

# Contractual remedies for breach of contract under the CISG and a comparison to Guatemalan law

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Pedro Mendoza\*

TRANSLATION by Juan Pablo Hernández

## Abstract

*In light of the fact that the Guatemalan Congress has approved Guatemala's accession to the UN Convention on Contracts for the International Sale of Goods (CISG), it is the appropriate time to conduct a comparative analysis between the CISG and current Guatemalan law. It is important to clarify that, since Guatemala deposited its instrument of accession on December 2019, the CISG is set to enter into force for Guatemala on 1 January 2021. This article seeks to analyze and compare the CISG system of contractual remedies with Guatemalan law on the issue, considering that this is one of the most salient subjects in modern contract law.*

## I. Introduction

Nowadays, we see an increasing acceptance and promotion of the trend toward uniformity and the unification of the law, mainly the law relating to international trade. In that light, there is some consensus in national systems and international scholarly writings that law, especially the law relating to the international trade in goods, should be brought into alignment. As a result of these efforts of uniformity, a new system has been proposed based equally on the law of obligations and contracts known in civil and common law systems, through instruments of uniform law such as the 1980 United

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\* LLB at Universidad Francisco Marroquín; LLM at the University of Columbia, New York; Founding partner at *Iurisconsulti, Abogados y Notarios*; Professor of 'General Theory of Contract Law' and 'International Business Law' at Universidad Francisco Marroquín (Guatemala). Email: [pmm@ufm.edu](mailto:pmm@ufm.edu).

Nations *Convention on Contracts for the International Sale of Goods* (CISG or Convention), the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the Principles of European Contract Law (PECL).

As part of the new trends established by these uniform law instruments, some novel rules relating to breach of contract can be identified. A salient example is the regulation of the sales contract found in the CISG, which has 93 Contracting States of many legal traditions and levels of economic development.

The CISG is an international treaty aimed at regulating international sales contracts and providing the parties with a modern, uniform and equitable regime that is well-suited for the current needs of trade.<sup>1</sup> The CISG contributes greatly to legal certainty by regulating and giving solution to a number of issues, including problems of interpretation, conflicting national systems and the costs associated with the drafting of contracts, among others.

This article does not seek to offer a comprehensive comparison of the principles and provisions of the CISG with Guatemalan law; it will be restricted to a comparison of the treatment of remedies that both systems of law have developed in connection with a breach of contract.

### **a) The CISG**

The CISG came as a result of a legislative effort that started in the beginnings of the 20<sup>th</sup> century. The Convention is divided into four parts: the first sets out general provisions and rules on its scope of application; the second regulates the formation of the contract; the third regulates the sales contract itself; and the fourth contains provisions on public international law.<sup>2</sup>

Additionally, it is notable that the CISG overwhelmingly employs legal terms that are abstract, broad and undefined (such as ‘*reasonable excuse*’, ‘*reasonable time*’, etc.). This is a strength rather than a weakness, given that these terms give judges a larger margin of interpretation that is necessary to apply the CISG’s provisions on a case by case basis.<sup>3</sup> In the same vein, these terms are intentionally open-ended as they seek to reflect a

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<sup>1</sup> Explanatory Note by the UNCITRAL Secretariat on the CISG, pp. 25-26.

<sup>2</sup> I Schwenzer, P Schlechtriem, ‘Introduction’ in I Schwenzer and E Muñoz, *Schlechtriem & Schwenzer: Commentary on the Convention on Contracts for the International Sale of Goods*, Vol 1 (Aranzadi 2011), p. 162.

<sup>3</sup> *Ibid*, p. 163.

compromise between the conflicting and irreconcilable interests of different juridical systems.<sup>4</sup> The CISG, as indicated in its preamble, has the objective of harmonizing different social and juridical traditions. Its provisions contain solutions coming from many countries, as a result of the close and impartial cooperation between jurists from civil and common law systems.<sup>5</sup>

### **b) Guatemalan Law**

In Guatemala, the Commercial Code is the law applicable to sales contracts; its rules are aimed at establishing the specific features of commercial contracts. This Code does not contemplate the general rules applicable to contracts, which are instead contained in the Civil Code. As a result, both Codes coexist, with the latter regulating contracts generally without regard to the specific circumstances of trade. The Commercial Code then operates normally through institutions and transactions regulated generally by the Civil Code, but modifies some of their rules to adapt them to the needs of commercial transactions.<sup>6</sup> Therefore, in Guatemala, these statutes operate, respectively, as the general and the specific rule, which is the reason why the legislative and scholarly distinction between civil law and commercial law is not absolute in Guatemala; in reality, these branches of law are complementary.<sup>7</sup>

In the same vein, the Commercial Code expressly establishes that the Civil Code is the default rule when the Commercial Code's provisions on obligations and contracts are insufficient.<sup>8</sup> It is because of this that, when comparing the provisions about contractual remedies contemplated in the CISG against those regulated by Guatemalan law, the analysis should be done with the general provisions on contracts contained in the Civil Code, given the absence of such provisions in the Commercial Code.

### **c) Contractual Remedies**

From the most significant contributions of the CISG, the implementation of a unitary notion of 'breach of contract' is one of the most notable.<sup>9</sup> The CISG introduces a new

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 166.

<sup>6</sup> E Vásquez Martínez, *Instituciones de Derecho Mercantil* (IUS Ediciones 2012), p. 15.

<sup>7</sup> *Ibid.*, p. 16.

<sup>8</sup> Article 694 of the Commercial Code.

<sup>9</sup> See *supra* note 3, p. 165.

worldview about the obligation, which strikes a balance between the interests of the buyer and the seller. By regulating breaches of contract with a unitary, broad and neutral concept, it is possible also to organize the system of remedies to which the innocent party will be entitled in case of a breach.

This orderly and systematic concept of contractual breach, and consequently of contractual remedies, can be contrasted to the codes of civil law countries, given that these systems regulate the actions to which creditors are entitled in the event of a breach of contract in a scattered and unorganized manner. It is notable that, in practice, this traditional contractual remedies are not appropriate to the current patterns of trade for different reasons, including their rigidity and the need of judicial intervention. Therefore, the ratification and implementation of uniform and international instruments such as the CISG is of great benefit to indirectly update those systems, like the one in force in Guatemala, which have statutes that are no longer responsive to the needs of businesses.

The implementation of the CISG in Guatemalan law will inevitably influence the interpretation and development of international and national sales contracts.<sup>10</sup> To find a comprehensive interpretation of Guatemala's contract law, it is convenient to take into account the general provisions of domestic contract law on remedies, alongside those of the CISG.

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<sup>10</sup> *Ibid*, p. 171.

## II. Comparative Analysis

### a) General Provisions on the System of Remedies in the Event of Breach

CISG	Guatemalan Civil Code
<p><b>Article 45</b></p> <p>(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77.</p> <p>(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.</p> <p>(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.</p>	<p><b>Article 1534.</b> <i>Effects of the contract.</i> Those who enter into a contract have the obligation to conclude it and to compensate any damages that may result from a failure to perform or a breach, intentional or not.</p> <p><b>Article 1535.</b> All bilateral contracts have a resolutive condition that is fulfilled when one of the parties fails to perform its obligations under the contract. The interested party can request avoidance of the contract or specific performance and, in both cases, the payment of damages, if any.</p>
<p><b>Article 61</b></p> <p>(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) exercise the rights provided in articles 62 to 65; (b) claim damages as provided in articles 74 to 77.</p> <p>(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.</p> <p>(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.</p>	<p><b>Article 1536.</b> Avoidance of the contract can also be requested, even after a claim for specific performance, when performance becomes impossible after the filing of the lawsuit.</p>

The provisions of the CISG establish two general rules that introduce the rights and actions of innocent parties in the event of a breach (Articles 45 and 61 of the CISG). Likewise, it regulates, in two separate sections, the remedies that can be claimed by sellers and buyers respectively when an international sales contract is breached. In

Articles 28, 46-52 and 74-77, the CISG establishes the remedies for the seller and, in Articles 28, 62-65 and 74-77, the remedies for the buyer.<sup>11</sup>

This system provides actions that are common to both parties of the sales contract and actions that are specifically designed for the seller or the buyer.

The remedies regulated by the CISG for both parties are the following:<sup>12</sup>

1. Specific performance
2. An additional period of time for performance (*Nachfrist*)
3. Avoidance
4. Damages
5. Exemption
6. Interest
7. Conservation

The remedies contemplated for each party are:

1. Price reduction
2. Replacement
3. Repair

One of the main features of the CISG is that it sets out no hierarchy for the remedies.<sup>13</sup> The innocent party is free to choose avoidance, damages, specific performance or any other remedy that suits its interests. Now, it is important to note that, in order to claim one of these remedies, the requirements contemplated by the CISG must be met. For instance, in the case of avoidance, the breach must be fundamental or occur after the innocent party provided the breaching party with an additional period of time to perform. As a result, although the affected party can choose the remedy it wishes, this choice is not completely up to its discretion, since it is subject to the limitations imposed by the CISG.

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<sup>11</sup> M P Perales, *El Contrato de Compraventa Internacional de Mercancías (Convención de Viena de 1980)* (2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/perales1.html#cvj>.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

The language of Articles 45 and 61 of the CISG, for the purposes of this analysis, brings about two important consequences: **First**, a general notion of breach; and **second**, the absence of a fault requirement to claim the remedies.<sup>14</sup>

The first point is relevant since the CISG's concept of breach extends to any obligation expressly stated in the contract or the Convention, regardless of whether it pertains to the seller or the buyer.<sup>15</sup> Moreover, the concept does not distinguish between types of breach, either in terms of gravity or whether it refers to late performance or performance as to quality or quantity (*i.e.*, the concept of '*cumplimento defectuoso*' or defective performance). As a result, any act that violates a contractual duty is considered a breach and the affected party is entitled to a remedy under the CISG.

Guatemalan law, particularly in the Civil and Commercial Codes, does not establish an equivalent rule establishing a general concept of breach that could unify all the remedies to which the innocent party is entitled. However, the Civil Code does contain, in Articles 1534, 1535 and 1536, general actions that can be exercised by the innocent party. These three provisions clearly mention only three remedies: damages, avoidance and specific performance. From a traditional civil law perspective, these Articles establish two main remedies to address breaches: avoidance and specific performance, either one of which can be accompanied by a claim of damages. In this case, it appears that the remedy of damages plays a secondary role *vis-à-vis* the other two remedies, given that it 'accompanies' them. Despite the fact that Guatemala lacks a theory that could develop specifically the relationship between these remedies, in practice there is a preference toward avoidance and specific performance as principal remedies, with damages as mere accessories to the alleged breach.

Regarding the absence of a fault requirement, the CISG is clear in stating that, if the seller or buyer fails to perform any of its obligations, the innocent party can exercise the enumerated remedies. As a result, the basic principle of strict liability is established, in the sense that fault is not required for the creditor to claim a remedy, since the mere failure to perform under the contract or the CISG suffices.<sup>16</sup> Now, the CISG does provide for a rule under Article 79 that gives nuance to the principle of strict liability,

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<sup>14</sup> M Will in C M Bianca, M J Bonell, *Commentary on the International Sales Law* (Giuffrè 1987), p. 329-332, available at: <http://www.cisg.law.pace.edu/cisg/biblio/will-bb45.html>.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

since it provides that a party is not liable for a failure to perform if it can prove that such failure is due to an impediment beyond its control that it could not reasonably be expected to have taken such impediment into account at the time of the conclusion of the contract.<sup>17</sup>

On the other hand, under Guatemalan law, Articles 1423 and 1424 of the Civil Code have been interpreted to mean that fault is an essential element to attribute the breach to the party that caused it. Article 1423 states expressly that ‘*a failure to perform by the obligor is presumed to have happened due to his fault unless otherwise proven*’ and Article 1424 further elaborates stating that ‘*fault means an action or omission that damages another, which occurs due to ignorance, incompetence or negligence, but without the intent to cause harm.*’ From these provisions and according to traditional civil law theory, Guatemala’s juridical system conceptualizes fault as an essential element to establish a breach. On the other hand, Article 1426 exempts liability for a breach if it occurred due to force majeure (*fuera mayor* or *caso fortuito*).

In sum, the CISG and Guatemala’s Civil and Commercial Codes adopt radically different stances regarding the remedies for a breach of contract. The CISG adopts a broad stance that favors the innocent party by enabling easy access to remedies to satisfy its interests. In contrast, Guatemalan law appears to prefer the remedies of specific performance and avoidance and requires fault on the part of the debtor in order to establish a breach.

In this article, the comparative analysis will concern only those remedies contemplated by the CISG as contrasted to the ones regulated in the Guatemalan Civil and Commercial Codes.

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<sup>17</sup> See *supra* note 12.



**b) Avoidance**

CISG	Guatemalan Civil Code
<p><b>Article 49</b></p> <p>(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. (...)</p>	<p><b>Article 1535.</b> All bilateral contracts have a resolutive condition that is fulfilled when one of the parties fails to perform its obligations under the contract. The interested party can request avoidance of the contract or specific performance and, in both cases, the payment of damages, if any.</p>
<p><b>Article 64</b></p> <p>(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.</p>	<p><b>Article 1581.</b> A resolutive condition agreed by the parties leaves the contract without effect from the moment of its fulfilment, without the need of judicial declaration.</p> <p><b>Article 1582.</b> The avoidance a contract as a result of an implicit resolutive condition must be declared by a judge.</p>

The CISG regulates, in Article 49(1) and 64(1), the remedy of avoidance of the contract. This remedy can only be exercised if the breach is fundamental or when a party fails to perform an obligation after the other party granted an additional period of time for performance (*Nachfrist*).

The first limitation to avoidance is the requirement of fundamental breach, which is understood to occur under the CISG when the breach 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 (Article 25). Therefore, there are two important elements to take into account: **First**, the breach must substantially deprive the innocent party of its contractual expectations (*i.e.*, from

the perspective of the innocent party) and **second**, the detriment must have been foreseeable (*i.e.*, from the perspective of the breaching party).<sup>18</sup>

**First**, the fundamentality condition requires that the breach substantially deprive the innocent party of what it was entitled to expect under the contract.<sup>19</sup> Thus, this analysis must consider the usability of the goods under the contract. For example, if the goods still serve the purpose expected by the buyer; if they can be resold at a lower price with the possibility to recover the damages caused by the difference; if substitute transactions are possible; or if the goods can be repaired or replaced without depriving the creditor of its contractual expectations,<sup>20</sup> then, the requirement of fundamentality is not met.

**Second**, even if one proves that the breach deprived the innocent party of what it was entitled to expect under the contract, it is possible that such breach does not meet the foreseeability test. This test requires that the breaching party could have predicted that the breach would have caused such a substantial detriment.<sup>21</sup> Moreover, objectively, it must be established whether a reasonable person in the same circumstances and of the same kind could have predicted this result.<sup>22</sup>

Under the CISG, it is not required that the breached obligation be the main obligation of the debtor in order to be fundamental; failure to perform an accessorial obligation can enable the innocent party to claim avoidance if the requirement of fundamentality is met.<sup>23</sup>

The second limitation to claim avoidance is the need to grant an additional period of time before declaring avoidance of the contract. This limitation is important above all in those circumstances where it is not clear whether the breach of contract is fundamental.<sup>24</sup> In this way, if a party grants the other an additional period of time to perform the obligation and that party fails to perform, the first party has the certainty

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<sup>18</sup> C Lui, *The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles and PECL and Case Law* (2005) available at: <http://www.cisg.law.pace.edu/cisg/biblio/liu8.html>.

<sup>19</sup> J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (1999), available at: <http://www.cisg.law.pace.edu/cisg/biblio/ho49.html>.

<sup>20</sup> See *supra* note 12.

<sup>21</sup> See *supra*, note 19.

<sup>22</sup> See *supra*, note 12.

<sup>23</sup> *Ibid.*

<sup>24</sup> See *supra* note 20.

that the breach is fundamental at that moment, even if it was not fundamental originally.<sup>25</sup>

Nonetheless, the possibility to avoid the contract when a party has failed to perform in an additional period of time is not open to all kinds of breach. This possibility is available mainly when the seller fails to deliver the goods or the buyer fails to pay the price or to take delivery.<sup>26</sup> This rule excludes situations where non-conforming goods are delivered, which is covered by other remedies. As a result, the CISG does not permit avoidance in trivial circumstances, even if the additional period of time was granted to the breaching party.<sup>27</sup>

As reflected in Articles 1535, 1581 and 1582 of the Civil Code, Guatemalan law only regulates the possibility to avoid the contract; any additional rule that would sufficiently develop this issue is instead contained in the section on rescission. Both institutions (avoidance and rescission) have the same effects. However, rescission applies under Guatemalan law when the contract has been validly concluded and has not yet been performed, and it is voided of its effects, either by mutual agreement<sup>28</sup> or by judicial declaration in case of breach of contract in those instances specified by the Civil Code.

In this sense, the Guatemalan Civil Code is different from other Ibero-American legal systems in that, in the latter, rescission only applies in cases of lesion, when the expectedly evenhanded relationship between the parties is offset at the time of the conclusion of the contract, with the purpose of protecting the legal order from the detrimental social effects of unconscionable or inequitable transactions.<sup>29</sup>

Therefore, under Guatemalan law, there is no norm that establishes specific limits to the declaration of avoidance, except those substantive conditions of the juridical relationship required to exercise the remedy, namely: that the contract be reciprocal or bilateral; that performance of the contract be pending; that the obligation be

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<sup>25</sup> See *supra* note 12.

<sup>26</sup> See *supra* note 20.

<sup>27</sup> See *supra* note 12.

<sup>28</sup> See Article 1579 of the Civil Code.

<sup>29</sup> E Muñoz, *El Derecho de los Contratos y de la Compraventa en Iberoamérica* (Tirant lo Blanch 2015), p. 210.

enforceable; and a failure to perform. Once these requirements are met, the affected party is entitled to declare avoidance.<sup>30</sup>

Additionally, there is no consensus in Guatemalan law on whether it is necessary to establish that the breach be fundamental to avoid the contract. In other words, in principle, any breach, be it accessorial or principal, could authorize the creditor to exercise this remedy. However, there is a possibility that Guatemalan law could limit the right of avoidance where the exercise of such remedy constitutes *abus de droit* – specifically, in those cases in which the breach is not essential to the contract and could easily be corrected through another remedy.<sup>31</sup>

Guatemalan law permits avoidance to occur in two ways: (a) where the parties have agreed in the contract that a specific breach avoids the contract (express resolute condition or ‘*condición resolutoria expresa*’), in which case, if the breach occurs, avoidance operates without the need of judicial declaration; and (b) where the parties did not mention a resolute condition, but the law presumes the existence of a tacit resolute condition, in which case judicial declaration is required.

In conclusion, due to the insufficient regulation of avoidance in Guatemalan law, it is possible to abuse this remedy without proper safeguards for the party affected by the *abus de droit* to safeguard its rights. On the contrary, the CISG clearly maintains the philosophy that avoidance is the *ultima ratio* to protect the integrity of the contract, allowing avoidance only when the breach is fundamental according to its provisions.

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<sup>30</sup> R A Contreras Ortiz, *Obligaciones y Negocios Jurídicos Civiles (Parte general)* (Serviprensa 2010), p. 70.

<sup>31</sup> See Article 1653 of the Civil Code and Article 18 of the Judicial Organic Law (Decreto 2-89).

## c) Specific Performance

CISG	Guatemalan Civil Code
<p><b>Article 46</b></p> <p>(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.</p> <p>(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.</p> <p>(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.</p>	<p><b>Article 1437.</b> The creditor may require performance of the obligation or the payment of the agreed sum, but not both, unless the latter is claimed due to extemporaneous or defective performance.</p> <p><b>Article 1535.</b> (...) The interested party can request avoidance of the contract or specific performance and, in both cases, the payment of damages, if any.</p> <p><b>Article 1397.</b> If payment is to be done in kind and it is impossible to deliver the same quantity and quality, the debtor shall pay the price of the good in the time and place indicated for payment, unless a price was agreed at the time of the performance of the contract.</p> <p><b>Article 1571.</b> If the seller guaranteed the correct functioning of the good for a period of time and, in that time, there is a defect in functioning, the buyer shall notify the seller within fifteen days computed from the moment in which the defect was discovered; and, if the seller does not immediately repair the good, the buyer may claim <i>saneamiento</i> [<sup>32</sup>].</p>

The CISG regulates in the same provision the buyer's right to claim specific performance, replacement or repair of the goods when they are non-conforming. These situations are grounded on the right to require the other party to perform the contract as a principal action, influenced by the civil law tradition. Article 46 of the CISG

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<sup>32</sup> **Translator's note:** The term *saneamiento* is maintained in this text for a lack of a better term in English. In Guatemalan law, as well as other civil law systems, *saneamiento* (or, in this context, *saneamiento por vicios ocultos*) refers to the warranty implied by law, extended by the seller, that the buyer will enjoy undisturbed legal possession of the purchased property and that, in case a hidden defect is discovered in the sold good, the seller warrants that the buyer will be entitled to legal remedy, either termination of the contract or price reduction.

regulates, for the buyer, the right to require performance, either in the form of delivering the agreed goods, delivering substitute goods or repairing the defective goods that were delivered; and, for the seller, the right to require the buyer to pay the price, take delivery or perform another obligation.<sup>33</sup>

However, this right, as a main remedy, is fundamentally limited by the disagreement between common law and civil law systems regarding specific performance.<sup>34</sup> Despite being conceived as the main remedy for breach of contract in civil law traditions, in the common law this remedy occurs in exceptional cases. As a result, this dichotomy was resolved in the CISG by permitting a claim for specific performance with some specific limitations.

The main limits are regulated in each of the subparagraphs of Article 46 of the CISG, and some others in other provisions. As mentioned before, it is by using broad and abstract concepts, such as the fundamentality of a breach or the reasonability of repair, that the uniformity purpose of the CISG is attained. These provisions broaden the margin of interpretation and force judges to consider all circumstances of each specific case.<sup>35</sup>

The first limit relates to the claim for specific performance, since Article 46(1) indicates that this remedy can no longer be claimed if another remedy has been exercised which is incompatible with specific performance, such as avoidance or damages.

Moreover, specific performance is also limited by Article 28 of the CISG. This Article states that specific performance cannot be claimed in some circumstances where, after refusal to perform by one party, the other party is forced to resort to a court. The provision states that, if *'one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.'* This provision clearly seeks to respect the common law approach to specific performance.<sup>36</sup>

In the Civil Code, Articles 1437 and 1535 contemplate specific performance as a remedy for the creditor. This is consistent with the Code's Graeco-Roman influence. Moreover,

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<sup>33</sup> See *supra* note 12.

<sup>34</sup> See *supra* note 3.

<sup>35</sup> See *supra* note 3.

<sup>36</sup> See *supra* note 12.

these provisions indicate that this remedy excludes the possibility of resorting to the other contemplated remedy. However, like in the CISG, both Articles coincide in that specific performance does not preclude a party from claiming damages.

Article 46(2) of the CISG regulates the replacement remedy and limits it in two ways. **First**, the claim for substitute performance applies when the lack of conformity is a fundamental breach. **Second**, it sets out a period of time for the request of substitute performance to be valid. It must be communicated to the seller, either in the same notice as the lack of conformity or within a reasonable time from that notice. Additionally, Article 82(1) of the CISG states that the buyer loses the right to substitute performance if it is impossible to return the original goods in substantially the same conditions in which they were received.<sup>37</sup>

Under Guatemalan law, although replacement is not expressly regulated, Article 1397 of the Civil Code permits paying the value of the goods when they cannot be delivered in the agreed quantity or quality. This provision does not contain a right to substitute performance; however, it does regulate the cases in which substitution in the same quality or quantity is not possible and therefore gives the creditor the right to claim equivalent payment. The absence of rules indicates that the creditor cannot claim replacement, but could claim payment where it is impossible to replace the goods.

The remedy of repair, contemplated in Article 46(3), is affected by the same temporal limitation as the notice of replacement. Additionally, for repair to apply, it must be reasonable. The ‘reasonable’ condition regarding repair requires a case-by-case analysis.

In contrast, in Guatemalan law, repair is regulated as a right that precedes liability for latent defects.<sup>38</sup> Article 1571, like the CISG, indicates a temporal limit to claim repair. The Civil Code regulates strictly the conduct of the obligor, forcing it to answer immediately to the notice of repair. In case of belated response, the provision allows the creditor to claim liability for latent defects. According to Guatemalan law, two actions can be exercised in these cases: (a) the *actio redhibitoria*, in order to rescind the contract, or (b) the *actio quanti minoris* or remedy of price reduction, which allows the buyer to claim a reduction of the price in the amount that the defective good is worth

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<sup>37</sup> *Ibid.*

<sup>38</sup> **Translator’s note:** In this paragraph, ‘liability for latent defects’ is employed as a translation of *saneamiento por vicios ocultos*. See *supra* note 32.

less.<sup>39</sup> Additionally, Article 1562 of the Civil Code allows the buyer to claim damages in both cases, if it can be proven that the seller was aware of the defects.

In conclusion, it is notable that Guatemalan law does not regulate repair or replacement as remedies for a breach of contract to protect the creditor's interests. Its dispersed and unorganized regulation is an obstacle for creditors to know their options when facing a breach of contract. This is not the case under the CISG, which clearly identifies the available remedies in an organized and systematic manner. The creditor can clearly identify under which circumstances these remedies are available.

#### d) Damages

CISG	Guatemalan Civil Code
<p><b>Article 74.</b> 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.</p>	<p><b>Article 1434.</b> Damages, which consist in the losses and loss of profit suffered by the creditor, must be the direct and immediate consequence of the breach, either because they were caused or because they would necessarily be caused.</p> <p><b>Article 1534.</b> Effects of the contract. Those who enter into a contract have the obligation to conclude it and to compensate any damages that may result from a failure to perform or a breach, intentional or not.</p> <p><b>Article 1535.</b> (...) The interested party can request avoidance of the contract or specific performance and, in both cases, the payment of damages, if any.</p>

Under the CISG, the affected party can claim damages, either as a main claim, as an alternative claim or cumulatively with other remedies.<sup>40</sup> Damages are neither a subsidiary nor a privileged claim *vis-à-vis* the other remedies.

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<sup>39</sup> See Article 1561 of the Civil Code.

<sup>40</sup> See *supra* note 12.



However, Guatemalan law contains a general rule on damages in Article 1534 of the Civil Code, which appears to place damages in a secondary role *vis-à-vis* avoidance and specific performance. In other words, the innocent party may, in principle, claim avoidance or specific performance and, in an accessory manner, the damages caused by the breach.

The CISG requires no fault in order to claim damages.<sup>41</sup> The existence of a breach suffices to authorize one of the parties to claim as damages the losses resulting from the breach.

The CISG's position is substantially different from that of Guatemalan law, which defines damages as a consequence of fault or intentional breach, where fault is understood as an act that occurs due to negligence, incompetence or ignorance that affects the other party, and intention is understood as a voluntary act that causes damage or loss of profit to the other party.

Under the CISG, damages are limited to the losses that were foreseen or foreseeable for the debtor at the time of the conclusion of the contract.<sup>42</sup> In this case, the CISG introduces a **subjective parameter** to determine whether the breaching party foresaw the losses at the time of the conclusion of the contract, and an **objective parameter** to determine on whether the debtor could have foreseen the losses at the time of contract conclusion.<sup>43</sup>

Guatemalan law adopts a different position since it only limits damages, in the cases where the parties agree on liquidated damages, to the quantum agreed by the parties as compensation (Article 1440 of the Civil Code). If the parties did not agree on liquidated damages, there is no provision that limits the amount of damages that can be claimed from the breaching party – save for the cases where the obligation was for the payment of money, in which case the damages consist in the interests calculated according to the rate set by law, accumulated until the day of effective payment.

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<sup>41</sup> J Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' in J Herbots, R Blanpain (eds), *International Encyclopaedia of Laws – Contracts*, Suppl. 29 (Kluwer Law International 2000), pp. 1-192.

<sup>42</sup> See *supra* note 12.

<sup>43</sup> C Liu, *Remedies for Non-performance: Perspectives from the CISG, UNIDROIT Principles & PECL*, Part IV, 2003, available at: <http://www.cisg.law.pace.edu/cisg/biblio/chengwei-74.html>.

Under Article 74 of the CISG, the concept of damages extends to actual damage and loss of profit.<sup>44</sup> In the same sense, it appears possible that damages may include other kinds of loss that comply with the test of foreseeability – for instance, direct or indirect damages and moral damages, regardless of whether they were caused intentionally.<sup>45</sup>

Under Guatemalan law, damages are contemplated as exclusively those actual losses and loss of profit that derive directly from the breach of contract. This means that indirect damages may not be compensated, unless the parties agreed otherwise. Guatemalan civil and commercial law does not regulate claims for moral damages.

In sum, the provisions of the CISG contemplate the remedy of damages as an independent action, which can be exercised by the interested party without the need to demonstrate fault. Guatemalan law, in line with traditional civil doctrine, requires fault or intention as a condition to claim damages and, despite the fact that some provisions, like Article 1534 of the Civil Code, appear to recognize some independence for the remedy, Article 1535 gives damages a subsidiary character *vis-à-vis* avoidance or specific performance.

#### e) Price Reduction

CISG	Guatemalan Civil Code
<p><b>Article 50</b> 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.</p>	<p><b>Article 1561.</b> As a remedy for latent defects, the buyer is entitled to exercise, at its discretion, the <i>actio redhibitoria</i> to rescind the contract, or the <i>actio aestimatoria</i> to reduce the price in the amount that the good is worth less.</p>

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<sup>44</sup> See *supra* note 12.

<sup>45</sup> *Ibid.*

The first notable feature of the price reduction remedy under the CISG is its independence from the action for damages. Despite the fact that both remedies consist in monetary compensation, the CISG differentiates clearly between a claim for price reduction and a claim for damages due to belated performance.<sup>46</sup> The parties may, therefore, exercise both remedies alternatively and even cumulatively.

Price reduction is a known remedy in the systems of continental law as it originates from the Roman law *actio quanti minoris*. In virtue of this remedy, also called the *actio aestimatoria*, the buyer is entitled to reduce the price of the goods if they do not conform to the contract. The CISG regulates lack of conformity in Article 35, referring to the quantity, quality, description, packaging and the lack of juridical conformity, *e.g.*, when the goods are delivered subject to third party rights according to Articles 41 and 42.<sup>47</sup>

This provision also identifies two different situations in which price reduction can be claimed, depending on whether the price has been paid or not. If the buyer has not paid the price, it has the unilateral right to reduce the price under the contract without judicial determination. However, if the buyer has already paid the price, it has the right to request a part of the price to be returned to the extent of the price reduction.<sup>48</sup> It is important to highlight that the CISG also contains a rule as to how to calculate the amount of the reduction.

It is important to clarify that price reduction is regulated in the Guatemalan Civil Code as a consequence of *saneamiento*.<sup>49</sup>

However, in order to exercise the remedy of price reduction, it is necessary that the latent defects fall into one of two categories: they must either (a) make the good improper for its intended purpose or (b) reduce its usefulness in such a way that, if the buyer had been aware of the defect, he would not have accepted the good or the agreed price.<sup>50</sup> Therefore, it could be understood that exercising the right of price reduction under Guatemalan law is more limited than under the CISG. Article 1559 of the Civil

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<sup>46</sup> M Müller-Chen, 'Derechos y Acciones en caso de Incumplimiento del Contrato por el Vendedor' in I Schwenzer, E Muñoz, *Schlechtriem & Schwenzer: Comentario sobre la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, Tomo II (Aranzadi 2011), p. 1326.

<sup>47</sup> See *supra* note 12.

<sup>48</sup> See *supra* note 47.

<sup>49</sup> See *supra* note 32.

<sup>50</sup> See Article 1559 of the Civil Code.

Code covers only those cases where the creditor's interests are substantially affected, to the extent that this requirement could be interpreted as a fundamentality requirement.

In sum, the CISG grants access to the remedy of price reduction when the goods do not conform to the contract. The Convention uses ambiguous and broad terminology, which leaves it up to the judges' discretion to employ the remedy. Moreover, the CISG does not require the breach to be fundamental in order for price reduction to apply.<sup>51</sup> On the other hand, Guatemalan law requires the defect to make the good improper for its intended purpose or reduce its utility in such a way that the good is obsolete for the buyer. From these circumstances it can be concluded that price reduction in Guatemala applies when the breach of contract relates to the essential characteristics of the goods. This is a scenario that is described under the CISG as a fundamental breach.<sup>52</sup>

#### f) Suspension of the Contract

CISG	Guatemalan Civil Code
<p><b>Article 71</b> (1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract.</p>	<p><b>Article 1540.</b> If, after the conclusion of a bilateral contract, one of the parties suffers a decrease in his assets capable of compromising the performance of his obligations or making it unlikely, the other party may refuse performance until the first party performs or guarantees the performance of his obligations.</p>

In principle, when parties conclude a contract, in virtue of *pacta sunt servanda*, they are bound to perform their respective obligations; however, the CISG authorizes one party to suspend performance of its obligation when there is a real possibility that the other party will fail to perform a substantial part of its obligation. The purpose of this right is to avoid a situation where one party performs to its detriment due to the other party's non-performance.<sup>53</sup>

<sup>51</sup> See *supra* note 43.

<sup>52</sup> Article 25 of the CISG.

<sup>53</sup> C Liu, *Suspension or Avoidance due to Anticipatory Breach: Perspectives from Articles 71 and 72 of the CISG, the UNIDROIT Principles, PECL and Case Law* (2005), available at: <http://www.cisg.law.pace.edu/cisg/biblio/liu9.html>

For this right to be exercised under the CISG, a high threshold is in place, in order to prevent *abus de droit*. **First**, suspension of performance is an anticipatory act. Therefore, it must be clear that a breach of contract is imminent, and to that end one must analyze the acts of performance of the parties and any previous practices, such as any agreement with carriers for the delivery of the goods or the handing over of a bill of lading.<sup>54</sup> This is a subjective analysis that relates to the party that exercises the remedy, since that party must demonstrate that, from its point of view, it was clear and apparent that the other party would fail to perform its obligations.

**Second**, the future breach must relate to a substantial part of the obligations of one of the parties. The CISG does not require the breach to be fundamental; therefore, Article 25 does not determine the substantiality of the obligation. One must conduct a comprehensive analysis of the specific case to determine the substantiality of the breach *vis-à-vis* the obligations that the potentially breaching party agreed to perform.<sup>55</sup> Additionally, in order to eliminate subjectivity regarding substantiality, the CISG requires the breach to derive from (a) a grave detriment to the capacity of the debtor to perform or to its creditworthiness or (b) its conduct in preparing to perform or performing the contract. This limits the circumstances that allow Article 71 to be invoked.<sup>56</sup>

Guatemalan law regulates the remedy of suspension of obligations in Article 1540 of the Civil Code. This remedy is known in scholarly writing as the *exceptio non adimpleti contractus*. The Civil Code broadly follows the CISG approach of limiting the remedy as much as possible to avoid abuse. The Civil Code only allows suspension of performance when one party suffers a reduction in its assets that compromises performance or makes it unlikely. A situation of bankruptcy or insolvency is not expressly contemplated, which means that the analysis is not focused on the reduction of assets itself but rather on whether the asset reduction creates a high likelihood that the debtor will fail to perform.

At this point, it must be highlighted that the CISG does not require the failure to perform to result from a reduction of assets; it allows other circumstances not expressly regulated to cause the future breach, as long as these cases are manifested through the behavior of the debtor when he prepares to perform or performs the contract.

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

Under Guatemalan law, like the CISG, the party affected by the suspension is entitled to request the party requesting the suspension to perform, as long as the first party provides sufficient security.

In sum, the CISG and the Guatemalan Civil Code allow the remedy of suspension of performance of an obligation in exceptional and limited circumstances, seeking to prevent an abuse of this remedy. However, the CISG contemplates broader criteria for the exercise of this remedy, while the Civil Code is clear that it only applies when it is a reduction in the assets of one of the parties that makes a contractual breach likely.