

Fundamental Breach of Contract: A Comparative Study of the CISG and Kyrgyz Law

by Zamirbek Mamytov

LL.M. SHORT THESIS
COURSE: International Business Transactions
PROFESSOR: Markus Petsche
Central European University
Hungary, Budapest 1051, Nador utca 9.

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ABSTRACT

This paper presents a comparative study of a fundamental breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Civil Code of the Kyrgyz Republic (Kyrgyz law). The main purpose of the study is to examine the provisions of a fundamental breach of contract under the CISG and Kyrgyz law, find their problematic provisions and make proposals to solve those problems. Comparative study is based on the analysis of provisions concerning fundamental breach of contract under the CISG, Civil Code, court decisions on fundamental breach of contract, arbitral awards related to CISG and legal expertise of scholars in the field of a fundamental breach of contract.

The outcome of the legal research demonstrates that the provisions of the CISG and Kyrgyz law concerning a fundamental breach of contract are commonly the same. However, after a deep analysis, several fundamental differences have been established, in particular, differences concerning the definition, constitutive elements and remedies. Moreover, the research showed that there are problematic issues on elements and remedies of fundamental breach of contract both under the CISG and Kyrgyz law. Subsequently, the research findings advance proposals on the coordination of the appropriate provisions of Kyrgyz law with CISG and vice versa.

Keywords: fundamental breach, contract, substantial detriment, foreseeability, remedy, damage, consequences.

INTRODUCTION

The legal regulation of a fundamental breach of contract for the international sale of goods remains the most discussed provisions of the CISG as it plays central role in termination and continuation of contractual relations of the parties. As of 29 December 2015, according to the UNCITRAL, 84 sovereign states adopted the CISG¹, and over two thirds of the world trade is done on the basis of CISG.² This data shows the significance of a fundamental breach of contract. The same situation can be seen in the Kyrgyz Republic as its trade volume has historically reached maximum. The volume of foreign trade of the Kyrgyz Republic for 11 months of 2018 exceeded 5 billion 967.6 million US dollars.³ Thus, a rapid rise of international sales of goods in the world and the Kyrgyz Republic shows the necessity of study of the legal regulation of a fundamental breach of contract provided in the CISG.

The study will focus on the CISG and Kyrgyz law provisions on the legal regulation of a fundamental breach of contract. As prominent experts pointed out the CISG is the most successful convention unifying rules in the sphere of international sale of goods adopted to remove the legal barriers to international trade and unification while the Kyrgyz law is also considered as one of the most advanced laws on the regulation of trade.⁴ However, both the CISG and Kyrgyz law have some inconsistencies in provisions that regulate a fundamental breach of contract as they face

¹ As of 29 December 2015, there are 84 Participating states to CISG

<<https://www.cisg.law.pace.edu/cisg/countries/cntries.html> > accessed on 27 January 2019.

² Martin Koehler and Guo Yujun, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems' 2006, *Pace International Law Review* 123, 20-45.

³ The National Statistical Committee of the Kyrgyz Republic, *Kyrgyzstan in numbers* (The National Statistical Committee Press 2019), 113.

⁴ John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation* (Kluwer Law International 2000) 6; Joseph Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules' (1996) 403 *American Journal of Comparative Law* 39, 45 ; Evgenij Suhanov and Kluwer Volters, *Civil Law (A common part)* (2007) 720; M.Sadikova, *Commentary to the Civil Code of the Kyrgyz Republic (Part 1)*" (Bishkek 2013) 778.

sparked debates over its meaning and interpretation. In spite of the development of world trade and internal trade in the Kyrgyz Republic, some provisions of a fundamental breach of contract still remain uncertain. In this sense, all of the mentioned factors necessitate a comparative analysis of the legal regulation of fundamental breach of contract, find problematic issues and advance concrete proposals on their solution.

The issue of the legal regulation of a fundamental breach of contract under the CISG and Kyrgyz law has never been subject to comparative analysis. There are comparative analysis on the formation of contract of mentioned acts and some attempts to analyze a fundamental breach of contract, but they have not given a full picture of existing issues.⁵ In this regard, taking into account the absence of a comparative research on a fundamental breach of contract, the current research is conducted to analyze relevant provisions of the CISG, Civil Code of the Kyrgyz Republic, the Law of the Kyrgyz Republic on the state regulation of foreign trade and other sources. In particular, the major emphasis has been placed upon the arbitral awards of International Court of Arbitration at the Chamber of Commerce of the Kyrgyz Republic as the most significant cases on fundamental breach of contract have been rendered in commercial arbitration. Moreover, the legal expertise of both CISG and Kyrgyz scholars that focus on a fundamental breach of contract has been analyzed. Finally, the decisions of the courts and arbitration tribunal awards have been analyzed as they are considered the main source of case law and judicial practice.

The main purpose of the study is to conduct a research on the legal regulation of a fundamental breach of contract under the CISG and Kyrgyz law. It seeks to find problematic issues

⁵ Begaiym Esenkulova, *Formation of Contract for the International Sale of Goods - Comparative Study of the CISG and Legislation of the Kyrgyz Republic*, Central European University March 24, (2009); Bakyt Karabaev, 'The Concept of Fundamental Breach of contract in the United Nations Convention on Contracts for the International Sale of Goods (CISG)' 12 (2009) *International Trade & Business Law Review* 82-116.

both under the CISG and Kyrgyz law and make concrete proposals on their solution. The main objectives are the followings:

- Analyze the concept of a fundamental breach of contract;
- Conduct a comparative study of constitutive elements of a fundamental breach of contract as well as available remedies and their consequences;
- Examine the problematic aspects of the legal regulation of a fundamental breach of contract under the CISG and Kyrgyz law;
- Propose concrete solutions of identified issues.

Concerning the research object and delimitation, the study is concentrated on a fundamental breach of contract for international sale of goods under the CISG and Kyrgyz law. It does not cover sale of goods other than regulated by the CISG. It is important to mention as the provision on a fundamental breach of contract under the Civil Code of the Kyrgyz Republic applies to all forms of the contract therefore it covers only the sales contracts regulated by the CISG. The research method is a qualitative study, and it represents a comparative analysis. The study is based on a comparative analysis of the provisions of the CISG and Kyrgyz law as well as court decision, arbitral awards and scholarly writings on the issues of a fundamental breach of contract.

The current research has both theoretical and practical significance. The theoretical significance can be proven by the fact that it is the first work conducted to compare the CISG and Kyrgyz law provisions on a fundamental breach of contract. There is no comprehensive research on the issues of a fundamental breach of contract and their problematic aspects under the CISG and Kyrgyz law as well as proposal of their solution. The concentration of the research on the Kyrgyz law provides a different view to the problems of the CISG as there are only comparative

analysis of the CISG with Germany, USA and other few countries. Thus, the study keeps abreast of the most updated information and makes a significant contribution for the future research. Concerning the practical significance, the research advances concrete proposals on improvement of current problematic issues of a fundamental breach of contract that may be used in future amendments of the legal acts, as well as they can be used in conclusion of sales contracts and other practices.

The thesis outline is constituted of an introduction, two chapters and a conclusion. The first chapter of the thesis is focused on the legal regulation of the concept of fundamental breach of contract under CISG and Kyrgyz law. In particular, it covers a comparative conceptual framework of fundamental breach of contract, constitutive elements of the concept and analysis of available remedies both for buyer and seller as well as consequences after the fundamental breach of contract. The second chapter is focused on problematic aspects of constitutive elements of fundamental breach of contract (i.e. substantial detriment under CISG and detriment and substantiality under Kyrgyz law). Then, it discusses problematic issues of available remedies in case of a fundamental breach of contract. Final section of this chapter provides concluding analysis of both CISG and Kyrgyz law and make proposals on the coordination of the appropriate provisions of Kyrgyz law with CISG and vice versa.

CHAPTER I. THE LEGAL REGULATION OF THE CONCEPT OF FUNDAMENTAL BREACH OF CONTRACT UNDER THE CISG AND KYRGYZ LAW

The first chapter of the thesis is focused on the legal regulation of the concept of fundamental breach of contract under CISG and Kyrgyz law. In particular, it covers a comparative conceptual framework of fundamental breach of contract. Then, it discusses constitutive elements of the concept, demonstrating how CISG and Kyrgyz law differ in determining fundamental breach of contract, and how constitutive elements establish whether a breach of contract is fundamental or non-fundamental. Final section of this chapter provides analysis of available remedies both for buyer and seller as well as consequences after the fundamental breach of contract.

1. CONCEPTUAL FRAMEWORK OF FUNDAMENTAL BREACH OF CONTRACT

Basically, the definition of the concept of fundamental breach of contract in any legal system or convention necessarily remains vague because of the variety of situations it has to cover, and the situations can totally differ from one another.⁶ There is no universal definition or magical formula that can automatically determine whether a breach of contract is fundamental or not. The concept of fundamental breach will rather have to be approached by distinguishing between different normative legal acts definitions and typical case scenarios.⁷ There are general definitions both under CISG and Kyrgyz law that set certain grounds on determining fundamental breach therefore the following section is focused on conceptual framework of fundamental breach of contract under CISG and Kyrgyz Law.

1.1. CISG

⁶ Peter Huber, *The CISG : a new textbook for students and practitioners* (European Law Publishers 2007) 213.

⁷ Ibid.

Fundamental breach plays a crucial role within the remedial system of CISG because the remedies available to the buyer and the seller depend on the characterization of the breach.⁸ In other words, it is a necessary precondition for avoiding the contract⁹; fundamental breach of contract by the seller also entitles the buyer to claim delivery of substantive goods¹⁰ and to enact remedies in spite of the risk having passed to him¹¹ while a non-fundamental breach will be sufficient to entitle the aggrieved party claim damages and price reduction¹². Therefore, there is a need for certainty and predictability since parties must use different measures to effect either a contract avoidance or continuance.¹³ For example, in the case of a fundamental breach of a seller's obligation, once the buyer avoids the contract, the seller must immediately take back the goods supplied, and this necessarily involves risk of damage or loss and expenses such as transportation and storage.¹⁴

Definition of fundamental breach of contract under CISG is vague, and it just provides general interpretive guidelines. Article 25 of CISG provides that 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 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.”¹⁵

⁸ ‘The concept of fundamental breach of contract under the United Nations Convention on Contracts for the International Sale of Goods, CISG’ (1998) <<http://it.ceu.hu/vpn>> accessed 5 February 2019.

⁹ United Nations Convention on Contracts for the International Sale of Goods (hereinafter - CISG), Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984). articles 49(1)(a), 64(1)(a).

¹⁰ CISG, Article 46(2).

¹¹ CISG, Article 70.

¹² CISG, Article 74, 50; Graffi, Leonardo, *Case Law on the Concept of Fundamental Breach in the Vienna Sales Convention*, 3 (2003) International Business Law Journal 338 < <http://it.ceu.hu/vpn>> accessed 5 February 2019.

¹³ Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 (1993) Wash. U.L.Q. 599, 609.

¹⁴ See Robert Koch, *Zum Begriff der wesentlichen Vertragsverletzung im Falle der Lieferung nicht vertragsgemäßer Ware* (1993) RIW 98, 99 (pointing out that the seller has practically no choice but to take immediate possession of the goods delivered and/or try to sell them to a third party once the buyer has avoided the contract).

¹⁵ CISG, Article 25.

Such vagueness is due to the differences existing in respect of the definitions of fundamental breach to be found in the various legal systems, which prevented the drafters from finding an agreement on the type of breach that leads to avoidance of contract or other remedies.¹⁶ However, as it is seen from the definition, CISG provides general interpretive guidelines such as a breach, substantial deprivation (detriment) and foreseeability for the breaching party of the detriment.¹⁷ This means by relying on these guidelines, taking into account relevant legal basis (case law and scholarly articles) and considering all the reasonable circumstances, it is possible to determine whether a breach of contract is fundamental or not. Additionally, the uncertainty created by the definition of fundamental breach can be avoided through a more specific avoidance regime negotiated by the parties or by making use of the avoidance mechanism provided for under articles 49(1)(b) and 64(1)(b).¹⁸ Even though the contracting parties indicate specific regimes, it does not resolve all the problems since the practice shows that they cannot anticipate every problem that might arise. Thus, the circumstances which give rise to fundamental breach still must be determined.¹⁹

In this sense, while determining fundamental breach of contract by relying on general guidelines of article 25, it is important to mention that CISG imposes the list of interpretative considerations. In accordance with article 7(1) of CISG in the interpretation, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.²⁰ In other words, respecting the international

¹⁶ Huber (n 7) 3-4.

¹⁷ Christopher Sheaffer, 'The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law', *Cardozo Journal of International and Comparative Law* 15 (2017) 461-463.

¹⁸ John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (2d ed 2007) 305.

¹⁹ Steven J. Stein, *Sales Contracts and the Impact of the UN Convention on the International Sale of Goods on U.S. Business, in International Commercial Agreements* (Practicing Law Institute, 1999) 49- 79.

²⁰ CISG, Article 7(1).

character of CISG and the need to promote uniformity requires an autonomous interpretation of its terms and concepts in the context of the CISG itself, without reference to any meaning under a particular domestic legal system.²¹ The interpretation of fundamental breach must also promote the observance of good faith in international trade.²² Therefore, by determining fundamental breach of contract under CISG, it is necessary to take into account all the above mentioned guidelines and requirements.

In determining fundamental breach of contract, the enormous role is played by case law and scholarly writings as well. Decisions of foreign courts are not binding on domestic courts, nor are domestic courts required to consider foreign scholarly writing.²³ However, as it is mentioned above, CISG's requirement of having regard for uniformity in its application calls for courts to consider interpretations of the Convention in other countries, thereby highlighting the importance of unified case law.²⁴ In accordance with the research, in most cases the courts and tribunals do not provide a detailed analysis as to the definition of fundamental breach, but the factors enumerated by the courts in determining fundamental breach are similar to those employed by the scholars' commentary.²⁵ Obviously, there is no universal determination of fundamental breach in scholar writings, however, there is a consensus on that the determination must be made in the light of the circumstances of each case.²⁶ The detailed scholarly writings on fundamental breaches of

²¹ Michael J. Bonell, *Methodology in Applying Uniform Law for International Sales Under the U.N. Convention*, Italian National Reports to the 12th International Congress of Comparative Law (1986) 45.

²² "Furniture leather case", Appellate Court München, Germany, (15 September 2004) <<http://cisgw3.law.pace.edu/cases/040915g2.html>> accessed 12 February 2019.

²³ Bonell (n 21) 45; Frank Diedrich, *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG*, 8 (1996) Pace Intl L Rev 303, 313.

²⁴ Honnold (n 18) 27.

²⁵ Ibid.

²⁶ Ibid.

contract of specific goods and circumstances gives an enormous effort on determining whether a breach is fundamental or not.

Having discussed the general definition fundamental breach of contract under CISG and general guidelines on interpretation of the definition, it is essential to mention by whom and how it can be occurred. First, the principal obligations of the buyer are the payment of the purchase price, taking delivery of the goods and examination of the goods²⁷, but the latter is not relevant if the breach is concerned fundamental breach of contract.²⁸ In regard to the first and second obligations, not every non-compliance may necessarily result a fundamental breach of contract.²⁹ For example, there can be short term delays in payment because of weekdays or other reasons (the payment date may coincide with an off-day), and it does not necessarily constitute a fundamental breach. Second, the seller's obligations, in its turn, include delivery of the goods, conformity of the goods, absence of third-party rights or claims and handing over of documents pertaining to the goods.³⁰ Not every breach of its obligations by the seller is a fundamental breach unless they are continuously conducted or substantially deprive the buyer of what he expected, which will be discussed in a second subchapter in a detail.

To sum up, the concept of fundamental breach of contract is determined in article 25 of CISG, and the definition provides fundamental elements of the concept such as detriment suffered by of the contracting parties, substantial deprivation and foreseeability. A breach of contractual obligation is not defined in article 25, but on the 1978 Draft Commentary it says that it should be

²⁷ CISG, Articles 38,53, 60.

²⁸ Kristina Siig, 'Fundamental Breach of the buyer's obligation under the CISG' <<https://www.jura.uni-hannover.de/fileadmin/fakultaet/Institute/Wolf/PreMoot/>> accessed March 14, 2018.

²⁹ Bridge, Michael, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods', *International and Comparative Law Quarterly*, 4 (2010) 911 available at <<http://it.ceu.hu/vpn>> accessed 17 January 2019.

³⁰ CISG, Articles 30,35, 41.

determined in light of circumstances of each case.³¹ The most persuasive approach is when contracting parties suffers an injury, for example, if the buyer cannot resell the delivered goods. Concerning a substantial detriment, a breach of contract must substantially deprive a contracting party what he was entitled to expect under the contract.³² Finally, foreseeability exempts a breaching party from liability unless it is to have been able to foresee the consequences of the breach if it is determined that he could or should have known them.³³ All mentioned general guidelines should be interpreted to promote uniformity and the observance of good faith as well as take into account international character, case law and scholarly writings.

1.2. KYRGYZ LAW

In accordance with the legislation of the Kyrgyz Republic, a fundamental breach of contract is a basis for unilateral change or termination of contract.³⁴ However, such unilateral change or termination of contract is in contradiction with one of the main principles of contract law - freedom of contract, a contract can be changed or terminated by the agreement of the parties.³⁵ When there is a contradiction or collision of law, there is always a potential threat to the interests of contracting parties. In other words, not every violation should lead to serious consequences such as termination of contract, but only those violations where a contracting party substantially deprived what he is entitled to expect under the contract, otherwise there will be a

³¹ Rolf Herber & Brigitte Czerwenka, 'Internationales Kaufrecht, Kommentar zu dem bereinkommen der Vereinten Nationen vom 11 April 1980" ber Vertrge ber den internationalen Warenkauf Art. 49' (1991) 6.

³² Ibid.

³³ Huber (n 7) 17.

³⁴ Civil Code of the Kyrgyz Republic, article 411(2).

³⁵ Civil Code of the Kyrgyz Republic, article 382.

contradiction in ordinary business and a threat of turnover destabilization.³⁶ In this sense, only well-drafted law is able to regulate the legal relationship of the parties and protect their interests.

Conceptual framework of fundamental breach of contract under the legislation of the Kyrgyz Republic significantly differs from CISG since the Civil Code of the Kyrgyz Republic is the primary law that governs all the business transactions, and the concept of fundamental breach is adopted to determine breaches of all the forms of contract, not only contracts related to the sale of goods.³⁷ In this regard, the general definition of fundamental breach of contract is very broad although there are specific guidelines in the section of sale of goods.³⁸ According to the article 411(2) of the Civil Code of the Kyrgyz Republic, “the breach of a contract by one of the parties is recognized as fundamental, causing the other party such damage that it significantly loses what it was entitled to expect when concluding the contract.³⁹” The definition is general since it applies to all type of contracts, but as it has been stated in introduction, this thesis is exclusively focused on fundamental breach in commercial sale of goods. Thus, by reference to this definition the specific requirements of the provision on commercial sale of goods should be taken into account.

There is a separate section of the Civil Code of the Kyrgyz Republic on commercial sale of goods, but there is also not clear definition of the concept of fundamental breach of contract.⁴⁰

However in accordance with article 486(1), it is written that one party can avoid the contract in

³⁶ Interview with Timur Abitov, managing partner of law firm "Terra Lex" and expert in contract law, interview by the author, Skype interview, Budapest/Bishkek, January 21, 2019 (hereinafter referred to as “Interview with Timur Abitov”)

³⁷ The Civil Code of the Kyrgyz Republic (Grazhdanskij kodeks Kyrgyzskoj Respubliki). Part 1 of 8 May, 1996 # 15 (with latest amendments of 6 August, 2018 #88); The Civil Code of the Kyrgyz Republic (Grazhdanskij kodeks Kyrgyzskoj Respubliki). Part 2 of 5 January, 1998 # 1 (with latest amendments of 6 August, 2018 #88) [hereinafter “Civil Code of the Kyrgyz Republic”].

³⁸ Honnold (n 18) 45.

³⁹ Civil Code of the Kyrgyz Republic, article 411(2).

⁴⁰ Ibid.

accordance with article 411(2).⁴¹ In other words, the section of commercial sale of goods does not have any specificity, and it gives a reference to the general definition of fundamental breach.⁴² On the other hand, there is a clear limitations concerning by whom and how fundamental breach can be occurred. In accordance with article 486 of the Civil Code of the Kyrgyz Republic,

1. “a violation of a sales contract on the part of the seller shall be deemed fundamental in the event of: supply of goods of improper quality with defects that cannot be eliminated within the time acceptable for the buyer; recurrent violations of the delivery schedule.
2. “a violation of a sales contract on the part of the buyer shall be deemed fundamental in the event of: recurrent violations of the payment schedule; recurrent failure to take the delivery goods.⁴³”

In other words, only above mentioned actions by the parties of commercial sale of goods can be a fundamental breach of contract. As a result, if these actions occur in a sales contract, non-breaching party may seek remedies with the reference to the general definition of fundamental breach of contract and its general guidelines.⁴⁴

The definition of fundamental breach of contract under the legislation explains the nature of the concept. However, it fails to specify the details and other requirement of fundamental breach as the definition itself too general. In addition to this, there is no specific definition in the section of commercial sale of goods of the Civil Code, except limitations of certain conduct by the parties that may result fundamental breach. Moreover, there is no specific laws under the legislation of the Kyrgyz Republic that gives an additional or supplementary specificity to define the nature of fundamental breach. As a result, since the Kyrgyz Republic’s legal system is civil law based, the

⁴¹ Ibid Article 486(1).

⁴² Elena Solovyeva et al., ed., *The Commentary to the Civil Code of the Kyrgyz Republic* (Bishkek Academia 2005) 31; Cholponkul Arabaev *Civil Law of the Kyrgyz Republic* (Science and Education Printing House 2005) 267.

⁴³ Civil Code of the Kyrgyz Republic, article 486(2)(3).

⁴⁴ Commentary to Part 1 of the Civil Code of the Kyrgyz Republic (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti pervoj), V. 2, Ch. 13-32 (Bishkek Academy Publishing House 2005) 470.

courts cannot refer to the cases therefore the interpretation of the concept is bore by the courts.⁴⁵ According to the laws of the Kyrgyz Republic, the authority to administer justice is given only to the courts of the Kyrgyz Republic.⁴⁶ Courts should analyze all the circumstances of the case, all relevant normative legal acts and render a decision. If the law does not give exact definition or does not say anything, the courts should rely on general principles of law and justice.⁴⁷

Having discussed the conceptual framework of fundamental breach of contract under CISG and Kyrgyz law, generally, a fundamental breach of contract is a serious breach that deprives the plaintiff the main benefit of the contract, and it gives another party a right to take necessary measures, in particular to terminate the contract. The principal difference is that the definition under CISG is made vis-a-vis sales contract while the definition under Kyrgyz law towards all types of commercial contracts. Moreover, in CISG fundamental elements of fundamental breach consists of breach, substantial detriment and foreseeability while Kyrgyz law requires only a breach and substantial detriment. Subsequently, the comparative analysis of fundamental elements of fundamental breach of contract will be discussed in light of the present conceptual framework analysis.

2. ELEMENTS OF FUNDAMENTAL BREACH OF CONTRACT

As it has been already discussed above, both CISG and Kyrgyz law provide vague definition of fundamental breach of contract, but they give general guidelines to define it. General guidelines, in particular constitutive elements such as a breach, substantial deprivation (detriment)

⁴⁵ Commentary to Part 2 of the Civil Code of the Kyrgyz Republic (Kommentarij k Grazhdanskomu kodeksu Kyrgyzskoj Respubliki chasti vtoroj), V. 4, Ch. 23-65 (Bishkek Academy Publishing House 2005) 590.

⁴⁶ The Constitutional Law of the Kyrgyz Republic "On the Status of Judges"(Konstiticionnyi Zakon Kyrgyzskoj Respubliki "O statute sudei") of June 9, 2008 # 141 (with latest amendments of 28 August, 2017 #148), article 1(2).

⁴⁷ Civil Code of the Kyrgyz Republic, article 411(2).

and foreseeability for the breaching party of the detriment, are the key of the determination of what kind of contractual breaches constitute fundamental breach of contract under both legal acts. Since CISG is international convention and drafted to regulate international sale of goods while Kyrgyz law is national law, elements of fundamental breach may have perceived and interpreted differently. Therefore, it is essential to break down comparative analysis of constitute elements of fundamental breach of contract under CISG and Kyrgyz law.

2.1. CISG

In accordance with the definition of fundamental breach of contract under article 25 of CISG, it requires the following elements: a breach, substantial deprivation and foreseeability for the breaching party of the detriment. By referring to a ‘breach of contract by one of the parties’, article 25 requires that the buyer or the seller has breached at least one of his obligations under the contract or CISG, and the existence of second element is already a proof of first therefore it does not require a further detailed analysis of first element.⁴⁸ The second element requires the buyer to prove that the breach has caused him to suffer a detriment which substantially deprives him of what he was entitled to expect under the contract.⁴⁹ However, even if one party’s breach constitutes a substantial detriment, the breach will not be fundamental if the result was not foreseeable.⁵⁰ In other words, foreseeability is conditional, and allows the party in breach to prevent avoidance provided that he proves that he did not foresee and a reasonable person of the same kind in the

⁴⁸ Tallon Denis, Peter Schlechtriem, Ingeborg Schwenzer (ed.). ‘Commentary on the UN Convention on the International Sale of Goods (CISG)’ 4 (2005) *Revue internationale de droit compare* . 424. <<http://it.ceu.hu/vpn>> accessed 18 January 2019.

⁴⁹ Joseph Lookofsky, *Understanding the CISG in the USA : a compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. Kluwer Law International 2004 <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

⁵⁰ Yujun (n 2) 215.

same circumstances would not have foreseen such a result.⁵¹ The second element is related to the aggrieved party, whereas the latter is related to the party in breach. An analysis of two fundamental elements will follow.

Substantial Detriment

Since substantial detriment is a fundamental element of fundamental breach of contract, it is essential to prove the existence of it, otherwise a lack of proof does not result a fundamental breach. According to the prevailing view, a substantial deprivation arises where (a) the non-breaching party no longer has an interest in performance or (b) the non-breaching party cannot reasonably be expected to be satisfied with other remedies (e.g. damages, price reduction).⁵² In other words, the impairment must be so serious that it suppresses the damaged party's interest in the performance of the contract or that said party can no longer be expected to be satisfied with less drastic remedies such as damages, price reduction or repair.⁵³ This in line with the basic principle inspiring the CISG, according to which the avoidance of the contract in cases of fundamental breach should constitute an ultima ratio remedy.⁵⁴ For example, if the seller was obliged to deliver fir-trees for a new year, and it delivered it after one month, the buyer obviously would not have any further interest in performance. Another example is if the buyer delivered contaminated goods, the seller cannot use it at all therefore it would not be satisfied even though the buyer would reduce the price for the goods. Appropriately, if the injured party has only

⁵¹ Graffi (n 12) 338-349.

⁵² Zaheeruddin, Mohammad, 'Avoidance of Contract for Fundamental Breach Under the United Nations Convention on Contracts for the International Sale of Goods, 1980', IUP Law Review, (2016) 6(3) 7.

⁵³ Franco Ferrari, 'Fundamental Breach of Contract Under the UN Sales Convention - 25 Years of Article 25 CISG', (2006) 25 Journal of Law and Commerce, 489-508.

⁵⁴ Ibid.

economic losses because of the breach, but it still has an interest in performance, it can seek for the damages, and it does not necessarily constitute fundamental breach.

The parties are free to determine when and under which circumstances a breach of the contractual expectation is fundamental, and they themselves can make it clear in the contract that particular obligations or methods of performing them are of essential importance for the promisee.⁵⁵ In other words, it may appear that contracting parties agree on certain requirements, and the non-compliance with them will be fundamental breach of contract, for example, conformity of the goods. If the seller delivers non-conforming goods, does it result fundamental breach of contract? What if the buyer does not suffer any loss (detriment) because of non-conformity? Answer to this question was given by the Supreme of Court of Germany, where it stated that if the non-breaching party cannot prove that there is a detriment, there is no fundamental breach of contract.⁵⁶ Consequently, breaches of contract that do not substantially deprive non-breaching party to what it was entitled to expect and contractual requirements that do not result a detriment cannot be considered as fundamental breach of contract.

On the other hand, the business world, especially in developed states, have started attaching the conformity of the goods with ethical standards such as sustainable production, child labor, environmental protection, human rights and etc.⁵⁷ Unsustainable production or child labor does not necessarily influence the physical conformity of the goods, but it is rather ethical non-conformity, and if the clients of such a buyer demand goods that are produced in a sustainable

⁵⁵ Denis (n 48) 424.

⁵⁶ "Cobalt Sulphate Case" (1996), Supreme Court of Germany <<https://cisgw3.law.pace.edu/cases/960403g1.html>> accessed January 29, 2019.

⁵⁷ Jan Hellner, *Ross Cranston and Jan Ramberg, Commercial Law Challenges in the 21st Century* (Lustus Forlag 2006), 250-251.

manner or without involvement of child labor, non-compliance with such requirement may result in loss of clientele, and consequently loss of profit.⁵⁸ Above mentioned contractual obligations on non-conformity of goods can be considered as fundamental breach in such cases since detriment can be immaterial as well. Even though the buyer does not suffer a material loss, it can lose its reputation before its customers, and reputation can result a substantial detriment in the future. Therefore, it is important to consider all the circumstances by determining a substantial detriment.

As a result, detriment does not equal damage, since under article 74 of CISG the party has a right to claim damages even if the breach is not fundamental (or substantial). It appears that the notion of detriment is much broader than that of damage, the economic loss suffered by the aggrieved party is not necessarily the only decisive element for establishing if a fundamental breach occurred.⁵⁹ Under article 74 of CISG, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.⁶⁰ In its technical use it has been said that the detriment need not be real and need not involve actual loss, nor does it necessarily refer to material disadvantage to the party suffering it, but means a legal detriment as distinguished from a detriment in fact and has been defined as giving up something which one had the right to keep, or doing something which he had the right not to do.⁶¹ As Enderlein & Maskow state:

"Though in commercial relations most things can be reduced to a damage, this is not the central issue here. On the contrary, when compensation for damages can serve as the adequate remedial action, this should be an indication of the fact that there is no detriment in the meaning of the Convention. It will be the case, however, when the aggrieved party in remaining bound to the contract is hindered in his

⁵⁸ The concept of fundamental breach of contract under the United Nations Convention on contracts for the International Sale of Goods (CISG) (1998) <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

⁵⁹ Graffi (n 12) 338.

⁶⁰ CISG, article 74.

⁶¹ Ferrari (n 53) 493.

commercial or manufacturing activities in such a way that he can no longer be expected to continue holding on to it. Hence, detriment can be a very complex phenomenon. But it must be in existence at the time of the avoidance of the contract. What matters most in commercial relations are economic results and not formal fulfillment of obligations."⁶²

As it is mentioned above, detriment is always accompanied with substantiality since the article says ‘substantially to deprive’. If we refer to the legislative history of article 25, it says that it should be proved that the detriment caused by the breach should be substantial.⁶³ In fact, in accordance with the prevailing view, substantiality of the detriment should be proved by taking account all the circumstances of each case, but at the same time there is a consensus on that substantiality should be laid upon the contractual expectation of the injured party since article 25 states that “*deprivation of what he is entitled to expect under the contract*”.⁶⁴ In this sense, the expectation of an injured party is a fundamental basis to establish a substantiality of the detriment. It is important to note that some scholars believe that the contractual expectation of the aggrieved party is the only principle to determine a substantiality.⁶⁵ For example, German courts stated in his ruling that “A breach of contract is fundamental when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, the interest in the fulfillment of the contract ceases to exist as a consequence of the breach of the contract (and this was capable of being known by the party in breach of the contract).⁶⁶”

⁶² Fritz Enderlein & Dietrich Maskow, ‘International Sales Law: United Nations Convention on Contracts for the International Sale of Goods’ 113; available at: <<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>> accessed 12 March 2019.

⁶³ Mirghasem Jafarzadeh, ‘Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and Shi'ah Law’ <<http://www.cisg.law.pace.edu/cisg/biblio/jafarzadeh1.html>> accessed 13 March 2019.

⁶⁴ Secretariat Commentary on 1978 Draft Art. 23 [draft counterpart of CISG Art. 25] <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-25.html>> accessed 13 March 2019.

⁶⁵ The concept of fundamental breach of contract under the United Nations Convention on contracts for the International Sale of Goods (CISG) (1998) <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

⁶⁶ Judgment by Oberlandesgericht [Appellate Court] Frankfurt, Germany, 17 September 1991; No. 5 U 164/90. English translation <<http://cisgw3.law.pace.edu/cases/910917g1.html>> accessed 15 March 2019.

To sum up, a key element of the fundamental breach is a substantial deprivation of the contractual expectations of the injured party. Injured party will be substantially deprived if he lost interest in performance and cannot be reasonable satisfied with other remedies. However, a party in breach can escape from contract avoidance if he proves that such a result was not foreseeable and a reasonable person could not have foreseen. An analysis of this element will follow.

Foreseeability

In equivalence with substantial detriment, foreseeability requirement is an ultimate element of fundamental breach of contract. The foreseeability serves as a filter that can save breaching party from the consequences. If the party in breach proves that substantial detriment was not foreseeable, he gets an excuse, and he is able to prevent another party to avoid the contract.⁶⁷ Depending on the agreement of the parties, the party in breach may not have a right to refer to foreseeability. If the parties agreed on specific performances of the party in breach, for example, the seller should have delivered the goods in a fixed date (e.g. Christmas trees in 23-25th of December), there is a little room for the seller to rely on a foreseeability.⁶⁸ On the other hand, if the parties did not agree on specific obligation, more tolerance would be given to the party in breach. Moreover, it is assumed that a party who knows the far-reaching consequences of a breach of contract for the other party, if he is not sure of his possibility to fulfill, either does not conclude the contract at all or makes increased efforts to prevent its violation. Therefore, the fundamentality of a breach is made dependent not only on its consequences but also on its foreseeability by the

⁶⁷ The concept of fundamental breach of contract under the United Nations Convention on contracts for the International Sale of Goods (CISG) (1998) <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

⁶⁸ Ibid.

other party.⁶⁹ In this regard, foreseeability is only a conditional element that must be proven to prevent the contract from being avoided.⁷⁰

In accordance with the prevailing view of case law and scholarly writings, the burden of proof of a foreseeability element is bore by the party in breach.⁷¹ As Liu states:

"As far as foreseeability [precisely, unforeseeability] is concerned the burden lies on the party in breach. This party has to prove that it did not foresee the 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. The aggrieved party on the other hand has to prove that the breach deprived it substantially of what it was entitled to expect under the contract."⁷²

In other words, the party in breach should prove both two points of foreseeability: a) he should prove that he did not foresee the substantial loss of expectation interest that the breach caused the non-breaching party; and b) a reasonable person in a similar situation and in similar conditions would not have foreseen as the party in breach himself. Only if the both points will be proved, the party in breach will be able to avoid the avoidance of the contract. It is important to note that foreseeability element is not only about procedural burden of proof, but also it has a substantive function as it is indicated above (e.g. if the parties indicated specific performance in a contract).⁷³

⁶⁹ Hellne (n 57) 250.

⁷⁰ Franco Ferrari (n 53) 500.

⁷¹ Hossam El-Saghir, 'Fundamental breach: Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 25 CISG' available at:

<<http://www.cisg.law.pace.edu/cisg/text/peclcomp25.html>> accessed 16 March 2019; UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods (8 June 2004),

A/CN.9/SER.C/DIGEST/CISG/25: Digest 1; available at:

<http://www.uncitral.org/english/clout/digest_cisg_e.htm> accessed 17 March 2019.

⁷² Chengwei Liu, *The Concept of Fundamental Breach: Perspectives From The CISG, UNIDROIT Principles And PECL and Case Law* (2nd edition 2005) 233.

⁷³ Ibid.

One of the most controversial issues of a foreseeability element is the time since article 25 of CISG does not expressly state the time when the breaching party had to foresee or should have foreseen the substantial detriment. There is a dispute whether all the circumstances arising after the conclusion of the contract should be taken into account or obligations should be determined only in light of the circumstances known at the conclusion of the contract.⁷⁴ Essentially, the first view seems preferable since under the general principle of good faith which according to case law underlies the Convention, at least to the extent that the party in breach was aware of that subsequent information.⁷⁵ If the latter approach is prevailing, all the information received after the conclusion of the contract by the party in breach about other party's specific requirements and expectations will not be taken into account, and it is in contradiction with the principle of a good faith.⁷⁶ However, there is the still possibility of arguing in support of the this approach.

“As explained when dealing with the concept of the injured party's expectations under the contract, whether or not the injured party was entitled to expect to have a particular benefit should be ascertained within the contract terms and other circumstances which came to the attention of the party in breach at the time of making the contract. The same analysis seems to be applicable to the measurement of foreseeability of the consequences of the breach. It can even go further and argue that the language of Art. 25 is in line with this approach, since it defines the consequences relevant to the determination of fundamental breach in terms of what a party "is entitled to expect under the contract" and the second sentence of the Article refers to the foreseeability of "such result" by the party in breach.”⁷⁷

⁷⁴ Robert Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods' 177-354 <<http://www.cisg.law.pace.edu/cisg/biblio/koch.html>>

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Jafarzadeh (n 63) 200.

In this regard, since contractual expectations of the aggrieved party are formed when they concluded the contract, foreseeability of violations of his expectations should be considered only at that time.⁷⁸

The last important phrase of the definition of a fundamental breach of contract under CISG is “a reasonable person test”. Since it is separated with the phrase ‘and’, it should be applied independently.⁷⁹ In order to find whether a breach was foreseeable, it is important to consider both objective and subjective perspectives of the party. In other words, the party in breach is considered to have been able to foresee the consequences of the breach if, when objectively viewed, it is determined that he could or should have known them.⁸⁰ However, it is possible that the party in breach can have particular knowledge in his activities or in particular sphere therefore he could have foreseen substantial detriment, but a reasonable person or reasonable merchant could not have foreseen. Therefore, the foreseeability element should be considered objectively, and both reasonable person and merchant in the same sphere should be analyzed on the grounds whether they could have foreseen a substantial detriment. In order to objectively analyze a reasonable merchant, he would, therefore, include "all merchants that satisfy the standards of their trade and that are not intellectually or professionally substandard." The features that may characterize reasonable merchants include: a) the merchant's degree of skill and professional qualifications (for example specialized licenses); b) the merchant's professional associations or affiliations which may set competency standards; c) the length of the merchant's business experience; and d) the

⁷⁸ Ibid.

⁷⁹ Dr. Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986)163.

⁸⁰ The concept of fundamental breach of contract under the United Nations Convention on contracts for the International Sale of Goods (CISG) (1998) <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

geographic region in which the merchant does business.⁸¹ As a result, the conjunction "and," makes it possible to conclude that such special knowledge cannot be taken into account, allowing the breaching party to escape a finding of fundamental breach by hiding behind the paradigm of the reasonable person of the same kind in the same circumstances.⁸²

Concluding the analysis of foreseeability under article 25 of CISG, it is important to restate that the Convention sets four major issues for the party in breach to prevent to contract being declared avoided. First, it is a subjective issue, where the party in breach proves that he did not foresee substantial deprivation to the contractual expectations of the aggrieved party. Second, the party in breach bears the burden of proof. Third, the time of foreseeability by prevailing view is the time of conclusion of the contract, but it includes all further relevant circumstances (e.g. the aggrieved party may inform specific date of delivery of goods after the conclusion of contract). Finally, there is an objective issue that requires to consider whether a reasonable person or merchant of the same kind in the same circumstances would not have foreseen a substantial detriment.

2.2. KYRGYZ LAW

The fundamental elements of fundamental breach of contract under Kyrgyz law differ from the elements under CISG. Under Kyrgyz law the breach of a contract by one of the parties is recognized as fundamental, causing the other party such a detriment that it significantly loses what it was entitled to expect when concluding the contract.⁸³ From the following definition it is clear

⁸¹ El-Saghir (n 71).

⁸² Grigera Naón, 'The U.N. Convention on Contracts for the International Sale of Goods' in: Horn/Schmitthoff eds., *The Transnational Law of International Commercial Transactions: Studies in Transnational Economic Law* (Deventer: Kluwer (1982) 89.

⁸³ Civil Code of the Kyrgyz Republic, article 411(2).

that there are two main elements: a) detriment; and b) substantial deprivation of what the aggrieved party was entitled to expect when it concluded the contract. Moreover, there is no requirement concerning foreseeability and reasonable person test. In order to establish an existence of fundamental breach, the damage suffered by the injured party because of the breach of contract and materials proving a significant difference between what the party expected when signing the contract, and what was actually gotten should be considered.⁸⁴

Detriment

The first element can be proved by the presence of damage of injured party i.e. loss, impairment that was suffered as a result of the breach of contract by the party in breach. Thus, the law gives a link to the general concept of a damage, which includes real damage (expenses, damage to property), loss of profit (unearned income) and an income of a person who has violated a right (the person whose right has been violated has the right to demand compensation, along with other losses, of lost profit in an amount not less than such income).⁸⁵ If the CISG completely differs a detriment from damages as a broader concept, Kyrgyz law treats them equally. In other words, in order to establish a fundamental breach, there should be a damage, and Kyrgyz law does not consider the fact that the detriment can occur in the future. For example, if the buyer conducts its business with a good reputation without any child labor, environmental harm and etc., and it requires its suppliers to do so, a violation of such standards by its suppliers does not immediately result a material damage. It is rather will occur later because of its reputation before its customers and other non-governmental organizations that may decrease sales and result loss of profit. At the

⁸⁴ Decision of the Supreme Court of the Kyrgyz Republic, № ЭД-549/15-МЧ-С5, dated from 23 January 2017.

⁸⁵ Civil Code of the Kyrgyz Republic, article 14.

time of the contractual breach, the detriment can be immaterial, but Kyrgyz law requires actual damage and significance of it.⁸⁶

The court practice has taken very tough position towards detriment since a violation is recognized as fundamental only in the case of proof of the occurrence of losses, and not only the fact of losses, but also their size is taken into account.⁸⁷ For example, the court rejected to approve the declaration of contract avoided and stated that there is a no actual damage.⁸⁸ In another case, the court rejected to approve the declaration of the contract avoided because of the insignificant amount of the tenant's debt, despite the existence of a basis of for termination provided by the contract.⁸⁹ The decision was reasoned by the argument that the termination of the contract is a last resort for the tenant's violation of his obligations and is applied in the event that the lessee fails to fulfill the obligation within a reasonable time even after a warning is sent to him.⁹⁰ As it is proven by the facts of case, the party in breach paid more than 50% of its debt therefore the court found the reaming part is not sufficient to declare the contract avoided.⁹¹

An existence of the detriment by itself does not give a right to recognize the violation as fundamental. In order to compensate only detriment, it is enough to approach other remedies such as damages.⁹² When the court finds that there is a detriment, it also should find out whether the difference between what the aggrieved party had the right to expect when concluding the contract

⁸⁶ V.V. Tutynina. 'Restoration of the violated right: the principles of civil law, the purpose or method of protecting civil rights.' 27(1) 2015 Perm University Journal/Vestnik Permskogo Universiteta 86-92.

⁸⁷ Ibid.

⁸⁸ Decision of the Judicial College on the Economic Affairs of the Supreme Court of the Kyrgyz Republic (2 October, 2003), case N B-01-271 / 01-C5.

⁸⁹ Decision of the Judicial College on the Administrative and Economic Affairs of the Supreme Court of the Kyrgyz Republic, (May 11, 2006), case N ED-000188 / 05.MB

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² El-Saghir (n 71).

and what he was actually able to get is really significant.⁹³ Therefore, it is important to establish, taking into account the rules of interpretation of the contract, what specific expectations the injured party set itself at the time of entering into the contract and how much the actions or omissions of the party in breach differ with these expectations.⁹⁴

Substantiality

There is a clear contradiction in Kyrgyz law as it defines detriment as equal to damage in the first element, but in defining the substantiality, it requires broader sense than the concept of damage. Obviously, the aggrieved party can lose what it already has, but implies that in determining substantial detriment, it is necessary to take into account that the aggrieved party suffers not only material loss, but also rights arising from the contract and its legitimate contractual expectations.⁹⁵ As S. Sarbash states:

“A fundamental breach of contract should be made dependent on the concept of ‘substantial deprivation’. In each case, the court must establish the purpose of the contract and what the aggrieved party actually received. It is important to determine the materiality of the damage caused and the purpose with which the party entered into this contract. Further, it is necessary to determine the extent of the damage caused by which leads to the fact that the injured party loses a significant part of his interest in the execution of the contract.”⁹⁶

Here the key moment is the significance of the damage, and how it can be measured? What circumstances should be taken into account by court? Only material loss or immaterial as well?

There is a big dispute on this question in scholarly writings. Some authors claim that the term

⁹³ Civil Code of the Kyrgyz Republic, Article 411(2).

⁹⁴ Yuliya Abova, V.P. Kabalkin, Andrei Mouzolin, *The Civil Code of the Kyrgyz Republic. Part one: Scientific and Practical Commentary* (2nd Edition 2009) 523.

⁹⁵ Decision of the Judicial College on the Administrative and Economic Affairs of the Supreme Court of the Kyrgyz Republic, (March 25, 2008), case N ED- 000949/07-MBS2.

⁹⁶ S.V. Sarbash ‘Restoration of corporate control’, Bulletin of civil law/Vestnik Grazhdanskogo prava No. 4.(2008) 70-79.

‘detriment’ should be interpreted narrowly, otherwise there will be a contradiction with the material damage requirement of fundamental breach of contract. Other authors believe that the ‘detriment’ should include not only material damage and loss of profit, but also immaterial (moral) losses.⁹⁷

Despite the dispute of scholarly writings, judicial practice interprets detriment in a broad way unilaterally. Obviously, this approach is more relevant as by detriments it is implied not only real damages such as losses incurred by the aggrieved party in connection with the destruction or damage to the property, as well as expenses incurred by the aggrieved party or must be incurred in order to restore his violated right.⁹⁸ It is possible that there is no damage or there is but not significant, however, the injured party may significantly loses what it was entitled to expect when concluding the contract.⁹⁹ Therefore, in order to defined fundamental breach of contract, the courts should consider a complex of negative consequences of the violation committed, and not only property losses in the form of real losses or lost profits, for example, later on the reputation of the aggrieved party before its customers may suffer because of the breach.¹⁰⁰

There is no concrete determination of substantiality in Kyrgyz law, and the court itself establishes case by case. This concept is so called evaluation category in civil law therefore in the light of judicial practice and legal expertise, it is possible only to analyze the ways how substantiality is established.¹⁰¹ Both judicial practice and legal expertise established concrete two ways to evaluate a substantiality of the breach. First, the injured party loses exactly what it could

⁹⁷ Ibid.

⁹⁸ Decision of the Judicial College on the Administrative and Economic Affairs of the Supreme Court of the Kyrgyz Republic, (May 11, 2006), case N ED-000188 / 05.MB

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Galina Korotkevich, ‘A restoration of corporate control’
<http://vitvet.com/blog/gkorotkevich/priznaniye_prava_na_ooo> accessed 17 March 2019.

and should have entitled in a contract.¹⁰² Here the courts should rely on article 392 of the Civil Code on interpretation of the contract, which says that “when interpreting the terms of a contract, the court takes into account the literal meaning of the words and expressions contained in it. The literal meaning of the terms of the contract in case of ambiguity is established by comparison with other conditions and the meaning of the contract as a whole”.¹⁰³ In other words, the scope of rights and legitimate interests should be determined primarily by the contract, and they require in each case a detailed and in-depth analysis of the contractual relationship and the applicable law.¹⁰⁴ Second, it concerns the moment at which the legitimate expectations of the injured party should be formed. The law indicates the moment of the conclusion of the contract, but the judicial practice shows that the dynamics of the civil relations should be taken into account.¹⁰⁵ In other words, as it has already mentioned above, it would contradict to the principle of a good faith if the legitimate interest of the parties is limited only to those conditions that were stipulated at the time of the conclusion of the contract, and if later these conditions have changed.¹⁰⁶

There is no concrete definition of substantiality of detriment, but after legal analysis of judicial practice and scholarly writings, it is possible to define the main features of it. Substantial detriment is: a) this is a type of breach of contract; b) a breach of contract must depend on the will of the party in breach; and c) breach of contract should be substantial. In its turn, the substantial means: a) damage in the form of a deprivation; b) the presence of a causal link: a violation leads to damage(s).¹⁰⁷ As a result, there are two constitutive elements of fundamental breach of contract

¹⁰² Yuliya Mihalchuk. ‘The concept of fundamental breach of contract in court practice’ 20 (2015) Law Journal EZh-Yurist 2.

¹⁰³ ¹⁰³ Civil Code of the Kyrgyz Republic, article 392(1).

¹⁰⁴ Ibid.

¹⁰⁵ M.A. Davletbaeva. *Scientific and Practical Commentary on Individual Articles of the Civil Code of the Kyrgyz Republic.*(2015) p. 355-361.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

under Kyrgyz law: a) detriment; and b) substantiality of the detriment. In order to establish a fundamental breach of contract, detriment should be significant. On the other hand, by establishing substantiality of the detriment, the courts may take into account both material and immaterial damages and establish a fundamental breach even though the material damage is not significant. In its turn, substantiality of the detriment is established by analysis of the contractual relations as well as other relevant circumstances that occurred after the conclusion of the contract.

In sum, CISG has more detailed and comprehensive constitutive elements of fundamental breach of contract since it sets three major rules to establish a fundamental breach such as substantial detriment, foreseeability and a reasonable person test. Kyrgyz law sets only two rules that sometimes contradict to each other. First, the substantial material damage should be in presence, and second, by establishing a substantiality of the detriment, damage does not have to be significant as the court considers not only material breach (damage), but also immaterial loss. In other words, Kyrgyz law, judicial practice and scholarly writings give certain links how to establish constitutive elements of fundamental breach, but fundamental breach is within the discretion of the court.

3. AVAILABLE REMEDIES AND THEIR CONSEQUENCES

Basically, remedies are legally enforceable measures of a coercive nature, through which the avoidance of infringements of rights, restoration (recognition) of rights and compensation for losses caused by infringements of rights can be protected.¹⁰⁸ Put another way, if one of the contracting party's rights are violated, he can restore them through available remedies. Both CISG

¹⁰⁸ Katrina Winsor, 'The Applicability of the CISG to Govern Sales of Commodity Type Goods' (2010) 14 *Vindobona Journal of International Commercial Law and Arbitration* 83, 116.

and Kyrgyz law provides generally the same remedies with some exceptional differences, which are discussed below.

3.1. CISG

The CISG provides for various remedies for the parties to a contract should an issue arise in the sale transaction that is not provided for by the parties.¹⁰⁹ The buyer's remedies for the seller's breach of contract are available in articles 45 – 52, and the seller's remedies are available for the buyer's breach of contract in articles 61 - 65.¹¹⁰

Buyer's remedies

In the case of a buyer injured by a fundamental breach, the buyer will have the following options:

- require the seller to perform his obligations and fix an additional reasonable period of time for the seller to perform;
- require the seller either to deliver substitutes if the goods are nonconforming or to repair the nonconforming goods;
- avoid the contract if the seller fails to perform any obligation amounting to a fundamental breach;
- avoid the contract if the goods have been either partially delivered or delivered but nonconforming and
 - a) the buyer does avoid within a reasonable time after the buyer know or should have known of the breach, or
 - b) the seller fails to perform after the buyer fixes an additional reasonable time for the seller to perform, or
 - c) the seller offers and fails to cure by the time indicated in the buyer's reply;
- declare the contract avoided if the goods have been delivered late and such declaration is made within a reasonable time after the buyer was aware that the delivery was made; and

¹⁰⁹ Ibid.

¹¹⁰ CISG, Articles 45-52, 61-65.

- accept delivery and reduce the price to be paid for the nonconforming goods.¹¹¹

Obviously, if the seller breaches the contract, the buyer has to consider all the available remedies and resort to a reasonable one. The buyer should take into account that in case of an avoidance of contract, the legal relationships of the parties will be terminated. If the seller brings a suit against the buyer and the court does not find the occurrence of fundamental breach, the buyer may face protracted litigation and expenses. The buyer should also take into account the future relations with the seller, especially in case of favorable conditions of contract to the buyer (e.g. cheap price, good quality). In such cases, the buyer may resort such remedies as setting an additional time for the seller's performance, price reduction in case of nonconforming goods and etc.¹¹² It is also important to note that in order to resort to remedies, the buyer does not have to bring a suit. It may send oral or written notice to the seller.¹¹³

The first available remedy for the buyer is to require the seller to perform his obligations within a reasonable period of time. Here the key word is a 'reasonable time'. What is a reasonable length of time for the seller to perform will depend on the facts and circumstances of the transaction and may require the buyer to evaluate such factors as the consequences of an extended delay, the seller's ability to deliver, and the buyer's own special needs.¹¹⁴ It is also important that the notice sent by the buyer should be concrete, where specific time for delivery is indicated. Additionally, in case of nondelivery, the buyer should consider whether nondelivery constitutes a fundamental breach (if he can resort to other remedies, it is not a fundamental breach). If the buyer provides an

¹¹¹ Andrew Babiak, 'Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods; (1992) 6 Temple International and Comparative Law Journal 113, 143.

¹¹² Tom McNamara, (2003), 'U.N. Sale of Goods Convention: Finally Coming of Age?' (2003) 32 Colo. Law 11-12, 17, 19-20.

¹¹³ Ibid.

¹¹⁴ Djakhongir Saidov, 'The Law of Damages in International Sales: The CISG and other International Instruments' <<https://www.cisg.law.pace.edu/cisg/biblio/saidov5.html>> accessed 20 January 2019.

additional time for the seller to perform its obligations and the seller fails to do so, the buyer can declare the contract avoided.¹¹⁵

If the goods are nonconforming and they amount to a fundamental breach of contract, the buyer may declare the contract avoided within a reasonable time.¹¹⁶ may require the seller either to deliver substitutes or to repair the nonconforming goods. If the buyer can accept substitute goods or can wait until nonconforming goods will be repaired, he can send a request to substitute goods or repair them (sometimes it is possible to request both).¹¹⁷ If the seller fails to substitute goods or repair them, the buyer will still be able to declare contract avoided.¹¹⁸ Besides that, in some cases of fundamental breach, the seller who has delivered defective goods may offer to cure the defects at his own expense. The seller facing a fundamental breach situation, however, may attempt to cure only if: (1) the remedy does not cause unreasonable delay, inconvenience, or uncertainty of reimbursement for expenses advanced by the buyer; and (2) the buyer does not reject the offer to cure.¹¹⁹

The last available remedy for the buyer is a price reduction. The buyer may resort to this remedy, when the seller delivers nonconforming goods, but the buyer can take a delivery. However, one of the shortcomings of this remedy is that when the buyer resorts it, it loses a right to avoid a contract since it contradicts to the principle of good faith as the buyer may not accept the goods, ask for the price reduction and later avoid the contract.¹²⁰ The buyer still has a right to

¹¹⁵ CISG, Article 49(1)(b).

¹¹⁶ Ibid Article 49(2)(b)(i).

¹¹⁷ Ibid, article 46(2).

¹¹⁸ Ibid, Article 49(2)(b)(ii).

¹¹⁹ Ibid, Article 48 (granting seller the right to cure), articles 48(1), 48(2); Peacock Darren, 'Avoidance and Notion of Fundamental Breach under the CISG: An English Perspective' (1992) 8 International Trade and Business Law Review 95.

¹²⁰ Ibid.

claim damages in addition to price reduction as well as giving reasonable time for the performance, substitution and of nonconforming goods and repairing.¹²¹

Seller's remedies

In the case of a fundamental breach by the buyer's failure to perform his obligations, the seller will have the following options:

- require the buyer to pay the price, take delivery or perform his other obligations (i.e., specific performance);
- set an additional reasonable period of time for the buyer to perform;
- declare the contract avoided within a reasonable time of the buyer has paid the contract price and the fundamental breach is caused by something other than late performance after
 - a) the seller knew or should have known of the breach, or
 - b) the buyer failed to perform within any additional reasonable period of time fixed by the seller, or
 - c) the buyer declared he would not perform during the additional period;
- declare the contract avoided if the buyer has paid the contract price, performed late, and if such declaration is made before the seller became aware of the buyer's late performance; and
- declare the contract avoided without further conditions if the buyer has not paid the contract price.¹²²

As it is mentioned above, the analysis of the seller should be whether the breach is fundamental or not, and if he finds that it is fundamental, he should decide which available remedy to resort. The first remedy for the seller is to require the buyer to pay the price, take delivery or perform his other obligations (i.e., specific performance). The seller has a right to require both contractual obligations and obligations under CISG. However, it is important whether the buyer is going to

¹²¹ Ibid.

¹²² CISG, articles 28, 61, 62, 63(1), 64(2)(b)(i), 64(2)(b)(ii), 64(2)(a), 64(1)(a), 81(1); Amir Al-Hajaj, "The Concept of Fundamental Breach and Avoidance under CISG," Doctor of Philosophy Thesis, (Brunel University School of Law 2015).

cooperate with the seller and does not law governing the contract treats specific performance as a remedy, otherwise, the seller should pursue other available remedies, in particular setting a reasonable time.¹²³ This remedy is considered as the most recommended since the seller may not be sure whether there is a fundamental breach of contract or not. If the buyer fails to perform within an additional time or refuses to perform, the seller will still have a right to declare the contract avoided.¹²⁴ It is principal to mention that the seller still has a right to claim damages in addition to remedies mentioned above.¹²⁵

The most practical remedy is definitely contract avoidance since if the buyer does not pay for the delivered goods, fundamental breach occurs, the seller may declare the contract avoided (i.e. the seller will be confident on fundamental breach since he cannot be satisfied with other remedies, which is usually in question in defining ‘substantial detriment’).¹²⁶ As Kazimierska states:

“The seller is entitled to avoid the contract immediately for a fundamental breach of the contract. The rule of article 64(1)(a) assumes that the breach is committed under the conditions in which the seller's right is effective at once, starting from the day the non-fulfilled obligation became due. Immediate avoidance is also at the seller's option when the buyer declares that he will not pay the price or take delivery of the goods within the additional period of time set by the seller according to article 64(1)(b), or if the seller otherwise receives a notice from the buyer that he will not perform, even if the delay in performance has not amounted to a fundamental breach of contract.¹²⁷”

¹²³ Clothes case, (1995), German District Court of Kessel, Germany <availabke at: <http://cisgw3.law.pace.edu/cases/950622g1.html>> accessed 13 March 2019.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ulrich Magnus, ‘The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases’, *Journal of Law and Commerce*, (2005) 25 422, 423. < <https://www.uncitral.org/pdf/english/CISG25/Magnus.pdf>> accessed 10 March 2019.

¹²⁷ Anna Kazimierska, ‘The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods’ *Pace Review of the Convention on Contracts for the International Sale of Goods* (Kluwer 2005) 79 192.

The time of the avoidance of contract is crucial since the situation in the market may change, and the reasonable time should limit the seller from waiting the market development and speculate with the costs. In case of breaches other than late performance, the seller may pursue his rights within a reasonable time.¹²⁸

The seller's right to declare the contract avoided can be lost or suspended. The main purpose is not to allow the seller to abuse his right to the disadvantage of the buyer.¹²⁹ The Convention does not have a concrete provision, but in accordance with case law and scholarly writings, the seller cannot declare the contract avoided if he already resorted to some available remedies, for example, the seller required to buyer to take the delivery or to perform other obligations.¹³⁰ If the seller has not received performance because he contributed to the buyer's failure by his own act or omission, he has, under article 80, no right to avoidance.¹³¹

Damages

The aggrieved party can be in two positions: first, he can be a party that declared the contract avoided; and second, he can be a party that did not declare. Obviously, the aggrieved party that did not declare the contract avoided can refer to the article 74 of CISG, where he can recover a sum equal to the loss, including loss of profit.¹³² However, such damages are limited as they may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Proceedings of the Congress of the UN Commission on International Trade Law: Uniform Commercial Law in the Twenty-First Century, (United Nations 1995) 86.

¹³¹ Ibid.

¹³² CISG Article 74; John P. McMahon, 'Drafting CISG Contracts and Documents and Compliance Tips for Managers and Counsels: Guide for Managers and Counsels' <available at: <http://iicl.law.pace.edu/cisg/page/guide-managers-and-counsel-drafting-cisg-contracts-and-documents>> accessed 15 March 2019.

conclusion of the contract.¹³³ In the second case, where the injured party declared the contract avoided, there are two possible scenarios. First, after the avoidance of the contract, the injured party has engaged in a substitute transaction in a reasonable manner and within a reasonable time. In this case, the damage will be equal to the difference between the contract price and the substitute transaction price plus incidental and consequential damages, including lost profit less any expenses saved.¹³⁴ Second, if the aggrieved party has not engaged in a substitute transaction, he may demand the difference between the price indicated in the contract and the price of the goods when the contract was avoided. Additionally, the injured party can recover incidental and consequential damages.¹³⁵

Consequences of Contract Avoidance

Before moving to the consequences of the contract avoidance, in article 26 of CISG it is written that the declaration of avoidance of the contract is effective only if made by notice to the other party.¹³⁶ There is no specific requirements concerning the form of the notice and what should it include, but in accordance with the legal expertise, the injured party is highly recommended to indicate that the contract is avoided and the reason of avoidance.¹³⁷ Concerning the consequences after avoidance of the contract, parties of the contract are released from their obligations under the contract with regard to the text of Article 81 of the CISG. Despite the fact that parties of the contract release themselves from further performance under the contract, certain provisions of the

¹³³ Ibid.

¹³⁴ Design of Radio Phone Case, Appellate court of Gent, Belgium, 15 May 2002, <available at: <https://cisgw3.law.pace.edu/cisg/wais/db/cases2/020515b1.html>> accessed 10 March 2019.

¹³⁵ Supra note, 128.

¹³⁶ CISG, article 26.

¹³⁷ Al-Haja, Amir, 'The Concept of Fundamental Breach and Avoidance under CISG,' Doctor of Philosophy Thesis', (Brunel University School of Law 2015) <<http://bura.brunel.ac.uk/bitstream/2438/12043/1/FulltextThesis.pdf>> accessed 9 March 2019.

contract still remain in power.¹³⁸ For example, if the parties agreed on specific remedies on avoidance of the contract, this part of the contract still will be in force as well as dispute clause and recovery of damages and restitution.¹³⁹ By restitution each party is obliged to return the other party received property, and in case of impossibility to return the received in kind - to refund its value through compensation.¹⁴⁰

3.2. KYRGYZ LAW

The Civil Code of the Kyrgyz Republic consists of two parts, where the first part regulates the general legal regulations while the second part regulates concrete forms of contract.¹⁴¹ In the first part, it provides general basis (i.e. fundamental breach of contract) for the change and termination of the contract while in the second part all the available remedies for the contracting parties are written.¹⁴²

Buyer's Remedies

Under Kyrgyz law, there is no provision on available remedies for the contracting parties, but there are written available remedies in every concrete breach of contract which are discussed below. The first possible breach of contract by the seller is nondelivery of the goods. Under Kyrgyz law, if the seller refuses to deliver the goods to the buyer, the buyer has the right to demand the transfer of the goods sold to him and the reimbursement of losses caused by the delay, or declare the contract avoided and demand compensation for damages.¹⁴³

¹³⁸ Darren (n 119) 321.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ The Civil Code of the Kyrgyz Republic, articles 411, 429-486.

¹⁴² Ibid, Article 411, 438, 486.

¹⁴³ Ibid, article 426.

If the seller does not transfer or refuses to transfer to the buyer the documents relating to the goods, the buyer can set him a reasonable time. A reasonable time depends on circumstances of each case. If the documents are not transferred, the buyer has the right to refuse to accept the goods and pay for them, and if they are paid, to demand the return of the paid sum of money.¹⁴⁴ Furthermore, If the seller delivered goods in less quantity than specified by the contract, the buyer has the right either to demand the missing quantity of the goods, or to refuse the transferred goods and to pay for it, and if the goods are paid, request a refund of the amount of money paid.¹⁴⁵

If the goods are nonconforming, the buyer may demand: a) price reduction; b) substitute or repair nonconforming goods; or c) compensation for the losses of substitute or repair nonconforming goods by the buyer. However, if the nonconformity constitutes a fundamental breach (detection of significant defects that cannot be avoided without disproportionate costs or time-consuming, or are detected repeatedly or appear again after their removal and other similar defects), the buyer can: a) declare the contract avoided; and b) to substitute the goods.¹⁴⁶ Finally, there is a general rule on declaration of the contract avoided, where the buyer has a right unilaterally avoid the contract in the event if the seller delivers nonconforming goods with defects that cannot be repaired in time acceptable for the buyer, if the seller repeatedly violates the terms of delivery of goods.¹⁴⁷

Seller's remedies

¹⁴⁴ Civil Code of the Kyrgyz Republic, article 427(2).

¹⁴⁵ Ibid, article 429.

¹⁴⁶ Ibid, article 438.

¹⁴⁷ Ibid, article 486.

As it is mentioned above, remedies under Kyrgyz law are available in every concrete breach of contract. In case of the seller's remedies, in cases where the buyer does not take delivery of the goods or refuses to do so, the seller has the right to demand from the buyer to accept the goods or to declare the contract avoided.¹⁴⁸ If the buyer fails to pay for the goods delivered in accordance with the contract of sale, the seller has the right to demand payment and interest. If the buyer refuses to do so, the seller has the right to declare the contract avoided.¹⁴⁹

One of the exclusive remedies under Kyrgyz law when the buyer does not pay or refuses to pay, the seller has a right to retain goods until the execution of buyer's obligations, in cases where the seller, in accordance with the sales contract, is obliged to transfer to the buyer not only the goods that the buyer has not paid for, but also other related or future goods.¹⁵⁰ Finally, there is a general rule on declaration of the contract avoided, where the seller has a right unilaterally avoid the contract in the event if the buyer repeatedly breaches the term of payment, if the buyer repeatedly violates his obligation on taking the delivery.¹⁵¹

Damages

Under Kyrgyz law, when the aggrieved party resorts available remedies such as price reduction, substitution or contract avoidance, he still has a right to claim damages in addition to them.¹⁵² Damages should be understood as expenses of the party whose rights have been violated, has or will have to make to restore the violated rights loss or damage to his property (real damage),

¹⁴⁸ Civil Code of the Kyrgyz Republic, article 447(3).

¹⁴⁹ Ibid, article 449.

¹⁵⁰ Ibid, article 449(3).

¹⁵¹ Ibid, article 486.

¹⁵² Nazimov I.A. 'A restoration of corporate control' 2 (2014) Russian Juridical Journal/Rossiiskij Juridiceskij Zurnal 95, 100.

and unearned income that the aggrieved party would receive under normal conditions of business if his right had not been violated (loss of profit).¹⁵³ If the party in breach received a profit (e.g. the buyer did not pay for delivery of the goods, and gained a profit using that money), the aggrieved party has a right demand a compensation.¹⁵⁴

Consequences of Contract Avoidance

As it is required under the CISG, Kyrgyz law also states that the declaration of avoidance of the contract is effective only if made by notice to the other party.¹⁵⁵ The notice should include that the contract is avoided and the reason why it is avoided. Concerning the consequences of contract avoidance, under the legislation of the Kyrgyz Republic, when the contract is avoided, obligations of the parties cease. However, one of the most controversial provisions of the Civil Code is that the parties do not have the right to demand the return of what was performed by them under the obligation prior to the avoidance of contract, unless otherwise provided by law or by agreement of the parties.¹⁵⁶ In other words, there is no restitution, and the aggrieved party may demand only damages. Scholars and judicial practice show another practice as they highlight the word ‘otherwise provide by law’ and resort to restitution if it is reasonable.¹⁵⁷

Summarizing the first chapter of the research, it is concluded that the comparative analysis of fundamental breach of contract under CISG and Kyrgyz law shows that they are generally corresponding. However, if it is analyzed in detail, the following differences occur. Under both

¹⁵³ Civil Code of the Kyrgyz Republic, Article 14.

¹⁵⁴ Ibid, article 14.

¹⁵⁵ Ibid, article 486(5).

¹⁵⁶ Ibid, article 414(4).

¹⁵⁷ Mihalchuk Yuliya. “New regulation of the share return mechanism.” Law Journal EZh-Yurist. No. 20.

CISG and Kyrgyz law the concept of fundamental breach is vague since in CISG it is due to the differences existing in respect of the definitions of fundamental reach to be found in the various legal systems, which prevented the drafters from finding an agreement on the type of breach that leads to avoidance of contract or other remedies therefore it provides just general guidelines of the concept. Under Kyrgyz law, it is vague because it covers all the forms of contract which may include leasing, credit contracts and etc.

Concerning the elements of fundamental breach, under CISG there are two constitutive elements such substantial detriment and foreseeability while in Kyrgyz law only substantial detriment. Moreover, there are various case law and legal expertise concerning the description of the elements under CISG, while in Kyrgyz law it is out under discretion of the court by analyzing all the circumstances of each case. Finally, in the Convention there are three provisions on available remedies both for the buyer, seller and provision on damages, but in Kyrgyz law they are written more specifically as available remedies are written under every specific breach of contract.

CHAPTER 2. PROBLEMS OF THE LEGAL REGULATION OF FUNDAMENTAL BREACH OF CONTRACT UNDER THE CISG AND KYRGYZ LAW

The second chapter of the thesis is focused on problematic issue of the legal regulation of the concept of fundamental breach of contract under CISG and Kyrgyz law. In particular, it covers existing problematic aspects of constitutive elements of fundamental breach of contract (i.e. substantial detriment under CISG and detriment and substantiality under Kyrgyz law). Then, it discusses problematic issues of available remedies in case of a fundamental breach of contract, their efficiency and shortcomings. Final section of this chapter provides concluding analysis of both CISG and Kyrgyz law and make proposals on the coordination of the appropriate provisions of Kyrgyz law with CISG and vice versa.

1. THE PROBLEMATIC ASPECTS OF CONSTITUTIVE ELEMENTS OF FUNDAMENTAL BREACH OF CONTRACT

In order to fully understand fundamental breach of contract under the CISG and Kyrgyz law analysis of conceptual framework and constitutive elements are not enough, it is also important to analyze problematic issues under both laws. The problematic issues concern a number of contradictions in constitutive elements under both the CISG and Kyrgyz law. In the CISG they are threshold problem, time of foreseeability, in Kyrgyz law it is a contradiction of detriment and substantiality, which are discussed below.

1.1. CISG

As it has already mentioned above, one of the main constitutive elements of fundamental breach of contract is a substantial detriment. One of the most controversial aspects of this elements is the high threshold test. It is argued that failure to deliver, for example, 10% of the goods would constitute a substantial detriment to the buyer under article 25 of the CISG, even though it may

not be the case. The buyer most likely will not be substantially deprived from his legitimate expectations under the contract.¹⁵⁸

The foreseeability element of fundamental breach of contract has some uncertainties. The first and most controversial one is the time at which the detrimental result must be foreseen. Article 25 does not answer this question therefore it is subject to dispute whether the breach should be foreseeable at the time of the conclusion of the contract or whether it can be after the conclusion of the contract. For example,

S agreed to ship 100 bags of rice to B. B's order was on a printed form that specified "new bags". When B prepared to ship he had at hand sound, used bags that he believed were of the same quality as new bags and would be acceptable to B subject to a modest price allowance. However, before S bagged the rice B telexed to S, "Have obtained contract for resale of rice which emphasizes use of new bags. Although sound used bags would usually be acceptable subject to a price allowance, use of new bags for this shipment is very important". S replied, "Shipping in extra high quality used bags". B rejected the shipment and notified S that the contract was avoided because of the danger of rejection by the sub-purchaser.

On the assumption that at the time of contracting the seller could not have foreseen that the detriment to the buyer would be substantial, should the later information be taken into consideration?¹⁵⁹

It has been suggested that if a detrimental result was not foreseeable at the time of the conclusion of contract, and becomes foreseeable after that, the party in breach cannot claim that the detrimental result was unforeseeable. According to this view any foreseeability of a substantial detriment before the time of breach but after the time of conclusion is to be taken into consideration since important information or requirement of the parties may pass after conclusion of the

¹⁵⁸ Harry Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle' (1998) 17 *Journal of Law and Commerce* 195.

¹⁵⁹ Enderlein, Fritz and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (Oceana Publication 1998) 123.

contract.¹⁶⁰ Another view is that foreseeability of the breach should only at the time of the conclusion of the contract as the Convention says ‘under the contract’. Moreover, the supporters of this view argue that the rights and obligations as well as possible outcome of the breach can be found only in a contract.¹⁶¹ If other circumstances after the conclusion of the contract are taken into account, one party by sending information or message may change fundamental breach into non-fundamental, which avoids the central role of the contract.¹⁶² Since there are good basis for both sides, the problematic aspect of the time of foreseeability still remains uncertain.

1.2. KYRGYZ LAW

The first problematic aspect of fundamental breach of contract under Kyrgyz law is the constitutive elements themselves. Under Kyrgyz law, basically, there is only basic element of fundamental breach of contract, and that is substantial detriment. However, the judicial practice and legal expertise shows that it is interpreted separately as detriment and substantiality.¹⁶³ First, in determining a fundamental breach of contract, the first element that should be proved is the presence of damage of injured party i.e. loss, impairment that was suffered as a result of the breach of contract by the party in breach.¹⁶⁴ In other words, in order to establish a fundamental breach, there should be a material damage. Moreover, a material damage should be significant, for example, in some cases the court rejected to approve the declaration of contract avoided and stated

¹⁶⁰ Alexander Lorenz, ‘Fundamental Breach under the CISG’. Pace Law School Institute of International Commercial Law’ <available at: <http://www.cisg.law.pace.edu/cisg/biblio/lorenz.html#fn72>>.

¹⁶¹ Ibid.

¹⁶² DiMatteo Larry *International Sales Law: A Global Challenge* (Cambridge University Press 2014) 21.

¹⁶³ Abulov Shamil, *The Problematic Aspects of the Legal Regulation of the Contract for the International Sale of Goods* (Juridical Center Press 2004) 211; "Civil Law of the Kyrgyz Republic (Grazhdanskoe pravo Kyrgyzskoj Respubliki) (Science and Education Printing House Bishkek)

¹⁶⁴ Ibid.

that there is a significant damage.¹⁶⁵ In this sense, significant damage is a prerequisite to establish a fundamental breach of contract.

In accordance with the law, the detriment should be significant that the injured party loses what it was entitled to expect at the time of conclusion of the contract. However, as it is mentioned above, according to the judicial practice and scholarly writings, substantiality of the breach is considered separately.¹⁶⁶ Substantiality is established by considering not only real damages such as losses incurred by the aggrieved party in connection with the destruction or damage to the property, but also expenses incurred by the aggrieved party or must be incurred in order to restore his violated right. Therefore, in order to define substantiality, the courts should consider a complex of negative consequences of the violation committed.¹⁶⁷ In sum, the contradiction is that in order to establish a fundamental breach of contract, there should be significant material damage. However, even though there is no significant damage, the court may find fundamental breach as it considers not only material breach, but also immaterial breaches that together can be significant.

The main problematic issue of constitutive elements of a fundamental breach of contract under Kyrgyz law is the lack of objective elements. Under the CISG the foreseeability serves as a filter that can save breaching party from the consequences. If the party in breach proves that substantial detriment was not foreseeable, he gets an excuse, and he is able to prevent another party to avoid the contract.¹⁶⁸ In order to find whether there is a fundamental breach of contract, it is

¹⁶⁵ Decision of the Judicial College on the Economic Affairs of the Supreme Court of the Kyrgyz Republic (2 October, 2003), case N B-01-271 / 01-C5.

¹⁶⁶ Decision of the Judicial College on the Economic Affairs of the Supreme Court of the Kyrgyz Republic, case N B-01-271 / 01-C5; (2 October, 2003)..

¹⁶⁷ Mohammad (n 52) 12.

¹⁶⁸ The concept of fundamental breach of contract under the United Nations Convention on contracts for the International Sale of Goods (CISG) (1998) <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

important to consider both objective and subjective perspective. However, Kyrgyz law does not provide such opportunity for the party in breach.

2. THE PROBLEMATIC ISSUES OF REMEDIES AND CONSEQUENCES OF FUNDAMENTAL BREACH OF CONTRACT

Having discussed the problematic aspects related to the constitutive elements of fundamental breach of contract, it is important to analyze issues concerning available remedies and consequences. As it is analyzed in the first chapter, available remedies both under the CISG and Kyrgyz law have advantages on efficiency and problematic issues. Under the CISG they are issues on the seller's right to cure, remedy on unique goods and interest rates while under Kyrgyz law they are a strict limitation of remedies, which are discussed below.

2.1. CISG

There is controversy in the seller's right to cure. Article 48(1) of the CISG provides an opportunity for the seller to remedy by himself and own expenses his breach of contract.¹⁶⁹ At the same time, the buyer has a right to avoid the contract in case of a fundamental breach of contract.¹⁷⁰ A proposal not to insert any reservation in favor of Art. 49 (thus strengthening the seller's right to cure) was rejected at the Vienna Conference.¹⁷¹ In this regard, it is possible to make a conclusion that the right to avoid the contract should not be prevailing if the seller can cure his contractual violations. The controversy is that if the breach of contract can be cured by the seller, is it a non-fundamental breach of contract or at least should the court take into account this possibility in determining the occurrence of a fundamental breach. There are two views in this

¹⁶⁹ CISG, article 48(1).

¹⁷⁰ Ibid, article 49.

¹⁷¹ Official Records (1989), 115, 343, in: J. Honnold, *Documentary History of the Uniform Law for International Sales* 687.

question. First and predominant approach is that the curability of the breach should be taken into account since the essential purpose of this doctrine is giving an opportunity to the seller to fix its contractual violations.¹⁷² However, there is another view what if the buyer has a particular and legitimate interest in being allowed to avoid the contract immediately. Such a legitimate interest exists, for example, where the breach was so serious that the basis of trust between the parties has been destroyed.¹⁷³ As a result, this questions still remains uncertain, and it is applied differently depending on circumstances of every case.

There is an uncertainty concerning the remedy on specific and unique goods. There can be a case where the goods are special or unique. If the seller does not deliver the goods to the buyer, and it constitutes a fundamental breach of contract, the buyer can resort to available remedy such as damages. The uncertainty is the measurement of the damages since the market price is unknown as there are no such goods in a market. One way of measuring the buyer's damages is suggested by Article 74. Under Article 74, the damages a party normally receives are equal to the difference between the market price and the contract price plus incidental and consequential damages less expenses saved.¹⁷⁴ Since there are no similar goods, there is no difference between the contract price and market price. The same problems work for the seller as well. In the same situation where the goods a special and unique and the buyer fundamentally breaches the contract, the seller will be allowed to recover only the contract price.¹⁷⁵

¹⁷² Allison Butler, 'The International Contract: Knowing when, why, and How to "Opt Out" of the United Nations Convention on Contracts for the International Sale of Goods' (2002) 2 ,Florida Bar Journal 29, 76.

¹⁷³ J. Honnold (n 18) 164.

¹⁷⁴ Parties unknown (10.06.2002), arbitral award, CIETAC China International Economic and Trade Arbitration Commission. China < <http://www.unilex.info/case.cfm?pid=1&do=case&id=1114&step=Abstract>> accessed 18 March 2019.

¹⁷⁵ Ibid.

Furthermore, there is a problematic issue concerning the interest rates. When the seller commits a fundamental breach of contract and the restitution takes place, the seller should refund the price paid by the buyer and to pay interest.¹⁷⁶ The date the interest starts from the the day when the price was paid by the buyer. As the Convention stipulates only the right to interest (commentators admit the lack of a provision on rate of interest), how the rate should be determined or over what period of time it is payable constitutes a gap in the Convention.¹⁷⁷ Since article 84(1) of the CISG does not provide interest rate and the date, article 7 should be approached, and there is a dispute among scholars. Ones argue that the uniform approach should be applied in all the transactions while others argue that the principles of international private law should apply, but there is no still clear and uniform answer to this question.¹⁷⁸

2.2. KYRGYZ LAW

As it has already mentioned above, the Civil Code of the Kyrgyz Republic consists of two parts, where the first part regulates the general legal regulations while the second part regulates concrete forms of contract.¹⁷⁹ In the first part, it provides general basis (i.e. fundamental breach of contract) for the change and termination of the contract while in the second part all the available remedies for the contracting parties are written depending in a concrete case.¹⁸⁰ The problematic issue is related to the second part. Under Kyrgyz law, there is no provision on available remedies for the contracting parties, but there are written available remedies in every concrete breach of contract. For example, If the seller does not transfer or refuses to transfer to the buyer the

¹⁷⁶ CISG, article 84(1).

¹⁷⁷ F. Ferrari, "Specific Topics of the CISG in Light of Judicial Application and Scholarly Writing" (1995) 10 *Preadviezen, Uitgebracht Voor de Vereniging Voor Burgerlijk Recht* 169.

¹⁷⁸ *Ibid.*

¹⁷⁹ The Civil Code of the Kyrgyz Republic, article 411.

¹⁸⁰ *Ibid.*, article 411, 438, 486.

documents relating to the goods, the buyer can set him a reasonable time. If the seller does not provide the documents within a reasonable time, the buyer has the right to refuse to accept the goods and pay for them, and if they are paid, to demand the return of the paid sum of money.¹⁸¹

The issue is that the remedy is limited. In other words, the buyer can resort only remedies that are provided under one article. In the case mentioned above, the buyer can only refuse to accept the goods and pay for them. Definitely he can ask for damages, but what if he wants to approach other remedies. In fact, if the seller refuses to give related documents, it may constitute a fundamental breach of contract and the seller may declare the contract avoided referring to the general remedy available for a fundamental breach of contract. The problem is that the buyer may want neither to avoid the contract nor to resort remedies that are available, and he may want to resort other remedies. Another example is that if the buyer does not take delivery of the goods or refuses to do so, the seller has the right to demand from the buyer to accept the goods or to declare the contract avoided.¹⁸² What of the seller is not interested in both remedies, and he wants to set a time to take the delivery. In this case, the seller cannot do it because of the limit of remedies.

3. RECOMMENDED SOLUTIONS OF PROBLEMATIC ISSUES

The thorough understanding of a fundamental breach of contract under the CISG and Kyrgyz law requires not only comparative analysis of conceptual framework constitutive elements and identification of problematic issues, but also examination of possible solutions of identified

¹⁸¹ Civil Code of the Kyrgyz Republic, article 427(2).

¹⁸² Civil Code of the Kyrgyz Republic, article 447(3).

problems. In this sense, this subchapter is devoted on solutions of problematic issues that possible will help to eliminate them.

3.1. CISG

The first issue is the contradiction between the seller's right to cure and the buyer's right to avoid the contract as the question is whether the right to avoid the contract should not be prevailing if the seller can cure his contractual violations. The controversy is that if the breach of contract can be cured by the seller, is it a non-fundamental breach of contract or at least should the court take into account this possibility in determining the occurrence of a fundamental breach. There is no clear answer. The possible solution would be the approach of Kyrgyz law since it is very efficient in practice. Kyrgyz law puts the seller's right to cure above fundamental breach of contract.¹⁸³ The main reason is the essence of the right to cure. If there is a possibility to cure the breach, it means the buyer has a reasonable interest and time to expect until the breach will be cured. It means there is no fundamental breach of contract as there is no substantial detriment because the aggrieved party can be satisfied by other remedies than avoiding the contract.¹⁸⁴

The second problem identified under CISG is the time of foreseeability, in particular whether the breach of contract should be foreseeable at the time of conclusion of contract or whether relevant circumstances after conclusion of contract should also be considered. The possible solution of this issue would be developing a strict approach in case in order to avoid uncertainties. In accordance with the prevailing view, all the circumstances should be considered after the time of conclusion of contract, and it is reasonable as the contrary approach contradicts

¹⁸³ Civil Code of the Kyrgyz Republic, article 486.

¹⁸⁴ Gallyamova, Natalya, 'The Vienna Convention on Contracts for the International Sale of Goods as a Constituent Part of the Legal System of the Kyrgyz Republic' (2006) 11, *The Journal of Law and Business* 1.

with the principle of good faith. Therefore, in order to avoid equivocality, there should be one strict approach.

Finally, there is a problematic issue concerning the interest rates. When the seller commits a fundamental breach of contract and the restitution takes place, the seller should refund the price paid by the buyer and to pay interest.¹⁸⁵ As the Convention stipulates only the right to interest (commentators admit the lack of a provision on rate of interest), how the rate should be determined or over what period of time it is payable constitutes a gap in the Convention.¹⁸⁶ One argues that the uniform approach should be applied while others argue that the principles of international private law should apply. The possible solution would be an approach of Kyrgyz law as it applies interest rate of the Central Bank of the Kyrgyz Republic. Since the contracting parties are expected to be in the Kyrgyz Republic, their expectations of interest rate are foreseeable and transparent. developing strict case law supporting the latter approach. The uniform approach cannot be used here. For example, if there is a uniform IMF interest rate, would it be reasonable to use for the parties from Bangladesh and Burma, where likely interest rate is different and parties' expectations may be different. Therefore, if the principle of private international law applies, the possible interest rate will more likely match with the parties' expectations.

3.2. KYRGYZ LAW

The first problematic aspect of fundamental of contract under Kyrgyz law is the constitutive elements themselves. Under Kyrgyz law, there is only one basic element of fundamental breach of contract, and that is substantial detriment. However, the judicial practice and legal expertise shows

¹⁸⁵ CISG, article 84(1).

¹⁸⁶ F. Ferrari, 'Specific Topics of the CISG in Light of Judicial Application and Scholarly Writing', in 10 Preadviezen, Uitgebracht Voor de Vereniging Voor Burgerlijk Recht 169; Enderlein & Maskow (n 62) 312.

that it is interpreted separately as detriment and substantiality.¹⁸⁷ First, significant damage is a prerequisite to establish a fundamental breach of contract, and the detriment should be significant that the injured party loses what it was entitled to expect at the time of conclusion of the contract. The possible solution to this issue would an approach of CISG. Since in establishing substantiality of the breach, the court takes into account material and as well as immaterial losses, there is no need to consider only material breach as a prerequisite.

The second problematic issue of constitutive elements of a fundamental breach of contract under Kyrgyz law is the lack of objective elements. Under the CISG the foreseeability serves as a filter that can save breaching party from the consequences. If the party in breach proves that substantial detriment was not foreseeable, he gets an excuse, and he is able to prevent another party to avoid the contract.¹⁸⁸ In order to find whether there is a fundamental breach of contract, it is important to consider both objective and subjective perspective. However, Kyrgyz law does not provide such opportunity for the party in breach. In this regard, the approach of the CISG seems more reasonable as it gives equal rights to both parties and views the breach both subjectively and objectively. Kyrgyz law approach supports the injured party more, which is in contradiction with the main principle of private law – equality of the parties.

Finally, there is an issue on limited remedy in Kyrgyz law. In other words, the injured can resort only remedies that are provided under one article of a particular breach. Definitely the aggrieved party can ask for damages, but if he wants to approach other remedies, he cannot. The

¹⁸⁷ Abulov, Shamil, *The Problematic Aspects of the Legal Regulation of the Contract for the International Sale of Goods* (Juridical Center Press 2006) 164 ; Arabaev, Cholponkul. *Civil Law of the Kyrgyz Republic (Grazhdanskoe pravo Kyrgyzskoj Respubliki)* (Bishkek: Science and Education Printing House 2004)

¹⁸⁸ The concept of fundamental breach of contract under the United Nations Convention on contracts for the International Sale of Goods (CISG) (1998) <<http://it.ceu.hu/vpn>> accessed 8 February 2019.

issue is that the injured party may want resort to favorable remedy for him, but Kyrgyz law limits his rights. The possible solution of this limitation can an approach of the CISG as there is a provision on remedies under the CISG, where all the possible remedies are written. In case of a breach of contract, the injured party may resort reasonable remedy. Therefore, it is suggested to amendment to the Civil Code of the Kyrgyz Republic to avoid the limitation of remedies.

Summarizing the second chapter of the thesis, it is important to state that as the comparative analysis of a fundamental breach of contract under the CISG and Kyrgyz law shows, there are number problematic aspects both under the CISG and Kyrgyz law. In particular, they concern the seller's right cure, time of foreseeability, interest rate under the CISG, and contradiction of constitutive elements, lack of foreseeability, remedy limitation under Kyrgyz law. Since there an increasing need for their solution, the possible solutions have been advanced. More precisely, it is suggested to rely on Kyrgyz law experience and develop a strict approach to put the seller's right to cure before a fundamental breach of contract, and to broaden the time for foreseeability and include circumstances after the conclusion of contract. Additionally, interest rate should be regulated by private international law. Concerning the problematic issues of Kyrgyz law, it is proposed to use the CISG's successful experience and include a foreseeability element, avoid contradiction of constitutive elements and remedy limitation.

CONCLUSION

The legal regulation of a fundamental breach of contract for the international sale of goods still remains of the most discussed topics both under the CISG and Kyrgyz law as it plays central role in termination and continuation of contractual relations of the parties. The current study was conducted to analyze the relevant provisions of the CISG and Kyrgyz law on conceptual framework of a fundamental breach of contract, its constitutive elements, available remedies, identify their problematic issues and make proposals for their solutions.

In conclusion, it can be stated that the objective of the research study has been achieved. The comparative analysis of the relevant provisions of the CISG and Kyrgyz law on fundamental breach of contract resulted that the provisions are generally similar. Under both legal acts, the definition of a fundamental breach of contract, substantial detriment element and remedies are the same. However, in spite of mentioned similarities of the CISG and Kyrgyz law, the scrupulous research identified that there are some fundamental differences on constitutive elements (i.e. lack of foreseeability in Kyrgyz law) of a fundamental breach of contract, available remedies (i.e. different approach on application of remedies) and their consequences (i.e. different application of restitution).

After comprehensive analysis of provisions concerning fundamental breach of contract under the CISG, Civil Code, court decisions on fundamental breach of contract, arbitral awards related to CISG and legal expertise of scholars in the field of a fundamental breach of contract, a number problematic aspects both under the CISG and Kyrgyz law has been identified. In particular, they concern the seller's right cure, time of foreseeability, interest rate under the CISG, and contradiction of constitutive elements, lack of foreseeability, remedy limitation under Kyrgyz

law. Since there is an increasing need for their solution, the possible solutions have been advanced. More precisely, it is suggested to rely on Kyrgyz law experience and develop a strict approach to put the seller's right to cure before a fundamental breach of contract, and to broaden the time for foreseeability and include circumstances after the conclusion of contract. Additionally, interest rate should be regulated by private international law. Concerning the problematic issues of Kyrgyz law, it is proposed to use the CISG's successful experience and include a foreseeability element, avoid contradiction of constitutive elements and remedy limitation.

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