termination.[195] In other words, the buyer cannot exercise his right of termination for the purpose of denying the seller an opportunity to cure. Under the UNIDROIT Principles, therefore, curability is, *de facto*, a relevant factor in determining whether or not non-performance is fundamental.

C. Case Law on Fundamental Breach

As of August 1998, there have been 49 decisions reported dealing with fundamental breach in its various settings.[196] As discussed in greater depth below, in most cases the

[193] The reason for this parallel seems to be that many of the same individuals who labored to produce the Convention and later commented on it, such as Michael Joachim Bonell and Alan Farnsworth, continued under UNIDROIT auspices to produce the UNIDROIT Principles. For a list of the members of the working group, who drafted the UNIDROIT Principles, see Bonell, 69 Tul.L.Rev. 1121, at 1126 (1995).

[194] UNIDROIT Principles, article 7.1.4, states in part:

> (1) The non-performing party may, at its own expense, cure any non-performance, provided that
>
> (a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;
>
> (b) cure is appropriate in the circumstances;
>
> (c) the aggrieved party has no legitimate interest in refusing cure, and
>
> (d) cure is effected promptly.
>
> (2) The right to cure is not precluded by notice of termination.
>
> (3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

[195] See UNIDROIT Principles, article 7.1.4, (2).

[196] The number of reported decisions dealing with fundamental breach differs between the databases set up by the Institute of International Commercial Law of Pace, University School of Law, and by the University of Freiburg. As of July 1998, 34 decisions dealing with article 25 were cited in the Freiburg database, while 49 decisions were listed in the Pace University database. Different methods of reporting seem to be the reason for that difference. As for most of these decisions, a cross-reference to the buyer's remedies in articles 46(2), 49(1)(a) and 51(2), only few to those of the seller in article 64(1)(a) can be found. Hence, fundamental breach was invoked more frequently by buyers than by sellers.

courts and tribunals do not provide a profound analysis as to the definition of fundamental breach.[197] Their reasoning, however, gives some insight as to why the courts considered a given non-performance as being fundamental or not The factors enumerated by the courts in determining fundamental breach are similar to those employed by the scholars and practitioners as mentioned above. It seems that there are two principal reasons, which account for this convergence.

First, all but three of the reported decisions dealing with fundamental breach[198] were rendered by courts in civil law jurisdictions, where the influence of legal writing on the interpretation and development of law is traditionally much greater than in most common law countries.[199] Secondly, many articles and some of the standard commentaries on the Convention were published before the Convention entered into force and thus were the only source of interpretation for the courts in the absence of any case law on the Convention.[200]

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[197] In many cases the issue of fundamental breach was not decisive, since the buyer did not observe the notice requirements under articles 38, 39, see, *e.g.*, *Landgericht* Berlin, 16 September 1992, 99 O 29/92, the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/text/49.htm; *Oberlandesgericht* München, 8 February 1995, 7 U 1720/94; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/text/143.htm; *Handelsgericht des Kantons* Zürich, 26 April 1995; HG 920670; an abstract of the decision is published in German in SZIER/RSDIE 1996, 51-52.

[198] See *Delchi Carrier, Sp.A v. Rotorex Corp.*; 1994 U.S. Dist. LEXIS 12820; 1994 WESTLAW 495787; also available in full text in the Pace University database, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/951206u1.html; an English abstract is available as CLOUT Case 85; *Delchi Carrier Sp.A v. Rotorex Corp.*, 71 F.3d 1024, at 1027 (2nd Cir. 1995); also available in full text in the Pace University database, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940909u1.html; an English abstract is available as CLOUT Case 138 (affirming the trial court's award of damages but reversing that court's rejection of specific heads of damages); *Roder Zelt- und Hallenkonstruktionen v. Rosedown Park Pty Ltd and Reginald R Eustace*, 1995 Fed. Ct. Rep. (Australia) 216-240; also available in full text at the databases of Pace University and the University of Freiburg, see http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950428a2.html;http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/ text/218.htm.

[199] See Dannemann, German Civil and Commercial Law, at 5; Schneider, 16 U.Pa.J.Int'l Bus.L. 615, at 668 (1995).

The fact that most of the reported decisions on the Convention were rendered by European (civil law jurisdiction) courts gave one author reason to warn against regionalized interpretations, see Flechtner, 15 J.L. & Com. 127, at 135 (1995).

[200] See, *e.g.*, the commentaries by Honnold, Uniform Law for International Sales under the 1980 United Nations Convention (1st ed., 1982); Schlechtriem, Uniform Sales Law (1986); Bianca/Bonell, Commentary on the International Sales Law (1987).

Scholars and practitioners, however, could not anticipate all of the problems arising out of the application of the Convention. It is necessary, therefore, to more closely examine the reported decisions on fundamental breach.

1. Nature of the Contractual Obligation

The courts have often looked at the nature of the contractual obligation in considering whether strict performance is of the essence of the contract. In the absence of express terms stipulating that any failure to perform strictly in compliance with the contractual obligations is considered a fundamental breach, the courts have tried to infer whether there was a duty of strict compliance from the language of the contract, its nature and the surrounding circumstances.

a. Quality of the Goods

In two cases, the buyers invoked fundamental breach, claiming that the quality of the goods did not meet the stipulated requirements. In the first case, the Innsbruck Court of Appeal heard a dispute between a Danish exporter and an Austrian buyer, where the buyer refused to pay the price and argued that the seller committed a fundamental breach of the contract because the flowers did not bloom throughout the entire summer. The Court denied that there was a fundamental breach on the grounds that the buyer failed to prove that the seller had guaranteed that the flowers would bloom through the entire summer.[201]

The second case involved litigation between German and Spanish parties over the delivery of a shipment of pepper, which contained approximately 150% of the maxi-

[201] *Oberlandesgericht* Innsbruck, 1 July 1994, 4 R 161/94 (affirming *Landgericht* Feldkirch, 29 March 1994, 5 Cg 176/92y – 64, holding); the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/ 107.htm; an English abstract is available as CLOUT Case 107; for an abstract in Italian: see Dir. com. int. (1996) 630-631 No. 102.

The appellate court further held that, even if the buyer had been able to establish lack of conformity of the goods, he would have lost his right to avoid the contract, since he had failed to give the seller notice within a reasonable period of time after discovery of the defect in accordance with article 39(1).

mum concentration of ethyl oxide admissible under German food and drug law. Here the buyer was more successful, as it was able to prove that it had expressly agreed with the seller that the goods must be fit for human consumption in Germany and, consequently, the Ellwangen District Court found a fundamental breach on that ground.[202]

b. Timely Delivery

In many cases where the seller has effected late delivery, the buyer, alleging that the time of the delivery was an essential term of the contract, declared the contract avoided and refused payment. To date, however, only one case has been reported where a court has decided that timely delivery was essential. In a dispute between a British seller and a German buyer over the non-delivery of iron- molybdenum ("CIF Rotterdam"), the Hamburg Court of Appeal held that in CIF contracts timely delivery is *per definitionem* an essential term of the contract.[203] In all other cases, however, the buyer failed to show that time was significant for the buyer in the sense that the contract stands and falls with timely delivery.[204]

The Oldenburg District Court, for example, denied fundamental breach in a dispute between a German buyer and an Italian seller, where the seller had dispatched summer

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The decision of the *Landgericht* Feldkirch is available at Pace University database, http://www.cisg.law.pace.edu/cisg/wais/db/cases2/940329a3.html.

[202] See *Landgericht* Ellwangen, 21 August 1995, 1 KfH O 32/95; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/ text/279.htm.

[203] See *Hanseatisches Oberlandesgericht* Hamburg, 28 February 1997, 1 U 167/95 (affirming *Landgericht* Hamburg, 2 October 1995, 419 O 85/95); the text of the decision is published in German: see database of the University of Freiburg, http:/www.jura.uni-freiburg.de/ipr1/cisg/text/261.htm.

The Hamburg Court of Appeal stated as follows: "[Translation]The untimely delivery constitutes a fundamental breach according to article 49(1)(a), 25 CISG. Untimely delivery, it is true, does not always constitute a fundamental breach. This general rule under the Convention, however, does not apply to cases where, at the time of the formation of the contract, it was obvious to the seller that the buyer had a special interest in punctual delivery... In the pertinent case such special interest of the buyer follows from the reference to the Incoterm "CIF" in the contract."

For the factual background, see *infra* note 245.

[204] Very often the buyer could not even show that the parties had established the terms of delivery. See, for example, Arbitration Court attached to the Hungarian Chamber of Commerce and Industry Arbitral award in case No. VB/94131 of 5 December 1995; original in German; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/134.htm; an English abstract is available as CLOUT Case 164; see also *Oberlandesgericht* München, 8 February 1995, 7 U 1720/94; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura. uni-freiburg.de/ipr1/cisg/urteile/text/ 143.htm; an English abstract is available as CLOUT Case 133.

clothes one day later than the stipulated time.[205] The Court concluded from the fact that the buyer took delivery of the goods instead of rejecting them that time was not of the essence of the contract.

In another case involving the sale of women's wear, where the French seller dispatched the goods two days after the stipulated time, the Ludwigsburg Petty District Court held that the inconvenience caused by the delay was only of minor importance to the German buyer and thus did not amount to fundamental breach.[206]

c. Disregard of the Seller's Distribution System

In a French case, the Grenoble Court of Appeal has held that the buyer's breach of contract by reselling to a Spanish buyer rather than to a South American or African buyer constituted fundamental breach.[207] The Court found that the parties clearly understood that resale was to be in South America or Africa and that seller's expectations under the contract were substantially impaired, because sale of its products in Spain had been seriously hampered by the parallel distribution caused when the buyer resold the goods in Spain.

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[205] See *Landgericht* Oldenburg, 27 March 1996, 12 O 2541/95; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/188.htm.

[206] See *Amtsgericht* Ludwigsburg, 21 December 1990, 4 C 549/90; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg /urteile/text/134.htm (affirmed by *Landgericht* Stuttgart, 30 August 1991, 16 S 14/91); for comments on the decision of the *Amtsgericht* Ludwigsburg, see Piltz, NJW 1994, 1101.

[207] See *Cour d'appel de Grenoble, Chambre commerciale; S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export*; 22 February 1995; original in French; the text of the decision is published in French: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/ 151.htm; an English abstract is available as CLOUT Case 154.

In this case, an U.S. export company had entered into contractual relations with a French manufacturer of "*Bonaventure*" jeans and had declared to restrict resale to South America and Africa. In fact, the U.S. company had sold the jeans to a fashion store in Madrid and subsequently not only refused to reveal their true destination but even provided the seller's lawyers with misleading information. The appellate court found for fundamental breach, justifying avoidance of this particular contract

2. Gravity of the Consequences of the Breach

In some cases, the courts have in particular looked at the gravity of the consequences of the breach in the light of: (a.) the contract's overall value and the monetary loss suffered by the aggrieved party; (b.) the fitness of the goods for the intended purpose and (c.) whether or not an award of damages would adequately protect the aggrieved party in order to determine whether a fundamental breach was committed.

a. Contract's Overall Value and the Monetary Loss Suffered by the Aggrieved Party

In none of the following cases, has a court expressly held that there was a fundamental breach due to the monetary loss suffered by the aggrieved party as a consequence of the breach. Nor have the courts denied the occurrence of such a breach on the grounds that the breach did not cause the aggrieved party any damages. The *ratio decendi* of these cases, however, leads one to believe that the courts were focusing on the monetary loss suffered by the aggrieved party in relation to the contract's overall value for the determination of fundamental breach.

For example, in *Delchi v. Rotorex*, a U.S. District Court admitted fundamental breach where 93% of the air condition compressors delivered were rejected in quality control checks because they had lower cooling capacity and consumed more energy than the sample model and specification.[208] The U.S. Court of Appeals for the Second Circuit affirmed the District court's conclusion "because the cooling power and energy

according to article 64(1)(a) on the grounds that the final destination of the merchandise was an essential condition of the contract.

[208] See *Delchi Carrier, Spa v. Rotorex Corp., supra* note 198 [emphasis added].

The defendant, a Maryland manufacturer of compressors for air conditioners, agreed to sell 10800 compressors to the plaintiff, an Italian manufacturer of air conditioners. The sales contract provided for delivery in three shipments. The defendant made the first shipment. While the second shipment was in transit, the plaintiff discovered that the compressors contained in the first shipment did not conform with the contract specifications. The plaintiff rejected the second shipment, stored it at the port of delivery and, after having tried unsuccessfully to cure the defects, sued claiming damages for breach of contract pursuant to article 74 CISG. The court held that the defendant's breach was fundamental and granted the plaintiff damages to cover.

consumption of an air conditioner compressor are important determinants of the *product's value*".[209]

In a dispute between a German seller and a Swiss buyer where fundamental breach was alleged, the Landshut District Court emphasized that the buyer would suffer considerable detriment because all of the sportswear delivered had shrunk about 10 to 15% after being washed.[210] The Court held that there was a fundamental breach since the buyer's customers would have either returned the merchandise or would not have bought any more from the buyer.[211]

The delivery of 80,000 scaffolding fittings, which did not entirely conform to the sample, was the subject of an arbitration award in a Chinese-Austrian dispute. Stating that the estimated costs of sorting out the bad fittings from the good would have amounted to more than one third of the purchase price, the tribunal found a fundamental breach on the grounds that "an important part" of 80.000 scaffold fittings did not conform to the sample.[212]

The Hamm Court of Appeal admitted fundamental breach in a German case where the German buyer refused to take delivery of more than half of the ordered bacon.[213] In this case the Italian seller had contracted with the buyer to deliver 200 tons of bacon in 10 installments. The seller delivered 4 installments, totaling 83,4 tons. Due to the

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[209] See *Delchi Carrier SpA v. Rotorex Corp.*, *supra* note 198.

[210] See *Landgericht* Landshut, 5 April 1995, 54 O 644/94; the full text of the decision is published in German: see database of the University of Freiburg, http:/www.jura.uni-freiburg.de/ipr1/cisg/text/193.htm.

[211] See *Landgericht* Landshut, http:/www.jura.uni-freiburg.de/ipr1/cisg/text/193.htm, at 4, where it states that as a result of being washed the sportswear shrunk one or two sizes. Accordingly, the customers could not wear the sportswear anymore after having washed them for the first time. As a result, the court concluded, the customers would either complain to the buyer (later a retail seller) or would not buy clothes offered by this seller anymore which would cause substantial detriment to the buyer.

[212] See Court of Arbitration of the International Chamber of Commerce, ICC Arbitration Case No. 7531 of 1994; see the editorial remarks by Kritzer, in the database by the Institute of International Commercial Law of Pace University School of Law, http://www. cisg.law.pace.edu/cisg/wais/db/cases2/947531i1.html, according to which the tribunal elaborated that the "[Buyer] has estimated the cost of sorting out bad fittings at USD 17,000,which may be compared with the invoiced price of the supplies, USD 46.397. The estimate has been communicated to [seller] and has not been disputed."

[213] See *Oberlandesgericht* Hamm, 22 September 1992, 19 U 97/91 (partially reversing *Landgericht* Bielefeld, 18 January 1991, 15 O 201/90); full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/ urteile/text/57.htm.

way the bacon was packaged and claiming that 420 kilograms out of 22,4 tons of the fourth installment were dirty, the buyer refused to take delivery of the remaining installments. The Court found that even if 420 kg of the bacon were contaminated the buyer would not have been entitled to refuse taking delivery according to article 71(1)[214], since such an amount could not be considered as a "substantial part" as required under this provision.

In two other cases, the courts have denied fundamental breach since the aggrieved parties did not suffer any loss due to the alleged breach by the other party. In a Russian case, a Russian buyer failed to pay for the delivered goods and objected to the seller's claim for the stipulated price, arguing, *inter alia*, that the seller had breached the contract by dispatching the goods before the buyer had transmitted the bank's guarantee. Emphasizing that the buyer did not suffer any damage, the Russian tribunal held that such a violation by the seller of the terms specified for dispatch of the goods (delivery in the absence of a banker's guarantee) could not be termed a fundamental breach of contract.[215]

In another case, the plaintiff, a Swedish seller of coke delivered to a company in the former Yugoslavia, sued a German buyer for the purchase price. The defendant objected that the coke was of inferior quality and that the seller had sold the coke in his own name directly to the buyer's client in Yugoslavia. The Munich Court of Appeal held that, if proven, such interference might be regarded as a violation by the seller of his "post-contractual" obligations. The Court, however, found that such a breach of

[214] Article 71 provides:

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

[215] See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry; Arbitral award in case No. 200/1994 of 25 April 1995; original in Russian; unpublished; an abstract is available as CLOUT Case 141. The tribunal further noted that under the CISG, if the violation of the contract on the part of the seller caused the buyer to suffer any damage, it would be entitled to compensation, but that in this particular case the buyer had not brought any such claim.

contract would not result in any objectively significant detriment to the buyer since he would not have lost his claim under the Convention to be paid the price.[216]

b. Frustration of the Purpose of the Contract

In two cases the buyer has invoked fundamental breach on the grounds that the goods delivered could not be used for their intended purpose since they were not merchantable. In the first case, the German Supreme Court held that, as a general rule, the merchantability of the goods (New Zealand mussels) in the importer's country is not an essential term of the contract.[217] According to the Court, in the absence of an agreement as to the merchantability of the goods, unmerchantability arising from the failure to observe special statutory provisions of the importer's country only constitutes a fundamental breach if one of the following conditions are met: (i) the same provision existed in the seller's state; (ii) the buyer had informed the seller and relied on the latter's expert knowledge; or (iii) the seller had or could have had knowledge of such provisions due to the particular circumstances of the case.[218]

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[216] See *Oberlandesgericht* München, 2 March 1994, 7 U 4419/93 (affirming *Landgericht* München I, 8 November 1993, 15 HKO 12117/93); the text of the decision is in part published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/108.htm; RIW 1994, 595-597; EuZW 1995, 31-32; an English abstract is available as CLOUT Case 83. The text of the decision of the *Landgericht* München is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ ipr1/cisg/urteile/text/96.htm.

[217] See *Bundesgerichtshof*, 8 March 1995, VIII ZR 159/94; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/ 144.htm; NJW 1995, 2099-2101; RIW 1995, 595-597; for comments on that decision, see Schlechtriem, IPRax 1996, 12-16; Piltz, EuZW 1995, 450-451; DelDuca/DelDuca, 29 UCC L.J. 99, at 145 (1996).

In that case, a Swiss exporter had delivered to his German customer New Zealand mussels, which contained approximately twice the maximum concentration of cadmium recommended for consumption by the German Federal Health Board. Affirming the lower courts' holdings, the German Supreme Court held that there were no grounds for avoiding the contract. For the lower courts' decisions, see *Oberlandesgericht* Frankfurt a.M., 20 April 1994, 13 U 51/93 (affirming *Landgericht* Darmstadt, 22 December 1992, 14 O 165/92); the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/ urteile/text/125.htm; an English abstract is available as CLOUT Case 84; for comments on that decision, see Magnus ZEuP 1995, 202 (210)(criticizing the decision on the grounds that the appellate court apparently views food only then not fit for human consumption when it actually harms the health of the consumers).

The decision of the *Landgericht* Darmstadt is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/177.htm.

[218] See *Bundesgerichtshof*, 8 March 1995, VIII ZR 159/94; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/ 144.htm.

In another case, the French Supreme Court reached what at first glance appears to be a somewhat different conclusion in a French-Italian controversy over the delivery of Italian wine not conforming to the French wine law due to the addition of sugar by the Italian seller.[219] The French Supreme Court found a fundamental breach on the ground that the wine was not merchantable in France.[220] Unlike in the New Zealand mussels case, here the unmerchantability was the result of manipulations by the seller. For that reason it seems justifiable to impose on the seller the duty to verify whether such manipulations affect the merchantability of the goods sold, thereby shifting the risk of unmerchantability to the seller, and to treat his failure to do so as fundamental breach.[221]

c. Remedy-Oriented Approach

Recently, a new approach to determine fundamental breach has been introduced by the Frankfurt Court of Appeal and the German Supreme Court. Both the Frankfurt Court of Appeal[222] and the German Supreme Court[223] focused on whether it was reasonable for the aggrieved party to make use of the goods delivered, in particular to resale them, and to claim for damages to compensate for the loss.[224]

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[219] See *Cour de Cassation*, 23 January 1996, *1re chambre civile*; published in French in IPRax 1997, 126; commented on by Schlechtriem, IPRax 1997, 132; Witz, Rec. Dall. Sir.1996, at 334 et seq.; Witz/Wolter, RIW 1998, 278, at 279 to 281.

[220] See *Cour de Cassation, id.*

[221] For a somewhat different conclusion, see Schlechtriem, IPRax 1997, 132 (stating that the French approach in treating "unmerchantability" in the buyer's country as fundamental breach differs from the German one).

[222] See *Oberlandesgericht* Frankfurt a.M., 18 January 1994, 5 U 15/93 (reversing *Landgericht* Frankfurt a.M., 9 December 1992, 3/3 O 37/92); the text of the decision is in part published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/ urteile/text/123.htm; RIW 1994, 240-241; NJW 1994, 1013-1014; a translation of the decision is published in English, see 14 J.L.& Com. 201-207 (1995);an English abstract is available as CLOUT Case 79; for comments on that decision, see, Diederichsen, 14 J.L. & Com, 177-180 (1995); Kappus, NJW 1994, 984-985; Diedrich, RIW 1995, 11-16; Koch, RIW 1995, 98-100.

[223] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/ urteile/text/ 135.htm; RIW 1996, 594-597; NJW 1996, 2364-2367; for comments on that decision, see Koch, RIW 1996, 687-688; Piltz, EuZW 1996, 448; Schlechtriem, EWiR, Art 25 CISG 1/96, 597-598; an English abstract is available as CLOUT Case 171.

[224] For a similar conception, see *Landgericht* Heidelberg, 3 July 1992, O 42/92; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/ urteile/text/38.htm.

In that case the German buyer concluded a contract for the sale of computer components with an U.S. seller. After delivery of 5 parts had been carried out, the buyer refused payment and declared the contract avoided on the grounds that the delivery of 11 parts had been agreed. The Berlin District

In the case decided by the Frankfurt Court of Appeal, the plaintiff, an Italian shoe manufacturer, had delivered shoes to the defendant, located in Germany, and issued invoices for the purchase price. The defendant paid only a portion of the price and denied any further obligation for pay the balance by asserting that the contract was avoided due to the late delivery and non-conformity of the shoes. The Court held that the defendant was not entitled to declare the contract avoided because it had not set a time limit within which the seller had to deliver and had failed to establish that a fundamental breach of contract was committed.[225] The Court noted that the evidence produced by the defendant proved neither specific defects nor the unfeasibility of further use of the goods and was therefore insufficient to determine whether or not the buyer could be reasonably expected to make use of the shoes.

In the case decided by the German Supreme Court, a Dutch company had entered into four separate sales agreements for the delivery of cobalt sulfate with the buyer, a German company. It was agreed that the goods should be of British origin and that the seller should supply certificates of origin and quality. After the receipt of the documents, the buyer discovered that the sulfate came from South Africa, that the certificate of origin was wrong, and that the quality fell short of the description in the contract. The buyer declared several times the contract avoided. Both the Hamburg District Court and the Hamburg Court of Appeal held that there were no grounds for contract avoidance.[226]

Affirming the lower courts' holdings, the German Supreme Court held that there was no fundamental breach justifying contract avoidance since the buyer could not show that the sale of the South African cobalt sulfate in Germany or abroad was not

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Court held that even if delivery of 11 parts had been agreed the dispatch of only five parts would not entitle the buyer to declare the contract in its entirety avoided according to article 51(2). The Court further held that, in determining fundamental breach, regard must be had whether it was reasonable for the buyer to make a substitute purchase and claim damages for any extra costs arising out of that substitute transaction. Since it turned out that the buyer had purchased the missing parts already before the delivery became due in order to satisfy his own client in Vienna, the Court found that no fundamental breach was committed.

[225] See *Oberlandesgericht* Frankfurt a.M., 18 January 1994, 5 U 15/93, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/123.htm; 14 J.L.& Com. 201, at 204 (1995).

[226] See *Hanseatisches Oberlandesgericht* Hamburg, 14 December 1994, 5 U 224/93 (affirming *Landgericht* Hamburg, 5 November 1993, 404 O 175/92); the full text of the decision is published in

reasonably possible.[227] The defendant therefore failed to demonstrate that it was substantially deprived of what it was entitled to expect under the contract. The Supreme Court expressly rejected the buyer's argument on appeal that the feasibility to cure a defect is the only decisive factor in determining fundamental breach and held that unfeasibility to cure does not necessarily constitute a fundamental breach.[228]

In the absence of express terms in the contract, the Supreme Court argued that in determining fundamental breach, the remedial system of the Convention and its underlying purposes, namely to preserve the enforceability of the contract and to restrain avoidance in favor of the damage or price reduction remedies, must be taken into account. The avoidance remedy, therefore, should only be allowed as a last resort in response to a breach so serious that the non-breaching party would have lost his interest in performing the contract.[229] Finally, the Court held that the delivery of wrong certificates of origin and of quality did not amount to a fundamental breach of contract since the defendant could have obtained correct documents from other sources.[230]

3. (In)ability of Performance

The Düsseldorf Court of Appeal, in a German-Swiss dispute, held that the inability to perform constitutes a fundamental breach. A Swiss buyer declared a contract with a German seller to deliver a machine designed to press keys avoided after having been informed by the manufacturer of the ordered machine, that the manufacturer had terminated the distribution agreement with the seller and would not carry out delivery of the machine in question unless payments were made directly to him. The buyer then made payments directly to the manufacturer. When the seller sued the buyer for the purchase price, the buyer objected that the seller was not able to deliver the machine and therefore he – the buyer – was entitled to declare the contract avoided. The

German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/216.htm.

[227] According to the German Supreme Court, the delivery of goods, which do not conform to the contract either because they are of lesser quality or of different origin, does not constitute non-delivery. Thus, the declaration of avoidance could not be based on article 49(1)(b) CISG since the plaintiff had effected delivery. See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223, at II.2.b).

[228] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223, at II.2.c)dd).

[229] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223, at II.2.c)dd).

Düsseldorf Court of Appeal rejected the buyer's arguments and held that mere non- or late delivery does not constitute a fundamental breach under article 25 provided that delivery is *objectively possible* and the seller was willing to deliver.[231] The Court continued that where delivery was objectively possible, but where it was obvious that the seller for idiosyncratic reasons would not be able to deliver the goods in question (*subjective impossibility*), the buyer would be entitled to avoid the contract. Since none of the requirements were pertinent the Court denied that any fundamental breach had been committed by seller.[232]

The insolvency of the buyer and the subsequent appointment of an administrator were found to have been a fundamental breach in an Australian case.[233] A German company had sold Tent hall structures to an Australian hire firm specializing in major events, such as the Australian Grand Prix and other large festivals. The buyer agreed to pay for the goods according to a set schedule but fell behind in its payments and, having encountered other financial difficulties, was placed under administration. The seller demanded that the administrator delivers up possession of the goods on the grounds that the contract of sales contained a retention of title clause, whereby title to the goods did not pass to the purchaser until the purchase price had been paid in full.[234] The administrator denied the existence of such a clause and refused to return the

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[230] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223, at II.2.d).

[231] See *Oberlandesgericht* Düsseldorf, 18 November 1993, 6 U 228/92 (partly reversing *Landgericht* Düsseldorf, 9 July 1992, 31 O 223/91); the text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/92.htm. The decision of the *Landgericht* Düsseldorf is published in German the text of the decision: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/ text/92.htm.

[232] On appeal, the German Supreme Court affirmed the decision of the appellate court insofar as it concerned the buyer's right to avoid the contract. The Court held that article 72 applies only where future performance is still due. Where the non-performance occurred after the performance had become due, the right to declare the contract avoided would be governed by article 49. Since in the case at issue the buyer declared the contract only avoided after delivery had been made and payment had become due, the Court thus held that the buyer could not invoke article 72. As for the buyer's right to declare the contract avoided under article 49 the Court held that he lost his right according to article 49(2)(b).

See Bundesgerichtshof, 15 November 1995; VIII ZR 18/94 (partly reversing Oberlandesgericht Düsseldorf, see supra note 231; the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/149.htm; for a German abstract see NJW 1995, 2101-2103; RIW 1995, 505-506.

[233] See *Roder Zelt- und Hallenkonstruktionen v. Rosedown Park Pty Ltd and Reginald R Eustace*; 1995 Fed. Ct. Rep. (Australia) 216-240; the full text of the decision is published in English: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/218.htm.

[234] See database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/ text/ 92.htm, at para. 58.

goods. The Court held that the fact that the company was insolvent or was likely to become so and the placement of the company under administration resulted in such a detriment to the seller so as to substantially to deprive it of what it was entitled to expect under the contract. The denial by the administrator of a retention of title term in the contract also amounted to fundamental breach within the meaning of article 25.[235]

4. (Un)willingness of Performance

A party's unwillingness to perform was the subject of an Italian-German dispute over the delivery of textiles, some of which were of a different color from that specified in the contract. After being informed by the Italian seller that he could not at that time deliver the remaining textiles of the ordered color, the German buyer declared the contract avoided. The Düsseldorf Court of Appeal held that a fundamental breach occurs if the seller declares seriously and definitely that he will not deliver substitute goods, but does not occur if he only declares that he cannot deliver at the moment.[236]

5. No-Reliance on the Other's Party Future Performance

Where a party has legitimately lost his faith and confidence in the other party's future performance and cannot be reasonably expected to continue the contractual relationship, courts have frequently found for fundamental breach. The reasons for the courts' findings can be best classified under the following headings:

a. Violation of Exclusive Rights By the Seller or the Buyer

The buyer's exclusive right to market and sell shoes under a certain brand name through an Italian manufacturer was the subject of a decision by the Frankfurt Court of

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[235] *Id.*

[236] See *Oberlandesgericht* Düsseldorf, 10 February 1994, 6 U 119/93 (affirming *Landgericht* Düsseldorf, 22 March 1993, 37 O 169/92; not published); the full text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/187.htm; an English abstract is available as CLOUT Case 82; commented on by Magnus, Jus 1995, 870 (criticizing the decision on the grounds that the appellate court did not apply article 51(2)).

Appeal.[237] The seller contracted to manufacture shoes with a trademark ("Marlboro") to be used as a basis for further orders. The manufacturer produced the shoes and subsequently displayed them with the trademark at a fair without the buyer's prior consent. Despite the buyer's urgent requests, the seller refused to remove the shoes from the exhibit. The buyer then advised the manufacturer one day after the fair that the buyer was severing the relationship and would not pay for the sample shoes, which were no longer of any value to the buyer. The Court found for fundamental breach on the grounds that the seller exhibited the shoes without the buyer's consent and under circumstances indicating that they could also be ordered directly from the manufacturer. It held that, in particular, the seller's refusal to remove the shoes at the buyer's request gave rise to the conclusion that the seller would breach the agreement again in the future. Therefore, the buyer could not reasonably be expected to further cooperate with the manufacturer.

In three cases fundamental breach was invoked by the buyer due to an alleged violation on the part of the seller of an exclusive distribution system. The first case was decided by the Frankfurt District Court in another German-Italian shoe case, where a German retailer, had ordered from an Italian manufacturer through a commercial agent 120 pairs of shoes "Exclusiva su B".[238] After delivery was effected and 20 pairs were resold, the buyer learned that identical shoes supplied by the Italian manufacturer were offered for sale by a competing retailer at a considerably lower price, in violation of his exclusive right of distribution in his home district. The buyer then returned the unsold 100 pairs. The Frankfurt District Court did not have to decide the issue whether there was a fundamental breach since it held that there was no express declaration of avoidance of the contract. Nevertheless, the District Court noted in *obiter dictum* that even

[237] See *Oberlandesgericht* Frankfurt a.M., 17 September 1991, 5 U 164/90; the text of the decision is in part published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/ text/28.htm; a translation of the decision is published in English: 12 J.L.& Com. 261-270 (1993); an English abstract is available as CLOUT Case 2; for comments on that decision, see Babiak, 6 Temple Int'l & Comp. L.J. 113, at 126 (1992); Behr, 12 J.L. & Com. 271 (1993); Karollus, Cornell CISG Review 51, at 63 (1995).

[238] See *Landgericht* Frankfurt a.M., 16 September 1991, 3/11 O 3/91; the text of the decision is in part published in German: see database of the University of Freiburg, http:/www.jura.uni-freiburg.de /iprl/cisg/text/26.htm; RIW 1

991, 952-954; reproduced in German with a brief summary in English and French: see Uniform L.Rev 1991, I, 376; an English abstract is available as CLOUT Case 6.

if the buyer was substantially deprived of what he was entitled to expect under the contract, the seller could not have foreseen such result.[239]

An alleged violation of an exclusive distribution agreement was also the subject of a recent decision rendered by the Koblenz Court of Appeal in a German-Dutch dispute over the delivery of acrylic blankets where the buyer refused any payment, *inter alia*, on the grounds that the seller had breached an exclusive distribution agreement.[240] The Court held that the buyer lost his right to declare the contract avoided under Art. 49(2)(b)(i)[241] and that in fact, the buyer had never declared the contract avoided for the alleged violation. Nevertheless, the Court stated in *obiter* that, if proven, such a violation could constitute a fundamental breach.[242]

In the above mentioned *"Bonaventure"* jeans case where the U.S. buyer disregarded the seller's exclusive distribution system, the Grenoble Court of Appeal held with reference to article 73(2)[243] that the buyer's fundamental breach of the particular contract in question gave the seller good grounds to conclude that the buyer would also fundamentally breach the contract in respect of further deliveries.[244]

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[239] This reasoning has been criticized by Karollus, Cornell CISG Review 51, at 63 (1995) (remarking that a seller who promises exclusive delivery must organize his distribution in such a way that he can meet his contractual obligations).

[240] See *Oberlandesgericht* Koblenz, 31 January 1997, 2 U 31/96 (affirming *Landgericht* Koblenz, 29 November 1995, 3 HO 188/94); the buyer's appeal from the appellate court's decision to the *Bundesgerichtshof* (BGH, VIII ZR 64/97) is pending. The full text of the appellate court's decision is published in German: see database of the University of Freiburg, http:/www.jura.uni-freiburg.de/ipr1/cisg/text/ 256.htm.

[241] Article 49(2)(b)(i) provides:

> (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
>
> (a) ...
>
> (b) in respect of any breach other than late delivery, within a reasonable time:
>
> (i) after he knew or ought to have known of the breach;
>
> (ii) ...

[242] See *Oberlandesgericht* Koblenz, http:/www.jura.uni-freiburg.de/ipr1/cisg/text/256.htm.

[243] Article 73(2) provides:

> If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

[244] See *Cour d'appel de Grenoble, Chambre commerciale, S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export*, 22 February 1995, *supra* note 207.

b. Uncertainty as to the Seller's Future Performance

In two reported cases, uncertainty as to the seller's future performance seems to have been the decisive factor in determining fundamental breach. The Hamburg Court of Appeal, in the above mentioned Chinese iron-molybdenum case, found a fundamental breach was indeed committed, where the seller, after not having been able to deliver the goods within the stipulated time, asked for more time due to ongoing negotiations with his supplier either for delivery of the goods or indemnification. Such a declaration, the Court held, constituted a fundamental breach since it remained uncertain for the buyer whether at all, and if so, when the seller would fulfil his obligation to deliver the goods.[245]

In the second case, a Swiss buyer had placed an order with an Italian seller with a request that the goods be delivered within the next 10 to 15 days. Almost two months later, the seller, after asking the buyer to confirm its order, specified the purchase price and assured the buyer that all the goods would be dispatched within a week. Two months after that, the buyer had not yet received the goods. The buyer then sent the seller a notice canceling the order and demanding a refund of the price. After receiving this notice the seller delivered part of the goods. The buyer refused to accept the late and short delivery and, as the seller did not refund the purchase price, commenced le-

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[245] See *Hanseatisches Oberlandesgericht* Hamburg, 28 February 1997, 1 U 167/95, *supra* note 203.

In this case the German buyer contracted with the British seller to deliver iron-molybdenum (65 % molybdenum) from China for a price of 9,70 US $/kg, CIF Rotterdam, time of delivery: October 1994 "from Chinaport to Rotterdam". The seller later informed the buyer that his supplier, due to a raise of the market price for molybdenum, demanded 10,50 US $/kg. The buyer denied any adjustment of the contract price. The seller then offered the buyer iron-molybdenum with a lower percentage of molybdenum (60%) for 10,20 US $/kg to be shipped in November/early December 1994 from China to Rotterdam. The buyer accepted the lower percentage but insisted on the agreed price and shipment of the goods no later than November 30, 1994, otherwise he would make a substitute purchase and claim damages for all loss suffered thereby. Following an inquiry by the buyer on November 15, the seller ensured that he would make all efforts to fulfil the contract in November. On December 2, the seller informed the buyer of the shipment of the molybdenum form Tianjin to Rotterdam. On December 13, however, he admitted that his Chinese supplier would not have delivered the molybdenum and asked for more time to fulfil the contract. The buyer replied on the same day that he needed the molybdenum and stressed again that he would make a substitute purchase and claim the difference between the current market price of 31, - US $/kg and the agreed price as damages. The buyer, however, indicated that he would accept an indemnity. In his response on December 14, the seller again asked for more time due to ongoing negotiations with his supplier either for delivery of the goods or indemnification. He also offered the buyer payment of US $ 10.088, - as indemnity. The buyer turned down

gal action, claiming avoidance of the contract for breach by the seller and asked for a refund of the purchase price with interest and damages. The Italian court found that there was a fundamental breach on the grounds that, two months after ordering and paying the price, the buyer was still waiting for two thirds of the goods.[246]

c. Failure to Provide Security for the Purchase Price

In one of the many German-Italian disputes regarding the delivery of shoes, the Italian manufacturer demanded security for the sales price because the German buyer had still not paid the manufacturer for a previous delivery. After the buyer failed to furnish security, the seller declared the contract avoided and resold the shoes to other retailers. The seller demanded compensation for various damages caused by the breach. The Düsseldorf Court of Appeal held that the Italian seller was entitled to avoid the contract in virtue of article 72[247], due to the German buyer's failure to furnish security for the sales price.[248]

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that offer, made a substitute purchase, and sued the seller for the difference between the contract price and the price in the substitute transaction.

[246] See *Pretura circondariale di Parma, sez.di Fidenza*; 77/89; 24 November 1989; *Foliopack Ag v. Daniplast S.p.A.*; original in Italian; the text of the decision is published in Italian; see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/316.htm; an English abstract is available as CLOUT Case 90.

See, on the other hand, the case No. 7585 of 1992 decided by the Court of Arbitration of the International Chamber of Commerce, where a Finnish buyer of machinery for a production line of foamed boards failed to make the third payment to his Italian seller. Although the tribunal stated that it was absolutely clear that the defendant did not have the financial resources, it did not find for fundamental breach and, thus, the seller's right of avoidance on article 64(1)(a) but on article 64(1)(b) thereby regarding the three-and-a-half months' waiting time as an "additional period of time" pursuant to article 63(1). A French abstract is available in: Bulletin de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale (November 1995) 59; J.D.I. (1995), No.4, 1015 et seq. [cited as a 1994 award]. See also the editorial remarks by Kritzer, Pace University database, http://www.cisg.law.edu/cisg/wais/db/cases2/947858i1.html, where the author states that "[w]ithout reference to Articles 63(1) and 64(1)(b), another provision of the CISG that could have been relevant to the results reached is Article 64(1)(a) on the theory that delay of over three months in providing the required letter of credit is a 'fundamental breach' of contract."

[247] Article 72 provides:

> (1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
>
> (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
>
> (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

[248] See *Oberlandesgericht* Düsseldorf, 14 January 1994, 17 U 146/93 (affirming *Landgericht* Krefeld, 28 April 1993, 11 O 210/92); the text of the decision is published in German; see database of

Similarly, and again in a German-Italian shoe dispute, the Berlin District Court found the Italian seller to be entitled to avoid the contract.[249] Here the Italian seller had already manufactured the 212 pairs of shoes ordered by a German buyer. Shortly before handing them over to the carrier, however, the seller noticed that two out of three checks concerning an earlier sale had not been honored and payment had been made only after the courts rendered respectively judgements of consent and by default. The seller requested security for the payment, but the buyer refused to provide any. Highlighting the buyer's previous experience with the seller's unwillingness to pay, the Court held that, prior to the date fixed for the delivery of the shoes, it was "clear"[250] that the buyer would not pay the price. The court defined "clear" in the sense of article 72 in terms of probability. "Clear" requires that a fact be obvious to anyone. Probability close to certainty, however, is not required.[251]

d. Making Delivery Dependent on an Unjustified Condition

A dispute between a German buyer and a Hong Kong seller was the subject of a decision by the Hamburg Chamber of Commerce Arbitration Tribunal.[252] The Hong Kong claimant and the German defendant had concluded a general agreement for the exclusive delivery and distribution of Chinese goods, under which the claimant was responsible for the business relations with Chinese manufacturers while the defendant was responsible for the distribution of the goods in Europe. On this basis, the parties regularly concluded successive contracts of sale. In 1993 the German buyer ordered goods from the Hong Kong seller. Following prepayment and confirmation by the Hong Kong seller, the latter, owing to financial difficulties of his Chinese supplier, made delivery dependent on the payment of unpaid invoices from previous sales con-

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the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/119.htm; an English abstract is available as CLOUT Case 130. The decision of the *Landgericht* Krefeld is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/101.htm.

[249] See Landgericht Berlin, 30 September 1992, 99 O 123/92; the text of the decision is published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/ urteile/text/70.htm.

[250] "Clear" in the –unofficial – German version of article 72 reads "offensichtlich" (obvious).

[251] See *Landgericht* Berlin, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/70.htm.

[252] See *Schiedsgericht der Handelskammer* Hamburg; 21 March 1996 (award on substantive issues); the text of the decision is published in German: see database of the University of Freiburg,

tracts. The tribunal found that both parties had committed a fundamental breach. It held that making delivery dependent on payment of arrears from previous sales contracts, where the parties had agreed upon prepayment of a specific order and the total sum for that had been paid, entitled the German company to avoid that order. On the other hand, the tribunal also held that the Hong Kong seller was entitled to avoid the general agreement due to the unpaid invoices, which had been due for many months.

6. Offer to Cure/Possible Cure

Whether or not a breach is curable without causing the buyer unreasonable inconvenience appears to be the decisive factor in a number of decisions rendered by German, French and Swiss courts.

The Koblenz Court of Appeal, in the above mentioned dispute over the delivery of acrylic blankets, expressly held that there is no fundamental breach if there is a serious offer to cure the defect.[253] In that case, the buyer refused payment of the purchase price not only on the grounds that the seller had broken an exclusive distribution agreement, but also because the goods delivered were defective and 5 acrylic blankets' rolls were missing. Attempts to settle the dispute in the presence of the Spanish manufacturer of the goods who had offered to make a substitute delivery against payment of the purchase price were unsuccessful. The Koblenz District Court[254] found for the seller and the appellate court affirmed that decision.[255]

With regard to the alleged non-conformity of the goods, the Court held that, even if proven, such a breach of contract would not be fundamental, since the seller's supplier had offered substituted delivery. The appellate court stated that, according to article 49(1)(a), the buyer's right to avoid the contract generally prevailed over the seller's

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http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/187.htm; an English abstract is available as CLOUT Case 166.

[253] See Oberlandesgericht Koblenz, 31 January 1997, 2 U 31/96, *supra* note 240.

[254] See *Landgericht* Koblenz, 29 November 1995, 3 HO 188/94 (not published).

[255] See *Oberlandesgericht* Koblenz, 31 January 1997, 2 U 31/96, *supra* note 240.

Article 39(1) provides:

> The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

right to cure under article 48(1).[256] However, referring to its underlying purposes, the court held that Article 49(1)(a) only prevails if the delivery of non-conforming goods amounted to a fundamental breach. In determining fundamental breach, on the other hand, the court stated that regard must be had not only to the gravity of the breach, but also to the willingness of the seller to cure the defect. Where the seller is willing to make substitute delivery and such delivery would not cause the buyer unreasonable inconvenience even non-conformity of major significance does not constitute a fundamental breach.[257]

The existence of a fundamental breach was denied by the Grenoble Court of Appeal in a Franco-Portuguese dispute as to whether the Portuguese buyer was entitled to refuse partial payment of the purchase price.[258] A French company had sold a second hand metallic hangar to a Portuguese buyer, the purchase price including the costs of dismantling and delivery. Following the buyer's refusal to pay the last installment of the price on the grounds that the dismantled metal elements were defective, the Court found that a certain quantity of the goods were not fit to be exactly reassembled, a fact expressly made known to the seller. Since that defect related to only part of the hangar and concerned metal elements, which could be repaired, the Court held, however, that it did not constitute a fundamental breach justifying avoidance of the contract pursuant to article 49(1)(a).[259]

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[256] See *Oberlandesgericht* Koblenz, 31 January 1997, 2 U 31/96, *supra* note 240.
Article 48(1) provides:

> Subject to article 49, the seller may, even after the date for delivery, remedy on his own expense any failure to perform his obligations, if he can do so without unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

[257] See *Oberlandesgericht* Koblenz, 31 January 1997, 2 U 31/96, *supra* note 240.

[258] See *Cour d'appel de Grenoble*, 26 April 1995, *Marques Roque, Joaquim v. S.A.R.L. Holding Manin Riviegravere*; original in French; the full text of the decision is published in French: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/iprl/cisg/urteile/text/154.htm; an English abstract is available as CLOUT Case 152.
The Court held that the disputed contract covered the sale of a used hangar together with its dismantling and that it was apparent from the invoices submitted that the supply of services did not constitute the significant part [of the contractual obligations]. The Court concluded that the contract therefore fell within the scope of application of CISG in accordance with article 3(2).

[259] See *Cour d'appel de Grenoble*, 26 April 1995, *Marques Roque, Joaquim v. S.A.R.L. Holding Manin Riviegravere*, *supra* note 258.

The possibility of repair was also taken into account by the Munich Court of Appeal in the above mentioned case of Polish coke sold from Sweden to Germany to be shipped to Yugoslavia and found to be of inferior quality.[260] The Court denied fundamental breach on the ground that the deviation from the description was objectively of minor significance and could be compensated for by adapting the firing process.

The Commercial Court of Zürich did not need to decide whether or not a fundamental occurred, since the buyer failed to notify the seller about the lack of conformity of the goods within a reasonable time.[261] The Swiss plaintiff had sold a "floating centre", a container filled with salt water for weightless floating, to the German defendant. The buyer alleged that the container leaked, declared the contract avoided and refused to pay the outstanding balance. The seller then sued to recover the outstanding balance and the Court ruled in favor of the plaintiff. After stating that the buyer had lost its right to declare the contract avoided under article 39, the Court held in *obiter dictum* that there in any event would not have been a fundamental breach because the non-conformity could have been easily cured.[262]

How the seller tried to cure the defect or where the repair was not successful gave the courts cause to find for fundamental breach in two cases. In the first case, the plaintiff, an Italian tile manufacturer, had supplied the defendant, a German company, with basic tiles and corresponding decorative tiles. After it was discovered that the basic tiles were defective, the manufacturer made a second delivery of an even larger number than had been ordered, to ensure that there would be enough tiles of one of the two kinds available for the buyer to tile the locality in question. When the seller demanded payment, the buyer declared the contract avoided. The Baden-Baden District Court held that the buyer cannot reasonably be expected to open all the packages, to sort out the tiles, to examine them and see whether a sufficient number of one kind were supplied, and then to repackage them.[263] It further held that the buyer had the

[260] See *Oberlandesgericht* München, 2 March 1994, 7 U 4419/93, *supra* note 216.

[261] See *Handelsgericht des Kantons* Zürich, 26 April 1995, HG 920670; a German abstract of the decision is published in German in SZIER/RSDIE 1996, 51-52; an English abstract is available as CLOUT Case 191.

[262] See *Handelsgericht des Kantons* Zürich, 26 April 1995, HG 920670, SZIER/RSDIE 1996, 52.

[263] See *Landgericht* Baden-Baden, 14 August 1991, 4 O 113/90; the text of the decision is in part published in German: see database of the University of Freiburg, http://www.jura.uni-freiburg.de/ipr1

right to avoid the contract in its entirety because the decorative tiles were of no interest for him without the basic tiles.[264]

In the second case, the Oldenburg Court of Appeal viewed the unsuccessful attempt of an Austrian seller to repair furniture, which did not conform to the contract, as a fundamental breach, and thus held that the German buyer was entitled to avoid the contract.[265]

D. Conclusion (Part II)

The principle objective of this Part has been to identify the various factors employed by scholars and the courts in determining when a breach of contract is fundamental. We have seen that both employ, with some minor variations, the following criteria in determining fundamental breach:

- the nature of the contractual obligation violated, namely whether the non-performed obligation was an essential term of the contract;
- in case of the delivery of non-conforming goods, the gravity of the consequences of the breach in the light of
  - the contract's overall value and the monetary loss suffered by the aggrieved party;
  - the fitness of the goods for their intended purpose; and
  - whether it is reasonable for the aggrieved party to retain the defective goods, make use of them and then claim damages for any loss suffered as a result of the breach ("remedy-oriented"-approach);

/cisg/urteile/text/24.htm; RIW 1992, 62; a summary published in Italian is available in: Dir. com. int., July-September 1993, 651; for an English translation, see 12 J.L. & Com. 277-281 (1993); an English abstract is available as CLOUT Case 50; for comments on that decision, see Karollus, Cornell CISG Review 51, at 63 (1995)(agreeing with the court's finding).

[264] See *Landgericht* Baden-Baden, *id.*

[265] See *Oberlandesgericht* Oldenburg, 1 February 1995, 11 U 64/94; original in German; unpublished; an English abstract is available as CLOUT Case 165.

The Austrian seller, a furniture manufacturer, agreed to manufacture a leather seating arrangement for the German buyer. The buyer sold the furniture to one of its clients, who discovered that the furniture did not conform with the contract. The buyer required the plaintiff to remedy the lack of conformity by repair. Even after the furniture had been repaired, the buyer still found that the furniture did not conform with the contract and declared the contract avoided. The seller demanded payment. The Court held that the seller did not have a payment claim against the buyer since the repaired furniture did not conform with the contract and this amounted to a fundamental breach of the contract giving the buyer the right to declare the contract avoided.

- the existence of an offer to cure, when the requirements of article 48(1) are met;
- the possibility of cure;
- the parties' (in)ability to perform;
- the parties' (un)willingness to perform; and
- whether a breach or conduct of one party gives the other party reason to believe that it cannot rely on the other party's future performance.[266]

With regard to these different factors, the following points should be noted:

(1) While the factors (2) to (4) basically concern situations where non-conforming goods were delivered, factors (5) and (6) respectively apply to non-delivery and non-payment or failure to take delivery situations. The scope of factor (1) and (7) is wider and applies to all forms of breach. The latter even covers situations where no breach has occurred at all but is to be expected.

(2) As for the *remedy-oriented* approach, at first glance it appears as if the courts are more concerned with whether the goods are reasonably (re)salable, while scholars also take into account other forms of making use of the goods, such as processing, and

[266] The concept of fundamental breach as set out by scholars and courts also corresponds closely to the position in English law. In particular, it seems that there is a direct correspondence to the four following cases: (1) where the term broken was a condition (*e.g., Bunge Corp. v. Tradax S.A.* [1981] 1 W.L.R. 711.); (2) where the breach deprived the aggrieved party of the substance of what he was contracting for (*e.g., Hong Kong Fir Shipping Co.Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q. B. 26; [1962] All E.R. 474); (3) where the breach evidences an intention not to perform the remainder of the contract (*e.g., Sale of Goods Act* 1979, U.K. 1979, c.54, s. 31(2)) and (4) that even an unintentional breach may give rise to an anticipatory repudiation of the rest of the contract (cf. *Universal Cargo Carriers Corp. v. Citati* [1957] 2 Q.B. 401, at 438).

Moreover, the criteria employed to determine fundamental breach under the Convention do not differ significantly from the American approach according to which a failure to render or offer performance must be *material*. The Restatement (Second) of Contracts (1979) § 241 provides:

> In determining whether a failure to render or offer performance is material, the following circumstances are significant:
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account all of the circumstances including any reasonable any reasonable assurances; [and]
> (e) the extent to which the behavior of the other party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

the buyer's risk of getting involved in a dispute as to whether he observed his duty to mitigate. Since scholars, however, deny a fundamental breach when the goods, even if they cannot be used for processing, are reasonably resalable, it seems that there is, in fact, no material difference from the jurisprudence.

(3) With regard to the approaches, which look at the existence of an *offer to cure* or a *possible cure*, it should be noted that only in one of the reported cases, in which the courts denied the occurrence of a fundamental breach, was an offer to cure made. In all other cases, the courts denied fundamental breach on the grounds that the breach was curable without stating whether an offer to this effect was made and the reported facts did not reveal such an offer. On the other hand, never found the courts for fundamental breach on the grounds that the non-conformity could not be cured. The courts apparently hold the view that while the possibility to cure usually means that the non-conformity does not constitute fundamental breach, the contrary situation, namely that the non-conformity cannot be cured, does not in itself indicates a fundamental breach.

(4) Never was express reference made to the UNIDROIT Principles in any of the reported cases. Nor did the courts discuss whether the fact that the breaching party would suffer disproportionate loss as a result of the avoidance, or that the breach was intentional or reckless, is relevant in determining fundamental breach.

(5) In no case did the breaching party successfully invoke unforeseeability of the consequences of the breach and, consequently, the courts did not need to decide the relevant point in time at which foreseeability is measured.[267] In other words, whenever the courts concluded that the injured party was substantially deprived of what he was entitled to expect under the contract and the notice requirements according to articles 38 and 39 were met, they found that a fundamental breach had been committed.

This is hardly surprising since unforeseeability can be successfully invoked only when the aggrieved party's special interest in the performance of the violated duty

does not follow from the terms of the contract or from the negotiations between the parties prior to the conclusion. In most of the reported cases in which the courts found for fundamental breach, however, the aggrieved party's special interest was obvious from the terms of the contract, or the aggrieved party was able to prove that it had made clear its special interest during the contract negotiations.[268]

[267] In the "esclusiva su B" case, the Frankfurt District Court noted only *obiter* that the seller could not have foreseen such result. See *Landgericht* Frankfurt, 16.09.1991, 3/11 O 3/91, *supra* note 238.

[268] See, *e.g.*, the Chinese iron-molybdenum case, where the Hamburg Court of Appeal stated as follows: "[Translation] The untimely delivery constitutes a fundamental breach according to article 49(1)(a), 25 CISG. Untimely delivery, it is true, does not always constitute a fundamental breach. This general rule under the Convention, however, does not apply to cases where, at the time of the contract formation, it was obvious to the seller, that the buyer had a special interest in punctual delivery. In the pertinent case *such special interest of the buyer follows from the reference to the Incoterm 'CIF' in the contract.*" See *Hanseatisches Oberlandesgericht* Hamburg, 28 February 1997, 1 U 167/95, *supra* note 203 **[emphasis added]**.

Part III – The Meaning of the Concept of Fundamental Breach in Light of the Text of Article 25, the Convention's Legislative History, Context within the Convention, Underlying Purposes and the Observance of Good Faith

The success of any uniform law depends on its uniform application and, consequently, article 7(1) calls for consideration of interpretations by judges, arbitrators, and scholars in all contracting states. Uniform application, however, is not an end in itself. Consideration of foreign decisions or scholarly writing is only permissible to the extent the foreign courts or scholars arrived at their conclusions by following the Convention's interpretation guidelines outlined above.[269] The principal objective of Part III is therefore to examine whether the various factors employed by scholars and the courts in determining fundamental breach can be justified by means of the Convention's interpretive techniques. Moreover, we will address the question of whether the criteria of the UNIDROIT Principles regarding the determination of fundamental nonperformance can be involved to determine fundamental breach, insofar as they deviate from the approaches employed under the Convention.

A. Elements Constituting "Fundamental Breach"

The first and foremost guide to interpretation is the ordinary meaning of the words used in the Convention. Therefore, this section examines the definition of fundamental breach under article 25. First, we will determine the term "breach of contract" (1.). Secondly, we will look at the elements, which transform a "simple breach of contract" into a fundamental breach, namely: some detriment suffered by one of the parties (2.); substantial deprivation (3.); and foreseeability (4.).

[269] For somewhat similar conclusions, see, Amato, 13 J.L. & Com. 1, 27 (1993)(stating that promoting uniformity does not mean "a slavish deference"); Bonell, in: Uniform Commercial Law in the Twenty First Century, at 35 (emphasizing that foreign decisions should be given certain persuasive value, "in the sense that the preference accorded to one argument rather than to another, as well as the decision to adopt a new solution, ought to be adequately justified"); similar, in substance, see Yuqing, in: Uniform Commercial Law in the Twenty First Century, at 45-46; Boggiano, Uniform Law, at 47

1. Breach of a Contractual Obligation

Breach of a contractual obligation, as a precondition to a finding of fundamental breach of contract, is not defined in article 25 for the purpose of the Convention. However, one can conclude from the Convention's remedial regime[270] and article 79(1)[271] that "breach of contract" includes all forms of defective performance, as well as a complete failure to perform. It also includes both excusable and inexcusable non-performance. The contractual obligation may either be expressly included in the Convention (*e.g.* delivery at the right time[272], at the right place[273] and of the correct goods[274] etc.) or created and defined by the parties as a *sui generis* obligation.[275] Where the transaction cannot be considered as a "contract of sale", the domestic law, invoked under conflicts of law rules, governs the legal consequences of the breach, unless the parties have agreed that the transaction is subject to the Convention's rules.[276] Finally, there is no breach of contract if the promisor is entitled to refuse to perform.[277]

(emphasizing that "court should take into account all available foreign precedents and academic writings in a comparative and *critical* manner"); Sevon, Method of Unification, at 18.

[270] Article 45, which enumerates the remedies available to the buyer, provides in part:

> (1) If the seller fails to perform *any of his obligations under the contract or this Convention*, the buyer may:
>
> (a) exercise the rights provided in articles 46 to 52;
>
> (b) claim damages as provided in articles 74 to 77.

Article 61, which enumerates the remedies available to the seller, provides in part:

> (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.

[emphasis added]

[271] Article 79(1) provides:

> A party is not liable for a failure to perform *any of his obligations* if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. [emphasis added]

[272] See article 33 (time of delivery).

[273] See article 31 (place of delivery).

[274] See article 35 (conformity of the goods).

[275] See Schlechtriem, in: Schlechtriem, Art. 25 N. 8.

[276] There is no definition of "contract of sale" in the Convention. However, it is possible to reconstruct a definition from the articles defining the obligations of the parties. Article 30 requires the seller "[t]o deliver the goods, hand over any documents relating to them and transfer the property in the goods"; while article 53 requires the buyer "[t]o pay the price for the goods and to take delivery of them". For this conclusion, see Winship, Scope of the Convention, at 1-22.

[277] See Schlechtriem, in: Schlechtriem, Art. 25 N. 8 (stating that if the seller suspends performance under article 71 because of the buyer's economic circumstances have deteriorated, the buyer is not entitled to avoid the contract for fundamental breach of contract).

2. Detriment

The Convention neither contains a definition of the term "detriment", nor does it give any examples of a detriment amounting to a fundamental breach.[278] It is thus unclear whether the detriment requires actual injury, damage or loss, and whether it refers only to material losses or to intangible losses as well, such as moral and economic damages. It is also unclear whether a legal detriment, as distinguished from a detriment in fact, is required.[279] Neither the French, Spanish nor Russian versions of detriment[280], nor the Secretariat Commentary on the 1978 Draft Convention, provides any greater assistance in this respect. The latter states that:

> The 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 injured party [281]

Confronted with such vagueness one is tempted to resort to the domestic interpretation of detriment. However, that would not shed any greater light on the matter, putting aside the fact that any uncritical reference would contradict the Convention's need for an autonomous and uniform interpretation.[282] Detriment is unfamiliar as a technical term anywhere in the common law world.[283] The same is not true with regard to the French, Spanish or Russian version. *Préjudice, perjuicio, bpeg* – each in its domestic setting - represents a common legal terminology indicating injury, damage and loss[284], but these terms are as obscure as detriment and thus of no help in deter-

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[278] This point has been stressed by Babiak, 6 Temple Int'l & Comp. L.J. 113, at 119 (1992).

[279] Van der Velden, Law of International Sales, at 64-65, suggests the employment of the detriment definition given by the *Corpus Iuris Secundum*, according to which "the detriment need not be real and involve actual loss, nor does it necessarily refer to material disadvantage to the party suffering it, but means a legal detriment as distinguished from a detriment in fact. It has also been defined as giving up something which one had the right to keep, or doing something which one had the right to do" (as quoted by van der Velden, *id.*). Will, in: Bianca/Bonell, Art. 25, at 2.1.1, has opposed this suggestion "because of the difference in context (*i.e.*, the doctrine of consideration)" and "the need for autonomous and uniform interpretation".

[280] The French version uses the word "*préjudice*", the Spanish "*perjuicio*" and the Russian "*bpeg*". For the text of the different language versions, see *supra* note 1 and *infra* 294.

[281] See para. 2 of the Secretariat Commentary on article 23 of the 1978 Draft Convention [= article 25 of the Official Text], Official Records, at 26; Doc. History 416.

[282] Will, in: Bianca/Bonell, Art. 25, at 2.1.1.

[283] Will, in: Bianca/Bonell, Art. 25, at 2.1.1.; Van der Velden, Law of International Sales, at 64.

[284] See Will, in: Bianca/Bonell, Art. 25, at 2.1.1.

mining the detriment element.[285] It thus seems to be the most persuasive approach to view the detriment element as a mere filter for those cases in which breach of a fundamental obligation occurred but caused no injury. Where the seller, for example, failed in his duty to package or insure the goods but they arrived safely nevertheless, there is no detriment. If on the other hand, the buyer lost a customer or an opportunity to resell the goods, there would be a detriment.[286]

3. Substantial Deprivation

A breach must cause a detriment that "substantially deprives" the aggrieved party of what he is "entitled to expect under the contract" in order for it to be fundamental. The reference to the expectation *under the contract* makes clear that the yardstick for breach of contract is first and foremost to be found in the express and implied terms of the contract itself. This reference, however, leaves the question open of whether other circumstances of the case, including the negotiations, trade practices the parties have established between themselves, usages, and any subsequent conduct of the parties should also be taken into account. Moreover, it is unclear when a breach substantially deprives the aggrieved party of his expectations. Is a party, for instance, substantially deprived only when he, on account of the breach, has totally lost his interest in the performance? Or does substantial deprivation require that the aggrieved party's purpose in entering the contract be "frustrated" or the benefit of the bargain have been lost due to the breach? Is the monetary injury or harm suffered by the non-breaching party decisive? The grammatical interpretation provides no answer to any of these questions.

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[285] See Will, in: Bianca/Bonell, Art. 25, at 2.1.1. (emphasizing that the meaning attached to the French, Spanish and Russian version of detriment in their domestic contexts indicates injury, damage, and loss in "a rather large and vague sense").

[286] See Will, in: Bianca/Bonell, Art. 25, at 2.1.1.2; for a similar notion, see Gonzalez, 2 Int'l Tax & Bus. Law. 79, at 86 (1984)(stating that the "Convention's definition of fundamental breach makes it possible to reconcile the interests of the parties in cases where an insignificant deviation from the contract produces surprising and serious consequences"); Ziontz, Nw. J.Int'l.L. & Bus. 129, at 173 (1980)(stating that "[a]voidance of an international sales contract is a remedy reserved for serious breaches by one of the parties"); Grigera Naón, UN Convention, at 105 (emphasizing that the notion of fundamental breach is consequently linked to the idea that no minor default shall give recourse to the extreme remedy of contract avoidance); Kastely, 8 Nw. J. Int'l L. & Bus. 574, at 599 (1988); Ndulo, 38 Int'l & Comp. L. Q. 1, at 16 (1989).

4. Foreseeability

The element of foreseeability sheds no further light on the concept of fundamental breach. First, the function of the foreseeability requirement itself is unclear. From the wording of the conditional clause "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 result", one may infer that there is a presumption of foreseeability of the consequences of the breach. It thus confirms the opinion of many scholars that foreseeability is not only a burden of proof rule, but also requires taking into account the breaching party's knowledge or foreseeability of the harsh consequences of the breach in determining whether or not it is fundamental.[287] On the other hand, the foreseeability requirement under article 25 has a similar effect as the foreseeability requirement under the general rule for calculation of damages in article 74, since it limits the rights of the aggrieved party in the event the other party did not foresee the far-reaching consequences.[288] It therefore seems plausible to conclude that only the detriment/substantial deprivation component is what makes a breach "fundamental", and that the foreseeability element serves solely to exempt the breaching party from his liability for breach of the contract.[289]

Another ambiguity results from the phrase "*and* a reasonable person of the same kind in the same circumstances".[290] It indicates that, in order to determine "foreseeability", not only is the subjective perspective of the party in breach relevant, but so too is the objective perspective of the reasonable merchant in the breaching party's position.[291] In other words, the party in breach will be considered as having been able to have foreseen the consequences of the breach even if he did not know the facts and circumstances enabling him to do so, as long as, objectively viewed, he could or should

[287] See *supra* Part II, B. 2., note 164.

[288] See Enderlein/Maskow, International Sales Law, Art. 25, at 4.1. (emphasizing that the special circumstances make up the severity of the breach).

[289] For this conclusion, see Babiak, 5 Temple Int'l & Comp. L.J. 113, at 118 (1992).

[290] Emphasis added.

[291] For the same conclusion, see Babiak, 5 Temple Int'l & Comp. L.J. 113, at 121 (1992); Grigera Naón, UN Convention, at 105 (stating that the decisive test can only be an objective one and that the judge will therefore have to analyze objectively the position of the non-performing party); Will, in: Bianca/Bonell, Art. 25, at 2.2.2.2.4; Enderlein/Maskow, International Sales Law, Art. 25, at 4.2.; Magnus, in: Staudinger, Art. 25 N. 14.

have known them. But what happens when the breaching party had a special knowledge and thus could have foreseen more than the average merchant? From the making use of the conjunction "and", it is possible to conclude that such special knowledge cannot be taken into account, and that the breaching party can thus escape a finding of fundamental breach by hiding behind the paradigm of the reasonable person of the same kind in the same circumstances.[292]

Finally, the text of article 25 does not expressly address the point in time at which the foreseeability standard is to be applied. From the use of the present tense " [a] breach of contract committed... is fundamental if it results" in depriving the other party "of what he is entitled to expect under the contract" it is possible conclude that a judge should place himself at the time the breach of contract has occurred.[293] Likewise, where the article 25 states "unless the party in breach did not foresee... such a result" it would appear that one should place oneself at the time of the breach.[294] The French, Spanish and Russian text of article 25, however, gives rise to a different conclusion.[295] The use of the past tense "*était*" instead of "*est*", "*tenia*" instead of "*tiene*", and "*byla*" instead of "*yest*" in the French, Spanish and Russian texts, respectively, conveys the impression that the formation of the contract is the relevant point in time

[292] For a different conclusion, see Enderlein/Maskow, International Sales Law, Art. 25, at 4.2; Will, in: Bianca/Bonell, Art. 25, at 2.2.2.2.4. (stating that "an overly astute merchant [who] in fact knew and foresaw more than his peers should not be allowed to hide the reasonable person of the same kind in the same circumstances").

[293] This point has been emphasized by Levasseur, Civil Code of Québec and the Vienna Convention, at 282.

[294] See Levasseur, *id.*

[295] The French text of article 25 reads:

> Une contravention au contrat commise par l'une des parties est essentielle lorsqu'elle cause à l'autre partie un préjudice tel qu'elle la prive substantiellement de ce que celle-ci *était* en droit d'attendre du contrat, à moins que la partie en défault n'ait pas prévu un tel résultat et qu'une personne raisonnable de même qualité placeé dans la même situation ne l'aurait pas prévu non plus. [emphasis added]

The Spanish text of article 25 reads:

> El incumplimiento del contrato por une de las partes será esecial cuando cause a la otra parte un perjuicio tal que la prive sustancialmente de lo que *tenia* derecho a esperar en virtud del contrato, salvo que la parte que ha incumplido no haya previsto tal resultado y que una persona razonable de la misma condición no lo hubiera previsto en igual situación. [emphasis added]

to determine the foreseeability.[296] This view is confirmed by the reference to the rights, which the aggrieved party was entitled to expect *under the contract*.[297]

5. Conclusion (Elements Constituting "Fundamental Breach")

This section has shown that the meaning of the elements constituting fundamental breach is not evident. The same is true for other official texts of the Convention, namely the French, Spanish and Russian versions. Therefore, the grammatical method of interpretation does not offer much guidance in answering the question of which of the various factors enumerated above can be employed in determining fundamental breach. However, with regard to these factors, the following conclusions seem possible:

(1) The reference to the expectations under the contract particularly supports the employment of those factors, which focus on the terms of the contract itself, in determining fundamental breach, that is to say the *nature of the contractual obligation*.

(2) When one considers that a buyer purchases goods for some purpose, it is permissible to evaluate the severity of a breach in the light of whether the *purpose of the contract* is frustrated or whether the aggrieved party lost his *interest* (due to the fact that the goods do not possess the features necessary for the intended use), provided that the purpose or the interest can be inferred from the terms of the contract.

(3) The *remedy-oriented approach* is not excluded by the wording of article 25. Here one could argue that businessmen generally enter into commercial contracts for purely economic reasons and can therefore be fully compensated by damages for any loss resulting from the breach. They are thus only substantially deprived of their expectations if they can not get fully compensated by damages. By the same token, em-

[296] With regard to the French text of article 25, this point has been emphasized by Levasseur, Civil Code of Québec and the Vienna Convention, at 282.

[297] For the same conclusion, see *e.g.* Schlechtriem, Uniform Sales Law, at 60.

For a different conclusion, see Flechtner, 8 J.L. & Com. 53-108, footnote 114 (1988). He argues that if, after the formation of the contract, it becomes clear that a failure to perform will cause substantial detriment, nothing in the text of Article 25 prevents such failure to perform up to this expectation from being a fundamental breach.

ployment of an *offer to cure* or looking at the *possibility to cure* is not excluded by the wording of article 25. Where the requirements of article 48(1) are met, that is to say that repair is possible within a reasonable time without causing the aggrieved party unreasonable inconvenience or uncertainty of reimbursement of expenses, the aggrieved party is not substantially deprived of his expectations.

(4) The determination of substantial deprivation by focusing on the *monetary loss suffered by the aggrieved party* cannot be justified for the reasons given to support the remedy-oriented approach. Moreover, the employment of that factor would impose a heavy burden on the aggrieved party, who would have to prove his substantial deprivation. Any determination of fundamental breach by reference to monetary loss would seem to be arbitrary, since it would not be clear when the loss amounts to a substantial deprivation. Is it required that the loss caused by the breach result in 50% or more of the monetary value of the contract? Or could a lesser percentage suffice? On the other hand, to require that the aggrieved party must have suffered a loss of more than 50% of the monetary value of the contract could not be justified etymologically[298].

(5) The wording of article 25 does not prohibit consideration of the parties' ability or willingness to perform, because total non-performance can be considered a breach, which strikes at the root of the contract. A contract of sale is generally concluded for the very purpose of exchanging goods in return for consideration, and if such exchange does not take place then the purpose of the contract is frustrated.

(6) The employment of the *no-reliance* factor also seems permissible where the breach or conduct creates uncertainty as to one party's future performance and where, as a consequence, the other party loses his interest in the contract. For the same reason, the UNCITRAL factor focusing on whether the breach was committed *intention-*

[298] For a similar argument where the seller delivers less of a quantity of goods than he had agreed to deliver, see Ziegel, Remedial Provisions, at 9-16, where the author argues that to require that the buyer must have been deprived by 50% or more of what he was entitled to receive before it can be said that there has been a fundamental breach cannot be "justified etymologically and would lead to startling results that could not have been intended by the delegates voting in support of the amendment of [Draft] article 23".

ally seems legitimate.[299] The other UNCITRAL factor, which looks to whether the breaching party would suffer disproportionate loss when the breach is treated as fundamental, cannot be supported by the wording of article 25. Moreover, the concerns expressed in respect of the approach focusing on the monetary loss suffered by the aggrieved party also apply to this approach. It is not clear under which circumstances a breaching party's loss becomes significant, and therefore any determination of fundamental breach would be arbitrary. In addition, the UNIDROIT factor is aimed at limiting the exercise of the right of avoidance, not at determining fundamental breach. In other words, it limits the availability of the avoidance remedy in spite of the existence of a fundamental breach, but it does not prevent a breach from being fundamental. It therefore is inappropriate to use it as a factor in determining fundamental breach.

B. The Meaning of the Concept of Fundamental Breach in Light of the Convention's Legislative History

Interpretation by way of legislative history seeks to resolve inherent ambiguities in a provision by considering the drafter's motives and deliberations as evidenced in the officially published preparatory works. To that end, in this section we first look very briefly at the history of the concept of fundamental breach as a principle of uniform sales law, since the deliberations within the UN Commission on International Trade Law (UNCITRAL) based on an analysis of the corresponding concept under the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS)[300], the predecessor of the Convention (1.). Next we examine the Official Records of the Vienna Diplomatic Conference proceedings and the preliminary discussions within UNCITRAL and its Working Group, reproduced in the UNCITRAL yearbooks (2.).

[299] See comment d. on UNIDROIT art. 7.3.1 (stating that "[s]ometimes an intentional breach may show that a party cannot be trusted").

[300] The text of ULIS appears in The Hague I, at 333-354. On coming into force in August 1972 the official text was reprinted in 834 U.N.T.S. 107 (1972), 3 I.L.M. 854 (1972). The English text is also available at the Pace University database, see http://www.cisg.law.pace.edu/cisg/text/ulis.html.

1. Pre-Convention Period

The notion of making the parties' right to terminate a contract dependent on the seriousness of the breach can be traced back to 1930, when the International Institute for the Unification of Private Law in Rome (UNIDROIT) appointed a committee to prepare a uniform law on international sales.[301] The early draft of 1939, however, did not contain a single concept of breach of contract applicable to any violation of any obligation by any party to the contract. Instead, breach of contract was conceived of as being a breach of a particular contractual obligation, such as the obligation to deliver or to take delivery.[302] Moreover, the remedial system resembled that of traditional English common law in that it gave the aggrieved party the right to avoid the contract only in cases where the term violated could be classified as a condition.[303] The notion of (fundamental) breach of contract as an all-embracing concept was first introduced during the preparatory work for ULIS and was included in the Drafts of 1956 and 1963.[304]

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[301] The Council of UNIDROIT resolved on April 29, 130, to appoint a Committee, for the purpose of preparing a draft of an international uniform law of sale. The Committee met eleven times, from 1930 to 1934, and submitted a preliminary draft, which was adopted by the Council of UNIDROIT and forwarded to the Council of the League of Nations. The draft was then transmitted to the Governments for comments. On receiving the remarks of the governments, the Committee prepared a new revised draft, which was adopted by the Council of UNIDROIT in 1939. The French text of the 1934 Draft (*Projet d'une loi internationale sur la vente*) is *reprinted* in 9 RabelsZ 8-40 (1935). The governments' comments on the 1934 Draft are reprinted in 10 RabelsZ 651-665 (1936). The English and French texts of the revised 1939 Draft are *reprinted* in UNIDROIT, Unification of Law, at 101-159 (1948).

[302] See, *e.g.*, articles 53-55 (Remedies for non-compliance with the duty to deliver); article 66 (Sanctions in the event of failure to take delivery).

[303] See article 55(3) of the 1939 Draft:

> An obligation of the seller is an essential *condition* of the contract where it appears from the circumstances that the buyer would not have concluded the contract without such undertaking. [emphasis added]

[304] In 1951 an international conference convened by the Government of the Netherlands in The Hague and attended by the representatives of 20 governments examined the 1939 draft and appointed a Special Commission with the task to further elaborate its text. By 1956 this commission had prepared a new draft which introduced at article 15 the principle of fundamental breach and defined it as follows:

> "A breach of contract shall be deemed fundamental wherever the party in breach knew or ought have known, at the time the contract was made, that the other party would not have contracted had he foreseen that such breach would occur."

The 1956 Draft was circulated to governments and other interested international bodies for comment. On the basis of these comments the commission completed a final draft in 1963 for submission to an international conference. The text of article 15, however, was unchanged.

The English and French text of the 1956 Draft is *reprinted* in UNIDROIT, Unification of Law, at 70-115 (1956).

The ULIS text adopted at the 1964 Hague Conference was further developed. ULIS Article 10 provided the following definition of a fundamental breach[305]:

> For the purposes of the present Law, a breach of contract shall be deemed to be fundamental wherever a 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.

2. Preparatory Work for the Convention

The review of the preparatory works of the Convention is structured as follows. First, we look at the attempts within UNCITRAL and at the Diplomatic Conference to define the concept of fundamental breach (a.). Next, with regard to the approach focusing on the existence of an offer to cure, we review the discussion of the relationship between the fundamental nature of a breach and the seller's right to cure (b.).

a. Definition of Fundamental Breach

(1) Deliberations within the UNCITRAL

Already at the Hague Conference, the concept of fundamental breach under ULIS Article 10 had been constantly criticized on the grounds that it was too subjective, as it relied on a test that required the breaching party to anticipate whether or not the non-breaching party would have entered into the contract had he foreseen the breach.[306]

For a brief summary of the early efforts to unify the law of international sales, see Bonell, in: Bianca/Bonell, Introduction to the Convention, at 3-5; Winship, Scope of the Vienna Convention, at 1-3/9; for a summary of the early efforts to define fundamental breach, see Eörsi, 31 Am. J. Comp. L. 333, at 336-339 (1979).

[305] The text presented to the 1964 Hague Conference by the Text Committee contains only minor changes compared with the definition of fundamental breach under the 1956/1963 draft. These were: "From the point of view of this statute" – an introduction; instead of "party", "party in breach"; instead of "contracted", "entered into the contract"; instead of "breach of contract", "breach of contract and its consequences". Finally, the place of the "other party" is taken by the "reasonable person"; this reasonable person must be in the same position as the other party. See the ironic comment on the amendments by Eörsi, 31 Am. J. Comp. L. 333, at 339 (1979), where the author states that the "number of words was increased from 31 to 64; for those who believe in the possibility of a definition of fundamental breach this was a quite useful change".

[306] See, *e.g.*, observations of the Austrian government (The Hague II, at 108), Dutch government (The Hague II, at 138), U.K. government (The Hague II, at 169); in the course of the debate: Loewe

During the preparatory work for the Convention, ULIS article 10 again became the object of much criticism. States and organizations objected to the ULIS definition on the grounds that it was too complex, and, again, because it included subjective standards that would be difficult to apply.[307] As a result, the UNCITRAL Working Group, based on a Mexican proposal, eliminated the subjective test as well as the related speculative element as to whether a "*reasonable* person" would have "entered into the contract *if* he had foreseen the breach and its effects".[308] Instead, the Working Group proposed a single objective criterion, namely whether the breach substantially impaired

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(Austria), Yadin (Israel), Davis (U.K.); only Tunc (France) and O'Keefe (Ireland) held the subjective notion appropriate (The Hague I, at 35-36).

To overcome the *ex post facto* reasoning necessary in the ULIS article 10 definition, the British and Dutch Governments, at the Hague conference proposed a new formula, in which objective criteria were to be judged at the time of the occurrence of the breach of contract (The Hague II, at 274). Their proposal read:

> A breach of contract shall be deemed fundamental, wherever the performance of the contract is, by reason of the breach, rendered radically different from that for which the parties contracted.

See also Van der Velden, Law of International Sales, at 63 (stating that the defect in the definition resulted from the reference to the reasonable man's mind at the time of the conclusion of the contract); for a similar statement, see Graveson/Cohn/Graveson, The Uniform Laws of International Sales Act, at 55.

[307] After it became evident that ULIS would not be widely adopted, the United Nations Commission on International Trade Law (UNCITRAL), established in 1966 with the task to promote "the progressive harmonization and unification of the law of international trade", decided at its first session in 1968 to inquire into the intentions of all Member States of the United Nations. Based on the comments of the 36 States that replied, UNCITRAL decided to set up a Working Group to determine whether ULIS could be modified to increase their acceptability or whether completely new texts should be drafted. The Working Group, composed of 14 States representing the different regions and legal traditions of the world, held nine sessions and produced two Draft Conventions, namely the 1976 Draft Convention on Sales, setting forth the rights and obligations of the seller and buyer under the sales contract, and the 1977 Draft Convention on Formation of the Sales Contract. At the second stage, the full Commission reviewed the two Draft Conventions, decided to consolidate the texts into one document – the 1978 Draft Convention on Contracts for the International Sale of Goods – and recommended to the U.N. General Assembly that it convene a diplomatic conference to review the Draft and finalize the Convention.

The General Assembly adopted this recommendation and convened a diplomatic conference in March-April, 1980 at UNCITRAL's headquarter in Vienna. At the Conference, attended by 62 States, most of the work was done in two "Committees", each of which included all of that States which attended the Conference. The larger task was assigned to the First Committee, which prepared Parts I-III (Articles 1-88) of the Convention. The Second Committee prepared Part IV, Final Provisions (Articles 89-101). The Committees could take action by majority vote, whereas significant action by the Conference Plenary required approval by a two-thirds majority.

For the history of the drafting within UNCITRAL, see Honnold, 27 Am.J.Comp.L. 223 (1979); Farnsworth, 18 Int'l Law. 17-19 (1984); Winship, Scope of the Vienna Convention, at 1-1 to 1-15.

[308] Emphasis in the original. The Mexican proposal employs as a criterion "whether the breach of contract substantially alters the scope or contents of the rights of the other party" (see UNCITRAL Yearbook VI (1975), at 95; Doc. History, at 220).

the value of the performance required by the contract.[309] This purely objective test was further developed and led to the following definition of fundamental breach:

> Article 9
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> 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.[310]

In its comment on article 9, the government of the Philippines expressed dissatisfaction with the idea that the breaching party had to foresee the substantial detriment.[311] In case of litigation, the burden of proof would thus be on the non-breaching party. This was not being considered to be a proper solution because it would be extremely difficult for the non-breaching to prove that the party in breach "foresaw or had reason to foresee such a result".[312] The United States echoed this criticism, and both the Philippines' and the United States' delegates to UNCITRAL suggested that the final phrase of article 9 should be reworded to read "unless the party in breach did not foresee and had no reason to foresee such a result".[313] This suggestion was approved by a majority of the members of UNCITRAL and the definition of "fundamental breach", as embodied under article 23 in the 1978 Draft Convention, thus reads:

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[309] The proposed revision of ULIS article 10 reads as follows (see UNCITRAL Yearbook VI (1975), at 95; Doc. History, at 220):

> For the purpose of the present Law, a breach of contract shall be regarded as fundamental wherever such breach substantially [to a significant extent] impairs the value of the contract and the present law.

As negotiations over fundamental breach continued, the text adopted by the Working Group read as follows (see Report of the Working Group on its sixth session, UNCITRAL Yearbook VI (1975), at 53; Doc. History, at 244):

> 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.

[310] ULIS Article 10 was replaced by Draft Article 9. See Working Group, Report on its Seventh Session, UNCITRAL Yearbook, VII (1976), at 90.

[311] See UNCITRAL Yearbook VIII (1977), at 127.

[312] See UNCITRAL Yearbook VIII (1977), at 127; for fuller review of the discussion see Michida, 27 Am.J.Comp.L. 279, 284-286 (1979).

[313] See Michida, 27 Am.J.Comp.L. 279, 285 (1979).

> Article 23
>
> 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 did not foresee and had no reason to foresee such a result.[314]

Unlike ULIS article 10, the proposed text did not deal with issue of the relevant time at which it was possible to foresee the result and UNCITRAL did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach.[315]

(2) First Committee Deliberations and the Decisions by Plenary Conference

(a) Amendments

At the Vienna Conference, the Federal Republic of Germany[316], Czechoslovakia[317], Pakistan[318], the United Kingdom[319], Egypt[320], Turkey,[321] and India[322] submitted amendments to Draft article 23. What follows a summary of those proposed amendments.

(i) Proposal of the former Czechoslovakia

The Czechoslovak delegation criticized Draft article 23 for two reasons. First, they argued that the substantial detriment element lacked precision. Secondly, they stated that the foreseeability requirement introduced a subjective element, which could create difficulties, particularly in relation to the buyer's right to require substitute delivery,

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[314] See 1978 Draft Convention, Official Records, at 7; Secretariat's Commentary on the 1978 Draft Convention, Official Records, 26; Doc. History, at 416.

[315] See UNCITRAL Yearbook VIII (1977), at 31; Doc. History, at 324.

UNCITRAL did not accept a proposal that the criterion of fundamental breach should be a "loss of interest in the contract" on the part of the innocent party. This proposal was opposed on the ground that it brought in the question of motive of contract and this was too subjective an element. See UNCITRAL Yearbook VIII (1977), at 31; Doc. History, at 324.

[316] U.N. DOC. A/CONF.97/C.1/L.63; *reprinted* in Official Records, at 99; Doc. History, at 671.

[317] U.N. DOC. A/CONF.97/C.1/L.81; *reprinted* in Official Records, at 99; Doc. History, at 671.

[318] U.N. DOC. A/CONF.97/C.1/L.99; *reprinted* in Official Records, at 99; Doc. History, at 671.

[319] U.N. DOC. A/CONF.97/C.1/L.104; *reprinted* in Official Records, at 99; Doc. History, at 671.

[320] U.N. DOC. A/CONF.97/C.1/L.106; *reprinted* in Official Records, at 99; Doc. History, at 671.

[321] U.N. DOC. A/CONF.97/C.1/L.121; *reprinted* in Official Records, at 99; Doc. History, at 671.

[322] U.N. DOC. A/CONF.97/C.1/L.126; *reprinted* in Official Records, at 99; Doc. History, at 671.

where it was important to have objective criteria to define fundamental breach. Had the existing definition of fundamental breach been accepted, they argued, the buyer would have to wait until he had suffered substantial detriment in order to avail himself of this right, and that was contrary to the requirements of international trade.[323] They proposed that the existing text be replaced with the following:

> A breach of contract is fundamental if the party in breach knew or ought to have known, in the light of the reasons for the conclusion of the contract, or any information disclosed at any time before or at the conclusion of the contract, that the other party would not be interested in performance in case of such a breach.[324]

This proposal was criticized by the Mexican delegation as having been too narrow in specifying that the party in breach ought to have known "that the other party would not be interested in performance in case of such a breach".[325] Similarly, the French delegation viewed the requirement that the non-breaching party must lose interest in the contract as a result of the breach as too severely limiting its right to terminate the contract.[326] The Danish delegation objected to the proposal on the ground that the proposed criteria were very difficult to apply in practice.[327] Later, the proposal of the former Czechoslovakia was rejected by the First Committee.[328]

(ii) Proposal of Egypt

The Egyptian delegation criticized Draft article 23 as being too subjective in nature, since the circumstances of the party in breach were taken as a basis for appreciating when this party claimed that it had not foreseen and had no reason to foresee that substantial detriment to the other party would result.[329] The Egyptian amendment to Draft

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[323] See comments by the representative of the former Czechoslovakia (Kopac, ¶ 4), Official Records, at 295-296; Doc. History, at 516-517.

[324] U.N. DOC. A/CONF.97/C.1/L.81; *reprinted* in Official Records, at 99; Doc. History, at 671.

[325] See comments by the representative of Mexico (Mantilla-Molina, ¶ 12), Official Records, at 296; Doc. History, at 517.

[326] See comments by the representative of France (Ghestin, ¶ 32), Official Records, at 298; Doc. History, at 519.

[327] See comments by the representative of Denmark (Trönning, ¶ 22), Official Records, at 297; Doc. History, at 518.

[328] See Official Records, at 298; Doc. History, at 519.

[329] See comments by the representative of Egypt (Shafik, ¶ 3), Official Records, at 295; Doc. History, at 515.

article 23 sought to introduce a more objective principle by indicating that the party in breach ought to provide proof that it had not foreseen such a result and that a reasonable person of the same kind in the same circumstances would not have foreseen it. It 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.*[330] [emphasis in the original]

The introduction of the criterion of what a reasonable person of the same kind in the same circumstances could have foreseen in determining fundamental breach was welcomed by many delegations. Although there was consensus among the delegations that the burden of proof should lay on the party in breach, they did not, however, wish to include language in the definition, which would raise questions of civil procedure.[331] As a result, the Egyptian delegation deleted the reference to proof ("proves that he") from their amendment and suggested amending the corresponding part of his text.[332] The revised amendment was adopted.[333]

(iii) Proposal of Pakistan

In the view of the Pakistani delegation, the expression "substantial detriment" was insufficiently precise.[334] It proposed replacing the words "if it results in substantial detriment to the other party" by the words "if it results in such detriment to the other party as would basically change the terms of the transaction".[335] Opinions as to this

[330] U.N. DOC. A/CONF.97/C.1/L.106; *reprinted* in Official Records, at 99; Doc. History, at 671.

[331] See, *e.g.*, comments by the representative of Austria (Reishofer, ¶ 6); Norway (Rognlien, ¶ 9); Mexico (Mantilla-Molina, ¶ 12); Greece (Krispis, ¶ 13); Denmark (Trönning, ¶ 21); Szasz (Hungary, ¶ 34), Official Records, at 296-298; Doc. History, at 517-519.

[332] See the reply of the representative of Egypt (Shafik, ¶¶ 41-42), Official Records, at 298; Doc. History, at 519, to the comments by the various delegations.

[333] See Official Records, at 299; Doc. History, at 520.

[334] See comments by the representative of Pakistan (Inaamullah, ¶ 45), Official Records, at 299; Doc. History, at 520.

[335] See U.N. DOC. A/CONF.97/C.1/L.99; *reprinted* in Official Records, at 99; Doc. History, at 671.

proposal were divided, but a majority of the delegations supported it[336], and an *ad hoc* working group was established to redraft Draft article 23 on the basis of the Pakistani proposal.[337]

(iv) Proposal of the Federal Republic of Germany

The delegation of the Federal Republic of Germany took the view that it was impossible to determine whether a breach was fundamental without referring to the terms of the contract.[338] Accordingly, it suggested phrasing Draft article 23 as follows:

> A breach committed by one of the parties is fundamental if, *having regard to all express and implied terms of the contract*, the breach results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such result.[339]
> [emphasis in the original]

This proposal was criticized by the delegations of the United Kingdom, Australia, the former USSR, and Sweden for having been too narrow, because it would have limited the courts' authority to consider the express and implied terms of the contract, without also allowing them to take into account other relevant circumstances.[340] The German representative responded that the expectations of the parties as found in the contract provided an objective test for measuring substantial detriment and that this

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[336] The delegations of Romania (Popescu, ¶ 46), the former Czechoslovakia (Kopac, ¶ 46), India (Kuchibhotla, ¶ 46) and Egypt (Shafik, ¶ 46) supported this amendment on the ground that it made the provision clearer and any more precise; China (Wang, ¶ 53), Spain (Olivencia Ruiz, ¶ 50) and Kenya (Waititu, ¶ 59) also supported the Pakistan proposal; see Official Records, at 299-300; Doc. History, at 520-521.

The delegations of Sweden (Hjerner, ¶ 47), Greece (Krispis, ¶ 49), the former USSR (Lebedev, ¶ 51), Hungary (Szasz, ¶ 54), Norway (Rognlien, ¶ 58) and the United States (Farnsworth, ¶ 55) criticized this amendment since they did not consider that it made the idea of substantial detriment more precise; see Official Records, at 299-300; Doc. History, at 520-521.

[337] The *ad hoc* working group consisted of the representatives of Argentina, Czechoslovakia, the Federal Republic of Germany, Ghana, Hungary, Norway, Pakistan, Romania and Spain; see Official Records, at 300, ¶ 65-66; Doc. History, at 521.

[338] See comments by the representative of the Federal Republic of Germany (Klingsporn, ¶ 68), Official Records, at 300; Doc. History, at 521.

[339] U.N. DOC. A/CONF.97/C.1/L.63; *reprinted* in Official Records, at 99; Doc. History, at 671.

[340] See comments by the representatives of the United Kingdom (Feltham, ¶ 70), Australia (Bennett, ¶ 74), the former USSR (Lebedev, ¶ 75) and Sweden (Hjerner, ¶ 77), Official Records, at 300-301; Doc. History, at 521-522.

amendment would not bar an examination of the circumstances of the case.[341] Other delegations supported the amendment as a good basis for determining fundamental breach[342], and the First Committee decided to refer it to the *ad hoc* working group set up to consider the Pakistani proposal.[343]

(v) Proposal of the United Kingdom

The amendment put forth by the delegation of the United Kingdom comprised two proposals. The first concerned the point in time at which foreseeability should be measured. The delegation was of the opinion that the article itself should be more specific and suggested that the moment when the contract was concluded was the relevant point, since it was at that point when the scope of the contract was defined by the parties.[344] The second proposal dealt with the definition of substantial detriment. The British delegation expressed its concern that a party adversely affected by an unfavorable shift in market prices could too easily escape from a detrimental situation by simply seeking all possible grounds to allege breach by the other party, in order to avoid the contract.[345] To avert the extreme measure of avoidance in such cases, they suggested specifying that "a breach does not result in substantial detriment to the other party if damages would be an adequate remedy for him".[346] Their proposal read as follows:

> A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless *at the time when the contract was concluded* the party in breach did not foresee and had no reason to foresee such result. *A breach does not result in substantial detriment to the other party if damages would be an adequate remedy for him.*[347] [emphasis in the original]

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[341] See comments by the German representative (Herber, ¶ 78); Official Records, at 301; Doc. History 522.

[342] See comments by the delegations of Finland (Sevon, ¶ 71), Belgium (Dabin, ¶ 69), Argentina (Boggiano, ¶ 72), Republic of Korea (Kim, ¶ 73) and Irland (Plunkett, ¶ 76), Official Records, at 299-300; Doc. History, at 521-522.

[343] See Official Records, at 301 (¶ 79-80); Doc. History, at 522.

[344] See Official Records, at 302 (¶ 1); Doc. History, at 523.

[345] See Official Records, at 302 (¶ 4); Doc. History, at 523.

[346] *Id.*

[347] U.N. DOC. A/CONF.97/C.1/L.104; *reprinted* in Official Records, at 99; Doc. History, at 671.

Both proposals were opposed by several delegations. The delegations of Norway, Finland, and Hungary voiced their opposition to the first proposal. They took the view that information provided after the conclusion of a contract could modify the situation with regard to both substantial detriment and foreseeability. For that reason, the wording of Draft article 23 should be flexible.[348] With regard to the second proposal, the Bulgarian delegation emphasized that the non-breaching party, as a matter of principle, should have the right to decide whether to sue for damages or to avoid the contract, as a consequence of substantial detriment[349]. The delegations of Ghana and Ireland pointed out that the very use of the notion of adequacy of damages was likely to lead to the remedy of avoidance being available in too narrow a range of circumstances.[350] It might not only be unfair to oblige the non-breaching party to accept damages, but there was also the question of what adequate damages were.[351] The United Kingdom withdrew their proposals in the light of those comments.[352]

(vi) Proposals of Turkey and India

The Turkish delegation suggested inserting the words "A breach" after the words "of the contract".[353] Due to the purely formal character of the proposal the Committee decided to transmit it without comment to the Drafting Committee.[354]

The delegation of India suggested inserting the words "as a reasonable person" after the words "had no reason" in the third line of article 23.[355] Since this idea was already incorporated in the Egyptian proposal, the Committee decided not further to discuss this amendment.[356]

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[348] See comments by the delegations of Norway (Rognlien, ¶ 2), Finland (Sevon, ¶ 2) and Hungary (Szasz, ¶ 2), Official Records, at 302; Doc. History, at 523.

[349] See the comments of the Bulgarian representative (Stalev, ¶ 6), Official Records, at 302; Doc. History, at 523.

[350] See the comments by the delegations of Ghana (Date-Bah, ¶ 8) and Ireland (Plunkett, ¶ 9), Official Records, at 302-303; Doc. History, at 523-524.

[351] See the comments of the Irish representative (Plunkett, ¶ 9), Official Records, at 302-303; Doc. History, at 523-524.

[352] See Official Records, at 302, 303 (¶ 3, 11); Doc. History, at 523, 524.

[353] U.N. DOC. A/CONF.97/C.1/L.121; *reprinted* in Official Records, at 99; Doc. History, at 671.

[354] See Official Records, at 303 (¶ 12, 13); Doc. History, at 524.

[355] U.N. DOC. A/CONF.97/C.1/L.126; *reprinted* in Official Records, at 99; Doc. History, at 671.

(b) Proposal of the ad hoc Working Group

Having taken into account the amendments of the delegations of Pakistan and the Federal Republic of Germany, the *ad hoc* working group, Hungary dissenting, submitted the following text:

> 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.[357]
> [emphasis in the original]

The text of the *ad hoc* working group was hotly debated. Many delegations were of the opinion that the text was no clearer than the existing formula "substantial detriment to the other party".[358] Moreover, some of them criticized the new text as being more subjective than the previous one.[359] The majority of delegations, however, took the exact opposite view. They argued that the reference to the expectations of the non-breaching party under the contract was an additional element of objectivity and, thus, some of the previous definition's vagueness was eliminated.[360] The proposal of the *ad hoc* working group was finally adopted by 22 votes in favor and 18 against, and, together with the amendment by Egypt, was referred to the Drafting Committee.[361]

In the Drafting Committee, the wording "substantially impair his expectations" under the contract proved unacceptable to the representatives of the civil law coun-

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[356] See Official Records, at 303 (¶ 15, 16); Doc. History, at 524.

[357] U.N. DOC. A/CONF.97/C.1/L.176; *reprinted* in Official Records, at 99; Doc. History, at 671.

[358] See comments by the delegations of Iraq (Sami, ¶ 22), France (Ghestin, ¶ 21), the former USSR (Lebedev, ¶ 26), China (Li Chih-min, ¶ 29), Official Records, at 329-330; Doc. History, at 550-551.

[359] See comments of the representatives of France (Ghestin, ¶ 21), the former USSR (Lebedev, ¶ 26), China (Li Chih-min, ¶ 29), Official Records, at 329-330; Doc. History, at 550-551.

[360] See comments by the delegations of Bulgaria (Stalev, ¶ 16); Austria (Reishofer, ¶ 17); Federal Republic of Germany (Schlechtriem, ¶ 23); Italy (Boncll, ¶ 24); Norway (Rognlien, ¶ 23); Spain (Olivencia Ruiz, ¶ 31); the former Czechoslovakia (Kopac, ¶ 32-34); Ghana (Sam, ¶ 35); Argentina (Boggiano, ¶ 36); Ireland (Plunkett, ¶ 37), Official Records, at 329-330; Doc. History, at 550-551.

The delegations of the United Kingdom (Feltham, ¶ 15); German Democratic Republic (Wagner, ¶ 20) sought to replace the words "substantially impair his expectations" by "substantially disappoint his expectations"; see Official Records, at 329-330; Doc. History, at 550-551.

[361] See Official Records, at 329-330 (¶ 39); Doc. History, at 550-551

tries.[362] Their representatives had suggested, that, rather than referring to expectations under the contract, the article should speak of the interests of one of the parties. However, that proposal was not acceptable to the representatives of the common law countries.[363] The Drafting Committee finally arrived at the present definition of fundamental breach, which represented a compromise acceptable to every one.[364] This definition was adopted at Plenary Conference by 42 votes to 2, with two abstentions.[365]

b. Relationship to the Seller's Right to Cure

(1) Deliberations within the UNCITRAL

During the preparatory work for the Convention several proposals to clarify the relationship between the seller's right to cure and the buyer's right to avoid a contract were made.[366] The central issue in discussing these proposals was whether the buyer may preclude the seller from curing any failure to perform his obligations where cure can be effected without causing the buyer unreasonable inconvenience or unreasonable expense. This issue was discussed in the context of a defect in the goods which, in the absence of repair, was so serious as to constitute a fundamental breach, but where the delay in remedying that defect would neither contribute a fundamental breach, nor even cause the buyer unreasonable inconvenience or expense.[367]

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[362] See comments by the Executive Secretary of the Convention (Vis, ¶ 13) explaining the text finally adopted by the Drafting Committee, Official Records, at 425; Doc. History, at 646.

[363] *Id.*

[364] *Id.*

[365] See Official Records, at 206; Doc. History, at 741.

The Swedish delegate (Hjerner, ¶ 13) voted against it on the grounds that the new formulation "could lend itself to several different interpretations and lead to confusion", and for the Spanish delegate (Garrigues, ¶ 15), "the idea embodied in article 23 that a breach would be taken into account only if it were 'fundamental' was totally unacceptable. The Canadian delegate (Ziegel, ¶ 12) explained his abstention that the new definition of fundamental breach imposed an unduly heavy onus on the aggrieved party since it would be difficult for him, particularly in the case of delivery of defective goods, to establish fundamental breach. See Official Records, at 206; Doc. History, at 741.

[366] The seller's right to cure appeared in ULIS as article 44 (1), which read:

> The seller shall retain, even after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

[367] See UNCITRAL Yearbook VIII (1977), at 45 (¶ 273); Doc. History, at 338.

None of these proposals, however, was adopted. The first unsuccessful attempt was made at the Sixth Session of the Working Group. The Working Group rejected the proposal to add to proposed article [43 bis] [= article 25 of the Official Text] the words "on account of delay" following the words "unless the buyer".[368] The effect would have been that the buyer could have avoided the contract and thereby cut off the seller's right only if delivery was late.[369]

The second unsuccessful attempt to curtail the buyer's right of avoidance was made within UNCITRAL. In the discussion of the various proposals[370] to amend article [43 bis], then renumbered as article 29 [= article 48 of the Official Text], some delegates took the view that the seller's right to cure should take precedence over the buyer's right to avoid. Such a rule would promote the upholding of contracts and prevent the unnecessary expense to the seller of avoidance where the defect could be quickly cured. The buyer would be protected by the fact that the seller's right would only operate where cure could be effected without such delay as would constitute a fundamental breach and only where the cure did not cause the buyer unreasonable inconvenience or expense.[371]

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[368] The amended text of ULIS article 44(1) adopted by Working Group as Article [43 bis] (1) stated (see UNCITRAL Yearbook VI (1973), at 70, Doc. History, at 148):

> The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 44 [= article 49 of the Official Text] or the price reduced in accordance with article 45 [= article 50 of the Official Text][or has notified the seller that he will himself cure the lack of conformity].

[369] See UNCITRAL Yearbook VI (1975), at 56; Doc. History, at 247.

[370] These proposals were as follows (see UNCITRAL Yearbook VIII (1977), at 44 (¶ 271, 272); Doc. History, at 337.:

> (i) That the words "unless the buyer has declared the contract avoided in accordance with article 30 [= article 49 of the Official Text] or has declared the price to be reduced in accordance with article 31[= article 50 of the Official Text]" be deleted.
>
> (ii) That the words "or has declared the price to be reduced in accordance with article 31" be deleted. In addition, article 31 should be amended to make it clear that the seller's right to cure his failure to perform takes precedence over the buyer's right to have the price reduced.
>
> (iii) That the following sentence be added to paragraph (1): "The seller is, however, obliged to compensate the buyer for any expense caused by the seller in exercising his right to cure the failure to perform.

[371] See UNCITRAL Yearbook VIII (1977), at 44 (¶ 271, 272); Doc. History, at 337.

Another view was that if the defect could be cured easily there would be no fundamental breach of the contract, since the notion of fundamental breach must be considered both in the light of the defect itself as well as the possibility to cure.[372] It was pointed out that this result, however, would not be evident in many common law jurisdictions if the words "unless the buyer has declared the contract avoided in accordance with article 30 [= article 49 of the Official Text]" were retained in article 29(1).[373]

There was considerable opposition within UNCITRAL, however, to the idea that the buyer's right to declare the contract avoided could be affected by an offer to cure the defect. Any possibility to cure was viewed as a privilege, which should depend upon the consent of the buyer, who always has the right to declare the contract avoided. UNCITRAL, after considerable deliberations, adopted in principle the following proposal:

> Article 29(1)
>
> The seller may, at his own expense, cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience including any uncertainty in reimbursement by the seller of expenses advanced by the buyer, unless the buyer has declared the contract avoided in accordance with article 30.[374]

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[372] See UNCITRAL Yearbook VIII (1977), at 44 (¶ 271, 272); Doc. History, at 337.

[373] See UNCITRAL Yearbook VIII (1977), at 44 (¶ 271, 272); Doc. History, at 337.

[374] See UNCITRAL Yearbook VIII (1977), at 44 (¶ 271, 272); Doc. History, at 337.
In the light of its deliberations the UNCITRAL considered the following proposals:
(i) That article 29(1) read as follows:
The seller may, at his own expense, cure, even after the date of delivery, any failure to perform his obligations, if he can do so within a reasonable time and without causing the buyer unreasonable inconvenience, unless the buyer has declared the contract avoided in accordance with article 30."
(ii) That article 29(1) read as follows:
The seller may, at his own expense, cure, even after the date of delivery, any failure to perform his obligations, if he can do so without such delay as will amount to fundamental breach of contract and without causing the buyer unreasonable inconvenience, including any uncertainty in reimbursement by the seller of expenses advanced by the buyer, unless the buyer has declared the contract avoided in accordance with article 30."

In light of the foregoing discussion, UNCITRAL reconsidered the definition of fundamental breach contained in article 9 [= article 25 of the Official Text] and the U.S. delegation proposed that article 9 read as follows (new language in italics):

> A breach committed by one of the parties to the contract is fundamental, if, *under all the circumstances, including a reasonable offer to cure*, it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result.[375]
> [emphasis in the original]

In support of this proposal, the U.S. delegation argued that the proposed addition to article 9 would protect against a technical avoidance of the contract when there had been an offer to cure under article 29.[376] However, others took the view that this change was unnecessary because the conditions governing an offer by the seller to cure were governed by article 29 and, if there was no offer to cure, the situation was governed by article 9.[377] Accordingly, the proposal was found to be superfluous.[378] The UNCITRAL did not retain the proposal and finally arrived at the following text, then renumbered as 1978 Draft article 44(1):

> Unless the buyer has declared the contract avoided in accordance with [Draft] article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.[379]

(2) First Committee Deliberations and the Decisions by Plenary Conference

(a) Amendments

The controversy over the relationship between the buyer's right to avoid and the seller's right to cure continued at the Vienna Diplomatic Conference, where amend-

[375] UNCITRAL Yearbook VIII (1977), at 31 (¶ 93); Doc. History, at 324.
[376] UNCITRAL Yearbook VIII (1977), at 31 (¶ 94); Doc. History, at 324.
[377] UNCITRAL Yearbook VIII (1977), at 31 (¶ 94); Doc. History, at 324.
[378] For fuller review of the discussion, see Michida, 27 Am. J. Comp. L. 279, 286-288.
[379] UNCITRAL Yearbook VIII (1977), at 31 (¶ 94); Doc. History, at 324.

ments were submitted to Draft article 44(1) by the Federal Republic of Germany[380], Singapore[381], Bulgaria[382], Japan[383] and the United States of America.[384] These amendments were to the following effect:

(i) Proposals of the Federal Republic of Germany, Bulgaria and Japan

In the view of the delegations of Bulgaria, the Federal Republic of Germany and Japan, the existing text of Draft article 44 (1) did not achieve a proper balance between the seller's interests and those of the buyer. They criticized that Draft article 44(1) would permit the buyer to immediately declare the contract avoided in the event of non-conformity amounting to fundamental breach of contract, without giving the seller an opportunity to remedy his failure to perform.[385] Explaining its position, the German delegation gave the example of a machine, which had been delivered but did not work. If the seller was prepared to remedy the fault within a reasonable time, the German delegate argued that the seller's right to remedy his failure to perform should prevail over the buyer's rights to avoid the contract.[386] The delegations of Bulgaria[387], the Federal Republic of Germany[388] and Japan[389] then, in separate proposals, proposed deleting the words "[u]nless the buyer has declared the contract avoided in accordance with Draft article 45".[390]

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[380] U.N. DOC. A/CONF.97/C.1/L.140; *reprinted* in Official Records, at 114; Doc. History, at 686.
[381] U.N. DOC. A/CONF.97/C.1/L.148; *reprinted* in Official Records, at 114; Doc. History, at 686.
[382] U.N. DOC. A/CONF.97/C.1/L.160; *reprinted* in Official Records, at 114; Doc. History, at 686.
[383] U.N. DOC. A/CONF.97/C.1/L.164; *reprinted* in Official Records, at 114; Doc. History, at 686.
[384] U.N. DOC. A/CONF.97/C.1/L.203; *reprinted* in Official Records, at 114; Doc. History, at 686.
See also Pre-Conference Proposals, Official Records, at 78-79; Doc. History, at 399-400, made by the International Chamber of Commerce (proposing a rewording of Draft Article 44(1), which would have made it clear that there was no fundamental breach of contract if the defect, although serious in itself, could be easily cured); the Federal Republic of Germany (suggesting that the words "unless the buyer has declared the contract avoided in accordance with [Draft] article 45" be deleted from paragraph (1)) and Portugal (recommending the deletion of the second sentence of paragraph (1) since it already follows from [Draft] article 41).
[385] See comments of the representatives of Germany (Klingsporn, ¶ 38); Bulgaria (Stalev, ¶ 37) and Japan (Hosokawa¶ 46); Doc. History, at 562-563.Official Records, at 341-342.
[386] See comments of the representative of Germany (Klingsporn, ¶ 38); Official Records, at 341; Doc. History, at 562.
[387] U.N. DOC. A/CONF.97/C.1/L.160; *reprinted* in Official Records, at 114; Doc. History, at 686.
[388] U.N. DOC. A/CONF.97/C.1/L.140; *reprinted* in Official Records, at 114; Doc. History, at 686.
[389] U.N. DOC. A/CONF.97/C.1/L.164; *reprinted* in Official Records, at 114; Doc. History, at 686.
[390] For the text of the Draft article45 [= article 49 of the Official Text], see Official Records, at 41; Doc. History, at 431.

These proposals were opposed by several delegations. Most of them objected that they would unjustly deprive the buyer of the right to declare the contract avoided.[391] The Swedish delegation criticized the proposal for its ambiguity. In its opinion, it was not sufficient to delete the first phrase of Draft article 44(1) in order to clarify that the seller's right to remedy prevail over the buyer's right of avoidance. To achieve that end, it would be further necessary to precisely define what constituted a fundamental breach.[392]

The Canadian delegation then suggested setting up an *ad hoc* working group. However, at the request of the German delegation, the Commission first took an indicative vote on the principle behind the identical proposals, namely, whether in Draft article 44 the seller's right to cure should prevail over the buyer's right of avoidance on the understanding that the vote would not affect the proposals themselves.[393] The principle behind the proposals was supported by 14 delegations and opposed by 18.[394]

(ii) Proposal of the United States of America

The U.S. delegation emphasized the close link between Draft article 42[395], under which the buyer could require the seller to either remedy a lack of conformity or deliver substitute goods, and Draft article 44 under which the seller could remedy failure to perform or deliver substitute goods. It took the view that if the buyer, invoking his rights under Draft article 42, demanded substitute goods, and the seller, based on Draft article 44, offered to remedy, it would be reasonable to allow the seller to do so, and that was the purpose of their amendment.[396] The U.S. delegation proposed revising the first sentence of paragraph (1) of Draft article 44 as follows (new language in italics):

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[391] See the comments of the delegations of Iraq (Sami, ¶ 42), India (Kuchibhotla, ¶ 51); Argentinia (Boggiano, ¶ 55); Chile (Eyzaguirre, ¶ 56); Australia (Bennett, ¶ 43), United Kingdom (Feltham, ¶ 44); Official Records, at 341-343; Doc. History, at 562-564.

[392] See Official Records, at 341-343 (¶ 48); Doc. History, at 562-564.

[393] See the comments of the delegation of Canada (Ziegel, ¶ 52) and the Federal Republic of Germany (Klingsporn, ¶ 58), Official Records, at 342-343; Doc. History, at 563-564.

[394] See Official Records, at 343; Doc. History, at 564.

[395] For the text of the Draft article 42 [=article 46 of the Official Text], see Official Records, at 38; Doc. History, at 428.

> Unless the buyer has declared the contract avoided in accordance with [Draft] article 45 *and regardless of any right of the buyer under* [Draft] *article 42*, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.[397] [emphasis in the original]

Alternatively, the first sentence of paragraph (1) may commence as follows:

> Unless the buyer has declared the contract avoided in accordance with [Draft] article 45, the seller may, even after the date of delivery *and regardless of any right of the buyer under* [Draft] *article 42*, remedy at his own expense...[398] [emphasis in the original]

The U.S. proposal was rejected without further discussion by 10 votes in favor and 10 against.[399]

(iii) Proposal of Singapore

The delegation of Singapore proposed that the words "without such delay as will amount to a fundamental breach of contract" in the first sentence of paragraph (1) be replaced by the words "without unreasonable delay".[400] It explained that its proposal was intended to make it easier to understand the principle espoused in Draft article 44(1). According to the existing text, a seller who committed a breach of contract could not remedy until the consequences of the delay in performance had been assessed.[401] As the paragraph did not make clear how to assess delay or how to determine whether that delay represented a fundamental breach of contract, it would be simpler to allow the seller to remedy, provided he could do so without unreasonable delay.[402]

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[396] See comments of the U.S. delegation (Farnsworth, ¶ 32); Official Records, at 352; Doc. History, at 573.

[397] U.N. DOC. A/CONF.97/C.1/L.203; *reprinted* in Official Records, at 114; Doc. History, at 686.

[398] U.N. DOC. A/CONF.97/C.1/L.203; *reprinted* in Official Records, at 114; Doc. History, at 686.

[399] See Official Records, at 352 (¶ 34); Doc. History, at 573.

[400] U.N. DOC. A/CONF.97/C.1/L.148; *reprinted* in Official Records, at 114; Doc. History, at 686.

[401] See the comments by the delegation of Singapore (Khoo, ¶ 82), Official Records, at 344; Doc. History, at 565.

[402] *Id.*

(b) Joint Proposal of the Member of the ad hoc Working Group

The Working Group, consisting of the representatives of Bulgaria, Canada, the German Democratic Republic, the Federal Republic of Germany, the Netherlands, Norway, and the United States of America submitted the following joint proposal:

(i) Alternative I:

Revise paragraph (1) of Draft article 44 to read as follows:

The seller may remedy at his own expense the failure to perform his obligations only if this is consistent with the reasonable interests of the buyer, does not cause him unreasonable inconvenience and the resulting delay does not amount to a fundamental breach of contract. The buyer retains any right to claim damages as provided for in this Convention.[403] [emphasis in the original]

At the end of Draft article 45(1)(a) [= article 49(1)(a) of the Official Text], add the following words:

...and the seller does not remedy the failure in accordance with article 44.[404] [emphasis in the original]

(ii) Alternative II:

Revise paragraph (1) of Draft article 44 to read as follows:

Subject to [Draft] article 45 the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so *without unreasonable delay* and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.[405]
[emphasis in the original]

The delegations of Bulgaria and Norway explained the joint proposal. The representative of the Bulgarian delegation emphasized that it was intended to guarantee the seller's right to remedy a failure to perform while at the same time safeguarding the legitimate interests of the buyer, who must be assured that the contract would be exe-

[403] U.N. DOC. A/CONF.97/C.1/L.213; *reprinted* in Official Records, at 115; Doc. History, at 687. The Federal Republic of Germany and Bulgaria withdrew their amendments in favor of the joint proposal; see Official Records, at 352 (¶ 12); Doc. History, at 573.

[404] U.N. DOC. A/CONF.97/C.1/L.213; *reprinted* in Official Records, at 115; Doc. History, at 687.

[405] U.N. DOC. A/CONF.97/C.1/L.213; *reprinted* in Official Records, at 115; Doc. History, at 687.

cuted.[406] Explaining the different alternatives, the Norwegian delegation stressed that Alternative II deleted the reference to fundamental breach. It also made Draft article 44 subject to Draft article 45, since the buyer must preserve his right to declare the contract avoided. The formula of unreasonable delay replaced that of delay "not amounting to a fundamental breach", since the new formula was more flexible and offered a remedy which suspended the buyer's actual avoidance of the contract under Draft article 45.[407]

Having been criticized for introducing new conditions and elements[408], alternative I of the joint proposal was rejected by 7 votes in favor and 17 against.[409] Paragraph (1) of Alternative II of the joint proposal was adopted in place of paragraph (1) as adopted by the Commission by 19 votes in favor and 7 against.[410] A Greek proposal to replace the words "[s]ubject to [Draft] article 45" at the beginning of paragraph (1) of alternative II with the words "[s]ubject to the contract not having been declared avoided in accordance with [Draft] article 45" found no support.[411] At the Plenary Conference Draft article 44 was adopted *in toto* by 42 votes to 2, with two abstentions.[412]

3. Conclusion (The Meaning of the Concept of Fundamental Breach in Light of the Convention's Legislative History)

The examination of the legislative history has demonstrated that the drafters of the Convention were primarily concerned with formulating a text, which would provide a

[406] See the comments by the delegation of Bulgaria (Stalev, ¶ 6), Official Records, at 351; Doc. History, at 572.

[407] See the comments by the delegation of Norway (Rognlien, ¶ 9), Official Records, at 351; Doc. History, at 572.

[408] See the comments of the Swedish delegation, see Official Records, at 352 (Hjerner, ¶ 17); Doc. History, at 573.

[409] See Official Records, at 352 (¶ 19); Doc. History, at 573.

[410] *Id.* After the adoption of paragraph (1) of Alternative II of the joint proposal, Singapore's own proposal became superfluous and was withdrawn accordingly. See Official Records, at 352 (¶ 36); Doc. History, at 573.

[411] See Official Records, at 352 (¶ 29, 30); Doc. History, at 573.

Only the delegation of the former Czechoslovakia (Cuker, ¶ 27) shared the Greek delegation's opinion. In the Czech delegation's view, the new wording of paragraph (1) was open to a number of interpretations and it was therefore desirable to refer the text to the Drafting Committee to make the necessary modifications; see Official Records, at 352; Doc. History, at 573.

[412] See Official Records, at 211; Doc. History, at 746.

more objective test in determining fundamental breach, as under ULIS article 10.[413] To that end they introduced a "reasonable person" as standard and made express reference to the aggrieved party's "expectation under the contract". With regard to the various factors employed in determining the fundamental nature of a breach, the Convention's legislative history gives rise to the following analysis:

(1) The debate over the German proposal which, together with the Pakistani proposal, formed the basis for reference to the aggrieved party's "expectation under the contract" makes clear that not only the terms of the contract are relevant in the determination of fundamental breach, but so too are the surrounding circumstances. The *travaux préparatoires* of article 25 thus confirms the approach, which employs the *nature of the contractual obligation* as a relevant factor in the determination of fundamental breach.

(2) One must ask whether the *remedy-oriented* approach is excluded by the fierce criticism of the United Kingdom's proposal and its subsequent withdrawal. In the present writer's view, this question cannot be answered in the affirmative. The proposal of the United Kingdom was intended to introduce the notion of adequacy of damages, as applied in the Common Law to determine the availability of specific performance, to the Convention's remedies the availability of which depends on a fundamental breach, namely avoidance and substitute delivery.[414] The basic approach under the Common Law is that specific performance is a discretionary remedy available only when damages are inadequate.[415] Such inadequacy is admitted, for example, where the object of a contract is unique and cannot be duplicated, or where obtaining a substantial equivalent involves difficulty, delay, or inconvenience.[416] Another factor taken into account is the difficulty of assessing and recovering damages.[417] Even where there is no such difficulty in qualifying the loss, damages may be an inadequate remedy because the ag-

[413] For similar conclusions, see Michida, 27 Am.J.Comp.L. 279, 285-286 (1979); Schlechtriem, Uniform Sales Law, at 58-59; Gonzalez, 2 Int'l Tax & Bus. L. 79, at 86 (1984)(stating that the new definition under the Convention shifts the burden of proving foreseeability to the party in breach, thereby alleviating the significant burden of proof which ULIS placed on the buyer).

[414] See the critical comments by the delegations of Ghana (Date-Bah, ¶ 8), Official Records, at 302; Doc. History, at 523.

[415] See Treitel, Remedies, at 16-30.

[416] See Treitel, Remedies, at 16-31; Kronman, 45 U.Chi.L.Rev. 351, at 358 (1978).

[417] See Treitel, The Law of Contract, at 920.

grieved party's loss is difficult to prove[418], because certain items of loss may not be legally recoverable[419], because only nominal damages would be claimable[420], or simply because the debtor may not be "good for the money".[421]

Ignoring the fact that not all of these factors are applicable in connection with the remedies of avoidance and substitute delivery[422], the remedy-oriented approach as introduced by (civilian) scholars and (civilian) courts cannot be compared with the Common Law doctrine of adequacy of damages. It does not introduce any test of adequacy of damages in the sense that avoidance or substitute delivery could only be required if damages were an inadequate remedy. The stress is rather on whether the aggrieved party especially needs this remedy - as opposed to damages – in the light of the circumstances to compensate for the detriment.[423]

It is true that some factors making the damage remedy available under the Common Law are also of significance in the remedy-oriented approach, such as difficulties in assessing damages.[424] Unlike under the latter approach, however, the Common Law gives no consideration to making specific performance available on the grounds that it is unreasonable for the buyer to run the risk of getting involved in a dispute with the seller whether he had sold the goods for a reasonable price and thus observed his duty to mitigate. On the contrary, under the Common Law one argument to support the existing doctrine is that the breaching party would lose the benefit of the mitigation rule if specific performance were the primary remedy.[425]

Moreover, the doctrinal basis and rationale for the remedy-oriented approach is completely different than the Common Law notion of adequacy of damages. The

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[418] See *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.*[1971] 1 W.L.R. 361.

[419] See *Hill v. C.A. Parsons Ltd.* [1972] 1 Ch. 305; *Evans Marshall & Co. Ltd. v. Bertola S.A.* [1973] 1 W.L.R. 349.

[420] See *Beswick v. Beswick*, [1968] A.C. 58.

[421] *See Evans Marshall & Co. Ltd. v. Bertola S.A.* [1973] 1 W.L.R. 349, at 380; *The Oakworth* [1975] 1 Lloyd's Rep. 531, at 583; *The Oro Chef* [1983] 2 Lloyd's Rep. 509, at 521.

[422] For example, where the subject matter is unique substitute delivery is impossible.

[423] For a similar conclusion, see, Diederichsen, 14 J.L. & Com. 177, 180 (1995).

[424] See *supra* Part II, B.1.b.(3).

[425] See Treitel, The Law of Contract, at 919 (stating that where, in a rising market, the buyer fails to make a substitute purchase, awarding him specific performance in such case would conflict with the principles of mitigation).

Common Law doctrine has its roots in the historical and jurisdictional conflict between Common Law courts and the Courts of Equity and the reluctance to use the process of contempt of court to redress private wrongs where less drastic methods of enforcement could do adequate justice to the plaintiff.[426] At present, based on the notion of contract law as a means of promoting economic efficiency, scholars increasingly justify this doctrine on economic grounds. They argue that that the total cost of a breach is minimized by recognizing a right to break contracts, so long as the breaching party is able to fully compensate the innocent party and to remain better off than before.[427] The remedy-oriented approach introduced by scholars and courts, on the other hand, is primarily based on the notion that avoidance and substitute delivery should be last-resort remedies to preserve the contract if at all feasible and to avoid economic waste in international trade.[428]

Aside from these theoretical arguments, one must also consider that the United Kingdom proposal was not formally put to vote. Admittedly, it was apparent that the proposal would not receive the necessary support of the delegates at the Diplomatic Conference and that the United Kingdom's delegation withdrew it for that reason. The lack of support, however, does not mean that the adequacy of damages factor cannot at all be employed in determining fundamental breach. What one can conclude from the opposition to this proposal is that the adequacy of damages should not be the only relevant factor. The remedy-oriented approach is therefore not excluded by the legislative history of the concept of fundamental breach.

(3) The discussion of the relationship between the seller's right to cure and the buyer's right to avoidance during the deliberations within UNCITRAL and at the Diplomatic Conference does prevent using the approach which determines fundamental breach in the light of an *offer to cure*. None of the proposals aimed at precluding the buyer's right to avoidance in favor of the seller's right to cure was adopted. It might be true, as some authors in support of that approach have argued, that the rejection of

[426] See Treitel, Remedies, at 16-30 to 16-31.

[427] See Schwartz, 89 Yale L.J. 271 (1979); Linzer, 81 Colum.L.Rev. 111, at 134-138 (1982); Kronman, 45 U. Chi.L.R. 351 (1978); Posner, Economic Analysis, at § 4.11; Waddams, Law of Contracts, at § 663.

[428] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223, Part II, C.2.c.

the U.S. proposal to amend the definition of fundamental breach within UNCITRAL was partly based on misunderstandings.[429] This argument, however, does not apply to the rejection of the various proposals made at the Diplomatic Conference where the controversy over the effect of an offer to cure continued.

Moreover, the majority of the delegations to the Diplomatic Conference expressed their will that the right to cure should not prevail over the right to avoidance, although admittedly just in an indicative vote. On the other hand, in conjunction with the many failures to incorporate into the cure provision a language which would have given the buyer's right to cure priority, this vote becomes conclusive, and any recourse to an existing offer to cure could only be considered a distortion of the Convention's legislative history.

(4) The question remains, however, if the approach looking at the *possibility to cure* is also excluded by the *travaux préparatoires*. Whether the mere possibility of cure prevents a breach from being fundamental was not discussed. The controversies within UNCITRAL and at the Diplomatic Conference arose primarily out of the fact that article 48(1) gives only the seller the right to cure and, therefore, an offer must be made by him. The approach focusing on whether cure is possible, however, only looks at the curability of the breach in general. It requires neither an offer to cure by the seller nor that the cure will be carried out by himself. Rather, the buyer can charge another person to remedy the defect or remedy it himself and claim damages. Thus, it seems possible to argue that this approach is not excluded by the Convention's legislative history.

[429] See Michida, 27 Am.J.Comp.L. 279, at 288 (1979), where the author comments on the discussion of the U.S. proposal as follows:

> After an hour's discussion it appeared that a majority did not support this proposal. Opposition was partly based upon misunderstanding: one argument, for example, emphasized that the problem was fully covered by the specific provision dealing with the right to cure. This was plainly an error; as was clearly explained during the discussion, the specific provision on cure (now art. 44 of the Draft Convention) is limited to cure by the seller while the new language was designed to extend similar protection to the buyer. But, as we have seen, there was no opportunity to consider the draft in the plenary session of UNCITRAL. [footnotes omitted]

(5) Concerning the *relevant time* when the party in breach had to foresee or should have foreseen the detrimental consequences to the other side, the legislative history, at first glance, seems to oppose the view focusing on the formation of the contract. One might follow from the deliberations within UNCITRAL and the withdrawal of the proposal of the United Kingdom at the Diplomatic Conference, which would have made the formation of the contract the determining point in time, that also information received by the breaching party about the other party's special interest after the conclusion of the contract must be taken into account. On the other hand, as rightly pointed out by one author, the opposing viewpoints in the discussion at the Diplomatic Conference were still based on the objective fundamental breach definition in article 23 of the 1978 Draft Convention, in which the extent of the detriment was the only determinative factor.[430] It therefore seems possible to conclude that the present version, in which the decisive factor is the interest of the party concerned, as fixed by the terms of the contract, also deems the conclusion of the contract as being the relevant time at which foreseeability is evaluated.[431]

(6) The Convention's legislative history provides no assistance concerning the permissibility of using the other approaches for the purpose of determining fundamental breach. Whether the legislative history of the various cross-references to fundamental breach offers more help will be examined separately in the next section, in conjunction with the respective provision referring to fundamental breach.

C. The Concept of "Fundamental Breach" in Context

The method of systematic interpretation requires analysis of a provision within its context and its relation to other provisions. As a method primarily aimed at avoiding conflicting interpretations within a given instrument, in most cases, it can only confirm the correctness of a possible interpretation already achieved by looking at the wording and the legislative history of the provision in question. The following analysis thus focuses on whether the different factors (including the additional criteria provided by the

[430] See Schlechtriem, Uniform Sales Law, at 60.

UNIDROIT Principles) employed to determine fundamental breach conform to the structure of the Convention's remedial system (1.), the various cross-references to fundamental breach (2.), and the few provisions under the Convention giving the parties the right to avoidance without requiring a fundamental breach (3.). Moreover, possible limitations on the concept of fundamental breach will be discussed (4.), and finally, we will ask and answer whether the regime of the seller's obligations under the Convention may influence the definition of fundamental breach (5.).

1. Remedial System of the Convention

a. Uniform Concept of Breach and the Notion of Fundamental Breach

The Convention provides a section on remedies available to each of the parties. Article 45(1) gives an overview of the remedies available to the buyer in the event of breach, namely specific performance (in the form of the right to delivery, substitute delivery and repair), avoidance, compensatory damages, and reduction in price.[432] The seller's remedies are enumerated at article 61(1).[433] They differ from the remedies available to the buyer for obvious reasons in two respects. First, the remedy of claiming a reduction in price is not available to the seller. Second, there is no need for substitutional performance or requiring the buyer to cure a defect in his performance.[434]

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[431] See Schlechtriem, Uniform Sales Law, at 60.

[432] For the text of article 45(1) see *supra* note 270.

[433] For the text of article 61(1) see *supra* note 270.

[434] Although articles 46 and 62 are phrased in terms of the "rights" of the parties, the Secretariat Commentary clearly indicates that they were intended to act as directives to a court in the event of litigation. The commentary on Draft article 42 [=article 46 of the Official Text], para. 8, Official Records, at 38; Doc. History, at 428, states:

> The style in which [Draft] article 42 in particular and Section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief. However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 42(1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law. [footnote omitted]

See also Secretariat Commentary on Draft article 58 [=article 62 of the Official Text], para. 5, Official Records, at 48; Doc. History, at 438 (similar discussion of the drafting style of article 62).

Under the Convention, the notion of breach of contract covers all failures of a party to perform any of his obligations, no matter whether the obligation has its origin in the contract, in a usage or in the Convention itself. Moreover, there is no distinction between "main" and "subordinate" obligations.[435]

Unlike under ULIS, the remedies available under the Convention are no longer differentiated on the basis of a particular type of breach.[436] In general, the type of the breach is of no importance in determining which remedies are available under the Convention. This principle is subject to two exceptions. First, substitute delivery and reduction in price are only available in case of the delivery of non-conforming goods. Whether goods, which are not free of third party rights (in the sense of articles 41 and 42), can be considered non-conforming is disputed.[437] Secondly, in cases of non-delivery and non-payment or failure to take delivery, the buyer's or the seller's right of avoidance, respectively, is subject to a *Nachfrist* procedure which allows avoidance only after having fixed a reasonable length of time for the defaulting party to remedy his non-performance.[438]

Under the Convention, apart from the damages remedy, avoidance and substitute delivery are only available when a fundamental breach is given. Thus, it seems plausible to conclude that the starting point of the Convention's remedial system is that damages are adequate to compensate the aggrieved party, and that avoidance and substitute delivery are last-resort remedies available only when damages are inadequate. The

[435] See Enderlein, Rights and Obligations of the Seller, at 187.

[436] ULIS differentiated, *i.a.*, between remedies for the seller's failure to perform his obligations as regards the date and place of delivery (ULIS articles 24-32), remedies for lack of conformity (ULIS articles 41-49), remedies for non-payment (ULIS articles 61-64). For the text of ULIS, see *supra* note 46.

[437] This question was not raised at the Vienna Diplomatic Conference when article 46 was discussed. Since the debates were concerned with physical defects, some authors view the scope of the provision as being limited to physical defects. See, *e.g.*, Huber, in: Schlechtriem, Art. 46 N. 27 (stating that though it may seem permissible to regard goods encumbered with third party rights or claims as being in "conformity with the contract", claiming that the Convention uses the terms "conformity of the goods" and goods that "do not conform with the contract" in a technical sense, covering only cases falling under article 35); for a similar view, see Piltz, Internationales Kaufrecht, § 5 N. 147.

For the different view, see Will, in: Bianca/Bonell, Art. 46, at 3.1 (arguing that the wording and the purpose of article 46(1) allow the conclusion that the obligation to deliver goods free of any rights or claims by third parties is included); see also Enderlein/Maskow, International Sales Law, Art. 46, at 3; Audit, Vente internationale, note 128.

structure of the Convention's remedial system, therefore, supports the *remedy-oriented* approach introduced by scholars and the courts[439], which applies to situations where non-conforming goods were delivered. By the same token, it allows the conclusion that the *amount of damages* suffered is not decisive in the determination of fundamental breach.

It should also be noted that under the Convention, "fault" is not generally a prerequisite to a finding of contractual liability and that this principle is as true with respect to the right to avoid the contract as it is in relation to the right to require substitute delivery or to claim for damages. Neither remedy depends on "fault" in the sense of deliberate or negligent wrongdoing. Consequently, there is no room for the application of the approach found in the UNIDROIT Principles treating intentional non-performance as fundamental.[440]

b. The Concept of Fundamental Breach and Party Autonomy (Article 6)

The principle of freedom of contract as set out in article 6 is one of the cornerstone principles underlying the Convention.[441] According to article 6,

> [t]he parties may exclude the application of this Convention or, subject to article 12, derogate or vary from any of its provisions.

The debates of the Vienna Diplomatic Conference confirm that article 6 is to be interpreted at face value and that parties may indeed derogate from or vary the effect of all of the provisions of the Convention with the exception of article 12.[442] A sugges-

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[438] See *infra* Part III, C.3.a.

[439] See *supra* Part II, B.1.b.(3); C.2.c.

[440] See *supra* note 191.

[441] For similar statements, see, *e.g.*, Bonell, in: Bianca/Bonell, Art. 6, at 1.1; Winship, Scope of the Vienna Convention, at 9-31; Samson, La vente: C.V.I.M., at 234, and Report, comment on Art. 25, para. 4.

[442] See Official Records, at 247-248; Doc. History, at 468-469.

See also para. 1 of the Secretariat Commentary on article 5 of the 1978 Draft Convention (=article 6 of the Official Text)(stating that the parties "may derogate or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention").

Article 12 aims at serving the special demands of those states the legal systems of which impose written form for contracts of international sales for purposes of validity, evidence, and administrative control. It provides:

> Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, accep-

tion that the principle of party autonomy should be limited by the concept of good faith was rejected with relatively little debate.[443] Accordingly, not only may the parties determine the content and extent of their obligations by adopting provisions in their contract different from the default rules in the Convention, but they may also indicate the circumstances under which the failure to perform by one party amounts to a fundamental breach. The principle of party autonomy thus requires looking at the *nature of the contractual obligation* for which strict performance might be essential.

2. Cross-References to Fundamental Breach

There are several cross-references to the concept of fundamental breach in the Convention: articles 46(2), 49(1)(a), 51(2), 64(1)(a), 72(1), 73(1), and (2).[444] Except for article 46(2), which is concerned with substitute delivery, all of the other provisions deal with the right of the parties to avoid the contract in specific situations. First, we will examine the various avoidance provisions (a.); and then we will analyze the buyer's right to demand substitute delivery (b.).

a. Fundamental Breach and Avoidance of the Contract

(1) Seller's Fundamental Breach: Articles 49(1)(a) and 51(2)

Articles 49(1)(a) and 51(2) deal with fundamental breach committed by the seller.

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tance or other indication or intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties *may not derogate from or vary the effect of this article*. [emphasis added]

[443] The proposal of the Canadian delegation aimed at limiting the principle of party autonomy was rejected after little debate. See the critical comments by the delegations of Norway (Rognlien, ¶ 57), Sweden (Hjerner, ¶ 58), United States (Farnsworth, ¶ 60), the Republic of Korea (Kim, ¶ 61), and Belgium (Dabin, ¶ 62). The Canadian proposal (U.N. DOC. A/CONF.97/C.1/L.10) to revise Draft article 5, as orally amended by the delegation of the German Democratic Republic, read as follows:

(1) The parties may exclude the application of this Convention or, subject to [Draft] article 11, derogate from or vary the effect of any of its provisions. However, except where the parties have wholly excluded the Convention, *the obligations of good faith*, diligence and reasonable care *prescribed by this Convention may not be excluded*.

(2) ... [emphasis added]

For the Canadian Proposal, as orally amended, see Official Records, at 86; Doc. History, at 658. For the critical comments, see Official Records, at 247-248; Doc. History, at 468-469.

According to article 49(1)(a) 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.

When the seller delivers only a part of the goods, or if only a part of the goods delivered conforms to the contract, article 51(2) provides that:

> The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract.

The express reference to the "obligations under the contract" in articles 49(1)(a) confirms the approach focusing on the *nature of the contract terms* in determining fundamental breach.

Concerning article 51(2) it has been argued that one important factor in determining whether the nonconformity of some of the goods or the incomplete delivery entitles the buyer to avoid the entire contract is, if the breach renders the intended use of the remainder impossible.[445] Article 51(2) therefore seems to support, at least in respect of the failure to make delivery completely or not fully in conformity with the contract, the approach, which asks whether the *purpose of the contract* has been frustrated due to the breach.

(2) Buyer's Fundamental Breach: Article 64(1)(a)

Article 64(1)(a) deals with the buyer's fundamental breach and runs parallel to article 49(1)(a).[446] It therefore does not add anything to the conclusion as for article 49(1)(a).

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[444] Article 70 also deals with fundamental breach but is not concerned with remedies. It is rather concerned with the effect of a breach by the seller on the passing of the risk.

[445] See Huber, in: Schlechtriem, Art. 51 N. 5 (stating that avoidance under article 51(2) requires that partial delivery must be of no interest to the buyer); see also Honnold, Uniform Law, at § 317 (noting that "[o]ne of the purposes of paragraph (2) of Article 51 is to make clear that paragraph (1) does not force the buyer to sort out the non-conforming goods for separate handling").

The U.S. Uniform Commercial Code achieves a similar result by providing (§2-608) for the revocation of acceptance of a "commercial unit", which is defined (§2-105(6)) as a unit which "by commercial usage is a single whole for the purpose of sale and division of which materially impairs its character or value on the market or in use".

[446] Article 64(1) provides in part:

(3) Anticipatory Fundamental Breach: Article 72

Article 72 allows a contract to be avoided when one party's breach is anticipated by the other. It reads:

> (1) If prior to the date for performance of the contract it is *clear* that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
> (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
> (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations. [emphasis added]

The text of paragraph (1) itself does not offer much assistance in the determination of fundamental breach.[447] In the context of paragraph (3), it is possible to conclude that those cases where it is clear that the promisor will not perform his future obligations are envisaged by the reference to fundamental breach under paragraph (1).[448] The question remains, however, which particular act or occurrence justifies the conclusion that the promisor will not perform? Is the application of article 72(1) limited to cases in which non-performance is absolutely certain? If so, the right to avoidance should be granted only where the promisor is unable to perform. But what then would be the function of paragraphs (2) and (3)?

The seller may declare the contract avoided:
(a) 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; ...

[447] For a similar statement, see Schlechtriem, Uniform Sales Law, at 95 (stating that it is not clear from the wording of paragraph (1) when a particular act or occurrence justifies the conclusion that a fundamental breach is to be expected).

Neither does the official ULIS commentary on ULIS article 76, which is basically recapitulated by Article 72(1) provide any further illumination. There it is elaborated that avoidance due to an anticipatory breach is fully justified since it would not be "right that one party remains bound by the contract when the other has, for instance, deliberately declared that he will not carry out one of his fundamental obligations or when he conducts himself in such a way that it is clear that he will commit a fundamental breach of contract". See Tunc, Comentary of the Hague Convention, at 88.

[448] For a similar conclusion, see Leser, in: Schlechtriem, Art. 72 N. 21 (stating that if the party threatening to breach the contract refuses to provide adequate assurance or does not react to the notice within a reasonable time, the contract may be avoided without further delay).

At first glance, it seems that paragraph (2) limits the right of avoidance to those cases in which the promisor fails to provide adequate assurance following a reasonable notice by the promisee, and that paragraph (3) exempts the promisee from the notice requirement in case of the promisor's refusal to perform.[449]

The Secretariat Commentary on the Draft article 63[450] shows confirmation of such understanding. Since article 72(1) is identical with Draft article 63, with the one exception that the Official Text refers to "a fundamental breach of contract" rather than a "fundamental breach", the Secretariat Commentary is of special relevance. It states, *inter alia*, that:

> The future fundamental breach may be *clear* either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance.[451]
> [emphasis added]

In the absence of such "clear" cases, the Secretary Commentary states that:

> The *failure by a party to give adequate assurance* that he will perform when properly requested to do so under [Draft] article 62(3) may help make it "clear" that he will commit a fundamental breach.[452]
> [emphasis added]

Draft Article 62(3) [= article 71(3) of the Official Text], which deals with the parties' right to suspend performance, on the other hand, provides that:

> A party suspending performance, whether before or after the dispatch of the goods, must immediately give notice thereof and must continue

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[449] For a different conclusion, see Strub, 38 Int'l Comp.L.Q. 475, at 498 (1989)(stating that a failure to respond to a request for assurances "is too vague to merit avoidance" under the text of article 72).

[450] Draft article 63 reads as follows (see Official Records, at 53; Doc. History, at 443):
> If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

[451] See para. 2 of the Secretary Commentary on Draft article 63, Original Records, at 53; Doc. History, at 443.

[452] *Id.*

> with performance if the other party provides adequate assurance of his performance.[453]

The text of Draft article 62(3) does not substantially differ from paragraph (2) of article 72, which was added to this article only at the Vienna Diplomatic Conference in order to take into account the concerns of the developing countries who expressed their fears that the power of avoidance might be abused.[454] In the light of these comments, it is therefore possible to conclude that the promisor's failure to provide adequate assurance in accordance with paragraph (2) of article 72 makes it "clear" that he will commit a fundamental breach.[455]

This conclusion, however, in turn gives rise to further questions: (1) Under which circumstances is the promisee entitled to demand adequate assurance of performance from the promisor and what constitutes an adequate assurance? (2) Is the right of avoidance under article 72, where there is no communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance, limited to those cases in which the promisor fails to provide adequate assurance?

What constitutes an adequate assurance varies depending on the circumstances, including the standing and integrity of the promisor, his previous conduct in relation to

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[453] Official Records, at 52; Doc. History, at 442.

[454] The delegate of Egypt (Shafik, ¶ 2), Official Records, at 420; Doc. History, at 641, introducing his delegation's amendments said that "the remedy [in paragraph (1)] whereby a party might proceed directly to avoidance of contract was rather drastic; even if the other party had already been declared bankrupt, his creditors might still be prepared to fulfill the contract...notification should be given in all cases".

[455] For the same conclusions, see Bennet, in: Bianca/Bonell, Art. 71, at 3.7.; Honnold, Uniform Law, at § 394; see also the decisions of the Düsseldorf Court of Appeal and the Berlin District Court where both courts held that failure to provide adequate assurance by the buyer makes it clear that he would not pay the purchase price. See *Oberlandesgericht* Düsseldorf , 14 January 1994, 17 U 146/93, *supra* note 248; Landgericht Berlin, 30 September 1992, 99 O 123/92, *supra* note 249.

Ziegel, Remedial Provisions, at 9-35, takes another position. He argues that a party's failure to provide an adequate assurance of performance is not unequivocal evidence of his unwillingness to perform, "particularly when he may question the validity of the requesting party's feeling of insecurity to bring with". Date-Bah, Perspective of the Developing Countries, at 34, agrees with Ziegel's opinion in that anticipatory breach under article 72(1) "requires proof by the person seeking to avoid the contract of facts from which a conclusion can logically and rationally be reached by induction that the other party is likely to commit a fundamental breach. Mere appearances are not good enough". See also Schlechtriem, Uniform Sales Law, at 96 (stating that refusal to provide adequate assurance "should not in itself be regarded as 'clear' evidence of an impending breach of contract").

the contract, and the nature of the event that creates uncertainty as to his ability and willingness to perform.[456] In general, for such an assurance to be "adequate", it must be such as will give reasonable security to the promisee either that the promisor will perform in fact, or that the promisee will be compensated for all his losses incurred in executing his own performance.[457] In practice, there will only be very few cases where a mere statement of intention and ability to perform provides adequate assurance to the promisee.[458] In most instances a new term of payment against documents, a guarantee by a reputable bank or other such party, or a letter of credit issued by a reputable bank will be required.[459]

When the promisor must provide such assurance depends on the circumstances surrounding the risk of non-performance. In the light of the serious economic consequences arising out of the obligation to provide such adequate assurance itself and the failure to comply with it, a subjective fear by the promisee will not justify a demand for adequate assurance.[460] Rather, as under article 71(1)[461], which sets out the circumstances permitting the parties' right to suspend performance, there must be objective grounds showing a high degree of probability that the promisor will not perform a substantial part of his obligations.[462] Either a serious deficiency in the promisor's ability to perform or in his creditworthiness is required or it must follow from his conduct in preparing to perform or in performing the contract.[463]

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[456] See Honnold, Uniform Law, at § 392 (emphasizing that threats of non-performance may develop under a wide variety of circumstances).

[457] See para. 13 of the Secretariat Commentary on Draft article 62, Official Records, at 53; Doc. History, at 443.

[458] For a similar statement, see Honnold, Uniform Law, at § 392 (stating that "reassuring words" alone cannot provide adequate assurance).

[459] For further examples, see the examples *62E* and *62F* by the Secretariat Commentary on Draft article 62(3), Official Records, at 53; Doc. History, at 443.

[460] For a similar conclusion, see Honnold, Uniform Law, at § 388; Schlechtriem, Uniform Sales Law, at 95 (stating that article 72(2) should primarily apply to situations where the performance of the promisor is jeopardized by objective circumstances).

[461] For the text of article 71(1), see *supra* note 214.

[462] For a similar conclusion, see Honnold, Uniform Law, at § 388.

[463] For a similar conclusion, see Leser, in: Schlechtriem, Art. 72 N. 10 (stating that the reasons mentioned under article 71(1) are also applicable to article 72). For examples of deficiencies in seller's ability to perform and the buyer's creditworthiness, see Bennet, in: Bianca/Bonell, Art. 71, at 2.6. (*e.g.*, where the production at the seller's factories was held up by a strike, which is likely to continue for some time; or where buyer falls behind in his payments to a seller in respect of other contracts).

For example, a buyer's history of making late payments in respect of other contracts might indicate a serious deterioration in his creditworthiness entitling the seller to ask for adequate assurance.[464] On the other hand, the mere fact that the seller made defective deliveries to other buyers with similar needs does not authorize the buyer to ask for assurance. However, if the cause of the seller's defective deliveries to other buyers was the result of using a raw material from a particular source, indications that the seller is preparing to use the raw material from the same source would give the buyer the right to demand adequate assurance.[465]

Whether avoidance based on article 72 is limited to those cases where the promisor failed to provide adequate assurance after having received a reasonable notice is not clear. Neither the wording nor the legislative history neither support nor exclude such a reading.[466] With regard to anticipated non-delivery, non-payment, or failure to take delivery, the synchronism between article 72 and articles 49(1)(b), 64(1)(b) seems to support it. Failure to provide adequate assurance and to respond to a *Nachfrist* notice present analogous questions because the underlying purposes and function of a *Nachfrist* notice and a demand for adequate assurance are analogous. They are aimed at preserving the contract by giving the promisor the opportunity to remove the obstacles

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[464] For a similar example with regard to the promisee's right to suspend his performance, see para. 6 of the Secretariat Commentary on Draft article 62 [= article 71 of the Official Text], Official Records, at 52; Doc. History, at 442.

[465] For a similar example with regard to the promisee's right to suspend performance, see para. 6 of the Secretariat Commentary on Draft article 62 [= article 71 of the Official Text], Official Records, at 52; Doc. History, at 442.

[466] It is true that the proposed amendment by Egypt to link the remedies of avoidance and suspension by replacing Draft article 63 was rejected by 19 votes in favor and 19 against. This amendment reads as follows (see U.N. DOC. A/CONF.97/C.1/L.249; U.N. DOC. A/CONF.97/C.1/L.250; *reprinted* in Official Records, at 130; Doc. History, at 702):

> (1) If the seller has already dispatched the goods before the grounds described in paragraph (1) of [Draft] article 62 become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.
>
> (2) The seller who prevents the handing over of the goods to the buyer under paragraph (1) of this article must immediately give notice to the buyer of his intention to declare the contract avoided should the buyer fail, within a reasonable time, to provide adequate assurance of properly performing his obligations.

The rejection, however, was mainly based on the grounds that the developed countries did not want to lump together the remedies of avoidance and suspension. It therefore does not rule out the conclusion that a failure to provide adequate assurance always constitutes a fundamental breach.

For a fuller review of the discussion about the Egyptian proposal, see Strub, 38 Int'l Comp.L.Q. 475, at 492-493 (1989); Vilus, Provisions Common to Seller and Buyer, at 245.

to perform which give rise to the right to avoidance.[467] While the *Nachfrist* procedure eliminates uncertainty when performance is overdue, the adequate-assurance procedure eliminates uncertainty concerning performance that is not yet due.[468]

Although the *Nachfrist* procedure is not applicable to the delivery of non-conforming goods, the arguments supporting an interpretation of article 72 analogously to articles 49(1)(b) and 64(1)(b) also apply to the anticipated delivery of non-conforming goods. Making avoidance dependent on a failure to provide adequate assurance would not only contribute to preserve the enforceability of the contract, but also eliminate the uncertainty as to when the anticipated delivery of non-conforming goods justifies avoidance. Therefore, it seems plausible to argue that, except for cases where the promisor is unable[469] or unwilling[470] to perform or where the circumstances would not allow for reasonable notice[471], avoidance may *only* be based on the failure of the promisor to provide adequate assurance in compliance with a reasonable notice.[472]

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[467] According to article 72(2), the promisor "must give reasonable notice to the [promisee] *in order to permit him to provide adequate assurance*". [emphasis added]

[468] This point has been emphasized by Flechtner, 8 J.L. & Com. 53-108, footnote 194 (1988), where the author notes that "[i]mperfect assurances and imperfect responses to a *Nachfrist* notice present analogous questions because the functions of a *Nachfrist* notice and a demand for adequate assurance are analogous: the *Nachfrist* procedure eliminates uncertainty when performance is overdue; the adequate-assurance procedure eliminates uncertainty concerning performance that is not yet due").

[469] For example, A promises to deliver oil to B by ship in Hamburg on January 9. On January 4 the ship is still 2000 kilometers from Hamburg. At the speed it is making it will not arrive in Hamburg on January 9, but at the earliest on January 15. As time is of the essence, a substantial delay is to be expected, and B may terminate the contract before January 9.

[470] Whether a demand for new terms or an alleged breach of contract amounts to a declaration not to perform is doubtful. For a similar conclusion, see Honnold, Uniform Law, at § 396 (stating that "[a]voidance should not be triggered if A informs B of the need to negotiate a modification of their agreement"); Magnus, in: Staudinger, Art. 72 N. 27.

For a different conclusion, see Schlechtriem, Uniform Sales Law, at 95, where the author notes that article 72(3) also covers those cases "in which a demand for new terms or alleged contract violations by the other side are used as pretext for not performing one's own obligations"; Stoll, 52 RabelsZ 616, at 642 (1988)(stating that cases where a party without justification put forward defences or demands to have the contract modified or renegotiated require similar treatment than repudiation).

Making performance depend on a modification of the contract, however, must be considered as a refusal to perform. For a similar conclusion, see Honnold, Uniform Law, at § 396; Magnus, in: Staudinger, Art. 72 N. 27.

[471] It has been argued that where the date of delivery is so near that assurances cannot be procured in time, there is no need to notify the other party; see Schlechtriem, Uniform Sales Law, at 95. Honnold, Uniform Law, at § 403, believes that "modern methods of communication" would normally allow the provision of notice without impinging on the aggrieved party's "freedom of action".

[472] Such an understanding would arrive at the same result as when one treats the failure to provide adequate assurance itself as an actual fundamental breach. This course is followed by the UNIDROIT Principles as well as the Principles of European Contract Law.

See article 8:105(2)(Assurance of Performance) of the European Contract Principles [= article of the 3.105(2) of the first version], at http://www.ufsia.be/~estorme/PECL2en.html:

In sum, article 72 confirms the approach, which employs the parties' (in)ability and (un)willingness to perform as a relevant factor in the determination of fundamental breach prior to the date of performance. It also confirms the approach, which focuses on whether a party's behavior may give cause to the other not to rely anymore on his future performance. In this writer's opinion, the no-reliance, however, must be founded on a failure to provide adequate assurance of one party's performance so as to allow the other party to avoid the contract.

(4) Fundamental Breach and Installment Sales: Article 73(1)(2)

Article 73 governs the avoidance of installment sales. While paragraph (1) of article 73 basically repeats the contents of articles 49(1)(a) and 64(1)(a) with respect to the parties' failure to perform a particular installment[473], paragraph (2) deals with future installments. The latter paragraph entitles the aggrieved party to declare the installment contract avoided for the future if the promisor's

> failure to perform any of his obligations in respect of any delivery gives [the aggrieved party] good grounds to conclude that a fundamental breach of contract will occur with respect to future installments.

As under article 72(1), paragraph (2) of article 73 does not itself provide any assistance when a particular act or occurrence justifies the conclusion that a fundamental breach is to be expected.[474] The formulation "good grounds to conclude" seems to

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> Where this assurance [of performance] is not provided within a reasonable time, the party demanding it may terminate the contract if he still reasonably believes that there will be a fundamental non-performance by the other party and gives notice of termination without delay.

UNIDROIT Principles article 7.3.4. (Adequate Assurance of Due Performance), at http://www.unidroit.ord/english/principles/princ.html:

> A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

[473] Article 73 (1) provides:

> In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

[474] According to para. 6 of the Secretariat Commentary on Draft article 64 [= article 73 of the Official Text], Official Records, at 54; Doc. History, at 444, "the test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in it-

require a less strict and more subjective standard for avoidance than under article 72(1).[475] This reading is confirmed by the Secretariat Commentary on the 1978 Draft version of article 73(2), which is identical with the Official Text. There it is expressly stated with reference to the 1978 Draft version of article 72(1) that avoidance of the contract in respect of future deliveries is permitted even though it is not "clear" that there will be a fundamental breach.[476]

The grounds for the assumption that a fundamental breach will occur are different under article 73 from those under article 72. Neither the promisor's failure to provide adequate assurance on the promisee's demand, due to a deterioration of the promisor's creditworthiness, nor his declaration that he will not perform, give the promisee the right to avoid the contract. An actual failure to perform must instead be the basis for avoidance of future installments.[477]

Thus, as far as it concerns future installments, article 73(2) does not support the approach, which considers a party's refusal to perform itself as a fundamental breach. It confirms, however, the no-reliance approach based on an actual breach.

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self is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear".

[475] There is a dispute among scholars whether the different formulations under articles 71(1)("it becomes apparent"), article 72(1)("clear") and article 73(2)("good grounds to conclude") require different degrees of certainty. Some authors hold the view that there is a gradation of remedies, increasing from article 71(1) via article 73(2) to article 72 in the sense that the latter requires the highest degree of certainty. They argue that not the different wording itself enables any distinction to be drawn, but the severity of the remedy's interference with the contract. Avoidance of the contract for the future under article 73(2), as a reaction of a breach of contract, although not necessarily fundamental in nature, is at a lesser level than avoidance of the whole contract. See Leser, in: Schlechtriem, Art. 73 N. 23; Magnus, in: Staudinger, Art. 73 N. 22 and Art. 72 N. 9.

Other authors conclude from the wording and the fact, that in the setting of article 73(2)(unlike the situations invoking articles 71 and 72) a breach of contract has already occurred, that a less strict and more subjective standard for avoidance is required. See, *e.g.*, Honnold, Uniform Law, at § 401; Bennett, in: Bianca/Bonell, Art. 73, at 3.3.

Schlechtriem, Uniform Sales Law, at 96, takes the view that the different formulations under articles 71(1), 72(1) and article 73(2) do not require different degrees of certainty. He argues that the decisive factor is "whether a reasonable person would be convinced that a breach of contract is certain to occur".

[476] See para. 5 of the Secretariat Commentary on Draft article 64, Official Records, at 54; Doc. History, at 444.

[477] For this conclusion, see Bennett, in: Bianca/Bonell, Art. 73, at 3.3 (stating that it is doubtful whether the grounds for the assumption that a fundamental breach will occur can derive from the bankruptcy of the other party or a statement by him that he does not intend to perform his obligations with respect to future installments); Enderlein/Maskow, International Sales Law, Art. 73, at 7.

b. The Concept of Fundamental Breach and the Duty to Deliver Substitute Goods (Article 46(2))

(1) Fundamental Breach in the Light of the Text of Article 46(2)

Article 46(2) is a specific case of the buyer's right to demand specific performance.[478] It gives the buyer the right to substitute delivery where the lack of conformity constitutes a fundamental breach of contract.[479]

Since this remedy applies only to the delivery of non-conforming goods and requires that delivery actually have occurred, article 46(2) does not apply when the seller has not delivered at all. In such a case the buyer has "only" the general right to demand specific performance under article 46(1). Consequently, the approach focusing on one party's (in)ability or (un)willingness to perform at all as a relevant factor in the determination of fundamental breach cannot be employed. Neither can the no-reliance approach be employed under article 46(2) since, as under articles 49(1)(a), 51(2) and 64(1)(a), no future performance is due other than the remedying of the non-conforming goods itself.

(2) Fundamental Breach and the Legislative History of Article 46(2)

The approach of the UNIDROIT Principles, focusing on whether the breaching party will suffer disproportionate loss as a result of the preparation or performance if the contract is avoided, has not been introduced into the Convention. The rationale for that approach, namely to treat non-performance after the preparation of performance less likely as fundamental than non-performance before such preparation[480], has not

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[478] Article 46(2) provides:

> If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

[479] Enderlein/Maskow, International Sales Law, Art. 46, at 3.

[480] See comment e. on UNIDROIT art. 7.3.1 (stating that "[n]on performance is less likely to be treated as fundamental if it occurs late, after the preparation of performance, than if it occurs early before such preparation").

been reported as subject of deliberations within UNCITRAL or at the Vienna Diplomatic Conference.

As for the buyer's right to substitute delivery, however, consideration was given to limit the exercise of this right to avoid hardship on the seller. Since the seller is in the same economic position as when the buyer had chosen avoidance of the contract[481], it seems useful to examine the legislative history of Article 46(2) and decide whether it can support the application of the UNIDROIT Principles approach.

(a) Deliberations within the UNCITRAL

During the preparatory work for the Convention there was some controversy as to whether or not the buyer's right to demand cure should me made explicit in the text, and whether there should be any limitations on the exercise of the buyer's rights to demand cure and substitute delivery. Under one view, the right to require cure should be limited to cases of fundamental breach and, if the goods have been delivered, the cure should not cause the seller unreasonable inconvenience or unreasonable expense.[482] Another view was that there should be no limitations on the right of the "innocent" party to require that the party in breach perform the contract.[483] A Special Working Group then proposed the following limitations on the buyer's right to demand cure (2) and substitute delivery (3)[484]:

> (2) The buyer may require the seller to remedy a lack of conformity in the goods by repairing them only if the seller can do so without unreasonable inconvenience or unreasonable expense.
> (3) The buyer may require delivery of substitute goods if the lack of conformity constitutes a fundamental breach and it is *reasonably practicable* for the seller to supply substitute goods.
> [emphasis added]

[481] For a similar statement, see Will, in: Bianca/Bonell, Art. 46, at 2.2.1.2.
Where the buyer asks for substitute delivery the seller has to cover not only the costs of disposing of the non-conforming goods, as is the case when the buyer avoided the contract, but also of shipping a second lot of goods to the buyer. The costs to the seller arising out of the exercise of the remedy of substitute delivery thus might be considerably higher than of the avoidance remedy.
[482] See UNCITRAL Yearbook VIII (1977), at 43 (¶ 247); Doc. History, at 336.
[483] See UNCITRAL Yearbook VIII (1977), at 43 (¶ 248); Doc. History, at 336.

In support of the proposed text, it was stated, *inter alia*, that if the costs to the seller of curing defects or of supplying substitute goods were prohibitive, then the buyer should be compelled to accept damages.[485] This rule would coincide with the principle of mitigation of damages set out in article 59 [=article 77 of the Convention].[486] Those who opposed the proposed text reiterated that the right to demand performance should not be subject to any pre-conditions.[487] UNCITRAL did not retain the proposal[488] and accordingly no limitation on the exercise of the buyer's right to substitute delivery was introduced in the text of the 1978 Draft Convention.[489]

(b) First Committee Deliberations and the Decisions by Plenary Conference

At the Vienna Diplomatic Conference the controversy continued. The amendments submitted by the delegations of Norway[490], Denmark[491], Finland[492], and Sweden[493] to

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[484] See UNCITRAL Yearbook VIII (1977), at 43 (¶ 251); Doc. History, at 336.

[485] See UNCITRAL Yearbook VIII (1977), at 44 (¶ 254); Doc. History, at 336.

[486] See UNCITRAL Yearbook VIII (1977), at 42 (¶ 254); Doc. History, at 335.

Likewise, the United States proposed amending Draft article 73 (= article 77 of the Official Text) to reduce a claim against the party in breach if the injured party failed to mitigate damages. As presented, the proposal would have applied to any form of relief. The proposal was defeated. See U.N. DOC. A/CONF.97/C.1/L.288, Official Records, at 133; Doc. History, at 705; see also para. 3 of the Secretariat Commentary on Draft article 73, Official Records, at 61; Doc. History, at 451 (mitigation applies only to damage awards).

[487] See UNCITRAL Yearbook VIII (1977), at 42 (¶ 256); Doc. History, at 335.

[488] See UNCITRAL Yearbook VIII (1977), at 42 (¶ 257); Doc. History, at 335.

[489] Draft article 42 provides (see Official Records, at 9; Doc. History, at 386):

> (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirements.
>
> (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with [Draft] article 37 or within a reasonable time thereafter.

[490] The Norwegian delegation proposed to replace paragraph (2) of Draft article 42 by the following text of paragraphs (2) and (3) (see U.N. DOC. A/CONF.97/C.1/L.79; *reprinted* in Official Records, at 112; Doc. History, at 684):

> (2) Where the goods do not conform with the contract, the buyer may require *the seller to remedy the lack of conformity by repair, unless this is not reasonably practicable for the seller, or to deliver* substitute goods if the lack of conformity constitutes a fundamental breach. [emphasis in the original]
>
> (3) Any request *for repair* or substitute goods *may be* made *only* in conjunction with notice given under [Draft] article 37 within a reasonable time thereafter. [emphasis in the original]

[491] The Danish delegation proposed to replace paragraph (2) of Draft article 42 by the following text of paragraphs (2) and (3) (see U.N. DOC. A/CONF.97/C.1/L.138; *reprinted* in Official Records, at 112; Doc. History, at 684):

Draft article 42(2) proposed that the buyer should have the right to require the seller to bring non-conforming goods into conformity by repair. Such a remedy was viewed as being in the interest of the buyer in cases where no substitute goods could be obtained, and being generally in the interests of both parties, in that it allowed a fairly lenient remedy which would remove obstacles to a contract.[494] The Norwegian and Swedish delegations pointed out that paragraph (1) of the Draft article 42 did not specify the nature or means of performance as regards the buyer's right to repair. Therefore a specific provision on the buyer's right to repair was required.[495] None of the proposals, however, aimed at curtailing the exercise of the buyer's right to substitute delivery.

Only the proposal made by the Federal Republic of Germany[496] purported to limit the buyer's right. It was to a large extent identical with the Scandinavian proposals as

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(2) Where the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair unless this is not reasonably practicable for the seller, or if the lack of conformity constitutes a fundamental breach, to deliver substitute goods.

(3) Any request for repair or substitute goods may be made only in conjunction with notice given under [Draft] article 37 or within a reasonable time thereafter.

[492] The Finnish delegation proposed to replace paragraph (2) of Draft article 42 by the following text of paragraphs (2) and (3) (see U.N. DOC. A/CONF.97/C.1/L.139; *reprinted* in Official Records, at 112; Doc. History, at 684):

(2) Where the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair if such a repair does not cause the seller unreasonable costs or harm. If the lack of conformity constitutes a fundamental breach, the buyer may require the seller to deliver substitute goods.

(3) Any request for repair or substitute goods may be made only in conjunction with notice given under article 37 or within a reasonable time thereafter.

[493] The Swedish delegation proposed to replace paragraph (2) of Draft article 42 by the following text of paragraphs (2) and (3) (see U.N. DOC. A/CONF.97/C.1/L.173; *reprinted* in Official Records, at 112; Doc. History, at 684):

(2) The buyer may require the seller to remedy the lack of conformity in the goods by *repairing* them only if the seller can do so without unreasonable inconvenience or unreasonable expense. [emphasis in the original]

(3) The buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and it is reasonably practicable for the seller to supply substitute goods.

[494] See comments of the Finnish delegation (Sevon, ¶ 74), Official Records, at 332; Doc. History, at 553.

[495] See comments of the Norwegian (Rognlien, ¶ 77) and Swedish delegation (Hjerner, ¶ 81), Official Records, at 333; Doc. History, at 554.

[496] The delegation of the Federal Republic of Germany proposed to revise paragraph (2) to read as follows (see U.N. DOC. A/CONF.97/C.1/L.135; *reprinted* in Official Records, at 112; Doc. History, at 684):

If the goods do not conform with the contract, the buyer may require the seller to remedy a lack of conformity in the goods by repairing them or to deliver substitute

far as the buyer's right to require the seller to repair the goods was concerned. There was a difference, however, in that the buyer's right to require substitute goods did not depend on whether the lack of conformity constituted a fundamental breach of contract. The German delegation took the view that this right should be excluded only if it was not reasonably practicable for the seller to deliver the substitute goods.[497]

An *ad hoc* Working Group was established to prepare a common text.[498] A compromise, however, was reached only in respect of the buyer's right to demand repair, the exercise of which was made subject to the condition that *repair be reasonably practicable for the seller.*[499]

The joint proposal was generally welcomed by several delegations with the exceptions of France[500], the former USSR[501], and the United States[502], which proposed amendments aimed at taking into account that in some cases the buyer should have the right to repair, *even if repair would put the seller to considerable inconvenience.*[503]

> goods unless it is reasonably not practicable for the seller to repair the goods or to deliver substitute goods. Any request to repair the goods or to deliver substitute goods may be made only in conjunction with notice given under [Draft] article 37 or within a reasonable time thereafter.

[497] See comments of the German delegation (Klingsporn, ¶ 76), Official Records, at 333; Doc. History, at 554.

[498] The *ad hoc* working group was composed of the representatives of Finland, the Federal Republic of Germany, Norway and Sweden.

[499] Their joint proposal was mainly based on the wording of the original amendment by the Federal Republic of Germany except for the question of the delivery of substitute goods, on which the member of the *ad hoc* Working Group held differing views. It added as a new paragraph (3) the following text (see U.N. DOC. A/CONF.97/C.1/L.173; *reprinted* in Official Records, at 112; Doc. History, at 684):

> If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair *unless this is not reasonably practicable for the seller*. A request for repair must either in conjunction with notice given under [Draft] article 37 or within a reasonable time thereafter. [emphasis added]

[500] The French delegation proposed the addition of the words "due account being taken of the legitimate interests of the buyer" at the end of the first sentence. See Official Records, at 335 (Ghestin, ¶ 15); Doc. History, at 556.

[501] The Soviet delegation proposed the deleting the words "for the seller" at the end of the first sentence of the new paragraph (3). See Official Records, at 336 (Medvedev, ¶ 24); Doc. History, at 557.

[502] The U.S. delegation suggested introducing a phrase such as "taking account of the circumstances of the seller and the buyer". See Official Records, at 336 (Farnsworth, ¶ 28); Doc. History, at 557.

[503] See comments by the French (Ghestin, ¶ 15), Russian (Medvedev, ¶ 24) and U.S. delegations (Farnsworth, ¶ 28), Official Records, at 335-336; Doc. History, at 556-557.

The three delegations finally agreed on a joint text, which was unanimously adopted.[504] It revised the new paragraph (3) to read:

> If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair unless this is not reasonable, taking account of all the circumstances. A request for repair must be made either in conjunction with notice given under [Draft] article 37 or within a reasonable time thereafter.[505]

The representative of the Federal Republic of Germany then suggested that his delegation's draft amendment should be brought into line with new paragraph (3) just adopted.[506] Paragraph (2) should accordingly be revised to read:

> If the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods *unless this is not reasonable*, taking account of all the circumstances. A request to deliver substitute goods may be made only in conjunction with notice given under Draft article 37 or within a reasonable time thereafter.[507] [emphasis added]

The German representative argued that his delegation's proposal would allow the courts to consider the circumstances of each particular case, including the difficulties of both the seller and the buyer. This proposal was criticized by several delegations, primarily on the grounds that the delivery of substitute goods and avoidance were, from an economic perspective, very similar situations[508], and that the delivery of substitute goods might turn out to be even more onerous on the seller than simple avoid-

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[504] See Official Records, at 336 (¶ 38); Doc. History, at 557.

[505] See Official Records, at 336 (¶ 37); Doc. History, at 557.

[506] See the comments by the German delegation (Landfermann, ¶ 47), Official Records, at 337; Doc. History, at 558.

[507] *Id.*

The proposal was welcomed by the Italian delegation whose representative pointed out that paragraphs (2) and (3) dealt only with specific cases and that the general right was set out in paragraph (1). The choice between the two possible remedies described in paragraphs 2 and 3, basically depended on the nature of the goods and not, as the existing text of paragraph (3) provided, on the nature of the breach. See Official Records, at 337 (Bonell, ¶ 51); Doc. History, at 558.

See, on the other hand, the comments of the Swedish delegation, Official Records, at 337 (Hjerner, ¶ 52); Doc. History, at 558, which criticized the German proposal for confusing the situation, since it collapsed two ideas, substitution and repair.

[508] See comments of the Bulgarian delegation (Stalev, ¶ 49), Official Records, at 337; Doc. History, at 558.

ance.[509] For these reasons, it was argued, the requirement of fundamental breach should be kept. In the light of that criticism it was agreed to reject the German proposal.[510]

(c) Conclusion

Neither UNCITRAL nor the delegates at the Vienna Diplomatic Conference adopted proposals which were aimed at taking into account the consequences arising out of the buyer's exercise of his right to demand substitute delivery. It seems that the delegates viewed the seller's interests as being sufficiently protected by the fundamental breach requirement, and wanted, once a fundamental breach occurred, to have the interests of the buyer in exercising his right to substitute delivery prevail over those of the seller.[511]

Such an interpretation is confirmed by the drafting history of the disposition governing the buyer's right to demand repair, which does not require a fundamental breach but may be limited in view of the consequences to the seller. In this context, it should also be noted that the delegates adopted an amendment to the effect that the buyer's right to repair is not automatically barred by the fact that repair would put the seller to considerable inconvenience.

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[509] See comments of the French delegation (Stalev, ¶ 49), Official Records, at 337; Doc. History, at 558.

See also para. 12 of the Secretariat Commentary on Draft article 42, Official Records, at 38; Doc. History, at 428:

> If the goods which have been delivered do not conform to the contract, the buyer may want the seller to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach..."

[510] See Official Records, at 337 (¶ 54, 55); Doc. History, at 558.

[511] For a similar conclusion, see Curran Grosswald, Cross Reference and Editorial Analysis of Article 46, Pace University database, http://www.cisg.law.edu/cisg/text/cross/cross-46.html (stating that elements of reasonableness are built into Article 46(2) and (3) in that the buyer may not require the seller to remedy a lack of conformity by repair pursuant to Article 46(3) when "this is unreasonable having regard to all the circumstances" and in that the buyer may only require delivery of substitute goods pursuant to Article 46(2) when there is a lack of conformity that constitutes a fundamental breach of contract.

Bearing in mind that in the most cases substitute delivery is likely to generate greater costs and thus causes even more hardship to the seller than avoidance, it therefore seems plausible to argue that when the consequences of substitute delivery are not considered in determining fundamental breach, all the more so should no consideration be given to any hardship suffered by the seller as a result of the contract avoidance (*argumentum a maiore ad minus*).

3. Avoidance Situations Where No Fundamental Breach Is Required

a. Non-Performance within Time Fixed by *Nachfrist* Notice: Articles 49(1)(b), 64(1)(b)

According to article 49(1)(b), non-delivery does not *per se* allow the buyer to declare the contract avoided. Likewise, article 64(1)(b) provides that non-payment or failure to take delivery itself does not entitle the seller to declare the contract avoided. In both cases must a *Nachfrist* be fixed[512], and only once the breaching party has failed to perform within this period fixed by the *Nachfrist* notice or has declared that he will not perform is avoidance permitted. This *Nachfrist* requirement leads to the question of whether it is reconcilable with articles 49(1)(b) or 64(1)(b), respectively, to treat non-performance due to the parties' (in)ability or (un)willingness as fundamental breach without having set such a *Nachfrist*.

In the present writer's view this question must be answered in the affirmative. The objective of the *Nachfrist* requirement is to exert pressure on the breaching party in case of late delivery and to give him a second chance to perform. However, where the party refuses to perform and thus expresses his unwillingness to perform the fixing of a *Nachfrist* makes no sense.[513] The same is true where it is clear from the circumstances

[512] See articles 47(1) and 63(1)(permitting the setting of a time limit for late performance on the side of the seller and buyer, respectively).

[513] For the same conclusion, see Huber, in: Schlechtriem, Art. 49 N. 22; Will, in: Bianca/Bonell, Art. 49, at 2.1.3.

See also Treitel, Remedies, at 16-149 to 16-150 (stating with regard to the *Nachfrist* requirement under German, Austrian and Swiss law that the main purpose of the requirement of a *Nachfrist* is to protect the promisor by giving him a further period of grace within which to perform, but that in case of the seller's refusal, "no useful purpose would be served by the *Nachfrist*"). [emphasis in the original]

that the party is or will not be able to perform.[514] The scope of article 49(1)(b) and 64(1)(b) is thus actually limited to cases of late delivery[515], and it follows from that the factors focusing on the parties' (in)ability or (un)willingness to perform are not excluded by articles 49(1)(b) and 64(1)(b).

b. Avoidance of Installments Based on Interdependence with a Defective Installment: Article 73(3)

Paragraph (3) of article 73 provides for cases where one installment is avoided in accordance with paragraph (1) of article 73 and it has interdependence with other past or future deliveries. In such case, the buyer may,

> at the same time, declare [the contract] avoided in respect of deliveries already made or of future deliveries if, *by reason of their interdependence*, those deliveries *could not be used for the purpose contemplated by the parties* at the time of the conclusion of the contract. [emphasis added]

This wording seems to support the approach focusing on the purpose of the contract in determining fundamental breach, even though it is not expressly stated that the lack of utility of past of future deliveries itself constitutes a fundamental breach. It could be argued, however, that article 73(3) is the counterpart of article 51(2) as far as delivery is made in installments and that it clearly contemplates a fundamental breach situation.[516]

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[514] See Treitel, Remedies, at 16-150 (stating that the *Nachfrist* requirement is not applicable where the default does not consist of delay but of impossibility).

[515] See para. 4 of the Secretariat Commentary on Draft article 43 [= article 47 of the Official Text], Official Records, at 39; Doc. History at 429:

> This Convention specifically rejects the idea that in a commercial contract for the international sale of goods the buyer may, as a general rule, avoid the contract merely because the contract delivery date has passed and the seller has not as yet delivered the goods. In these circumstances the buyer may do so if, and only if, the failure to deliver on the contract delivery date causes him substantial detriment and the seller foresaw or had reason to foresee such a result.

[516] See Huber, in: Schlechtriem, Art. 51 N. 3 (stating that article 51(2) is not applicable to installment contracts).

4. Limitations on the Concept of Fundamental Breach

a. Foreseeability of the Consequences of the Breach

The systematic interpretation of the foreseeability element, for several reasons, strongly supports the approach, which focuses on the conclusion of the contract as the relevant point in time. First of all, except for those provisions concerning the loss of remedial rights as a result of a delay by the aggrieved party[517], whenever knowledge or foreseeability is required under the Convention the time of the conclusion of the contract is relevant.[518] It should also be noted that article 73(3) dealing with the avoidance of installment contracts, expressly refers to the time of the conclusion of the contract.

Moreover, businessmen calculate their potential risks arising out of a transaction at the time of the formation of the contract.[519] Taking into account events occurring after the closure, however, would allow one party to increase the risks of the other party. A buyer, for example, could transform a contract in which the time of delivery is not fundamental into a transaction where time is of the essence of the contract by simply informing the seller that he has promised to sell the goods at a particular time.[520] Such a reading of article 25 would hardly contribute to a greater acceptance of the Convention in the business world.[521]

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[517] See, *e.g.* article 40, 43, 49(2)(b), 64(2)(b).

[518] See Holthausen, RIW 1990, 101, at 105 (concluding from the very similar wording of articles 25 and 74 that the time of the conclusion of the contract is the relevant point in time for knowledge or foreseeability and emphasizing with reference to article 9(2), 31(b), 42(2)(a), 73(3), and 79(1) that under the Convention, whenever knowledge and foreseeability is required, the time of the conclusion of the contract is relevant, except for those provisions which deal with the loss of remedial rights as a result of a delay by the aggrieved party, such as article 40, 43, 49(2)(b), 64(2)(b), but those provision apply by their nature only a later point in time).

[519] This point has been emphasized by those authors viewing the time of the conclusion of the contract as relevant. See, *e.g.* Schlechtriem, in: Schlechtriem, Art. 25 N. 15.

[520] For a similar example, see Schlechtriem, Uniform Sales Law, at 60.

[521] Both the black letter rules of the UNIDROIT Principles and the European Principles do not expressly state the time when the party in breach had to have or should have foreseen the detrimental consequences to the other side. The official commentaries, however, expressly refer to the time of the formation of the contract.

See Lando/Beale, The Principles on European Contract Law, at 126; UNIDROIT, Principles of International Contracts, comment on art.7.3.2(a).

Finally, the foreseeability requirement under article 25 is similar to that under article 74, which contains the foreseeability test for the recovery of damages, and provides that the

> damages may not exceed the loss which the party in breach foresaw or ought to have foreseen *at the time of the conclusion of the contract*...[emphasis added]

as a possible consequence of the breach of contract. As one Canadian author, who represented Canada at the Vienna diplomatic conference, rightfully pointed out: it would be "anomalous" if a party could take the radical step of avoiding the contract on the basis of consequences for which it could not even recover damages.[522]

b. Seller's Right to Cure: Article 48

Having regard to an offer to cure is not expressly required in the determination of fundamental breach, and an American proposal to include such language in article 25 during the preparatory works for the Convention was not adopted by UNCITRAL.[523] Thus, consideration of an offer to cure as a limiting factor in determining fundamental breach, in view of its present definition, is only permissible if one argues that, where cure of a breach is feasible and the breaching party is willing to cure, the aggrieved party is not substantially deprived of his expectations under the contract. With regard to the buyer's right to avoidance, such an interpretation, though plausible[524], cannot be

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[522] See Ziegel, Remedial Provisions, at 9-20.

Flechtner, 8 J.L. & Com. 53-108, at II. A. (1988) takes a different view. With reference to the U.C.C., which, on the one hand, limits consequential damages to losses foreseeable at the time of contracting (article 2), while on the other hand permits the buyer to revoke acceptance of non-conforming goods – an action equivalent to avoidance under the Convention – if the non-conformity "substantially impairs [their] value to him" (section 2-608(1)), he argues that there is a precedent for the "anomaly" feared by Ziegel in the U.S. sales law. Furthermore, he argues that this alleged "anomaly" could be justified on the ground that the foreseeability requirements in Articles 25 and 74 serve different purposes. While the foreseeability limitation on damages is designed to limit the financial exposure of the parties to a contract for sale by excluding liability for remote consequences, the foreseeability requirement in the definition of fundamental breach, in contrast, is meant to limit avoidance to appropriate circumstances.

[523] See *supra* Part III, B.2.b.(1)(a)(ii), note 399.

[524] See Huber, in: Schlechtriem, Art. 46, N. 23 (stating that where the cure of a breach is feasible the aggrieved party is not generally substantially deprived of its expectations under the contract); Schlechtriem, Uniform Sales Law, at 78 (stating that when time is not of the essence of the contract, the seller's cure within a reasonable time after the due date will normally prevent the delay from constituting a fundamental breach).

justified by the Convention's legislative history of the concept of fundamental breach, as illustrated above.[525] It is also incompatible with the text of article 48(1) itself.[526]

The opening words of article 48(1) make the seller's right to cure "[s]ubject to article 49". Giving these words their ordinary and plain meaning, it appears that the buyer's right to declare the contract avoided in accordance with article 49(1)(a) prevails over the seller's right to cure.[527] The determination of fundamental breach in the light of any offer to cure, however, would enable the seller to prevent the buyer from avoiding the contract and would, therefore, actually allow the seller's right to cure prevail over the buyer's right to avoid. Even if one argues that the opening words do not clarify their exact relationship, the position that the right to cure is paramount ignores the fact that the majority of the delegations at the Vienna Diplomatic Conference took the exact opposite view.[528]

Another argument against the determination of fundamental breach in the light of an offer to cure can be found in the text of article 50, where it is expressly stated that the seller's right to cure prevails over the buyer's right to reduce the price. In view of such a clear wording, it seems plausible to conclude that if the delegates to the Diplomatic Conference had really wanted the right to cure to prevail over the right to declare the contract avoided, they would have used similar words either in article 48 or 49.

Furthermore, the employment of an offer to cure as a relevant factor in determining fundamental breach would cause both theoretical and practical problems. The notion of an offer being able to retrospectively frustrate the buyer's existing right of avoidance is difficult to justify in theory.[529] Practically, this approach gives rise to the ques-

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[525] See *supra* Part III, B. 3.

[526] For the text of article 48(1), see *supra* note 256.

[527] For a similar conclusion, see Ziegel, Remedial Provisions, at 9-22; Schnyder/Straub, in: Honsell, Art. 48 N. 29. Honnold, Uniform Law, at § 296, takes a very different position. He argues, with reference to the legislative history, that the amendment to article 48(1) "leaves little room for doubt" that the right to cure is the paramount provision and that the cure provision of article 48(1) could be frustrated "by an unqualified application of article 49(1)".

[528] See *supra* Part III, B.2.b.(1)(a)(ii), note 394.

[529] See Karollus, ZIP 1993, 490, 495; Huber, in: v. Caemmerer/Schlechtriem (1st ed), Art. 46, N. 18 (both criticizing the curability approach on the grounds it enables the seller retrospectively to frustrate the buyer's right of avoidance). See also the critical comments by Will, in: Bianca/Bonell, Art.

tion of whether the seller must have made his offer to cure before the buyer has made his notice of avoidance. If priority were decisive, one would provoke a competition between buyer and seller and produce purely arbitrary results.[530] Leaving aside that such competition in exercising a remedy should not be a consideration under law, it would also leave the seller in limbo as long as he does not know of the defect.[531]

The only way to avoid such consequences (and to protect the seller's interests) would be either to impose on the buyer the duty to notify the seller of the breach and to give the seller the opportunity to invalidate the declaration of avoidance retroactively through an offer to cure, or to not treat his right to cure as precluded by the notice of avoidance. The latter way has been adopted by the UNIDROIT Principles[532] but, at least as a general rule, there is no room for it under the Convention. According to the Official Records of the Convention it was not even discussed during the preparatory work for the Convention.

Both approaches seem difficult to reconcile with the character of the avoidance remedy, which initially releases both parties from their obligations after notice of avoidance has been given. To make the fundamental nature of the breach dependent on an offer to cure would give the seller the opportunity to reinstate the buyer's obligations. Consequently, the buyer would be retroactively burdened with the duty to mitigate the loss resulting from the breach. This result does not seem to be fair to the buyer since he already bears the risk of evaluating the gravity of the breach.[533]

48, at 3.2.2., where the author asks the question of whether there is any "need to resort to so unconvincing a construction" to protect the seller's right to cure by giving the following illustration:

> Suppose that yesterday [the buyer] concluded that a certain breach was fundamental; today is he awaiting the seller's offer to cure – the very breach has changed its nature and become a non-fundamental one; and if tomorrow all hope vanishes – the breach is automatically re-converted into a fundamental breach. Fundamental – non-fundamental – from day to day does not allow for any legal certainty in international transactions.

[530] This point is rightly emphasized by Schnyder/Straub, in: Honsell, Art. 49 N. 22, Karollus, ZIP 1993, 490, 495.

[531] For the same criticism, see Karollus, ZIP 1993, 490, 495.

[532] See *supra* note 194.

[533] See Will, in: Bianca/Bonell, Art. 48, at 2.1.1.1.1. (stating that "the buyer who has already suffered the seller's fundamental breach of contract should not, in addition, be burdened with the entire range of uncertainties as to the same seller's ability and willingness to cure").

For all these reasons, it is this writer's view that having regard to an offer to cure as a decisive factor in the determination of fundamental breach is not permissible. It would result in more uncertainty and, as one author rightfully points out, indeed "contribute to the further weakening of the notion of fundamental breach".[534] Insofar as it has been argued that the seller's right to cure would be frustrated through an unqualified application of the buyer's right to avoidance is this not true. His right is simply limited to those cases where the breach is not fundamental or where the buyer decides not to avoid the contract despite the occurrence of a fundamental breach.

c. Duty to Mitigate Losses

Article 77 imposes a duty on the aggrieved party to take reasonable steps to mitigate his loss.[535] Those steps include the resale of the goods by an aggrieved buyer as well as the purchase of substitute goods by an aggrieved seller[536]. If this provision were applicable under articles 46(2), 49(1)(a) and 64(1)(a), then article 77 would effectively preclude the buyer from exercising the right to substitute delivery and avoidance whenever substitute goods were reasonably available and would bar the seller from declaring the contract avoided whenever it was reasonably possible to resell the goods.[537] In other words, the effect of article 77 would be that the aggrieved party must mitigate loss through the choice of remedy.[538]

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[534] For this statement, see Will, in: Bianca/Bonell, Art. 48, at 3.2.2. , where the author criticizes the "offer-to-cure" approach for not being very precise.

[535] Article 77 provides:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

[536] For similar conclusions, see Knapp, in: Bianca/Bonell, Art. 77, at 2.2.; Schlechtriem, Gemeinsame Bestimmungen, at 169; Farnsworth, 27 Am.J.Comp.L. 247, at 251; Honnold, Uniform Law, at § 418; Stoll, in: Schlechtriem, Art. 77 N. 10; Enderlein/Maskow, International Sales Law, Art. 77, at 2; Herber/Czerwenka, Internationales Kaufrecht, Art. 77 N. 6; Piltz, Internationales Kaufrecht, § 5 N. 462.

[537] For a similar conclusion, see Farnsworth, 27 Am. J. Comp. L. 247, at 251 (1979)(commenting on Draft article 73 [= article 77 of the Official Text] that "the most common step to be taken in avoidance of loss under a contract for the sale of goods is a substitute sale or 'resale' to another buyer in the case of breach by the buyer and a substitute purchase or 'cover' from another seller in case of breach by the seller").

[538] For the same conclusion with regard to the availability of the specific performance remedy under articles 46(1) and 62, see Kastely, 63 Wash.L.Rev. 607, at 622 (1988).

The suggestion that article 77 limits the right to substitute delivery and avoidance is contradicted, however, by the wording of article 77, the remedial structure of the Convention, and its drafting history. In the first instance, the second sentence of article 77 provides that

> the party in breach may claim a reduction in the *damages* in the amount by which the loss should have been mitigated. [emphasis added]

Under this wording, the duty to mitigate applies only when the aggrieved party claims damages, not when that party demands substitute delivery or avoidance.[539]

Second, article 77, as enacted, is placed within the section of the Convention entitled "Damages".[540] Articles 46(2), 49(1)(a), 51(2) and 64(1)(a), on the other hand, appear in the sections governing remedies for breach of contract by the seller and the buyer, respectively, and are not concerned with the availability of damages. Under the Convention, there is a clear distinction between the remedies available to the buyer in articles 46 to 52 and damages as provided in articles 74 to 77.[541] A similar distinction can be found as for the seller's remedies.[542] The organization of the remedial provisions constitutes a significant distinction between the right to substitute delivery and avoidance and a claim for damages, including the duty to mitigate damages under article 77.[543]

Finally, the drafting history clearly indicates that article 77 does not limit the right to avoidance or substitute delivery. At the Vienna Diplomatic Conference, the United States proposed to amend the Draft version of article 77 to the effect that the words "or a corresponding modification or adjustment of any other remedy" should be added to the provision.[544] It was argued that an aggrieved party's failure to mitigate loss

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[539] See Feltham, J. Bus. L. 346, at 355 (1981)(stating that article 77 "is hardly expressed as a bar to requiring performance").

[540] See Kastely, 63 Wash.L.Rev. 607, at 622 (1988); Walt, 26 Tex.Int'l L. J. 211, at 215 to 216 (1991)(both emphasizing that article 77 is placed in the section which deals only with the damages remedy).

[541] See Article 45(1), *supra* note 270.

[542] See Article 61, *supra* note 270.

[543] For a similar assertion in respect of the parties' right to specific performance, see Kastely, 63 Wash.L.Rev. 607, at 622 (1988).

[544] See U.N. DOC. A/CONF.97/C.1/L.288, Official Records, at 133; Doc. History, at 705.

should relieve the party in breach not only of liability for damages but also in respect of the aggrieved party's other remedies.[545] This proposal was rejected by a large majority of the delegates.[546] Article 77, therefore, is not applicable to the exercise of the right to substitute delivery and avoidance. The question of whether the duty to mitigate loss, as an expression of good faith in international trade, requires that in order to mitigate loss the aggrieved party should refrain from exercising these remedies will be discussed later.[547]

5. Fundamental Breach in the Light of the Regime Governing the Seller's Obligations under the Convention

Under the Convention a breach is not necessarily fundamental whenever the seller violates a specific obligation or provision, and the availability of the remedies does not generally depend on the violation of a specific obligation, except for the seller's duty to deliver the goods.[548] In the latter case, the buyer's right to avoidance is subject to the *Nachfrist* procedure, which allows avoidance after having fixed a time of reasonable length for the defaulting party to remedy his non-performance.[549]

The fact that the fundamental nature of a breach does not depend on the violation of a specific provision of the Convention calls into question the approach focusing on

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The U.S. proposed to revise the second sentence of Draft article 73 [= article 77 of the Official Text] to read as follows:

> If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated, or *a corresponding modification or adjustment of any other remedy*. [emphasis in the original]

[545] The U.S. proposal was aimed at cases where the seller, despite the buyer's wish to the contrary, continue to manufacture a thing which has become useless for the buyer, solely in order to claim the full contract price. See the comments by the U.S. delegate (Honnold, ¶ 55), Official Records, at 396; Doc. History, at 617.

[546] For the discussion of the proposal, see Official Records, at 396-398 (¶¶ 55 –78); Doc. History, at 617-619. The proposal was rejected by 24 votes to 8.

[547] See *infra* Part III, E.2.b.c.d.

[548] Unlike the Common Law of England, the Convention does not adopt a system of *a priori* characterization of the seller's obligations into condition and warranties with respect to implied terms of title, description, merchantability, fitness, and sale by sample. Nor does the Convention, as does the German law, differentiate between "main" and "subordinate" obligations, nor between different forms of breach (impossibility, delay, so-called "positive violation of a contractual duty", *culpa in contrahendo*).

For a brief summary of the Common Law remedial system, see Treitel, Remedies, at 16-167, and for a brief summary of the German system, see, *e.g.*, Dannemann, German Civil and Commercial Law, at 27 to 33.

whether the buyer's expectations have been frustrated due to the breach. Those who support this approach take the view that, where the goods do not possess the features necessary for the use intended by the buyer, or where a third party claims a right to possession or prohibits their use by virtue of a patent or other industrial or intellectual property right, a fundamental breach has been committed. Since these cases constitute a breach of the seller's obligation under articles 35(2)(a)(b)[550], 41[551] and 42[552], this approach leads to the result that any violation of these provisions must be regarded as a fundamental breach.[553]

This conclusion, however, is supported neither by the text of article 25 nor by its legislative history. It seems to be inconsistent with the legislative history of article 49(1)(b). At the Vienna Diplomatic Conference, a Dutch proposal to extend the *Nachfrist*-avoidance-mechanism under the 1978 Draft version of article 49(1)(b)[554] to cover important breaches of contract other than non-delivery was rejected by a sub-

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[549] See *supra* Part III, C.3.a.

[550] Article 35(2)(a)(b) provides:

> (1) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
> (a) are fit for the purposes of which goods of the same description would ordinarily be used;
> (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement

[551] Article 41 provides:

> The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

[552] Article 42 provides in part:

> (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
> (a) ...
> (b) ...

[553] See Schlechtriem, JZ 1988, 1037, at 1045, where the author takes the view that any violation of article 35(2)(b) and (c) constitutes a fundamental breach. Lack of fitness for the ordinary use, in his eyes, cannot be regarded as a fundamental breach.

[554] Draft Article 45(1)(b) [=article 49(1)(b) of the Convention] provides:

> (1) The buyer may declare the contract avoided:
> (a) ...
> (b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of [Draft] article 43 or has declared that he will not deliver within the period so fixed.

stantial margin.[555] The effect of that proposal would have been to authorize the buyer to transform a lack of conformity into a fundamental breach and, as the Official Records of the discussion of the proposals show, this was the decisive factor leading to its being rejected.[556]

From this rejection, it is plausible to infer that there should be no *automatism* in the sense that a certain of lack of conformity or that third party claims should always be regarded as a fundamental breach. As the case law on fundamental breach confirms, lack of conformity is, in practice, most often invoked by buyers on the grounds that the goods are not fit for the intended use. Had the delegations to the Diplomatic Conference viewed such unfitness as a fundamental breach, the discussion of the extension of the *Nachfrist*-avoidance-mechanism to cases of lack of conformity would have been superfluous. In this writer's view, therefore, the approach, focusing on whether the purpose of the contract has been frustrated in order to determine fundamental breach, is not reconcilable with the regime governing the seller's obligations under the Convention.[557]

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[555] See Report on the proceedings in the First Committee, Official Records, at 117; Doc. History, at 689 (9 votes in favor and 31 against). The Dutch amendment (U.N. DOC. A/CONF.97/C.1/L.165; *reprinted* in Official Records, at 116; Doc. History, at 688) were to the following effect:

> Revise subparagraph (b) of paragraph (1) to read as follows:
>
> [I]f the seller has not, within the additional period of time fixed by the buyer in accordance with paragraph (1) of [Draft] article 43, *performed his obligations*, or has declared that he will not *do so* within the period so fixed. [emphasis in the original]

After this proposal was amended orally by Canada by the insertion of the word "important" immediately before the word "obligations", the Canadian delegation withdrew its own proposal in favor of the Dutch amendment. See Report on the proceedings in the First Committee, Official Records, at 117; Doc. History, at 689.

The Canadian amendment (U.N. DOC. A/CONF.97/C.1/L.150; *reprinted* in Official Records, at 116; Doc. History, at 688) reads as follows:

> [I]f the seller has not delivered the goods or *performed any other material obligation* within the additional period of time fixed by the buyer in accordance with [Draft] article 43 or has declared that he will not deliver within the period so fixed.

[556] See the comments by the delegations of Sweden (Hjerner, ¶ 69), the Federal Republic of Germany (Schlechtriem, ¶ 71), the United States (Farnsworth, ¶ 76), Greece (Krispis, ¶ 77), International Chamber of Commerce (Bortolotti, ¶ 82), Spain (Olivencia Ruiz, ¶ 83) and the United Kingdom (Feltham, ¶ 84), Offical Records, at 354-355; Doc. History, at 575-576.

[557] The German Supreme Court's finding in the New Zealand mussels case that, in the absence of an agreement as to the merchantability of the goods, unmarketability does not constitute fundamental breach thus corresponds with this conclusion. See *Bundesgerichtshof*, 8 March 1995, VIII ZR 159/94, *supra* note 217.

6. Conclusion (The Concept of "Fundamental Breach" in Context)

We have scrutinized the concept of fundamental breach under article 25 in the context of the Convention's remedial system, the various cross-references to fundamental breach, those provisions under the Convention giving the parties the right of avoidance without requiring a fundamental breach and the regime of the seller's obligations under the Convention. Moreover, potential limitations on the concept of fundamental breach and their effect on the availability of those remedies requiring a fundamental breach have been discussed. The results of this examination can be summarized as follows:

The Remedial System of the Convention

The remedial system of the Convention supports the approach, which focuses on the *nature of the contractual obligation*, and the *remedy-oriented* approach. The approach, focusing on the gravity of the consequences as measured by the *contract's overall value and the monetary loss suffered by the aggrieved party*, is not supported by the Convention's remedial system. It disregards the fact that the damages remedy, apart from the right of avoidance, is always available to the aggrieved party, nor can it explain why avoidance is necessary, above and beyond the damages remedy, to protect the expectation interests of the aggrieved party under the contract. Nor too can the application of the additional criteria provided for by the UNIDROIT Principles be supported, according to which a breach is fundamental because it was committed *intentionally or recklessly*. It disregards the fact that under the Convention's remedial system fault is not generally a condition of contractual liability and that no remedy depends on fault in the sense of deliberate or negligent wrongdoing.

Cross-References to Fundamental Breach

The criterion employed by the UNIDROIT Principles which looks at whether the breaching party would suffer a *disproportionate loss* as a result of the avoidance in determining fundamental breach cannot be supported by the various cross-references to fundamental breach. To the contrary, the drafting history of article 46(2) gives good reason to view recourse to this criterion, in general, as prohibited. The different

cross-references do, however, confirm the *no-reliance* approach (articles 72, 73(2)) and the approaches looking at one party's *(in)ability (un)willingness to perform* (article 72) or whether the goods are fit to their *intended purpose* (article 51(2)).

Avoidance Situations Where No Fundamental Breach Is Required

None of the various approaches to determine fundamental breach is excluded by the provisions entitling the parties to avoid the contract without requiring a fundamental breach (articles 49(1)(b), 64(1)(b)). As far as it concerns installment sales, article 73(3) supports the approach focusing on the intended purpose.

Regime of the Seller's Obligations under the Convention

The approach, which asks whether the aggrieved party cannot use the goods for their *intended purpose*, can be supported by article 51(2) and 73(3). However, it is challenged by the Convention's concept according to which the fundamental nature of the breach does not automatically follow from the breach of a certain obligation under the Convention. One way to avoid any inconsistency could be to apply this approach only within the scope of articles 51(2) and 73(3), and to consider unfitness for the intended purpose outside their scope as a fundamental breach only where the parties have agreed on fitness for a particular use. In that case, the parties' will prevails over conceptual concerns.

Limitations on the Concept of Fundamental Breach

As far as the *foreseeability* requirement is concerned, the systematic interpretation supports the notion of the conclusion of the contract as being the relevant point in time. Having regard to an *offer to cure* in determining fundamental breach, in so far it concerns avoidance of the contract, is not permitted in the light of the wording and legislative history of article 48(1) and its relationship to articles 49(1)(a). The same is not true in respect of the approach that looks only at whether *cure is possible*. It fol-

lows from the wording[558] and the legislative history of article 48(1) that the scope of this provision is limited to situations where the seller himself or a third party appointed by him remedies the defect.[559] This approach, however, does not require the seller to remedy the defect. Nor do the theoretical concerns about the retroactive effect of an offer to cure apply to that approach.

D. Underlying Purposes and Policies of the Term "Fundamental Breach" within the Remedial System of the Convention

The purpose of the fundamental breach requirement can best be understood in context within the remedial system of the Convention and especially in the context of those remedies whose availability depends on the existence of a fundamental breach, namely avoidance and substitute delivery. From the Convention's legislative history it is possible to conclude that the limitation of the right of avoidance and substitute delivery is primarily aimed at avoiding hardship to the party in breach.[560]

With regard to the remedy of substitute delivery, there is no doubt that in many cases it will cause hardship to the seller. He must not only take back the delivered goods but also deliver substitute goods, which necessarily involves the risk of damages or loss and expenses such as transportation and storage costs.[561] Regarding the avoidance remedy, however, there are situations where avoidance does not produce any hardship to the seller. This is the case, for example, in situations of future performance, where the goods have not been dispatched and the buyer declares the contract avoided. Unless the goods are of a specific nature, or are especially designed for the

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[558] "...the *seller* may,..., remedy at his own expenses any failure to perform his obligations..." [Emphasis added].

[559] Accordingly the buyer himself, based on article 48, cannot charge a third party to remedy the defect at the seller's expense. The costs of repair effected by a third party are only recoverable as damages when the requirements of article 74 are met. For the same conclusion, see Magnus, in: Staudinger, Art. 48 N. 35.

[560] See Will, in: Bianca/Bonell, Art. 49, at 2.1.2. (stating that the purpose of restricting the buyer's choice of avoidance serves primarily the interests of the seller who must take back the goods supplied and bears all risks of damages or loss).

[561] At the Vienna Diplomatic Conference, the French representative (Ghestin, ¶ 53), in support of the fundamental breach requirement, pointed out that the remedy of substitute delivery might be even more onerous on the seller than avoidance of the contract. See Official Records, at 337 (¶ 53). Doc. History, at 559; for a similar statement see also Will, in: Bianca/Bonell, Art. 46, at 2.2.1.2.

needs of the buyer, and for those reasons they are difficult to sell to third parties, avoidance does not mean hardship to the seller.[562]

Similarly, where the seller declares the contract avoided due to the buyer's failure to pay, the costs of returning of the goods will cause the buyer hardship only in exceptional cases. Moreover, in a situation where the buyer is close to going bankrupt the seller will be content to at least get back the goods, even at his own risk and expense.[563] To a certain extent the Convention seems to take into account these different situations by allowing the buyer to avoid the contract before delivery has been made and an actual fundamental breach has occurred. However, there is no assumption under the Convention that the seller is generally in a better position to dispose of the goods than is the buyer. It seems, therefore, that the underlying purpose of the fundamental breach requirement is not so much concerned with protecting the interests of the breaching party as much as preserving the enforceability of the contract if it all feasible and to avoid economic waste in trade.[564] This policy is also reflected in offering

[562] See Audit, Lex Mercatoria, at 150 (emphasizing that recession can be a great inconvenience, particularly where the goods were made specifically for the buyer).

[563] Article 64(1), which establishes the seller's right to avoidance, does not distinguish between his right to avoid the contract before or after the goods have been delivered. If he does so, article 81(2) entitles to seek restitution from the buyer. When the seller is not the only unpaid creditor, however, his claim to restitution is likely to conflict with the claims of other creditors and the question arises which right prevails. The Convention does not deal with any rights which third persons may have acquired on the goods concerned. Whether, for instance, a creditor of the buyer, the buyer's receivers in bankruptcy, or a purchaser in good faith may oppose the restitution of goods sold is to be determined by the applicable national law. The effect of a retention of title clause my be influenced by three legal systems: the *lex contractus* decides whether the parties can contractually defer the transfer of title, the third party effect of the title is determined by the *lex rei sitae*, and finally, the *lex concursus*, decides to what extent the retention of title must be recognized in winding-up of the estate. And under these various applicable domestic rules, the right of an unpaid seller under article 81(2) as against the rights of other creditors of a buyer in possession, the buyer's receivers, or a purchaser in good faith will be often prejudiced.

See Honnold, Uniform Law, at §§ 356.1, 448-449; Lookofsky, Understanding the CISG in Europe, at 115-116 (stating that article 81(2) is not intended to prejudice the rights of third parties as defined by other applicable rules); Tallon, in: Bianca/Bonell, Art. 81, at 2.7 (pointing out that restitution may be thwarted by the bankruptcy of the party who has to return the goods); Ziegel, Remedial Provisions, at 9-32 to 9-33.

[564] See Hillman, Corn. L. Rev. 21-49, at C. 1. (1995)(stating that the Convention's goal of saving deals promotes important international values pertinent to the contracting process); Audit, Lex Mercatoria, at 150 (stating that avoidance leads to the unwanted inconvenience and expense of litigation); Dubé, Civil Code of Quebec and the Vienna Convention, at 219; Michida, 27 Am.J.Comp.L. 279, at 283 (1979); Kappus, RIW 1992, 528, at 530; Magnus, The General Principles of the CISG, 3 Int'l Trade & Bus. L. A., 33-56, at para. 9 (1997)(concluding from the fact that the Convention allows contract avoidance only under narrow conditions and as a last resort, that the *favor contractus* rule is one of the Convention's general principle).

the breaching party the possibility to cure and requiring the aggrieved party under certain circumstances to provide a *Nachfrist*.

All factors employed in determining fundamental breach limit the availability of the remedies of avoidance and substitute delivery and thus serve the Convention's objective. However, none of the factors is applicable to all possible situations of fundamental breach and, for that reason, the extent of the limitation differs depending on the factors employed. Some of the factors, such as *(in)ability*, *(un)willingness*, for example, can only be applied to the remedy of avoidance in cases of non-delivery, non-payment or failure to take delivery. They cannot be employed to determine under which circumstances the delivery of non-conforming goods amounts to a fundamental breach. The *no-reliance* approach is only applicable where future performance is due.

The approaches looking at an *offer-to-cure possible cure* or whether the failure to perform was *intentional or reckless* are applicable to both the avoidance and the substitute delivery remedy. Since their application requires actual delivery, however, they cannot be employed in non-delivery situations or future performance situations. The same holds true for the *remedy-oriented* approach and the factor looking at the *intended purpose* of the goods. Finally, the approach in the UNIDROIT Principles that looks at whether the breaching party suffers *disproportionate loss* if the non-performance is treated as fundamental, is applicable to actual as well as to future performance situations but is limited in its scope to the avoidance remedy.

In view of these limitations on each of these factors, it seems that their accumulated application would serve the underlying purposes and policies of the fundamental breach requirement best. As concerns the relevant point in time at which foreseeability of the consequences of the breach is measured, the approach that is focused on the time of the formation of the contract limits the availability of the remedies of avoidance and substitute delivery more than does the approach that also takes into account the breaching party's subsequent knowledge.

E. The Concept of Fundamental Breach and the Observance of Good Faith

This section is concerned with the final requirement to be observed in the interpretation of the Convention, namely the promotion of the observance of good faith in international trade. In particular, we will examine whether the promotion of the observance of good faith requires a modification of the contractual or statutory right of the parties to avoid the contract or demand substitute delivery. In this context, we will further examine whether the various factors employed in determining fundamental breach correspond with the requirement of good faith.

1. The Application of the Principle of Good Faith in Area of Remedies in General

As pointed out above, the requirement of good faith not only operates as an additional criterion in interpreting the Convention, but is also directed to the conduct of the parties to an individual contract of sale.[565] Consequently, it has been argued by scholars to construe fundamental breach and the exercise of the remedies requiring a fundamental breach in the light of the Convention's many references to standards of reasonableness and the general duty to mitigate damages.[566]

In the following four specific cases, especially worthy for consideration, because of their practical relevance and partially because of the controversy they provoked at UNCITRAL as well as at the Vienna Diplomatic Conference, will be examined in which the application of the principle good faith is discussed.

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[565] See *supra* Part I, C.

[566] See, *e.g.*, Dore & Defranco, 23 Harv. Int'l L.J.49, at 61 (1982)(stating that the good faith requirement also applies in circumstances in which the right to declare a contract avoided is lost); Honnold, Uniform Law, at 95 (stating that "avoiding a contract after a market change that permits a party to speculate at the other's expense, may well be inconsistent with the Convention's provisions governing [this remedy] when they are construed in the light of the principle of good faith"); Huber, in: Schlechtriem, Art. 48 N. 9 (stating that the seller's right to choose between different methods of cure follows from the principle of good faith); Shen, 13 Ariz.J.Int'l & Comp. L. 253, at 276 (1996)(concluding that article 7 subjects the exercise of the right to specific performance to the general "good faith" obligation).

2. Four Specific Cases for the Application of the Principle of Good Faith

a. Minor Breaches of Contract

It has been argued that the good faith requirement precludes a party from automatically invoking his right of avoidance or substitute delivery after a minor deviation in performance by the other.[567] None of the various approaches applicable to the delivery of non-conforming goods considers a breach of contract causing few if any damages, where the goods can still be used for their intended purpose, or where the defect can be easily and cheaply repaired as fundamental. These approaches thus take the requirement of good faith in the proposed form sufficiently into account.

Such is not the case, however, where the parties have expressly agreed that any deviation from all or specific contract terms constitutes a fundamental breach. The application of the approach focusing on the *nature of the contract* would entitle the aggrieved party to avoid the contract or to demand substitute delivery even if the breach is minor as described above. The issue in such case is whether the Convention's principle of party autonomy is limited by the Convention's good faith requirement to act reasonably.

Unlike under the UNIDROIT[568] and the European Principles[569], however, the principle of party autonomy is not expressly limited under the Convention, and attempts at the Vienna Diplomatic Conference to limit this principle by the concept of good faith

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[567] See *e.g.* Rosett, 45 Ohio St. L.J. 265, at 290 (1984)(stating that good faith is an interpretive tool that precludes a perfect tender approach to interpretation of the seller's obligations of delivery and does not treat minor deviations by either side as an event that terminates the contract).

[568] UNIDROIT Principles articles 1.5 and 1.7 provide:

> Article 1.5 ("Mandatory rules")
>
> The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.
>
> Article 1.7 ("Good faith and fair dealing")
>
> (1) Each party must act in accordance with good faith and fair dealing in international trade.
>
> (2) The parties may not exclude or limit this duty.

[569] European Principles (completed and revised second version), Article 1:102 (1), provides (see http://www.ufsia.bc/~estorme/PECL2en.html):

> (1) Under these Principles, parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.

were rejected.[570] Within the scope of the Convention, the parties' freedom to determine the content of their individual contract is only restricted by otherwise applicable mandatory rules, be they of national, international, or supranational origin. It seems, therefore, that the Convention's principle of party autonomy prevails over the Convention's good faith requirement and that the breaching party cannot invoke good faith to invalidate a clause providing for avoidance or substitute delivery for any deviation from the contract, no matter how trivial.[571] This view is confirmed by article 4, according to which the Convention is not concerned with the validity of the contract or of any of its provisions.[572]

b. The Fundamental Breach is Curable and the Seller Offers Cure before/after the Buyer Declared the Contract Avoided

Professor Honnold, who argues that whether a breach is fundamental should be decided in the light of an offer to cure, holds the view that the principle of good faith imports affirmative obligations on the parties to communicate during performance and to cooperate in the repairing of defects.[573] He argues that, in case of the delivery of defective goods, where cure is feasible, the principle of good faith requires the buyer to not avoid the contract before having given the seller the opportunity to remedy the defect. To that end the buyer must communicate the defect to the seller and request information regarding the seller's plans concerning cure. The seller then is "obliged"

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[570] See *supra* Part III, C.1.b., note 442, 443.

[571] For a similar conclusion, see Enderlein/Maskow, International Sales Law, Art. 7, at 5 (stating that a contract with clear wording cannot be modified based on the principle of good faith. For a different conclusion without giving any reason, see Babiak, 6 Temple Int'l & Comp. L.J. 113, at 142 (1992); Bonell, in: Bianca/Bonell, Art. 7, at 2.4.1. (stating that even contractual agreements might be disregarded if their application in accordance with article 6 would in the specific case appear to be contrary to good faith); Magnus, The General Principles of the CISG, 3 Int'l Trade & Bus. L. A. (Austr.) 33-56, at 5.(b)(1)(1997)(stating that except for the provision of Art. 12 CISG, the validity issues to be determined in conformity with national law and the principle of good faith, the parties' authority to regulate their relationship is unlimited).

[572] Article 4 provides:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise provided in this Convention, it is not concerned with:
> (a) the validity of the contract or of any of its provisions or of any usage;
> (b) ...

[573] See Honnold, Uniform Law, at § 296 (arguing that the good faith requirement obliges on the one hand the buyer to inform the seller of the defect and to ask him whether he will remedy it, and on

to respond to the buyer's request.[574] Other authors more generally take the view that an aggrieved party must act reasonably to mitigate damages and this duty may require accepting an offer to cure from the breaching party, possibly even after a fundamental breach has been committed.[575]

If one follows these propositions to their logical conclusion, as far as the avoidance remedy is concerned, in fact, only the *offer-to-cure* approach would be the decisive factor in the determination of fundamental breach where non-conforming goods have been delivered. All other approaches applicable to the delivery of non-conforming goods would need to be interpreted in a way that they are not decisive when the seller offers cure and the requirements of article 48(1) are met. To apply the good faith requirement in such a manner, however, is not permitted since it disregards the text of article 48(1) and the intention of the majority of the delegates at the Vienna Diplomatic Conference.[576] As we noted above, the principle of good faith may not modify a statutory provision of the Convention in order to justify a result, which is contrary to its wording and the intent of the drafting parties. Therefore, the proposition that the principle of good faith always requires taking into account an "offer-to-cure" in determining fundamental breach cannot be supported.

c. The Fundamental Breach Is Curable and the Buyer Demands Substitute Delivery while the Seller Offers Cure

In the context of the buyer's demand for substitute delivery when at the same time the seller offers cure, some authors take the view that if the seller can meet the buyer's expectations to the same degree by repairing as well as by delivering substitute goods, then the decisive consideration will be the cost, and consequently in choosing his remedy, the buyer must observe the duty to mitigate losses and allow the seller to cure.[577]

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the other one, it obliges the seller to respond to the buyer's request for early information about his plans to remedy).

[574] *Id.*

[575] See, *e.g.*, Hillman, Corn. L. Rev. 21-49, at C. 1. (1995)(stating that the aggrieved party's duty to minimize loss may require it to accept new offers from the breaching party, possibly even after a fundamental breach).

[576] See *supra* Part III, B.2.b., C.4.b.

[577] See *e.g.* Will, in: Bianca/Bonell, Art. 48, at 3.1.1.; Huber, in: Schlechtriem, Art. 46 N. 56

This situation seems to be a stronger case for having regard to an offer to cure. The opening words of article 48(1) refer only to the buyer's right of avoidance but not to his right of substitute delivery, and the theoretical concerns about the retroactive effect of an offer to cure do not apply to the remedy of substitute delivery.[578]

The only objection to such an application of the principle of good faith would be that the U.S. proposal to amend the 1978 Draft version of article 48 and to allow the seller to cure a defect, regardless of the buyer's right to substitute delivery, was rejected at the Vienna Diplomatic Conference. However, the proposal was only rejected by 10 votes in favor and 10 against and, according to the Official Records of the Conference, without further discussion.[579] In view of the outcome of this vote, it seems, therefore, permissible to apply the good faith requirement in the proposed form.[580] Where repair is feasible without causing the buyer unreasonable inconvenience, it is indeed plausible to argue that the general principle of reasonableness requires taking into account an offer to cure in the determination of fundamental breach when the buyer demands substitute delivery while the seller offers repair.[581]

d. Substitute Delivery Is Impossible or Exceptionally Burdensome

Some authors argue with regard to the right to specific performance under article 46(1) that the principle of good faith requires that the breaching party be relieved of

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and Art. 48 N. 9 (stating that it follows from the principle of good faith that article 46(2) does not give the buyer a right to compel the seller to deliver substitute goods, if the defect could be remedied just as well by repair and repair would be reasonable for the buyer and more favorable to the seller); Neumayer/Ming, Convention de Vienne sur les contrats, at 322 (arguing that the Convention prefers to prevent the additional economic burdens involved in the restitution of previously delivered goods and conclude that the seller's right to repair should prevail over the buyer's right to require substitution, provided that the other conditions of Article 48(1) are met); Grosswald Curran, Cross-Reference Article 46, at "Another reasonableness issue" (with reference to the principle of reasonableness arguing that "a solution is to handle [the interplay between Article 46(2) and Article 48] according to the formula recited in Article 46(3): in a manner that is not regarded as unreasonable having regard to the circumstances of each case").

[578] See Grosswald Curran, Cross Reference Article 46, at "Another reasonableness issue" (with regard to the text of articles 48(1) and 50 (buyer's right to reduce the price) pointing out that interplay between Article 46(2) and Article 48 is not accompanied by either type of express language).

[579] See *supra* Part III, B.2. b.(2)(a)(ii), notes 395 to 399.

[580] See Schneider, 7 Ariz. J. Int'l Comp. L. 69, at 82 (1989) (pointing out that the question of whether the Convention places a serious limit on the seller's right to cure by giving the buyer the right to dictate the terms of the cure under Article 48 with a demand for substitute goods is still open to debate).

the obligation to make a delivery if it is physically impossible or exceptionally burdensome.[582] Since substitute delivery under article 46(2) is a particular case of specific performance, this proposition also applies to that right. Where substitute performance is physically impossible, however, recourse to the principle of good faith is not necessary. In that case the remedy of substitute delivery is meaningless and will not be sought by the buyer.[583] It only becomes relevant when the exercise of the right to substitute performance is exceptionally burdensome for the breaching party.

There are, however, two objections to the proposed application of the good faith principle to the buyer's right to substitute delivery. The first follows from the legislative history of article 46(2) and the context of article 46(3). Proposals aimed at taking into account the consequences to the seller when the buyer demands substitute delivery were rejected.[584] The second objection follows from article 28[585], according to which the exercise of the right to specific performance, and so too the buyer's right to substitute delivery, is subject to the law of the *forum* and, therefore, outside the scope of the Convention.[586] Hence, there is no room for the application of the Convention's principle of good faith in the proposed form to limit the availability of the right to substitute delivery. Its application would entail broadening the scope of the Convention.

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[581] The consequence of such application of the good faith requirement is that the buyer's right to substitute delivery depends on the seller's failure to remedy the defect within a reasonable time.

[582] See Kastely, 63 Wash. L. Rev. 607, at 621 (1988)(concluding from the Secretariat Commentary on Draft article 65 [= article 79 of the Official Text] that the principle of good faith is an essential aspect of the right to performance. See also para. 8 of the Secretariat Commentary on article 65, Official Records, at 55; Doc. History, at 445.

[583] See Schlechtriem, Uniform Sales Law, at 103 (stating that in cases where obligations are physically impossible to fulfill, domestic legal doctrine–"*impossibilum nulla est obligatio*"–generally prevent a demand for performance).

[584] See *supra* Part III, C. 2.b.(2).

[585] Article 28 provides:

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

[586] There is general agreement that the right to substitute delivery, as a specific form of the right to require performance, is subject to article 28. See, *e.g.*, Bernstein/Lookofsky, CISG in Europe, at 86; Magnus, in: Staudinger, Art. 46 N. 31; Dubé, Civil Code of Quebec and the Vienna Covention, at 219. Honnold, Uniform Law, at § 285, however, takes the view that "in the absence of evidence that UNCITRAL and the Diplomatic Conference faced this problem and evidenced a decision to give an unqualified reading to Article 28, Articles 46(2) and 46(3) should be regarded as *lex specialis* qualifying the general provisions of Article 28".

3. Conclusion (The Concept of Fundamental Breach and the Observance of Good Faith)

The main objective of this section was to examine whether the Convention's requirement to promote the observance of good faith in international trade requires a modification of the contractual or statutory right of the parties to avoid the contract or demand substitute delivery. To that end, four specific cases were illustrated and scrutinized in which such a modification has been suggested. The result of this examination is that the principle of good faith cannot set aside express terms of the contract according to which any deviation from the contract is deemed fundamental. With regard to statutory rights, it was shown that the principle of good faith limits the buyer's right to substitute delivery, but not his right to avoid the contract, when the seller offers cure and provided that the requirements of article 48(1) are met. It therefore modifies the effect of article 46(2) and by the same token supports, in part, the approach that determines fundamental breach in the light of an offer to cure. In all other above discussed cases, the good faith principle may modify the effect of the avoidance or substitute delivery provisions or take precedence over them only under exceptional circumstances, but not as a general rule.

F. Conclusion (Part III: The Meaning of the Concept of Fundamental Breach in Light of the Text of Article 25, the Convention's Legislative History, Context within the Convention, Underlying Purposes and the Observance of Good Faith)

In this Part, following the Convention's rules of interpretation, we have examined the concept of fundamental breach under article 25 in the light of its structure, legislative history, context within the Convention, underlying purposes, and the observance of good faith. We have attempted to demonstrate that all approaches employed in determining fundamental breach support the underlying purpose of this concept, namely to preserve the enforceability of the contract by limiting the remedies of avoidance and substitute delivery. However, the approaches which focus on the *monetary loss of the aggrieved party*, *intentional or reckless non-performance* and *disproportionate loss*,

cannot be supported by means of grammatical, historical and systematic interpretation of fundamental breach and, therefore, their application must be ruled out. The results of our examination of the various approaches can be summarized as follows:

1) Having regard to the *nature of the contractual obligation violated* in determining fundamental breach is confirmed by the text of article 25, its legislative history and the principle of party autonomy, which allows the parties to determine the circumstances under which a breach of contract will be fundamental. The supremacy of that principle is confirmed by the reference to the parties' obligation under the contract in the various cross-references to fundamental breach. The principle of party autonomy is not limited by the Convention's requirement to observe good faith in international trade.

2) The approach which focuses on the *contract's overall value and the monetary loss suffered by the aggrieved party* cannot be supported by the wording of article 25. While the *travaux préparatoires* remain silent as to the permissibility of that approach, it cannot be supported by the remedial system of the Convention. It is therefore not a relevant factor to be considered in determining fundamental breach.

3) To take into account the *fitness of the goods for their intended purpose* as relevant factor in determining fundamental breach is supported by the text of article 25. According to the preparatory works, the drafters of the Convention did not discuss whether the fitness of the goods for the intended purpose is of such importance that unfitness always constitutes a fundamental breach. The cross-reference to article 51(2) confirms such an approach as far as partial non-performance is concerned, and article 73(3) confirms it in respect of installment sales. It is, however, rejected by the Convention's regime governing the seller's obligations. This approach, therefore, cannot be applied outside the scope of articles 51(2) and 73(3).

4) The *remedy-oriented* approach can be supported by the language of article 25 and is not excluded by its legislative history. It is strongly supported by the Convention's remedial system.

5) The wording of article 25 can support the approach, which determines fundamental breach in the light of an offer-to-cure. It is, however, excluded by the opening words of article 48(1), its legislative history, and the systematic interpretation of fundamental breach. While the "observance of good faith" requirement under article 7(1) cannot modify article 48(1) contrary to the express intent of the legislator in avoidance situations, it requires consideration of an *offer-to-cure* where the buyer demands substitute delivery and the seller offers to cure.

6) To consider whether *cure is possible* without requiring an offer by the breaching party can be supported by the text of article 25. This approach, unlike the offer-to-cure approach, is not excluded by the language of article 48(1). Nor is it ruled out by the drafting history of article 48(1).

7) The wording of article 25 can support the approach that looks at the parties' (in) ability and (un) willingness to perform. It is further supported by the legislative history of article 49(1)(b) and article 64(1)(b), by their wording and by the various cross-references to fundamental breach in article 72 and article 73(2).

8) To have regard to whether the *breach or conduct by one party gives the other party reason to believe that it cannot rely on the other party's future performance* can be supported by the language of article 25 and the cross-references to fundamental breach in article 72 and article 73(2).

9) The approach that focuses on whether the breach was committed *intentionally or recklessly* can be supported by the text of article 25. It is, however, incompatible with the remedial system of the Convention under which fault is not a condition of contractual liability and of no importance in the availability of either remedy. Recourse to this approach to determine fundamental breach is thus not permissible.

10) Taking into account the extent to which the breaching party suffers *disproportionate loss* in determining whether a breach is fundamental is supported neither by the wording of article 25 nor by its drafting history. This factor, therefore, cannot be employed in the determination of fundamental breach.

11) The language of article 25 supports the approach which holds the time of the formation of the contract as the relevant point in time at which the party in breach had to foresee or should have foreseen the detrimental consequences to the other party. This approach is not supported by the legislative history, but neither should it be regarded excluded, since the deliberations at the Vienna Diplomatic Conference based on the Draft version of article 25 which differs from the final text. The systematic interpretation of the foreseeability requirement as well as the underlying purposes of article 25 strongly endorse this approach.

Part IV – Critique of the Remaining Approaches

Part III has examined whether the employment of the different approaches employed by scholars and the courts in determining fundamental breach can be justified by means of the Convention's rules of interpretation. This examination has shown that only the following criteria are applicable to determine the fundamental nature of a breach:

- the nature of the contractual obligation violated, namely whether the non-performed obligation was an essential term of the contract;
- in case of the delivery of non-conforming goods, the gravity of the consequences of the breach in the light of
  - with regard to partial non-performance, the fitness of the goods for their intended purpose; and
  - whether it is reasonable for the aggrieved party to retain the defective goods, make use of them and then claim damages for any loss suffered as a result of the breach ("remedy-oriented"-approach);
- with regard to fundamental breach as a prerequisite for the availability of the buyer's right to substitute delivery, the existence of an offer to cure, when the requirements of article 48(1) are met;
- the possibility of cure;
- the parties' (in)ability or to perform;
- the parties' (un)willingness to perform; and
- whether a breach or conduct of one party gives the other party reason to believe that it cannot rely on the other party's future performance.

There are three principal objections to the remaining approaches employed in determining fundamental breach. These objections are based on the assumption that the existence of various and partially conflicting approaches does not correspond to the business community's need for certainty and predictability in contractual relationships. They originate from the placement of the definition of fundamental breach in the first chapter of Part III under the heading "General Provisions".[587] Part III (articles 25-88) not only regulates the substance of the contract of sale, including the respective rights

[587] For a similar conclusion, see Schnyder/Straub, in: Honsell, Art. 49 N. 21; Magnus, in: Staudinger, Art. 48 N. 29; v. Hoffmann, Gewährleistungsansprüche, at 299 (all concluding from the place-

and obligations of the buyer and the seller, but also deals with the remedies available to the seller and the buyer. Giving this heading its plain and ordinary meaning, there is only one concept of fundamental breach to be applied to any provision in Part III.[588]

The first objection to the various approaches is that none of them is applicable to both non-delivery, non-payment or failure to take delivery situations, on the one hand, and to the delivery of non-conforming goods on the other. The *no-reliance* approach, as applied by the scholars and the courts, for example, is only applicable to cases where future performance is due. But where no future performance is due from the breaching party other than the remedying of the breach itself, the aggrieved party cannot invoke no-reliance.[589] The approach, which looks at one party's (in) ability or (un) willingness to perform, applies only to non-delivery, non-payment, or failure to take delivery situations, and not where non-conforming goods were delivered.

On the other hand, the approach, which asks whether the goods are fit for their *intended purpose*, requires some form of delivery of the goods. The same is true for the *remedy-oriented* and the *offer-to-cure* approach, as well as for that, which is focused on the *possibility to cure*, without requiring an offer by the breaching party. None of these approaches is applicable when the seller has not delivered the goods or when performance is not yet due.

The approach that is focused on the nature of the contractual obligation, in theory, applies to all possible situations of fundamental breach. However, where there are no express or implied terms of the contract from which it can be deduced that, any or a certain failure to perform constitutes a fundamental breach or may give the other party the right to avoidance or substitute delivery, this approach provides no assistance.

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ment of the definition of the term "fundamental breach" makes clear that it needs to be interpreted uniformly throughout the Convention).

[588] See Schnyder/Straub, in: Honsell, Art. 49 N. 21; Flechtner, 8 J.L. & Com. 53-106, at I.D. (1988)(emphasizing that "the Convention replaces U.C.C. Article 2's byzantine rules on material breach with a single standard applicable in all circumstances").

[589] This point has been emphasized by the German Supreme Court, see Bundesgerichtshof, 15 November 1995; VIII ZR 18/94, *supra* note 232.

Consequently, the limited scope of the different factors leads to the conclusion that fundamental breach is to be interpreted differently, depending on which remedy is sought and whether or not performance was due.[590] For example, when the buyer demands substitute delivery, only those approaches which are applicable where delivery actually took place, can be employed in determining fundamental breach. Both the no-reliance approach and that, which looks at a party's (in)ability or (un)willingness to perform, are not applicable when the remedy of substitute delivery is sought. They apply only to the avoidance remedy. On the other hand, the approach focusing on the existence of an offer to cure cannot be employed when the buyer has declared the contract avoided, but is relevant in the determining fundamental breach when he demands substitute delivery.

The second objection arises from the fact that the application of the various approaches applicable to the delivery of non-conforming goods may lead to conflicting results. For example, where the goods were bought for processing, there would be a fundamental breach under the purpose approach if processing were impossible due to the delivery of partially defective goods. The remedy-oriented approach, on the other hand, would reach this result only if the sale of the goods were unreasonable for the aggrieved party. Another conflict may potentially arise from the application of the remedy-oriented approach and the approach looking at whether cure is possible, *e.g.* where the defect in the goods sold is not curable, but their resale is reasonable, as was the case in the "African cobalt sulfate" decision by the German Supreme Court.[591] In those cases the question arises, which of the conflicting approaches should prevail. A concurrent application of the different approaches, in the absence of any order, must necessarily lead to arbitrary results and is unduly onerous on the aggrieved party, since it increases the risk of misevaluating whether a breach was in fact fundamental.

The third objection to the various approaches is that they are not applicable to any possible actual fundamental breach situations where no future performance is due. For example, none of the various approaches can be applied where the seller has violated the buyer's exclusive right to market the goods sold where no further deliveries are

[590] Such an interpretation has been suggested by Karollus, ZIP 1993, 490, at 495.

due. Nor can they be employed when one of the parties to a contract of sale has violated his obligation to inform or to co-operate with the other party.[592] The approach, which looks at one party's (in)ability or (un)willingness to perform, is limited to non-delivery, non-payment, or failure to take delivery situations. The approach that looks at whether the breach is curable is limited in its application to the delivery of non-conforming goods and documents, but cannot be employed to determine the nature of other forms of breach. The same holds true regarding the remedy-oriented approach and that which asks whether an offer to cure was made in determining fundamental breach. Finally, the approach focusing on whether the goods are fit for their intended use can be only employed with regard to the delivery of partially non-conforming goods.

In the light of these objections, it seems necessary not only for both practical and theoretical reasons, but also on grounds of certainty and predictability, to rethink the existing approaches in determining fundamental breach and to replace them by a more coherent unified concept.

[591] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223.

[592] For example, S in Montreal agrees to sell goods to B in Hamburg at a stated price f.o.b. Montreal. B fails to nominate a vessel to carry the goods thereby preventing S from performing his own obligation to ship the goods. Does, in the absence of any contract terms from which it follows that failure to nominate a vessel is to be regarded as fundamental breach, B's failure constitute a fundamental breach entitling S to terminate the contract?

Part V – Introduction of a New Methodology

In this final part, a new methodology for the determination of fundamental breach will be introduced. This new methodology would cover all possible breach of contract situations; would be applicable to both the avoidance and substitute delivery remedy; and is a justifiable interpretive method in accordance with article 7(1). To that end, it is first necessary to examine in greater detail how the Convention balances the parties' competing interests, with regard to the availability of these particular remedies.

Many legal systems, in meting out justice in private law matters, assume that merchants generally enter into commercial contracts for purely economic reasons and can, therefore, be fully compensated with damages for any breach of contract, whether fundamental or not.[593] The Convention, however, accepts this premise only once the parties have performed their obligations to deliver the goods, paid the price for the goods, and taken delivery of them. Only then are damages the primary remedy in case of a breach, whereas all other remedies, with the exception of reduction in price, are available only after additional requirements have been met. Before the parties have fulfilled their obligations, at least in terms of its placement in the Convention's overall scheme, specific performance is the primary remedy although damages are equally available.[594]

If the assumption is right that in commercial relations most things can indeed be reduced to monetary damages, then one must confront the question of why should the aggrieved party ever wish to pursue the remedy of avoidance and substitute delivery? The most important reason, in commercial practice, is that these remedies yield a more favorable result in monetary terms.[595] This will be so where the loss suffered is wholly or partly irrecoverable, e.g. because the aggrieved party violated his duty to mitigate,

[593] See Treitel, Remedies, at 16-10 to 16-31 (illustrating the different approaches towards the availability of specific performance as opposed to damages in various common and civil law jurisdictions).

[594] This point has been emphasized by Treitel, Remedies for Breach of Contract, at § 72 (stating that the Convention adopts the Civil Law principle that the aggrieved party is entitled to require performance).

[595] For other possible reasons which the aggrieved party has for terminating the contract, see Treitel, Remedies for Breach of Contract, at § 241 (stating that while the most obvious reason of the aggrieved part is the hardship which he may suffer in having to accept or retain a performance different

or where the party in breach is exempted from damages for failure to perform due to an impediment beyond his control, or where damages are hard to quantify, to prove or to enforce, or are too remote. Another case in which the aggrieved party, in particular, might wish to avoid the contract is where he has made a bad bargain, which would still have been bad, even if the contract had been duly performed. Moreover, in principle, avoidance may favor the aggrieved party in the event of the other party's insolvency. Finally, with regard to substitute delivery, a further reason to seek this remedy is that the buyer needs the goods and only the seller produces them; or where no adequate substitute goods are available elsewhere.

On the other hand, the party in breach may have equally obvious reasons for wishing to resist avoidance and substitute delivery. Once the contract has been avoided the party in breach must make restitution of whatever the aggrieved party has supplied or paid under the contract. That may mean that he has to bear a risk, which, by the terms of the contract or by its very nature, was one, which had been undertaken by the aggrieved party.[596] This will generally be the position when a buyer seeks to avoid a forward sale on a falling market, or when a seller seeks to avoid such a sale on a rising market. The party in breach may even lose all or most of his performance when there is no market for it elsewhere. Moreover, in attempting to perform he may have incurred expenses, which will be wholly or largely wasted as a result of avoidance. In addition, both substitute delivery and avoidance necessarily involve risks of damage or loss and expenses such as costs for the transport of the (substitute) goods. When other remedies, such as damages or price reduction are available, these remedies will often safeguard the interests of the aggrieved party sufficiently so that avoidance should be avoided.

The Convention, on the one hand, protects the interests of the aggrieved party by recognizing in principle the right to avoidance and substitute delivery. By providing these remedies the Convention takes into account that there are situations where the interests of the aggrieved party are not sufficiently protected by an award of damages.

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from that for which he bargained, the right to terminate is often asserted for quite different reasons, such as that termination is the speedier remedy than a suit for performance or damages).

[596] This point has been emphasized by Treitel, Remedies for Breach of Contract, at § 241.

However, by requiring that the defect has substantially deprived the aggrieved party and that the deprivation has been foreseeable for the party in breach, the Convention also considers the interests of the party in breach. When the party in breach is able and willing to perform, he enjoys further protection in that a formal notice either in the nature of a *Nachfrist* (after performance was due) or a demand for adequate assurance (before performance was due) is required. Where the party in breach is unable or unwilling to perform at all, the Convention allows the aggrieved party to avoid the contract without requiring any formal notice or the existence of a fundamental breach. Ignoring these particular cases, one may conclude that the Convention, in the determination of fundamental breach, incorporates a dual test based on a certain degree of severity of the breach and focuses on whether the aggrieved party especially *needs* these remedies – as opposed to damages – to compensate for impairment.

Of the existing approaches, only the remedy-oriented approach takes into account these two factors. This approach focuses not only on whether the goods do not possess the features necessary for their intended use by the buyer (*"severity of the breach"* factor), but also on whether the interests of the buyer are sufficiently protected by damages (*"need"* factor). All other approaches focus exclusively on the severity of the default in evaluating the degree of the breach. The remedy-oriented approach, however, is limited in its scope to the delivery of non-conforming goods and, at least in its current form as proposed by scholars, only takes into account the risk ran by the *buyer* of becoming involved in a dispute with the seller as to whether he had sold the goods for a reasonable price thereby observing his duty to mitigate losses. Moreover, it is of no assistance in the determination of fundamental breach, when the *seller* is seeking the avoidance remedy. On the other hand, this approach is a good basis for developing a more comprehensive methodology.

In order to cover all possible situations of fundamental breach, past, present or future, in determining the severity of the breach, regard should be had not only as to whether the breach has frustrated the buyer's expectations with respect to the intended use of the goods. Rather one should ask whether a breach by one party has frustrated the expectations of the other party with regard to the purpose of the contract *as a whole*. Such an approach would not only be applicable to the delivery of non-

conforming goods, but also to other cases of non-performance enumerated in the Convention, such as late delivery or late payment, failure to deliver in full, defect in title, and missing or defective documents. Moreover, it would also apply to (anticipated) breaches of other obligations, which "frustrate" the aggrieved party's purpose in entering into the contract, such as: the failure to obtain certain permits, test certificates, or other documents[597]; to protect trademarks[598] or to refrain the buyer from parallel importing[599] or the seller from selling goods inside a certain territory[600]; a violation of the duty to provide information; and the failure to co-operate in order to give full effect the contract, etc.[601]

If the purpose of the contract has indeed been frustrated, the question that remains is whether there should be any limitations on the possible reasons indicating the aggrieved party's "need" of the remedy of avoidance and substitute delivery as outlined above. In the present writer's view, if the party in breach loses the benefit of the mitigation rule, the aggrieved party should be deprived of exercising these particular remedies. Moreover, problems with regard to the obtainment and enforcement of a damages award should not be taken into account, since such considerations also concern the remedy of avoidance and substitute delivery, the enforcement of which also requires taking legal action. One instance of when substitute delivery is not preferable to a damages award is when performance of the contract would have become illegal, for example, where after the delivery of the defective goods the seller's government has imposed an export ban on selling goods of that kind. The buyer should then be barred from exercising this remedy even if he cannot obtain a satisfactory substitute.

On the other hand, where the party in breach is exempted from paying damages under article 79 for failure to perform due to an impediment beyond his control, the ag-

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[597] See *Bundesgerichtshof*, 3 April 1996, VIII ZR 51/95, *supra* note 223.

[598] See *Oberlandesgericht* Frankfurt a.M., 17 September 1991, 5 U 164/90, *supra* note 237.

[599] See *Cour d'appel de Grenoble, Chambre commerciale; S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export*; 22 February 1995, *supra* note 207.

[600] See *Landgericht* Frankfurt a.M., 16 September 1991, 3/11 O 3/91, *supra* note 238.

[601] See Schlechtriem, in: Schlechtriem, Art. 25 N. 24 (emphasizing that "the fact an obligation is stated to be 'ancillary' is irrelevant to the importance of the corresponding interest which the promisee has in its performance"); Bernstein/Lookofsky, CISG in Europe, at 88, where the authors state, that "even the breach of an ancillary duty can amount to a fundamental breach if it is so seriously

grieved party should be entitled to avoid the contract or, if possible, demand substitute delivery.[602] The same is true where damages cannot compensate the aggrieved party, when they are hard to quantify or difficult to prove; or where the buyer runs the risk that, when calculating the loss, there will be a dispute with the seller regarding the reasonableness of the resale price. Such is the case where no market price for the non-conforming goods is ascertainable, or where the aggrieved party suffered or is likely to suffer immaterial harm for injury of his business reputation, as for example, when the buyer of luxury goods designated to be sold in a high-end markets sells them to ordinary drugstores.

Another case where avoidance is the more appropriate remedy are continuing or successive contracts, calling for repeated acts of performance over a period of time, in particular exclusive distribution agreements. Such contracts presuppose the continuation of a relationship involving personal confidence, and, therefore, a breach of one party, which destroys that confidence, should justify avoidance by the other.

The buyer's insolvency is a further case for avoidance though in the most instances restitution will be thwarted by the applicable *lex concursus*.[603] Where the damages are too remote under article 74 and assuming that the formation of the contract is the relevant point in time at which foreseeability is measured, in most instances the grounds invoked by the aggrieved party to justify avoidance will also be regarded as too remote under article 25. Therefore, this case will not become very practical. Finally, the fact that a bad bargain was made should not be taken into account when determining the aggrieved party's need of avoidance, since the risk of making a bad bargain has been undertaken by the aggrieved party.

It was the object of this Paper to elucidate the concept of fundamental breach and to replace the various approaches introduced by the courts and scholars with a methodology that would provide the parties to a sales transaction governed by the Conven-

jeopardizes the purpose of the transaction that the aggrieved party cannot reasonably be expected to further trust the party in breach".

[602] For the same conclusion, see Honnold, Uniform Law, at § 308.2 (stating that "when Article 79 exempts a party from damages for failure to perform, the *appropriate* remedy is usually avoidance of the contract") [Emphasis added]

tion greater assistance in being able to determine whether a fundamental breach has occurred. To that end we critically examined the existing approaches. We have concluded that it is necessary not only for both practical and theoretical reasons, but also on grounds of certainty and predictability, to rethink the existing approaches in determining fundamental breach and to replace them by a more coherent unified concept. The new methodology incorporates a test, which asks whether the purpose of the contract has been frustrated due to the breach, and whether the aggrieved party needs the remedy of avoidance or substitute delivery - as opposed to damages - in determining fundamental breach. In case of a breach and in the absence of any contractual provision providing for fundamental breach, with the help of this new methodology, it should not be difficult to the aggrieved party to determine as to whether this breach is fundamental. Moreover, with regard to the remedy of substitute delivery, this methodology promotes the uniform application of the Convention in both Common Law and Civil Law jurisdiction since the factors indicating the buyer's need to substitute delivery would give him in Common Law jurisdictions, subject to the court's discretion, the right to a judgement entitling the buyer to this form of specific relief. By the same token, the new methodology is appropriate to reconcile the conflict in the Convention's remedial provisions created by article 28, which limits the buyer's right to (substitute) performance in Common Law jurisdictions.

[603] See *supra* note 563.