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§6.01 INTRODUCTION

A "breach of contract" under the CISG is a term used to describe a party's non-performance of an obligation under a contract. The remedies available for a buyer are set forth in Part III of the CISG: Articles 45-52. See Chapter 7 for a discussion of a seller's remedies.

Overall, the CISG permits several remedies, which include (1) right to performance—Specific Performance (Article 46) [provided domestic law recognizes the relief] (2) right to cure (Article 48); (3) right to avoid the contract because of a fundamental breach of contract—Rescission (Article 49); (4) right of price reduction (Article 50, sentence 1); (5) right to damages (Article 45(1)(b) in connection with Articles 74-77). As to other remedies, it is important to observe that the preservation of a contract is highly regarded under the CISG, and as a direct consequence the remedy of rescission, or "avoidance" of a contract, is only permitted upon a finding of a material breach (or "fundamental breach").

If the breach is not fundamental, a buyer may still avoid the contract provided it first gives notice to the seller which requests the seller to repair or substantiate the goods *and* sets forth an additional time limit for the seller to perform—*Nachfrist* notice. This notice can be in conjunction with a buyer's notice of nonconformity pursuant to Article 39, or it could be sent separately provided the buyer sends it within a reasonable time period. If the seller delivers the goods after the established time period, a buyer still might

be able to avoid the contract provided notice is given within a reasonable period of time. However, a buyer who withholds a seller's right to cure may forfeit his or her right to a reduction of price. The remedy asserted by the buyer will dictate the damages available to the buyer. The CISG also provides remedies for excess delivery after fixing of an additional time period as well as other circumstances that are described in this chapter. Similar to domestic application of contract law, commercial issues, particularly in the international arena, are subjective and counsel should seek a remedy in accordance with the facts as presented by his or her client.

Practical Application: Counsel should consult Table 4—Commercial Transactions Comparative Chart in Appendix A.

§6.02 OVERVIEW OF REMEDIES AVAILABLE TO BUYER

Article 45 sets forth the remedies available to a buyer in the event that a seller fails to perform any of his or her primary obligations under a contract or the CISG.¹ Similar to obligations, the terms of the contract with regard to remedies also take precedence over the CISG.² In case of a seller's noncompliance with a contract or CISG obligation, in principle the following five legal remedies (defects rights) are at the buyer's disposal:

- (1) Right to performance (Article 46)—Specific Performance;
- (2) Right to cure (Article 48);
- (3) Right to avoid the contract because of a fundamental breach of contract (Article 49)—Rescission;
- (4) Right of price reduction (Article 50 sentence 1);
- (5) Right to damages (Article 45(1) (b) in connection with Articles 74-77).³

Conditions for remedies set forth in a contract or secondary obligations, such as the notice requirements of nonconformity or avoidance imposed by the CISG, must still be satisfied in order for a buyer to recover damages.⁴ Moreover, a seller may be exempted from damages if conditions arise that prevent him or her from performing (*force majeure*.) See Chapter 8. Buyers may also be limited in their

¹Switzerland 5 April 2005 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/050405s1.html>; Spain 5 November 2003 Appellate Court Vizcaya, available at <http://cisgw3.law.pace.edu/cases/031105s4.html>; Russia 22 October 2003 Arbitration proceeding 134/2001, available at <http://cisgw3.law.pace.edu/cases/031022r1.html>; Germany 15 September 2003 Appellate Court Rostock, available at <http://cisgw3.law.pace.edu/cases/030915g1.html>; Switzerland 19 August 2003 Canton Appellate Court Valais, available at <http://cisgw3.law.pace.edu/cases/030819s1.html>.

²Russia 27 July 1999 Arbitration proceeding 302/1996, available at <http://cisgw3.law.pace.edu/cases/990727r1.html>.

³Switzerland 5 November 2002 Commercial Court des Kantons Aargau, available at <http://cisgw3.law.pace.edu/cases/021105s1.html>, stating in the case of a purchase of fungible goods, the buyer can either demand subsequent improvement (CISG Article 35, Article 45(1)(a), Article 46(1) and (3)), replacement (CISG Article 35, Article 45(1)(a), Article 46(1) and (2)), a reduction of the purchase price (CISG Article 35, Article 45(1)(a), Article 50), or damages (CISG Article 35, Article 45(1)(b), Article 74), or declare the contract avoided (CISG Article 35, Article 45(1)(a); Article 49(1)(a)). See also Germany 10 February 1994 Appellate Court Düsseldorf [6 U 32/93], available at <http://cisgw3.law.pace.edu/cases/940210g1.html>.

⁴Germany 11 April 2005 District Court Frankfurt, available at <http://cisgw3.law.pace.edu/cases/050411g1.html>; Switzerland 7 July 2004 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/040707s1.html>; Germany 10 March 2004 Appellate Court Celle, available at <http://cisgw3.law.pace.edu/cases/040310g1.html>; Switzerland 13 January 2004 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/040113s1.html>; Germany 19 December 2002 Appellate Court Karlsruhe, available at <http://cisgw3.law.pace.edu/cases/021219g1.html>; Switzerland 25 February 2002 District Court Schaffhausen, available at <http://cisgw3.law.pace.edu/cases/020225s1.html>; ICC Arbitration Case No. 9083 of August 1999, available at <http://cisgw3.law.pace.edu/cases/999083i1.html>.

remedy if they fail to act as to the remedy they sought during the course of the contract.⁵ In addition to prescribing the remedies, Article 45(1)(b) defines the calculation of the amount of damages by referencing Articles 74 to 77.⁶ A buyer may seek damages under other theories, for examples, tort remedies, as well as other provisions of the CISG when seeking remedies.⁷ “[T]he right to claim damages exists either as an exclusive right or as a supplementary right besides the right to require performance, to reduce the price or to avoid the contract.”⁸ “No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.”⁹

Practical Application: Unfortunately, attorneys are often presented with the issue of remedies after the facts of the case have transpired. Hence, the consultation should include what the client wants to achieve and what is available to him or her based on the terms of the contract, the actions of the parties, and the language of CISG.

§6.03 A BUYER'S RIGHT TO ELECT REMEDY

A buyer's right to demand a remedy is set forth in Article 46, which authorizes several options to the buyer. Article 46(1) provides that a buyer can demand specific performance when the seller has failed to perform, unless he or she has resorted to an inconsistent remedy. In the event the seller has performed, but the goods fail to conform, Article 46(2) provides that a buyer can demand re-delivery provided certain requirements are met. Subsection (3) of Article 46 sets forth a means for the buyer to request the seller to cure a nonconforming delivery by repair. Notably, the right to cure is different from the one set forth in Article 48(1).

[A] Specific Performance

Article 46(1) provides a buyer with the remedy of specific performance; however, applicability is subject to said remedy being recognized under domestic law through the provision of Article 28. The conditional provision of Article 46(1) reflects a compromise among the common law and civil law jurisdictions. The terms of a contract determine the authority of the courts.¹⁰ Therefore, if a complaint sufficiently sets forth the facts to justify an order of specific performance under Article 46(1) and domestic law observes said remedy by virtue of Article 28, then an action for specific performance will be acknowledged.¹¹ Counsel should observe jurisdictional issues since a buyer must exercise a remedy or such right is forfeited.¹² See generally Chapter 9.

Article 46(1) restricts the right to compel performance when the buyer has already resorted to a remedy

⁵Switzerland 21 September 2004 District Court Luzern-Land, available at <http://cisgw3.law.pace.edu/cases/040921s1.html>.

⁶Germany 6 September 2004 District Court Hamburg, available at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Russia 17 February 2003 Arbitration proceeding 168/2001, available at <http://cisgw3.law.pace.edu/cases/030217r1.html>; Switzerland 5 November 2002 Commercial Court des Kantons Aargau, available at <http://cisgw3.law.pace.edu/cases/021105s1.html>.

⁷Article 45(2). Russia 16 April 2003 Arbitration proceeding 99/2002, available at <http://cisgw3.law.pace.edu/cases/030416r1.html>.

⁸See Fritz Enderlein, *Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods, International Sale of Goods*, Dubrovnik Lectures 195, Oceana (Petar arcevic and Paul Volken, eds. 1996) Ch. 5, pp. 133-201, also available at <http://cisg.law.pace.edu/cisg/biblio/enderlein1.html>.

⁹Article 45(3).

¹⁰Russia 27 July 1999 Arbitration proceeding 302/1996, available at <http://cisgw3.law.pace.edu/cases/990727r1.html>.

¹¹Magellan International v. Salzgitter Handel, 1999 U.S. Dist. LEXIS 19386, 1999 WL112288468 (N.D. Ill.), also available at <http://cisgw3.law.pace.edu/cases/991207u1.html>.

¹²Germany 22 September 1998 Appellate Court Oldenburg, available at <http://cisgw3.law.pace.edu/cases/980922g1.html>.

inconsistent with performance. Such inconsistency exists between performance and avoidance, but also between performance and price reduction.¹³ However, the buyer can combine its request for performance and a claim for any remaining damage.¹⁴ A buyer can elect a different remedy thereafter; however, if the buyer has fixed an additional period of time for performance, then the buyer is prevented from requesting other remedies except damages under Article 47.

[B] Partial Performance or Excessive Delivery

If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, Articles 46 through 50 apply in respect to the part of the goods that are missing or which do not conform.¹⁵ The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.¹⁶ To determine whether a breach is fundamental, courts have looked at the parties' agreement and at their evaluation of the importance of the performance.¹⁷ In the event the seller delivers before the date fixed, the buyer may take delivery or refuse to take delivery.¹⁸ If the seller delivers a quantity greater than that mandated under the contract,¹⁹ the buyer may take delivery or refuse to take delivery of the excess quantity.²⁰ If the buyer takes delivery of all or part of the excess quantity, the buyer must pay for it at the

¹³See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 38, at para. 7.

¹⁴*Id.* at para. 4.

¹⁵Article 51(1). Austria 5 July 2001 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/010705a3.html>; ICC Arbitration Case No. 7660 of 23 August 1994, available at <http://cisgw3.law.pace.edu/cases/947660i1.html>.

¹⁶Article 51(2). ICC Arbitration Case No. 7660 of 23 August 1994, available at <http://cisgw3.law.pace.edu/cases/947660i1.html>; Article 39 Notice of Nonconformity and *Nachfrist* notice are still warranted for a partial avoidance. See Germany 11 October 1995 District Court Düsseldorf, available at <http://cisgw3.law.pace.edu/cases/951011g1.html>; Germany 8 January 1993 Appellate Court Düsseldorf, available at <http://cisgw3.law.pace.edu/cases/930108g1.html>; Germany 14 August 1991 District Court Baden-Baden, available at <http://cisgw3.law.pace.edu/cases/910814g1.html>.

¹⁷See generally Austria 21 June 2005 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/050621a3.html>; Russia 16 June 2003 Arbitration proceeding 164/2001, available at <http://cisgw3.law.pace.edu/cases/030616r2.html>; Germany 12 October 2000 District Court Stendal, available at <http://cisgw3.law.pace.edu/cases/001012g1.html> (buyer failed to prove that it had given notice of the asserted defects according to Article 39(1)); Russia 27 October 1999 Arbitration proceeding 269/1998, available at <http://cisgw3.law.pace.edu/cases/991027r1.html>; Hungary 25 May 1999 Budapest Arbitration proceeding Vb 97142, available at <http://cisgw3.law.pace.edu/cases/990525h1.html>; China 30 January 1996 CIETAC Arbitration proceeding (Compound fertilizer case), available at <http://cisgw3.law.pace.edu/cases/960130c1.html>; Germany 3 July 1992 District Court Heidelberg, available at <http://cisgw3.law.pace.edu/cases/920703g1.html>.

¹⁸Article 52(1). China 5 February 1996 CIETAC Arbitration proceeding (Antimony ingot case), available at <http://cisgw3.law.pace.edu/cases/960205c2.html>.

¹⁹Canada 31 August 1999 Ontario Superior Court of Justice (*La San Giuseppe v. Forti Moulding Ltd.*), available at <http://cisgw3.law.pace.edu/cases/990831c4.html> (ten percent deviation in contract warranted dismissal of buyer's claim); China 6 September 1996 CIETAC Arbitration proceeding (Engines case), available at <http://cisgw3.law.pace.edu/cases/960906c1.html>.

²⁰Article 52(2). Germany 22 September 1992 Appellate Court Hamm, available at <http://cisgw3.law.pace.edu/cases/920922g1.html> (if the buyer either accepts the goods or does not notify the seller about the excessive quantity according to Article 39(1), the price to be paid rises proportionally); Germany 25 September 2002 Appellate Court Rostock, available at <http://cisgw3.law.pace.edu/cases/020925g1.html>. Nor is Article 40 CISG applicable, as the deviation from the contract was clearly stated in the documents delivered with the goods.

contract rate.²¹

Practical Application: The terms of the contract govern the quantity and quality of the goods. Hence, if there is an oral agreement as to all or part of the agreement, counsel should be alert as to relevance of an Article 96 reservation, which precludes oral contracts or terms.

[C] Re-Delivery

If the goods do not conform to the terms of the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract *and* a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.²² Therefore, if the breach is “fundamental,” the buyer may either require delivery of substitute goods under Article 46 (2), or declare the contract void under Article 49 and seek damages.²³ See §6.04. In contrast to giving notice of a lack of conformity under Article 39, the buyer does not yet need to communicate the rights he wants to assert. Whether for claims demanding substitute goods or repair (Article 46(2) & (3)) or demanding contract avoidance (Article 49), the buyer has a further reasonable time period available.²⁴ Notably, a buyer will forfeit its right to demand the delivery by the respondent of equipment in good working order if, for example, the buyer fails to preserve equipment as such a legal remedy is incompatible with its right to demand performance by the seller of its obligations.²⁵

[D] Right to Cure

Pursuant to Article 46(3), a buyer may require the seller to remedy the lack of conformity by repair if the goods do not conform to the contract, and there is no need to decide whether this is considered a delivery of substituted goods or a repair.²⁶ The request in accordance with Article 46(3) must be given or the buyer will lose any claim for loss of profit and loss of order.²⁷ A buyer is entitled to remedying if the remedying is reasonable for a seller with regard to the circumstances and if the buyer requested the remedying either with the notification of deficiencies or within a reasonable period of time.²⁸ However, if

²¹Article 52(2). Switzerland 19 August 2003 Canton Appellate Court Valais, available at <http://cisgw3.law.pace.edu/cases/030819s1.html>; Russia 16 December 1996 Arbitration proceeding 378/1995, available at <http://cisgw3.law.pace.edu/cases/961216r1.html>.

²²Article 46(2).

²³*Delchi Carrier v. Rotorex*, 1994 WL 495787, 1994 U.S. Dist. Lexis 12820, also available at <http://cisgw3.law.pace.edu/cases/951206u1.html>. See also generally France 26 October 2004 Appellate Court Poitiers, available at <http://cisgw3.law.pace.edu/cases/041026f1.html>; Spain 28 April 2004 Appellate Court Barcelona, available at <http://cisgw3.law.pace.edu/cases/040428s4.html>.

²⁴Austria 14 January 2002 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/020114a3.html>; Russia 24 January 2000 Arbitration proceeding 54/1999, available at <http://cisgw3.law.pace.edu/cases/000124r1.html>.

²⁵Russia 17 November 1998 Arbitration proceeding 164/1996, available at <http://cisgw3.law.pace.edu/cases/981117r1.html>.

²⁶Germany 9 June 1995 Appellate Court Hamm, available at <http://cisgw3.law.pace.edu/cases/950609g1.html>.

²⁷China 31 January 2000 CIETAC Arbitration proceeding (Clothes case), available at <http://cisgw3.law.pace.edu/cases/000131c1.html>. See also generally France 26 October 2004 Appellate Court Poitiers, available at <http://cisgw3.law.pace.edu/cases/041026f1.html>; Spain 28 April 2004 Appellate Court Barcelona, available at <http://cisgw3.law.pace.edu/cases/040428s4.html>; France 26 April 1995 Appellate Court Grenoble (*Marques Roque Joachim v. Manin Rivière*), available at <http://cisgw3.law.pace.edu/cases/950426f2.html>; Germany 9 November 1994 District Court Oldenburg, available at <http://cisgw3.law.pace.edu/cases/941109g1.html>.

²⁸Article 46(3).

demand is made, failure of the seller to repair may result in future avoidance of the contract.²⁹ However, only after the time for remedying has passed in accordance with Article 47, can a buyer seek the right of avoidance of the contract.³⁰

§6.04 NACHFRIST NOTICE

Under Article 47(1), a buyer can fix an additional delivery period of reasonable length, referred to as the *Nachfrist* principle, which is the granting of additional time for delivery of goods.³¹ The *Nachfrist* principle is a concept borrowed from German domestic law and the French procedure of *mise en demeure*³² and can also be found in international “Restatements” of the law, such as the PECL and UNIDROIT principles. See Chapter 1 for further explanation. However, the domestic treatment of this concept should be disregarded and should not be used to explain the principle within the CISG despite significant similarities in doctrine and jurisprudence.³³

There is no common-law counterpart to the concept of *Nachfrist*. This is due in part to the fact that there is no principle of a fundamental breach but rather avoidance of contract is based on breach of contractual terms—major term versus minor terms. Common law recognizes time limitations imposed by performance of the contract. Hence, “there is no need to determine whether such a delay constitutes a fundamental breach or not, the question is one of breach of warranty or condition.”³⁴

In general, two *preliminary points* are to be kept in mind in regard to the *Nachfrist* procedure contemplated under the CISG:

(1) The aggrieved party may sue for enforcement (under the CISG, subject to Article 28) of his right to require performance by claiming specific performance, with no obligation to grant first to the non-performing party any additional term for performance by a *Nachfrist* procedure; although the *Nachfrist* procedure has been designed to be a *companion* to the specific performance.

(2) Of particular notice, termination is an act of the aggrieved party, not an act of a court or arbitrator. Provided there has been a fundamental non-performance or the other conditions for termination are met, the aggrieved party may terminate by giving notice of termination to the non-performing party; also without having to first grant an additional period of performance for the breaching party.³⁵

Issues surrounding the *Nachfrist* notice are most commonly associated with a buyer's right to avoidance as set forth in Article 49(1) (a) and (b). German courts, which may have been influenced by their application of the *Nachfrist* principle, have held that where the aggrieved parties fail to grant an additional

²⁹Russia 25 June 2003 Arbitration proceeding 151/2002, available at <http://cisgw3.law.pace.edu/cases/030625r1.html>; Germany 19 December 2002 Appellate Court Karlsruhe, available at <http://cisgw3.law.pace.edu/cases/021219g1.html>; France 29 January 1998 Appellate Court Versailles (Giustina International v. Perfect Circle Europe), available at <http://cisgw3.law.pace.edu/cases/980129f1.html>.

³⁰Switzerland 27 January 2004 District Court Schaffhausen, available at <http://cisgw3.law.pace.edu/cases/040127s1.html>.

³¹Spain 29 March 2005 Court of First Instance of Tudela, available at <http://cisgw3.law.pace.edu/cases/050329s4.html>; Germany 6 September 2004 District Court Hamburg, available at <http://cisgw3.law.pace.edu/cases/040906g1.html>.

³²See Bruno Zeller in *Buyer's notice fixing additional final period for performance: Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Articles 47 and 49(1)(b) CISG* (2001), available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp47.html>.

³³*Id.* This would also be consistent with the internationality and uniformity concept set forth in Article 7.

³⁴*Id.*

³⁵*Id.*

period for nondelivery, they have no right to avoid the contract.³⁶ These rulings imply that avoidance may not be based on late performance unless a *Nachfrist* period has been fixed and expired without performance, thereby concluding that time of performance was not fundamental. According to scholars, this interpretation preserves the contract but fails to observe the *discretionary nature of Nachfrist under the CISG*.³⁷ As such, “[o]nly in the absence of a fundamental breach”³⁸ does the aggrieved party, for the purpose of declaring avoidance, have to first grant the breaching party an additional period of time for performance.”³⁸ Notably, recent decisions from Germany reveal a tendency to adhere more to the CISG standards.³⁹

Practical Application: Depending on the status of the contract, for example, execution or litigation, diverse opinions exist as to the contents of *Nachfrist* notice. Case law suggests that actions of the parties can demonstrate “additional notice,”⁴⁰ while other opinions warrant explicit language.⁴¹ As such, counsel appears to have case law to justify either position provided evidence can verify his or her position; however, a conservative approach in execution of a *Nachfrist* notice would be to include express language.

The effect of the dispatch of a *Nachfrist* notice is that a buyer is precluded from seeking any other remedy and the seller is given time to comply with the request or must indicate that he or she will not comply with the notice.⁴² Upon expiration or notice of noncompliance, a buyer may seek his or her right to

³⁶See Germany 27 April 1999 Appellate Court Naumburg, available at <http://cisgw3.law.pace.edu/cases/990427g1.html>; Germany 1 July 2002 Appellate Court München, available at <http://cisgw3.law.pace.edu/cases/020701g1.html>.

³⁷Chengwei Liu, *Additional Period (Nachfrist) for Late Performance: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2d ed.: Case annotated update (March 2005), citing Ericson P. Kimbel in *Nachfrist Notice and Avoidance Under the CISG*, 18 *Journal of Law and Commerce* (1999), n. 25, available at <http://www.cisg.law.pace.edu/cisg/biblio/kimbel.html>.

³⁸*Id.*, citing Cour d'appel [Appellate Court] Grenoble, France 4 February 1999; No. RG 98/0270 (appeal of decision RG 97008146). Translation by Gary F. Bell; available at <http://www.cisg.law.pace.edu/cases/990204f1.html>. See, e.g., Spain 29 March 2005 Court of First Instance of Tudela, available at <http://cisgw3.law.pace.edu/cases/050329s4.html>; Netherlands 31 August 2005 Appellate Court Leeuwarden (Auto-Moto Styl S.R.O. v. Pedro Boat B.V.), available at <http://cisgw3.law.pace.edu/cases/050831n1.html> (finding no evidence of fundamental breach or notice); Germany 6 April 2000 District Court München, available at <http://cisgw3.law.pace.edu/cases/000406g1.html> (non-delivery of sole chair not fundamental breach; *Nachfrist* notice mandated).

³⁹Germany 20 July 2004 Appellate Court Karlsruhe, available at <http://cisgw3.law.pace.edu/cases/040720g1.html> (court recognizes proof of time of the essence as fundamental breach as well as *Nachfrist* principles based on additional time); Germany 21 April 2004 Appellate Court Düsseldorf [15 U 88/03], available at <http://cisgw3.law.pace.edu/cases/040421g3.html> (holding it was not necessary for buyer to fix a *Nachfrist* notice because seller itself had acknowledged late delivery and set a new date for delivery).

⁴⁰Spain 3 November 1997 Appellate Court Barcelona, available at <http://cisgw3.law.pace.edu/cases/971103s4.html>. See also Chengwei Liu, *supra*, note 37, available at <http://www.cisg.law.pace.edu/cisg/biblio/liu4.html#54>, citing scholarly views, Albert H. Kritzer, Editorial Remarks on ICC Arbitration Case No. 7585 of 1992, available at <http://www.cisg.law.pace.edu/cases/927585i1.html>. For the views of Will, Knapp, Enderlein & Maskow, and Honnold, see respectively <http://www.cisg.law.pace.edu/cisg/biblio/will-bb47.html>, <http://www.cisg.law.pace.edu/cisg/biblio/knapp-bb63.html>, <http://www.cisg.law.pace.edu/cisg/biblio/enderlein-art63.html>, and <http://www.cisg.law.pace.edu/cisg/biblio/ho47.html>, respectively.

⁴¹Germany 24 April 1997 Appellate Court Düsseldorf, available at <http://cisgw3.law.pace.edu/cases/970424g1.html>. See also Chengwei Liu, *supra*, note 37.

⁴²In general, it is accepted that the notice is effective immediately under Article 27's dispatch rule although some scholars disagree. See Ericson P. Kimbel, *Nachfrist Notice and Avoidance Under the CISG*,

avoidance of the contract.⁴³ Notice of noncompliance can constitute proof and acknowledgment of liability by the seller.⁴⁴ However, the buyer is not deprived thereby of any right he or she may have to claim damages for delay in performance.⁴⁵

Practical Application: The terms of the contract should determine whether a breach is fundamental, thereby granting the buyer the right to avoidance under Article 49(1)(a). If the buyer is uncertain, transmittance of a *Nachfrist* notice acts as a reassurance that remedy of avoidance may be a viable option. While advising a client as to its remedial options, counsel should inquire as to whether a deadline for compliance is warranted: do you want to terminate this contract if the seller fails to comply? If so, language should be included to state explicitly the action the buyer has elected with regard to the contract. *See generally* Appendix B, Form B-3, Sample Notices.

§6.05 AVOIDANCE

Avoidance is a buyer's right to avoid a contract when a seller commits a "fundamental breach."⁴⁶ European courts have repeatedly adhered to the concept that the remedy of avoidance serves as a means of last resort (*ultima ratio*) of a party performing his or her contractual obligations, if the other party failed to perform within an additional period of reasonable length, or if the supplied goods continued to be useless for the buyer, thereby preserving the contract in conformity with the CISG philosophy.⁴⁷ To date, no U.S. court has denied the remedy based on a strict adherence as demonstrated by European courts.⁴⁸ "Avoidance" under the CISG implies an early end to the contract and comprises national concepts of rescission as well as termination or cancellation without court intervention.⁴⁹ Avoidance of a contract is of paramount importance, for in accordance with Articles 81-84, it can release both parties from their obligations under the contract, above all things, the seller from the obligation to deliver goods and the

18 Journal of Law and Commerce (1999) 301-331, also available at <http://www.cisg.law.pace.edu/cisg/biblio/kimbel.html#kli>.

⁴³Switzerland 27 January 2004 District Court Schaffhausen, available at <http://cisgw3.law.pace.edu/cases/040127s1.html>; Germany 19 December 2002 Appellate Court Karlsruhe, available at <http://cisgw3.law.pace.edu/cases/021219g1.html>; Austria 5 July 2001 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/010705a3.html>.

⁴⁴France 18 December 2003 Appellate Court Lyon (*Société P. Service et al. v. Société F. automatique et al.*), available at <http://cisgw3.law.pace.edu/cases/031218f1.html>.

⁴⁵Article 47(2).

⁴⁶*See Enderlein, supra*, note 8. *See also* Denis Tallon, *Effects of Avoidance*, in *Commentary on the International Sales Law, The 1980 Vienna Sales Convention* 602 (C. M. Bianca & M. J. Bonell, eds., 1987). The term in interpretation is called "original" by the international legal doctrine. *See also* John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 60 (1987).

⁴⁷Germany 3 April 1996 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/960403g1.html>; Austria 7 September 2000 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/000907a3.html>; Italy 13 December 2001 District Court Busto Arsizio, available at <http://cisgw3.law.pace.edu/cases/011213i3.html>; Switzerland 28 October 1998 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/981028s1.html>.

⁴⁸*Medical Marketing v. Internazionale Medico Scientifica*, 1999 U.S. Dist. LEXIS 7380; 1999 WL 311945 (E.D. La.), also available at <http://cisgw3.law.pace.edu/cases/990517u1.html> (confirming avoidance arbitral award based on German exception rule); *Delchi Carrier v. Rotorex*, 71 F.3d 1024 (1995), also available at <http://cisgw3.law.pace.edu/cases/951206u1.html>; *but see Shuttle Packaging Sys. v. Tsonakis et al.*, 2001 U.S. Dist. LEXIS 21630; 2001 WL 34046276 (W.D. Mich.), also available at <http://cisgw3.law.pace.edu/cases/011217u1.html>.

⁴⁹Drafting this particular provision required the drafters to adopt such neutral language upon which they could reach an agreement. *See* Michael J. Bonell, *Interpretation of the Convention*, in *Commentary on the International Sales Law*.

buyer from the obligation to take delivery of the goods and pay the price for the goods.⁵⁰ *See generally* Chapter 8. Both buyer and seller have the right to suspend or avoid an installment contract due to fundamental breach under Articles 71-73.⁵¹ “It is not an avoidance in the juridical way of the words with effects *ex tunc*, but a *résiliation*, which releases both parties from their contractual obligations yet to be executed and which executes itself *ex tunc*.”⁵² A buyer's right to avoidance is set forth in Article 49, which provides the following:

- (1) The buyer may declare the contract avoided:
 - (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; *or*
 - (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.
- (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
 - (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
 - (b) in respect of any breach other than late delivery, within a reasonable time:
 - (i) after he knew or ought to have known of the breach;
 - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; *or*
 - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance. (Emphasis added).

Hence, avoidance can occur in several situations: (1) when the seller fails to perform any of his or her obligations under the contract and the failure constitutes a fundamental breach of the contract pursuant to 49(1)(a); (2) in the case of non-delivery, if the seller does not deliver the goods within an additional period of time fixed by a buyer's notice made in compliance with Article 47 of the CISG or where the seller declares that he will not deliver within the fixed period pursuant to Article 49(1)(b); or (3) late delivery or other circumstances set forth in Article 49(2). A buyer may lose his right to avoidance if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.⁵³

[A] Notice Requirement

A party that petitions for the avoidance of the sales contract must expressly declare the agreement

⁵⁰Russia 22 October 1998 Arbitration proceeding 196/1997, available at <http://cisgw3.law.pace.edu/cases/981022r1.html>.

⁵¹Shuttle Packaging Sys. v. Tsonakis et al., 2001 U.S. Dist. LEXIS 21630, 2001 WL 34046276 (W.D. Mich.), also available at <http://cisgw3.law.pace.edu/cases/011217u1.html>.

⁵²Switzerland, Supreme Court (Bundesgericht) (FCF S.A. v. Adriaafil Commerciale S.r.l), 15 September 2000, available at <http://cisgw3.law.pace.edu/cases/000915s2.html>, *citing* Neumayer/Ming, *op. cit.*, n. 1 and Article 81 CISG; *see also* Spain 3 October 2002 Appellate Court Pontevedra, available at <http://cisgw3.law.pace.edu/cases/021003s4.html> (stating that “contrary to what happens in several domestic legal systems, avoidance is not judicial but becomes effective automatically after the obligation to give notice to the party in default is observed).

⁵³Germany 12 March 2001 Appellate Court Stuttgart, available at <http://cisgw3.law.pace.edu/cases/010312g1.html>.

avoided by *notice* to the opposite party so that there are not any remaining doubts upon the incentive of the petitioning party.⁵⁴ There has been the suggestion of an implied declaration of avoidance with courts questioning whether the recipient of this declaration was in the position to undoubtedly realize the buyer's obvious will not to be bound any longer under the sales contract.⁵⁵ At least one court has held that notice of avoidance is unnecessary where obligor clearly and conclusively refuses to perform.⁵⁶ Overall, a declaration of avoidance must be explicitly recognizable and realizable to the other party.⁵⁷ All notices must be sent within a reasonable period of time.⁵⁸ "Indeed, the CISG does not provide any obligation concerning the form of the avoidance of sale contracts"⁵⁹; however, explicit language should clearly indicate immediate termination. Courts have held that future termination, request for delivery, or return of goods *without* further explanation insufficient to constitute notice.⁶⁰ One tribunal noted the following:

⁵⁴ Article 26.

⁵⁵ Germany 14 October 2002 Appellate Court Köln, available at <http://cisgw3.law.pace.edu/cases/021014g1.html>; Germany 16 September 1991 District Court Frankfurt, available at <http://cisgw3.law.pace.edu/cases/910916g1.html>, *citing* Leser, in Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht, München 1990* [German Commentary on the CISG, Munich 1990], Art. 26 No. 10 CISG), *in contrast*, see Herber/Czerwenka, *International Law on Sales Contracts, Munich 1991*, Art. 26 No. 2, Art. 49 No. 11 CISG; Enderlein/Maskow/Sargardt, Art. 26 No. 2 *et seq.* CISG; *see also* Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.), available at <http://cisgw3.law.pace.edu/cases/000915s2.html>.

⁵⁶ Germany 15 September 2004 Appellate Court München, available at <http://cisgw3.law.pace.edu/cases/040915g2.html>.

⁵⁷ Switzerland 20 February 1997 District Court Saane, available at <http://cisgw3.law.pace.edu/cases/970220s1.html>; Austria 5 July 2001 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/010705a3.html>; Germany 19 December 2002 Appellate Court Karlsruhe, available at <http://cisgw3.law.pace.edu/cases/021219g1.html>; *but see* Denmark 10 November 1999 Western Appellate Court, available at <http://cisgw3.law.pace.edu/cases/991110d1.html> (denying adequate notice of avoidance).

⁵⁸ France 14 June 2001 Appellate Court Paris (Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitrierie), available at <http://cisgw3.law.pace.edu/cases/010614f1.html>.

⁵⁹ Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.), available at <http://cisgw3.law.pace.edu/cases/000915s2.html>, *citing* Neumayer/Ming, *op. cit.*, n. 1 and Article 11 CISG.

⁶⁰ Germany 13 January 1999 Appellate Court Bamberg, available at <http://cisgw3.law.pace.edu/cases/990113g1.html>; Germany 31 January 1997 Appellate Court Koblenz, available at <http://cisgw3.law.pace.edu/cases/970131g1.html>; Germany 16 September 1991 District Court Frankfurt, available at <http://cisgw3.law.pace.edu/cases/910916g1.html> (rejecting explicit and implicit avoidance; *but see the following cases upholding notice*: ICC Arbitration Case No. 8786 of January 1997, available at <http://cisgw3.law.pace.edu/cases/978786i1.html>; China 22 March 1995 CIETAC Arbitration proceeding (Down jacket and winter coat case), available at <http://cisgw3.law.pace.edu/cases/950322c1.html>; Germany 25 June 1997 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/970625g2.html> (buyer's notice that it could not use a certain quantity of the goods and was placing them at the disposal of the seller regarded as an effective notice of avoidance); Belgium 4 June 2004 District Court Kortrijk (Steinbock-Bjonustan EHF v. NV Duma), available at <http://cisgw3.law.pace.edu/cases/040604b1.html> (upholding unilateral avoidance); Switzerland 27 January 2004 District Court Schaffhausen, available at <http://cisgw3.law.pace.edu/cases/040127s1.html>; Netherlands 23 April 2003 Appellate Court's-Gravenhage, available at <http://cisgw3.law.pace.edu/cases/030423n1.html>; ICC Arbitration Case No. 7645 of March 1995, available at <http://cisgw3.law.pace.edu/cases/957645i1.html>; Russia 7 June 1999 Arbitration proceeding 238/1998, available at <http://cisgw3.law.pace.edu/cases/990607r1.html>; Russia 11 May 1997 Arbitration proceeding 2/1995, available at <http://cisgw3.law.pace.edu/cases/970511r1.html>; ICC Arbitration Case No. 9978 of March 1999, available at <http://cisgw3.law.pace.edu/cases/999978i1.html> (holding buyer's declaration of avoidance was validly expressed according to Article 26 CISG by sending a fax in which the buyer asked for restitution of price); Germany 29 December 1998 Hamburg Arbitration proceeding, available at <http://cisgw3.law.pace.edu/cases/981229g1.html>; Italy 20 March 1998 Appellate Court Milan (Italdecor v. Yiu's Industries), available at <http://cisgw3.law.pace.edu/cases/980320i3.html> (cancellation of purchase order sufficient for avoidance

[t]o interpret the [avoidance] declarations and the conduct of a party there is a need to establish its real intent if the other party knew it at all. The guide for this interpretation is the manner in which a reasonable person would have understood this declaration or this conduct in the same circumstances.⁶¹

Parties that come from Contracting States that have filed reservations under Articles 12 and 96 should also adhere to all writing requirements for notice. See Chapter 2. A contract is avoided when a declaration of avoidance is dispatched to the party.⁶² Article 49(1) does not prescribe any time limitation for giving notice; however, consideration should be given to the circumstances and evidence surrounding the case. Hence, case law on the subject has varied as to time limitations.⁶³ In contrast, 49(2) sets forth a right to declare avoidance of a contract after “delivery” of the goods within a reasonable time period; however, similar to subsection 1 of Article 49, courts have employed a subjective means of evaluating whether the notice was reasonable.⁶⁴ At least one court noted that unlike notice for nonconformity under Article 39, notice for avoidance has to be declared only after it appears that the nonconformity amounts to a fundamental breach which cannot be otherwise remedied.⁶⁵ However, notice of avoidance during the pendency of an appeal fails to fall within a reasonable time under Article 49.⁶⁶

[B] Fundamental Breach—Article 49(1)(a)

The key term for avoidance as set forth in Article 49(1)(a) is defining what constitutes a “fundamental breach.” Fundamental breach is a common term consistently interwoven throughout the CISG and establishes remedies available to buyers and sellers as well as certain aspects of the passing of risks.⁶⁷ See also Chapter 7. Article 25 defines a “fundamental breach” as follows:

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

notice); Russia 5 March 1998 Arbitration proceeding 160/1997, available at <http://cisgw3.law.pace.edu/cases/980305r2.html>; Germany 21 March 1996 Hamburg Arbitration proceeding, available at <http://cisgw3.law.pace.edu/cases/960321g1.html>.

⁶¹ICC Arbitration Case No. 8128 of 1995, available at <http://cisgw3.law.pace.edu/cases/958128i1.html>.

⁶²Article 27. Chengwei Liu, *Comparison of CISG Article 27 and Counterpart Notice Provisions of the UNIDROIT Principles and PECL*, available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp27.html>, referencing scholars acknowledgement of dispatch rule under Part III of the CISG with exception of Articles 47(2), 48(4), 63(2), 65(1), 65 (2) and 79(4) that are tied to the moment of receipt. See also Russia 3 April 1995 Arbitration Court of Moscow City, available at <http://cisgw3.law.pace.edu/cases/950403r1.html>; Germany 17 September 1991 Appellate Court Frankfurt, available at <http://cisgw3.law.pace.edu/cases/910917g1.html>.

⁶³See, e.g., OLG Celle 20 U 76/94, May 24, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950524g1.html>; Germany 15 February 1995 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/950215g1.html>; LG Ellwangen 1 KfH O 32/95, Aug. 21, 1995 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/950821g2.html>; Germany 22 February 1994 Appellate Court Köln, available at <http://cisgw3.law.pace.edu/cases/940222g1.html>; ICC Arbitration Case No. 9978 of March 1999, available at <http://cisgw3.law.pace.edu/cases/999978i1.html>.

⁶⁴Spain 3 November 1997 Appellate Court Barcelona, available at <http://cisgw3.law.pace.edu/cases/971103s4.html>; Amtsgericht [Petty District Court][AG] Nordhorn 3 C 75/94, Jun. 14, 1994 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/940614g1.html>; OLG Frankfurt 5 U 164/90, Sep. 17, 1991 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/910917g1.html>; LG Freiburg 8 O 75/02 22, Aug. 22, 2002 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/020822g1.html>; HO Turku, Apr. 12, 2002 (Fin.), available at <http://cisgw3.law.pace.edu/cases/020412f5.html>.

⁶⁵Tribunale di Busto Arsizio, 13 December 2001, available at <http://www.unilex.info/case.cfm?pid=1&d=927&step=Abstract>.

⁶⁶Belgium 8 March 2001 Appellate Court Mons (Vetimo v. Aubert), available at <http://cisgw3.law.pace.edu/cases/010308b1.html>.

⁶⁷Articles. 46(2), 49(1)(a), 51(2), 64(1)(a), 70, 72(1), 73(1) and (2).

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 (emphasis added).

The two key criteria of Article 25 is that (1) the breach must result in a *detriment* to the innocent party and (2) the breach must *substantially* deprive the innocent party of what he or she is entitled to expect under the contract. However, the last provision of Article 25 provides an escape clause for a seller provided the seller can prove that the breach was not foreseeable. In general, the buyer bears the burden of proving the elements of a fundamental breach.⁶⁸

[1] Detriment Under a Fundamental Breach

The term “detriment” is not defined by the CISG nor does it give any example of a detriment that rises to the level of a fundamental breach.⁶⁹ Legislative history reveals that the drafter accepted an objective test for determining the fundamental of the breach.⁷⁰ The Secretariat Commentary states that “[t]he determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.”⁷¹ It is conclusive from this comment that the drafters intended the word “detriment” to be synonymous with “injury” and “harm,” and it can also be exemplified by monetary harm and interference with other activities.⁷²

[2] Substantially Deprive Buyer Under a Fundamental Breach

The second element of a fundamental breach is that the detriment caused by the breach must substantially deprive the buyer of what he is entitled to expect under the contract. Despite the controversy surrounding the adoption of this standard, the drafters concluded that for a breach to be fundamental, it must result in such detriment as substantially to deprive the victim of breach of *what he is entitled to expect under the contract*.⁷³ Such terms can be proven by the express language of the contract as well as by the implied agreement of the parties *at the time it was made*.⁷⁴

[3] Application by the Courts

The terms of a contract establish the requirements and/or standards of the goods and obligations expected of the parties.⁷⁵ Whether failure to adhere to a term amounts to a fundamental breach may be

⁶⁸Germany 3 April 1996 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/960403g1.html>.

⁶⁹Andrew Babiak, *Defining “Fundamental Breach” Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 Temple Int'l & Comp. L.J. 113 at 119.

⁷⁰See UNCITRAL, yearbook, VI (1975). Historically, Article 25 objective test developed out of the debate over the weakness of the ULIS, which had adopted a subjectivity test.

⁷¹Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat Commentary, at ¶2, art. 23 of the 1978 Draft Convention.

⁷²See Mirghasem Jafarzadeh, *Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law*, Shahid Beheshti University, Tehran, Iran (December 2001), available at <http://cisgw3.law.pace.edu/cisg/biblio/jafarzadeh1.html>.

⁷³*Id.*

⁷⁴See Robert Koch, *The Concept of Fundamental Breach of Contract Under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Kluwer Law International (1999) 263, also available at <http://cisgw3.law.pace.edu/cisg/biblio/koch.html>.

⁷⁵Italy 20 March 1998 Appellate Court Milan (Italdecor v. Yiu's Industries), available at <http://cisgw3.law.pace.edu/cases/980320i3.html>; Switzerland 15 September 2000 Supreme Court [4P.75/2000] (FCF S.A. v. Adriafile Commerciale S.r.l.), available at <http://cisgw3.law.pace.edu/cases/000915s1.html>; ICC Arbitration Case No. 9978 of March 1999, available

dependent on a tribunal employing Article 8 or 9 to determine whether the terms goes to the “essence” of the agreement.⁷⁶

Practical Application: An all encompassing provision provided in an acceptance, an order, or the contract *may* provide recourse for a buyer, such as the following:

Seller hereby agrees that failure to adhere to any portion of this Order [or Contract], including but not limited to, delivery, performance, and use, shall constitute a fundamental breach and Buyer shall have the exclusive right to the remedy of avoidance in addition to any other remedy provided by law. Seller hereby knowingly waives all rights to prior notice of said nonconformities and avoidance as provided by law.

If the terms of the contract fail to establish the standards, buyers often argue that the goods fail to serve the purpose for which they were purchased. This often entails the introduction of evidence proving that seller was aware of its purpose.⁷⁷ *See generally* Chapters 3 and 4 for discussion on Articles 8 and 9. Notably, this argument invokes the defense of foreseeability by the seller as set forth in Article 25. The business of the buyer may also come into play. If, for example, the goods are for his or her actual business versus resale. If the former, courts have considered that a fundamental breach may not result if the nonconformity of the goods can be remedied by the seller without causing unreasonable delay.⁷⁸ Therefore, not only is the weight of the defect relevant, but also the preparedness of the seller to cure the defect without unacceptable delay and the burden to the buyer is of importance. Some courts have held that even a serious defect is not a fundamental breach of contract if the seller is prepared to replace the goods without unacceptable burden to the buyer.⁷⁹ However, if the goods were bought for resale, courts have considered whether resale can reasonably be expected from the buyer in the normal course of business.⁸⁰ The impact

at <http://cisgw3.law.pace.edu/cases/999978i1.html>; Germany 19 December 2002 Appellate Court Karlsruhe, available at <http://cisgw3.law.pace.edu/cases/021219g1.html>.

⁷⁶*See* CISG-AC Opinion no. 5, The buyer's right to avoid the contract in case of nonconforming goods or documents 7 May 2005, Badenweiler (Germany). Rapporteur. Professor Dr. Ingeborg Schwenzer, LL.M., Professor of Private Law, University of Basel, available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op5.html>. *See also* Germany 12 March 2001 Appellate Court Stuttgart, available at <http://cisgw3.law.pace.edu/cases/010312g1.html>; China 30 October 1991 CIETAC Arbitration proceeding (Roll aluminum and aluminum parts case), available at <http://cisgw3.law.pace.edu/cases/911030c1.html>; Spain 3 November 1997 Appellate Court Barcelona, available at <http://cisgw3.law.pace.edu/cases/971103s4.html>; Italy 24 November 1989 Court of First Instance Parma (Foliopack v. Daniplast), available at <http://cisgw3.law.pace.edu/cases/891124i3.html>; Belgium 8 March 2001 Appellate Court Mons (Vetimo v. Aubert), available at <http://cisgw3.law.pace.edu/cases/010308b1.html>.

⁷⁷Spain 29 March 2005 Court of First Instance of Tudela, available at <http://cisgw3.law.pace.edu/cases/050329s4.html>.

⁷⁸Shuttle Packaging Sys. v. Tsonakis et al., 2001 U.S. Dist. LEXIS 21630; 2001 WL 34046276 (W.D. Mich.), also available at <http://cisgw3.law.pace.edu/cases/011217u1.html>; France 26 April 1995 Appellate Court Grenoble (Alain Veyron v. Ambrosio), available at <http://cisgw3.law.pace.edu/cases/950426f1.html>.

⁷⁹Germany 14 October 2002 Appellate Court Köln, available at <http://cisgw3.law.pace.edu/cases/021014g1.html>, *citing* OLG Koblenz [31 January 1997], OLGR 1997, 37; Lurger, p. 98; Schlechtriem/Huber, CISG, 3rd ed., §49 No. 12 et seq.; Staudinger/Magnus, BGB, revision 1999, Article 49 CISG No. 14 with further references; *but see* France 26 May 1999 Supreme Court (Schreiber v. Thermo Dynamique), available at <http://cisgw3.law.pace.edu/cases/990526f1.html>.

⁸⁰Switzerland 15 January 1998 Appellate Court Lugano, Cantone del Ticino, available at <http://cisgw3.law.pace.edu/cases/980115s1.html>; ICC Arbitration Case No. 7531 of 1994, available at <http://cisgw3.law.pace.edu/cases/947531i1.html>.

on the repudiation of the buyer has also been considered for avoidance⁸¹ as well as the safety of the goods.⁸² Delay of delivery may not be relevant if the buyer is in the wholesale business as the delay, absent evidence to the contrary, ordinarily does not result in such detriment of the company as to substantially deprive it of what it is entitled to expect under the contract.⁸³ However, the contrary may result if the parties agreed that time of delivery was of the essence.

Delivery of documents that do not conform to the contract amounts to a defect in quantity and not as an equivalent to non-delivery of the goods unless the factual scenario surrounding the missing documents establishes a fundamental breach.⁸⁴ Missing documents in documentary sales fails “if the seller can remedy the non-conformity of the documents consistently with the weight accorded to the time of performance.”⁸⁵ Late delivery by a seller is not considered to be a fundamental breach under paragraph (a) of Art. 49 CISG when buyer unreasonably rejects the vessel carrying goods which prevented unloading of the cargo.^{85.1} There is scholarly opinion that in commodity trades, missing documents do not amount to a fundamental breach unless there is no timely delivery of conforming documents.⁸⁶ Nevertheless, a buyer, who is delivered nonconforming goods that fail to constitute a fundamental breach, may refuse to make payment and to take delivery if reasonable under the circumstances.⁸⁷ *As this criterion is subjective, a buyer exercising this option should use caution as it may be subjecting itself to a counterclaim of avoidance by the seller for non-payment under Article 64.*⁸⁸ See generally Chapter 7.

[4] Foreseeability Under a Fundamental Breach

The foreseeability test, as recited in Article 25, provides that a breach will not be fundamental if the seller can rely on the foreseeability provision of Article 25.⁸⁹ The legislative history reveals that there was a consensus that this burden should be on the party in breach because of the logical difficulty of requiring the non-breaching party to prove what the party in breach actually foresaw or a reasonable man in its position could have foreseen.⁹⁰

[5] Avoidance for Non-Delivery—Article 49(1)(b)

A second means of avoidance is provided in Article 49(1)(b), whereby a seller *who has failed to deliver* and does not do so within the additional period of time fixed by the buyer under Article 47(1)—*Nachfrist* notice—entitles the buyer to avoid the contract. See §6.04. In contrast to Article 49(1)(a), which permits avoidance by the buyer for (any) fundamental breach by the seller, subsection (b) of Article 49(1) applies *only* in the event of non-delivery.⁹¹ Although Article 47(1) CISG is a may-do provision, courts have

⁸¹Austria 5 July 2001 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/010705a3.html>.

⁸²France 4 June 2004 Appellate Court Paris, available at <http://cisgw3.law.pace.edu/cases/040604f1.html>.

⁸³Finland 18 February 1997 Turku Court of Appeal, available at <http://cisgw3.law.pace.edu/cases/970218f5.html>.

⁸⁴CISG-AC Opinion no. 5, *supra*, note 76.

⁸⁵*Id.*

^{85.1}Marketing v. Green, 2006 WL 891196 (D.N.J.), also available at <http://cisgw3.law.pace.edu/cases/060404u1.html>.

⁸⁶*Id.*

⁸⁷*Id.*

⁸⁸Shuttle Packaging Sys. v. Tsonakis et al., 2001 U.S. Dist. LEXIS 21630; 2001 WL 34046276 (W.D.Mich.), also available at <http://cisgw3.law.pace.edu/cases/011217u1.html>.

⁸⁹The legislative history of Article 25 reveals that the burden of proving foreseeability of loss was originally on the party in breach but was rejected as it invoked several civil procedure issues.

⁹⁰See generally Switzerland 28 October 1998 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/981028s1.html>.

⁹¹Article 49(1)(b). See, e.g., Valero Marketing v. Green, 2006 WL 891196 (D.N.J.), also available at <http://cisgw3.law.pace.edu/cases/060404u1.html> (holding U.S. buyer could not rely on paragraph (b) of Article 49 (1) when Finnish seller could have delivered on time but for the buyer's wrongful refusal to accept delivery vessel which prevented the immediate unloading of cargo).

held that the reference in Article 49(2)(b) and in Article 47(2) provides that the fixing of an additional period of time is an indispensable requirement for the buyer's exercise of remedies for breach of contract by the seller, unless the seller has declared that he will not deliver under any circumstance (there is no such statement on the part of the [seller] in the present case).^{91.1} However, under either subsection of Article 49, a fundamental breach does not occur unless the breach goes to a material term of the parties' agreement. The notice requirements are not warranted under Article 49 if the parties knew that the seller was not going to be able to perform.⁹² Under Article 49 (1)(b) the following conditions must be satisfied by the buyer in order to declare an avoidance:

1. The breach in question is one of non-delivery;
2. The seller was allowed a reasonable time extension to perform—so-called *Nachfrist* period; and
3. Failure to perform within the fixed time period warrants that the non-fundamental breach is then “upgraded” and avoidance of the contract becomes available.⁹³

§6.06 AVOIDANCE OF DELIVERED GOODS—ARTICLE 49(2)

In cases where the seller has delivered the goods, a buyer loses the right to declare the contract avoided unless he or she does so in respect of late delivery, within a reasonable time after he has become aware that delivery has been made.⁹⁴ In the event of a breach other than late delivery, a buyer may still seek an avoidance if: within a reasonable time after a buyer knew or ought to have known of the breach or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Article 48, or after the buyer has declared that he will not accept performance. Article 49(2)(b) in essence provides the commencement period for determining when notice of avoidance should be declared except for late deliveries, which is addressed in Article (2)(a). Similar to notice provisions found throughout the CISG, no set time limit is established *per se* and therefore a subjective overview of the facts based on the evidence submitted by the parties determines the “reasonableness” of the notice.⁹⁵

^{91.1}Marketing v. Green, 2006 WL 891196 (D.N.J.), also available at <http://cisgw3.law.pace.edu/cases/060404u1.html> (additional time for performance by the seller could not be considered as valid, since Art. 47 CISG precludes the buyer from asking for a reduction of price when the additional period is pending).

⁹²Italy 11 January 2005 District Court Padova (*Ostroznik Savo v. La Faraona soc. coop. a.r.l.*), available at <http://cisgw3.law.pace.edu/cases/050111i3.html>.

⁹³Jonathan Yovel, *Comparison Between Provisions of the CISG (Seller's Right to Remedy Failure to Perform: Article 48) and the Counterpart Provisions of the PECL (Articles 8:104 and 9:303)* (March 2005), available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp48.html#y13>.

⁹⁴Article 49 (2)(a). See Switzerland 23 April 2002 District Court Schaffhausen, available at <http://cisgw3.law.pace.edu/cases/020423s1.html>. Marketing v. Green, 2006 WL 891196 (D.N.J.), also available at <http://cisgw3.law.pace.edu/cases/060404u1.html> (late delivery by the seller could not be considered a fundamental breach under paragraph (a) of Art. 49 when buyer unreasonably rejected the vessel “Bear G,” the seller could have started unloading the cargo only two days after the expected date, and the buyer would have still been able to blend the naptha with other components and release the final product, as planned, onto the market prior to 30 September 2001 (i.e. before the final product's October price fall that it alleged had caused it to suffer damages).

⁹⁵In the following cases notice has been found to be reasonable: Germany 31 January 1997 Appellate Court Koblenz, available at <http://cisgw3.law.pace.edu/cases/970131g1.html>; Germany 1 February 1995 Appellate Court Oldenburg, available at <http://cisgw3.law.pace.edu/cases/950201g1.html> (five weeks); Germany 26 November 1999 Appellate Court Hamburg, available at <http://cisgw3.law.pace.edu/cases/991126g1.html>; Italy 13 December 2001 District Court Busto Arsizio, available at <http://cisgw3.law.pace.edu/cases/011213i3.html>; Spain 3 November 1997 Appellate Court Barcelona, available at <http://cisgw3.law.pace.edu/cases/971103s4.html> (48-hour period within which the buyer cancelled following delivery of the last late installment received was deemed to be a “reasonable time”); France 29 January 1998 Appellate Court Versailles (*Giustina International v. Perfect Circle*

§6.07 SELLER'S RIGHT TO CURE AFTER DELIVERY

A seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer subject to Article 49.⁹⁶ However, the buyer retains any right to claim damages as provided for in this CISG.⁹⁷ See Chapter 8. Practitioners should note that regarding the relation between the right of seller to cure and the right of buyer to avoidance of the contract under Article 49 that fundamental breach has been subject to considerable controversy within the drafting committee, and remains in academic controversy today.⁹⁸ As a direct consequence, there is case law that provides that a declaration of a fundamental breach precludes a seller's right to cure.⁹⁹ In contrast, there is case law supporting a seller's right to cure even upon declaration of avoidance.¹⁰⁰

Practical Application: In the event of discourse among international

Europe), available at <http://cisgw3.law.pace.edu/cases/980129f1.html> (reasonable after additional time periods granted by buyer). *In contrast*, see Germany 15 February 1995 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/950215g1.html> (five months unreasonable); Germany 2 March 1994 Appellate Court München, available at <http://cisgw3.law.pace.edu/cases/940302g1.html> (four months unreasonable); Germany 31 January 1997 Appellate Court Koblenz, available at <http://cisgw3.law.pace.edu/cases/970131g1.html>.

⁹⁶Article 48(1). Switzerland 10 February 1999 Commercial Court Zürich, available at <http://cisgw3.law.pace.edu/cases/990210s1.html>; Germany 23 June 1995 Lower Court München, available at <http://cisgw3.law.pace.edu/cases/950623g1.html>.

⁹⁷*Id.* See also France 26 April 1995 Appellate Court Grenoble (Marques Roque Joachim v. Manin Rivière), available at <http://cisgw3.law.pace.edu/cases/950426f2.html>.

⁹⁸See generally Jonathan Yovel, *Comparison Between Provisions of the CISG (Seller's Right to Remedy Failure to Perform: Article 48) and the Counterpart Provisions of the PECL (Articles 8:104 and 9:303)* (March 2005), available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp48.html#y13>; *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March–11 April 1980, A/CONF. 97/19*, at 40 *et seq.*, available at <http://cisgw3.law.pace.edu/cisg/text/link48.html> (for support of avoidance takes precedence over seller's right to cure); *in contrast*, see John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, *Kluwer Law International*, 3d ed. (1999); pp. 320-21, available at <http://cisgw3.law.pace.edu/cisg/biblio/ho48.html>. See also Huber in Schlechtriem, *Commentary* (1998), pp. 406-410 and Honnold, *Uniform Law* (1999), pp. 319-322, available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html>.

⁹⁹See generally ICC Arbitration Case No. 7531 of 1994, available at <http://cisgw3.law.pace.edu/cases/947531i1.html> (seller could not cure absent consent of buyer); Italy 24 November 1989 Court of First Instance Parma (Foliopack v. Daniplast), available at <http://cisgw3.law.pace.edu/cases/891124i3.html>; Germany 25 June 1997 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/970625g2.html>.

¹⁰⁰See generally Switzerland 5 November 2002 Commercial Court des Kantons Aargau, translation available at <http://cisgw3.law.pace.edu/cases/021105s1.html>; Switzerland, Bundesgericht, 28 October 1998, 4C.197/1998 Erw. 2b, available at <http://cisgw3.law.pace.edu/cases/9810218s1.html>; Germany, Oberlandesgericht [Appellate Court] Koblenz, 31 January 1997, 2 U 31/96, available at <http://cisgw3.law.pace.edu/cases/970131g1.html>; Switzerland 27 April 1992 District Court Locarno Campagna, available at <http://cisgw3.law.pace.edu/cases/920427s1.html>; Handelsgericht Zürich SZIER 1996, 51; Schlechtriem, *Internationales UN-Kaufrecht*, Tübingen 1996, page 99/100 side no. 180; Schlechtriem/Huber, *Kommentar zum einheitlichen UN-Kaufrecht*, 3.A., München 2000, note 12 to Art. 49, N 1, 20, 23 and 24 to Art. 48; Honsell/Schnyder/Straub, *Kommentar zum UN-Kaufrecht*, Berlin 1997, note 35 to Art. 48 and note 23 to Art. 49; Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, Neuwied 2000, note 4 *et seq.* to Art. 48.

opinions, it is most likely that an argument analyzed under domestic law application may be resourceful, and therefore “international reliance” may be an ineffective argument. For example, under Section 2-508 of the U.C.C. upon the rejection of the tender by the buyer, the seller may give reasonable notice of his intent to cure the shipment. However, the seller must have reasonable grounds to believe that the tender would be accepted despite the nonconformity. However, if the time of delivery is specifically made essential in the contract, or the contract expressly provides that no replacements will be allowed, the seller cannot have the grounds to believe that a nonconforming tender will be accepted, and therefore the cure is inapplicable.¹⁰¹

If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request.¹⁰² A buyer's silence to seller's request to remedy pursuant to Article 48(2) has been held to constitute a relinquishment of its rights to a claim.¹⁰³ The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.¹⁰⁴ A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.¹⁰⁵ A request or notice by the seller seeking to remedy nonconforming goods is not effective unless received by the buyer.¹⁰⁶ The content of the notice must provide the time frame the seller plans to cure the nonconformity.¹⁰⁷ Notably, if the seller remedies any failure to perform his obligations in accordance with Article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price under Article 50.¹⁰⁸ It has been held that the seller has to bear the costs that the buyer incurs when the seller remedies defects of the delivered goods.¹⁰⁹

§6.08 SELLER'S RIGHT TO CURE MAY VOID BUYER'S RIGHT TO REDUCTION IN PRICE

Under Article 50, a buyer may reduce the price of nonconforming goods in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time whether or not the price has already been paid to the seller.¹¹⁰ A buyer's right to reduction of price is subject to Article 39 notice requirements as well as proof of a valid declaration

¹⁰¹This would be particularly true for case law that provides that time of performance is not a fundamental breach.

¹⁰²Article 48(2). Germany 14 June 1994 Lower Court Nordhorn, available at <http://cisgw3.law.pace.edu/cases/940614g1.html>.

¹⁰³China 29 December 1999 CIETAC Arbitration proceeding Shenzhen No. 1138-1 (Indonesian round logs case), available at <http://cisgw3.law.pace.edu/cases/991229c1.html>.

¹⁰⁴Article 48(2).

¹⁰⁵Article 48(3).

¹⁰⁶Article 48(4). Finland 12 November 1997 Turku Court of Appeal, available at <http://cisgw3.law.pace.edu/cases/971112f5.html>; Germany 9 November 1994 District Court Oldenburg, available at <http://cisgw3.law.pace.edu/cases/941109g1.html>.

¹⁰⁷See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41, para. 14.

¹⁰⁸Article 50. See also Austria 23 May 2005 Supreme Court, available at <http://cisgw3.law.pace.edu/cases/050523a3.html>; Austria 14 January 2002 Supreme Court, translation available at <http://cisgw3.law.pace.edu/cases/020114a3.html> (in dicta); Switzerland 10 February 1999 Commercial Court Zürich, available at <http://cisgw3.law.pace.edu/cases/990210s1.html>; Finland 12 November 1997 Turku Court of Appeal, available at <http://cisgw3.law.pace.edu/cases/971112f5.html>.

¹⁰⁹Germany 9 June 1995 Appellate Court Hamm, available at <http://cisgw3.law.pace.edu/cases/950609g1.html>.

¹¹⁰Article 50.

expressing buyer's intent to reduce price.¹¹¹ Although Article 50 is remedial in nature, it also limits the remedy by providing that "if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may *not* reduce the price."¹¹² Therefore, a seller who properly exercises Article 48 may preclude a buyer from reducing the price of nonconforming goods, irrespective of whether or not the price has already been paid.¹¹³ Whether or not a buyer is entitled to a price reduction pursuant to Article 50 turns on the credibility of the evidence the buyer presents to the court or tribunal.¹¹⁴

Practical Application: The purpose of inclusion of Article 50 is to bring to the practitioner's attention the interrelationship between Article 48 and Article 50. *See* Chapter 8 for further discussion on damages. Counsel should also take note that the civil law doctrine of price reduction is inapplicable since under the CISG a buyer can claim damages without having to prove that there is fault on the part of the seller.

¹¹¹Germany 2 March 1994 Appellate Court München, available at <http://cisgw3.law.pace.edu/cases/940302g1.html>; Switzerland 11 June 1999 Commercial Court Aargau, available at <http://cisgw3.law.pace.edu/cases/990611s1.html>.

¹¹²Article 50.

¹¹³Germany 6 September 2004 District Court Hamburg, available at <http://cisgw3.law.pace.edu/cases/040906g1.html>; Germany 31 January 1997 Appellate Court Koblenz, <http://cisgw3.law.pace.edu/cases/970131g1.html>; Germany 14 April 1993 Lower Court Cloppenburg, available at <http://cisgw3.law.pace.edu/cases/930414g1.html>.

¹¹⁴Spain 5 November 2004 Appellate Court Vizcaya, available at <http://cisgw3.law.pace.edu/cases/031105s4.html>.