

**General Assembly**

Distr.: General  
8 June 2004

Original: English

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**United Nations Commission  
on International Trade Law****UNCITRAL Digest of case law on the United Nations  
Convention on the International Sale of Goods\****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, 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.

**Purpose of the provision**

1. Article 25 defines the notion of fundamental breach as used in various provisions of the Convention. A fundamental breach in this specific sense is a prerequisite for certain remedies under the Convention, such as the party's right to terminate the contract (articles 49 (1) (a) and 64 (1) (a); but see also articles 51 (2), 72 (1), 73 (1) and (2)), the right to require delivery of substitute goods presupposes a fundamental breach (article 46 (2)). A fundamental breach also has some bearing under the risk provisions of the Convention (article 70). In general article 25 defines the border line between the "normal" remedies for breach of contract—like damages and price reduction—and incisive remedies like termination and specific performance.

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\* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

## Definition of fundamental breach

2. A fundamental breach requires first, that one party has committed a breach of contract. The breach of any obligation under the contract suffices irrespective whether the duty had been specifically contracted for or followed from the provisions of the Convention. Even the breach of any collateral duty can amount to a fundamental breach. For example, a manufacturer's duty to deliver goods under a certain trademark exclusively to the buyer has been held to have been fundamentally violated when the manufacturer displayed those goods at a fair for sale and kept them there despite a warning by the buyer.<sup>1</sup>

3. In order to rank as fundamental a breach must be of a certain nature and weight. The aggrieved party must have suffered such detriment as to substantially deprive it of what it was entitled to expect under the contract. The breach must therefore nullify or essentially depreciate the aggrieved party's justified contract expectations. What expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on customary usages and on the additional provisions of the Convention. For example, buyers cannot normally expect that delivered goods comply with regulations and official standards in the buyer's country.<sup>2</sup> Therefore, e.g., the delivery of cadmium-contaminated mussels has not been regarded as a fundamental breach since the buyer could not have expected that the seller met the contamination-standards in the buyer's country and since the consumption of the mussels in small portions as such did not endanger a consumer's health.<sup>3</sup>

4. Article 25 requires further that the violating party must have foreseen the result of the breach of the contract. However, the provision does not mention at which time the consequences of the breach must have been foreseeable. One court has decided that the time of conclusion of contract is the relevant time.<sup>4</sup>

## Specific situations of fundamental breach

5. Courts have decided whether certain typical fact patterns constitute fundamental breaches. It has been determined on various occasions that the failure to perform a contractual duty constitutes a fundamental breach of contract unless the party has a justifying reason to withhold its performance. This has been decided in the case of final non-delivery<sup>5</sup> as well as in the case of final non-payment.<sup>6</sup>

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<sup>1</sup> CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; see also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

<sup>2</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]; see CLOUT case No. 418 [Federal District Court, Eastern District of Louisiana, United States 17 May 1999] (in the same sense and relying on CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]); Oberster Gerichtshof, Austria, 13 April 2000, *Internationales Handelsrecht* 2001, 117.

<sup>3</sup> CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

<sup>4</sup> CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision).

<sup>5</sup> CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (only partial and very late delivery); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

<sup>6</sup> CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994].

However, if only a minor part of the contract is finally not performed, e.g., one delivery out of several deliveries is not supplied, this remains a simple, non-fundamental breach of contract.<sup>7</sup> On the other hand a final and unjustified announcement of the intention not to fulfil one's own contractual obligations has been found to constitute a fundamental breach.<sup>8</sup> Likewise, the insolvency and placement of the buyer under administration has been held to constitute a fundamental breach under article 64 since it deprives the unpaid seller of what it was entitled to expect under the contract, namely payment of the full price.<sup>9</sup> It has also been determined that non-delivery of the first instalment in an instalment sale gives the buyer reason to believe that further instalments will not be delivered and therefore a fundamental breach of contract was to be expected (article 73 (2)).<sup>10</sup>

6. As a rule late performance—be it late delivery of the goods or late payment of the price—does not constitute in itself fundamental breach of contract.<sup>11</sup> Only when the time for performance is of essential importance either if it is so contracted<sup>12</sup> or if it is due to evident circumstances (e.g., seasonal goods)<sup>13</sup> then delay as such can amount to a fundamental breach.<sup>14</sup> But even if there is no fundamental breach, the Convention allows the aggrieved party to fix an additional period of time for performance; if the party in breach fails to perform during that period, the aggrieved party thereupon may declare the contract avoided (articles 49 (1) (b) and 64 (1) (b)).<sup>15</sup> Therefore in case of a delay in the performance, but only in that case, the lapse of that additional period turns a non-fundamental breach into a fundamental one.

7. If defective goods are delivered, the buyer can terminate the contract when the non-conformity of the goods is to be regarded as a fundamental breach (article 49, paragraph 1 (a)). It therefore becomes essential to know under what conditions delivery of non-conforming goods constitutes a fundamental breach of contract. Court decisions on this point have found that any non-conformity concerning quality remains a mere, non-fundamental breach of contract as long as the buyer—without unreasonable inconvenience—can use the goods or resell them even

<sup>7</sup> CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997].

<sup>8</sup> See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]. In that case the seller had given notice that he had sold the specified good to another buyer. See also Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russia, 4 April 1998, award No. 387/1995, Unilex (final refusal to pay the price).

<sup>9</sup> CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

<sup>10</sup> CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

<sup>11</sup> Corte di Appello di Milano, Italy, 20 March 1998, Unilex (late delivery); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery); CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992] (late payment).

<sup>12</sup> CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (the late delivery under a CIF sale was held to be a fundamental breach of contract).

<sup>13</sup> Corte di Appello di Milano, Italy, 20 March 1998, Unilex (in that case the buyer had ordered seasonal knitted goods and pointed to the essential importance of delivery at the fixed date although only after conclusion of the contract); ICC International Court of Arbitration, France, award No. 8786, January 1997, *ICC International Court of Arbitration Bulletin* 2000, 70.

<sup>14</sup> CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997]; (late delivery constitutes a fundamental breach when the buyer would prefer non-delivery instead and the seller could have been aware of this).

<sup>15</sup> See, e.g. CLOUT case No. 301 [Arbitration—International Chamber of Commerce No. 7585 1992].

with a rebate.<sup>16</sup> For example, the delivery of frozen meat which was too fat and too wet and consequently worth 25.5 per cent less than meat of the contracted quality according to an expert opinion was not regarded as a fundamental breach of contract since the buyer had the opportunity to resell the meat at a lower price or to otherwise process it.<sup>17</sup> On the contrary, if the non-conforming goods cannot be used or resold with reasonable effort this constitutes a fundamental breach and entitles the buyer to declare the contract avoided.<sup>18</sup> This has been held to be the case as well where the goods suffered from a serious and irreparable defect although they were still useable to some extent (e.g. flowers which were supposed to flourish the whole summer but did so only for part of it).<sup>19</sup> Courts have considered a breach to be fundamental without reference to possible alternative uses or resale by the buyer when the goods had major defects and the buyer needed the goods for manufacture.<sup>20</sup> The same conclusion had been reached where the non-conformity of the goods resulted from added substances the addition of which was illegal both in the country of the seller and the buyer.<sup>21</sup>

8. Special problems arise when the goods are defective but repairable. Some courts have held that easy reparability excludes any fundamentality of the breach.<sup>22</sup> Courts are reluctant to consider a breach to be fundamental when the seller offers and effects speedy repair without any inconvenience to the buyer.<sup>23</sup>

9. The violation of other contractual obligations can also amount to a fundamental breach. It is, however, necessary that the breach deprives the aggrieved party of the main benefit of the contract and that this result could have been foreseen by the other party. Thus, a court stated that there is no fundamental breach

<sup>16</sup> CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

<sup>17</sup> CLOUT case No. 248 [Schweizerisches Bundesgericht, Switzerland, 28 October 1998].

<sup>18</sup> CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (shoes with splits in the leather) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts which shrink by two sizes after first washing).

<sup>19</sup> CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994].

<sup>20</sup> See CLOUT case No. 138 [Federal Court of Appeals for the Second Circuit, United States, 6 December 1993, 3 March 1995] (lower cooling capacity and higher power consumption than contracted of compressors delivered for the manufacture of air conditioners); CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine) (see full text of the decision); CLOUT case No. 315 [Cour de Cassation, France, 26 May 1999] (metal sheets absolutely unfit for the foreseen kind of manufacture by the buyer's subbuyer) (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular use which was made known to the seller and which was incapable of reaching the promised production level represented a “serious and fundamental” breach of the contract, since the promised production level had been an essential condition for the conclusion of the contract, and therefore forming the basis for termination).

<sup>21</sup> Compare CLOUT case No. 150 [Cour de Cassation, France, 23 January 1996] (artificially sugared wine which is forbidden under EU-law and national laws) (see full text of the decision); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (watered wine) (see full text of the decision).

<sup>22</sup> Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 1996, 51.

<sup>23</sup> CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

in case of delivery of the wrong certificates pertaining to the goods if either the goods were nevertheless merchantable or if the buyer itself could—at the seller’s expense—easily get the correct certificates.<sup>24</sup> The unjustified denial of contract rights of the other party—e.g. the validity of a retention of title clause and the seller’s right to possession of the goods<sup>25</sup> or the unjustified denial of a valid contract after having taken possession of samples of the goods<sup>26</sup>—can amount to a fundamental breach of contract. The same is true when resale restrictions have been substantially violated.<sup>27</sup>

10. A special case is the delayed acceptance of the goods. A delay in accepting the goods will generally not constitute a fundamental breach, particularly when there are only a few days of delay.<sup>28</sup>

11. The cumulated violation of several contractual obligations makes a fundamental breach more probable but does not automatically constitute a fundamental breach.<sup>29</sup> Whether a fundamental breach exists depends on the circumstances of the case as well as on whether the breach resulted in the aggrieved party losing the main benefit of, and the interest in, the contract.<sup>30</sup>

### **Burden of proof**

12. Article 25 regulates also to some extent the burden of proof. As far as foreseeability is concerned the burden lies on the party in breach.<sup>31</sup> This party has to prove that it did not foresee the detrimental effect of its breach and that a reasonable person of the same kind in the same circumstances would not have foreseen such an effect. The aggrieved party on the other hand has to prove that the breach deprived it substantially of what it was entitled to expect under the contract.<sup>32</sup>

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<sup>24</sup> CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

<sup>25</sup> CLOUT case No. 308 [Federal Court of Australia, 28 April 1995].

<sup>26</sup> CLOUT case No. 313 [Cour d’appel, Grenoble, France, 21 October 1999] (see full text of the decision).

<sup>27</sup> CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 154 [Cour d’appel, Grenoble, France, 22 February 1995]; CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994], (see full text of the decision); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

<sup>28</sup> CLOUT case No. 243 [Cour d’appel, Grenoble, France, 4 February 1999].

<sup>29</sup> CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

<sup>30</sup> *Id.* (see full text of the decision).

<sup>31</sup> *Id.* (see full text of the decision).

<sup>32</sup> *Id.* (see full text of the decision).