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The "Detriment" as a Prerequisite for Fundamental Breach of Contract: Effect of Case Law on Making a Better Uniform Understanding of CISG Article 25

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Abstract:

This study examined the Detriment as a Precondition for Fundamental Breach of contract. Fundamental breach is one of the key doctrines used by the United Nations Convention on Contracts for the International Sale of Goods(CISG hereafter) -namely the doctrine of fundamental breach of contract provided for in article 25. Based on this article detriment means a substantial deprivation of a party of what he is entitled to expect under the contract. To determine whether or not the term detriment equal damages, article 25 CISG does not contain any definition or examples to clarify the term 'detriment'. This study explored this notion in light of the large number of courts' decisions related to article 25.

he study ended to a certain fact that case law is the correct way to achieve uniformity in understanding CISG article 50, and to establish some directions, which hopefully will benefit to reach a uniform interpretation of the "detriment" notion.

Introduction

The detriment is one of the prerequisites for Fundamental Breach. Fundamental breach is one of the key doctrines used by the United Nations Convention on Contracts for the International Sale of Goods-namely the doctrine of fundamental breach of contract provided for in

article 25. This article is one of the most important provisions in the convention because the doctrine of a fundamental breach has a crucial role to the CISG's remedial system. The fundamental breach is a prerequisite for some of the remedies given to both parties (seller and buyer) under the convention, while others only require a simple breach. It is the necessary precondition to use the following remedies: avoidance⁽¹⁾ of the contract under articles 49(1)(a) and 64(1)(a)), delivery of substitute goods under article 46(2)), and to enact remedies in spite of the risk having passed to him (art. 70). However, a simple breach will be sufficient for the damaged party to claim damages under article 74 and to claim a price reduction in accordance to article 50.

On the other hand article 25 is one of the most difficult provisions to interpret⁽²⁾, because it only defines fundamental breach of contract in general terms without providing the meaning of them, nor gives lines or examples to clarify the concept. Although, various fruitful efforts have been made in order to realize a uniform interpretation of the meaning of factors constituting fundamental breach, this goal has not yet been achieved.

As article 25 CISG does not contain any definition or examples to clarify the term 'detriment', this study will examine the meaning of this term in the context of article 25 CISG, seeking assistance from the large number of decisions and interpretations of courts around the world.

However, before addressing the subject matter of this study, it is necessary to first take a glance on the elements constituting fundamental

(1) It is first of all the precondition for the non-defaulting party to use his right to avoid the contract, and thus the concept of fundamental breach decides whether a contract lives or dies. Article 49(1)a; art. 51; 64(1)a; 72(1); 73. As a legal basis for the [buyer]'s avoidance of the contract, the provision of Art. 49(1)(a) CISG is relevant. This provision states that the buyer may declare the contract avoided if the failure by the seller to perform any of its obligations under the contract amount to a fundamental breach. A breach is fundamental according to the definition of Art 25 CISG, if it results in such a detriment to the other party, as to substantially deprive it of what it is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

(2) See Shoe leather case Poland 11 May 2007 Supreme Court of Poland (Shoe leather case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/070511p1.html>]

breach and the use of UNIDROIT Principles to interpret and supplement article 25 of CISG. Thus, the objective of this paper is limited. It does not examine the entire elements of CISG article 25. Moreover, it does not examine the issue, in details, under UNIDROIT Principles. Instead, it considers the effect of case law on making a better uniform understanding of the term "detriment" as a precondition for fundamental breach of contract laid down in CISG article 25.

Therefore this paper will be divided as follows:

- 1 - Introduction
- 2 - Glance on Prerequisites for Fundamental Breach
- 3 - The decisive factor: the damaged party's essential interest in the performance of the contract.
- 4 - Objective test to establish the legitimate contractual expectation
- 5 - Economic loss is not completely irrelevant

2- Glance on Prerequisites of Fundamental Breach

Under this section two issues will be examined: the prerequisite of fundamental breach and the use of UNIDROIT Principles to interpret article 25 of CISG.

2.1 The Prerequisites

Article 25 provides for that:” A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result”. One can note that this article contains two parts:

The first is related to the damaged party which is a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract.

And the second part is related to the breaching party which is: unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

This part talks about Foreseeability of substantial detriment by the breaching party as a precondition for fundamental breach⁽³⁾. A breach of contract may be considered as fundamental only if it is foreseeable⁽⁴⁾ that the damaged party will be deprived of what he is entitled to expect under the contract. The impact of a failure to perform an obligation is assessed by looking at whether the breaching party, knew or could have been aware of the particular expectations on the part of the non-breaching party⁽⁵⁾. This means that the burden of proof of unforeseeability is upon the breaching party. The breaching party may avoid the effect of the fundamental breach doctrine by showing that either he did not foresee the substantial detriment suffered by the damaged party, or that a reasonable person of the same kind in the same circumstances could not have foreseen it. Therefore, lack of such foreseeability is regarded as an

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- (3) CISG does not address the issue as to when a reasonable must foresee the promisor's interest. Whether that time is, at the latest, the time of contracting or whether it may be later, so that the obligation breached can be upgraded, is a matter of controversy amongst legal writers. It is argued that the foreseeability should be assessed as of the date of contracting. For this see Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods*, Translated by Geoffrey Thomas, Clarendon Press, Oxford, 2nd Edition, 1998, p1180. It was stated also that "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 it should it not be excluded, since the deliberations at the Vienna Diplomatic Conference [were] 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". See Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)* Reproduced with permission from Pace ed., *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Kluwer Law International (1999) 177 - 354. <http://cisgw3.law.pace.edu/cisg/biblio/koch.html#III>.
- (4) Therefore, it was held that: "The change of market is a business risk, which should have been foreseen by the [Buyer], as a businessman and should be prepared to bear the risk, so it was not a change of situation for which neither party had subjective fault, and for which neither parties should be liable. In sum, the [Buyer] cancelled the order and avoided the contract in order to avoid market risk, which constituted a fundamental breach, so the [Buyer] should be liable for the [Seller]'s loss". (China 29 September 2000 CIETAC Arbitration proceeding (Cushion case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/000929c1.html>]).
- (5) See *Software case*, Austria 21 June 2005 Supreme Court (Software case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/050621a3.html>]. See also *Netherlands 23 April 2003 Appellate Court 's-Gravenhage (Rynpoort Trading v. MenebaMeel)* [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/030423n1.html>].

excuse in favor of the breaching party meaning that the damaged party being prevented from resorting to avoidance⁽⁶⁾.

Moreover, if both parts of article 25 are met the breach will not be fundamental unless there is no offer to cure by the seller under article 48 CIS. Serious breach will not be fundamental if the defaulting party offers to cure it under CISG article 48⁽⁷⁾. Therefore it was held that: "According to doctrine as well as jurisdiction of the UN Sales Law, an objective fundamental defect does not mean a fundamental breach of contract when the defect is removable and the seller agrees to remedy this defect without creating unreasonable delay or burden on the buyer. That the buyer is obliged to accept a remedy (subsequent cure of the defect) offered by the seller results from Art. 48(2) CISG"⁽⁸⁾.

Needless to say that article 25 cannot be applied alone, however only in conjunction with CISG's other provisions related to remedial system, as indicated in the introduction, because fundamental breach of contract is regarded as a prerequisite for some remedies available for the buyer and seller under the convention. Therefore, it has become clear that the availability of fundamental breach of contract decides whether the contract to live or die. If a breach of contract takes place, and was proved that it is a fundamental one, a party can declare the avoidance of the contract⁽⁹⁾.

However, in all circumstances, it should be noted that the term fundamental breach under Art. 25 CISG is to be interpreted narrowly. If it is doubtful whether or not a breach may qualify as fundamental, it

(6) See the Germany case, Germany 17 September 1991 Appellate Court Frankfurt (Shoes case) [Cite as: <http://cisgw3.law.pace.edu/cases/910917g1.html>]. See also for this Will, article 25, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 205-221. Available at <http://cisgw3.law.pace.edu/cisg/biblio/will-bb25.html>). Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods, Translated by Geoffrey Thomas, Clarendon Press. Oxford, 2nd Edition, 1998, p178-180.

(7) See for this John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, (Hague, the Natherland: Kluwer Law International, 3rd ed. 1999), p 210.

(8) See the judgment of the Bundesgericht [Swiss Supreme Court] of 28 October 1998, 4C.197/1998 Erw. 2b [available at <<http://cisgw3.law.pace.edu/cases/9810218s1.html>].

(9) Leonardo Graffi, Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention. *Revue de droit des affaires internationales / International Business Law Journal* (2003) No. 3, 338-349 (Forum Européen de la Communication) Paris. Available at <http://www.cisg.law.pace.edu/cisg/biblio/graffi.html>.

should generally be assumed that no fundamental breach is existent⁽¹⁰⁾. This result is in line with the general principle of CISG pursuant to which avoidance of contract should be of the last resort, which should not be granted easily. Furthermore, when interpreting the term fundamental breach, CISG itself calls for a uniform interpretation and application when it says in article 7 that:” 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”.

In all cases, pursuant to article CISG 25 the breach will be fundamental if the non-defaulting party suffers detriment. This article does not give any assistance to clarify the term detriment. No definition is given in this article and no examples are given to clarify when detriment rises to the level of a fundamental breach. In addition, it is unclear whether it refers to the detriment actual damage or loss, and whether it refers only to material losses or to intangible losses⁽¹¹⁾. The “nature of detriment was never at issue, only its effectiveness”. Therefore the discussion about this term was given to its purpose. The purpose simply is to make the resort to avoidance in very limited cases, and this clearly aims beyond the scope of compensation for damages⁽¹²⁾.

It has become clear that the doctrine of detriment is much broader than that of damage and therefore, Article 25 CISG should be extensively interpreted, for it "does not presuppose an actual or impending pecuniary damage. Instead, Art. 25 CISG also applies to other kinds of damage, e.g., an impediment of commercial disposal or a detriment to the reputation of the well-performing party”⁽¹³⁾. This means that it is enough

(10) See the (Packaging machine case), Switzerland 18 May 2009 Bundesgericht [Federal Supreme Court] (Packaging machine case) [Cite as: <http://cisgw3.law.pace.edu/cases/090518s1.html>]. See also (Inflatable triumphal arch case) Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (Inflatable triumphal arch case) [Cite as: <http://cisgw3.law.pace.edu/cases/021105s1.html>].

(11) Robert Koch, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG) Reproduced with permission from Pace ed., Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International (1999) 177 - 354. <http://cisgw3.law.pace.edu/cisg/biblio/koch.html#III>.

(12) Will, Article 25, Op Cit, 205-221.

(13) See the Auto case, Austria 23 January 2006 Oberlandesgericht [Appellate Court] Linz (Auto case) [Cite as: <http://cisgw3.law.pace.edu/cases/060123a3.html>]

to note that under Article 25, detriment means a substantial deprivation of a party of what he is entitled to expect under the contract.

2.2 The use of UNIDROIT Principles to Interpret Article 25 of CISG.

According to Article 7 of CISG, when interpreting this Convention, one should take into consideration:

- 1 - its international character
- 2 - the need to promote uniformity in its application and the observance of good faith in international trade
- 3 - matters governed by this Convention, but not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Shall such structure of this provision permit the recourse to UNIDROIT Principles for interpretation?

No doubt that the UNIDROIT Principles are also of international character and therefore, they could considerably be used for the purpose of applying article 7 in finding the proper interpretation of the CISG provisions. "Although, in view of its binding nature, CISG will take precedence over the UNIDROIT Principles whenever the requirements for its application exist", It has become evident that in cases where the CISG provisions govern the international trade contract, the UNIDROIT Principle may be of service by being used as a means of interpreting and supplementing the CISG⁽¹⁴⁾.

Article 7.3.1 of the UNIDROIT Principles provides that:"(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance". It is clear that the effect of this article bears a significant degree of similarity to the one of the CISG article 50, since it provides for the same factor laid down in article 25 CISG, which should be taken into account in determining the non-performance would hold a fundamental

(14) John Felemegas, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 115-265, available at: <http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#ch46>.

character or not, i.e. "the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result"⁽¹⁵⁾.

However, the UNIDROIT principles further provides more guidelines that assist to determine whether the breach is a fundamental non-performance or not. It provides, in paragraph 2, that: "In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether: a-...

- (b) strict compliance with the obligation which has not been performed is of essence under the contract;
- (c) the non-performance is intentional or reckless;
- (d) the non-performance gives the aggrieved party reason to believe that it cannot

rely on the other party's future performance;

- (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated".

Shall all these factors assist in interpreting article 25 of CISG? Not all these factors laid down in this article may be used to interpret and make a better understanding for its counterpart 25 CISG provision.

The reference to the legitimate expectation under the contract, in article 25 of CISG, 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, and therefore, this result allows the resort to factors (b) and (d) of article 7.3.1(2) of the UNIDROIT Principles⁽¹⁶⁾. In other words, although there is no express provision in CISG, for example, on factor (b) (strict compliance of essence) of the principles, it may be taken into account to determine the fundamentality of breach. It should be

(15) The Official Comment on this provision states that: "The first factor referred to in para. 2(a) [of Art. 7.3.1] is that the non-performance is so fundamental that the aggrieved party is substantially deprived of what it was entitled to expect at the time of the conclusion of the contract." "[The second factor referred to in para. 2(a) of Art. 7.3.1 is that] [t]he aggrieved party cannot terminate the contract if the non-performing party can show that it did not foresee, and could not reasonably have foreseen, that the non-performance was fundamental for the other party". Comment 3(a) on UNIDROIT Principles Art. 7.3.1.

(16) Robert Koch, The Concept of Fundamental Breach, Op Cit, 177 - 354.

noted that the expectation interests are tied totally to the terms of the contract. Under CISG Article 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate or vary from any of its provisions". This article contains the general principle of party autonomy which gives the parties the right to craft their own rules to govern their relationship, and thus the parties may set their own standards as to the circumstances under which the non-performance will be considered as fundamental breach. Therefore, if a contract governed by the CISG requires strict compliance with an obligation, a minor deviation from the defined standard of performance would constitute a fundamental breach of contract in the meaning of article CISG 25⁽¹⁷⁾.

However, it should be noted that under the CISG, "fault" is not generally a prerequisite for contractual liability. Therefore, the factor laid down in article 7.3.1(2)(c) of the UNIDROIT Principles may not be used, since it requires "fault" as a prerequisite⁽¹⁸⁾.

Moreover, no use of the factor, laid down in article 7.3.1(2)(e) of the UNIDROIT Principles, focusing on the disproportionate loss suffered by the non-performing party as a result of the preparation or performance if the contract is terminated, since the formula of article 25 looks at the side of damaged party rather than the side of breaching party. In other words, Importance should be given to "the consequences for the party in damage more than to the breach itself"⁽¹⁹⁾. Thus, it is less important to consider how badly the breaching party behaved or suffered as a result of breach. Moreover, it appears that such factor is not welcomed by CISG, since: firstly there are no guidelines to indicate under which circumstances a breaching party's loss becomes significant. This leads to a certain fact that any determination of fundamental breach would therefore be arbitrary and cause uncertainty. Secondly," 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

(17) John Felemegas, *Op Cit*, 115-265.

(18) Robert Koch, *Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 25 CISG*, November 2004. Available online at: <http://cisgw3.law.pace.edu/cisg/biblio/koch1.html>.

(19) *The Clothing case*, Switzerland 11 April 2002 Canton Appellate Court Vaud (Clothing case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/020411s1.html>]

of the avoidance remedy in spite of the existence of a fundamental breach but it does not prevent a breach from being fundamental"⁽²⁰⁾.

3- The decisive factor: the damaged party's essential interest in the performance of the contract.

According to article 25 A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. This article deals with main factor that refers to the sphere and meaning of detriment in the context of CISG. The detrimental consequences should be assessed according to what the damaged party could have legitimately expected from the contract and whether the breach has destroyed such expectation or not⁽²¹⁾. This destruction must be serious that the essential interest of the damaged party in performance of the contract is lost (essentially ceases to exist), without the necessity that the latter suffers some monetary damage⁽²²⁾. Put another way, a fundamental breach of contract in terms of Art. 25 CISG requires that the party, which has acted in accordance with the contract, has suffered a detriment. This detriment must also be of such impact as substantially to deprive him of what he is entitled to expect under the contract. The legitimate expectation of the party which acted in accordance with the contract is, therefore, decisive⁽²³⁾. However, considering and keeping in mind: "both its history and purpose, any narrow construction must be excluded. Detriment does not equal damage nor does it equal loss or any similar international or national term of art"⁽²⁴⁾.

(20) Robert Koch, Commentary Op Cit, Available online at: <http://cisgw3.law.pace.edu/cisg/biblio/koch1.html>

(21) Franco Ferrari, Fundamental Breach of Contract Under the UN Sales Convention– 25 Years of Article 25 CISG –Reproduced with permission of 25 Journal of Law and Commerce (Spring 2006) 489-508. Available at <http://cisgw3.law.pace.edu/cisg/biblio/ferrari14.html>

(22) See for this Cobalt sulphate case, Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html>]

(23) Austria 21 June 2005 Supreme Court (Software case) [Cite as: <http://cisgw3.law.pace.edu/cases/050621a3.html>]

(24) Will, article 25, Op Cit, 205-221. Available at <http://cisgw3.law.pace.edu/cisg/biblio/will-bb25.html>. See also the case of Germany 21 November 2007 Appellate Court Koblenz (Shoes case) [Cite as: <http://cisgw3.law.pace.edu/cases/071121g1.html>].

Therefore the destruction of the interest of damaged party in the performance of contract should be decided on a case-by-case basis⁽²⁵⁾. In other words, the specific circumstances of the individual case must be taken into account in order to determine whether a breach amounts to a fundamental breach⁽²⁶⁾, and thus confirming the significant role of courts for a proper and correct understanding of the concept of fundamental breach.

It, thus, became clear that if the seller did not prove the performance of its obligation of delivery of goods to the buyer, it would be considered as committed fundamental breach of contract in the light of Article 25 of the CISG. By doing this, the seller would be regarded as substantially deprived buyer of what it was entitled to expect from the contract⁽²⁷⁾.

Likewise, if the Seller failed to deliver the goods based on the specification and quality stipulations in the contract, his action would amount to a fundamental breach of the contract, as the buyer would be regarded as deprived of its justified contractual expectations⁽²⁸⁾. In one case the buyer made a contract to buy a printing machine with the precision of 0.03mm. the seller delivered him a machine used for ordinary business purposes, and thus the buyer's interest in the performance ceased to exist, for the buyer was deprived of what it is entitled to expect under the contract⁽²⁹⁾.

(25) For this approach see Franco Ferrari, *Op Cit*, 489-508. See also Leonardo Graffi, *Op Cit.*, 338-349.

(26) Packaging machine case, Switzerland 18 May 2009 Bundesgericht [Federal Supreme Court] (Packaging machine case) [Cite as: <http://cisgw3.law.pace.edu/cases/090518s1.html>]. Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html>].

(27) Data processing equipment case, France 12 October 2000 Appellate Court Paris (Data processing equipment case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/001012f1.html>]

(28) China 9 September 2002 Shanghai Yangpu District People's Court (China Shanghai Dongda Import & Export Corp. v. Germany Laubholz - Meyer Corp.) [Cite as: <http://cisgw3.law.pace.edu/cases/020909c2.html>].

(29) Printing machine case, China 14 January 2004 CIETAC Arbitration proceeding (Printing machine case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/040114c1.html>]. see also China August 2006 CIETAC Arbitration proceeding (Chilling press case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/060800c1.html>] in which The Arbitration Tribunal verified that on 15 April 2004 the [End User] received the first installment and found that the goods have severe quality defects (mainly rust and are inconsistent with the design) and thereupon the [Buyer]'s purpose of the Contract could not be realized.

The same conclusion has been reached where the goods sold become completely unusable, as the damaged party (buyer) will be regarded as substantially deprived of what he is expected from the contract⁽³⁰⁾. The buyer will, also, be regarded as being deprived of what it is entitled to expect from the contract, if the seller delivered only a small quantity of sold goods. In one case a seller entered into a contract for the sale of 119 doors and 123 door frames. The seller delivered a consignment of 22 doors and 174 door frames, although the buyer had made it known that strict compliance is needed⁽³¹⁾, as the goods would be resold to the [Buyer]'s customer and that this could not have been done from the goods that were actually delivered. Pursuant to this, the buyer did not get what it was entitled to expect under its contract, and thereupon, was given a right to avoid the contract in accordance with Article 49(1)(a) of the CISG, "since it was ascertained that [Seller] was acquainted with the needs for which [Buyer] has purchased the goods"⁽³²⁾. It was also held that the buyer is entitled to declare the contract avoided as the failure to deliver the first instalment by the seller gives the buyer the reason to believe that a fundamental breach of contract was to be expected for further instalments (article 49(1)(b), 73(1) and (2) CISG)⁽³³⁾.

It has also been determined that the non-delivery of packaging machine with the performance required under the contract, is regarded as detriment in the meaning of article 25 CISG. In Switzerland case the court found that: "the packaging machine achieves an actual performance of 52 vials per minute while 180 vials per minute were required under the contract concluded between the parties. This deviation establishes a fundamental breach of contract in terms of Art. 25 CISG". This means that the purchaser received a packaging machine with only a

(30) See China December 2005 CIETAC Arbitration proceeding (Heat transfer oil furnace case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/051200c1.html>]

(31) See Slovenia 14 December 2005 Higher Court [Appellate Court] in Ljubljana (Door and door jamb case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/051214sv.html>]

(32) See the Door and door jamb case, Slovenia 14 December 2005 Higher Court [Appellate Court] in Ljubljana (Door and door jamb case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/051214sv.html>]

(33) The Sunflower oil case Switzerland case, Switzerland 5 February 1997 Commercial Court Zurich (Sunflower oil case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/970205s1.html>]

29% of the agreed performance, and thus his interest in the performance ceased to exist, since the seller delivered him a machine with a loss of productivity of 71%⁽³⁴⁾. It is notable that the court found that the buyer was substantially deprived of what it had been entitled to expect, for it concluded that contract to buy a new packaging machine to achieve a better performance than the former machine that has been using to process the three types of goods. In other words, the buyer would not have entered into the particular contract, had it been aware of the packaging machine's actual performance. Therefore, the interest of the damaged party (the buyer) in performance of the contract is lost as its former packaging machine – which had been used before in order to process the three types of goods – had been capable of achieving a similar performance⁽³⁵⁾. It is evident-from the fact of the case- that the court based its decision on the buyer's legitimate contractual expectation, for it had been delivered a packaging machine which failed to achieve the performance required under the contract.

On the other hand, the placement of the buyer in administration was held to constitute a fundamental breach of contract, since this resulted in such detriment to the seller as to substantially deprive it of what it was entitled to expect under the contract, i.e. the seller's right of receiving full purchase price. The seller, therefore, was held to be entitled to avoid the contract under articles 61 and 64 CISG⁽³⁶⁾.

The question now is: what criterion should be considered to establish the legitimate contractual expectation?

4- Objective test to establish the legitimate contractual expectation

As article 25 does not provide any clarification or yardstick for the meaning of detriment, it is not an easy task to determine precisely when a breach of contract deprives a damaged party of what he is entitled to expect under the contract. It is submitted, however, that some

(34) The Packaging machine case, Switzerland 18 May 2009 Bundesgericht [Federal Supreme Court] [Cite as: <http://cisgw3.law.pace.edu/cases/090518s1.html>]

(35) Ibid.

(36) Australia 28 April 1995 Federal Dist. Ct., Adelaide (Roder v. Rosedown) [Cite as: <http://cisgw3.law.pace.edu/cases/950428a2.html>]. See also UNICITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, p 118-119.

circumstances should be taken into account to establish detriment. The intent of the parties and the formula of article 25 will now be examined.

4.1- The Intent of the Parties

A breach must cause a detriment that substantially deprives the damaged 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 it 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⁽³⁷⁾. Under CISG Article 6: "The parties may exclude the application of this Convention or, subject to article 12, derogate or vary from any of its provisions". This article contains the general principle of party autonomy which gives the parties the right to craft their own rules to govern their relationship, and thus the parties may set their own standards as to the circumstances under which the failure to perform by one party amounts to a fundamental breach⁽³⁸⁾.

Under article 25 the damaged party bears the burden to prove the fact that the breach of contract caused him the destruction of what it was entitled to expect under the contract. An express provision can give assistance in this situation by taking the opportunity to expressly state in the contracts which obligations is considered essential breach of which is fundamental⁽³⁹⁾. As for late performance (for example), the most obvious method to decide whether a breach is fundamental or not is the existence of an agreement stating that delivery should be done at an exact time. "A fundamental breach of contract will be assumed if the parties have expressly concluded a firm deal because in this case the parties have a common intent that the transaction as a whole be dependent on the compliance with the designated time limit of delivery...Non-compliance with a specified time for delivery forms a fundamental breach of contract only if exact compliance with that time is of particular interest to the buyer. It must be recognizable for the seller at the time of conclusion of

(37) Robert Koch, *The Concept of Fundamental Breach*, Op Cit., 177 - 354.

(38) Robert Koch, *Ibid*, at 185.

(39) See for this Cobalt sulphate case, Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html>]. See also the (Computer telephone board case) Austria 28 September 2000 Appellate Court Graz [Cite as: <http://cisgw3.law.pace.edu/cases/000928a3.html>].

the contract that the buyer would prefer no delivery at all to a delayed delivery”⁽⁴⁰⁾. If a government agency entered into a contract with a German seller for the purchase of certain photographs specifications for the evolution of its country. The buyer made it clear to the seller that the goods would be used in the annual celebration marking the state’s 40rd National Day to be held on 2nd February. The seller delivered them on 3rd of February. The buyer refused to accept the goods, as it was substantially deprived of what it had been entitled to expect, and thus the conduct of the seller amounted to a fundamental breach of contract.

However, the parties should designate a firm date in the meaning that compliance with a time limit for delivery be crucial for the existence of the contract as a whole. The formulation "as soon as possible" used by the buyer is not sufficient to realize this result. While the formulation or the term "at the latest", is sufficiently to indicate the importance of delivery in time⁽⁴¹⁾. Furthermore, it is sufficient to indicate that the goods are required to show it in an exhibition to be held in a certain date. In a Chinese case⁽⁴²⁾, a dispute arose with regards to a contract of purchasing an automobile. The purpose for the buyer to sign the contract was not to purchase the automobile itself only, but to show it in an exhibition in order to expand tourism business⁽⁴³⁾. The tribunal found that the automobile which the seller delivered had design and quality defects. The seller’s engineers adjusted and tested the automobile twice, but could not fix it. The purpose of the contract was frustrated when the automobile could not be shown in the exhibition and thereupon the buyer was substantially deprived of what it is entitled to expect under the contract.

In the absence of express contractual stipulations, the court needs to determine whether one party’s breach of contract substantially deprives the other one of what it was entitled to expect under the contract. In

(40) Memory module case, Germany 12 November 2001 Appellate Court Hamm (Memory module case) [Cite as: <http://cisgw3.law.pace.edu/cases/011112g1.html>].

(41) Memory module case, Germany 12 November 2001 Appellate Court Hamm [Cite as: <http://cisgw3.law.pace.edu/cases/011112g1.html>]. In this case it was also, even indirectly, established that a delayed delivery of the goods sold may constitute a fundamental breach according to the nature of the goods such as seasonal goods.

(42) Automobile case, China December 2006 CIETAC Arbitration proceeding (Automobile case) [Cite as: <http://cisgw3.law.pace.edu/cases/061200c1.html>]

(43) The [Buyer] is a company which provides tourist services, and it purchased this automobile for its anticipated purpose of exhibition.

doing so, consideration should be given to the tendency of the CISG to leave the remedy of avoidance of contract as the last resort. In other words, the court should favor reduction of price or compensation for damages over the remedy of avoidance⁽⁴⁴⁾. That does not mean however that the damaged party's will or the interest he wanted to reach-namely his reasonable expectation- is to be only taken into consideration. Rather one should consider more objective legitimate contractual expectations as they result from the specific contract⁽⁴⁵⁾. The critical question is, thus, whether the damaged party is substantially deprived of what he is entitled to expect under the contract. Determining the intent of a party or the understanding a reasonable person would have had, requires a full analysis of the text of the contract, any practices which the parties have established between themselves, usages, negotiations and all relevant circumstances of the case⁽⁴⁶⁾. Therefore, "the concrete and ascertained legal relationship is crucial for this determination"⁽⁴⁷⁾.

It follows from the above discussion that not only the express agreement is relevant to consider a breach as fundamental, but also that may be decided in light of the surrounding circumstances, previous practices and other factors provided for in article 8 of CISG⁽⁴⁸⁾.

(44) See for this Designer clothes case, Germany 14 October 2002 Appellate Court K?ln (Designer clothes case) [Cite as: <http://cisgw3.law.pace.edu/cases/021014g1.html>]. also Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html>]

(45) Franco Ferrari, Op Cit Available at <http://cisgw3.law.pace.edu/cisg/biblio/ferrari14.html>. See also for this Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html>], where it was held: "Fundamental" in the meaning of Arts. 49 and 25 CISG requires a considerable breach of contract - both when interpreting the wording, and when looking at the purpose of the CISG's provisions regarding the buyer's legal remedies. Such gravity can be derived from the contract itself, from the relevant circumstances (Art. 8 CISG), or from the reasons listed in Art. 35(2) CISG. If a considerable breach does not follow from these criteria, then even a defect of the goods which cannot be remedied does not entitle the buyer to avoid the contract under Art. 49(1)(a) CISG".

(46) Article 8 of CISG.

(47) The Shoe leather case, Poland 11 May 2007 Supreme Court of Poland (Shoe leather case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/070511p1.html>]. See also Meat case, Switzerland 28 October 1998 Supreme Court (Meat case) [Cite as: <http://cisgw3.law.pace.edu/cases/981028s1.html>].

(48) In application of this article, the court- in a Swiss decision Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.)cite as: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000915s2.html>.

4.2- the formula of article 25 looks to the side of damaged party rather than the side of breaching party.

Importance should be given to "the consequences for the party in damage more than to the breach itself"⁽⁴⁹⁾. Thus, it is less important to consider how badly the breaching party behaved. The question of fundamental breach depends instead on, or "What is thus decisive is how important the interest is, which is created through the breached term of the contract"⁽⁵⁰⁾. What the damaged party is concerned for is the significance of his interest in proper performance than the extent of damage caused by the breach. Of course, the significance of performance of a particular obligation for the damaged party can be inferred from the substantial damage suffered by him. However a breach may substantially deprive this party of his legitimate contractual expectation in spite of no actual damage was suffered. Suppose, for example, that the parties of a contract agreed that delivery of goods to be in a fixed date and compliance with this particular deadline is essential for the buyer. In such a case, any delay in delivery⁽⁵¹⁾ will substantially deprive the buyer of what he is entitled to expect under the contract⁽⁵²⁾.

Basically, contractual obligations of every kind are to be considered for the determination of a substantial contractual interest, irrespective of whether they constitute a main or ancillary obligation or concern quality,

(49) Clothing case, Switzerland 11 April 2002 Canton Appellate Court Vaud (Clothing case) [Cite as: <http://cisgw3.law.pace.edu/cases/020411s1.html>]

(50) See for this Soyprotein products case, Switzerland 1 March 2002 Civil Court Basel (Soyprotein products case) [Cite as: <http://cisgw3.law.pace.edu/cases/020301s1.html>]

(51) In general a failure to make payment on time is not fundamental breach of contract, "because the seller's interest in receiving payment is normally not substantially impaired by the delay in payment". See Peter Schlechtriem, *Op Cit*, p 490. However, only in an exceptional case, delay will constitute a fundamental breach of contract. it is held that: "The refusal to establish a timely letter of credit was clearly a fundamental breach within the meaning of Article 25 and Article 64(1)(a) of the Convention." See Judgment by Supreme Court of Queensland, in the case of *Downs Investment v. Perwaia Steel*, Australia, 17 November 2000; No. Civil Jurisdiction No. 10680 of 1996; available at: <<http://cisgw3.law.pace.edu/cases/001117a2.html>>.

(52) Peter Buber and Alastair Mullis, *The CISG, A New textbook for the students and Practioners*, 2007, by sellier- European Law Publisher, p 214-215. Available at [http://books.google.ae/books?id=jw8bZ4syM6UC&pg=PA200&lpg=PA200&dq=M%C3%BCller-Chen+\(in+S-schlechtriem/Schwenzer,+Commentary+to+the+CISG](http://books.google.ae/books?id=jw8bZ4syM6UC&pg=PA200&lpg=PA200&dq=M%C3%BCller-Chen+(in+S-schlechtriem/Schwenzer,+Commentary+to+the+CISG)

quantity, time of delivery or other manners of performance⁽⁵³⁾. It was held that:

"The concept of fundamental breach as defined in article 25 CISG must be interpreted in a restrictive way and, in case of doubt, it must be considered that conditions of such breach are not fulfilled... The importance of the breach is not determinative; only the consequences of the breach to the damaged party are determinative. This means that a principal obligation must have been breached in such a way that the economic goal of the contract cannot be achieved; the damaged party being interested no longer in the performance of the contract. Absolute loss of all objective interests of the creditor is not required....According to that view, the breach of an ancillary obligation can only constitute a fundamental breach if it has some repercussions on the performance of the principal obligations in a such way that the interest of the creditor in the performance of the contract is lost, without the necessity that the latter suffers some monetary damage (Neumayer/Ming, op. cit., n. 4 and 7 ad art. 25 CISG). The motivation of the creditor must be identifiable by the debtor, so the debtor could have known or it would be possible to know that the creditor considered the performance of the breached contractual clause so essential that he would have refused the contract if he had known of such future breach"⁽⁵⁴⁾.

"It follows from the above that the objective element of substantial detriment and the subjective element of contractual expectation are two blended concepts, since detriment can lead to fundamental breach if the aggrieved party has lost interest in receiving performance. Unfortunately, these elements are defined too generically to enable the interpreter to grasp the concept of fundamental breach. This inevitably calls for a case by case analysis, thus confirming the importance of a case law approach for a correct understanding of the issue"⁽⁵⁵⁾.

(53) See for this Cobalt sulphate case, Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html>]

(54) See the Switzerland case, Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.) [Cite as: <http://cisgw3.law.pace.edu/cases/000915s2.html>]

(55) Leonardo Graffi, Op Cit 338-349, available at <http://cisgw3.law.pace.edu/cisg/biblio/graffi.html>.

At the end one should note that the test as in article 25 is too severe and will make it very difficult in practice for a seller or buyer (but particularly a buyer) to cancel a contract because of defective performance by the other⁽⁵⁶⁾. This result is, definitely, in line with the general principle underlying CISG under which keeping the contract alive is to be preferred over its death by using the remedy of avoidance⁽⁵⁷⁾. A remedy of avoidance of a sales contract should be the last resort, as any declaration of avoidance leads to the fact that both parties should be put in the same situation they were in before the conclusion of the contract, namely the restitution of the parties' performances. "And such restitution may be always quite burdensome within the context of international trade"⁽⁵⁸⁾.

5- Economic loss is not completely irrelevant

Economic loss based on actual loss suffered seems to be the decisive element in case of defective goods. As the most commonly recurring situation, and in determining whether there is a detriment of Buyer's or Seller's interests, case law dealt with a high number of cases of delivery of defective goods.

As a main obligation, the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract⁽⁵⁹⁾. Therefore, in case of delivery of defective goods, a fundamental breach will occur if the seller deprives the buyer substantially of what he is entitled to expect under the contract. Certainly the buyer expects to take delivery of conforming goods, i.e. which are of the quantity, quality and description required by the contract and which are contained or packaged in manner required by the contract⁽⁶⁰⁾. However, shall every

(56) Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, July p1981, available at <http://cisgw3.law.pace.edu/cisg/text/ziegel25.html>

(57) See the Clothing case, Switzerland 11 April 2002 Canton Appellate Court Vaud (Clothing case) [Cite as: <http://cisgw3.law.pace.edu/cases/020411s1.htm>

(58) The Globes case Germany 27 February 2002 District Court M■nchen (Globes case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/020227g1.html>.

(59) See article 35\1 of CISG.

(60) See article 35\1 of CISG.

delivery of defective goods constitute a fundamental breach of contract? The question is not answered by the convention, and therefore the scholar writings and courts decisions were important in this regard.

It should be noted that in determining whether the delivery of defective goods will be considered as substantially deprived the buyer of what it is entitled to expect from the contract, "although without expressly saying so, case law seems to favour an economically oriented approach, based on the actual loss suffered by the aggrieved party"⁽⁶¹⁾. Some courts drew some lines to decide whether there is a detriment of Buyer's or Seller's interests and therefore a fundamental breach or not in case of lack of conformity:

1- Feasibility of further use of the goods. One of the solutions used for establishing whether the delivery of defective goods is fundamental breach or not is the possibility of further use of such defective goods. According to article 49(1)(a) of CISG avoidance of a contract because of non-conformity is available only if non-conforming delivery amounts to a fundamental breach of contract by the seller. The breach would be fundamental if the goods delivered are of no use for the buyer or its ultimate buyer. Therefore, if the buyer or its ultimate customer claims damages only for a small part of the purchase price, it is to be assumed that most of the goods delivered were of some use and were in fact used⁽⁶²⁾. Therefore, In order to avoid a contract under the Convention, It was held that: "the buyer generally must prove specific defects and the non-feasibility of further use of the goods, because otherwise the existence of a fundamental breach cannot be evaluated [by the court]."⁽⁶³⁾. In what so called the shoes case, the buyer did not succeed in showing that defectiveness of goods was a fundamental breach. The court decided that there was no fundamental breach in cases in which the buyer eventually can make some use of the defective goods. In this case the buyer tried to draw the attention of the courts to many things to prove that there was a fundamental breach, but failed to succeed. The

(61) Leonardo Graffi, Op Cit, 338-349.

(62) See the Germany Stainless steel plate case, Germany 23 January 2004 Appellate Court D■sseldorf (Stainless steel plate case) [Cite as: <http://cisgw3.law.pace.edu/cases/040123g1.html>].

(63) A judgment of a German court, Germany 18 January 1994 Appellate Court Frankfurt (Shoes case) [Cite as: <http://cisgw3.law.pace.edu/cases/940118g1.html>]

buyer claimed that the shoes were "defective in all makings". He also complained about the shoes being made of a material ("S. Oro") different from the agreed upon ("Metallic Leather Gold") and that caused the shoes not to be smoothly manufactured but to have heavy wrinkles. All these allegations were not accepted by the court and rejected to grant the buyer the remedy of avoidance, as the breach did not impair the contractual expectation of the damaged party⁽⁶⁴⁾.

2- Fitness of the object sold for the purpose for which it was intended.

The object sold being unsuitable for the purpose for which it was intended is another criterion used by courts for application of article 25 of CISG. If it was established the unfitness of the object sold, the courts might decide the availability of fundamental breach⁽⁶⁵⁾. This criterion was embodied in a judgment of a Spanish court regarding the manufacture and marketing of tiles and bricks⁽⁶⁶⁾. The court stated that the machinery supplied by seller suffers from a defect which makes it unsuitable for the purpose for which it was intended. the Court considered the seriousness of the defects in the light of the expert report and upheld the report which confirmed that the buyer was substantially deprived of what he is entitled to expect under the contract, for the performance of the machinery sold is highly unsatisfactory, as the bricks suffer multiple breakages as soon as the machinery reaches some speed⁽⁶⁷⁾.

However, it should be noted that the goods sold being prohibited by law to be imported or distributed in one country does not mean that the goods are in bad condition or not fit for the agreed purpose⁽⁶⁸⁾, because it is the buyer's responsibility to make sure of which features the goods

(64) A judgment of a German court, Germany 18 January 1994 Appellate Court Frankfurt (Shoes case) [Cite as: <http://cisgw3.law.pace.edu/cases/940118g1.html>]

(65) See Machinery case, Italy 13 December 2001 District Court Busto Arsizio (Machinery case) [Cite as: <http://cisgw3.law.pace.edu/cases/011213i3.html>]. See also China 6 November 2002 CIETAC Arbitration proceeding (Pipe extrusion case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/021106c1.html>] in which the court stated that: "the equipment delivered by the [Seller] cannot be used for production".

(66) See the Bricks case, Spain 29 March 2005 Court of First Instance of Tudela (Bricks case) [Cite as: <http://cisgw3.law.pace.edu/cases/050329s4.html>]

(67) Ibid.

(68) See a judgment in Spain case, Spain 2 March 2000 Appellate Court Granada (Frozen chicken legs case)[Cite as: <http://cisgw3.law.pace.edu/cases/000302s4.html>]

should have in order to enter the country of destination⁽⁶⁹⁾. However, a court declared three exceptions in which the seller has an obligation to supply goods, which conform to standards of the buyer's country:

- 1 - if the same standards exist in import and export country, or
- 2 - if before or at the conclusion of the contract the buyer informed the seller about such standards, or
- 3 - if the seller had knowledge of the standards due to special circumstances⁽⁷⁰⁾, example the seller has branch office in the buyer's state, or particularly specialized in exports to this state⁽⁷¹⁾.

It should be emphasized again that the defective goods delivered must be practically useless for the buyer in order for the breach to be fundamental. "If the defective goods can be put to use- and even where only restricted use is possible- there will generally be no fundamental breach of contract"⁽⁷²⁾In one case a buyer bought fittings and equipment for ice production to be used for an ice café. It was held that: "Even if the inventory which had been intended for ice cream production had not been usable in a similar manner, buyer could at least have made use of a part of the inventory (namely, the part intended for the café) and has in fact made use of it". Therefore the court decided that no fundamental breach of contract (Article 25 CISG) had occurred, and avoidance of the entire contract would have only been possible under these circumstances if the missing installation of the inventory for ice cream production had affected [Buyer]'s interest in making use of the other part⁽⁷³⁾.

3- Defect that cannot easily be repaired and the cost of repair. The severity of a breach may be evaluated in light of whether the defect is repairable and of whether the cost of repair is not high. It is established that the repair is possible according to article 48 CISG, and thus if the defect is not easily repairable, this will be an indication that the damaged

(69) Ibid.

(70) See for these exceptions the Germany case, Germany 8 March 1995 Supreme Court (New Zealand mussels case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/950308g3.html>]

(71) See UNICITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, p 118.

(72) CafÖ inventory case, Germany 25 January 2008 Appellate Court Hamburg (CafÖ inventory case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/080125g1.html>]

(73) Ibid.

party is substantially deprived of what it was entitled to expect under the contract.

In a judgment of a Swiss court regarding a contract of sale of “a container filled with salt water for weightless floating, The court mentioned that the seller’s failure to perform its obligation was probably not a fundamental breach as the damage concerned was easily repairable”⁽⁷⁴⁾. Furthermore, delivery of defect goods does not constitute a fundamental breach where the cost of repairing the goods is not high⁽⁷⁵⁾.

4- The large quantity of defective goods. If the percentage of defective goods is very high, the damaged party (the buyer) may only be entitled to avoid the contract. In such a situation fundamental breach is easy to assess, since virtually all the goods or the large quantity of them are defective and thus useless for the buyer⁽⁷⁶⁾.

In the case of *Delchi Carrier v. Rotorex Corporation*⁽⁷⁷⁾, Rotorex (the seller) agreed to sell 10,800 compressors to Delchi (the buyer) for use in Delchi’s “Ariele” line of portable room air conditioners. Prior to executing the contract, the seller sent the buyer a sample compressor and accompanying written performance specifications. The seller started to send the shipments. While the second shipment was on the way, the buyer discovered that the first lot of compressors did not conform to the sample model and accompanying specifications. Then the buyer informed the seller that 93 percent of the compressors were rejected in quality control checks because they had lower cooling capacity and consumed more power than the sample model and specifications. After several unsuccessful attempts to cure the defects in the compressors, the buyer asked the seller to supply new compressors conforming to the original sample and specifications. The seller refused, claiming that the performance specifications were inadvertently communicated to the buyer. In this case the Court

(74) Saltwater isolation tank case, Switzerland 26 April 1995 Commercial Court Zürich (Saltwater isolation tank case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/950426s1.html>]

(75) Industrial furnace case, Switzerland 26 July 2007 Canton Appellate Court Jura (Industrial furnace case) [Cite as: <http://cisgw3.law.pace.edu/cases/070726s1.html>].

(76) Leonardo Graffi, OP cit, 338-349 .

(77) United States 6 December 1995 Federal Appellate Court [2nd Circuit] (*Delchi Carrier v. Rotorex*) [Cite as: <http://cisgw3.law.pace.edu/cases/951206u1.html>]

concluded that the buyer did not substantially receive what was entitled to expect under the contract. And therefore the seller was liable for a fundamental breach of contract⁽⁷⁸⁾.

Therefore the buyer was given the right to avoid the contract because 93% of the goods sold did not conform to the sample model and did not satisfy the quality controls standards. This means that the buyer had not received substantially that which it was entitled to receive. because 'the cooling power and energy consumption of an air conditioner compressor are important determinants of the product's value'. That the compressors fell below the required contractual standard was not in doubt, but was it really the case that the buyer could not have resold (albeit at a lower price) the contract goods? The court did not consider it necessary to consider that question. What appears to have been decisive for the court in this case was that the contract made clear that compliance with the requirements as to cooling power and energy consumption was, if not of the essence of the contract, nevertheless of considerable importance. Thus, the seller's failure to comply with those terms entitled the buyer to avoid the contract notwithstanding that he may have been able to make use of the goods actually delivered⁽⁷⁹⁾.

However, the percentage of defective goods should not be required to be close to full amount⁽⁸⁰⁾ in order to form a fundamental breach. Rather, the quantity of non-conforming goods being so large is sufficient to amount to a fundamental breach, allowing the buyer to avoid the contract. In one case it was noted that the Seller delivered non-conforming goods, which was as high as 77.47% of the entire goods. This was regarded as fundamental breach of the Contract. Therefore, the tribunal ruled that the Buyer has the right to return the goods and ask for refund of the price⁽⁸¹⁾.

(78) United States 6 December 1995 Federal Appellate Court [2nd Circuit] (*Delchi Carrier v. Rotorex*) [Cite as: <http://cisgw3.law.pace.edu/cases/951206u1.html>]

(79) See Alastair Mullis, *Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases*, Published in *Andreas & Jarborg eds., Anglo-Swedish Studies in Law*, LustusForlag (1998) 326-355. Available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html#80>.

(80) See for this Leonardo Graffi, *OP cit*, 338-349.

(81) *Cotton gin motes case*, China 7 April 2005 CIETAC Arbitration proceeding (*Cotton gin motes case*) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/050407c1.html>]

5- The merchantability of defective goods: In court's opinion, if the goods could have been marketed by buyer under a different description in the ordinary course of business without disproportionate effort albeit at a reduced price, the defect wouldn't amount to a fundamental breach. To put it differently, because the buyer could still make some use of the goods, his interest in the fulfillment of the contract had not completely disappeared⁽⁸²⁾. In the Greece Shock absorber case the court ruled that a breach is fundamental for the purposes of CISG article 25 when, due to lack of conformity, the buyer cannot resell the goods: in particular, the automobile shock absorbers which were sold to the buyer did not conform with the contractual description; the court judged that this fact deprived the buyer of what the buyer was entitled to expect from the specific sale contract, i.e., to resell the goods purchased for a profit (since the shock absorbers that were delivered to the buyer could not be installed in the specific types of vehicles of the buyer's customers and the latter returned the car shock absorbers to the seller). Therefore, the first criterion of CISG article 25 was met and the buyer was given the right to declare the contract avoided⁽⁸³⁾.

In another case the court ruled that the defects in vehicles constitute an objective detriment of buyer's interests. The defects occur irregularly, thus rendering the vehicle unreliable. Particularly for an authorized expert for vehicles who is strongly dependent on the usability of the vehicle, it means a harsh drawback. Furthermore, the defects negatively affect driving safety. Therefore, buyer suffered not only detriments concerning his commercial disposals, but also concerning his personal safety. In the light of the safety issues at stake, it cannot be reasonably expected that the vehicle is used in the future. Moreover, it cannot be expected to have the car resold with these severe safety issues in order to prevent an avoidance of the contract. Therefore, it is to be concluded that

(82) See Alastair Mullis, Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases, Published in Andreas & Jarborg eds., *Anglo-Swedish Studies in Law*, LustusForlag (1998) 326-355. Available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html#80>.

(83) See the editorial remark of Greece case, Greece 2003 Decision 14953/2003 of the Single-Member Court of First Instance of Thessalonika (Shock absorber case) [editorial analysis available] [Cite as: <http://cisgw3.law.pace.edu/cases/030001gr.html>]

these defects form a fundamental breach of contract which – if the further prerequisites are fulfilled as well – entitle the buyer to avoid the contract in accordance with Art. 49 CISG⁽⁸⁴⁾.

6- Lack of conformity is capable of being remedied through a price reduction. According to a judicial approach if the lack of conformity is capable of being remedied through a price reduction, the seller will not be regarded as committed a fundamental breach of contract in the meaning of article 25 of the CISG. A dispute arose, in one case⁽⁸⁵⁾ between a Spanish buyer and a Chinese seller-manufacturer of specialty flags. The two parties had concluded an agreement valued at nearly EUR 42,000 for the sale of 198,000 Portuguese flags, which were specifically produced for the 2006 FIFA World Cup in Germany and intended to be gifted to the public. The buyer made a subsequent arrangement to re-sell the flags to its Portuguese client for almost EUR 90,000, which the Portuguese entity paid promptly and in full. However, upon receiving the flags, the buyer's customer discovered what both parties later agreed to be defects in the goods, which ranged from poor knitting to defective prints of the Portuguese coat of arms. In answering the issue of whether the seller committed a fundamental breach or not under article 25 the court made it clear that the seller did not commit a fundamental breach under article 25 of the CISG by supplying Sosa Dias with defective flags in advance of the 2006 FIFA World Cup. In other words, The Court decided that there was not a fundamental breach of contract, since the buyer expected low-quality merchandise, and thus the lack of conformity was capable of being remedied through a reduction in the contract price. This decision ascertains that the circumstances of the case are always decisive.

Conclusion

- 1 - This study showed the importance of case law to realize a correct understanding for the concept of detriment as a prerequisite for fundamental breach of contract.
- 2 - As a rule, it has become clear that the doctrine of detriment is

(84) Auto case, Austria 23 January 2006 Oberlandesgericht [Appellate Court] Linz (Auto case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/060123a3.html>]

(85) Banderas de Portugal case, Spain 14 July 2009 Appellate Court Madrid (Banderas de Portugal case) [translation available]

- much broader than that of damage. It means, according to article 25, a substantial deprivation of a party of what he is entitled to expect under the contract. The matter, therefore, is all about the impairment of legitimate contractual expectations of the damaged party, without the need to show that he suffered loss or did not benefit from performance. In some cases, for example, it was showed that the buyer would prefer no delivery at all to a delayed delivery.
- 3 - It was showed that article 25 supports the idea of determining the severity of a breach in light of the terms of the contract itself.
 - 4 - This study, by resorting to many cases related to the notion of fundamental breach, showed that economic loss based on actual loss is not completely immaterial; rather it has proved through case law that it is an indication of detriment in case of delivery of defective goods. It was showed that the fundamentality of a breach may be assessed in light of the fitness of the object sold for the purpose for which it was intended, in light of whether defect can easily be repaired and the cost of repair, of whether the quantity of defective goods is large or not, of the merchantability of defective goods, and of whether the defect is capable of being remedied through a price reduction, and the possibility of further use of defective goods.

Therefore, the uniformity started to be achieved by the courts, and would be preferable to continue the effort by judges and arbitrators in this respect, as all contracting states of CISG should consider themselves as one entity to reach the purpose of uniformity of the meaning of detriment. This conclusion needs the judicial systems to benefit from courts' decisions of each other's.

In sum up: case law is the correct way to make a better uniform understanding for CISG article 25, and to establish some directions, which hopefully will benefit to reach a uniform interpretation of the meaning of detriment, and thereupon a uniform application of article 25 of CISG.

References

- Alastair Mullis, Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases, Published in Andreas & Jarborg eds., Anglo-Swedish Studies in Law, LustusForlag (1998) 326-355. Available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html#80>.
- Alastair Mullis, Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases, Published in Andreas & Jarborg eds., Anglo-Swedish Studies in Law, LustusForlag (1998) 326-355. Available at <http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html#80>.
- Comment 3(a) on UNIDROIT Principles Art. 7.3.1.
- Editorial remark of Greece case, Greece 2003 Decision 14953/2003 of the Single-Member Court of First Instance of Thessalonika (Shock absorber case) [editorial analysis available]
- [Cite as: <<http://cisgw3.law.pace.edu/cases/030001gr.html>>]
- Franco Ferrari, Fundamental Breach of Contract Under the UN Sales Convention– 25 Years of Article 25 CISG –Reproduced with permission of 25 Journal of Law and Commerce (Spring 2006) 489-508. Available at <http://cisgw3.law.pace.edu/cisg/biblio/ferrari14.html>
- Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, July p1981, available at
- John Felemegas, The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2000-2001) 115-265, available at: <http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html#ch46> <<http://cisgw3.law.pace.edu/cisg/biblio/felemegas.html>> .
- John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, (Hague, the Natherland: Kluwer Law International, 3rd ed. 1999).
- Leonardo Graffi, Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention. Revue de droit des affaires

internationales <<http://www.iblj.com/?&lg=gb&lg=>> / International Business Law Journal <<http://www.iblj.com/?&lg=gb>> (2003) No. 3, 338-349 (Forum Européen de la Communication) Paris. Available at <<http://www.cisg.law.pace.edu/cisg/biblio/graffi.html>>.

- Peter Schlechtriem, Commentary on the UN Convention on the International Sale of Goods, Translated by Geoffrey Thomas, Clarendon Press. Oxford, 2nd Edition, 1998.
- Robert Koch, Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Article 25 CISG, November 2004. Available online at: <<http://cisgw3.law.pace.edu/cisg/biblio/koch1.html>>.
- Robert Koch, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG) Reproduced with permission from Pace ed., Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International (1999) 177 - 354. <http://cisgw3.law.pace.edu/cisg/biblio/koch.html#III>.
- UNICITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, p 118.
- Will, article 25, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 205-221. Available at <<http://cisgw3.law.pace.edu/cisg/biblio/will-bb25.html>>).

Case Law:

For Example

- A judgment of a German court, Germany 18 January 1994 Appellate Court Frankfurt (Shoes case) [Cite as: <http://cisgw3.law.pace.edu/cases/940118g1.html>]
- Australia 28 April 1995 Federal Dist. Ct., Adelaide (Roder v. Rosedown) [Cite as: <<http://cisgw3.law.pace.edu/cases/950428a2.html>>]. See also UNICITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition, p 118-119.

- Auto case, Austria 23 January 2006 Oberlandesgericht [Appellate Court] Linz (Auto case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/060123a3.html>]
- Banderas de Portugal case, Spain 14 July 2009 Appellate Court Madrid (Banderas de Portugal case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/090714s4.html>].
- Café inventory case, Germany 25 January 2008 Appellate Court Hamburg (Café inventory case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/080125g1.html>]
- Clothing case, Switzerland 11 April 2002 Canton Appellate Court Vaud (Clothing case) [Cite as: <http://cisgw3.law.pace.edu/cases/020411s1.htm>]
- Cobalt sulphate case, Germany 3 April 1996 Supreme Court (Cobalt sulphate case) [Cite as: <http://cisgw3.law.pace.edu/cases/960403g1.html> >].
- Computer telephone board case) Austria 28 September 2000 Appellate Court Graz [Cite as: <http://cisgw3.law.pace.edu/cases/000928a3.html> >].
- Cotton gin notes case, China 7 April 2005 CIETAC Arbitration proceeding (Cotton gin notes case) [translation available] [Cite as:
- Door and door jamb case, Slovenia 14 December 2005 Higher Court [Appellate Court] in Ljubljana (Door and door jamb case) [translation available]
- [Cite as: <http://cisgw3.law.pace.edu/cases/051214sv.html>]
- Germany case, Germany 8 March 1995 Supreme Court (New Zealand mussels case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/950308g3.html>]
- Germany Stainless steel plate case, Germany 23 January 2004 Appellate Court Düsseldorf (Stainless steel plate case) [Cite as: <http://cisgw3.law.pace.edu/cases/040123g1.html>].
- Industrial furnace case, Switzerland 26 July 2007 Canton Appellate Court Jura (Industrial furnace case) [Cite as: <http://cisgw3.law.pace.edu/cases/070726s1.html>].
- Meat case, Switzerland 28 October 1998 Supreme Court (Meat case) [Cite as: <http://cisgw3.law.pace.edu/cases/981028s1.html> >].

- Memory module case, Germany 12 November 2001 Appellate Court Hamm (Memory module case)
- [Cite as: <<http://cisgw3.law.pace.edu/cases/011112g1.html>>].
- Saltwater isolation tank case, Switzerland 26 April 1995 Commercial Court Zürich (Saltwater isolation tank case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/950426s1.html>]
- Shoe leather case, Poland 11 May 2007 Supreme Court of Poland (Shoe leather case) [translation available] [Cite as: <<http://cisgw3.law.pace.edu/cases/070511p1.html>>].
- Slovenia 14 December 2005 Higher Court [Appellate Court] in Ljubljana (Door and door jamb case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/051214sv.html>]
- Spain case, Spain 2 March 2000 Appellate Court Granada (Frozen chicken legs case)[Cite as: <http://cisgw3.law.pace.edu/cases/000302s4.html>]
- Sunflower oil case Switzerland case, Switzerland 5 February 1997 Commercial Court Zürich (Sunflower oil case) [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/970205s1.html>]
- Switzerland case, Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.) [Cite as: <http://cisgw3.law.pace.edu/cases/000915s2.html>]
- The Packaging machine case, Switzerland 18 May 2009 Bundesgericht [Federal Supreme Court]
- [Cite as: <http://cisgw3.law.pace.edu/cases/090518s1.html>]
- United States 6 December 1995 Federal Appellate Court [2nd Circuit] (Delchi Carrier v. Rotorex)
- [Cite as: <http://cisgw3.law.pace.edu/cases/951206u1.html>]

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