





## **Avoidance of Contract under CISG**





**Avoidance of the contract**

# Buyer's right to avoid

- Art. 49.1 (a) Avoidance for fundamental breach of single delivery contract
- Art. 49.1 (b) Avoidance based on failure of seller to comply with Art. 47 request
- Arts. 71-73 Avoidance based on anticipatory breach or installment contract
- Arts. 81-88 Effects of avoidance and preservation of goods

# Buyer's right to avoid

Art. 49.I (a) if the *failure by the seller* to perform any of his obligations under the contract or this Convention amounts to a *fundamental breach* of contract;

Avoidance for breach of single delivery contract

Based on fundamental breach by seller

But not all breaches are fundamental under Art. 25

# Fundamental breach

## Art. 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.

## Questions:

What is buyer entitled to expect?

Has buyer been substantially deprived of that?

Was this result foreseeable by the seller?





**Avoidance of the contract**

# Applying Art. 25

## **What is buyer entitle to expect?**

Focus is on parties' agreement

Agreement -in-fact-Articles 8 and 9

CISG defaults, unless agreed otherwise - incl. Art. 35.2

## **Has buyer been substantially deprived?**

Yes, if buyer has no reasonable use for goods

No need for avoidance if damages are sufficient

**Questions:** Should buyer be required to resell the goods, if damages are sufficient?

If so, can a breach ever be fundamental if buyer can resell goods and recover damages as compensation for its loss?

Should it matter whether seller financial able to pay damages?



# Avoidance and cure

## **Art. 48**

(1) Subject to **article 49**, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations

If seller asserts right to cure, does this affect the buyer's right to avoidance?

Seemingly, "no", as right to cure under Art. 48 is "subject to" Art. 49

However, if seller can reasonably cure any breach, then has buyer suffered a substantial deprivation?

Or, should buyer be required to accept reasonable cure and seek damages?

# Foreseeability under Art. 25

Was buyer's substantial deprivation of its contract expectations foreseeable by seller?

- At what point in time do we measure? →
  - Time contract was concluded
  - Time of performance by the seller
- How do we apply foreseeability test? →
  - Second distinct step after substantial deprivation
  - As factor in single test of whether the breach is fundamental
- Who has the burden of proving foreseeability? →
  - May depend on whether one or two part test

# Notice and timing issues

Art. 26. Avoidance requires *notice*

Informs seller that buyer no longer desires performance of seller's obligations

No formality required

Art. 49.2

Notice must be timely



In cases of late delivery  
- Art. 49.2 (a)

In all other cases -  
Art. 49.2 (b)





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