AVOIDANCE IN NONPAYMENT SITUATIONS AND FUNDAMENTAL BREACH UNDER THE 1980 U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods[1] (the Convention) provides, as a general rule, that a party may avoid or terminate a contract only in response to a "fundamental breach" by the other party to the contract.[2] The Convention defines fundamental breach in article 25.[3] This article identifies guidelines for determining when a buyer's nonpayment amounts to a fundamental breach entitling the seller to avoid the contract. The basic premise upon which this analysis rests is that only substantive law can give meaning to a theoretical concept such as fundamental breach.

Initially, to provide a general understanding of the rule, a historical overview of its development at the United Nations Commission on International Trade Law (UNCITRAL)[4] will be provided. Article 25[5] will then be compared with its counterpart in the Uniform Law on the International Sale of Goods (ULIS).[6]

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1. Final Act of The United Nations Conference on Contracts for the International Sale of Goods (the Convention), U.N. CONF. ON CONT. FOR THE INT'L SALE OF GOODS—OFFICIAL RECS., U.N. Doc. A/CONF. 97/19 (1981), [hereinafter cited as OFFICIAL RECORDS]. The Convention is reprinted in 19 I.L.M. 668 (1980).

2. *Id.* arts. 49 (1)(a), 64 (1)(a).

3. *Id.* art. 25.

4. *See infra* notes 8-24 and accompanying text. For a more comprehensive understanding of the history and goals of the Convention, see OFFICIAL RECORDS, *supra* note 1, at 230. The Official Records comprise the documents reviewed at and generated by the Conference. Included among these materials are prior drafts of the Convention, the Secretary General's appraisal of the penultimate draft, the comments of governments and internal organizations on various drafts, amendments proposed at the Conference and committee reports. *See also* Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L LAW. 17, 17-19 (1984).

5. Convention, *supra* note 1, art. 25.

6. Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (1972), *reprinted in* 3 I.L.M. 854 (1964). [hereinafter cited as ULIS].

Since no case law interpreting article 25 of the Convention exists, other less authoritative sources must be examined. Hence, statutes and decisions prescribing commercial law in England, the United States and Sweden, which maintain the basic rule that not every breach of contract is enough to give an aggrieved party the right to avoid a contract, will be appraised. From this study it may be possible to derive guidelines pertaining to the definition of fundamental breach in article 25 of the Convention and its application.

Since the Convention gives legal effect to commercial usages, the manner in which international traders have developed the concept of fundamental breach will then be examined. For example, standard contracts used in international trade usually indicate a time period for a reasonable delay in payment, and this period differs with the type of transaction and the goods involved. Thus, these contracts may also prove helpful in determining how the definition of fundamental breach in article 25 will develop and be applied in practice.

I. THE CONVENTION

A. *Avoidance:*[7] *Fundamental Breach*

In a sales contract governed by the Convention, the buyer is obligated to pay the price and to take delivery.[8] Since the parties may deviate from the Convention's provisions,[9] the contract itself may im-

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7. Avoidance in installment contracts is not discussed herein. *But see* Convention, *supra* note 1, art. 73, which reads:

> (1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.
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> (2) If one party's failure to peform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
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> (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Id.

It is to be noted that this article bears a strong resemblance, both in form and substance, to § 2-612 of the Uniform Commercial Code.

8. Convention, *supra* note 1, art. 53.

9. *Id.* art. 6.

pose additional obligations upon the buyer. In the case of a buyer's breach of any of his obligations, the Convention provides the seller with an assortment of remedies.[10]

Under article 64 the seller may, under certain circumstances, declare the contract "avoided;"[11] i.e., the seller may cancel or terminate the contract, or may be discharged from further obligations under the contract.[12] Not every breach, however, entitles the seller to avoid the contract.[13] As a general rule, the breach must amount to a "fundamental breach" of contract.[14]

Article 25 provides a definition of fundamental breach:

> A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.[15]

Over the years, the international sales law's definition of funda-

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10. *Id.* arts. 61-65.

11. *Id.* art. 64. Article 64 provides in part:

> (1) The seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

Id.

12. Other terms describing the same effect are rescission, repudiation and the setting aside of the contract. *See, e.g.*, J. CALAMARI & J. PERILLO, CONTRACTS §§ 21-22 (2d ed. 1978).

13. Convention, *supra* note 1, art. 64(2). Article 64(2) states in part: "in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided. . . ." *Id.*

14. *Id.* art. 64 (1)(a). The Convention incorporated what seems to be an exception to this general rule adapted from German law. *Id.* art. 64(1)(b). In the event of a delay in the performance of an obligation, the aggrieved, waiting obligee may notify the delinquent obligor that he must perform within a specified reasonable time period. If the delaying obligor does not comply with the *Nachfrist* ("or else") notice, the obligee is entitled to avoid the contract, notwithstanding the delaying obligor's failure to fulfill the requisites for fundamental breach in article 25. *Id. See* Honnold, *The New Uniform Law for International Sales and the UCC: A Comparison*, 18 INT'L LAW 27-28 (1984).

Even though the *Nachfrist* provision in article 64 (1)(b) appears to state an exception to the general rule, one would hope that international merchants would regularly exploit this provision. If so, litigation as to whether a breach is fundamental will arise with less frequency.

15. *Id.* art. 25.

mental breach has been modified a number of times. The 1964 Hague Convention on Uniform Law on the International Sale of Goods, section 10, defined a breach as "wherever a party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects."[16] This definition was highly criticized;[17] especially its "subjective" requisites, which were viewed as causing problems in its application:[18]

> The effect of the Article is that it depends on the actual or required knowledge on the part of the party in breach at the time of the conclusion of the contract, whether a breach is fundamental or not, but this knowledge refers in part to a hypothetical situation of fact prevailing partly at the time of the breach, i.e., the breach itself and its effect.[19]

Another commentator stated: "Analysis of this provision in UNCITRAL made it clear that 'fundamental breach' must be redefined in terms of the materiality of the breach."[20]

Article 25 of the Convention sets up three criteria to assist in defining "fundamental breach." First, the breach must result in a detriment to the innocent party; second, it must substantially deprive the innocent party of what he is entitled to expect under the contract; and third, the result must have been foreseeable.[21] These are objective criteria. The objective approach is evident in the second requisite's reference to what the innocent party is "entitled" to expect and in the third requisite's incorporation of the "reasonable person" test.[22]

As previously mentioned, the definition of fundamental breach has undergone substantial change over the years during the development of an international sales law. A number of scholars have scrutinized

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16. ULIS, *supra* note 6, art. 10.

17. *See supra* note 4.

18. Conversely, Huber labels article 25 a failure, "sie ist nichtssagend and überdies missverständlich." Huber, *Der Uncitral-Entwurf eines Uberinkommens über internationale Warenkaufverträge*, 43 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 462 (1969).

19. R.H. GRAVESON, THE UNIFORM LAWS OF INTERNATIONAL SALES ACT (1967): A COMMENTARY 55 (1968).

20. J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE UNITED NATIONS CONVENTION 212 (1982).

21. Convention, *supra* note 1, art. 25. In order to avoid the contract, however, notice must be given to the other party. *Id.* art. 26. This is a change from the ULIS and a rejection of *ipso facto* avoidance. *See supra* note 6.

22. *Id.*

each definition in an attempt to determine which one most accurately reflects the concept's application in practice.[23] The prevailing view remains that judges have not yet articulated a principled standard for determining what constitutes a fundamental breach:

> Only practice has been able to define [the] meaning with reasonable certainty over the decades. In applying [the] concept the judge forms an opinion, taking all circumstances into consideration whether the breach of contract is so significant as to justify avoidance or not. If it is, he then comes to the conclusion that the statutory definition has been fulfilled; otherwise, that it has not. In other words, he does not form his conclusion through confronting the facts and the statutory text. He resorts to the statutory text merely to support his already existing instinctive conclusion.[24]

If we accept this view, it may be advisable to study the interpretation of similar provisions in national legal systems, bearing in mind the international character of the sales convention and other limitations on the authoritativeness of these sources.

B. Payment of the Price

Before commencing this analysis, a few words regarding the buyer's obligation to pay the price are appropriate. Article 58[25] establishes when the buyer must pay for the goods. If a date is not agreed upon in the contract, the buyer generally must pay when the seller ten-

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23. One scholar views the doctrine of fundamental breach of contract in terms of a method of escape from the most carefully drafted exemption clauses. He claims the cases seem to establish that no matter how extensive an exemption clause might be, it could not exclude liability in respect of the breach of a fundamental term or of a fundamental breach. *See* A. GUEST, ANSON'S LAW OF CONTRACT 149 (26th ed. 1984).

24. Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L 333, 336 (1983).

25. Convention, *supra* note 1. Article 58 reads:

> (1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents. (2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price. (3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Id.

ders either the goods or the documents controlling the goods.[26] The buyer's obligation to pay the price includes compliance with the terms concerning the manner of payment,[27] e.g., the issuance of a letter of credit,[28] or the establishment of a banker's acceptance.[29]

II. ENGLISH LAW

Under English law the seller's right to avoid[30] the contract due to the buyer's failure to pay the price arises in two types of cases. The first, which is not dealt with here, involves the buyer's repudiation of the contract.[31] The second involves a breach amounting to a "fundamental breach."[32] The second group may be sub-categorized as follows:

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26. *Id.* art. 58 (1).

27. *Id.* art. 58.

28. For an overview of the purposes and mechanics of establishing a letter of credit, see P. OPPENHEIM, INTERNATIONAL BANKING 73-104 (3d ed. 1979). For general guidelines concerning international letters of credit, see Uniform Customs and Practices for Documentary Credits, I.C.C. No. 400.

29. *See generally* P. OPPENHEIM, *supra* note 28, at 105-113.

30. *See* THE COMMON LAW LIBRARY, BENJAMIN'S SALES OF GOODS §§ 990-94 (2d ed. 1981); *see also infra* notes 33, 45 & 67.

31. *Cf.* Convention, *supra* note 1, art. 71. Article 71 provides:

> (1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract. (2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. (3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension of the other party and must continue with performance if the other party provides adequate assurance of his performance.

Id.

32. The doctrine of fundamental breach in English law is confused:

> The terminology of "fundamental breach" and "breach of a fundamental term", which was originally adopted to deal with problems created by wide exclusion clauses, has also been brought into service to determine whether a breach of contract is sufficiently serious to justify the innocent party in treating himself as discharged from further obligations under the contract.

HALSBURY'S LAWS OF ENGLAND § 545 (Lord Hailsham ed. 1974). The House of Lords has recently addressed the doctrine in connection with wide exemption clauses in Photo Prod. v. Securicor Transp., [1980] 2 All E.R. 556. "Insofar as the doctrine survives the Securicor case, it is therefore one of interpretation, that exemption clauses will not be interpreted so as to cover fundamental breach of contract." BENJAMIN'S SALES OF GOODS *supra* note 30, § 992.

first, where the contract stipulates a right to terminate; second, where the statute defines the right to terminate the contract; third, where termination is a common law right; and fourth, where a right to terminate arises as a result of the buyer's failure to comply with contract provisions as to the method of payment.

A. Private, Statutory and Common Law Rights to Terminate

A contract may stipulate a right to terminate in the event of any breach. In *Mardorf Peach & Co., Ltd. v. Attica Sea Carriers Corporation of Liberia,*[33] where such a clause was at issue, the court upheld the obligee's right to rescind the contract upon the obligor's failure to make timely installment payments.[34] Further, the English Sale of Goods Act provides: "[u]nless a different intention appears from the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale."[35] The seller's right to resell the goods is therefore limited to cases "where the buyer does not within a reasonable time pay or tender the price."[36]

Even if such is the case, the doctrine might still be applicable to determine whether the breach justifies termination or not. In Suisse Atlantique Societe d'Armement Maritime, S.A. v. N.V. Rotterdamsche Kolen Centrale, [1966] 2 All E.R. 61, Lord Wilberforce wrote:

> For, though it may be true generally, if the contract contains a wide exemptions clause, that a breach sufficiently serious to take the case outside the clause will also give the other party the right to refuse further performance, it is not the case, necessarily, that a breach of the latter character has the former consequence. An act which apart from the exemptions clause, might be a breach sufficiently serious to justify refusal or further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause.

Id. at 91-92. Lord Reid stated to the contrary: "General use of the term 'fundamental breach' is of most recent origin, and I can find nothing to indicate that it means either more or less than the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract." *Id.* at 70.

33. [1977] 1 All E.R. 545.

34. *Id.* at 548.

35. Sale of Goods Act § 10(1) (1893). Section 10(1) provides:

> Unless a different intention appears from the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Id.

36. *Id.* § 48(3). This section states:

> Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

These principles were applied in *Ryan v. Ridley and Co.*,[37] where the plaintiff sold a cargo of codfish to the defendant and payment was to be made "by cash in exchange for" the bill of lading and insurance policy. The cargo arrived by ship on October 24, 1901, and "soon" thereafter the plaintiff tendered the shipping documents and requested payment. The plaintiff, not having been paid by November 1, sold the cargo a day or two later and sued to recover the loss caused by the resale. In holding for the plaintiff, the court reasoned:

> The words in the clause must be given their natural meaning, and 'cash against documents' meant that when the documents were tendered the cash must be ready. But a practical meaning must be given to the words . . . . The clause meant that the payment against the documents must be made within a reasonable time—*e.g.*, if the buyer said, 'You shall have a cheque tomorrow morning,' that would be sufficient, or even a greater delay would not be unreasonable if it would not affect the rights of the parties. If ever there was a case in which the nature of the cargo demanded promptitude, that of the cargo in the present case did.[38]

Ryan illustrates that under the English Sale of Goods Act a failure by the buyer to pay the price on the date stipulated is not per se a breach entitling the seller to terminate the contract.[39] The common law provided, "however, [that] a repeated failure to pay the price when the seller demands payment on several occasions, would . . . it is submitted, amount to a breach sufficiently serious to entitle the seller to terminate the contract."[40]

Id.

37. [1902] 19 T.L.R. 45; 8 Com. Cas. 105.

38. *Id.* at 45-46.

39. Stipulations of time involving subjects other than payment are treated as being of the essence of the contract. *See* Charles Rickards Ltd. v. Oppenheim, [1950] I K.B. 616; Hartley v. Hymans [1920] 3 K.B. 475, 494-95; Crawford v. Toogood (1879) 13 Ch. D. 153 (As a condition of performance, time is of the essence in a contract for the sale of goods. On the lapse of the stipulated time, if the buyer continues to press for delivery, he waives his right to cancel the contract. The buyer then has a right to give notice fixing a reasonable time for delivery, again making time of the essence. If this new stipulation is not fulfilled the buyer may cancel the contract). *Id.*

40. BENJAMIN'S SALES OF GOODS, *supra* note 30, § 1445.

B. *Breach of the Terms of a Documentary Credit Clause*

In international commerce it is common practice to have a documentary credit clause in a sales contract.[41] These clauses obligate the buyer to open a documentary credit in favor of the seller.[42] Usually, no time is specified for the furnishing of the documentary credit;[43] the only time specified in the contract is the period of shipment.[44] In these instances, it is necessary to determine when the buyer was supposed to open the documentary credit; only then can consideration be given as to whether there was a breach entitling the seller to terminate the contract.

This issue was raised in *Pavia & Co., S.P.A. v. Thurmann-Nielsen,*[45] where, pursuant to a c.i.f. contract,[46] the plaintiff sold groundnuts for shipment from Brazil to Genoa, with delivery to be made in February, March or April of 1949. Payment was to be made by letter of credit in favor of the sellers and utilizable by them against delivery of shipping documents.[47] The buyers did not make the credit available until April 22.[48] The court held that in the absence of an express stipulation in the contract, the credit should have been opened not when the sellers were ready to ship the goods, but at the beginning of the shipment period. Lord Denning stated the rationale for this holding as follows:

> The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship, and whenever he does ship the goods he must be able to draw on the credit. He may ship on the very first day of the shipment period. If the buyer is to fulfill his obligations, he must, therefore, make the credit available to the seller at the very first date when the goods may be lawfully shipped in compliance with the contract.[49]

The rule in *Pavia & Co.* was slightly reformulated, to the advan-

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41. *See generally id.* §§ 2131-2294.
42. *See id.* § 2133.
43. *See id.* § 2167.
44. *Id.*
45. [1952] 1 All E.R. 492.
46. In a c.i.f. sales contract, the contract price includes in one lump sum the cost of the goods as well as the insurance and freight costs to the given destination. BLACK'S LAW DICTIONARY 220 (5th ed. 1979).
47. *Pavia & Co.*, 1 All E.R. at 493.
48. *Id.* at 492.
49. *Id.* at 495.

tage of the sellers, in *Sinason-Teicher Inter-American Grain Corporation v. Oilcakes and Oilseeds Trading Co., Ltd.*[50] In *Sinason-Teircher*, the c.i.f. contract called for shipment of barley during October or November 1952. Payment was to be net cash against documents, and the buyers were to issue a guarantee to the sellers through their bank that the documents would be taken up on first presentation. No date was provided with respect to when this guarantee was to be furnished. The court, in this case, adopted a rule which obligated the buyers to furnish the guarantee within a reasonable time prior to the first date for shipment. Before the first date for shipment, the seller cancelled the contract on September 10, 1952, and therefore the sellers rather than the buyers were liable.[51]

In *Ian Stach, Ltd. v. Baker Bosley, Ltd.*,[52] the court rejected the rule applied in *Sinason-Teicher* and found the rule laid down in *Pavia & Co.* controlling.[53] In *Ian Stach*, the plaintiff sold steel to the defendant under a f.o.b. contract. Delivery was to be made in August or September 1956, and payment was to be made by letter of credit.[54] The buyer had the right to select the date of shipment and also the responsibility of making the arrangements for shipment.[55] When the buyer had not opened the letter of credit by August 14, the seller treated the contract as repudiated and resold the goods.[56] The buyer argued that since he had the right to determine the date of shipment, the credit had to be opened at a reasonable time before that date.[57] The court, however, rejected this notion and held that the prima facie rule requires opening of the credit, at the latest, by the earliest shipping date.[58]

Hence, although no general rule can be cited as controlling the time in which the buyer must comply with specifications of the method of payment (i.e., the issuance of a letter of credit or the establishment of a bank guarantee), compliance is required, at the latest, by the first date of the shipping period. In some cases, however, this would not be sufficient and compliance would have to be accomplished within a reasonable time before the first date for shipment.[59]

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50. [1954] 3 All E.R. 468.
51. *Id.* at 472.
52. [1958] 2 Q.B. 130.
53. [1958] 1 All E.R. 547.
54. *Id.*
55. *Id.* at 542.
56. *Id.*
57. *Id.*
58. *Id.*
59. The argument could be made, however, that the Queen's Bench decision in *Ian Stach* does not have any impact upon the decisions in the Court of Appeals. *But see*

C. A Seller's Right to Rescind Under a Documentary Credit Clause

With respect to c.i.f. contracts, Benjamin states: "The seller can rescind if the buyer fails to comply with a requirement of the contract to provide a bank guarantee for payment, or a confirmed credit,"[60] and, with respect to f.o.b. contracts: "[T]he general rule is that any failure of the buyer, unless waived, as to the time and place . . . justifies rescission . . . ."[61] A literal reading of Benjamin's restatement of the rule would imply that stricter compliance with the terms of a f.o.b. contract is required. Thus, it may be inferred that the range of instances which would trigger a seller's right to immediately rescind is broader under f.o.b. contracts than it is under c.i.f. contracts since "any failure" entitles the seller to rescind the contract. The case law, however, does not appear to recognize this distinction, and it is doubtful whether Benjamin intended such a literal interpretation.[62]

In *Trans Trust S.P.R.L. v. Danubian Trading Co., Ltd.*,[63] the seller sued for damages caused by the buyer's failure to establish a letter of credit. Without reference to whether the contract was c.i.f. or f.o.b., Lord Denning observed:

> [T]he seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods. What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a letter of credit' is rather like a stipulation 'subject to the contract.' If no credit is provided, there is no

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BENJAMIN'S SALES OF GOODS, *supra* note 30, § 2170, which states that the cases do not lay down a conclusive rule either in the case of f.o.b. contracts (*see infra* note 61) or in the case of c.i.f. contracts:

> A documentary credit furnished at a reasonable time before the commencement of the shipping period enables him to prepare the goods for punctual shipment. He can also use the credit in order to furnish, right at the beginning of the shipping period, a back-to-back credit in favour of an ultimate supplier of the goods.

Id.

60. *Id.* § 1751.

61. *Id.* § 1863. The meaning of f.o.b. is free on board at some location, such as f.o.b. shipping point or f.o.b. destination. The invoice price includes delivery at the seller's expense to that designated location. BLACK'S LAW DICTIONARY 578 (5th ed. 1979).

62. *See* BENJAMIN'S SALES OF GOODS, *supra* note 30, § 1863. In fact, Benjamin notes that "the rate is not utterly inflexible . . . . " *Id.*

63. [1952] 1 All E.R. 970.

> contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract. . . .[64]

The facts in *A.E. Lindsay & Co., Ltd. v. Cook*[65] involved a buyer's failure to satisfy what was characterized as an implied condition precedent to the contract. A seller in Australia contracted to sell frozen chickens to a buyer in England.[66] Delivery was to be made by a ship due to sail on September 28, 1951.[67] Payment was to be made by credit, to be opened "immediately" in favor of the seller at the Rural Bank of Sydney.[68] Although the buyer instructed his bank to open the credit with the Rural Bank on September 24, the credit was not opened until October 6.[69] By that time the ship had already set sail without the buyer's shipment. The buyer sued for damages due to nondelivery. Although the court voiced its sympathy toward the plaintiffs, who did their best to open the credit but failed to do so because of an "unfortunate conjunction of circumstances," it held that it was an implied condition precedent to the contract that the buyer would open the credit before the seller shipped the goods.[70] The court found that the condition precedent was not satisfied, as a result of which the seller repudiated the contract and sold the chickens to a third party. The court reasoned that "[i]t is quite clear . . . that the defendant was entitled to do what he did."[71]

The rule applied in *A.E. Lindsay & Co.* has implicitly controlled later decisions, including those where the buyer's delay in opening the letter of credit was characterized merely as a failure to satisfy a condi-

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64. *Id.* at 976. Lord Denning further noted that he regarded "the provision of a credit as different from the payment of money and not subject to the special rules . . . relating thereto." *Id.* at 977.

65. [1953] 1 Lloyd's List L.R. 328.

66. *Id.* at 331.

67. *Id.*

68. *Id.*

69. *Id.* The Rural Bank was not known to buyer's bank, which instead opened the credit with the New South Wales Bank in Sydney. The New South Wales Bank was then, according to its contract with buyer's bank, required to open the credit at Rural Bank. The credit, however, was not opened at the New South Wales Bank until September 28, and the Rural Bank was not notified until October 6. *Id.* at 332.

70. *Id.* at 335.

71. *Id.*

tion precedent to delivery of the goods. In *Etablissements Chainbaux S.A.R.L. v. Harbormaster, Ltd.*,[72] the buyer sued the seller for failing to deliver the goods. The court determined that: "[t]he furnishing of a letter of credit was a condition precedent to the delivery of the goods, and therefore *prima facie* if they want to establish the breach of delivering the goods they must allege that they have fulfilled the necessary condition precedent, that they have furnished the letter of credit."[73] The contract indicated that the buyer was to open the credit within a few weeks.[74] The court estimated a reasonable time therefrom and held that since the buyer had not opened the letter of credit within that time the sellers were justified in canceling the contract.[75]

In *Enrico Furst & Co. v. W.E. Fischer, Ltd.*,[76] one of the issues raised was whether the buyer's breach of his obligation to open the letter of credit within the time agreed upon was waived by the seller. With regard to this issue, the court stated:

> If by his conduct the seller leads the buyer to suppose, and to act upon the supposition, that he, the seller, will not insist upon the opening of the credit within the specified time, he waives his right to treat the failure to open the credit within the specified time as a breach of condition entitling him to repudiate the contract but he does not thereby waive his right to have the credit of the particular kind opened within a reasonable time, and to treat failure to open it as a breach of condition if it is not opened in a reasonable time.[77]

D. English Law in Comparison with the Convention

As noted above, four types of cases relevant to this inquiry arise under English law. Each group offers guidance in refining the Convention's definition of fundamental breach in article 25[78] and the right to the remedy provided in article 64(1)(a)[79] of the Convention.

Freedom of contract is the prevailing principle under both English law and the Convention.[80] Thus, merchants can, in most circumstances, explicitly provide for their rights and remedies in the event of a breach

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72. [1955] 1 Lloyd's List L.R. 303.
73. *Id.* at 310.
74. *Id.* at 311.
75. *Id.*
76. [1960] 2 Lloyd's List L.R. 340.
77. *Id.* at 345.
78. Convention, *supra* note 1, art. 25.
79. *Id.* art. 25.
80. Convention, *supra* note 1, art. 6.

of the contract. Additionally, the English Sale of Goods Act and English common law remedies reflect the same basic ideas that underlie the definition of fundamental breach in article 25.[81] Under both laws, three factors appear determinative of whether the breach is fundamental or not: the perishability of the goods; whether the buyer repeatedly fails to pay on seller's demand; and whether the buyer is given a reasonable time.[82] Thus, in these cases, determining if and when a seller may avoid the contract is particularly dependent on the configuration of facts presented by the individual case.[83]

The cases under English law, where a right to terminate arises as a result of the buyer's failure to comply with contract provisions as to method of payment, however, do not fit into this system of case by case judgments.[84] A "per se" rule of fundamental breach is applied to the cases that fall within this group.[85] Any breach as to the opening of a letter of credit (or the establishment of a bank guarantee) is in itself so important that it gives the seller the right to cancel the contract, or in the words of the Convention, any such breach is "fundamental."[86] The Convention's language, however, does not provide the seller with an automatic right to rescind in these circumstances.[87] In fact, article 54 of the Convention obligates the buyer to pay the price and complete the "steps" and "formalities" required to enable payment to be made, and thus clarifies that there should not be a specific, independent approach to these steps and formalities.[88] Of course, there might also be cases under the Convention where *any* delay in establishing a letter of credit will be considered a fundamental breach, but then the judgment will be based upon the terms of the contract and the factual situation of the case, and not on a per se rule.

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81. *Id.* art. 25.

82. *See supra* notes 36-77 and accompanying text. *See also* BENJAMIN'S SALES OF GOODS, *supra* note 30, §§ 1231-1256 (discussing fundamental breach as defined by English common law and also reviewing the statutory remedy under the Sale of Goods Act); J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES § 185 (1982); PARKER SCH. OF FOREIGN & COMP. LAW OF COLUM. U. INT'L SALES: THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 9.03(d) (1984) [hereinafter cited as PARKER SCHOOL].

83. *See generally supra* note 82.

84. *See* BENJAMIN'S SALES OF GOODS, *supra* note 30, § 1751 (1981).

85. *Id.*

86. Convention, *supra* note 1, art. 25.

87. *Id.* art. 54.

88. J.HONNOLD, *supra* note 86, § 323: "The failure to take one of the required steps 'to enable payment to be made' itself constitutes a breach of contract." *Id. See also* PARKER SCHOOL, *supra* note 82, § 7.02.

III. The Law Under the Uniform Commercial Code

A. *In General*

The Uniform Sales Act, in section 65, the precursor to the Uniform Commercial Code (U.C.C.), stated: "where the goods have not been delivered to the buyer, and the buyer has . . . committed a material breach [of the contract], the seller may totally rescind the contract or the sale."[89]

The question of "whether a breach [was] material or substantial [under § 65 depended] on the terms of the contract and on the facts and circumstances of the case."[90] The terms of the contract stated, e.g., whether or not time was of the essence. If payment was to be made in advance or concurrent with delivery, it was inferred that time was of the essence in the contract. If, however, the sale was on credit the opposite inference was taken.

The U.C.C. provides that payment is due in accordance with the contract, or otherwise at the time of delivery.[91] If payment is due on or before delivery, and the buyer fails to make the payment when due, the remedies afforded the seller are stated in Section 2-703.[92] Section

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89. Uniform Sales Act § 65, 1A U.L.A. 233 (1950).

90. 77 C.J.S. *Sales* § 233 (1952).

91. U.C.C. § 2-301 (1983) states: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." *Id.* § 2-310 provides:

> Unless otherwise agreed
>
> (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
>
> (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and
>
> (c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
>
> (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying the starting of the credit period.

Id.

92. *Id.* § 2-703 provides:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612), then also with respect to the whole un-

2-703 states that failure to make payment includes the dishonor of a check, the nonacceptance of a draft and the failure to furnish an agreed upon letter of credit.[93] The section further states that: "[w]here the buyer . . . fails to make a payment due on or before delivery," the seller may, among other remedies, re-sell the goods or cancel the contract.[94] Hence, it seems as if the seller would have an absolute right to re-sell or cancel, independent of whether the breach is material. Nothing in the comment to the U.C.C., however, indicates that such a radical change in the law was intended. One commentator has observed, "the mere fact that section 2-703 states that the seller may cancel, in absolute terms, would be immaterial and really ineffective to provide any substantive right."[95]

The question of materiality was dealt with in *Nora Springs Cooperative v. Braudau*,[96] where the alleged breach was the buyer's nonacceptance of delivery. One of the buyer's defenses was that the breach was too insubstantial to give the seller the right to cancel the contract.[97] The court stated that under U.C.C. 2-703(f):

> where the buyer breaches the contract the aggrieved seller may "cancel." "Cancellation" occurs when either party puts an end to the contract for breach by the other. Nothing is mentioned about *materiality* of the breach as argued by [the buyer]. Thus, when read together with [1-106] which mandates that remedies are to be "liberally administered to the end that the aggrieved party may be put in as good a position as if the other party has fully performed," we might very well hold that materiality need not be shown to warrant cancellation . . . .[98]

However, even if, arguendo, materiality is a requirement for cancellation under the theory that the general principles of law merchant

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delivered balance, the aggrieved seller may
(a) withhold delivery of such goods;
(b) stop delivery by any bailee as hereinafter provided (Section 2-705);
(c) proceed under the next section respecting goods still unidentified to the contract;
(d) resell and recover damages as hereafter provided (Section 2-706);
(e) recover damages for nonacceptance (Section 2-708) or in a proper case the price (Section 2-709);
(f) cancel

93. *Id.* comment 3.
94. *See supra* note 92 and accompanying text.
95. [3A Sales & Bulk Transfers] U.C.C. Serv. (Bender) § 13.02, at 1 (1984).
96. 247 N.W.2d 744 (Iowa 1976).
97. *Id.* at 747.
98. *Id.* at 749.

supplement the specific provisions of the [U.C.C.] section [1-103], [the buyer's] contention is still unconvincing.

The decisions in *Mott Equity Elevator v. Svihovec*[99] and *Ziebarth v. Kalenze*[100] are in accord with this theory. Both cases involve the buyer's non-acceptance of delivery of the goods. In *Mott*, the court held that "the buyer breached the agreement in not accepting delivery within a *reasonable* time, giving rise to [the seller's] right to cancel under [2-703]."[101] In *Ziebarth*, the court reaffirmed this reasoning and held that the buyer "breached the agreement by not picking up [the goods] within a *reasonable* time."[102]

The reasoning in these cases, which define breach as the buyer's nonacceptance of delivery within a reasonable time, clearly indicates that the court incorporated a material breach requirement into section 2-703(f).

Since, as a practical matter, resale and cancellation have the same effect on a contract, it is also helpful to review cases involving resale upon a buyer's failure to pay the price. In *Mott*, the court said: "[t]he only condition precedent to the seller's right to resell is a breach by the buyer within section 2-703."[103] The same rule is expressed in other decisions.[104] The result in *Mott* and its successors cannot, however, have been intended by the legislators. The comment to section 2-703 specifically states that the article rejects any doctrine of election of remedy, and that the remedies in the section are cumulative.[105] Consequently, it would be quite possible for a seller, in the case of a buyer's failure to pay, to first cancel the contract and then resell the goods and recover damages. If that were the case, then a material breach would be required in order to cancel the contract, whereas *any* breach would justify a resale of the goods under the same contract. Clearly, this result could not have been intended. If the requirement for cancellation is a

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99. 236 N.W.2d 900 (N.D. 1975).

100. 238 N.W.2d 261 (N.D. 1976).

101. 236 N.W.2d at 909 [emphasis added].

102. 238 N.W.2d at 269 [emphasis added].

103. 236 N.W.2d at 908.

104. *See, e.g.*, Desbien v. Penokee Farm Union, 220 Kan. 358, 552 P.2d 917 (1976); Clock v. Missouri-Kansas-Texas Railroad, 407 F. Supp. 448 (E.D. Mo. 1976).

105. U.C.C. § 2-703 (1983) (comment 1):

> This section . . . gathers together in one convenient place all of the various remedies open to a seller for any breach by the buyer. This Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature and include all of the available remedies for breach. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case.

Id.

material breach, then in order to justify a resale the breach would also have to be material.

B. The U.C.C. in Comparison with the Convention

It is not clear whether the Convention's concept of fundamental breach is interchangeable with the U.C.C.'s definition of material breach. As mentioned previously, the Convention's definition of fundamental breach is interpreted of late in a more objective manner. The U.C.C. does not make certain whether a material breach is always required and, if so, whether the materiality of the breach is meant to be a subjective standard. Some courts have interpreted a materiality requirement into U.C.C. section 2-703; those decisions are the only available evidence of the standards used in applying the requirement. Unfortunately, these decisions do not clarify whether an objective or subjective standard governs under the Code. If subjective criteria determine whether a material breach has occurred, it may be impossible to use cases arising under the Code as guidance for the interpretation of the Convention's objectively determined concept of fundamental breach.

IV. SWEDISH LAW

A. In General

The Swedish Sale of Goods Act of 1905[106] was prepared in consultation with Denmark and Norway; these countries enacted sales acts nearly identical to Sweden's shortly after promulgation of the Swedish Act.[107] Hence, the following analysis can be analogously applied to all three countries.

Section 28 of the Swedish Act states in part:

> Where the price is not paid in due time or the buyer fails to take a measure on which the payment of the price depends, the seller may, at his option, avoid the contract of purchase or demand its performance; if the delay is insignificant, the purchase may not be repudiated, unless it is a commercial sale.[108]

The applicability of the section is limited to cases where the goods are

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106. Swedish Sale of Goods Act of 1905, 1961-62 INT'L INST. FOR UNIFICATION OF PRIVATE LAW, UNIFICATION OF LAW Y.B. 203 (UNIDROIT).

107. *Id.* at 203 n.1.

108. *Id.* § 28.

not yet in the buyer's possession.[109]

The scope of the provision encompasses not only cash payments, but "measure[s] on which the payment of the price depends."[110] These measures might include, for example, the acceptance of a draft or the issuance of a letter of credit.[111] The seller's right under section 28 is also limited by the requirement that the delay must be significant, unless the sale is a commercial sale (i.e., between two merchants).[112] In a commercial sale or trade purchase, any delay entitles the seller to avoid the contract.[113] According to the commentary, in commercial trade even an insignificant delay of payment is of great importance.[114] "Thus, [a] seller may . . . lawfully discharge himself from further performance under the contract even if payment is tendered the day after it is due."[115]

Today, this absolute right of the seller is considered too harsh. In a draft for a new Swedish Sale of Goods Act (the Draft),[116] "the seller [may] declare the contract avoided if the breach is 'fundamental' but not, as under the present Act, [for] any delay in a commercial sale."[117] As an exception to this provision, the Draft presents another "new" rule. When the buyer is obliged to pay against documents representing the goods, the seller may declare the contract avoided even though the breach is not fundamental.[118] "This rule follows commercial practice."[119]

Even though the Draft has not yet led to legislation, there is no reason to neglect these "new influences" in Swedish law. Rather, one might assume that these new rules will be kept intact, especially since they reflect modern commercial practice.[120] If this assumption is correct, Swedish sale of goods law will provide that the buyer's delay in

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109. *Id.* Paragraph 2 of § 28 reads: "After the goods have come into the buyer's possession, the seller is not entitled to repudiate the purchase . . . unless he has reserved his right to do so or the buyer has rejected the goods." *Id.*

110. *Id.*

111. *See generally* notes 28-29 and accompanying text.

112. Swedish Sale of Goods Act, art. 28. As defined by the Swedish Act, a "trade purchase" is a purchase "concluded between merchants in the course of their trade." *Id.* art. 3.

113. *Id.* art. 28.

114. Almen, *Om Köp och byte av lös egendom*, 1960 P.A. NORSTEDTS OCH SÖNERS FÖRLAG 402.

115. *Id.* at 402.

116. Köplag. Slutbetänkande av Köplagsutredningen. 1976:66, § 6.3.3.

117. Hellner, *The Draft to a New Swedish Sale of Goods Act*, in 1978 SCANDINAVIAN STUDIES IN LAW 69 (1978).

118. *Id.*

119. *Id.*

120. *Id.*

payment must be significant or fundamental in order to entitle the seller to avoid the contract. In the application of such a rule, case law and other authorities concerning noncommercial sales contracts under section 28 may be helpful, because traditionally only a material breach by a noncommercial buyer would entitle a seller to avoid the contract.[121]

Section 28 provides that the delay is to be considered from the seller's perspective.[122] The commentary stresses that the judgment should be made as to the effect of the breach "in concreto."[123] According to the commentary, primary considerations are the length of the delay and whether the seller made any demand of payment or other indicia of the necessity of prompt payment.[124]

Two Norwegian cases have turned on whether the buyer's breach was fundamental. In *N.R.T. 1921 s. 513,*[125] the court emphasized the type of goods (shares of stock) and the seller's continued demand for payment as important factors giving the seller the right to avoid the contract. In *N.R.T. 1925 s. 566,*[126] where the court also held the delay significant, the length of the delay, the buyer's knowledge of the importance of timeliness and the seller's interest in closing the contract were determinative factors in the decision.

B. Swedish Law in Comparison with the Convention

Currently, Swedish law provides that any delay in a commercial sale entitles the seller to avoid the contract.[127] This, of course, differs greatly from the rule of the Convention.[128] As pointed out above, however, this is a Swedish regulation born at the beginning of the century, and hence the difference is more the result of archaic legislation than an intended approach toward this type of buyer's breach.[129]

Apart from the exception for payment against documents, the rules in the Draft largely follow the Convention as to materiality under section 28. The commentary suggests that the issue should be determined according to subjective criteria. The case law indicates as determinative the length of the delay, the seller's demand or other indica-

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121. *See supra* note 108 and accompanying text.

122. Bengtsson, *Hävningsratt och uppsägningsrätt vid Kontraktsbrott,* 1967 P.A. NORSTEDTS OCH SÖNERS FÖRLAG 270.

123. Almen, *supra* note 114, at 402.

124. *Id.* at 139.

125. *See* Bengtsson, *supra* note 122, at 270.

126. *Id.* Hellner, *supra* note 117, at 69.

127. *See supra* notes 108 & 114-15 and accompanying text.

128. *See* Convention, *supra* note 1, arts. 25 & 64.

129. *See supra* notes 116-20 and accompanying text.

tions that time is of the essence, and the type of goods involved. These factors may also be of great importance in decisions under article 25 of the Convention. However, due to the subjective approach under section 28, the potential influence Swedish law could have on the development of a working definition of fundamental breach under the Convention may be vastly diluted.

V. STANDARD CONTRACTS

A review and appraisal of domestic legal decisions and laws is helpful in interpreting article 25 of the Convention; it gives the concept of fundamental breach a more practical meaning. Guidelines deduced from this appraisal indicate the specific factors which national courts have emphasized as important to their decisions.

Another way of approaching the problem is to study provisions in contracts normally used in international sales. The Convention gives legal effect to commercial usages and practices. Under article 9(2) customary usages are read into the contract.[130] The usage must be one "of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."[131]

If the standard contracts[132] used in international trade fulfill the requirements of article 9(2)[133] then these contracts may be helpful in defining "fundamental breach" as used in the Convention. Of course, a provision in a standard contract does not in itself establish "a usage," but it does provide a strong indication of custom and usage. Moreover, even if the provision (or the contract) is such that it does not meet the required standards for "a usage," it is still possible that a court would take it into consideration when determining whether the buyer's delay was reasonable. In addition, comparison of standard contracts indicates how merchants treat delays by a buyer and how such treatment differs with the type of transaction and goods which are sold.

Following are a few examples of provisions in standard contracts concerning this issue. The ECE General Conditions for the Supply of Plant and Machinery for Export (No. 188) states at article 8.7: "if at the end of the period fixed in paragraph F of the Appendix, the Purchasers still have failed to pay the sum due, the Vendor shall be enti-

130. Convention, *supra* note 1, art. 9(2).

131. *Id.*

132. These agreements are normally drafted by an international organization (such as the United Nations), an organization of sellers in the same field or by a seller with substantial sales.

133. Convention, *supra* note 1, art. 9(2).

tled by notice in writing to the Purchaser, and without requiring the consent of any court, to terminate the contract . . . ."[134] Paragraph F of the appendix allows the parties to state the "period of delay in payment authorizing termination of vendor [in] . . . months."[135]

The ECE General Conditions for the Supply and Erection of Plant and Machinery for Import and Export (No. 188A)[136] are similar to the provision in No. 188.[137] The period of delay, however, is set at three months.[138]

Both of these contracts allow the buyer a long period of delay before the seller may cancel.[139] This is, of course, due to the type of goods and kind of transaction concerned. Undoubtedly, this could be used as a guideline for a court in its interpretation of fundamental breach in article 25.

Conversely, when a transaction involves perishable goods, the period of permissible delay is shorter. Article 56 of the ECE General Conditions for Fresh Fruit and Vegetables Including Citrus Fruits, for instance, states:

> failure to comply with the payment clauses contained in the contract shall give the seller the right to serve notice on the purchaser calling upon him to make payment within 24 hours, and notifying him that at the end of such period he reserves the right to suspend subsequent deliveries or to terminate the contract . . . .[140]

Moreover, article 44(i) of the ECE General Conditions for Dry and Dried Fruits advises:

> If the documents are not taken up by the buyer within the prescribed time limit [24 hours following the presentation of the invoice or the documents], the seller shall be entitled, after giving notice within the two working days following the expiry of the said time limit, to terminate the contract . . . .[141]

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134. U.N./ECE General Conditions for the Supply of Plant and Machinery for Export, 1953 ECON. COMMISSION EURO. No. 188, U.N. Doc. E/ECE/ME88.

135. *Id.*

136. U.N./ECE General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, No. 188A, U.N. Doc. E/ECE/ME/188A (1957).

137. *Id.* appendix, para. F. *See also* ECE No. 188, *supra* note 134, para. F.

138. *See supra* note 136, appendix, para. F.

139. *See supra* note 137 and accompanying text.

140. U.N./ECE General Conditions for Fresh Fruit and Vegetables Including Citrus Fruit, U.N. Doc. ECE (1979).

141. U.N./ECE General Conditions of Sale for Dry (Shelled and Unshelled) and Dried Fruit, U.N. Doc. ECE/AGRI/41 at 23 (1979). The General Conditions of Sale re-

Furthermore, the ECE General Conditions for Potatoes declares in article 47(i):

> any delay in payment, non-payment or failure to open a bank credit by the date specified in the contract shall entitle the seller to call upon the buyer to perform his obligation within three working days after receipt of the communication from the seller, warning him that, on the expiry of the time limit, the seller may suspend deliveries or terminate the contract.[142]

It should be noted that in none of these three provisions is any delay, per se, a breach entitling the seller to avoid the contract. Even when the goods are of such a perishable nature as fresh fruit, the buyer is permitted twenty-four hours to tender payment.[143]

The CMEA General Conditions provide in sections 67(2) & (3): "The seller shall be obliged to give the buyer additional time to open a letter of credit . . . If the buyer fails to open the letter of credit even within the additional time, the seller shall have the right to cancel the contract."[144]

This provision is close to a requirement of fundamental breach. The requirement that the seller must give the buyer additional time is another way of saying that not just *any* delay is enough to give the seller the right to cancel the contract. The difference is that, under the CMEA provision, additional time must always be granted, whereas under article 25, at least theoretically, any delay might be a fundamental breach.[145]

Article 24 of General Contract (No. 1) of the Grain and Feed Trade Association provides: "[i]n default of fulfillment of contract by either party, the other, at his discretion, shall, after giving notice by letter, telegram, or telex, have the right to sell or purchase as the case

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ferred to herein for various agricultural products are prepared by "the Group of Experts on International Trade Practices Relating to Agricultural Products, a subsidiary organ of the Working Party on Standardization of Perishable Produce, which is itself a subsidiary body of the Committee on Agricultural Problems of the United Nations Economic Commission for Europe." *Id.* at 1.

142. U.N./ECE General Conditions of Sale for Potatoes, U.N. Doc. ECE/AGRI/42 at 28 (1980).

143. *See* U.N./ECE General Conditions for Fresh Fruit, *supra* note 140.

144. U.N./ECE General Conditions of Delivery of Goods Between Organizations of the Member Countries of the Counsel for Mutual Economic Assistance, U.N. Doc. ECE (1968).

145. Convention, *supra* note 1. Article 25 does not require additional time to be given to the buyer, but only that the three criteria be met. *See supra* note 21 and accompanying text.

may be, against the defaulter . . . ."[146] This right to resell the goods affords the seller the same practical result as if he had a right to cancel the contract. Resale, however, must be preceded by notification to the buyer by letter, telegram or telex.[147] This provision grants the seller a surprisingly extensive right, as the mere transmittal of a telex is a simple procedure. Thus, this provision provides the seller with nearly an absolute right to resell.

The Official Contract Form for Hide and Skin Sellers and Tanners provides in article 12:

> if the buyer fails to make payment in accordance with the terms laid down in this contract and such failure is fairly attributable to government restrictions imposed after the signing of this contract, the seller may, at any time before tender of payment in full by the buyer, and after giving seven days' notice to the buyer, cancel this contract . . . .[148]

Under this contract, the seller's right to cancel because of nonpayment is limited to cases where the failure to pay is due to governmental restrictions imposed after the signing of the contract.

The governmental restrictions provision raises another issue. Suppose that such a restriction of the seller's right would be a usage covered by article 9(2).[149] The restriction is then applicable to the contract and prohibits the seller from canceling when the delay of payment occurs for any reason other than governmental restrictions. If, however, the delay is not due to governmental restrictions, whether the requirements of article 25 would require a fundamental breach is unclear. In this case the situation is governed by both usage—not entitling the seller to cancel—and article 25—entitling avoidance. The usage prevails here, however, since it is impliedly made applicable to the contract (article 9(2)) and under article 6 the parties are permitted to derogate from the provisions of the Convention.[150]

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146. The Grain and Feed Trade Association, General Contract No. 1 (Aug. 1, 1976) (available at Baltic Exchange Chambers, 28 St. Mary Ave., London, EC3A 8EF).

147. *Id.*

148. The International Counsel of Hide and Skin Sellers Associations and the International Council of Tanners, Official Contract Form No. 5 (1973).

149. Convention, *supra* note 1, art. 9(2).

150. J. HONNOLD, *supra* note 20, at 149. Articles 9(2) and 6 provide that a party may derogate from the provisions of the Convention. See *supra* notes 9, 79, 130, 133, 149 and accompanying text for a discussion of these provisions.

CONCLUSION

The basic rule of the Convention, that a seller may avoid the contract if the buyer's breach amounts to a fundamental breach, has its counterpart in the legal systems of England, the United States and Sweden. Although the basic rule is the same, the differences in commercial practice and behavior are influential for each nation's interpretation of fundamental breach under article 25. The major factor the courts of England, the United States and Sweden have considered in determining whether a breach is fundamental (material or significant) is the length of the delay. But the length of the delay is not meaningful until the reasonableness of the delay is established. Reasonableness, in turn, depends upon other factual circumstances.

Both English and Scandinavian courts have emphasized the importance of the type of goods concerned. In a transaction involving goods, such as shares of stock or codfish, the buyer will be required to meet his obligations expeditiously. Moreover, English law provides that repeated failure by the buyer to pay on demand might give the seller an immediate right of cancellation. Even when this rule is not applied, the seller, by repeating his demand for payment or by otherwise showing the buyer that time is of the essence, can shorten the payment period to the extent a court will deem reasonable.

Finally, standard commercial contracts also clearly indicate how time periods differ depending on the goods sold under the agreement. In the case of perishable goods, the seller may avoid the contract after a twenty-four hour delay; the time period for a seller of plants and machinery could be months or years.

While the determination of whether a breach is fundamental will be decided on a case by case basis, depending on the factual circumstances, domestic and private law consistently recognize as important certain factors. Given the ambiguity in article 25 and the international community's interest in promoting commercial stability, courts should consider these general norms in interpreting and applying article 25 of the Convention.