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Abstract

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an international Convention that applies to contracts for the sale of goods between two parties from different States. The CISG has gained world-wide acceptance and recognition in the last twenty years due to a combination of factors, one of which is the increase in globalisation which necessitated and facilitated its growth. A central provision to the Convention is Article 25 which relates to the concept of fundamental breach. The consequence of a finding of fundamental breach is avoidance of contract. As a result of the harsh consequences of the avoidance remedy, a proper understanding of the elements in Article 25 is necessary to the study of the CISG.

Article 25 allows a party to avoid a contract if the other party has committed a fundamental breach within the meaning of the provision. The definition of fundamental breach is subject to debate and commentators have suggested various criterions to assess whether the breach substantially deprives the injured party of his or her expectations under the contract. More controversially, the second element of the provision, the foreseeability rule, is still an unsettled area. The foreseeability rule can act to exempt the party in breach from the harsh consequences of avoidance if the breaching party can demonstrate that such detriment could not be foreseen by himself and by a reasonable person in his circumstances. There are conflicting authorities on what is the relevant time to fix foreseeability. Questions have also been raised about the practical applicability of the foreseeability rule and whether it is superfluous.

This thesis postulates that the relevant time for determining foreseeability under Article 25 should be extended to a point in time after the formation of the contract where subsequent knowledge can be taken into account. Further, it suggests that a possible reason for the lack of application of the foreseeability rule is the uncertainty associated with the differing opinions on this issue at present. The position advanced in this thesis is that the rule is not superfluous; it serves an important exemption function which is overlooked by commentators who support fixing foreseeability at the time of the conclusion of the contract. In reaching such a conclusion, the paper engages in a process of exploring and evaluating various interpretive techniques and principles and scholarly writings. Finally, it is advocated that the courts and tribunals should adopt an interpretive approach that resonates with the underlying objective and purpose as well as promoting uniformity in the interpretation of the Convention.
Introduction

The United Nations Convention on the International Sale of Goods (CISG) has gained worldwide acceptance since its adoption by the United Nations Commission on International Trade Law (UNCITRAL) in 1988. The CISG governs a contract for the sale of goods between two parties whose places of business are in different States. The States must be signatories to the Convention, and the parties must have not expressly opted out of the application of the CISG.

The CISG prescribes the obligations and performances of the parties as well as provides a combination of civil law and common law remedies. One of the remedies provided under the CISG is avoidance of contract. To effect this relief, the parties must prove the requirements set out in Article 25 of the CISG. Article 25 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 of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

Majority of the debate has centred on the first element of Article 25 being the definition of substantial detriment. There has been very little discussion or case analysis on the

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4 CISG, Arts 30-65
5 See CISG generally. For example, Art 28 - specific performance; Art 46(2) - substitute delivery; Art 50 - price reduction; Art 74 - damages; Art 81(2) – restitution.
6 CISG, Art 25
7 CISG
second element of Article 25, namely the foreseeability requirement. This thesis explores the divergent views on the timing of foreseeability and assesses the arguments in support of the differing views. This necessitates a close examination of the interpretive principles and methods required under the CISG as well as an understanding of the overall objective and purpose of the Convention. Finally, this thesis postulates that, in determining when the relevant time of foreseeability should be fixed, consideration must be given to whether the party in breach could reasonably act upon the information received so to avoid its performance resulting in substantial detriment to the other party. In other words, subsequent knowledge is relevant to the extent that the breach becomes wilful with such knowledge.

Chapter 1 provides a contextual background to the CISG as well as the role of fundamental breach within the Convention. Chapter 2 seeks to examine the different interpretive principles and methods applicable to the interpretation of the Convention as a preface to Chapter 3 which focuses on the different approaches to interpreting the foreseeability rule in Article 25 of the CISG. Specifically, Chapter 3.1 examines the various arguments in favour of fixing the time at the conclusion of the contract, and Chapter 3.2 posits four arguments in favour of fixing the time of foreseeability at a point where the party wilfully commits the breach despite having received notification of the severity of the breach.

Finally, it is submitted that this thesis offers a different perspective in examining the issue of timing of foreseeability in Article 25 and provides a detailed examination of the underlying principles, objectives, interpretive methods and the core functionality of the CISG.

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9 Magnus, above n 8, 324
10 Koch, above n 8, 204-205
Chapter 1 – A Contextual Background

1.1 The history of the CISG

Since the late twentieth century, there has been an increase in technology and globalisation.\(^{11}\) Trade across nations have grown in both numbers and complexity.\(^{12}\) The need to achieve predictability and certainty in the sales law of an increasingly global commercial community precipitated the creation of a set of uniform international sales laws.\(^{13}\)

In April 1964 a Diplomatic Conference of twenty-eight States met at Hague and set forth The Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).\(^{14}\) These Conventions did not prove to be very successful,\(^{15}\) as only nine nations adopted and ratified them.\(^{16}\) Amongst the nations who adopted the Conventions, Great Britain made reservations under the Convention to not be bound by certain provisions; and with the exception of Gambia, the rest of the member States were within the Western Europe


\(^{14}\) Honnold (2009), above n 3, 4; Schlechtriem/Schwenzer, above n 1, 1; Franco Ferrari, ‘Uniform Interpretation of The 1980 Uniform Sales Law’ (1994-95) 24 Georgia Journal of International and Comparative Law 183, 190-191; Winship, above n 2, 1-9

\(^{15}\) Schlechtriem/Schwenzer, above n 1, 1; Ferrari, above n 14, 191; Hackney, above n 3, 473; Schlechtriem (1998), above n 8, 1

\(^{16}\) Schlechtriem/Schwenzer, above n 1, 1. The countries were: Gambia, Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino and Great Britain.
geographical region.\textsuperscript{17} As a result of this lack of acceptance, another uniform law was needed which would be acceptable to the widest possible international constituency.\textsuperscript{18}

At the 1980 Vienna Diplomatic Conference, the United Nations Commission on International Trade Law (UNCITRAL) invited suggestions and recommendations from sixty-two national delegates on the formulation of a uniform law on the international sale of goods.\textsuperscript{19} The outcome of the Conference was the adoption of the United Nations Convention on Contracts for the International Sale of Goods (CISG).\textsuperscript{20}

The CISG gained much more acceptance than its predecessor, the ULIS.\textsuperscript{21} This success is mainly attributable to two factors. Firstly, the delegates were drawn from countries with widely differing legal, social, and economic environments.\textsuperscript{22} Secondly, the CISG employed improved and clearer drafting.\textsuperscript{23} As of 7 July 2010, the CISG had seventy-six member states, including nine out of the ten leading trade nations, with the exception of the United Kingdom.\textsuperscript{24} The seventy-six member states\textsuperscript{25} represent a diversified composition of the treaty, including industrialised and developing countries in Africa, Asia, South America, North America and Europe. This is contrasted with the predominantly Western European member states constitution of the ULIS. The diversity in the Convention's constituents contributed to the success of the CISG,\textsuperscript{26} which potentially governs an estimation of seventy to eighty percent of all international sales transactions.\textsuperscript{27} Secondly, the increase in technology and globalisation necessitated and assisted the need for an international uniform law on the sale of goods.\textsuperscript{28} Therefore, a combination of the opportune timing of the creation of the CISG and the wide

\begin{footnotesize}
\begin{enumerate}
\item For example, Germany, Italy, Luxembourg, the Netherlands, San Marino and Great Britain. Honnold (2009), above n 3, 4; Winship, above n 2, 1-9
\item Schlechtriem/Schwenzer, above n 1, 3; Ferrari, above n 14, 195
\item Schlechtriem/Schwenzer, above n 1, 3
\item ibid, 1; Ziegel, above n 18, 9-4
\item Ziegel, above n 18, 9-3
\item Koch, above n 8, 271-272
\item A table of the seventy-six member states and their status is provided in Appendix I.
\item Schlechtriem/Schwenzer, above n 1, 6
\item Schwenzer/Hachem, above n 24, 458
\item Hillman, above n 13, 21
\end{enumerate}
\end{footnotesize}
participation at the 1980 Diplomatic Conference contributed to the success the Convention.

1.2 How fundamental breach fits within the CISG

The CISG is divided into four parts. Part I provides rules on the sphere of application and contains the general provisions. Part II governs the formation of the contract. Part III includes chapters regulating obligations of the seller and buyer, passing of risk, types of breach and various remedies. Part IV includes the final provisions concerning ratification and reservations that member states may make under the Convention. Article 25 is contained in Part III of the Convention and many other articles within this Part refer to the concept of fundamental breach. Article 46 enables a buyer to require delivery of substitute goods by the seller if the non-conformity of the goods delivered constitutes a fundamental breach. Article 49 allows the buyer to avoid the contract if the seller has committed a fundamental breach in the performance of any of his or her obligations under the contract. Article 51 allows the buyer to avoid the contract if partial delivery made by the seller or the non-conformity of the goods constitute a fundamental breach. Article 64, is the reverse of Article 49, and allows the seller to avoid the contract if the buyer has committed a fundamental breach in the performance of any of his or her obligations under the contract. The occurrence of fundamental

29 CISG
30 CISG, Arts 1-13; Schlechtriem/Schwenzer, above n 1, 3
31 CISG, Arts 14-24; Schlechtriem/Schwenzer, above n 1, 3
32 CISG, Arts 25-88; Schlechtriem/Schwenzer, above n 1, 3
33 CISG, Arts 89-101; Schlechtriem/Schwenzer, above n 1, 3; Honnold (2009), above n 3, 4
34 Magnus, above n 8, 320
35 CISG, Art 46(2): “If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.”
36 CISG, Art 49(1)(a): “The buyer may declare the contract avoided: if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.”
37 CISG, Art 51(2): “The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.”
38 CISG, Art 64(1)(a): “The seller may declare the contract avoided if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.”
breach also impinges on the issue of passing of risk, governed under Articles 66-70. Article 72 allows either party to avoid the contract for anticipatory fundamental breach. Finally, fundamental breach also appears in Article 73 with respect to delivery by instalments.

It is clear from the above that fundamental breach is a central concept in the CISG and a correct understanding of the concept is paramount to the interpretation of the related articles.

1.3 The elements of fundamental breach

Article 25 states 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 of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.”

There are two limbs to the fundamental breach test set out above. The first element is substantial detriment of what the other party is entitled to expect under the contract. The second element is whether the party in breach or a reasonable person of the same kind in the same circumstances as the party in breach would have foreseen such substantial detriment. There are differing opinions on what constitutes fundamental

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39 CISG, Art 70: “If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.”
40 CISG, Art 72(1): “If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.”
41 CISG, Art 73(1): “In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.”
44 Schlechtriem/Schwenzer, above n 1, Art 25 para 9, 286
On the balance of academic opinion, the view that prevails is that the 
foreseeability element serves solely to exempt the breaching party from his or her 
liability. In relation to the first element, there is a large amount of literature relating to what 
constitutes substantial detriment. For example, Koch suggests that a remedy-oriented 
approach is more appropriate. This approach takes into consideration whether 
damages is an adequate remedy. However, on the balance of opinion, the position 
appears to be that, where the injured party loses interest in the performance by the 
other party in the contract, the detriment is considered substantial. In support, Zeller 
also argues that "substantial detriment goes beyond damages as described in Article 74. 
Simply put, detriment does not equal damages." Commentator Will is of the same 
opinion. It can be further argued that from the plain wording of Article 25, it does not 
refer to the extent of the damage, but instead to the importance of the interests which 
the contract and its individual obligations actually create for the promise.

In further support, Schlechtriem and Butler are of the same view: "It is not the objective 
weight of the breach of contract, and not the extent of the damage, that determines 
whether a breach is fundamental, rather the significance for the creditor is the key 
consideration."

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46 Graffi, above n 8, 338; Schlechtriem/Schwenzer, above n 1, Art 25, para 1, 281-282
48 Koch, ‘The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)’, above n 8, 177; Zeller, above n 8, 219; Babiak, above n 43, 113; Graffi, above n 8, 338; Schlechtriem/Schwenzer, above n 1
50 Schlechtriem (1986), above n 8, 59; Graffi, above n 8, 340; Magnus, above n 8, 321
51 Zeller, above n 8, 226
52 Will, above n 8, 210
53 El-Saghir, above n 8; Schlechtriem (1998), above n 8, 177
54 Schlechtriem/Butler, above n 8, 98
With regards to the second element, the foreseeability rule requires that the party in breach did not foresee and a reasonable person of his kind in his circumstances would have not foreseen the severity of the detriment caused to the injured party. It is undisputed that it is the substantial detriment that has to be foreseen by the breaching party and that the burden of proof rests on the breaching party to show that he or she could not foresee such detriment so to exempt him or herself from liability arising from fundamental breach. However, the timing of the foreseeability rule remains controversial and is the focus of this thesis. The question is whether foreseeability should be fixed at the time of conclusion of the contract, or can it be extended to include information received after contract formation. This issue is addressed in detail in Chapter 3 of this thesis.

55 Babiak, above n 43, 119; Honnold (2009), above n 3, Art 25, 272-279; Schlechtriem (1998), above n 8, 173-182
56 Schlechtriem (1998), above n 8, 179; Ziegel, above n 18, 9-18
57 Schlechtriem (1998), above n 8, 181-182; Honnold (2009), above n 3, Art 25, 279
58 Schlechtriem supports the view that foreseeability should be fixed at the time of conclusion of the contract, see Schlechtriem (1998), above n 8, 179; for a contrary opinion, see Honnold (2009), above n 3, Art 25, 275-278
Chapter 2 – Interpretive Principles

The success of any uniform law depends on the extent of uniformity in the interpretation and application of its provisions. Since the focus of this thesis is based on an interpretation issue relating to the foreseeability rule in Article 25, this chapter necessarily prefaces the arguments advanced in Chapter 3 with analyses of the interpretive methods applicable to the Convention.

The CISG is a Convention that operates on an international level\(^59\) which aims to harmonise the effect of domestic contract laws.\(^60\) This is evident in the Preamble of the Convention where it states that,

> the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economical and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.\(^61\)

It is important to note that the Convention must be interpreted free from any influences from domestic preconceptions.\(^62\) One current problem associated with uniform interpretation of the Convention is what some commentators call "the homeward

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\(^{59}\) By virtue of its application to the Contracting States. Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2\(^{nd}\) English ed., 2005) 4


\(^{61}\) Preamble of the CISG

trend". This refers to the tribunals or courts’ tendency to attribute their own domestic legal concepts and assumptions to the application and interpretation of the Convention. Honnold explains this effect as a consequence of one’s natural tendency to read the international rules in light of the domestic legal ideas that have been imbedded at the core of one’s intellectual formation. There is some evidence to suggest that the “homeward trend” is a prominent problem in the United States. For example, in *Beijing Metals and Minerals Import/Export Corporation v American Business Centre Inc.*, the United States Court of Appeals for the Fifth Circuit indicated that the Convention had no effect on the application of the Texas parol evidence rule (a domestic legal principle) to a written settlement agreement, even though the oral agreements did not contradict anything in the agreement.

Even though the “homeward trend” is likely to manifest itself at the level of unarticulated and even unconscious background suppositions, it remains a problem that some courts and tribunals import domestic legal concepts to aid the interpretation of the Convention. This problem highlights the importance of using the correct methods of interpretation to ensure that the Convention is interpreted as mandated by Article 7 and as intended by its drafters.

Since the focus of this thesis is on the appropriate method of interpretation of the foreseeability rule in Article 25, it is necessary to first explore the interpretive principles contained within Article 7(1) of the CISG as a primary source of interpretative aid. Further, this chapter assesses the interpretive value of the Convention’s legislative history and the Secretariat Commentary on Article 25. Moreover, the comparative interpretive value of uniform law projects like the

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64 Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 200  
66 Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 203  
68 Ibid, at 1182-83  
69 Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 204  
70 Schwenzer/Hachem, above n 24, 458; Komarov, above n 62, 79  
UNIDROIT Principles on International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) and the Uniform Law on the International Sale of Goods (ULIS) is addressed. This chapter also evaluates whether the underlying principles of the Convention such as reasonableness and good faith should play a role in the interpretation of Article 25. Finally, the position advanced in this thesis prefers the teleological approach of examining the underlying purposes of the Convention as a method of interpretation.

2.1 Article 7(1)

Article 7 of the CISG provides the basis of interpretation for the Convention. The importance of Article 7 in interpreting the Convention has been highlighted by many commentators.72

Article 7(2) is a “gap-filling” provision that allows domestic legal principles to be imported in interpreting the Convention when the matters are expressly not governed under it. For the purpose of this thesis, the focus will be on Article 7(1) since the issue of foreseeability in fundamental breach is expressly addressed in the Convention.

Article 7(1) provides that,

"in the interpretation of this Convention, 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."73

These requirements are discussed below.

2.1.1 “International character”

It is widely accepted that international uniform law must be interpreted autonomously in such that regard is to be had with its international character.74 In this sense,


73 CISG
decisions and arbitral awards of a foreign jurisdiction is only persuasive, and not binding.\textsuperscript{75} Furthermore, autonomous interpretation dictates that the interpretation of the Convention must detach itself from national preconceptions of the terms applied.\textsuperscript{76} Professor Huber articulates this concept simply as the terms and provisions of the Convention "should be given a 'CISG-meaning', based on the structure and the underlying policies of the Convention as well as on its drafting and negotiating history."\textsuperscript{77}

It is important to note that the importation of the common law doctrine of fundamental breach and principle of foreseeability on damages established in \textit{Hadley v Baxendale}\textsuperscript{78} is not permissible.\textsuperscript{79}

\subsection*{2.1.2 “The need to promote uniformity”}

It has been suggested that a strict global uniformity in applying the CISG is "neither possible nor even desirable."\textsuperscript{80} This is attributable to two primary reasons. Firstly, the


\textsuperscript{75} Schwenzer/Hachem, above n 24, 468; Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 211


\textsuperscript{77} Huber, above n 76, 229

\textsuperscript{78} \textit{Hadley v Baxendale} (1854) 156 E. R. 145


\textsuperscript{80} Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 205; Schlechtriem/Schwenzer, above n 1, 7; Schlechtriem uses the words “...by interpreting them as far as possible uniformly and autonomously...”'; Di Matteo, above n 62, 11; Camilla Baasch Andersen,
CISG itself is not a uniform instrument in the sense that it has six authentic texts of different languages.\textsuperscript{81} Secondly, to apply the uniformity principle in a strict and absolutist fashion could undermine the "substantive purposes and the political underpinnings of the CISG".\textsuperscript{82}

In relation to the first reason, the problem with six authentic texts in different languages is that certain concepts may not exist in all legal systems, and that the differences in syntax, and the social and cultural underpinning of words and phrases influences one's understanding of the concept.\textsuperscript{83} Flechtner suggests that "there is no such thing as a perfectly transparent translation".\textsuperscript{84} In attempting to resolve this issue, Article 33 of the 1969 Vienna Convention on the Law of Treaties beckons the parties to look to "the meaning which best reconciles the texts, having regard to the object and purposes of the treaty".\textsuperscript{85}

With regard to the second justification, it is acknowledged that one of the main criticisms of the Convention's promotion of uniform interpretation is its adoption of imprecise terms such as "reasonable" and vague phrases such as found in Article 25 on the definition of fundamental breach.\textsuperscript{86} This problem is exacerbated by the fact that there is no "supernational court" having the jurisdiction to decide with binding authority on the interpretation of certain phrases in the Convention.\textsuperscript{87} To that extent,
Schlechtriem recognises and suggests that academic commentaries are of “considerable importance, because the domestic jurists often has no or only limited access to foreign legal literature and practice”.88

One reason for the deliberate adoption of ‘vague’, but general, terms is that the drafters intended to give the CISG flexibility.89 A uniform law on sale of goods needs to accommodate all types of transactions comprised of different complexities, cultural, legal, economical and social influences, and political challenges.90 Therefore, the Convention must be read and applied in a manner that permits it to grow and adapt to novel circumstances and changing times.91 By way of illustration, the term “a reasonable length of time” would apply differently to durable goods, as opposed to seasonal or perishable goods.92 Since the CISG is drafted with the intention of providing such flexibility in its interpretation, this must be preserved and accommodated.93 In validation, Flechtner argues that multiple answers can sometimes be more in keeping with what the drafters had in mind regarding the principle of uniform interpretation.94

Therefore, uniformity in interpretation does not refer to absolute uniformity, but rather a concept of relative and functional uniformity.95 Uniformity as mandated by Article 7(1) is not achieved through a superficial literal interpretation of the same words appearing in different provisions; instead it is achieved through one’s ability to understand the underpinning concepts and purposes of the Convention.96

88 Schlechtriem/Schwenzer, above n 1, 6
89 Ibid, 4; Magnus, above n 8, 322; Honnold (2009), above n 3, 16; Andersen (2007), above n 80, 229; Zeller (2007), above n 71, 18
90 Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 206
91 Honnold (2009), above n 3, 16
92 Schlechtriem/Schwenzer, above n 1, Art 39 para 16; Zeller (2007), above n 71, 101
93 Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 206
94 Ibid, 207
95 Di Matteo, above n 62, 10; Andersen (2007), above n 80, pp 35-36, 229
96 An example would be to utilise the teleological approach in the interpretation of the Convention, and specifically, Article 25 of the CISG. Zeller (2007), above n 71, 4
2.1.3 “Observance of good faith in international trade”

There are divergent views on the applicable scope of the good faith principle, with some commentators suggesting that it should extend to the conduct of the parties\(^97\); while others believe that the principle should only be used in the interpretation of the obligations expressly imposed on the parties in the Convention\(^98\).

It should be cautioned that the principle of good faith should not be used as a “super-tool” to override the rules and policies of the Convention.\(^99\) Its function is to provide guidance on the correct and appropriate interpretation of the provisions in the Convention. Professor Huber opines that where there are conflicting results from various interpretive methods, it is conceivable that the good faith guideline may “influence the concrete result of the interpretation of a provision”.\(^101\) It should also be noted that there are several provisions in the Convention itself that regulate the parties’

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\(^{99}\) Huber, above n 76, 229; The principle has been criticised as vague and causing different interpretive outcomes in different national courts: Bonell in Bianca/Bonell, above n 72, 84; Gyula EÖrsi, ‘Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods’ (1979) 27 American Journal of Comparative Law 311, 314
\(^{100}\) Huber, above n 76, 229, 230
\(^{101}\) Ibid, 229-230
conduct which represent an application of the good faith principle.\textsuperscript{102} For example, Article 16(2)(b) provides that an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.\textsuperscript{103} The concept of good faith is also reflected in the principles of reasonableness\textsuperscript{104} and mitigation.\textsuperscript{105}

2.2 The “Four Corners” principle

Zeller opines that words cannot be given meaning in isolation, instead, they must be read within the four corners of the CISG.\textsuperscript{106} The four corners principle simply refers to the interpretive mandate in Article 7 of the CISG.\textsuperscript{107} This includes references to the promotion of uniform interpretation, the principle of good faith, guidance from international private law, and the validity issues contained in Article 4 of the Convention.\textsuperscript{108}

2.3 Legislative history and Secretariat Commentary

The records of the drafting and deliberation process of the Working Group on the Convention are documented in the form of reports, and are referred to as the \textit{travaux préparatoires} (legislative history). The Secretariat Commentary is a special report accompanying the final drafts to the Convention as an explanatory commentary.\textsuperscript{109} Many commentators have highlighted the importance of consulting the Convention’s

\begin{footnotes}
\footnote{102}{For example, CISG, Arts 16(2)(b); 21(2); 29(2); 37; 48; 39; Koch, ‘The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)’, above n 8, 207-208; Bonell in Bianca/Bonell, above n 72, 85}
\footnote{103}{Some also argue this as a principle of equitable estoppel: see Honnold (2009), above n 3, 142}
\footnote{104}{Schlechtriem/Schwenzer, above n 1, Art 7 para 30, 104}
\footnote{105}{Reasonableness is mentioned in 37 provisions in the CISG, and Article 77 relates to mitigation of damages; Koch, ‘The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)’, above n 8, 209-210}
\footnote{107}{Ibid}
\footnote{108}{Ibid, Chapters 3-6; Zeller (2007), above n 71, 105}
\end{footnotes}
legislative history when interpreting its provisions.\textsuperscript{110} It has been suggested that even when the meaning of the text is clear, legislative history should be consulted, since the “setting in which language is used is an essential aspect of its meaning”.\textsuperscript{111} Furthermore, where recourse is to be had to the purpose of the Convention, the travaux préparatoires should be examined, as it provides detailed discussions of the drafters relating to the uses and intended effects of the provisions.\textsuperscript{112}

However, the travaux préparatoires cannot dominate the interpretation. It has been suggested by many commentators that the value of the legislative history should not be overestimated.\textsuperscript{113} There are several reasons for this. Firstly, once the CISG is adopted by the Contracting States, it acquires a “life of its own” and its meaning can change with time and subsequent interpretations.\textsuperscript{114} Another reason is that the difference in opinion documented in the travaux préparatoires is of a political nature.\textsuperscript{115} It should also be kept in mind that the Convention is a product of compromises by various sovereign States at a Diplomatic Conference.\textsuperscript{116} Therefore, it is submitted that while the legislative history of the Convention is useful and informative, it is not decisive or dominating amongst the various interpretative techniques applicable to the Convention.

2.4 The Preamble of the Convention

The Preamble of the Convention indicates the aim and underlying objective of the Convention, and more generally, the motivation for creating this set of uniform law on the international sale of goods.\textsuperscript{117} It is more than a “hortatory statement of reasons for accepting the uniform law”.\textsuperscript{118} While the Preamble may be consulted when applying the


\textsuperscript{111} Honnold (2009), above n 3, 124

\textsuperscript{112} Schlechtriem/Schwenzer, above n 1, Art 7 para 20, 101

\textsuperscript{113} Felemegas (2007), above n 74, 19; Ferrari, ‘Uniform Interpretation of The 1980 Uniform Sales Law’, above n 14, 206-207; For an example of a specific criticism on Article 25, see Schlechtriem (1986), above n 8, 60; Andersen in Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, above n 87, 69

\textsuperscript{114} Felemegas (2007), above n 74, 19

\textsuperscript{115} Ibid

\textsuperscript{116} Ibid

\textsuperscript{117} Schlechtriem/Schwenzer, above n 1, 13

\textsuperscript{118} Honnold (2009), above n 3, para 475, 705
Convention, it should be given little weight for the reason that the Convention sets forth the rules for interpreting its provisions in Article 7. However, the Preamble can be used authoritatively for the general proposition that the purpose of the CISG is to create uniform international sales law and to promote the development of international trade and the removal of trade barriers.

2.5 Other authentic texts of the CISG

When interpreting the English text of the CISG, regard may be had to the other authentic texts to clarify any ambiguities in the drafting where a literal interpretation of one version is inadequate. However, this must be approached with caution, as there are inherent differences in the legal significances attached to certain terms in different languages.

2.6 Cases

The practice of consulting foreign decisions has been strongly urged in scholarly commentary, and has actually been adopted in some decisions applying the Convention. However, the topic that this thesis focuses on has generated little case law to date; there has been one decision on the timing of foreseeability under Article 25. Consequently, this thesis centres its analyses primarily on scholarly

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119 Schlechtriem/Schwenzer, above n 1, Preamble, para 7, p11
120 Honnold (2009), above n 3, para 475, 705
121 Ibid, 706
124 Honnold (2009), above n 3, 125
125 Magnus, above n 8, 324
126 Appellate Court Dusseldorf (Shoes case) 24 April 1997, <http://cisgw3.law.pace.edu/cases/970424g1.html>
commentaries. The importance of consulting scholarly writings as a technique to fulfil the mandates in Article 7(1) is similarly recognised.127

2.7 ULIS

ULIS is the CISG’s predecessor and contains certain parallel provisions to the CISG. As a predecessor, ULIS can provide some guidance on any changes in the provisions between the 1964 text and the 1980 draft. The interpretive value of ULIS, however, is limited for two primary reasons. Firstly, the CISG represented an improvement from ULIS in its drafting.128 At the twelfth meeting of the 1980 Vienna Diplomatic Conference, many delegates129 acknowledged that the drafting of the CISG represented a ‘great improvement on the ULIS text’.130 Secondly, Article 10 of ULIS states that, “a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.” However, the CISG deliberately left the question of time open notwithstanding its predecessor’s express wording to fix the time of foreseeability at the conclusion of the contract. Moreover, at the 1980 Conference, the Committee did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach.131

Therefore, the fact that ULIS fixes the time of foreseeability at the conclusion of the contract cannot be used as guidance to interpret the relevant time of foreseeability in Article 25 of the CISG.

127 Honnold (2009), above n 3, 125
129 Official Record, Vienna Diplomatic Conference: Summary records of Meetings of the First Committee (12th meeting) [12, Mr Mantilla-Molina (Mexico)], [14, Mr Wagner (German Democratic Republic)], [15, Mr Hjerner (Sweden)]
<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting12.html>
130 Ibid, [15, Mr Hjerner (Sweden)]
<http://www.cisg.law.pace.edu/cisg/legislative/B01-25.html>
2.8 Other comparative uniform law projects

2.8.1 UNIDROIT Principles
When the first set of the UNIDROIT Principles of International Commercial Contracts (PICC) was launched in 1994, they closely followed the CISG not only in its systematic approach but also with respect to the mechanism of remedies.\(^{132}\) The objective of the principles is to "establish a balanced set of rules for use throughout the world, irrespective of legal traditions and economic and political conditions in which they are to be applied".\(^{133}\) Therefore, the principles serve a function of interpreting and supplementing international uniform law instruments.\(^{134}\) As such the UNIDROIT Principles, although only by way of persuasive authority, can be regarded as an interpretive aid to the Convention.\(^{135}\)

2.8.2 PECL
The Principles of European Contract Law is another set of principles from which guidance may be drawn to aid the interpretation of the CISG provisions.\(^{136}\) However, it is submitted that PECL is only of slight influential significance for two reasons. Firstly, as stated above, Article 7 of the Convention mandates several principles of interpretation. Secondly, PECL has limited applicability due to its geographic limitation to only countries in the European Union.\(^{137}\) This significantly differs from the objective of the Convention which is aimed at creating uniformity in sales law across all the nations in the world. The demographic composition of the European Union lacks the inclusion of developing and emerging economies. Therefore, it is arguable that PECL has a different objective to that of the CISG. Furthermore, PECL encompasses the entire arena of contract law. This must be contrasted with the CISG which only aims to regulate the international sale of goods. As a result, provisions contained in PECL may be designed to accommodate the wider realm of all legal principles in contract law. It is


\(^{133}\) Mullis, above n 62, 48

\(^{134}\) Ibid


\(^{136}\) El-Saghir, above n 8

submitted that drawing guidance from PECL in the exercise of interpreting the CISG must be done with caution.

For the purpose of comparative analysis, the corresponding provision to Article 25 in PECL is nevertheless examined. Similar to Article 25 of the CISG, Article 8:103 of PECL is also silent on the issue of the relevant time of foreseeability. However, it is interesting to note that Article 8:103 paragraph (c) provides that intentional non-performance may be a factor to be taken into consideration when determining whether there was a fundamental breach. In other words, if a party intentionally breaches a term of the contract, then this constitutes an attributing factor to a finding of fundamental breach. This suggests that wilful breach is a consideration in fundamental breach. It is arguable that this appears to extend the time of foreseeability to when the party in breach is notified of the substantial detriment ensuing from the breach, but nevertheless continues to breach the contract.

2.9 Reasonableness

Schlechtriem suggests that “good faith in international trade” should be construed in light of the Convention’s many references to standards of reasonableness. The principle of reasonableness is referred to thirty-seven times in the Convention; it is an underlying general principle of the Convention. The references to ‘reasonable notice’, ‘reasonable length of time’, and ‘reasonable person’ appear in provisions that regulate the parties’ conduct and intentions. These references demonstrate that the principle of reasonableness constitutes a general criterion for evaluating the parties’

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138 PECL, Art 8:103 (c)
139 Schlechtriem (1998), above n 8, 67
142 For example, CISG, Article 8 (interpreting statements of intentions), Article 33 (delivery of goods within a reasonable time after conclusion of the contract), Article 48 (to remedy the breach without unreasonable inconvenience to the other party), Article 77 (reasonable measures to mitigate damages).
behaviour, and has a strong bearing on the proper interpretation of all the provisions in the Convention. Furthermore, the principle of reasonableness not only embodies textual flexibility itself; but also enables a large degree of flexibility in the interpretation of the CISG.

It is important to bear in mind that it is not the intention of the drafters that the uniformity of the Convention should suffer under the flexibility provided by the principle of reasonableness. The position of this thesis does not suggest that the time of foreseeability should be either fixed at the conclusion of the contract, or at the time of breach, but rather, it posits a medium ground upon which the interpretation is a reasonable one, and upon which functional uniformity can be achieved.

2.10 Teleological approach

Commentator Koch has posited that the teleological method of interpretation attempts to resolve uncertainties in legislation by looking at the objectives and underlying policies of the text in question. Furthermore, Koch suggests that there are two different aspects of teleological interpretation: the particular purpose and object of the provision or term; and the object and purpose of the Convention as a whole.

This approach goes beyond a literal interpretation and a simple application of the rules stated in Article 7. Under this approach, the relevant time of foreseeability is determined with regards to the purpose and function of the foreseeability requirement in Article 25. Further, the underlying objective of the Convention as a whole is considered and an interpretation of the foreseeability rule that is consistent and resonates with the policies and objectives of the Convention is proposed.

It is argued in this thesis that the teleological method of interpretation to Article 25, and specifically, to the concept of foreseeability, is most appropriate.

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143 Hillman, above n 13, 28
144 Kritzer, editorial comments on “Reasonableness” as a general principle of the Convention, above n 141
146 Ibid, 75
Chapter 3 – The Relevant Time of Foreseeability

There are currently differing views of when the relevant time for determining foreseeability is in the context of Article 25. There is scholarly support for both sides of the clear divergence between fixing the time at the conclusion of the contract149, or post contract formation.150

This thesis proposes a middle ground on which foreseeability is to be fixed at the point when the party in breach, having received information on the substantial detriment that will ensue from the breach, nevertheless wilfully commits the breach. This approach is an extension to Professor Honnold’s opinion that, in determining foreseeability, information received post contract formation but prior to the commencement of performance can be taken into account.151 Commentators such as Will, Liu, Maskow, and Flechtner have also agreed with Professor Honnold’s view.152 An illustrative example of this view is for instance, in a case of a contract for delivery of goods to be manufactured, the buyer notified the seller after the conclusion of the

151 Honnold (1999), above n 97, 209
3.1 Foreseeability at the time of conclusion of the contract

There are three main arguments in favour of fixing the time of foreseeability at the time of conclusion of the contract. This subchapter analyses and assesses the strengths of these arguments in light of the general principles and methods of interpretation outlined in Chapter 2. Furthermore, this chapter adopts a holistic approach to the interpretation of the CISG and Article 25, which necessitates the consideration of the underlying purposes of the Convention and the underpinning rationale of the foreseeability rule.154

3.1.1 What the party is entitled to “expect under the contract”

Some commentators have posited the argument that since the wording of Article 25 specifies substantial detriment as depriving the other party of "what he is entitled to expect under the contract", it naturally follows that the foreseeability should be fixed at the time of conclusion of the contract, as the parties’ expectations under the contract are formed at the time of contracting.155

This argument is unconvincing for several reasons. Firstly, it represents an overly simplistic literal approach to the interpretation of Article 25. It must be recognised that business transactions in the modern society are complex and consist of continual cooperation and communication between the parties. Therefore, to treat sales agreements as static relationships where parties’ rights and expectations are frozen in time at the conclusion of the contract is to ignore the fact that contracts generally

153 Enderlein/Maskow, above n 152, 116; Will, above n 8, 221
154 Zeller (2007), above n 71, 4
156 Honnold (2009), above n 3, 144
157 The duty to communicate to and notify the other party underlies numerous provisions under the CISG, for example, Article 19(2), 21(2), 26, 48(2): ibid
involve a continuing association between the parties in an evolving context.\textsuperscript{158} It simply does not reflect the reality of business transaction processes today.

Secondly, it has been argued that the use of present tense in “what he is entitled to expect under the contract” indicates that the judge should place himself at the time of breach of contract.\textsuperscript{159} The author of this paper notes that contrastingly, the French, Spanish and Russian versions of the CISG give a different conclusion. All three texts use the past tense verb such as “était” instead of “est” in French, “tenía” instead of “tiene” in Spanish, and “byla” instead of “yest” in Russian. It has been posited that this difference in the choice of verbs conveys the impression that the formation of the contract is the relevant point in time to determine foreseeability.\textsuperscript{160} There is the argument that the interpretation of the English text should be in line with the other authentic texts of the Convention. It is evident from the above that the arguments that are premised on the tenses of the verbs lend themselves open to divergent literal interpretations and are thus unconvincing.

Thirdly, a party may have a contractual expectation of certain performances even though, at the time of contracting, it appeared that a failure to meet this expectation would not have serious consequences. However, if it later becomes evident that such a failure will cause substantial detriment to the other party, nothing in the text of Article 25 prevents a wilful breach to perform up to this expectation of the injured party under the contract from being a fundamental breach.\textsuperscript{161}

For the above reasons, it is therefore unsatisfactory to premise an argument on the interpretation of the foreseeability principle on a simple literal interpretation of the “what he is entitled to expect under the contract” requirement.

\textsuperscript{158} Flechtner, ‘Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.’, above n 62, 78
\textsuperscript{161} Flechtner, ‘Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.’, above n 62, footnote 114
3.1.2 Uniform interpretation – the principle of foreseeability in Article 74

Some argue that the reading of the foreseeability test in Article 25 should be in “uniformity” with the foreseeability requirement under Article 74.\(^\text{162}\) Article 74 prescribes when the injured party may claim damages against the party in breach; specifically, it fixes the time of foreseeability of damages to “the time of conclusion of the contract.” However, there is a lack of explanation or analysis of the underlying purposes of the two foreseeability tests in the scholarly writings in support of the above view. For example, Zeller simply states: “Foreseeability is a general principle of the CISG and must be understood in conjunction with Article 74.”\(^\text{163}\)

It is difficult to see the underlying reasons or justifications for this argument, or the foundations upon which this proposition is grounded. Firstly, Flechtner proposes that uniform interpretation, as required under Article 7(1), is “neither a rigid nor a simple mandate”.\(^\text{164}\) A proper understanding of the requirement of uniform interpretation requires a process or methodology involving awareness of and respect for the purposes of which provisions and rules are designed to achieve.\(^\text{165}\)

It is the opinion of the present author that a closer examination of the purposes of the two foreseeability tests reveals that they are designed to achieve different objectives. To interpret the foreseeability test in Article 25 in line with the foreseeability requirement in Article 74 would result in a misapplication, and further, a misunderstanding of the principle of uniform interpretation.

3.1.2.1 The different purposes of the two foreseeability rules

The purpose of the foreseeability requirement in Article 74 is to limit the breaching party’s liability to what could be foreseen at the time of conclusion of the contract.\(^\text{166}\) The foreseeability should be so restricted for good reasons.\(^\text{167}\) Most importantly, the act of contracting is a mechanism through which parties allocate the risks arising from the

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\(^{164}\) Flechtner, ‘The Several Texts of the CISG in a Decentralised System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’, above n 63, 188

\(^{165}\) Ibid

\(^{166}\) Flechtner, ‘Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.’, above n 62, 77

\(^{167}\) Ibid, 76
bargain. Under this view, it would only be fair to impose liability upon the breaching party to pay damages to the extent he foresaw at the time he entered into the contract, as that is the time he calculated his risks under the bargain and agreed to receive in return what he considered adequate to cover that risk. The breaching party should not be forced to extend its liability and pay extra damages suffered by the other party in the event of an unforeseen events occurring.

However, this logic would not apply to force a party to continue the contractual relationship with another, especially, when at the time of wilful breach, the breaching party foresaw the substantial detriment the other party would suffer as a result of the breach. The purpose of the foreseeability requirement in Article 25 is designed to avoid the cancellation of a contract for reasons which were not sufficient to warrant avoiding it. Therefore, the time of foreseeability does not need to be limited to the time of conclusion of the contract, since what is important is at the time of breach, whether the breaching party could foresee or ought to have foreseen the substantial detriment likely to result from the breach. Flechtner argues that the fact that the severity of the consequences was not foreseeable at the time of conclusion of the contract “has little relevance to the issue of avoidance.” The relevant distinction lies at the point in time when it becomes foreseeable to the breaching party that the breach will result in substantial detriment to the other party. Under the circumstances that there are reasonable measures open to the breaching party, he or she should remedy the severity of the breach or avoid it.

As suggested by commentator Winsor, “[t]he reasoning behind Article 25 is to protect a seller from unmeritorious termination by the buyer, and avoiding economic waste that might otherwise result from international transport of goods when manufactured

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169 Saidov, above n 168, 102
goods are rejected and must be returned to the seller's warehouse";\textsuperscript{173} the interpretation proposed by this thesis achieves this purpose and is also reflective of the principle of uniform interpretation and the underlying purposes of the CISG.

\subsection*{3.1.2.2 Criticisms of the foreseeability rule under Article 74}

Moreover, there are even criticisms on fixing the time of foreseeability at the time of contracting for the purposes of claiming damages.\textsuperscript{174} Commentator Murphey suggests that, in relation to the foreseeability requirement, "a sounder decision can be made nearer the time of performance or breach."\textsuperscript{175} It is important here to qualify the analysis below. This thesis does not wish to import common law principles such as the principle of foreseeability in damages in \textit{Hadley v Baxendale}\textsuperscript{176} as precedence in the interpretation of the foreseeability requirement under Article 25 or Article 74. It is clear from Chapter 2 of this thesis that the interpretation of provisions within the CISG must be kept within the ‘four corners’ of the CISG and recourse to domestic legal principles is not permissible.\textsuperscript{177} This paper however proposes to extract the underlying rationales of the following English cases and the commentary on the common law position on damages, and draw an analogy to support the position of this thesis.

In the case of \textit{Gee v Lancashire and Yorkshire Railway Co}\textsuperscript{178}, the English Court in suggesting that the time of foreseeability be extended to allow for notice after the contract was made stated that it was

\begin{thebibliography}{100}
\footnotesize
\bibitem{Murphey1974} Murphey, above n 174, Chap VII.(d)
\bibitem{Hadley1854} \textit{Hadley v Baxendale} (1854) 156 E. R. 145
\bibitem{Gee1860} \textit{Gee v Lancashire and Yorkshire Railyway Co} (1860) 158 E. R. 87
\end{thebibliography}
“not sure that another qualification might not be added which would be in favour of the plaintiffs in this case, that is, that in the course of the performance of the contract one party might give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say: ‘If, after that notice, you persist in breaking the contract I shall claim the damages which will result from the breach.’”

Other English cases such as *Kollman v Watts* and *Black v Baxendale* expressed similar views on the importance of notification. In the French Civil Code, Article 1150 provides that the debtor is only liable for damage which was foreseen or foreseeable at the date of the contract, *unless he was guilty of “dol”*. *Dol* is suggested to mean fraud or wilful breach in this context. From the above, it may reasonably be deduced that timely notification and wilful breach are the underlying reasons to extend the time of foreseeability to post contract formation. Samek further argues that, “a party who wilfully breaks his contract is surely less entitled to the protection than a party who breaks his contract accidentally or negligently.” Therefore, the party in breach should bear the consequence of causing the substantial detriment where his breach is wilful and he had reasonable notice of the likelihood of such detriment ensuing from the breach.

### 3.1.2.3 The foreseeability rule under Article 25 should be interpreted on its own

The function of the foreseeability test in Article 25 is to protect the just claims of the breaching party, and no more. To limit the time of foreseeability to the time of contracting would impose a technical restriction on the function of the foreseeability rule and significantly reduce the protection afforded on the injured party’s claims. The CISG has never been rigid in its interpretation. Therefore, to fix the time at the conclusion of the contract not only misconstrues the underlying purpose for which the

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179 Ibid, 218 cited in Samek, above n 174, 125
180 *Kollmann v Watts* [1963] V. R. 396
181 *Black v Baxendale* (1847) 154 E. R. 174
182 Samek, above n 174, 126 (original French version: Le débiteur n’est tenu que des dommages et intérêts qui ont été prévue ou qu’on a pu prévoir lors du contrat, lorsque ce n’est point par son dol que l’obligation n’est point exécutée.)
184 Samek, above n 174, 126-127
185 Honnold (2009), above n 3, 278
186 Bruno Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 89
foreseeability test in Article 25 seeks to achieve, but also creates a technicality contrary to the principles of interpretation within the CISG.

Furthermore, the German Civil Code (Bürgerliches Gesetzbuch) requires the contracting party to give notice of a higher risk not necessarily at the time of entering into contract but only when he becomes aware of the risk. This seems to be a more fair approach to accounting for risks that could not be foreseen by either party at the time of contracting.

In conclusion, while "uniform interpretation" may be perceived by some as being achieved through interpreting the foreseeability test in Article 25 akin to the foreseeability test contained in Article 74, it has been demonstrated above that this is a misunderstanding and a superficial application of what is required under Article 7(1) of the Convention. True "uniform interpretation" is achieved through interpreting the rule in a manner that resonates with the underlying purposes and rationales of Article 25, the CISG, and the general functions of contract law.

3.1.3 An anomaly?
Professor Ziegel argues that, to extend the relevant time of foreseeability in Article 25 beyond the time of foreseeability expressly fixed in Article 74, creates an anomaly, where the party can avoid the contract on grounds justifying avoidance, but the circumstance is regarded as too remote for the recovery of damages.

In rebuttal of Professor Ziegel's purported anomaly, the different purposes of the foreseeability requirement under Articles 25 and 74 must be highlighted. Avoidance of contract does not subject the breaching party to special liability beyond expectation remedies. As stated above in Chapter 3.1.2.1, the foreseeability requirement in Article 25 does not focus on determining the financial risk assumed by the breaching party, but rather, the purpose of the foreseeability rule in Article 25 is to identify those breaches that "truly disrupt" the parties’ contractual relations. Therefore, it serves a very different purpose to the function of the foreseeability rule in Article 74 where

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187 Honnold (2009), above n 3, 278
189 Ibid
190 Ziegel, above n 18
191 Honnold (2009), above n 3, 278
192 Ibid
damages are to be limited to what was foreseeable at the time of conclusion of the contract.\textsuperscript{193}

Furthermore, the Uniform Commercial Code (U.C.C.) Article 2-608(1) permits the buyer to revoke acceptance of non-conforming goods even though Article 2 limits consequential damages to losses foreseeable at the time of contracting. This demonstrates a clear precedence of this alleged anomaly existing in other legal systems.

It must also be noted that, contrary to Professor Ziegel's alleged anomaly, it is submitted that to determine the time of foreseeability at the time of conclusion of the contract would present an inherent problem within the Convention where the injured party is left with useless goods, without recourse to damages or restitution.\textsuperscript{194} Similarly, if there is an impediment or 'force majeure' within the meaning of Article 79\textsuperscript{195}, the injured party is also left without recourse to any remedies available under the Convention. For example, if the buyer contracts with the seller for certain manufactured pumps, and subsequent to the conclusion of the contract, the buyer's country introduced new regulations prohibiting importation of pumps containing a certain material which would ordinarily be included in the manufacturing process. If the buyer notifies the seller prior to the commencement of the manufacturing process of this change in the regulation, and the seller nevertheless ignores such notification and delivers non-conforming pumps. It is arguable that the seller may rely on Article 79 to exempt itself from liability to pay damages, since the impediment, namely the regulation, was not foreseeable at the time of conclusion of the contract.\textsuperscript{196} Similarly, the substantial detriment following from including the raw material in the manufacturing process was equally unforeseeable at the time of the conclusion of the contract. In these circumstances, the buyer has no remedies available to him under the Convention.

Based on the above analysis, it is therefore plausible to conclude that the relevant time of foreseeability under Article 25 should be determined at a point later than the conclusion of the contract.

\textsuperscript{193} Ibid
\textsuperscript{194} Ibid
\textsuperscript{195} CISG, Art 79 exempts a party from liability to pay damages if an unforeseeable impediment prevented the party's proper performance of its obligations under the contract.
\textsuperscript{196} CISG, Art 79 fixes the time of foreseeability of such impediment at the conclusion of the contract.
3.2 Foreseeability determined post contract formation

This subchapter posits four arguments proposing why the time of foreseeability should be determined at the point of wilful breach when the breaching party has notification of the resulting substantial detriment. It should be caveated that where substantial detriment is unavoidable by the time it became foreseeable to the breaching party, then it cannot be said that the party in breach foresaw the resulting detriment within the meaning of Article 25. Honnold supports this view and pertinently states that,

"information a party receives too late to affect performance seems outside the scope of Article 25, since the foreseeability principle presumably is designed to give the breaching party an opportunity to give special attention to minor details of performance the importance of which he could not otherwise have anticipated."

3.2.1 Legislative history and the debate at the 1980 Vienna Diplomatic Conference

To interpret an article or provision within the Convention, the starting point should always be a literal approach accompanied by its legislative history. Zeller highlights the interpretive value of the drafting process by pointing out that, “the CISG is an international instrument [and] the intention of the drafters must first be discovered through the words they chose.” Therefore, any interpretation should not directly contradict the legislative intent of the words chosen or deliberately omitted.

Legislative history and the Secretariat Commentary show that the question of the relevant time for determining foreseeability was deliberately left open. At the thirteenth meeting, the United Kingdom proposed to insert “unless at the time when the

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198 Honnold (1999), above n 97, 209
199 Honnold (2009), above n 3, 124
200 Schlechtriem/Schwenzer, above n 1, Art 7 para 20, 101
201 Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 87
202 Official Record, Vienna Diplomatic Conference: Summary records of Meetings of the First Committee (12th meeting) [15, Mr Hjerner (Sweden)], [23, Mr Tronning (Denmark)], [30, Mr Bennett (Australia)], [36, Mr Szasz (Hungry)], [41, Mr Shafik (Egypt)]
<http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting12.html>
"contract was concluded" the party in breach did not foresee or had no reason to foresee such a result" into Article 25 (then Article 23). However, this proposal received criticisms from the delegates from Norway, Finland and Hungary who indicated that, "[i]nformation provided after the conclusion of a contract could modify the situation as regards both substantial detriment and foresight." 203 The United Kingdom subsequently withdrew its recommendation.204 Importantly, Honnold highlights that in evaluating legislative history, consideration must be given to the resistance to change.205 In the end, the decision was recorded as follows:

"The Committee, after deliberation, did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach."206

In addition, the Secretariat Commentary stipulates that, "[i]n case of dispute, that decision, [being the time of foreseeability] must be made by the tribunal."207

It is clear from the legislative drafting process that, the absence of the fixing of a relevant point in time for foreseeability was not due to an inadvertent omission. On the contrary, it was decided, through careful consideration, that the issue should be left to the tribunals and judges to find a more balanced decision based on the circumstances of each individual case.208

However, it is acknowledged and stated above in Chapter 2.3 that the value of the legislative history is limited. Schlechtriem points out that the rejection of fixing the vantage point of foreseeability to the time of conclusion of the contract was still based on the objective version of the 1978 Draft Convention, in which the extent of the detriment was the only determining factor for a finding of fundamental breach. The present version of Article 25, in determining the occurrence of fundamental breach, concerns itself decisively with the interest of the party as fixed by the terms of the...
contract which fixes the conclusion of the contract as the relevant time for knowledge or foreseeability.\(^\text{209}\)

### 3.2.2 Interpretation in conjunction with Article 8(3)

A few commentators have formed the view that when interpreting Article 25, regard must be had to Article 8 of the Convention.\(^\text{210}\) For example, Zeller suggests that foreseeability is not only detectable in terms of contracts but is also discoverable under Article 8,\(^\text{211}\) and when determining the promisee’s expectations under the contract, a clear reference to Article 8 is required.\(^\text{212}\) The need to consult Article 8 is made clear in the second part of Article 25 which, if rephrased, could be read that as ‘a fundamental breach has been committed if the party in breach did foresee and a reasonable person of the same kind in the same circumstances would have foreseen such a result’.\(^\text{213}\) Therefore, Article 8’s subjective and objective intent must be taken into consideration.\(^\text{214}\) Similarly, commentator Williams puts forward the position that subsequent information may be relevant by way of Article 8(3).\(^\text{215}\) Furthermore, Article 8 has been recommended as an interpretive tool which compliments Article 7:

> “Certainty, flexibility and justice are displayed within the CISG and have been given meaning through Articles 7 and 8.”\(^\text{216}\)

Article 8 of the CISG allows the court to take into account not only the subjective intent of the parties but also their objective intent.\(^\text{217}\) Article 8(3), in particular, directs the

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\(^{209}\) Schlechtriem (1986), above n 8, 60; Liu (2005), above n 152, chapter 2.3(d), n119


\(^{211}\) Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 91


\(^{213}\) Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 90

\(^{214}\) Ibid

\(^{215}\) Williams, above n 210, Chap IV.C.1

\(^{216}\) Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 88-89

\(^{217}\) CISG, Art 8(1): “For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have
tribunals to refer to all the relevant circumstances of the case ‘including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties’ in determining the intent of the parties.”

While it is acknowledged that Article 8 governs the intentions of the parties; it is also important to appreciate that, the parties’ true intentions influence the obligations and expectations under the contract. Furthermore, the CISG is designed to be a flexible instrument which is to be applied to reflect and give effect to the parties’ true intentions. Therefore, the principle of foreseeability should be interpreted accordingly. Given that Article 8(3) allows the subsequent conduct of the parties to be taken into account when determining the parties’ intentions, it would be plausible to interpret the timing issue of the foreseeability requirement in Article 25 to extend beyond the conclusion of the contract.

3.2.3 The principle of cure

Many authors have noted the interesting interplay between Article 48 and Article 49 of the Convention. Article 48(1) provides the seller with an opportunity, after the date of delivery, to remedy at his own expense any failure to perform his obligations. Article 49(1)(a) provides that the buyer may declare the contract avoided if the seller’s

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218 CISG, Art 8(3): “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”; Zeller, ‘The Remedy of Fundamental Breach and the United Nations Convention on the International Sale of Goods (CISG) - A Principles Lacking Certainty?’, above n 8, 225

219 Honnold (2009), above n 3, 16


221 CISG, Art 48(1): “Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.”
failure to perform any of his obligations under the contract amounts to a fundamental breach.\textsuperscript{222} The relationship between the right to cure and avoidance is demonstrated by the fact that Article 48 is expressly subjected to the application of Article 49.\textsuperscript{223}

The legislative history of Article 25 seems to suggest a similar view. It was put to the Committee that a right to cure should be included in Article 25 which would read as follows,

\begin{quote}
"[A] breach committed by one of the parties to the contract is fundamental if, under all the circumstances, including a reasonable offer to cure, it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result."\textsuperscript{224}
\end{quote}

While the Committee did not retain the proposal for the reason that such an inclusion is superfluous, this nevertheless demonstrates that the principle of cure is closely linked with the principle of fundamental breach.

The existence of the principle of cure in the Convention signifies that the overall purpose of the Convention is to keep the contract afoot\textsuperscript{225} where there is an opportunity to cure the breach or the severity of the breach. The objective of this principle, by way of analogy, can be applied to demonstrate that the party in breach should always attempt to remedy the breach or the severity of the consequences resulting from the breach if such an opportunity presents itself.

The Convention, and the law in general, encourages the proper performance of contracts.\textsuperscript{226} If the seller, post contract conclusion, learns of the substantial detriment to the buyer resulting from his breach, then in line with the above rationale, he should endeavour to cure his breach. If after receiving notification of the likelihood of the

\begin{flushright}
\textsuperscript{222} CISG, Art 49(1): “The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract”.  
\textsuperscript{225} Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 89  
\textsuperscript{226} Samek, above n 174, 129
\end{flushright}
resulting substantial detriment from his breach, the seller nevertheless wilfully breaches or refuses to remedy the breach, then his conduct would be contrary to the overarching purpose and intent of the Convention. To limit the time of foreseeability to the conclusion of the contract would encourage the above described behaviour, since the seller is afforded irrational protection under the foreseeability test. To interpret a provision within the Convention so as to result in fostering wilful breach or conducive of 'bad faith' in the parties' conduct would be against the purpose of the Convention and the principle of foreseeability which is to promote trade and economic efficiency.  

Furthermore, the Convention promotes co-operation between the parties. For example, the buyer must cooperate in facilitating the seller's delivery. Conversely, the seller must cooperate in protecting the buyer's interests. For instance, when the seller does not have to insure goods in transit, it must provide information so that the buyer can obtain insurance for the goods. Therefore, to interpret the timing of foreseeability as fixed at the time of conclusion of the contract would also undermine the general assumption that parties contract to form a co-operative venture from which both parties will benefit.

It is submitted that the approach to the interpretation of the interplay between Article 25 and Article 48 should be a ‘functional’ one. The function of fundamental breach is to force the parties to either cure the contract or agree on avoidance. Hence, the interpretation of the foreseeability requirement should give effect to this function, and accordingly, be fixed at the time when the party in breach has the opportunity to cure the consequences of the breach.

Furthermore, under the UNIDROIT Principles, the buyer’s right to terminate is suspended, provided that the seller’s offer to cure is appropriate and the buyer has no

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228 According to Professor Albert Kritzer, providing needed co-operation is a general principle of the Convention: Andersen in Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, above n 87, 73 at footnote 27; Hillman, above n 13, 28
229 CISG, Art 60(a)
230 CISG, Arts 30-34
231 CISG, Art 32(3)
232 Hillman, above n 13, 28-29
233 Zeller, ‘Fundamental Breach and the CISG - a Unique Treatment or Failed Experiment?’, above n 62, 92
legitimate interest in refusing an offer to cure.\textsuperscript{234} With regard to this, commentator Koch advocates that, curability is, “de facto, a relevant factor in determining whether or not non-performance is fundamental under the UNIDROIT Principles”.\textsuperscript{235}

It is submitted that a proper interpretation of the foreseeability requirement necessitates a uniform approach which can be achieved by drawing guidance from another principle of the Convention, namely the principle of cure, which is intertwined with the principle of avoidance; and by giving effect to the underlying purpose of the Convention.

\subsection*{3.2.4 The principle of good faith}

The principle of good faith is a foundational interpretive principle that is expressly stipulated in Article 7(1).\textsuperscript{236} Commentators Graffi and Liu have expressed support for the view that foreseeability should be determined after the conclusion of the contract in light of the principle of good faith.\textsuperscript{237} Similarly, commentator Magnus suggests that the obligation of good faith may have an overriding effect where exceptional circumstances of the case so require.\textsuperscript{238} There are differing views on whether the principle of good faith should only be invoked in the interpretation of the Convention, or whether it also applies to the conduct of the parties. On the balance of opinions, it appears that the principle plays a role in the conduct of the parties, which in turn affects the interpretation of any provision.\textsuperscript{239}

Similar to the CISG, PECL also contains provisions on the promotion of good faith and fair dealing.\textsuperscript{240} The principle of good faith in PECL requires the parties to employ a co-

\begin{flushleft}
\textsuperscript{234} UNIDROIT Principles of International Commercial Contracts, Art 7.1.4
\textsuperscript{236} CISG, Art 7(1): “In the interpretation of this Convention, 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.”; Schlechtriem (1986), above n 8, 38
\textsuperscript{237} Graffi, above n 8, 341; Liu (2005), above n 152, chapter 2.3(d), n107
\textsuperscript{238} Magnus, above n 8, 325
\textsuperscript{240} PECL, Art 1:201(a): “Each party must act in accordance with good faith and fair dealing.”
\end{flushleft}
operative relationship where both parties should engage in ongoing communication and endeavour to properly perform their respective obligations under the contract. Article 1:201 of PECL expressly supports this view.

While article 8:103(c) of PECL is silent on the timing of foreseeability for fundamental non-performance, it provides that intentional breach should be a factor considered in determining whether the non-performance is fundamental. Similarly, the UNIDROIT principles also state that when determining fundamental non performance, one must consider the factor of whether the party intentionally breached the contract. Drawing guidance from the two uniform law principles, one may reasonably argue that wilful breach is not a conduct that is promoted or encouraged under uniform laws on the international sale of goods.

It should be noted that some commentators correctly argue that the concept of fault, that is intentional default, is not a pre-condition to finding liability under the CISG. It is submitted that the position proposed by this paper on the timing of foreseeability in Article 25 is not inconsistent with this view. While fault or intentional breach is not a pre-condition to finding liability, it plays no role in the exemption of liability of the breaching party if liability is found. As discussed earlier in this paper, the concept of foreseeability in Article 25 merely functions as an exemption to liability. In other words, if the breach by one party resulted in substantial detriment to the other party, the party in breach may be exempted from liability if he did not, or a reasonable person in his circumstances would not have foreseen the severity of the consequences of the breach. Therefore, the element of intent acts as a consideration in the exemption of liability, rather than the finding of liability in Article 25. Accordingly, the position

241 Honnold (2009), above n 3, 144
243 PECL, Art 1:201, “Each party owes to the other party a duty to co-operate in order to give full effect to the contract.”
244 PECL, Art 8:103: “a non performance is fundamental if, (c): the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.”
245 UNIDROIT Principles of International Commercial Contracts, Art 7.3.1(2)(c); Furthermore, Art 1.7 encourages good faith in the parties' performance.
247 See discussions in Chapter 1.3
advanced in this paper is not in conflict with the view that fault is not a factor to finding liability under the CISG.

Therefore, to interpret the foreseeability requirement under Article 25 as allowing or conducive of wilful breach is against the principle of good faith; against the cooperative relationship that should exist between the parties; and against the principles evinced in other uniform law projects.

However, commentator Saidov is of the opinion that, whatever the commercial practical reality may be, the law should not deny the breaching party of an opportunity for self-protection. The argument, in essence, is that fixing the time of foreseeability at the time of conclusion of the contract allows the breaching party an opportunity to calculate the risks and to protect himself accordingly. While this may be a feasible argument for the purposes of the foreseeability doctrine under Article 74 for limitation on damages; it cannot be rationally applied to a situation of wilful breach.

Finally, we must examine the purpose of the foreseeability test in Article 25 with a holistic approach. As suggested by Samek, "the function of contract is not merely to protect the injured party in cases of breach. It also consists in offering a simple, speedy, and relatively safe procedure for regulating economic relations between individuals and interest groups. This function demands the proper performance of contracts and not merely compensation for breach." Therefore, the law should encourage the proper performance of contracts, and the consequences of improper performance, or wilful breach, should be borne by the breaching party.

In conclusion, it is submitted that one cannot give meaning to words such as 'breach', 'detriment' and 'foreseeable' in isolation, but rather Article 25 should be looked as a single thought in light of the underlying purpose and objective of the Convention, the legislative history, and the underpinning rationales and principles of the Convention which can be found in other provisions. This thesis has proposed that Article 8 and

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248 Hillman, above n 13, 28; Honnold (2009), above n 3, 144
249 Saidov, above n 168, 119
250 For detailed discussions, see Chapter 3.1.2
252 Samek, above n 174, 129
Article 48 can be used as guidance in interpreting Article 25 due to the interplay between the Articles.
Chapter 4 – The Practical Application of the Foreseeability Principle

4.1 Case law
It has been noted by Koch, after reviewing the relevant case law that, “in no case did the breaching party successfully invoke unforeseeability of the consequences of the breach and, consequently, the courts did not need to decide the relevant point in time at which foreseeability is measured”.253 Similarly, Liu has recognised that “the time issue of the second element or even this second element itself, i.e., foreseeability by the breaching party of the substantial deprivation, may not arise (in the real world) often”.254

A close examination of all the recent reported cases available on the CISG Pace Law School website reveals that no court or arbitral tribunal has discussed the principle of foreseeability.255 To date, there has been one case in 1997 in the Appellate Court of Düsseldorf which considered the time of foreseeability issue under Article 25 and decided that the time should be fixed at the time of conclusion of the contract.256 In that case, an Italian shoe manufacturer sold shoes to a German buyer, but failed to deliver the agreed quantity. The buyer avoided the contract without fixing an additional period of time in accordance with Article 47, and the breach was found to be non fundamental since the contract did not stipulate that time was of the essence.257 On the issue of the relevant time of foreseeability, the court simply stated the proposition that “this is apparent for the seller at the conclusion of contract”.258 Regrettably, there was no analysis on the timing of foreseeability. Since there has been no court or arbitral tribunal’s analyses on the timing issue, the importance of commentaries and scholarly writings on this issue is consequently elevated.

4.2 Is the foreseeability requirement under Article 25 superfluous?
As stated earlier in Chapter 1.3 and after reviewing all the relevant case law on Article 25, majority of the discussions under Article 25 revolve around the criteria constituting

254 Liu (2005), above n 152, chapter 2.3(d), n127
255 Cases from 2008 – 2011. For a complete list of all the cases examined, please see bibliography list under Cases.
256 Appellate Court Düsseldorf (Shoes case) 24 April 1997 <http://cisgw3.law.pace.edu/cases/970424g1.html>
257 Ibid, para 2.a
258 Ibid
This result is not surprising due to the variety of factual scenarios and the varying degrees of the severity of breach in each individual circumstance of the cases. However, given the severe consequences of avoidance, why don’t the parties invoke the foreseeability exemption on a more frequent basis? Does this suggest that the principle of foreseeability is superfluous?

Some learnered authors have opined that,

“where the parties, for instance, expressly or implicitly agreed that strict compliance with the contract terms is essential and any deviation from those terms is to be regarded as fundamental, the party in breach cannot invoke the non-foreseeability”.

Under such circumstances, substantial detriment is foreseeable to a person of the same kind and in the same circumstances. The same is true where the “importance of the obligation breached follows from the terms of contract or from the negotiations between the parties, which preceded the formation of the contract”. Both Schlechtriem and Koch are of the opinion that, “[o]nly when the particular importance of the violated duty has neither been established in the contract itself nor discussed during the contract negotiations, can foreseeability be relevant”.

The above view seems to suggest that foreseeability is only relevant where the substantial detriment has not been communicated prior to, or at the time of conclusion of the contract. Hence, the foreseeability requirement only arises when information relating to the substantial detriment comes to light for the party in breach after the conclusion of the contract. Therefore, to interpret the time of foreseeability at the time of contracting would create an incongruous result to the above proposition.

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261 Schlechtriem/Schwenzer, above n 1, Art 25, para 12


263 Schlechtriem/Schwenzer, above n 1, Art 25 para 14
Furthermore, if the essential terms and conditions are expressed in the contract, then a literal interpretation solely resolves the issue of whether the severity of the breach was foreseeable or not at the time of conclusion of the contract. Besides, even if the essential conditions were not expressed in the contract but communicated to the party in breach through pre-contractual negotiations or correspondence, Article 8(3) of the Convention would cover the situation as being pre-contractual negotiation and the party in breach would not be able to claim that he did not foresee the issues discussed. Therefore, if the relevant time of foreseeability is fixed at the time of contracting, then this element is rendered superfluous, since it serves no additional purposes to what the other provisions in the Convention already provide. Interestingly, even Schlechtriem, the very advocate of fixing time at the conclusion of the contract, recognises that by reducing the importance accorded to substantial detriment in favour of determining detriment by reference to what the promise actually expected from the contract, foreseeability has thereby lost its function as a ground for excuse where damage was unforeseeable.\textsuperscript{264} Therefore, it is submitted that the foreseeability element would serve a much more functional purpose if the relevant time of foreseeability is extended beyond contract formation.

\textsuperscript{264} Schlechtriem/Schwenzer, above n 1, Art 25 para 3, 284
Conclusion

While the relevant time for determining foreseeability of substantial detriment is unclear in the context of Article 25, it has not greatly impacted on the promotion and adoption of the CISG.\textsuperscript{265} There has not been any court decisions or arbitral awards, with the exception of one,\textsuperscript{266} referring to the application of the foreseeability requirement. Therefore, the lack of analysis or decisions supporting any view proposed by various commentators has resulted in the uncertainty of the application of this principle.

Amongst the various interpretive principles and techniques applicable to the CISG, weight must be given to those that promote uniformity in interpretation and portray a holistic view of the Convention.\textsuperscript{267} It has been argued in this thesis that a technical and rigid interpretation of the foreseeability test in Article 25 to fix the time at the conclusion of the contract, would encourage the conduct of wilful “fundamental breach”. Alarmingly, this is contrary to the drafters’ intentions, the purposes for which the Article seeks to achieve, the principle of good faith, and most importantly, the underpinning reason for the existence of the foreseeability requirement in Article 25.

It would be interesting to see which view the court or arbitral tribunal will take when a case finally hinges on the principle of foreseeability under Article 25. It is hoped that the courts and arbitral tribunals will bear in mind that, a proper interpretation of the foreseeability requirement can only be achieved by examining the CISG as a whole, that is, to read Article 25 in conjunction with Articles 7, 8, 48, 74 and 79.

Finally, through examining the relevant scholarly writings, case law and international comparative uniform law instruments on the issue of the relevant time of foreseeability under Article 25, and exploring and evaluating the various interpretive techniques under the Convention; it is the opinion advanced in this thesis that a functional approach to the interpretation of fundamental breach should be adopted.\textsuperscript{268} It is advocated that a case by case application of the foreseeability requirement should be

\textsuperscript{265} Schwenzer/Hachem, above n 24, 458
\textsuperscript{266} Appellate Court Dusseldorf (Shoes case) 24 April 1997 <http://cisgw3.law.pace.edu/cases/970424g1.html>
\textsuperscript{268} Andersen (2007), above n 80, 34-35
promoted, as cases concerning the concept of fundamental breach often consist of a broad spectrum of differing facts.\footnote{Graffi suggests that for an interpreter to grasp the concept of fundamental breach, a case by case analysis is inevitable: Graffi, above n 8, 340} This paper has proposed that the relevant time of foreseeability should be fixed at the time of when the party in breach receives notification of the likelihood of substantial detriment ensuing from his breach. It is submitted that this interpretation of the foreseeability rule under Article 25 is a more coherent interpretation in line with the underlying purposes of the Convention and the provision itself.
## Appendices

### Appendix I

**Member States as of 7 July 2010, reported by UNCITRAL**

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* Dates on which the countries ratified the Convention or which Republics acceded to the Convention by reason of formerly being part of a State which ratified the Convention.

** Article 101(2) provides that the Convention takes effect on the first day of the month following the expiration of twelve months after ratification.

*** Articles 92 – 96 allow States to make reservations and declarations to not be bound by certain provisions under the Convention. For details on each Article, please see notes at the end of the table.
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**Notes:**

Art 92 allows reservation to be made to exclude the application of Part II and/or Part III of the Convention.

Article 93 allows the States to exclude the application of the Convention to its territorial units if the State has two or more territorial units.

Article 94 allows two or more States to make jointly or reciprocal declarations to exclude the application of the Convention if the States have the same or closely related legal rules on matters governed by the Convention.

Article 95 allows States to declare to not be bound by Art 1(1)(b) of the Convention.

Article 96 allows States to make reservations to exclude the writing requirement under the Convention regarding to contract formation, modification and termination.
Appendix II

Excerpts of the Convention including relevant Articles referred to in the thesis

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) [CISG]

THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

PART I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter 1

SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

...
Article 4
This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

...

Chapter II
GENERAL PROVISIONS

Article 7
(1) In the interpretation of this Convention, 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.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8
(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

...

PART II
FORMATION OF THE CONTRACT

...

Article 16
(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:
(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

**Article 21**

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

...
Chapter II
OBLIGATIONS OF THE SELLER

... 

**Article 30**
The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

*Section I. Delivery of the goods and handing over of documents*

**Article 31**
If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

**Article 32**
(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

**Article 33**
The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
(c) in any other case, within a reasonable time after the conclusion of the contract.

**Article 34**

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

...  

**Article 39**

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

...  

**Article 46**

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

**Article 47**

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.
**Article 48**

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

**Article 49**

(1) The buyer may declare the contract avoided:

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

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.
Article 50
If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51
(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Chapter III
OBLIGATIONS OF THE BUYER

Article 60
The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

... 

Article 64
(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

... 

Chapter IV
PASSING OF RISK

Article 70
If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V
PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. Anticipatory breach and instalment contracts

... 

Article 72
(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73
(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Damages

Article 74

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. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

...

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

...

Section IV. Exemptions

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

... 

**Section V. Effects of avoidance**

**Article 81**

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

... 

**PART IV**

**FINAL PROVISIONS**

**Article 89**

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

**Article 90**

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

**Article 91**

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.
Article 92
(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93
(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94
(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.
Article 95
Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.

Article 96
A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97
(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98
No reservations are permitted except those expressly authorized in this Convention.

Article 99
(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the
month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 52 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

**Article 100**

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

**Article 101**

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.
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