

forcement of foreign arbitral awards, is whether the jurisdiction is a party to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The U.S., a party to the New York Convention, tends to strongly favor international arbitration and courts in the United States will confirm and enforce arbitration decisions rendered here.

Does “Where” Matter?

Absolutely. For reasons noted above under “Risk on” when you leave the area where you do business and take your case on a “road show” to another country, you incur expenses and begin to assume more risk. On the other hand, if you are arbitrating your case in a location near your business in the Carolinas, you significantly cut your expenses, get to use more of your witnesses, and you do not have to disrupt your company. Furthermore, the seat of the jurisdiction also provides the default law, should there be an issue outside of the arbitration. In short, it is better to cook in one’s own kitchen than to be cooked in someone else’s!

And the Point Is?

Point one: Make sure you put a clause in your contract which provides for arbitration of any business dispute using the procedural rules of your choice. Arbitration clauses can be found: <http://charlottearbitrationsociety.org/resources/forms-and-documents/>

Point two: Make sure that your arbitration clause specifies both the location of the seat and venue of the proceeding. The “seat” is generally the place with jurisdiction over the parties and applicable law. The “venue” is where you hold the hearings. Good drafting requires considering both. And if your companies are in the Carolinas, the CIAS advocates that you make the venue close to or in a city with a large airport so that witnesses, and arbitrators, are not inconvenienced: “The seat and place of arbitration

shall be *Charlotte, Mecklenburg County, State of North Carolina, United States of America.*”

Risk Avoidance

So before it’s too late, do something smart. Remove risk. If you are doing international business in the Carolinas, insert an arbitration clause into your contract (like the one provided below) and ask the person drafting your agreement to make sure that the hearing will be held close to or at a convenient location to your business.

For further questions may be directed to info@charlottearbitrationsociety.org. A member of our board or staff will contact you.

Model Clause with Charlotte as the Seat:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by [Insert chosen arbitration institution (Eg. AAA, ICC, JAMS)] in accordance with the [Insert chosen arbitration forum rules] in force at the time of the execution of the contract, which rules are deemed to be incorporated by reference in this clause. The seat and place of the arbitration shall be Charlotte, Mecklenburg County, State of North Carolina, United States of America. * The Tribunal shall consist of [Insert number of arbitrators]** arbitrator(s). The language of the arbitration shall be English [Insert a alternative preferred language, if appropriate under the circumstances.]

Note: *The above clause is a general clause, and is not provided as legal advice, and should be tailored and customized to the needs of a client. Contact the CIAS.*

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Definition of Fundamental Breach under CISG’s Art. 25

By Ana Paula de Barros

The United Nations Convention on Contracts for the International Sale of Goods (CISG) – in force in the U.S. since 1988 – was enacted to harmonize the law and to promote fairness within cross-border transactions regarding the sale of goods. The concept of fundamental breach, articulated in Article 25 of the CISG, is deceptively simple: “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.” However, interpreting this language correctly is pivotal in understanding how the CISG is applied across a wide variety of cases. This is because the remedies available to the aggrieved party when the

breach is fundamental differ greatly from the remedies available when the breach is non-fundamental. For instance, avoidance of a contract – without first resorting to another remedy – is only available if the contractual non-performance amounts to a fundamental breach.¹ Conversely, curing default is preferred over other, more severe remedies, as long as maintaining the contract is feasible.

Although Article 25 has been criticized as vague, it nonetheless provides a useful set of analytical tools that can be used in applying the fundamental breach concept. Here, the toolbox consists of the following elements: breach, substantial deprivation, and foreseeability.² These elements are given interpretive life by Articles 7, 8, and 9 of the CISG.³ This article will briefly examine each of these fundamental breach elements in turn.

I. Breach of Contract

The existence of a contractual breach is the primary element of a fundamental breach under the CISG.⁴ Although Article 25 is silent on what constitutes a breach of contract, other provisions of the CISG provide guidance. For example, a contractual breach unquestionably can result from non-performance of a contract's obligations, but, under Article 9, a breach can also derive from a failure to comply with obligations arising from the practice and usage established between the parties. Furthermore, even the breach of an ancillary obligation established under a contract can be deemed fundamental as long as the obligation is governed by the CISG or closely connected to the sale of goods.⁵

II. Substantial Deprivation

Under Article 25, breach of contract has to result "in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract." Detriment is defined as any current or forthcoming unfavorable result, monetary or not, arising from the contractual breach.⁶ However, the focus here is not on the detriment, but rather on the extent of the deprivation. The detriment must extensively hamper the legitimate contractual expectations of the aggrieved party so that normal remedies will not satisfy the party's expectations. The injured party's legitimate expectations under the contract will help to measure the extent of the deprivation. To assess the parties' legitimate expectations, a court will first analyze the language of the contract. When this is insufficient, the circumstances surrounding the contract must also be considered in accordance with CISG's Articles 8 and 9.⁷

III. Foreseeability

Lastly, the detriment has to be foreseeable. If the detriment was unforeseeable by the defaulting party and by a reasonable person of the same kind under the same circumstances, then the breach is not fundamental. Because the defaulting party's point of view is subjective, the application of the 'reasonable person' standard introduces objectivity into the analysis. A reasonable person 'of the same kind' means a merchant doing the same business, within the same function, and of the same professional expertise as the defaulting party.⁸ 'In the same circumstances' means in the conditions of the market, national and worldwide, encountered by the party in breach.⁹

Moreover, the majority of commentators consider the formation of the contract as the point in time where the detrimental result must be foreseeable.¹⁰ The burden of proving the foreseeability element is on the defaulting party.¹¹

IV. Conclusion

Although Article 25's wording is somewhat imprecise, it ultimately provides the tools to identify a fundamental breach. Provided that courts, arbitrators, and mediators understand the elements of breach, substantial deprivation, and foreseeability and are able to place them within the context of the interpretative rules established by CISG's Articles 7, 8, and 9, any lingering uncertainty and unpredictability will likely dissipate.

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(Endnotes)

1 See CISG Article 49 (1) (a) and Article 64 (1) (a).

2 Franco Ferrari, *Fundamental Breach of Contract Under the UN Sales Convention: 25 Years of Article 25 CISG* 25 JOURNAL OF LAW AND COMMERCE 489, 489-500 (Spring 2006).

3 **Article 7** "[...] Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [...]" **Article 8** "[...] (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." **Article 9** "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage 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." [I would include the relevant text of Articles 7,8, and 9 to the extent that you cite them later so that the author has a continuous point of reference.

4 See 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 177, 261 (1999).

5 Ferrari, *supra* note 2, at 495.

6 *Id.*

7 Andrew Babiak, *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 113, 120 (1992).

8 Michael Will, *Article 25*, in BIANCA & BONELL, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 205, 219 (Griuffrè: Milan eds., 1987).

9 Babiak, *supra* note 7, at 122.

10 Ferrari, *supra* note 2, at 499-500.

11 Babiak, *supra* note 7, at 122.

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