

Article 25

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

INTRODUCTION

1. Article 25 defines the term “fundamental breach,” which is used in various provisions of the Convention. A fundamental breach as here defined is a prerequisite for certain remedies under the Convention, including a party’s right to avoid the contract under articles 49 (1) (a) and 64 (1) (a), and a buyer’s right to require delivery of replacements for goods that failed to conform to the contract (article 46 (2)). The phrase is also used in other provisions of the Convention in connection with avoidance of contract (see articles 51 (2), 72 (1), 73 (1) and (2)). A fundamental breach also impacts the operation of the passage-of-risk provisions of the Convention—see article 70 and paragraph 13 of the Digest for Part III, Chapter IV. In general article 25 defines the border between situations giving rise to “regular” remedies for breach of contract—like damages and price reduction—and those calling for more drastic remedies, such as avoidance of contract.

DEFINITION OF FUNDAMENTAL BREACH IN GENERAL

2. A fundamental breach requires, first, that one party has committed a breach of contract. Breach of any obligation under the contract can suffice—provided the other requirements for a fundamental breach are present—irrespective of whether the duty was specifically contracted for between the parties or if, instead, it followed from the provisions of the Convention. Even the breach of a collateral duty can give rise to a fundamental breach. For example, where a manufacturer had a duty to reserve goods with a particular trademark exclusively for the buyer, and the manufacturer displayed the trademarked goods at a fair for sale (continuing to do so even after a warning by the buyer), the manufacturer was found to have committed a fundamental breach.¹

3. In order to rank as fundamental, a breach must be of a certain nature and weight. The aggrieved party must have suffered such detriment as to substantially deprive it of what it was entitled to expect under the contract. The breach must therefore nullify or essentially depreciate the aggrieved party’s justified contract expectations. What expectations are justified depends on the specific contract and the risk allocation envisaged by the contract provisions, on customary usages, and on the provisions of the Convention. For example, buyers cannot normally expect that delivered goods will comply with regulations and official standards in the

buyer’s country.² Therefore, e.g., the delivery of mussels with a cadmium content exceeding recommended levels in the buyer’s country has not been regarded as a fundamental breach (or, indeed, as a breach at all) since the buyer could not have expected that the seller would meet those standards and since the consumption of the mussels in small portions as such did not endanger a consumer’s health.³ However; the court in that case stated three exceptions from the rule that the seller need not know and observe the standards in the buyer’s country: (1) if the standards in both countries are identical; (2) if, before or at the conclusion of the contract, the buyer informed the seller about these standards, or (3) if due to special circumstances the seller knew or should have known about those standards because, e.g., it particularly specialised in exports to the buyer’s country or has a branch office there.⁴

4. Article 25 provides further that a breach is fundamental only if the substantial deprivation of expectations caused by the breach was reasonably foreseeable to the breaching party. However, the provision does not mention the time at which the consequences of the breach must have been foreseeable. It has been expressly stated that the time of the conclusion of contract is the relevant time.⁵

5. It has been held that the term fundamental breach should be interpreted restrictively.⁶ A Supreme Court found that, in case of doubt, no fundamental breach should be accepted.⁷

SPECIFIC FUNDAMENTAL BREACH SITUATIONS

6. Courts have decided whether certain typical fact patterns constitute fundamental breaches. It has been determined on various occasions that complete failure to perform a basic contractual duty constitutes a fundamental breach of contract unless the party has a justifying reason to withhold its performance. This has been decided in the case of final non-delivery⁸ as well as in the case of final non-payment.⁹ However, if only a minor part of the contract is finally not performed (e.g., one delivery out of several deliveries is not made), the failure to perform is a simple, non-fundamental breach of contract.¹⁰ On the other hand a final and unjustified announcement of the intention not to fulfil one’s own contractual obligations has been found to constitute a fundamental breach.¹¹ Likewise, the buyer’s insolvency and placement under administration has been

held to constitute a fundamental breach under article 64 since it deprives the unpaid seller of what it was entitled to expect under the contract, namely payment of the full price.¹² Similarly, a buyer's refusal to open a letter of credit as required by the contract has been held to constitute a fundamental breach.¹³ It has also been determined that non-delivery of the first instalment in an instalment sale gives the buyer reason to believe that further instalments will not be delivered, and therefore a fundamental breach of contract was to be expected (article 73 (2)).¹⁴

7. As a rule late performance—whether late delivery of the goods or necessary documents or late payment of the price—does not in itself constitute a fundamental breach of contract.¹⁵ Only when the time for performance is of essential importance either because it is so contracted¹⁶ or due to evident circumstances (e.g., seasonal goods)¹⁷ does delay as such amount to a fundamental breach.¹⁸ Although the date for delivery may be fixed by agreement, a short delay may nonetheless not constitute a fundamental breach if the buyer's interests are not impaired.¹⁹ But even if a delay in delivery, in payment, or in taking delivery of the goods is generally not deemed a fundamental breach, the Convention allows the aggrieved party to fix an additional period of time for performance; if the party in breach fails to perform during that period, the aggrieved party may then declare the contract avoided (articles 49 (1) (b) and 64 (1) (b)).²⁰ Therefore in such cases, but only in such cases, the lapse of the additional period turns a non-fundamental delay in performance into a sufficient reason for avoidance.

8. If defective goods are delivered, the buyer can avoid the contract when the non-conformity of the goods is properly regarded as a fundamental breach of contract (article 49 (1) (a)). It therefore is essential to know under what conditions delivery of non-conforming goods constitutes a fundamental breach. Court decisions on this point have found that a non-conformity concerning quality remains a mere non-fundamental breach of contract as long as the buyer—without unreasonable inconvenience—can use the goods or resell them even at a discount.²¹ For example, the delivery of frozen meat that was too fat and too moist, and that consequently was worth 25.5 per cent less than meat of the contracted quality (according to an expert opinion), was not regarded as a fundamental breach of contract since the buyer had the opportunity to resell the meat at a lower price or to otherwise process it.²² On the other hand, if the non-conforming goods cannot be used or resold with reasonable effort this constitutes a fundamental breach and entitles the buyer to declare the contract avoided.²³ This has been held to be the case as well where the goods suffered from a serious and irreparable defect although they were still useable to some extent (e.g., flowers which were supposed to flourish the whole summer but did so only for part of it).²⁴ Courts have considered a breach to be fundamental without reference to possible alternative uses or resale by the buyer when the goods had major defects and conforming goods were needed for manufacturing other products.²⁵ The same conclusion has been reached where the non-conformity of the goods resulted from added substances the addition of which was illegal both in the country of the seller and the buyer.²⁶

9. Special problems arise when the goods are defective but repairable. Some courts have held that easy repairability precludes finding a fundamental breach.²⁷ Courts are reluctant to consider a breach fundamental when the seller offers and effects speedy repair without any inconvenience to the buyer.²⁸ Also if the buyer himself repairs the goods and uses them this is evidence that he has not lost the interest in the contract and a fundamental breach must be denied.²⁹ This has been so held even though the seller had already unsuccessfully attempted to repair the defects over a whole year.

10. The violation of other contractual obligations can also amount to a fundamental breach. It is, however, necessary that the breach deprive the aggrieved party of the main benefit of the contract and that this result could have been foreseen by the other party. Thus, a court stated that there is no fundamental breach in case of delivery of incorrect certificates pertaining to the goods if either the goods were nevertheless merchantable or if the buyer itself could—at the seller's expense—easily acquire the correct certificates.³⁰ Likewise, a typographical error in a bill of lading (“1999” instead of “1998”) does not constitute a fundamental breach and does not entitle the buyer to refuse payment.³¹ The unjustified denial of contract rights of the other party—e.g., a refusal to recognize the validity of a retention of title clause and the seller's right to possession of the goods,³² or the unjustified denial of a valid contract after having taken possession of samples of the goods³³—can amount to a fundamental breach of contract. The same is true when exclusive supply obligations or resale restrictions have been substantially violated,³⁴ or when the buyer, under an FOB contract, refuses to perform its obligation to hire a ship so that it is impossible for the seller to deliver the goods free on board.³⁵

11. A delay in accepting the goods will generally not constitute a fundamental breach, particularly when the delay is only for a few days.³⁶

12. The cumulation of violations of several contractual obligations makes a fundamental breach more probable, but does not automatically constitute a fundamental breach.³⁷ In such cases, the existence of a fundamental breach depends on the circumstances of the case as well as on whether the breach resulted in the aggrieved party losing the main benefit of, and its interest in, the contract.³⁸

BURDEN OF PROOF

13. Article 25 regulates to some extent the burden of proving its elements. The burden with regard to the foreseeability element of article 25 lies with the party in breach.³⁹ This party must prove that it did not foresee the substantial detrimental effect of its breach, and that a reasonable person of the same kind in the same circumstances would not have foreseen such an effect. Where the buyer however asserts that the seller should have known specificities of the production procedure for which the buyer intended to use the goods, the buyer must at least substantiate those circumstances.⁴⁰ On the other hand, the aggrieved party has to prove that the breach substantially deprived it of what it was entitled to expect under the contract.⁴¹

Notes

¹ CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; see also CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997]. See also CLOUT case No. 154 [Cour d'appel Grenoble, France, 22 February 1995], also *Journal du droit international* 1995, 632 (breach of a re-import restriction); CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997], also in *Internationales Handelsrecht* 2003, 172 (breach of an exclusive distribution obligation).

² CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]. See CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States 17 May 1999] (in the same sense and relying on CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995]); CLOUT case No. 426 [Oberster Gerichtshof, Austria, 13 April 2000], also in *Internationales Handelsrecht* 2001, 117. See also Audiencia Provincial de Granada [Spain, 2 March 2000], *Internationales Handelsrecht* 2002, 82 (delivery of chicken meat that did not comply with slaughtering regulations in the buyer's country held no breach at all); Oberster Gerichtshof, Austria, 25 January 2006, *Internationales Handelsrecht* 2006, 110 (delivery of pig liver whose import was rejected because it did not comply with import regulations).

³ CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995].

⁴ See CLOUT case No. 123 [Bundesgerichtshof, Germany, 8 March 1995] and CLOUT case No. 418 [U.S. District Court, Eastern District of Louisiana, United States 17 May 1999] (applying the third of the exceptions formulated by the Bundesgerichtshof).

⁵ CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (see full text of the decision); CLOUT case No. 681 [China International Economic and Trade Arbitration Commission, People's Republic of China, 18 August 1997].

⁶ Bundesgericht, Switzerland, 2 April 2015, www.servat.unibe.ch (late delivery of documents, no fundamental breach); Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27.

⁷ *Ibid.* (see full text of the decision).

⁸ CLOUT case No. 90 [Pretura circondariale di Parma, Italy, 24 November 1989] (only partial and very late delivery); CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995] (see full text of the decision).

⁹ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case No. 468 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 October 1998]; CLOUT case No. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001]; CLOUT case No. 810 [China International Economic and Trade Arbitration Commission, People's Republic of China, 8 April 1999] (refusal to open a letter of credit); CLOUT case No. 983 [China International Economic and Trade Arbitration Commission, People's Republic of China, 10 May 2005] (even final partial non-payment can amount to fundamental breach).

¹⁰ CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997]; also Brandenburgisches Oberlandesgericht, Germany, 18 November 2008 *Internationales Handelsrecht* 2009, 105.

¹¹ See CLOUT case No. 136 [Oberlandesgericht Celle, Germany, 24 May 1995]. In that case the seller gave notice that he had sold the specified good to another buyer. See also CLOUT case No. 595 [Oberlandesgericht München, Germany, 15 September 2004] (seller's refusal to deliver on the assumption that the contract had been cancelled was a fundamental breach) (see full text of the decision); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, Russian Federation, 4 April 1997 (Arbitral award No.387/1995), Unilex (final refusal to pay the price).

¹² CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

¹³ CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000], citing CLOUT case No. 187 [U.S. District Court, Southern District of New York, United States, 23 July 1997] (see full text of the decision). See also CLOUT case No. 986 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 February 2002].

¹⁴ CLOUT case No. 214 [Handelsgericht des Kantons Zürich, Switzerland, 5 February 1997].

¹⁵ Bundesgericht, Switzerland, 2 April 2015, www.servat.unibe.ch (late delivery of documents no fundamental breach); Corte di Appello di Milano, Italy, 20 March 1998, Unilex (late delivery); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery); CLOUT case No. 301 [Cour of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585) (late payment); CLOUT case No. 859 [Superior Court of Ontario, Canada, 6 October 2003] (late delivery, assuming on the facts a fundamental breach).

¹⁶ CLOUT case No. 277 [Oberlandesgericht Hamburg, Germany, 28 February 1997] (late delivery of goods with volatile market prices under a CIF sale was held to be a fundamental breach of contract).

¹⁷ Corte di Appello di Milano, Italy, 20 March 1998, Unilex (the buyer had ordered seasonal knitted goods and pointed to the essential importance of delivery at the fixed date, although only after the conclusion of the contract); Court of Arbitration of the International Chamber of Commerce, France, January 1997 (Arbitral award No. 8786), *ICC International Court of Arbitration Bulletin* 2000, 70.

¹⁸ CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (late delivery constitutes a fundamental breach when the buyer would prefer non-delivery instead and the seller could have been aware of this); CLOUT case No. 859 [Superior Court of Ontario, Canada, 6 October 2003] (late delivery a fundamental breach because the seller knew that the buyer did, and had to, rely on timely performance in order to fulfill its own delivery contract with a client [the court, however, relied partly on common law]).

¹⁹ CLOUT case No. 846 [U.S. Court of Appeals (3rd Circuit), United States, 19 July 2007] (a two-day delay that did not impede the use of the delivery regarded as a non-fundamental breach).

²⁰ See, for example, CLOUT case No. 301 [Court of Arbitration of the International Chamber of Commerce, 1992 (Arbitral award No. 7585)].

²¹ Supreme People's Court, People's Republic of China, 30 June 2014, (ThyssenKrupp Metallurgical Products GmbH v. Sinochem International (Overseas) Pte Ltd), (2013) *Min Si Zhong Zi* No. 35 Civil Judgment ("considering as a whole how the fundamental breach provision under CISG was interpreted in judgments given in other countries, where the buyer could use or resell the goods without unreasonable inconvenience, even at a discounted price, non-conformity in quality is still no more than a non-fundamental breach"), available on the Internet at www.court.gov.cn; CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998].

²² Supreme People's Court, People's Republic of China, 30 June 2014, (ThyssenKrupp Metallurgical Products GmbH v. Sinochem International (Overseas) Pte Ltd), (2013) *Min Si Zhong Zi* No. 35 Civil Judgment (holding that delivery of petroleum coke with a higher degree of hardness than was permitted under the contract did not constitute a fundamental breach as it caused merely a delay in reselling the goods), available on the Internet at www.court.gov.cn; CLOUT case No. 248 [Bundesgericht, Switzerland, 28 October 1998]; CLOUT case No. 988 [China International Economic and Trade Arbitration Commission, People's Republic of China, 2000] (holding that delivery of non-conforming souvenir coins of which the buyer resold 75 per cent did not constitute a fundamental breach).

²³ Cour d'appel de Paris, France, 25 January 2012, original French version available on the Internet at www.cisg-france.org, and, on appeal, CLOUT case No. 1505 [Cour de cassation, France, 17 December 2013] (erroneous labelling of two boxes of meat having revealed uncertainties and inconsistencies regarding production and expiry dates); CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine); CLOUT case No. 79 [Oberlandesgericht Frankfurt a.M., Germany, 18 January 1994] (shoes with cracked leather) (see full text of the decision); Landgericht Landshut, Germany, 5 April 1995, Unilex (T-shirts that shrink by two sizes after the first washing); Bundesgericht, Switzerland, 18 May 2009 *Internationales Handelsrecht* 2010, 27 (packaging machine reached only one-third of the agreed level of production).

²⁴ CLOUT case No. 107 [Oberlandesgericht Innsbruck, Austria, 1 July 1994]. For a similar case see CLOUT case No. 992 [Copenhagen District Court, Denmark, 19 October 2007] (pony bought for riding competitions that proved to be incurably lame held to constitute a fundamental breach); Bundesgericht, Switzerland, 18 May 2009] *Internationales Handelsrecht* 2010, 27 (packaging machine reached only one-third of the agreed level of production).

²⁵ See CLOUT case No. 138 [U.S. Court of Appeals (2nd Circuit), United States, 6 December 1995] (compressors with lower cooling capacity and higher power consumption than the goods contracted-for, which were required for the manufacture of air conditioners by the buyer); CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine) (see full text of the decision); CLOUT case No. 315 [Cour de cassation, France, 26 May 1999] (metal sheets absolutely unfit for the foreseen kind of manufacture by the buyer's customer) (see full text of the decision); see also Tribunale di Busto Arsizio, Italy, 13 December 2001, published in *Rivista di Diritto Internazionale Privato e Processuale*, 2003, 150–155, also available on Unilex (delivery of a machine totally unfit for the particular use made known to the seller and that was incapable of reaching the promised production level represented a “serious and fundamental” breach of the contract, since the promised production level was an essential condition for the conclusion of the contract; the lack of conformity therefore was a basis for avoidance); Bundesgericht, Switzerland, 18 May 2009, *Internationales Handelsrecht* 2010, 27 (even after numerous attempts to correct problems, packaging machine reached only one-third of the agreed level of production).

²⁶ Compare CLOUT case No. 150 [Cour de cassation, France, 23 January 1996] (artificially sugared wine which is forbidden under EU-law and national laws) (see full text of the decision); CLOUT case No. 170 [Landgericht Trier, Germany, 12 October 1995] (watered wine) (see full text of the decision). Similarly, Hof 's-Gravenhage, the Netherlands, 23 April 2004, *Nederlands Jurisprudentie* 2004 no. 713 (delivery of flour with carcinogenic addition that was forbidden in the Netherlands but not in Mozambique—the place of delivery and use—held to constitute a fundamental breach).

²⁷ Handelsgericht des Kantons Zürich, Switzerland, 26 April 1995, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 1996, 51; Oberlandesgericht Köln, Germany, 14 October 2002, *Internationales Handelsrecht* 2003, 15; CLOUT case No. 937 [Cantonal Court of the Jura, Switzerland, 26 July 2007].

²⁸ CLOUT case No. 152 [Cour d'appel, Grenoble, France, 26 April 1995]; CLOUT case No. 282 [Oberlandesgericht Koblenz, Germany, 31 January 1997].

²⁹ See Bundesgerichtshof, Germany, 24 September 2014, *Neue Juristische Wochenschrift* 2015, 867 = CISG-online No. 2545 (para. 27 s.).

³⁰ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996].

³¹ CLOUT case No. 808 [China International Economic and Trade Arbitration Commission, People's Republic of China, 4 June 1999].

³² CLOUT case No. 308 [Federal Court of Australia, Australia, 28 April 1995].

³³ CLOUT case No. 313 [Cour d'appel, Grenoble, France, 21 October 1999] (see full text of the decision).

³⁴ CLOUT case No. 1517 [Oberster Gerichtshof, Austria, 15 November 2012], (exclusive supply contract which seller breached; no fundamental breach because seller delivered an autumn and winter collection of Italian designer clothes to a competitor of the buyer only at one of the buyer's outlets and stopped this delivery and removed the clothes there after a month; moreover, the buyer had requested the continuation of the contract at a discount of 50 per cent for the already delivered clothes); CLOUT case No. 2 [Oberlandesgericht Frankfurt a.M., Germany, 17 September 1991]; CLOUT case No. 154 [Cour d'appel, Grenoble, France, 22 February 1995]; CLOUT case No. 82 [Oberlandesgericht Düsseldorf, Germany, 10 February 1994], (see full text of the decision); CLOUT case No. 217 [Handelsgericht des Kantons Aargau, Switzerland, 26 September 1997].

³⁵ CLOUT case No. 987 [China International Economic and Trade Arbitration Commission, People's Republic of China, 22 March 2001].

³⁶ CLOUT case No. 243 [Cour d'appel, Grenoble, France, 4 February 1999].

³⁷ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision).

³⁸ *Ibid.* (see full text of the decision).

³⁹ *Ibid.* (see full text of the decision).

⁴⁰ Bundesgericht, Switzerland, 2 April 2015, www.servat.unibe.ch.

⁴¹ Supreme People's Court, People's Republic of China, 30 April 2014, (C & J Sheet Metal Co. Ltd v. Wenzhou Chenxing Machinery Co. Ltd), (2014) *Min Shen Zi* No. 266 Civil Ruling, available on the Internet at www.court.gov.cn; See also CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996] (see full text of the decision); CLOUT case No. 882 [Handelsgericht des Kantons Aargau, Switzerland, 5 November 2002], also in *Internationales Handelsrecht* 2003, 178.