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**“THE IMPACT OF THE UNIFORM
SALES LAW ON DRAFTING THE
CONTRACT FOR INTERNATIONAL
SALE”**

**THE RIGHT TO AVOID THE
CONTRACT – THE CONCEPT OF
“FUNDAMENTAL BREACH” UNDER
THE CISG**

**Carlo Mastellone
Studio Legale Mastellone, “LegAll[®] Firenze”
Via Gustavo Modena, 23
50121 Firenze (Italy)
Tel. +39 055.4620040
Fax +39 055.475854**

**e-mail c.mastellone@studiomastellone.it
www.studiomastellone.it
www.leg-all.it**

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Art. 25 of the CISG refers to *fundamental breach* – *contravention essentielle, incumplimiento esencial, wesentliche Vertragsverletzung, wezentlijke tekortkoming, infrazione essenziale, bitna povreda*.

«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».

«Contravention au contrat commise par l'une des parties est **essentielle** lorsqu'elle cause à l'autre partie un **préjudice** tel qu'elle la **prive substantiellement** de ce que celle-ci était en droit d'attendre du contrat, **à moins** que la partie en défaut **n'ait pas prévu** un tel résultat et qu'une **personne raisonnable** de même qualité placée dans la même situation **ne l'aurait pas prévu non plus**».

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1. Relevance of the fundamental breach.

The “fundamentality” of the breach is the basic criteria based upon which it is possible to determine whether a given contract may be legitimately terminated or not by the party suffering the breach of an international sales contract. It is noteworthy that the termination or avoidance of the contract is an **exceptional remedy** under the CISG, which should be regarded as an *extrema ratio* when all the other devices (*e.g.* reduction of the price, compensation, reparation, etc.) fail to maintain or restore the economic goal of the contract.

In defining the expression «*fundamental breach*» the distinction between breaches that are fundamental as opposed to breaches that are not fundamental is critical for the purpose of elaborating the criteria that differentiate the situations where a contract will be kept in life as opposed to the situations where to the contrary the contract will cease to exist.

The “fundamental breach” is taken into account in respect of the following:

- a) The buyer’s right to declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or the Convention amounts to a fundamental breach of contract (Art. 49.1.(a));

- b) The buyer's right to declare the contract avoided in its entirety if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract (Art. 51.2(2));
- c) The seller's right to declare the contract avoided in its entirety if the failure by the buyer to perform any of his obligations under the contract or the Convention amounts to a fundamental breach of contract (Art. 64.1.a(1));
- d) The right of either party to declare the contract avoided if, prior to the date for performance of the contract, it is clear that the other party will commit a fundamental breach of contract (Art. 72.1);
- e) The right of either party, in the case of a contract for delivery of goods by instalments, to declare the contract avoided with respect to an instalment, if the failure of the other Party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment (Art. 73.1(1));
- f) The right of either party to declare the contract avoided for the future, provided that he does so within a reasonable time if one Party's failure to perform 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 (Art. 73.2(2));
- g) The fundamental breach is also of critical importance within the ambit of the questions of the **conformity of the goods** with the contract, taking into account that if the goods do not conform with the contract, the buyer may not require delivery by the seller of substitute goods if the lack of conformity does not constitute a fundamental breach of contract (Art. 46.2); and
- h) Finally the notion of fundamental breach is also relevant with regards to the questions relating to the **passing of risks**: if the seller has committed a fundamental breach of contract, the buyer's rights to which the buyer is entitled as an effect of the breach of contract (the right to require performance by the seller or the remedy to declare the contract avoided) subsists independently of the circumstance that the risks have been transmitted to the buyer (cf. Art. 70).

2. The detriment (*préjudice*) to the other party (not in breach).

According to Art. 25 CISG the first element that needs to be ascertained to qualify a breach as "fundamental" is to verify whether such breach resulted in a «*detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract*».

2.1. Breach of the "primary" or main obligation.

From the point of view of the distinction made in contract law between "primary" or "main" obligations" and "secondary obligations" of an "ancillary nature", the concept of "fundamental breach" clearly applies more frequently in case of a breach of the "principal" obligations under the contract. Indeed, such breaches are more incline "substantially to deprive" the contract of its economic goal, *i.e.* to deprive the party not in breach of what he is entitled to expect under the contract. This situation applies if and when the circumstances which have led the parties to the determination of concluding the contract disappear. In the presence of a fundamental breach of contract by either party, the other party loses his interest in the performance of the agreement. It should be underlined, though, that not every breach of a principal obligation is qualifiable as "fundamental", but only those that are so serious as to frustrate the expectations of the parties.

The jurisprudence has dealt with this issue on a number of occasions and the party not in breach has exercised his right to declare the contract avoided in the case of fundamental breaches relating to the following:

- a) the non-conformity of the goods
- b) delays in delivery
- c) non-payment of the purchase price
- d) failure to comply with the obligation to take delivery of the goods.

2.2. Breach of the “secondary” obligation (of an ancillary nature).

Even the non-performance of an obligation having an ancillary nature may be relevant for the purpose of determining the existence of a fundamental breach of contract, if the party entitled to the performance has a specific interest to such performance. In this sense, unless otherwise agreed, the breach of an obligation of an ancillary nature may amount to a fundamental breach if such breach has had an effect, of whatever kind, on the performance of the principal obligation, resulting in the party not in breach no longer being interested in the performance of the contract.

It is clear that the above will be dependent on the correct interpretation of the contract and of the specific circumstances. It is therefore up to the judge to determine, on a case-by-case basis, whether an ancillary obligation has an essential nature, and specifically whether certain obligations such as:

- the obligation to acquire certain authorisations or permits, or
- to obtain certain certificates or other documents, or
- the issuance signing of an insurance policy, or
- the protection of trademarks or other relations,

may be qualified as “essential obligations”.

3. Foreseeability of the «detriment» to the other party (*la prévisibilité du préjudice*).

The parties may expressly agree in the contract that a given obligation and its performance have a special importance for the beneficiary of the obligation – hence constitute an essential element of the contract. The breach of the obligation in question will not entitle the other party to argue that he was not aware of its essential nature and therefore to object that the contract may be legitimately avoided in case of breach.

In other words, in the presence of a contract clause expressly and specifically giving importance and relevance to certain specific obligations (for example, delivery within an agreed deadline), the party that has committed the breach will no longer be entitled to object that it did not have the intention of causing damages to the other party and that it was not aware of the consequences resulting from its action.

Therefore if the contract clauses are drafted in a clear manner, hence leaving no doubt on the common intention of the parties, the party in breach will not be entitled to rely on the fact that it *«did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result»*.

On the other hand, if the parties did not take the precaution of specifically agreeing the “special importance” given to certain obligations laid down in the contract or to the performance, such special importance may well result from the circumstances of the contract, such as the nature of the breach, or from the negotiations leading to the conclusion of the contract.

Therefore:

- obtaining an insurance policy;
- obtaining certain permits or certificates;
- the date of delivery not being expressly stipulated, but its importance that may be presumed in consideration of the specific nature of the sale, etc.,

all the above may be identified in the course of the negotiations as “essential elements” or conditions leading to the conclusion of the contract, without which the party would not have consented to the conclusion of the contract itself.

In the circumstances, the party not in default would be entitled to terminate the agreement for breach of performance of one of the above said obligations, and it would have little difficulty in submitting evidence that the party in breach was aware of the importance that the former gives to the performance of such specific obligation; hence excluding the possibility for the party in breach to resort to the criteria of non-foreseeability as laid down by the last sentence of Article 25 CISG «[...] **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**».

The criteria of the “foreseeability” applies in these situations where the parties have failed to expressly provided for in the agreement the “special importance” of a given obligation, in the event that such argument cannot be drawn from discussions during the negotiations or from the special nature of the obligation in question. In the latter situations it becomes necessary to resort to interpretation techniques such as those laid down by Article 8.1 of the CISG – «*statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was*».

If the above is not applicable, then «*statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances*» (Art 8.2.). In other words, it becomes necessary to investigate whether a reasonable business person belonging to the same field of business or doing business in the same economic sector would have been able to detect the importance attached to the obligation that has been breached.

4. Burden of proof.

Interestingly enough, Art. 25 distributes the burden of proof regarding its elements among the parties of the contract. The proof that the breach amounts to «*such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract*» lies with the party not in breach. On the contrary, the element of foreseeability acts like a cause of justification, such as it is the party in breach that has the burden of proving that he «*did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen*» that the breach would frustrate the contractual expectations of the counterparty.

5. Recent jurisprudence on art. 25 CISG (last five years, 2007-2011) examined.

- **Australia** 13 August 2010 Federal Court of Australia (*Cortem SpA v. Controlmatic Pty Ltd*);
- **Switzerland** 16 December 2009 Bundesgericht (Supreme Court) (*Chemical products case*);

- **Netherlands** 9 December 2009 *Rechtbank* [District Court] Zwolle (___ v. *Bortly Neon B.V.*);
- **United States** 29 October 2009 Federal District Court [Florida] (*Banks Hardwoods Florida, LLC v. Iglesias S.A.*);
- **France** 7 October 2009 *Cour d'appel* [Appellate Court] Paris (*Computer motherboard case*);
- **Netherlands** 29 July 2009 *Rechtbank* [District Court] Arnhem (*Minibus case*);
- **Spain** 14 July 2009 *Audiencia Provincial* [Appellate Court] Madrid;
- **Spain** 6 July 2009 *Audiencia de Alicante* (*Aluminum cans case*);
- **United States** 29 May 2009 Federal District Court [New York] (*Doolim Corp. v. R Doll LLC et al.*);
- **Switzerland** 18 May 2009 *Bundesgerichtshof* [Federal Supreme Court] (*Packaging machine case*);
- **United States** 26 March 2009 U.S. District Court [Ohio] (*Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*);
- **Spain** 24 March 2009 *Audiencia Provincial* [Appellate Court] Barcelona (*Cuttlefish case*);
- **Germany** 2 April 2009 *Oberlandesgericht* [Appellate Court] Hamm;
- **Netherlands** 3 February 2009 *Gerechtshof* [Appellate Court] Leeuwarden (*JPB Industrial Services B.V. v. Buchen Industrial Services N.V.*);
- **Greece** 2009 Decision 4505/2009 of the Multi-Member Court of First Instance of Athens (*Bullet proof vest case*);
- **Greece** 2009 Decision 8161/2009 of the Single-Member Court of First Instance of Athens (*Mops case*);
- **China** 25 December 2008 Shanghai First Intermediate People's Court [District Court] (*Shanghai Anlili International Trading Co. Ltd. v. J & P Golden Wings Corp.*);
- **Italy** 11 December 2008 *Tribunale di Forlì* [District Court] (*Mitias v. Solidea S.r.l.*);
- **Germany** 18 November 2008 Appellate Court Brandenburg (*Beer case*);
- **Switzerland** 6 November 2008 *Kantonsgericht* [Canton Court] Glarus (*Bags case*);
- **Netherlands** 7 October 2008 *Gerechtshof* [Appellate Court] Arnhem (*Arens Sondermaschinen GmbH v. Smit Draad / Draad Nijmegen B.V.*);
- **Switzerland** 26 September 2008 *Appellationsgericht* [Appellate Court] Basel-Stadt (*Packaging machine case*) **25B**;
- **Switzerland** 12 September 2008 *Amtsgericht* [District Court] Sursee (*Second-hand tractor case*);
- **United States** 20 August 2008 U.S. District Court [New York] (*Hilaturas Miel, S.L. v. Republic of Iraq*);

- **China** 18 April 2008 CIETAC Arbitration Award [CISG 2008/01] (*PTA powder case*);
- **United States** 16 April 2008 U.S. District Court [New York] (*Macromex Srl. v. Globex International, Inc.*);
- **Germany** 25 January 2008 *Oberlandesgericht* [Appellate Court] Hamburg (*Café inventory case*);
- **Spain** 17 January 2008 Supreme Court (*Used automobiles case*);
- **Spain** 27 December 2007 *Audiencia Provincial* [Appellate Court] Navarra (*Case involving machine to repair bricks*);
- **Germany** 27 November 2007 *Bundesgerichtshof* [Federal Supreme Court] (*Glass bottles case*);
- **Germany** 21 November 2007 *Oberlandesgericht* [Appellate Court] Koblenz (*Shoes case*);
- **Switzerland** 13 November 2007 *Bundesgericht* [Supreme Court];
- **Slovak Republic** 25 October 2007 Regional Court [District Court] Zilina (*Elastic fitness clothing case*);
- **American Arbitration Association** 23 October 2007 [Interim Award] (*Macromex Srl. v. Globex International Inc.*);
- **Serbia** 1 October 2007 Foreign Trade Court of Arbitration, Serbian Chamber of Commerce (*Timber case*);
- **Switzerland** 30 August 2007 *Kantonsgericht* [District Court] Zug (*GMS modular case*);
- **Switzerland** 26 July 2007 *Tribunal cantonal* [Appellate Court] Jura (*Industrial furnace case*);
- **China** 24 July 2007 CIETAC Arbitration Award [CISG 2007/07] (*Flexo label printing machine case*);
- **Netherlands** 18 July 2007 *Rechtsbank* [District Court] Utrecht (*Prodema S.A. v. Michon B.V.*);
- **Austria** 4 July 2007 *Oberster Gerichtshof* [Supreme Court] (*Auto case*);
- **China** 30 June 2007 CIETAC Arbitration Award [CISG 2007/04] (*Color concrete block production line case*);
- **Slovak Republic** 27 June 2007 Supreme Court Zilina (*Elastic fitness clothing case*);
- **Slovak Republic** 28 May 2007 Regional Court [Appellate Court] in Kosice (*Mitsubishi automobile case*);
- **Poland** 11 May 2007 Supreme Court (*Shoe leather case*);
- **China** May 2007 CIETAC Arbitration Award [CISG 2007/06] (*Hammer mill case*);
- **Switzerland** 27 April 2007 *Tribunal cantonal* [Appellate Court] Valais (*Oven case*);

- **Switzerland** 19 April 2007 *Pretore del Distretto* [District Court] Lugano (*Children's play structure case*);
- **Stockholm Chamber of Commerce** 5 April 2007 (*Pressure sensors case*);
- **Spain** 22 March 2007 *Audiencia Provincial* [Appellate Court] Madrid;
- **Spain** 20 February 2007 *Audiencia Provincial* [Appellate Court] Madrid (*Sunprojuice DK, Als v. San Sebastian, S.c.A.*);
- **Germany** 12 January 2007 *Oberlandesgericht* [Appellate Court] Köln.

6. Relevant cases that dealt with the qualification of a breach as fundamental.

6.1. Cases in which the courts found that the breach was “fundamental”.

- 1) **Netherlands 29 July 2009 District Court Arnhem (*Minibus case*).**
SELLER’S COUNTRY: Netherlands (defendant); BUYER’S COUNTRY: Germany (plaintiff); GOODS: Minibus.
➤ If the Seller, after having repaired the good delivered, refuses to return the good to the Buyer on the basis that the Buyer has not paid the entire purchase price, the Seller commits a fundamental breach and the Buyer is entitled to avoid the entire contract.
- 2) **United States 29 May 2009 Federal District Court [New York] (*Doolim Corp. v. R Doll, LLC, et al.*) (*Garment case*).**
SELLER’S COUNTRY: South Korea (plaintiff); BUYER’S COUNTRY: United States (defendant); GOODS INVOLVED: Garments (women’s knit pants, dresses and tops).
➤ Payment by the Buyer of only 20% of the purchase price constitutes a Buyer’s fundamental breach.
- 3) **Swiss Federal Supreme Court (Bundesgericht), 18 May 2009 (*Packaging machine case*).**
SELLER’S COUNTRY: Switzerland; BUYER’S COUNTRY: Spain; GOODS INVOLVED: Packaging machine.
➤ If a packaging machine, expected under the contract to package 180 vials per minute, has an actual performance of 52 vials per minute, this is a fundamental breach. This is especially the case when a mere price reduction could not be considered because Buyer’s loss of productivity throughout the expected lifetime of the machine exceeds the purchase price by far.
- 4) **China 25 December 2008 Shanghai First Intermediate People’s Court [District Court] (*Shanghai Anlili International Trading Co. Ltd. v. J & P Golden Wings Corp.*).**
SELLER’S COUNTRY: France (defendant); BUYER’S COUNTRY: People’s Republic of China (plaintiff); GOODS INVOLVED: Liquors.
➤ If Seller delivers a first installment of goods that are seriously defective, this represents a fundamental breach that entitles the Buyer to terminate the contract with respect to that installment. If, moreover, the breach has the effect of breaking the trust between the parties with relation to future installments, the Buyer is entitled to terminate the whole contract.

- 5) **Italy 11 December 2008 Tribunale di Forli [District Court] (*Mitias v. Solidea S.r.l.*).**
SELLER'S COUNTRY: Italy; BUYER'S COUNTRY: Slovenia; GOODS INVOLVED: Shoes.
- When from the Seller's behavior it can be inferred that the defects of the goods could not be removed, so that any counteroffer cannot be considered adequate for making up for the lack of conformity without an unreasonable inconvenience to the buyer, there is fundamental breach on the part of the Seller.
- 6) **China 18 April 2008 CIETAC Arbitration proceeding (*PTA powder case*).**
SELLER'S COUNTRY: Sweden (respondent); BUYER'S COUNTRY: People's Republic of China (claimant); GOODS INVOLVED: PTA powder (waste product).
- Delivery of goods that are not in conformity with the quality requirements under the contract and are unfit for import because the quality standards required by the (China) customs for importation are not met, constitutes a Seller's fundamental breach.
- 7) **Germany 21 November 2007 Appellate Court Koblenz (*Shoes case*).**
SELLER'S COUNTRY: Italy (plaintiff); BUYER'S COUNTRY: Germany (defendant); GOODS INVOLVED: Shoes.
- Particularly when the Buyer runs a small resale shop, so that the resale of defective goods might easily lead to a general loss of trust in Buyer's reputation among its customers, a delivery which led to 36 complaints of Buyer's customers constitutes a fundamental breach of contract on the part of the Seller.
- 8) **Serbia 1 October 2007 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (*Timber case*).**
SELLER'S COUNTRY: Romania (respondent); BUYER'S COUNTRY: Serbia (claimant); GOODS INVOLVED: Timber (poplar).
- In a contract for the purchase of timber to be delivered in installments, complete failure to deliver the first installment while keeping the advance price, constitutes a Seller's fundamental breach with respect to that delivery.
- 9) **China 24 July 2007 CIETAC Arbitration proceeding (*Flexo label printing machine case*).**
SELLER'S COUNTRY: Denmark (respondent); BUYER'S COUNTRY: People's Republic of China (claimant); GOODS INVOLVED: Flexo label printing machine.
- When the defects of the machine delivered cannot be eliminated within a reasonable time with reasonable efforts by the Seller, the Buyer is deprived of its foreseeable contractual expectations and the Seller commits a fundamental breach.
- 10) **Austria 4 July 2007 Supreme Court (*Auto case*).**
SELLER'S COUNTRY: Austria (defendant); BUYER'S COUNTRY: Germany (plaintiff); GOODS INVOLVED: Cars.

- If a car has such defects that negatively affects driving safety for all passengers, and that also reasonably hinder the possibility of reselling it, Seller has committed a fundamental breach.

11) China 30 June 2007 CIETAC Arbitration proceeding (*Color concrete block production line case*).

SELLER'S COUNTRY: Germany (respondent); BUYER'S COUNTRY: People's Republic of China (claimant); GOODS INVOLVED: Color concrete block production line.

- Notwithstanding timely delivery of the good (a concrete block production line machine), the Seller commits a fundamental breach if he fails to provide the Buyer with all the drawings and technical materials that are needed to complete the civil works for the installation of the machine, as provided for under the contract.

12) China May 2007 CIETAC Arbitration proceeding (*Hammer mill case*).

SELLER'S COUNTRY: Germany (respondent); BUYER'S COUNTRY: People's Republic of China (claimant); GOODS INVOLVED: Hammer mill.

- Delivery of goods (hammer heads) that are a critical part of a device (a mill) and that weigh over 10% more than what is specified in the contract is a fundamental breach.

13) Switzerland 19 April 2007 District Court Lugano (*Children's play structure case*).

SELLER'S COUNTRY: Italy (defendant); BUYER'S COUNTRY: Switzerland (plaintiff); GOODS INVOLVED: Children's play structure.

- Delivery of a structure destined for use by the general public that does not meet neither the contractual specifications, nor the minimum legal and technical safety rules (which are an implied requirement of the contract) constitutes a fundamental breach.

6.2. Cases in which the courts found that the breach was not “fundamental”.

1) Spain 14 July 2009 Appellate Court Madrid.

SELLER'S COUNTRY: China; BUYER'S COUNTRY: Spain; GOODS INVOLVED: Flags of Portugal.

- When the goods sold are of little value, destined to be used as a promotional gift attached to a publication, the existence of defects that do not prevent the goods from being used for that finality does not constitute a fundamental breach.

2) Germany 18 November 2008 Appellate Court Brandenburg.

SELLER'S COUNTRY: Germany (plaintiff); BUYER'S COUNTRY: Belgium (defendant); GOODS INVOLVED: Beer.

- It is not a fundamental breach if, in a three years contract, one particular year the Buyer orders 7.5% less goods than what has been agreed in the contract.

- 3) **Germany 25 January 2008 Appellate Court Hamburg.**
 SELLER'S COUNTRY: Netherlands (defendant); BUYER'S COUNTRY: Spain (plaintiff); GOODS INVOLVED: Inventory for a café.
- In cases of delivery of defective goods, they must be practically useless for the buyer in order for the breach to be fundamental. If the defective goods can be put to use – and even where only restricted use is possible – there will generally be no fundamental breach of contract. If Buyer has actually made use of a considerable part of the inventory, it has demonstrated that it has been interested in this particular part.
- 4) **American Arbitration Association 23 October 2007 (*Macromex Srl. v. Globex International Inc.*) Interim Award.**
 SELLER'S COUNTRY: United States (respondent); BUYER'S COUNTRY: Romania (claimant); GOODS INVOLVED: Frozen chicken parts.
- Delivery after the expiration of a an additional two weeks period expressly granted in the contracts beyond the fixed delivery date does not constitute a fundamental breach if the parties' prior course of dealing and industry practice allowed for some flexibility in the delivery date. Even if there is no "bright-line" rule for what constitutes a reasonable delay, if the delay was within the parties' and/or industry's definition of "reasonable" it would not be sufficient to find a fundamental breach.
- 5) **Switzerland 30 August 2007 District Court Zug.**
 SELLER'S COUNTRY: France; BUYER'S COUNTRY: Switzerland; GOODS INVOLVED: GMS Modules.
- If Buyer makes partial use of the defective goods, albeit in a limited way (installing them in a different device), there is no fundamental breach on the part of the Seller.
- 6) **Switzerland 26 July 2007 Canton Appellate Court Jura.**
 SELLER'S COUNTRY: Switzerland; BUYER'S COUNTRY: Germany; GOODS INVOLVED: Industrial furnace.
- When only some areas of the good (a furnace) do not comply with mandatory safety regulations, there is no fundamental breach if the defects are easily correctible at low price.
- 7) **Stockholm Chamber of Commerce Arbitration Award of 5 April 2007.**
 SELLER'S COUNTRY: Brazil (respondent and counterclaimant); BUYER'S COUNTRY: People's Republic of China (claimant); GOODS INVOLVED: Pressure sensors.
- When the defects of the goods are minor and do not impair the goods' function, there is no fundamental breach (there is no right to flawless goods).

7. Conclusions

Careful contract drafting is critical: the terms of the agreement must be drafted in such manner as not to leave any doubt on the intention of the contracting parties, on the importance and on the manner of performance of each obligation, on their importance in the eyes of the signing

parties (if an obligation is considered essential, this should be expressly specified in the contract) and on the effects and penalties applicable in case of breach.

Clauses drafted in a clear and specific manner will limit the possibility of abuse and incoherence. Generally speaking the above contributes to preventing bad faith behaviors. It also facilitates the parties in respect of misunderstanding and complex and time-consuming burdens of proof. It follows that a carefully well drafted contract, in principle, will encourage the parties to perform the obligations undertaken in a correct manner.