

## **Fundamental Breach of Contract: A Comparative Review of the CISG and UPICC in International Commercial Contract**

**Putri Batari Widyadhana\* , Desi Yanti Yohanes Lauw**

Universitas Padjadjaran, Indonesia

Email: putri22001@mail.unpad.ac.id\* , desi22002@mail.unpad.ac.id

### **Abstract**

The concept of *fundamental breach* is a pivotal element in international commercial contract law, as it defines the conditions under which a party may terminate a contract and pursue remedies. In cross-border transactions involving parties from different legal systems, the interpretation of this doctrine is critical to ensuring legal certainty and protecting legitimate commercial interests. This study addresses the research problem of how *fundamental breach* is defined and applied under two major instruments—the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UPICC)—and what implications these differences have for contracting parties. The objective of this research is to compare and critically analyze the doctrinal approaches of the CISG and UPICC to provide a clearer understanding of their respective frameworks. Using a qualitative legal research method based on normative analysis, the study examines statutory provisions, official commentaries, and scholarly works. The findings reveal that the CISG offers a more structured and predictable framework by emphasizing substantial deprivation of contractual expectations and foreseeability. In contrast, the UPICC provides greater flexibility by incorporating factors such as intentional or reckless non-performance and the importance of strict compliance. The implications of this analysis suggest that, while the CISG is better suited for parties seeking legal certainty, the UPICC accommodates commercial fairness and adaptability in complex international contracts.

**Keywords:** fundamental breach; contract termination; international commercial contract.

### **INTRODUCTION**

In an era marked by accelerating globalization, the expansion of international trade has brought with it a growing need for uniformity and predictability in the legal rules governing cross-border transactions (Block, 2016). The existence of divergent national laws can give rise to uncertainty, increase transaction costs, and create barriers to the flow of goods and services across borders. As international commerce becomes ever more interconnected, the harmonization and unification of contract law have become essential to ensure fairness, efficiency, and legal certainty in international commerce (CISG-online, 2013; Ishida, 2020; Nwafor, 2011; Uknevičiūtė, 2020). United Nations Convention on Contracts for the International Sale of Goods (“CISG”) represents a significant milestone in the unification of international commercial law. It was developed by the United Nations Commission on International Trade Law (“UNCITRAL”) as the successor to two earlier treaties on international sales that is the Convention relating to a Uniform Law for the International Sale of Goods (“ULIS”) and the Convention relating to a

## Fundamental Breach of Contract: A Comparative Review of the CISG and UPICC in International Commercial Contract

Uniform Law on the Formation of Contracts for the International Sale of Goods. Both of these earlier conventions were initiated under the sponsorship of the International Institute for the Unification of Private Law (“UNIDROIT”) (al., 2017; Block, 2016; Bridge, 2014; Chaves, 2024; International, 2025). The CISG was adopted in 1980 during a diplomatic conference attended by representatives from 62 countries and 8 international organizations. It officially came into force on 1 January 1988 in its first eleven Contracting States (Bonell, 1996). Additionally, as of 2025 CISG has been adopted by 97 Contracting States (CISG-online, 2025). The primary objective of the CISG is to establish uniform rules governing the formation of international sales contracts, as well as to define the legal rights and obligations of buyers and sellers involved in cross-border transactions (Petrovic et al., 2017).

While CISG represents a binding multilateral treaty aimed at legal unification, UNIDROIT has also developed a complementary yet distinct instrument which serves as a non-binding *soft law* alternative. UNIDROIT typically creates binding international conventions that require adoption by signatory countries. However, UNIDROIT Principles of International Commercial Contracts (“UPICC”) is an exception since it is intentionally designed as a non-binding set of guidelines (Chaves, 2024). UPICC is created for the purpose of harmonizing the law of international commercial contracts. UPICC may be applied in cases where the contracting parties have agreed that any disputes will be resolved based on “*general principles of law, the lex mercatoria or the like*” or when the parties have not specified any governing law in their contract (Bridge, 2014). Notably, both CISG and UPICC have regulated termination of contracts in light of a fundamental breach. The doctrine of ‘fundamental breach’ is at the heart of the law of contract, more especially contract of sale of goods, in fact it is the gate-way provisions through which other remedies or obligations can be invoked (Nwafor, 2013).

The basic concept of fundamental breach was already embedded in Article 10 of ULIS and did not give rise to significant debate during the preparatory work of the CISG. According to Article 10 of ULIS, a breach of contract is considered fundamental if, upon the moment the contract was made, the party in breach knew or should have known that a reasonable person in the other party’s position would not have agreed to the contract if they had anticipated the breach and its consequences.. In continuation of the earlier approach, Article 25 of the CISG marks a notable advancement over its predecessor. It not only requires that the breach result in detriment, but further stipulates that such detriment must substantially deprive the aggrieved party of what they were entitled to expect under the contract. The introduction of this threshold serves to limit the return on non-conforming goods in cases where doing so would cause disproportionate economic loss (CISG Advisory Council, 2005). Article 25 of the CISG provides a precise 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.”

According to the Official Commentary on the UNIDROIT Principles, fundamental non-performance refers to non-performance that is significant and not simply a minor issue (UNIDROIT, 2016). As outlined in Article 7.3.1 of the UPICC, factors are important in assessing whether non-performance constitutes a fundamental breach. These factors include substantial deprivation of the other party’s expectations, strict performance of the essence, intentional or reckless non-performance, no reliance on future performance, and disproportionate loss.

Previous research by Malkawi (2020) examines the interplay between fundamental breach, the duty to cure, and avoidance rights under the CISG. The study critically highlights that although Article 25 defines fundamental breach, courts and tribunals often prioritize the cure mechanism (Articles 48–49) before declaring avoidance, leading to inconsistencies in application across jurisdictions. This doctrinal variability undermines the predictability of the remedy system per the CISG (Malkawi, 2020). Then Ishida (2020) critically analyzes Articles 25 and 49 of the CISG, arguing that the good faith duty requires parties to attempt to cure defects collaboratively before avoidance. Ishida suggests that failure to comply with this duty negates the existence of a fundamental breach, thereby discouraging opportunistic avoidance and enhancing fairness in international transactions (Ishida, 2020).

This research aims to provide a comparative analysis of the concept of fundamental breach as governed by the CISG and the UPICC. The research benefits include providing legal practitioners and contract drafters with nuanced insights into which framework—CISG or UPICC—is more suitable under differing commercial contexts, as well as contributing to academic discourse on international commercial contract law by illuminating the comparative strengths and limitations of these two modern frameworks.

## **RESEARCH METHOD**

This article was written using comparative study methodology, which involved analyzing and comparing legal concepts and doctrines as applied in different legal instruments, namely the CISG and UPICC. Through this approach, the study explored the similarities and differences in how each framework addressed the termination of contracts in the event of serious non-performance. The study also employed a normative juridical method, focusing on the interpretation of the relevant provisions in both instruments and supported by doctrinal opinions. To strengthen the analysis, the study drew upon official commentaries, academic literature, and case law that provided context and interpretation of the rules. This research was qualitative in nature,

using secondary data sourced from legal texts, scholarly writings, and official documents relevant to the field of international commercial contracts.

## RESULTS AND DISCUSSIONS

### Criteria for Fundamental Breach

#### *Substantial Deprivation and Detriment*

The core element of a fundamental breach is “*detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract*” (Bjorklund, 2018; Huber, 2015, 2018; Unidroit, 2016). Detriment shall be understood as any present or anticipated adverse consequence, whether pecuniary or non-pecuniary in nature, arising directly from a breach of contractual obligations (Ferrari, 2006). It is important to note that this notion is distinct from the concept of damage and does not equate to loss or other similar terms commonly used in international or domestic legal terminology (Bianca & Bonell, 1987). As outlined in Article 74 of the CISG, damages can be claimed by a party even if the breach does not amount to a fundamental or substantial breach (Kritzer, 1989). Detriment serves a limited function by excluding certain cases where a fundamental obligation has been breached without causing harm.

The first requirement under Article 25 of the CISG is the existence of detriment, which must be interpreted broadly to include both material and immaterial harm (Leisinger, 2007). For instance, if the seller fails to pack or insure the goods, but they still arrive safely, no injury would result. However, detriment would arise if the buyer were to lose a resale opportunity or a customer (Bianca & Bonell, 1987). In such cases, material harm stems from the buyer’s loss of a resale opportunity or a valuable customer, leading to financial loss. On the other hand, immaterial harm includes reputational damage or commercial inconvenience caused by the seller’s failure to pack or insure the goods. Even if the goods arrive safely, these harms may still impact the buyer significantly. Thus, detriment under the CISG extends beyond physical damage to include broader commercial consequences.

In *ThyssenKrup Metallurgical Products GmbH v. Sinochem International (Overseas) Pte Ltd*, decided by the Supreme People’s Court of the People’s Republic of China on 30 June 2014, the dispute arose from an international sale contract for petroleum coke between a German seller and a Singaporean buyer. The buyer alleged that the goods delivered had a Hardgrove Grindability Index of 32, which fell below the agreed contractual range of 36 to 46, and claimed this constituted a fundamental breach under the CISG. While the Jiangsu Higher People’s Court (Court of First Instance) held that the non-conformity fundamentally deprived the buyer of its contractual expectations, the Supreme Court reversed this ruling. It held that the breach was not fundamental because the goods could still be used and were resold at a reasonable market price. The Court affirmed that under the CISG, delivery of non-conforming goods does not constitute a fundamental breach unless the

non-conformity substantially deprived the buyer of the expected benefit and cannot be overcome without unreasonable inconvenience.

In contrast to the CISG's approach, which uses detriment as a measure for determining a fundamental breach, the UPICC deliberately omits any reference to "detriment" as a qualifying criterion. This represents a conscious departure from the CISG's dual-pronged test that requires both substantial deprivation and detriment. By excluding the notion of detriment, the UPICC makes it clear that proving material loss is not necessary to establish a fundamental breach. It is sufficient to demonstrate that the injured party's legitimate interests, as reflected in the contract, have been significantly impaired (Uknevičiūtė, 2011).

Nevertheless, in the Official Commentary on the UNIDROIT Principles, the authors are of the opinion that this distinction has no practical impact or effect. It is their view that the detriment requirement is redundant, and consequently, the focus should not be on the severity of the harm, but rather on protecting the legitimate interests of the injured party as outlined in the contract (Huber, 2015). Another reason the detriment requirement is considered redundant is that a significant loss of the contractual expectations of the injured party already amounts to a form of 'detriment'.

This understanding aligns with Article 7.3.1(2)(a) of the UNIDROIT Principles, which emphasizes that substantial deprivation is to be assessed not based on the injured party's subjective expectations, but rather on what they were objectively entitled to expect under the contract. As noted in the commentary, the test is not concerned with a non-performing party disregarding its duties, but instead focuses on how important the performance was to the injured party in light of the contractual agreement. This reinforces the view that substantial deprivation itself serves as a proxy for detriment under the UPICC.

An illustration from the UPICC Official Comment sheds light on how substantial deprivation is assessed. In the scenario, A undertakes to remove waste from B's site during 1992, but B does not inform A that construction is scheduled to begin on 2 January 1993 (UNIDROIT, 2016). When A fails to complete the removal by that date, the Official Comment suggests that B cannot terminate the contract because the delay was not foreseeable. However, this interpretation has been criticized for overlooking the core question of whether B was substantially deprived of its contractual expectations. Since B never communicated the urgency of timely performance, it cannot be said that A's delay deprived B of something it was objectively entitled to expect under the contract. No clear importance was attached to strict performance within a specific timeframe, therefore the breach does not reach the threshold of fundamental non-performance according to Article 7.3.1(2)(a), and termination is therefore unwarranted (Huber, 2015).

### ***Foreseeability***

The foreseeability requirement in Art. 25 of the CISG is similar to the foreseeability requirement in regards to damages found in Article 74 CISG (Mamytov & Petsche, 2019; Meyer, 2010; Quynh, 2024; Ramberg, 2013). Foreseeability serves to interpret the parties intentions at the time of contract formation, as the allocation of liability relies on the information exchanged before the contract was made. This requirement is evaluated cumulatively, meaning the defaulting party must both subjectively and objectively have predicted the result of the breach. The objective perspective observes the potential conduct of reasonable individual in like circumstances. The burden with regard to the foreseeability element of Article 25 lies with the party in breach. Given that it is improbable that the breaching party will admit to having foreseen the detriment in question, the “reasonable person standard” was presented. This approach aligns with the interpretive framework established in Article 8(2) of the CISG, which emphasizes the understanding a typical person would be expected to have under the same conditions.

There are three principal situations in which the foreseeability does not apply. Firstly, when the parties have expressly agreed in the contract that a specific term or obligation is of essential importance, any breach of that term renders the foreseeability test inapplicable. Secondly, where a particular obligation was emphasized during negotiations and clearly acknowledged as significant, even if not expressly included in the written contract, the foreseeability test may be excluded, provided its importance can be demonstrated. Lastly, if the obligation in question is so fundamental to the nature and purpose of the contract that its breach evidently frustrates the contractual expectations, the foreseeability test becomes irrelevant.

Under Article 7.3.1(2)(a) of the UPICC, the foreseeability requirement is more narrowly construed. The relevant time is still the moment of contract conclusion. However, the foreseeability test under UPICC focuses solely on the consequences of the non-performance, that is whether the breach deprived the aggrieved party of its contractual expectations. Consequently, it does not matter whether the non-performance was foreseen or foreseeable by the party in breach. Therefore, the non-performing party can only be excused if two conditions are met: first, it had no actual knowledge of the relevant circumstances; and second, its lack of knowledge was not due to negligence.

### ***Other Factors***

The CISG only includes 3 factors of a fundamental breach that is detriment, substantial deprivation, and foreseeability. While UPICC excludes the element of detriment for a fundamental breach, there are 4 other factors that comes into the consideration; whether strict performance of the unfulfilled obligation is considered essential to the contract; whether the non-performance was done intentionally or with recklessness; whether the injured party has valid reasons to doubt the other party’s ability to fulfill its obligations in the future; and whether terminating the contract would cause the non-performing party a

loss that is disproportionate to the breach or the preparation/performance already carried out.

### **Strict Compliance of the Essence of the Contract**

Paragraph (2)(b) does not focus on how serious the non-performance is, but rather on the nature of the contractual obligation, where strict compliance is of the essence. The parties may already define what obligation they consider to be fundamental or ‘of the essence’ in the contract itself. In this case, a breach of the fundamental clause gives the injured party the right to terminate the contract. One example of this is a contract where there is a given deadline for the obligation.

However, if the contract has not stipulated what obligation is considered as fundamental or the essence of the contract, it can be deduced from the intention of the parties. As stipulated in Article 4.1 of the UPICC, “*A contract shall be interpreted according to the common intention of the parties.*” This intention can be seen from the circumstances of the case, in particular from the commercial background of the transaction. For instance, in commodity sale contracts, timely delivery is typically essential, and in documentary credit transactions, the submitted documents must strictly match the credit terms.

### **Intentional or reckless non-performance**

A breach of contract done intentionally or recklessly may be considered as a fundamental breach. The rationale behind this is that such conduct, even if the breach itself is not severe, may destroy the other party’s trust in the contract. When trust is lost, it is unreasonable to expect the aggrieved party to remain bound by the contract.

Nonetheless, the factor of intent or recklessness should be applied with caution and not interpreted too broadly. It is generally more appropriate to prioritize the extent of harm caused to the aggrieved party (as outlined in Art. 7.3.1(2)(a)) and the significance of the breached obligation within the overall contract (as addressed in Art. 7.3.1(2)(b)). While there may be instances where intentional or reckless conduct leads the aggrieved party to lose complete trust in the defaulting party, such cases are more suitably handled under Art. 7.3.1(2)(d).

The right to terminate the contract is also limited by the good faith principle. Terminating a contract based on non-performance of minor obligations may be contrary to the good faith principle stipulated in Article 1.7 of the UPICC, even though the breach is intentional.

### **No Reliance on Future Performance**

This provision in UPICC addresses situations where a party’s non-performance leads the aggrieved party to reasonably believe that the other party will not fulfill its future obligations. This provision is especially relevant

in long-term or installment contracts, where a single serious breach or a pattern of repeated minor breaches may indicate a loss of trust. For example, if X who is entitled to reimbursement for expenses held Y's behaviour of submitting false vouchers as fundamental non-performance, X may terminate the contract although the amount claimed is insignificant.

However, it is not enough for the aggrieved party to merely feel distrust, there must be reasonable justification. A case of intentional breach of contract also indicates that a party cannot be relied on, which relates to the intention factor in Article 7.3.1(2)(c) of the UPICC. Moreover, this factor should be considered alongside other elements under Article 7.3.1(2), particularly whether the breach substantially deprives the aggrieved party of their expected benefit under the contract, as stated in paragraphs (a) and (b).

However, this provision does not apply in the case of anticipatory breach, where the non-performance has not happened yet, this is instead regulated in Article 7.3.4 until 7.3.5 of the UPICC.

### **Disproportionate Loss**

Article 7.3.1(2)(e) of the UPICC considers whether terminating the contract would cause disproportionate loss to the non-performing party due to preparations made for performance. This factor focuses solely on the interests of the non-performing party and is particularly relevant in cases where other elements of Article 7.3.1(2) might suggest a fundamental breach.

For this provision to apply, the non-performing party must have already made some level of preparation for its performance. It must then be assessed whether those preparations would result in substantial loss if the contract were terminated, and whether those preparations could be used elsewhere, such as being sold to others or used internally. One example of this is, if A is late in delivering customized software to B, and B still needs the software, B may be entitled to damages but not termination, especially if A cannot resell the product. In such a case, the delay may not substantially deprive B of its expected benefit under the contract, so the breach is not fundamental.

However, if the breach was intentional or reckless, as per Article 7.3.1(2)(c), it's unlikely that the non-performing party can use the "disproportionate loss" argument to avoid responsibility. Conversely, the aggrieved party may also use the lack of disproportionate loss to argue for termination, particularly in borderline cases where it is unclear whether a fundamental breach occurred. If ending the contract would not severely harm the breaching party, this might support the case for termination.

### **Consequences for Fundamental Breach**

#### ***CISG***

The CISG provides both the buyer and the seller with the right to avoid the contract under specific circumstances where the fundamental expectations under the agreement are seriously disrupted. The right of avoidance is

## Fundamental Breach of Contract: A Comparative Review of the CISG and UPICC in International Commercial Contract

governed primarily by Articles 49 and 64 of the CISG and is subject to the principle of fundamental breach as defined in Article 25. The rules differ slightly depending on whether the party seeking avoidance is the buyer or the seller, as follows:

### ***Avoidance of the contract by the buyer***

Fundamental breach allows the buyer to declare the contract avoided under Article 49 of the CISG. Article 49(1)(a) of the CISG provides that avoidance is possible “*if the failure by the seller to perform any of his obligations under the contract or this Conversation amounts to a fundamental breach of contract.*” As previously discussed, the buyer may validly declare avoidance only if two cumulative conditions are satisfied: *first*, the seller must have failed to perform an obligation under the contract; and *second*, that failure must have substantially deprived the buyer of what he was entitled to expect under the contract.

When the fundamental breach is due to the delivery of non-conforming goods, the buyer must provide the seller with proper and timely notice of the non-conformity in order to preserve the right to avoid the contract. The buyer is free to use any form in order to notify a non-conformity, specifically including fax messages and registered mail or e-mail. Moreover, Article 49(1)(b) explains that “*if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47 or declares that he will not deliver within the period so fixed.*” Article 47 of the CISG governs the buyer’s right to set an additional period (*Nachfrist*) for the seller to perform. The main consequences of this provision include the buyer’s right to avoid the contract if the seller fails to perform within the *Nachfrist*, and temporary restriction on remedies, whereby the buyer cannot invoke other remedies (e.g., avoidance, price reduction) while the *Nachfrist* is pending. If the buyer has declared the avoidance of the contract under Article 49(1)(b) it will be for him to prove that he has fixed a reasonable period of time under Article 47.

Finally, Article 82(1) of the CISG restricts the buyer’s ability to avoid the contract if the buyer is unable to return the goods in substantially the same condition as when they were received. However, under the exceptions set out in Article 82(2) of the CISG, the buyer may still exercise the right to avoid the contract in specific circumstances. These includes where the inability to return the goods in the required condition is not attributable to any act or omission of the buyer, where the goods have perished or deteriorated as a result of an examination conducted in accordance with Article 38, or where the goods have been sold or consumed in the ordinary course of business. In the latter situation, the buyer must account to the seller for any benefits derived from the goods in accordance with Article 84(2) of the CISG.

*Avoidance of the contract by the seller*

The discussion now proceeds to an analysis of the seller's corresponding right of avoidance under the CISG. Pursuant to Article 64(1)(a) of the CISG, the seller may avoid the contract if the buyer commits a fundamental breach of any of their obligations. The decisive consideration in determining whether a breach is fundamental lies not in the extent of monetary loss suffered, but rather in the significance which the parties attach to the obligation in question. The Secretariat Commentary itself raises uncertainty over how often in practice a buyer's failure to fulfill core obligations, namely the obligation to pay the price and the obligation to take delivery, constitutes a fundamental breach. It observes that in most instances, such failures will not constitute a fundamental breach *until a certain period of time has elapsed*.

This inherent uncertainty underscores the utility of the *Nachfrist* procedure, which gives the right to the seller to avoid the contract promptly upon expiry of the additional period, without having to wait until it becomes clear that the breach satisfies the threshold of fundamental breach. Moreover, the seller's right to fix an additional period for performance under Article 63 of the CISG mirrors the buyer's right under Article 49(1)(b) of the CISG. In this respect, Article 63(1) of the CISG permits the seller to grant the buyer an additional period of reasonable length to fulfill its contractual obligations. During that additional period, pursuant to Article 63(2) of the CISG, the seller is precluded from exercising any remedies for breach, unless the buyer has explicitly declared that it will not perform within the period granted. Under Article 64(1)(b) of the CISG, the seller may declare the contract avoided if the buyer fails to pay the price or take delivery of the goods within the additional period, or if the buyer declares in advance that it will not do so.

It is important to note that, while the seller may invoke the *Nachfrist* mechanism under Article 63(1) of the CISG for the breach on *any* obligation by the buyer, the right to avoidance under Article 64(1)(b) is confined to cases involving the buyer's failure to pay the price or to take delivery. In these specific circumstances, there is no requirement for the seller to demonstrate that the breach was fundamental.

**UPICC**

The Consequence of a fundamental breach under UPICC is termination. Unlike the CISG, which sets out different provisions governing contract avoidance in cases of fundamental breach by distinguishing between situations where the buyer seeks to avoid the contract and those where the seller does, the UPICC, address the termination of contract due to fundamental non-performance in a more unified manner. Specifically, the UPICC consolidates the regulation of termination for fundamental breach under a single article, namely Article 7.3.1, without drawing a distinction based on which party initiates the termination. This article applies to all causes of termination

It is further regulated in the next article that the party that terminates the contract does so by giving notice to the other party. Therefore, as long as the aggrieved party doesn't give notice, the contract remains intact. The effects of contract termination include releasing both parties from their obligations to perform or receive any future duties. However, termination does not prevent either party from seeking compensation for any failure to perform. Rights to claim compensation for the aggrieved party as a result of non-performance is further regulated in Article 7.4.2 of the UPICC. Additionally, termination of the contract does not affect clauses in the contract related to dispute resolution or other provisions intended to remain in effect after termination.

### **Recent Case Law on Fundamental Breach of Contract**

#### ***Case Law from CISG Standpoint***

#### **Socinter v. Wallace Corporation**

In April 2006, the French company Socinter ordered several tons of vacuum-packed fresh lamb meat from Wallace Corporation Ltd, a New Zealand-based exporter. The meat was shipped in three containers (Nos. 1555, 1583, and 1595) under Cost, Insurance, Freight (CIF) delivery terms, meaning that the risk usually transferred to the buyer as soon as the goods were loaded onto the ship. The shipments arrived in France between 26 April and 13 June 2006. Upon inspection, Socinter claimed that the goods were non-conforming. First, Container 1555 contained two cartons (out of 928) with discrepancies regarding the expiry date. The expiry date printed (11 May 2006) did not comply with the agreed shelf life of 73 days from packaging, and was inconsistent with the production date range certified by New Zealand health authorities. Second, Containers 1583 and 1595 were allegedly contaminated with high levels of Enterobacteriaceae and lactic acid bacteria, detected through independent laboratory testing (Silliker Lab). In one instance, a customer returned the meat citing a nauseating smell and significant quantities had to be destroyed. Socinter argued that the goods were non-conforming and filed suit to rescind all three contracts and claim damages. Wallace, in turn, filed a counterclaim seeking payment of its invoices.

In this case, the courts applied Article 25 of the CISG to assess whether Wallace Corporation's conduct amounted to a fundamental breach of contract. For Container 1555, although only two cartons out of 928 were found to have labelling defects, this inconsistency raised serious concerns regarding the overall conformity of the shipment. The issue relates specifically to expiry dates, which are crucial in food safety and regulatory compliance. The court noted that Wallace failed to demonstrate that the rest of the goods in the container were unaffected by the same issue. As a result, the court found that this uncertainty undermined Socinter's ability to safely and legally market the product, depriving it of the contractual benefit.

For Containers 1583 and 1595, laboratory testing revealed that the meat was contaminated with extremely high levels of bacteria, including

## Fundamental Breach of Contract: A Comparative Review of the CISG and UPICC in International Commercial Contract

Enterobacteriaceae and lactic acid bacteria, in quantities far exceeding acceptable thresholds which were some millions of times above the guideline levels. These findings indicated that the meat was unfit for human consumption. The court relied on EU hygiene regulations and technical guidelines from *Centre National d'Études et de Recommandations sur la Nutrition et l'Alimentation* (CNERNA) to determine that the contamination posed a serious health risk and was a clear violation of the quality standards expected for perishable food products. Consequently, the failure to deliver goods that met these essential standards was held to be a grave breach of contract. In both instances, the court concluded that Socinter had been substantially deprived of the benefits it was entitled to under the terms of the contract. As such, the breaches met the threshold of Article 25 of the CISG, and Socinter was entitled to avoid the contracts under Article 49 of the CISG.

*Doolim Corp. v. R Doll, LLC, et al.*

In 2007, a South Korean seller and an American buyer entered into multiple contracts for the production of approximately 500,000 women's garments, including pants, dresses, and tops, to be manufactured in Vietnam. The contracts stated that the buyer was required to pay within 15 days of receiving the goods. In July and August of that year, the buyer ordered and received 77,528 garments valued at \$381,026.10, but failed to make payment within the agreed period. The seller, in response, sought and obtained a payment assurance from the buyer.

Subsequently, in October and November 2007, the buyer placed further orders: 157,092 garments worth \$659,059.74, and 249,293 garments worth \$878,262.64, with most of the latter destined for resale to K-Mart. The buyer made only one partial payment of \$200,000, which was credited toward the October order, but failed to pay the remaining amounts. On 25th November 2007, the buyer submitted another order for 13,735 garments worth \$67,433.75. As the payment failures continued, the parties signed a modification agreement on 8th December 2007, under which the buyer agreed to pay \$931,000 in five separate installments (scheduled between 14th December 2007, and 20th April 2008) and to provide a letter of credit securing the K-Mart order. Despite this agreement, the buyer had neither made any of the scheduled payments nor issued the required letter of credit. Consequently, the seller halted the delivery of the remaining garments. Then the buyer sued, claiming damages for breach of contract under the CISG.

The court determined that the buyer's actions constituted a fundamental breach under Article 25 of the CISG. Regarding the garments already delivered, the buyer's payment of less than 20% of the total purchase price significantly denied the seller its rightful expectation of receiving complete and timely payment. This failure, the court held, constituted a fundamental breach because it went to the heart of the seller's right to receive performance as agreed. However, from a CISG standpoint, the court's

reasoning could have been more precise. Under the CISG, mere delay in payment does not ordinarily amount to a fundamental breach because the seller's interests are protected through the right to claim damages and to fix an additional period for performance (Article 63(1) and 64(1)(b) of the CISG). In this case, the seller effectively granted additional time by negotiating a modified payment plan and waiting around three months before declaring the contract avoided. The buyer's continued failure to perform even under these extended terms properly justified contract avoidance. Therefore, the fundamental breach arose not simply from late payment, but from the persistent failure to cure the default despite being given further opportunities.

For the undelivered garments, the court correctly applied Article 72 CISG. The buyer's failure to make installment payments and to provide the required letter of credit clearly signaled an impending fundamental breach. As a result, the seller was entitled to terminate the contract before the delivery date, since the buyer's conduct demonstrated an unwillingness or inability to fulfill its contractual obligations. In summary, the buyer's repeated failure to pay the amounts due and its breach of the modified payment agreement constituted a fundamental breach under Article 25, justifying the seller's decision to avoid the contract.

#### **Case Law from UPICC Standpoint**

##### ***Matrisul Equipamentos de Precisão Ltda. v. LOHR Sistemas Eletrônicos Ltda.***

In 2012, Lohr Sistemas Eletrônicos Ltda., a Brazilian manufacturer of electronic components, entered into a contract with Matrisul Equipamentos de Precisão Ltda. for the supply of molds essential to its production process. The agreement, structured as a sale on approval (“**compra e venda a contento**”), stipulated that the molds were to be delivered by 16 February 2008, with the price payable in four installments. The contract was secured by a personal guarantee from Ivan Antônio Pedron, the co-defendant. The seller failed to deliver the molds within the agreed timeframe, and when the delivery eventually occurred, the molds were incomplete and defective, failing to meet the specifications required for the buyer's manufacturing operations. Despite these defects, the buyer accepted the molds in their imperfect condition in order to avoid disrupting its commitments to a third-party client.

Lohr subsequently initiated legal proceedings seeking termination of the contract, restitution of amounts paid, compensation for moral damages, and enforced a contractual penalty amounting to 10% of the contract price. The Court of First Instance ruled partially in favor of the buyer by granting a price reduction and ordering the seller to pay the contractual penalty. The Court of Appeal affirmed this decision, concluding that termination of the contract was not warranted because the breach was not considered fundamental. The court reasoned that the buyer's decision to retain the defective molds and continue

using them to meet its obligations to third parties indicated that its primary interest was in preserving the contract rather than terminating it. The court further noted that the buyer, as commercial entity, could not have been unaware of what is generally recognised in commercial practice and confirmed, for example, by Article 7.3.1 of the UPICC that a contract may be terminated only where the breach is fundamental where it deprives the aggrieved party of what was entitled to expect under the contract.

***Don Victorino v. Claimants (undisclosed)***

In 2008, three Spanish individuals (the sellers) agreed to exchange a parcel of land with Victorino, a private developer (the buyer), in return for a building. Victorino, however, failed to deliver the building within the agreed timeframe, and no real progress had been made even at the time of litigation.

Since timely delivery of the building was considered a fundamental obligation, the buyer's failure to perform gave the sellers the right to terminate the contract. This conclusion was upheld by all levels of the Spanish courts, based on both Article 1204 of the Spanish Civil Code and Article 7.3.1 of the UNIDROIT Principles.

Victorino challenged the claim through multiple defenses, arguing:

- 1) His failure to deliver was not essential and did not justify contract termination.
- 2) The principle of contract conservation applied, given that he had undertaken urbanization works and precursor agreements.
- 3) He acted without intentional misconduct.

However, urbanization works were not part of the main contractual obligation whose breach justified termination, and Victorino's reference to them was irrelevant in this case. The trial court (First Instance) ruled in favor of the sellers, declaring the contract terminated and awarding damages, including a contractual penalty and a daily fine for delay.

Victorino then appealed to the Court of Appeals in Ávila, which upheld the decision in full. The appellate court applied Article 7.3.1 of the, as well as PECL and CISG provisions, concluding that Victorino's failure had fundamentally deprived the sellers of what they were contractually entitled to. The court emphasized that modern contract law focuses on frustration of contractual purpose, not the breaching party's intention, to determine fundamental breach.

Victorino further appealed to the Spanish Supreme Court (Cassation), which dismissed all grounds of appeal, reaffirming the lower courts' findings. However, the Supreme Court modified one aspect: it removed the €105,600 penalty relating to delay, while leaving all substantive findings intact, including contract termination. It also ordered the return of any deposit, denied costs at all stages, and remanded the case for administrative handling. Thus, the courts consistently held that timely delivery was essential, and Victorino's prolonged failure to deliver justified contract termination under both Spanish

law and the international standard of fundamental breach as defined in Article 7.3.1 UPICC.

## CONCLUSION

The doctrines of fundamental breach in the CISG and UPICC serve as crucial protections for contractual expectations in international trade, yet they adopt markedly different approaches with significant practical effects for contracting parties. The CISG provides a clear, rule-based framework centered on substantial deprivation and foreseeability, promoting predictability, reducing opportunistic terminations, and fostering contractual stability—beneficial for risk assessment and contingency planning. In contrast, the UPICC employs a flexible, multifaceted analysis that considers essential obligations, intentional or reckless non-performance, future performance expectations, and disproportionate economic loss, allowing for nuanced decisions aligned with the complexities of contemporary commerce but potentially increasing interpretive uncertainty. Both aim to balance fairness and stability, so the preference between them often depends on whether parties prioritize the CISG's certainty or the UPICC's adaptability. Future research could investigate the development of hybrid models that integrate the CISG's structured clarity with the UPICC's contextual flexibility, alongside empirical studies of judicial and arbitral interpretations of borderline fundamental breach cases to understand how these doctrines function in practice.

## REFERENCES

- Al., J. P. et. (2017). The Exclusion of the Validity of the Contract from the CISG: Does it still Matter? *Journal of Business Law*.
- Bjorklund, A. (2018). Article 25. *Commentary on the UN Convention on the International Sale of Goods (CISG) (2nd Ed)*.
- Block, M. J. (2016). The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes. *Rutgers Law Record: The Digital Journal of Rutgers School of Law*.
- Bridge, M. (2014). The CISG and the UNIDROIT Principles of International Commercial Contracts. *Uniform Law Review*.
- Chaves, V. (2024). International Harmonisation of Contract Law and The UNIDROIT Principles. *Revista Arace Magazine*.
- CISG-online. (2013). Contracting States. *SSRN*. <https://cisg-online.org/cisg-contracting-states>
- Huber, P. (2015). Termination. *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*.
- Huber, P. (2018). Article 47. *Commentary on the UN Convention on the International Sale of Goods (CISG) (2nd Ed)*.
- International, T. M. P. G. v. S. (2025). ThyssenKrup Metallurgical Products GmbH v. Sinochem International (Overseas) Pte Ltd. *CISG-Online*. [https://cisg-online.org/files/cases/8761/translationFile/2847\\_32766027.pdf](https://cisg-online.org/files/cases/8761/translationFile/2847_32766027.pdf)

## Fundamental Breach of Contract: A Comparative Review of the CISG and UPICC in International Commercial Contract

- Ishida, Y. (2020). Identifying fundamental breach of Articles 25 and 49 of the CISG. *Journal of Law, Policy and Globalization*. <https://repository.law.umich.edu/mjil/vol41/iss1/3>
- Mamytov, Z., & Petsche, M. (2019). *Fundamental Breach of Contract: A Comparative Study of the CISG and Kyrgyz Law*.
- Meyer, L. (2010). *Non-Performance and Remedies under International Contract Law Principles and Indian Contract Law: A Comparative Survey of the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and Indian Statutory Contract Law* (Vol. 60). Peter Lang.
- Nwafor, N. (2011). Comparative Evaluation of the Doctrine of Fundamental Breach under the CISG, UNIDROIT Principles and the English Law. *Master's Thesis, Mykolas Romeris University*. <https://ssrn.com/abstract=2340440>
- Quynh, N. T. (2024). Comparing Foreseeability in Contractual Damages under the CISG, Unidroit Principles and Principles of European Contract Law. *Pázmány Law Review*, 11(1), 147–158.
- Ramberg, J. (2013). Cisg and UPICC as the basis for an international convention on international commercial contracts. *Vill. L. Rev.*, 58, 681.
- Uknevičiūtė, S. (2020). The Concept of Fundamental Breach of the Contract in a Comparative Perspective. *Michigan Journal of International Law*.
- Unidroit. (2016). *Unidroit Principles of International Commercial Contracts 2016*. *Unidroit Principles of International Commercial Contracts 2016*.